

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Modern Healthcare Services, J.V. LLC,

Appellant,

RE: QuarterLine Consulting Services, LLC

Appealed From

Size Determination No. 2-2021-065

SBA No. SIZ-6114

Decided: November 29, 2021

APPEARANCES

Laurel A. Hockey, Esq., Daniel Strouse, Esq., Joshua Schnell, Cordatis, LLP, Arlington, VA, for Appellant

Suzanne Sumner, Esq., Barbara A. Duncombe, Esq., Taft Stettinius & Hollister LLP, Dayton, OH, for Appellant

Todd R. Overman, Esq., Sylvia Yi, Esq., Bass, Berry & Sims PLC, Washington, D.C., for QuarterLine Consulting Services, LLC

DECISION¹

I. Introduction and Jurisdiction

On June 23, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2021-065 (Remand of 2-2021-027) concluding that QuarterLine Consulting Services, LLC (QuarterLine) is a small business for the U.S. Army Medical Command (Army) Solicitation No. W81K00-18-R-0018. On July 8, 2021, Modern Healthcare Services, J.V. LLC (Appellant), filed the instant appeal with the SBA Office of Hearings and Appeals (OHA) maintaining that the Area Office erred regarding SBA's recertification rule under 13 C.F.R. § 121.404(g) and that QuarterLine's status rendered it ineligible for the award. For the reasons discussed *infra*, the appeal is REMANDED, and the Size Determination No. 2-2021-065 is VACATED.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

On July 19, 2018, the Army's Health Contracting Activity issued a solicitation for mission essential, commercial, personal and non-personal services in support of the Soldier Readiness Processing Center in coordination with William Beaumont Army Medical Center (WBAMC) to provide soldier mobilizations and demobilizations support, as well as to provide secondary support to WBAMC's Primary Care and other outlying clinics at Fort Bliss, Texas. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 622110, General Medical and Surgical Hospitals, with a corresponding \$38.5 million annual receipts size standard, as the appropriate code at the time the solicitation was issued. QuarterLine made its initial offer, including price, on August 22, 2018.

A bid protest challenging the original award was filed at the U.S. Government Accountability Office (GAO). In response to the GAO protest, the Army agreed to take corrective action. Following the corrective action, final proposal revisions were due September 11, 2020.

Subsequently, on February 9, 2021, the offerors were notified that QuarterLine was selected for the award. On February 11, 2021, Appellant filed a size protest against QuarterLine. In the first protest, Appellant alleged that QuarterLine is other than small and therefore ineligible for the procurement based upon its acquisition by a large firm, Planned Systems International (PSI), subsequent to its submission of its initial offer, but prior to award.

In response, QuarterLine disputed Appellant's arguments and argued that it is eligible under the regulation and that its acquisition by PSI was not prior to its initial award. QuarterLine provided a completed SBA Form 355, indicating it had two affiliates as of the date of initial offer, and that for the applicable years, the financial statements and tax returns for these firms were consolidated with QuarterLine's. To demonstrate that it is small and eligible for the instant solicitation, QuarterLine provided consolidated tax returns and financial statements for itself and its affiliates for the applicable years. QuarterLine further provided a full response to the allegations and all additional requested information.

On April 5, 2021, the Area Office issued Size Determination No. 2-2021-027 finding that QuarterLine was a small business for the Army's Solicitation No. W81K00-18-R-00. On the same day, Appellant filed a size appeal of that determination with OHA. On May 25, 2021, I remanded the matter to the Area Office for a new size determination, based upon the position taken by SBA's Office of General Counsel. *See Size Appeal of Modern Healthcare Services, JV, LLC*, SBA No. SIZ-6099 (2021) (*Modern Healthcare I*).

A. Size Determination No. 2-2021-065

Upon OHA's remand, on June 23, 2021, the Area Office issued Size Determination No. 2-2021-065 finding that QuarterLine is small under the assigned NAICS code. The Area Office found that the version of SBA's size regulations at 13 C.F.R. § 121.404(g)(2)(iii) cited by Appellant in its initial protest is the current version of the regulations, effective November 16, 2020, and are not applicable to the instant procurement. Under the applicable regulations, 13 C.F.R. § 121.404(g)(2), in effect at the time size is determined, QuarterLine was not required to recertify its size, and even if it were, it was not ineligible for award. The Area Office relied on *Size Appeal of AOC Connect, LLC*, SBA No. SIZ-6025 (2019) to find that 13 C.F.R. § 121.404(g) applied only to multiple award contracts (MAC). (Size Determination, at 5.) The Area Office further found that the inclusion of Federal Acquisition Regulation (FAR) 52.219-28 in the Solicitation did not require QuarterLine to recertify its size, and so did not render QuarterLine ineligible, despite the decision in *HWI Gear, Inc. v. United States*, 151 Fed. Cl. 668 (2020), because the whole clause was not included. (*Id.*, at 6.) The Area Office also found that QuarterLine and PSI were not affiliated at the date to determine size under the Present Effect Rule. 13 C.F.R. § 121.103(d). (*Id.*, at 7.) Thus, the Area Office found QuarterLine is an eligible small business.

B. Appeal

On July 8, 2021, Appellant filed the instant appeal. Appellant challenges the Area Office's Size Determination issued in response to OHA's remand order in *Modern Healthcare I*, largely renewing the arguments from its first size appeal petition. Appellant asserts QuarterLine submitted its initial offer on August 22, 2018, was acquired by PSI on December 20, 2018, and thus, the acquisition occurred before the award on February 9, 2021. (Amended Appeal, at 7.)

Appellant argues that the Area Office committed clear error by finding that SBA's recertification requirement only applies to MACs. The Area Office's conclusion contravenes the SBA's size regulation and is directly contradictory to the position taken by SBA's Office of General Counsel (OGC) in *Modern Healthcare I*, arguing that “recertification is required when an offeror on a prime federal contract acquires or is acquired by another concern in between the time of offer and award.” (*Id.*, at 3; citing *Modern Healthcare I*, at 2.)

Appellant claims that the Area Office committed clear error in finding that even if QuarterLine was required to recertify, QuarterLine's status as a large business did not render it ineligible for award. Appellant argues that this finding contravenes SBA's recertification rule, 13 C.F.R. § 121.404(g), which outlines exceptions to the rule that size is determined at the time of initial offer, and that when an exception applies, size must be determined at the time of recertification. (*Id.*, at 3.)

The relevant exception requires an offeror to recertify its size when acquired after its initial offer and before award. (*Id.*, at 4-5, citing 13 C.F.R. § 121.404(g)(2)(ii)(D).) Appellant argues that unlike § 121.404(g)(2)(i), which applies to contracts and provides that a contractor's inability to recertify impacts the agency's ability to count options and orders “from that point forward, toward its small business goals,” the exception in § 121.404(g)(2)(ii)(D) that applies to

pending offers, is not a counting rule, and instead, links recertification to the award itself. (*Id.*, at 5.) Following the acquisition by PSI, QuarterLine was required to recertify its size for its pending offer under the solicitation, and because QuarterLine was no longer a small business, Appellant argues that QuarterLine was ineligible for the contract award. (*Id.*)

Appellant states that the Area Office also committed clear legal and factual error by failing to address the applicability of FAR 52.219-28, which was included in the solicitation. (*Id.*) Instead, the Area Office argued that the Court of Federal Claims decision in *HWI Gear, Inc.* did not apply. In finding that QuarterLine was not required to recertify notwithstanding the mandates of FAR 52.219-28, Appellant states the Area Office committed clear legal error. (*Id.*) Further, the Area Office's attempt to distinguish *HWI Gear, Inc.* was based on clear factual error, because the Area Office concluded that the solicitation only incorporated FAR 52.219-28 by reference. Appellant claims that this is clear legal error, because the solicitation did not just incorporate FAR 52.219-28 but included it in its entirety. (*Id.*)

In addition, Appellant argues that the Area Office erred by failing to abide by OHA's remand order. (*Id.*, citing *Modern Healthcare I.*) More specifically, Appellant states that when “OGC ‘moved to remand the instant appeal to the Area Office to ensure that [the Army's] award to QuarterLine is properly recorded for small business goaling purposes.’” (*Id.*, at 6, citing *Modern Healthcare I.*, at 2.) The Area Office's new Size Determination determined QuarterLine's size only using the date of initial proposal submissions, making no finding of QuarterLine's size. As such, even if OHA were to find that QuarterLine's inability to recertify only impacted the Army's ability to count the award, OHA must, again, remand the case to the Area Office to determine QuarterLine's size for goaling purposes. (*Id.*, at 4-5.)

C. Supplemental Arguments

On July 16, 2021, Appellant filed a motion to file a supplemental appeal accompanied with the supplemental appeal after reviewing the Area Office File. In its supplemental arguments, Appellant claims that the Area Office ignored admissions by QuarterLine on its SBA Form 355 and information on its 2017 financial statement. (Supplemental Appeal, at 1-2.) More specifically, the Area Office determined QuarterLine's size as of August 22, 2018, the date QuarterLine submitted its initial proposal. The Area Office relied on a completed SBA Form 355, consolidated financial statements for years 2015, 2016, and 2017, and the Federal Tax Returns for the same years. Additionally, on Question No. 7 of Form 355, QuarterLine answered “yes” to having issued stock options, pledging stock as collateral, and having stock held by a trust, voting trust, or voted in accordance with a shareholder's agreement. (*Id.*, at 2.)

Notwithstanding the “yes” answers, Appellant states that QuarterLine did not identify the person or concern holding the options and amount, the details of its arrangement involving the pledge of its stock as collateral, or the relevant documents relating to a trust, voting trust, or vote in accordance with a shareholder's agreement. The Area Office File includes no correspondence between QuarterLine and the Area Office about its answer to Question 7 on Form 355 or the missing information and documents. (*Id.*)

The significance of QuarterLine's admission and the Area Office's failure to investigate is clear from the information in the Area Office File. (*Id.*, at 4.) Appellant claims that the Area Office File included 2017 Consolidated Financial Statements (2017 Financial Statement), identifying several private noteholders, including [Company 1 and Company 2], neither of which were identified on the Form 355. (*Id.*, citing Exh. E.) Particularly, Note 4 to the 2017 Financial Statement reported a 2015 Revolving Line of Credit of \$XXX with [Company 2] that subsequently increased on January 1, 2017, to \$XXXX. Note 5 identified several Notes Payable; two of which included substantial Notes Payable to [Company 1], convertible into at least a X% ownership interest in QuarterLine, and a third Note Payable to [Company 2], collateralized with "XXXXXXXXXXXXXXXXXXXX." (*Id.*)

Appellant argues the Area Office ignored QuarterLine's admission in response to Question No. 7, never inquired about the missing information required by Form 355, and failed to ask questions about the entities shown on the 2017 Financial Statement to determine whether they controlled or had the power to control QuarterLine on August 22, 2018. (*Id.*, at 4.) This was despite the fact that [Company 1] had a right to convert its loans into at least X% or more ownership interest in QuarterLine, and [Company 2] held XXX of QuarterLine as collateral for a Letter of Credit and Note Payable. (*Id.*, at 4-5.) Appellant argues that this should have raised questions about their affiliation with QuarterLine, given the Declaration of QuarterLine's President and Chief Executive Officer (CEO), who indicated that several creditors were XXXXXXXXXXXX. (*Id.*, at 5.)

Appellant continues by pointing out that SBA regulations make it clear that a concern's size must account for all affiliates. Additionally, for affiliation to arise between two concerns, a concern controls or has the power to control the other, or a third-party control or has the power to control them both. Control may be affirmative or negative, and affiliation may be found "whether control is exercised, so long as the power to control exists." Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. SBA must consider the "totality of circumstances" in determining whether affiliation exists. 13 C.F.R. § 121.103(a). SBA considers stock options and convertible securities to have a present effect on the power to control the concern. Appellant further states that "SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised." (*Id.*, at 5; citing 13 C.F.R. § 121.103(d).) Appellant then points to 13 C.F.R. § 121.103(f), stating that affiliation based on identity of interest may arise between firms that are "economically dependent through contractual or other relationships." (*Id.*, at 6.)

Notwithstanding QuarterLine's admissions in response to Question No. 7 of its SBA Form 355, and the evidence from the 2017 Financial Statement that [Company 1 and Company 2] held outstanding options and convertible securities during the period of measurement, and QuarterLine was financially dependent on these two concerns for its operations, Appellant claims the Area Office failed to consider whether the companies were affiliated when determining QuarterLine's size. (*Id.*) Appellant argues this constituted clear legal and factual error. Accordingly, OHA should vacate and remand the Size Determination to the Area Office to determine whether QuarterLine was affiliated with [Company 1 and Company 2] as of the date of initial proposals. (*Id.*)

Appellant points to *Mark Dunning Industries, Inc.*, SBA No. SIZ-5284, at 11 (2011), citing *Size Appeal of Fort Carson Support Servs.*, SBA No. SIZ-4740 at fn.3 (2005), to support its argument that the Area Office “may not “ignore facts that are plainly part of the record or that are reasonably available to it in making a size determination.” Moreover, Appellant points to *Size Appeal of Maywood Closure Co. LLC and TPMC-Energy Solutions Environmental Services 2009, LLC*, SBA No. SIZ-5499, at 10 (2013), to support its argument that accuracy in completing SBA documentation is critical for the Area Office to conduct a meaningful size determination. Additionally, in *Maywood Closure Co.*, OHA recognized that inaccurate documentation can lead to legal or factual errors in the size determination and considered the protested concern's answers to questions on the Form 355 for inaccuracies or misstatements. (*Id.*, at 7.)

Further, Appellant argues the Declarations prepared by QuarterLine's President and CEO, indicated that it “was able to enter into discussions with several creditors to resolve outstanding issues that XXXXXXXX.” (Response from Protested Firm, at Exh. F; Graff Declaration at ¶ 10.) Notwithstanding clear indications that its creditors XXXXXXXX, Appellant claims the Area Office failed to investigate whether [Company 1 and Company 2] were affiliated with QuarterLine. Given the Area Office's failure to consider QuarterLine's admission on its Form 355 and the information on its 2017 Financial Statement showing compelling evidence of affiliation between QuarterLine and [Company 1 and Company 2], OHA should remand this Size Determination to the Area Office to determine whether [Company 1 and Company 2] were affiliated with QuarterLine at the time of initial proposals. (*Id.*, at 8.)

D. QuarterLine Response to Appeal Petition

On July 26, 2021, QuarterLine responded to the appeal petition. First, QuarterLine argues that recertification, whether required or not, does not affect eligibility for award. (Response, at 3.) In response to Appellant's *AOC Connect, LLC* argument, QuarterLine argues that it is inapplicable, because Appellant did not demonstrate why it is clear error for the Area Office to rely on *AOC Connect, LLC*. (*Id.*, at 4-5.) The cases are analogous in that the decision involved a single award contract and interpreted the applicable version of 13 C.F.R. § 121.404(g). (*Id.*) Despite Appellant's concerns of the Area Office's deviation from the OGC Comments, they are not in the Area Office File.

Additionally, *Modern Healthcare I* noted that Appellant questioned the correctness of *AOC Connect, LLC* but did not direct the Area Office to ignore OHA precedent or otherwise rule on the impact of *AOC Connect, LLC*. Instead, *Modern Healthcare I*, directs the Area Office to issue a new size determination following the SBA's concession of error. Both, the Area Office and OGC agree that QuarterLine's acquisition by PSI after offer and prior to award does not change QuarterLine's eligibility for award. (*Id.*, at 5-6, citing *Size Determination*, at 5-6; *see also Modern Healthcare I*, at 2.) As such, QuarterLine's eligibility for award is based on the date of initial offers, and Appellant's appeal does not challenge QuarterLine's size as of the date of initial offer. (*Id.*, at 6.) Furthermore, QuarterLine states the *Size Determination* acknowledges that “PSI is a large firm [and] that QuarterLine was acquired by PSI,” and the CO has the appropriate information to accurately record QuarterLine's size for goaling purposes. (*Id.*, citing *Size Determination*, at 2.)

Next, QuarterLine argues that its other than small status following acquisition does not render it ineligible for award. In response to Appellant's argument that the technical corrections to § 121.404(g) make QuarterLine ineligible for the award, QuarterLine claims the technical change was to clarify that SBA wanted the exceptions at § 121.404(g) to apply to the entirety of the paragraph, not just the last sentence, and that the rule was “not intended to make any *substantive change* to the paragraphs.” (*Id.*, citing 83 Fed. Reg. 12849, 12850 (Mar. 26, 2018), emphasis QuarterLine's.)

Further, QuarterLine states that the Area Office properly interpreted the applicability of *HWI Gear, Inc.*, and that the incorrect solicitation reference was a harmless error. (*Id.*, at 8.) The Area Office addressed *HWI Gear, Inc.* because Appellant argued that FAR 52.219-28 requires recertification. However, bid protests have no bearing on size protests and vice versa. (*Id.*, at 9, citing *White Hawk Grp., Inc. v. United States*, 91 Fed. Cl. 669, 673 (2010); *Veterans Contracting Grp., Inc. v. United States*, 135 Fed. Cl. 316, 330 (2017).) Appellant's argument on *HWI Gear, Inc.* is based on an agency's evaluation of proposals, and OHA has no jurisdiction over that. (*Id.*, citing *Size Appeal of Mystic Ventures Grp., LLC*, SBA No. SIZ-6006 (2019).) As such, QuarterLine states that the only relevant regulations applicable to this appeal are found in 13 C.F.R. § 121.404, which is the appropriate regulation upon which the Area Office based its size determination. (*Id.*, at 10.)

E. OGC Comments

On July 26, 2021, SBA responded to OHA's request for comments. SBA acknowledges that it recently recognized the merits of a policy that requires an offeror that is acquired in between offer and award to recertify its small business size status to receive the contract. (OGC Comments, at 2, citing 13 C.F.R. § 121.404(g)(2)(iii) as implemented at 85 Fed. Reg. 66146, 66154 (Oct. 16, 2020).) This policy, however, did not exist when the Army issued the instant solicitation, or when QuarterLine was acquired by PSI. Instead, SBA regulations in effect at the time would have required QuarterLine to recertify its size status within 30 days of being acquired by PSI to ensure any award was properly recorded for goaling purposes. (*Id.*) QuarterLine's inability to recertify as small would not render the concern ineligible for award. Instead, the Army would not receive small business credit for the contract awarded to QuarterLine. (*Id.*)

In assessing QuarterLine's size under OHA's remand order, the Area Office affirmed its initial determination that QuarterLine was not required to recertify its size status after being acquired by PSI. (OGC Comments, at 2-3; citing *AOC Connect, LLC* (limiting the application of § 121.404(g)(2) to Multiple Award Contracts).) Since the Area Office's Size Determination does not assess QuarterLine's size status as of the time it recertified or should have recertified after being acquired by PSI, SBA suggests that OHA reconsider the holding in *AOC Connect, LLC* and remand the matter to the Area Office for a new size determination. (*Id.*, at 3.)

F. Appellant Response to OGC Comments

On August 2, 2021, Appellant responded to OGC's comments with three arguments. First, Appellant argues that QuarterLine was required to recertify when acquired by PSI after

submission of its offer and prior to award. Appellant also requests OHA reconsider its holding in *AOC Connect, LLC* and find the recertification regulations apply to single award procurements. (Appellant Response, at 1-3.) Second, Appellant argues that assuming QuarterLine would have recertified as other than small, QuarterLine was ineligible for award. Appellant points to SBA's recent revision of the regulation, which provided that if a firm was ineligible to recertify as small after a merger but prior to award, it was no longer eligible to receive an award. This change was meant not to change, but to clarify existing policy. (*Id.*, at 4-5, citing 13 C.F.R. § 121.404(g)(2)(iii) (2020) revised at 86 Fed. Reg. 66146, 66153, 66182 (Oct. 16, 2020).) Third, Appellant argues that FAR 52.219-28 required QuarterLine to recertify its size. (*Id.*, at 5.)

G. QuarterLine Response to OGC Comments and Appellant's Supplemental Pleading

On August 2, 2021, QuarterLine responded to OGC's comments. QuarterLine states that “OGC's comments confirm again that while recertification is required under single award contracts when an acquisition occurs after offer and before award, that it has no impact on QuarterLine's eligibility for award.” (Response to Comments, at 1-2.) Further, QuarterLine concurs with OGC's conclusions that it remains eligible for the award and asks OHA to either deny or dismiss the appeal. (*Id.*, at 2-4.)

On September 23, 2021, QuarterLine also responded to Appellant's Supplemental Pleading. (Response to Supp. Pleading). Particularly, QuarterLine argues that the Area Office did not err in its review of Form 355 and 2017 Financial Statement, and any lack of follow up communication was a harmless error. (*Id.*, at 1-3.) Thus, QuarterLine requests OHA find the Area Office made a harmless error in failing to investigate the responses on QuarterLine's Form 355 and ask questions about QuarterLine's 2017 consolidated financial statement as it considered the relevant information in the record and further investigation would not change the result of the Size Determination. (*Id.*, at 5-6.)

QuarterLine also moved to dismiss the issues of whether QuarterLine had any other affiliates based on economic dependence or stock options as untimely and/or as a substantive issue raised for the first time on appeal. (*Id.*, at 2.) More specifically, QuarterLine argues that the economic dependence argument was raised more than 15 days after the Size Determination. (*Id.*, citing 13 C.F.R. § 134.304(a).)

In the alternative, Appellant's allegations that QuarterLine is affiliated with its creditors based on its 2017 consolidated financial statement and responses on its SBA Form 355 should be dismissed as they are new arguments raised for the first time on appeal. (*Id.*, citing Supp. Pleading, at 3-8.) QuarterLine further argues that Appellant's contention that “[Company 1 and Company 2] held outstanding options and convertible securities during the period of measurement, and QuarterLine was financially dependent on these two concerns for its operations” are not only untrue, but they are also substantive issues raised for the first time on appeal and should be dismissed. (*Id.*, citing Supp. Pleading, at 2, 6; 13 C.F.R. § 134.316(a).)

H. Appellant's Response to QuarterLine's Motion to Dismiss

On October 8, 2021, Appellant filed a timely Response to QuarterLine's Motion to Dismiss. Appellant argues that its Supplemental Pleading is timely, because OHA routinely allows supplemental pleadings after its attorney has viewed file material for the first time under a protective order. (Response to Motion to Dismiss, at 2, citing *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008 (2019).) Appellant argues the Supplemental Pleadings raised relevant and timely issues, because the Area Office failed to properly inquire about what Appellant characterizes as an incomplete Form 355 and 2017 financials, which could have led to a determination of QuarterLine having as yet unadmitted affiliates. (*Id.*, at 2-4.) Further, the Size Determination did not state that QuarterLine had creditors, and thus, Appellant could not have learned of or addressed that issue until its counsel reviewed the Area Office File. (*Id.*, at 5.)

Appellant is not asking OHA to consider new evidence on appeal, but to consider evidence in the record, which the Area Office overlooked and did not consider. (*Id.*, at 6-7.) Appellant maintains the Area Office's failure to consider QuarterLine's response to the question of whether it had issued stock options was not harmless error. Rather, the Area Office should have inquired further into this issue, to see if there was affiliation with any other entities other than those QuarterLine admitted to, and whether discussions with creditors referred to in QuarterLine's submission resulted in any creditor having the power to control QuarterLine. (*Id.*, at 9-11.)

III. Analysis

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, that the Size Determination was based on clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006). OHA will not consider the Size Determination *de novo* but will review the record to determine whether the Area Office made a clear error. *Id.* As such, OHA will only disturb the size determination if OHA has a “definite and firm conviction the Area Office made key findings of law or fact that are mistaken.” *Precision Standard, Inc.*, SBA No. SIZ-4858, at 4 (2007).

B. Discussion

A concern's size is generally determined as of the date of its initial offer, including price. 13 C.F.R. § 121.404(a). A concern that qualifies as small at the time of its initial offer, including price, is small throughout the life of the contract. 13 C.F.R. § 121.404(g). The regulations identify some exceptions to this rule:

(2)

(i) In the case of a merger, sale, or acquisition, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(ii) Recertification is required:

(A) . . .

(B) . . .

(C) . . .

(D) If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award.

(3) . . .

(4) The requirements in paragraphs (g)(1), (2), and (3) of this section apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than small, the agency cannot count any new orders issued pursuant to the contract, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, HUBZone SBCs, SDVO SBCs, and ED/WOSBs.

13 C.F.R. § 121.404(g) (2018).²

In making the Size Determination, the Area Office relied upon *dicta* in the *AOC Connect, LLC*, that the recertification requirements at 13 C.F.R. § 121.404(g)(2) applied only to MACs to find that QuarterLine was not required to certify its size upon being acquired by PSI after it submitted its offer.

² This version of the regulation was the one in effect at the time QuarterLine certified its size with the submission of its initial offer, including price, and so is the applicable regulation for determining QuarterLine's size.

Upon further reflection, I conclude that the recertification requirements in the regulation require QuarterLine to recertify its size and the *dicta* in *AOC Connect, LLC* with respect to MACs was in error. Clearly, § 121.404(g)(4) provides that the requirements of § 121.404(g)(2) apply to MACs. However, this subparagraph does not provide that § 121.404(g)(2) applies only to MACs, but rather that the recertification requirements applicable to other contracts applied to MACs as well. The subparagraph (g)(4) was added to the regulation in connection with the 2013 rule implementing Section 1331 of the Small Business Jobs Act of 2010 (Jobs Act), Public Law 111-240. 78 Fed. Reg. 61114 (Oct. 2, 2013). This section revised the Small Business Act to authorize small business participation under MACs in new contexts. 15 U.S.C. § 644(r). The intent of rule was that the same general size and recertification rules that had been in place since 2006 would also apply to MACs. The drafters of the proposed rule stated:

When a business represents that it is small, it is then considered small for the life of that specific contract, and the concern is not required to again certify that it qualifies as small for that contract unless the contract is a long term contract (i.e., the contract exceeds five years) or there is a merger, acquisition, or novation. . . . Similarly, a contractor must also recertify its size status whenever there has been a contract novation, or merger or acquisition and no novation has been required.

...

[A]ll of these same rules concerning when size is determined apply to multiple award contracts. For multiple award contracts, SBA will determine size at the time of initial offer of the contract based upon the size standard set forth in the solicitation for that contract. [. . .] If the business concern represented it was small for that NAICS code at the time of contract award, then it will be considered small for that order with the same NAICS code.

77 Fed. Reg. 29130, 29136-37 (May 16, 2012).

The final rule adopted this policy and embodied it in the regulation. In the preamble to the final rule, SBA stated that if a business is acquired or merges, it must recertify its size. 78 Fed. Reg. 61114, 61118-9, 61131-32 (October 2, 2013). I, therefore, conclude that the provision at § 121.404(g)(4) was not intended to limit application of the recertification rules to MACs; rather, SBA, in response to the authority under the Jobs Act, was merely clarifying for the procurement community that the same size and recertification requirements that had historically applied to all prime federal contracts also apply to MACs. Therefore, QuarterLine was required to recertify its size to the CO upon being acquired by PSI.

QuarterLine argues that it is not required to recertify as a small business as a condition of receiving the award. When the rule was adopted in 2016, the drafters explained that a merger or acquisition between offer and award would generally only impact small business goaling considerations, as it had been the policy pertaining to merged or acquired contractors performing under previously awarded contracts. 81 Fed. Reg. 34243, 34253 (May 31, 2016). When SBA made a technical correction to the regulation in 2018, it emphasized that the rule was not intended to make any substantive change to the paragraph. 83 Fed. Reg. 12849, 12850 (Mar. 26,

2018). Therefore, QuarterLine's size is to be determined as of the date of its initial proposal. Because it was acquired by PSI after submitting its proposal but prior to award, it must recertify its size as of the date, but if it cannot recertify as small, the contract and all orders issued against it would not count as awards to small business for goaling purposes.

Appellant also argues that the inclusion of FAR 52,219-28 into the Solicitation requires QuarterLine to recertify as small post-acquisition as a condition of receiving the award, relying on *HWI Gear, Inc.* However, *HWI Gear, Inc.* is inapposite, because it is a bid protest case, not a size case. *Id.*, at 151 Fed. Cl. 667. The Court was careful to note that size protests are the province of SBA, and that its case was a bid protest. The requirements for self-certification for size are set forth at 13 C.F.R. § 121.404 and SBA's regulations do not require other certifications from offerors on Federal procurements. *See Size Appeal of the W.I.N.N. Group, Inc.*, SBA No. SIZ-5360, at 8 (2012).

I conclude that the *dicta* in *AOC Connect, LLC* that the recertification requirements applied only to MACs was in error and OVERRULE it. The requirements for recertification for a firm that was acquired or merged after submitting its initial offer, including price, but prior to award, apply to QuarterLine in this case. Should QuarterLine be found other than small, the Army may not count an award to it towards its small business goals. Accordingly, I VACATE the size determination and REMAND this matter to the Area Office for a new size determination, consistent with this opinion. Appellant may present its Supplemental Arguments to the Area Office upon remand.

IV. Conclusion

Appellant has established that the size determination is based upon a clear error of fact and law. Accordingly, I GRANT the instant appeal, and I REMAND this matter to the Area Office for a new size determination, consistent with this opinion.

CHRISTOPHER HOLLEMAN
Administrative Judge