

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

SIZE APPEAL OF:

22nd Century Technologies, Inc.,

Appellant,

Appealed From
Size Determination Nos. 01-2021-017,
01-2021-018

SBA No. SIZ-6122

Decided: September 21, 2021

APPEARANCES

Steven J. Koprince, Esq., Shane J. McCall, Esq., Nicole D. Pottroff, Esq., Koprince Law LLC, Lawrence, Kansas, for 22nd Century Technologies, Inc.

Seth Locke, Esq., Brenna Duncan, Esq., Perkins Coie LLP, Washington, D.C., for Fibertek Inc.

John E. McCarthy Jr., Esq., Karla V. Perez Chacon, Esq., Zachary H. Schroeder, Esq., Crowell & Moring LLP, Washington, D.C., for Ideal Innovations, Inc.

DECISION¹

I. Introduction and Jurisdiction

On June 4, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determinations No. 01-2021-017 and No. 01-2021-18 (Size Determinations), finding 22nd Century Technologies, Inc. (Appellant) other than small. On June 16, 2021, Appellant filed the instant appeal from those size determinations. Appellant argues that the size determinations are clearly erroneous and requests that OHA reverse them, and find Appellant is an eligible small business. For the reasons discussed *infra*, the appeal is DENIED, and the size determination is AFFIRMED.

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 appeal within fifteen

¹ This decision was originally 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. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

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

A. Solicitation and Award

On March 25, 2015, the Department of the Army (Army) issued Solicitation No. W15P7T-15-R-0008 for Responsive Strategic Sourcing for Services (RS3) indefinite-delivery indefinity-quantity (IDIQ) multiple award contract (MAC), seeking knowledge-based support services for requirements with Command, Control, Communications, Computers, Intelligence, Surveillance, and Reconnaissance (C4ISR) related needs (the RS3 MAC). The Solicitation was unrestricted. The designated North American Industry Classification System (NAICS) code for the solicitation was 541712, Research and Development in Physical, Engineering, and Life Sciences (except Biotechnology) with a corresponding 500 employee size standard. (MAC Solicitation, at 101.)

The RS3 Solicitation included Section H.3, on Task Orders Restricted to Small Business. (*Id.*, at 36.) It stated that any proposals submitted for a task order restricted to small business shall include the following representation:

The Contractor represents that it [] is [] is not a small business concern under NAICS code 541712 assigned to contract number TBD.

(*Id.*, § H.3.5.)

It also required that:

In the event a task order is restricted to small businesses in accordance with H.3, the RFP for the task order shall indicate the restriction. Only contractors eligible to compete as a small business may submit a proposal in response to the task order [Request for Proposal].

(*Id.*, § H.2.4.)

On May 6, 2015, Appellant submitted a proposal for the RS3 Solicitation. On March 1, 2019, the Army awarded Appellant an RS3 contract. (Appeal, at 1).

On December 29, 2020, the Army issued the subject Solicitation No. W9090MY-21-R-D002 (or RS3-20-0045) for a Task Order under the RS3 contract (Task Order Solicitation). Proposals were extended to February 8, 2021. The Task Order was to provide the U.S. Central Command (USCENTCOM) with Near Real Time Identity Operations (NRTIO) services with enhanced situational awareness, exploitation, and analysis capabilities through the use of all available technological solutions in Near Real Time (NRT).

The Task Order Solicitation also provided on its first page:

In accordance with base contract clause H.2.4, this task order is restricted to small businesses in accordance with H.3. Only contractors eligible to compete as a small business may submit a proposal in response to the task order RFP. Any proposal submitted for a task order restricted to small businesses shall include the following representation: The Contractor represents that it is, is not a small business concern under NAICS Code 541715 assigned to contract number TBD.²

(Task Order Solicitation, at 1.)

While the Task Order Solicitation included NAICS code 541715, it did not include a size standard. (*Id.*) However, it included a requirement to submit a Small Business Participation Commitment Document and provided the plan would be incorporated as a commitment and contractual requirement and would be evaluated. (*Id.*, at 13, 18.) The Task Order Solicitation called for offerors to check which category of business they qualified in, and one of these categories was Other Than Small Business. (*Id.*, Attachment 0006 at 1.)

On February 8, 2021, Appellant, Ideal Innovations, Inc. (Ideal) and Fibertek, Inc. (Fibertek) submitted initial offers, which included price.

B. Appellant's Proposal

In the first cover page of its Proposal, Appellant self-represented “that it is is not a small business concern under NAICS 541712 assigned to contract number W15P7T-19-D-0202.” (Proposal, at 1.) The Proposal's Volume IV and its Small Business Participation Commitment Document (SBPCD), however, noted that Appellant was other than small business (OTSB). (*Id.*, at 4.)

On March 23, 2021, Appellant responded to the CO's e-mail correspondence and clarified the following:

22nd Century Technologies Inc. is small business concern under NAICS 541712 for the purposes of contract number W15P7T-19-D-0202. On page 4 our team made a typographical mistake and should have checked the Small Business (SB) check box as we are a small business for this IDIQ.

(E-mail from Jessica Duncan, Director of Operations of Appellant (Mar. 23, 2021, 12:31 EST).)

C. Protests and Size Determinations

On May 7, 2021, the Army awarded the Task Order Solicitation to Appellant. On May 11, 2021, Ideal filed a size protest. Similarly, on May 14, 2021, Fibertek also filed a size protest.

² NAICS code 541715, Research and Development in Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology), with a corresponding 1,000 employee size standard, has replaced NAICS code 541712.

On June 4, 2021, the Area Office issued two size determinations in response to the two protests. Because the two determinations (01-SD-2021-17 and 01-SD-2021-18) are essentially identical, I will discuss them both here as one size determination (Size Determination (SD)).

The Area Office first addressed the issue of the date as of which to determine Appellant's size. The RS3 IDIQ MAC was issued on March 25, 2015, as an unrestricted procurement. Appellant submitted its initial offer on the subject Task Order on February 8, 2021, and the Area Office found that it would determine Appellant's size as of that date. The Area Office noted that on October 16, 2020, SBA published a new final rule on recertification on multiple award contracts. 85 Fed. Reg. 66150 (October 16, 2020). The rule took effect on November 16, 2020. (SD, at 2.) The Preamble explained the reasons for revision to 13 C.F.R. § 121.404(a)(1). It noted that SBA has been criticized for allowing agencies to receive credit towards their small business goals for awards to firms which are no longer small. (*Id.*) The Area Office further stated there is a legitimate concern when a concern self-certifies as small for an unrestricted MAC and at a later time when the concern is no longer small uses its self-certification as small for the underlying MAC to qualify as a small business. (*Id.*, at 3.) In SBA's view, the first time size is important is when a CO sets aside an order for small business under an unrestricted MAC. SBA concluded that it does not make sense to allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded. (*Id.*, at 3-4, citing 85 Fed. Reg. at 66151.) The revised regulation further reads:

For an unrestricted [MAC], if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the [MAC], it is small for goaling purposes for each order issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted [MAC] is set-aside exclusively for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement. However, where the underlying [MAC] has been awarded to a pool of concerns for which small business status is required, if an order or a Blanket Purchase Agreement under that [MAC] is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement).

(13 C.F.R. § 121.404(a)(1)(i)(A) (2020).)

The Area Office found the instant Task Order fits the circumstances which prompted the revision of the rule. The underlying contract was issued as an unrestricted solicitation in 2015, and Appellant's size status was irrelevant to its Contract Award No. W15P7T-19-D-0202 in 2019. This Task Order Solicitation was issued on December 29, 2020, and it was restricted only

to RS3 contract holders who were small businesses. Because the Task Order Solicitation was issued after the new regulation became effective, the Area Office found that all offerors must recertify their size status and be qualified as small businesses as of the date they submitted their proposal, which included price. Appellant submitted its proposal with price on February 8, 2021, and that is the date the Area Office used to determine Appellant's size. (*Id.*, at 7-8.)

The Area Office indicated that if the applicable regulation was in effect prior to November 16, 2020, February 8, 2021 would still be the date to determine Appellant's size. That regulation required that a concern's size be determined at the time of its offer for the underlying MAC, unless the contracting officer requested a new size certification in connection with the specific order. (*Id.*, at 7, citing 13 C.F.R. § 121.404(a)(1)(i) (2019).)

Here, the Area Office found the Army intended to maximize opportunities for small business, so the solicitation for the underlying MAC contract provided that in the event a task was restricted to small business in accordance with the contract's § H.3, the task order's RFP would indicate the restriction, and only contractors eligible to compete as a small business could submit a proposal in response to such an RFP. (*Id.*) However, the Army intended to maximize opportunities for small businesses, so § H.2.4 was included, stating that only eligible contractors could submit an offer in response to a solicitation set-aside for small business. (*Id.*, *supra*, citing RS3 Solicitation at 36.) The Area Office pointed to the language in the RS3 MAC at §§ H.2.4, H.3.5 and the language in the cover letter of the Task Order RFP in support of its finding that this Task Order RFP was a small business set-aside requiring offerors to recertify their size. (*Id.*, at 7-8.)

The Area Office also concluded that the CO was requesting all offerors to certify or “check off” the appropriate box to indicate whether they were a small business under NAICS code 541715 or not. (*Id.*, at 8.) All RS3 awardees were certified to NAICS code 541712 because NAICS code 541715 did not exist in 2015. The CO was effectively requesting all offerors to recertify for the Task Order, even though he did not specifically so state. The Area Office noted that Appellant pointed to cases where OHA found the Area Office had erred in finding a task order solicitation requiring recertification, but none of these cases involved certification to a different NAICS code, which did not exist when the underlying contract was issued. The Area Office maintained that Appellant was the only offeror who certified to NAICS code 541712, while all other offerors certified to NAICS code 541715. The Area Office thus concluded that the CO had requested recertification, and therefore under the old regulation Appellant's size should be determined as of February 8, 2021. (*Id.*)

The Area Office then noted that Appellant's SBA Form 355 gave information on its size as of May 6, 2015. (*Id.*, at 9.) Appellant did not provide its current payroll information and conceded it did not meet the 1,000-employee size standard as of 2021. The Area Office thus determined that Appellant was other than small.

C. Appeal

On June 16, 2021, Appellant filed the instant appeal (Appeal). Appellant argues the Area Office made three errors of law. First, it relied upon the November 16, 2020 regulation when that

regulation did not apply to this procurement. Second, there was no request for recertification in the Solicitation. Third, the Solicitation is not a small business set-aside. (Appeal, at 2.)

Appellant states, the Area Office noted that the subject Solicitation for the instant Task Order was issued on December 29, 2020, and amended three times—the last on January 22, 2021. (*Id.*, at 3.) Appellant notes that the Solicitation required:

In accordance with base contract clause H.2.4, this task order is restricted to small businesses in accordance with H.3. Only contractors eligible to compete as a small business may submit a proposal in response to the task order RFP. Any proposal submitted for a task order restricted to small businesses shall include the following representation: The Contractor represents that it [] is, [] is not a small business concern under NAICS Code 541715 assigned to contract number TBD.

(*Id.*, at 4, citing Solicitation at 1.)

Appellant notes the Solicitation did not identify a size standard while it does state the designated NAICS code 541715 replaced NAICS code 541712. Appellant adds that nowhere did the Solicitation use terms like “recertify,” “re-represent,” “new certification,” or “as of the date of the order” to describe the requested small business representation. (*Id.*)

Appellant then asserts that other portions of the Solicitation indicated that other than small businesses could submit offers. The Solicitation required submission of a Small Business Participation Document and stated that these would be evaluated. (*Id.*, citing Solicitation at 13, 18.) The solicitation also included a place where an offeror would identify itself as other than small or small, or other category of business. (*Id.*, citing Solicitation's Attachment 6, at 1.) It did not include a Notice of Small Business Set-Aside or Limitations on Subcontracting clauses, both of which are required for small business set-asides. (*Id.*, at 5.)

With references in the Solicitation to offers by other-than-small businesses and the omission of mandatory set-aside clauses, Appellant did not believe that the Army had established a small business set-aside. (*Id.*, at 6.) However, even if the Order had been set-aside, the Solicitation did not request recertification and the SBA regulations effective at the time of the RS3 Solicitation did not impose an automatic recertification requirement. (*Id.*) Because Appellant was a small business on the appropriate date to determine size, arguing May 6, 2015, Appellant submitted its proposal to the Solicitation. (*Id.*)

Appellant reasserts arguments it raised in response to the protests, citing to OHA precedent to argue that the Solicitation had contained no request for recertification and did not contain a size standard—something OHA has held is necessary to establish a request for recertification. (*Id.*, at 5-6.) Appellant further stated that it would be improper to retroactively apply 13 C.F.R. § 121.404(a)(1)(i)(A) to the RS3 contract, arguing that a contract is governed by the SBA regulations that existed at the time the underlying solicitation is issued, and regulations cannot be applied retroactively without a “manifest intention” that they be so applied. (*Id.*, at 6-7.) Appellant also pointed the Solicitation did not establish a small business set-aside and the provisions in the Solicitation specifically indicated that other-than-small businesses could submit

proposals, stating that the 50% small business figure “may” include the prime contractor “if” the prime is small, and so on. (*Id.*, at 7.) Additionally, the Solicitation omitted FAR clauses that are required to be included in orders set-aside under unrestricted multiple-award contracts. (*Id.*)

Appellant finds error in the Area Office's adverse Size Determination, adopting the new rule without addressing the question of retroactivity or offering any OHA authority that a switch in a NAICS code occasioned by a five-year NAICS update effectively imposes a recertification requirement on all affected orders. (*Id.*, at 8.) Further, the Area Office ignored Appellant's argument that the Solicitation did not establish a small business set-aside and simply found that the task order in question is 100% small business set-aside. (*Id.*, at 9.)

On appeal, Appellant first argues the Area Office erred in applying the November 16, 2020 regulation. A contract is governed by the SBA regulations in effect at the time the solicitation was issued. (*Id.*, citing *Size Appeal of Johnson Development*, SBA no. SIZ-5863 (2017).) Appellant asserts the U.S. Court of Federal Claims applied the version of the regulation “at the time relevant to the case” rather than the current version in a case where 13 C.F.R. § 121.404 was at issue. (*Id.* at 10, citing *Straughn Envtl. v. U.S.*, 135 Fed. Cl. 360 (2017).) This is consistent with longstanding authority that statutes and regulations cannot be applied retroactively unless there is a “manifest intention” that they are meant to be retroactive. (*Id.*) In the case of multiple award contracts, the regulation in effect on the date of the issuance of the solicitation for the underlying contract governs, not the date of the task order solicitation. (*Id.*, citing *Size Appeal of Tyler Construction Group, Inc.*, SBA No. SIZ-5323 (2012) and *Size Appeal of Systems Resource Mgmt, Inc.*, SBA No. SIZ-4640 (2004).)

Appellant then asserts that the Preamble to the November 16, 2020 regulation states that it is not retroactive. (*Id.*, at 11, citing 85 Fed. Reg. 66145, 66176 (Oct. 16, 2020)). Further, GAO has cited this language to confirm that the rule is not retroactive. (*Id.*, citing *Yang Enterprises*, B-418922.4 (May 20, 2021).)

Appellant points to the U.S. Supreme Court precedent that a law “must be deemed retrospective” where it “takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past.” The presumption against retroactivity is especially strong with respect to “new provisions affecting contractual rights” where “. . . predictability and stability are of prime importance.” (*Id.*, at 12, citing *Landgraf v. USI Film Productions*, 511 U.S. 244, 269, 271 (1994).) SBA has made this same point as to the importance of certainty in the procurement process. (*Id.*, at 13, 78 Fed. Reg. 61114, 61118 (Oct. 2, 2013).) Appellant thus, argues the Area Office's application of the November 16, 2020 regulation retroactively here impaired its existing rights, and was in error. (*Id.*, at 13-14.) To the extent the Area Office believed it was entitled to apply the new regulation because the Task Order Solicitation postdates it, Appellant argues that such a belief contradicts *Tyler Construction* as well as the longstanding principles disfavoring retroactivity set forth in *Landgraf*. (*Id.*, at 14.)

Appellant further argues the Area Office erred in finding that the Task Order Solicitation required recertification. The Area Office had found earlier case law inapplicable because NAICS code 541715 was a “new” NAICS code, but the earlier NAICS code 541712, was

interchangeable with it. Therefore, the reference to NAICS code 541715 did not establish a request for recertification. (*Id.* at 14-15.) Appellant maintains the Solicitation's request for confirmation of small business status does not explicitly require size recertification, as required by 13 C.F.R. § 121.404(g)(3)(v). (*Id.*, at 15.) Without an explicit request, size recertification is not required. (*Id.*, citing *Size Appeal of DNT Solutions, LLC & Alliant Solutions Partner, LLC*, SBA No. SIZ-5962 (2018) *Size Appeal of Delmock Technologies, Inc.* SBA No. SIZ-5937 (2018); *Size Appeal of Codelynx, LLC*, SBA No. SIZ-5720 (2016).) Where OHA has found recertification was required, the request was clear and explicit. (*Id.*, citing *Size Appeal of Metter Indus., Inc.*, SBA No. SIZ-5456 (2013).)

Further, Appellant contends the Task Order Solicitation is not a request for recertification because it fails to include a size standard, and there can be no request for recertification without a size standard. (*Id.*, at 16, citing *Size Appeal of Complete Packaging & Shipping Supplies, Inc.*, SBA No. SIZ-5568 (2014); *Size Appeal of Orion Mgmt, LLC*, SBA No. SIZ-5853 (2017).) Appellant maintains the Area Office erred in finding the mention of NAICS code 541715 a requirement for recertification, because this is the successor code for NAICS code 541712, the code designated in the underlying MAC, and OHA has held the two codes are interchangeable. (*Id.*, at 17, citing *NAICS Appeal of Credence Mgmt. Solutions*, SBA No. NAICS-5914 (2018).) Additionally, the regulations require NAICS code for a Task Order be one in the underlying MAC. (*Id.*, at 18, citing 13 C.F.R. § 121.402(c)(2)(i).) The CO could not have designated a “new” NAICS code. Thus, Appellant argues the Area Office's approach would mean that every time one NAICS code supersedes another, all orders under MACs with the predecessor NAICS code would be subject to a mandatory recertification requirement. (*Id.*, at 18-19.)

Appellant further maintains the Area Office erred by not considering whether the Task Order was a small business set-aside. (*Id.*, at 19.) If it is not, Appellant's size status is irrelevant. The Solicitation omits FAR clauses mandatory for set-asides, and the Solicitation contained provisions that indicated that other than small firms could present proposals. (*Id.*, at 19-20.) Appellant notes that balanced against all, this was a single statement suggesting that the Solicitation might be a set-aside. (*Id.*, at 20.) Instead of resolving this critical issue, the Area Office ignored Appellant's evidence entirely and found the Solicitation was a small business set-aside without rationale.

H. Fibertek's Response

On July 2, 2021, Fibertek responded to the appeal. Fibertek maintains the RS3 Contract contemplates that certain task orders issued under the RS3 IDIQ contract may be set-aside for small businesses, and that in the event a task order is restricted to small businesses, RS3 awardees must certify their current size status at the time of the proposal submission for the task order in question. (Fibertek Response, at 3, citing W15P7T-19-D-0202 at 31.) Specifically, clause H.2.4 states in relevant part: “Only contractors eligible to compete as a small business may submit a proposal in response to the task order RFP.” (*Id.*) In the following clause, H.2.5 states, “[i]f a task order RFP does not indicate any restriction to small businesses, then any contract holder, including large businesses and small businesses, may submit a proposal in response to the task order RFP.” (*Id.*) Section H.3 of the RS3 Contract governs Task Orders Restricted to Small Businesses and provides, under clause H.3.5, that for each set-aside

competition, RS3 contractors must *re-certify* their size. (*Id.*, emphasis Fibertek's.) Specifically, H.3.5 states:

Any proposals submitted for a task order restricted to small businesses ***shall include the following representation:***

The Contractor represents that it is, is not a small business concern under NAICS Code 541712 to contract number TBD.

(*Id.*, emphasis Fibertek's; underlining in the original.)

Underscoring the Army's requirement that a company's size certification be done at the time task order proposals were due, Fibertek seeks to submit new evidence in the form of slides from the Army's April 25, 2019 kickoff meeting for contract holders. Fibertek maintains, it was the RS3 contracting office's policy that concerns competing for small business set-side task order awards would have to certify their size as of the time of proposal submission. (*Id.*, at 4-5, citing Ex. A, at 88, 94.)

Fibertek shows that when the Army issued the Solicitation for this Task Order on or about December 28, 2020, the first page included the following language:

In accordance with base contract clause H.2.4, this task order is restricted to small businesses in accordance with H.3. Only contractors eligible to compete as a small business may submit a proposal in response to the task order RFP. Any proposal submitted for a task order restricted to small businesses shall include the following representation: The Contractor represents that it is, is not a small business concern under NAICS Code 541715 assigned to contract number TBD.

(*Id.*, at 5 citing RFP at 1, emphasis Fibertek's.)

Fibertek argues the instant procurement was a 100% small business set-aside. The first page of the RFP explicitly states the Task Order is restricted to small businesses. Where the plain language of a solicitation limits competition to small businesses, the procuring agency's failure to include applicable FAR clauses does not alter the set-aside status of the competition. (*Id.*, at 8, citing *Size Appeal of WRS Infrastructure & Env't, Inc.*, SBA No. SIZ-5007 (2008).)

Fibertek then argues the plain language of the Task Order RFP requires recertification. A solicitation may require a re-certification at the task order level without using the words "certify" or "re-certify." (*Id.*, 9, citing *Size Appeal of Metters Industries, Inc.*, SBA No. SIZ-5456 (2013).) Appellant's reliance on *DNT Solutions, LLC & Alliant Solutions Partner, LLC*, SBA No. SIZ-5962 (2018) is misplaced, when a number of factors lead to the conclusion there was no request for decertification, and no NAICS code was identified. (*Id.*, at 10-11.) Fibertek also maintains *Delmock Technologies, Inc.*, SBA No. SIZ-5937 (2018) does not support Appellant's argument because the solicitation lacked any certification requirement. (*Id.*, at 11.)

Fibertek contends the fact that the Task Order RFP does not include a specific statement, i.e., the size standard for the procurement is 1,000 employees, does not preclude a finding the RFP required recertification. There is no strict rule that even a NAICS code must appear on the face of the solicitation, so long as offerors understand the relevant size status. (*Id.*, at 12, citing *Size Appeal of U.S. Dep't of State & Precise Sys., Inc.*, SBA No. SIZ-5627 (2014).)

Fibertek maintains that the November 16, 2020 regulation should apply here. It requires that for set-aside task orders issued under unrestricted multiple award contracts concerns recertify their size and qualify as small at the time they submit an initial offer that includes price. (*Id.*, at 14-15, citing 13 C.F.R. § 121.404(a)(1)(i)(A) (2020).)

Fibertek further maintains that none of the cases cited by Appellant establishes a rule that the SBA regulations in effect at the time of the submission of the initial offer for the base contract must apply to all subsequent task orders issued under it. (*Id.*, at 15.) In *Tyler Construction*, it was undisputed that there was no task order certification after the effective date of the new regulation, and so it is inapposite here where there was a task order certification. (*Id.*) In *Size Appeal of Systems Resource Management, Inc.*, SBA No. SIZ-4640 (2004), OHA merely noted newly issued regulations might yield a different result. In *Yang Enterprises*, B-418922.4 (May 20, 2021), the agency relied upon a regulation that was not in effect until more than year after proposal submission. As for *Size Appeal of Total Systems Technologies Corporation*, SBA No. SIZ-5562 (2014), Fibertek argues this case cuts against Appellant's argument, because OHA specifically considered a regulation that took effect after issuance of a solicitation for a blanket purchase agreement under a GSA schedule contract, but before proposals were due. (*Id.*, at 16-17.)

Fibertek finds Appellant's arguments as to fairness and predictability of the contracting process are misplaced. While Appellant argued that its rights under the underlying RS3 contract would be abridged, Appellant was not entitled to more than the minimum order of \$500.00 under the RS3 contract, which it has already received. (*Id.*, at 17.) The precise question is whether offerors were on notice of the new rule and re-certification requirement for the purposes of this particular task order, which Fibertek acknowledges that they were. (*Id.*, at 18.) Fibertek further agrees with SBA, that sound policy supports application of the November 16, 2020 regulation here. (*Id.*, at 18-22.)

I. Ideal's Response

On July 2, 2021, Ideal also responded to the Appeal. Ideal noted Appellant's RS3 MAC contract provided that task orders under the contract may be set-aside for small business, and that only eligible small businesses may compete for those task orders. (Ideal Response, at 4, citing RS3 contract at § § H.2.4, H.3.) Further, contractors competing for small business set-aside task orders were required to represent that they either were or were not a small business under NAICS code 541712. (*Id.*, citing RS3 contract at § H.3.5.)

Ideal also seeks to introduce the slide deck from the Army's April 25, 2019 presentation, which informed offerors that they would be required to certify their small business status at the time of proposal submission for specific orders. (*Id.*, at 4-5, citing Ex. 1, slides 88, 94.) The RFP

for the instant Task Order stated that it was restricted to small businesses. (*Id.*, at 6, citing RFP at 1.)

Ideal argues the Area Office properly applied the November 16, 2020 regulation, 13 CFR 121.404(a)(1)(i)(A) (2020). Ideal asserts neither the plain language of the regulation nor the regulatory history of the regulations limits its reach to task order procurements conducted under MACs issued after the regulation's effective date. (*Id.*, at 9.) The instant situation, of a restricted task order competed under an unrestricted MAC, is exactly what the new regulation was intended to address. Ideal further argues that the exceptions to 13 C.F.R. § 121.404 apply not only at the date of the offer, but also at the date of a triggering event. (*Id.*, at 10-11, citing *Size Appeal of Total Systems Technologies Corporation*, SBA No. SIZ-5562 (2014) and *Size Appeal of Digital Management, Inc.*, SBA No. SIZ-5709 (2016).)

Ideal maintains the solicitation required recertification. The RS3 contract provides for certification of small business status for small business set-aside task orders, and the April 25, 2019 Contractor Kickoff slides clarified that vendors proposing for orders restricted to small business must certify themselves as small at the time of their proposal. (*Id.*, at 14-16.) The instant Task Order Solicitation states on its first page that it is restricted to small business. Offerors were plainly required to certify their size when responding to this Solicitation. (*Id.*, at 16-20.)

J. Agency's Comments

On July 7, 2020, SBA filed its Agency Comments. SBA identified the issue here is which version of 13 CFR § 121.404(a) is applicable to the RS3 Task Order Solicitation issued as a 100% small business set-aside on December 28, 2020. SBA maintains the application of 13 C.F.R. § 121.404(a)(1)(i)(A), effective November 16, 2020, by SBA in the subject size determination was appropriate. (Agency Response, at 3.)

As a matter of fact, on March 25, 2015, the Army issued the Solicitation for the RS3 IDIQ MAC as an unrestricted procurement; however, it also announced it intended to maximize opportunities for small businesses and inserted language in the Solicitation addressing the potential for the award of a task order restricted to small business. (*Id.*, at 2.) On December 28, 2020, the Army issued this instant Task Order Solicitation, RS3-20-0045 or W909MY-21-R-D002, intended to award an RS3 Task Order as a 100% small business set-aside with designated NAICS code 541715, with a corresponding 1,000 employee size standard. On February 8, 2021, Appellant submitted a proposal including price. On May 7, 2021, the CO awarded the task order to Appellant, and notified unsuccessful offerors. (*Id.*, at 2-3.)

The Task Order Solicitation was issued, and Appellant's proposal submitted, after the effective date of the November 16, 2020 regulation. SBA maintains that application of the rule here is not retroactive. A retroactive regulation extends in scope and effect to matters that have occurred in the past, which existed before the law came into effect. (*Id.*, at 3, citing *Size Appeal of CS360, LLC*, SBA No. SIZ-5419 (2012).) SBA amended § 121.404 to provide that size for a small-business set-aside task order would be determined at the time of the offer on the order, not at the time of the offer on the underlying contract, for unrestricted multiple-award contracts other than the Federal Supply Schedule or that feature small business pools. (*Id.*, citing 85 Fed. Reg.

66146, 66150-153 (Oct. 16, 2020) and 13 C.F.R. § 121.404(a)(1)(ii)(A).) The change is part of SBA's 16-year effort to address the concerns expressed by SBA's Office of Inspector General (OIG) and others that small business awards were being made to firms which no longer qualified as small. (*Id.*, at 3-4.)

SBA urges OHA that a finding that the November 16, 2020 regulation does not apply to orders on MAC contracts where the challenged concern's offer and certification was made prior to November 16, 2020 could undermine SBA's efforts to address OIG's concerns. (*Id.*, at 4.) MAC contracts can span decades, and agencies could continue to make awards to other than small firms for years, and this was not SBA's intent. SBA intended the changes to the regulation would take effect on November 16, 2020. The rule was meant to have prospective effect and apply to any solicitation issued for an order reserved or set-aside for small business on or after November 16, 2020. To find otherwise would unnecessarily prolong the implementation of SBA's regulatory scheme. (*Id.*)

SBA further asserts the Solicitation for the underlying MAC required concerns submitting a proposal for a task order would be subject to a self-certification requirement when an order was restricted to small business. (*Id.*, at 5, citing Solicitation § H.3.)

Finally, SBA concludes by asserting the instant Task Order Solicitation was set-aside for small business, and it does not state or imply that other than small businesses were eligible for award. (*Id.*, at 6-7.)

K. Appellant's Reply

On July 14, 2021, Appellant replied to SBA's comments. Appellant reasserts its argument that the Area Office's application of the November 16, 2020 regulation was retroactive. Further, Appellant rejects SBA's argument that *Size Appeal of C360, LLC*, SBA No. SIZ-5419 (2012) supports the application of the new regulation. The case did not involve application of a new statute or regulation to an existing contract. (Appellant's Reply, at 1-2.)

Appellant emphasizes the new statutes and regulations cannot be retroactively applied if such application would affect parties' rights under existing contracts. A contract's effective date should determine whether application of a statute or regulation was retroactive. Administrative rules will not be construed to have retroactive effect unless their language requires this. Thus, a regulation applied to existing contracts is retroactive. Appellant then rejects SBA's policy argument in favor of applying the November 16, 2020 regulation. Further, SBA has not shown that the language of the regulation requires retroactive application. In fact, the Final Rule expressly disclaimed retroactivity. In addition, Appellant reiterates its prior claims, that the application of the new regulation would impair Appellant's rights under the existing regulation. (*Id.*, at 3-7.)

Additionally, Appellant also takes issue with Fibertek's attempt to distinguish *Tyler Construction*, and argues that in such a case, OHA relied upon the date of an underlying MAC contract to determine size. (*Id.* at 7-8.) Appellant also argues that SBA's statement of its intent in

promulgating the regulation is not entitled to deference, because the regulation is not ambiguous. (*Id.*, at 8-9, citing *Size Appeal of Digital Mgmt.*, SBA No. SIZ-5709 (2015).)

Finally, Appellant reasserts its prior arguments that the Task Order Solicitation did not require recertification, and that it was not set-aside for small business. (*Id.*, at 11-15.)

L. Motions for New Evidence

On July 2, 2021, Fibertek filed a Motion for the Admission of New Evidence, which is a slide deck dated April 25, 2019, created by the contracting officer, who held a kickoff meeting for RS3 prime contract holders. (Fibertek's Motion.) The purpose of the meeting was to provide RS3 contract holder with information about the program and the Government's approach to task orders, while the presentation included a slide deck. Fibertek seeks to admit the slide deck into evidence because it clarifies the question of whether certification was required by the Task Order Solicitation. Fibertek maintains this does not enlarge the issues and clarifies the facts on appeal.

On the same day, Ideal filed a Motion for Admission of New Evidence, seeking to admit the identical slide deck. (Ideal's Motion.) Ideal maintains the slide deck is relevant to the issues on appeal, does not enlarge the issues, but responds to Appellant's arguments, and clarifies the facts on appeal.

On July 14, 2021, Appellant opposed both motions. (Appellant's Opposition.) Appellant argues that Fibertek and Ideal had access to this material during the protest process and could have submitted it to the Area Office. The proffered evidence enlarges the issues and is irrelevant as extrinsic evidence to vary an unambiguous written contract. Appellant also contends that they seek to contradict the contract, which includes FAR clause 52.219-28, which means recertification is required when the CO explicitly requests it, and nothing further. Further, by its own terms, the slide deck is not binding.

On July 22, 2021, Ideal replied to Appellant's Opposition. (Ideal's reply to Opposition.) Ideal argues that it did not present the slide deck to the Area Office because it was not aware of the issue of whether the Solicitation required certification. This issue arose in the Size Determination, and this is Ideal's first chance to address it. Further, the slide deck does not enlarge the issues on appeal, but directly addresses the issue of whether certification was required. Finally, the submission of the slide deck is not an attempt to vary the terms of a written contract, but to clarify the H-3 clause of the underlying RS3 MAC and support the conclusion that certification was required here. In contrast, Appellant's reliance on FAR 52.219-28 is a new argument on appeal and should be disregarded.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a 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).)

B. Preliminary Matters

New Evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In the instant case, I find that Fibertek and Ideal have not established good cause to admit the new evidence. The slide deck was created by the CO and readily available for submission, but the CO and the movant parties chose not to produce it to the Area Office. It is well-settled that OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). Therefore, I DENY Fibertek and Ideal's motion to supplement the record and EXCLUDE its proffered evidence from the record.

C. Analysis

The initial issue in this case is whether the Task Order Solicitation was a small business set-aside. Given that it explicitly stated, “this task order is restricted to small businesses in accordance with H.3,” I conclude that it clearly was. The fact that certain clauses were not included in the Solicitation does not alter its set-aside status. *WRS Infrastructure and Environment, Inc.*, at 6 (finding that despite the absence of FAR 52.219-6 from the RFP, the RFP involved a total small business set-aside). That the Task Order Solicitation did not explicitly mention the size standard does not mean it was not a set-aside, when the inclusion of a NAICS code with only one size standard made it clear what the applicable size standard was. *U.S. Dep't of State & Precise Sys.*, at 8.

The next issue is whether the Task Order Solicitation required offerors to recertify their size for the instant task order. Appellant argues that there was no request for recertification in the Solicitation and the Task Order Solicitation is not a small business set-aside. While the Solicitation did not identify a size standard, Appellant concedes that it designated NAICS code 541715, which replaced 541712. Because Appellant claims that nowhere did the Solicitation use terms like “recertify,” “re-represent,” “new certification,” or “as of the date of the order” to describe the requested small business representation, the task order was not for a small business and did not require recertification. (*Id.*)

Considering the record before me and the arguments made by the parties, I find the Area Office properly determined the Task Order Solicitation as requiring recertification at the task order level. Here, the RS3 MAC gave ground rules for setting-aside task orders for small business under § H.3. The provisions ensured awards would be made to small businesses, while the language required that all future small business set-aside task orders must have the following provision:

Any proposals submitted for a task order restricted to small businesses shall include the following representation: The Contractor represents that it is, is not a small business concern under NAICS Code 541712 assigned to contract number TBD.

MAC, at 36 § H.3.5.

The instant Task Order Solicitation, W909MY-21-R-D002, was also restricted to holders of small business RS3 contracts, and included this specific language:

In accordance with base contract clause H.2.4, this task order is restricted to small businesses in accordance with H.3. Only contractors eligible to compete as a small business may submit a proposal in response to the task order RFP. Any proposal submitted for a task order restricted to small businesses shall include the following representation: The Contractor represents that it is, is not a small business concern under NAICS Code 541715 assigned to contract number TBD.

Task Order Solicitation, at 1.

As the task order was restricted to small businesses in accordance with H.3, only contractors eligible to compete as a small business were able to submit a proposal in response to the task order RFP. RS3 MAC at 36, § H.2.4. Consistent with these provisions, the record establishes that Appellant unmistakably certified it is a small business in its February 8, 2021 Proposal, including price, Sections II.A and II.B, *supra*. Thus, the Area Office properly determined Appellant's size as of February 8, 2021.

Appellant's reliance on a number of OHA decisions—to argue that without an explicit request, size recertification is not required—is contrary to OHA's finding on *Metters Industries*, where a task order solicitation asked each offeror to verify, in writing, that it was a small business for its contract, and that the offeror was still a small business at time of the task order proposal submission and task order award. *Id.*, at 9. OHA found such a statement is equivalent in substance to a certification, notwithstanding that the procuring agency did not utilize the words “certify” or “recertify” in its tasks order solicitation. *Id.*, citing 15 U.S.C. § 632(w)(3) (indicating that “certification” generally consists of a representation by an authorized representative that “a business concern qualifies as a small business concern of the exact size and status claimed by the business concern for purposes of bidding on a Federal contract or subcontract”); 71 Fed. Reg. 66,434, 66,438 (Nov. 15, 2006) (observing that certification “occurs when an offeror represents that it is small as part of its offer or by submitting an offer,” and that “certification” is essentially synonymous with “representation” of small business status).

Here, the plain language of the Task Order Solicitation requires offerors to specify their size status with their proposals, thereby requiring recertification in spite of the missing words “certify” or “re-certify” from the Solicitation. *Metters Industries*, at 9. Particularly, this Task Order Solicitation included the NAICS code 541715, distinguishing from the inapposite cases cited by Appellant, wherein the solicitations were missing the NAICS code and the size standard altogether.

Because the Area Office found that Appellant is other than small based on dispositive issues, OHA need not decide whether the November 16, 2020 regulation applied to this case.

As Appellant has failed to meet its burden of establishing clear error by the Area Office, and the appeal is DENIED, and the Area Office's size determination is AFFIRMED.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the U. S. Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge