

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

SIZE APPEAL OF:

EBA Ernest Bland Associates, P.C.,

Appellant,

Appealed From  
Size Determination No. 02-2021-090

SBA No. SIZ-6139

Decided: February 16, 2022

APPEARANCES

Jason P. Matechak, Esq., Jill K. McDowell, Esq., Impresa Legal Group, Arlington, VA,  
for EBA Ernest Bland Associates, P.C.

DECISION

I. Introduction and Jurisdiction

On September 30, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2021-090 dismissing a size protest filed by EBA Ernest Bland Associates, P.C. (Appellant) against Global Engineering Solutions (GES). The Area Office determined that the protest was untimely, because the protest was filed against the award of a task order that does not require recertification. On appeal, Appellant contends that the Area Office erroneously dismissed the protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the Area Office's decision and vacate the award to GES. For the reasons discussed *infra*, the appeal is denied.

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). A timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017); *Size Appeal of Ad Med Consulting, Inc.*, SBA No. SIZ-5355, at 2 (2012).

## II. Background

### A. The Solicitations

On March 16, 2021, the U.S. Army Corps of Engineers, Contracting Division (USACE) issued Task Order Request for Quote (TORFQ) No. W9123721Q0049 for a 100% small business set aside contract. This TORFQ is under the GSA Federal Supply Schedule FC00CORP000C, which is a Multiple Award Contract (MAC) with a duration longer than five (5) years.

The TORFQ called for a contractor to “provide all necessary services required to survey an existing health care facility's potable domestic water piping systems to include use of traditional measurement methodologies and/or LiDAR scanning method, data gathering, and Building Information Model (BIM) development.” (TORFQ at 12.) Further, the “[a]s-builts and surveying data shall be used to develop Architectural and Plumbing models” for the Clarksburg, Beckley, and Huntington, WV Medical Health Facilities. (Id.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) Code 541990, All Other Professional, Scientific and Technical Services with a corresponding \$16.5 million annual receipts size standard. (Id.) The TORFQ did not include any express language requesting or requiring that the GSA Schedule prime contractor certify or recertify its size for this task order.

The TORFQ incorporated FAR Clause 52.212-3 Offeror Representations and Certifications-Commercial Items. (Id., at 40-55.) Proposals were due July 16, 2021. Appellant and GES submitted timely offers.

### B. Protest

On September 7, 2021, Appellant learned that GES was awarded the TORFQ. On September 14, 2021, Appellant filed a protest challenging GES's size.

In the protest, Appellant argued that “GES did not comply with the [CO]'s explicit request for certification.” (Protest at 2.) Specifically, Appellant argued that on or about January 10, 2020, GES merged with another firm, Salas O'Brien (Salas), and was no longer a small business. (Id. at 5.) As a result, GES was required to complete “annual representation and certification electronically,” pursuant to FAR 52.212-3. (Id. at 2-5.) Because the TORFQ incorporated FAR 52.212-3, Appellant claimed that GES failed to comply with the TORFQ and FAR regulation when it merged with Salas by failing to recertify as other than small. (Id.)

Appellant then argued that GES failed to inform the CO of its status change within 30 days of the merger, pursuant to 13 C.F.R. § 121.404(g). (Id. at 5-7.) In Appellant's view, the merger with Salas “triggered” 13 C.F.R. § 121.404(g)(2)(i), which requires a contractor to “recertify its small business size status” within 30 days of a merger, sale, or acquisition. (Id.) Due to the merger with Salas, GES was no longer a small business; therefore, GES was ineligible for the award. Appellant concluded that GES is not eligible for the award because (1) GES is no longer a small business and (2) GES failed to recertify as “other than small” within 30 days of a merger. (Id.)

### C. Contracting Officer's Referral

On September 17, 2021, the CO forwarded the protest to the Area Office for review. Accompanying the size protest, the CO proffered that recertification for the task order was not requested. (Protest Referral to SBA, at 2.) Further, the CO asserted that SBA has held that incorporation of the FAR Clause 52.212-3 alone “does not constitute a request for recertification.” (Id., citing Size Appeal of AIS Eng'g, Inc., SBA No. SIZ-5614, at 5 (2014).)

### D. Size Determination

On September 30, 2021, the Area Office issued the Size Determination, dismissing Appellant's size protest as untimely. The Area Office explained that the TORFQ is under a long-term GSA schedule contract. (Size Determination at 1.) The Area Office noted the regulations at 13 C.F.R. § 121.1004(a)(3)(i) provide that a size protest related to a long-term contract may be filed only at three stages:

First, an interested party may protest a size certification made at the time the long-term contract is initially awarded. 121.1004(a)(3)(i). Second, an interested party may protest a size certification made at the time an option is exercised. 121.1004(a)(3)(ii). Third, an interested party may protest a size certification made ‘in response to a [CO's] request for size certifications in connection with an individual order.’ 121.1004(a)(3)(iii).

(Id. at 1-2.) The instant protest was not timely filed at either of the first two stages, so the sole issue presented was whether the CO requested recertification in conjunction with the TORFQ. (Id. at 2.) The CO informed the Area Office that “the business size was obtained at the contract level and not at the order level.” (Id.)

Citing OHA case law, the Area Office stated that, when a CO does not request recertification for a task order under a long-term contract, there is “no regulatory mechanism” for a private party to challenge a successful offeror's size in connection with that order, and any such size protest must therefore be dismissed. (Id., citing Size Appeals of Safety and Ecology Corp., SBA No. SIZ-5177 (2010) and Size Appeal of Quantum Prof'l Servs., Inc., SBA No. SIZ-5207 (2011), recons. denied, SBA No. SIZ-5225 (2011) (PFR).) Language in a solicitation indicating that an award is limited to small businesses does not constitute a recertification requirement. (Id., citing Safety and Ecology Corp., SBA No. SIZ-5177, at 23.) OHA also has found that “recertification does not occur simply because mandatory FAR clauses were incorporated.” (Id., quoting Size Appeal of ReliaSource, SBA No. SIZ-5536, at 4 (2014).) Absent an explicit requirement for recertification, or confirmation from the CO that recertification was required, a size protest against a task order is untimely. (Id., citing Size Appeal of CodeLynx, LLC, SBA No. SIZ-5720 (2016).)

### E. Appeal

On October 15, 2021, Appellant filed the instant appeal. Appellant asserts that the Area Office committed two main errors in reaching its decision. (Appeal at 1.) OHA should therefore (1) grant the appeal, and (2) remand the matter to the Area Office to vacate the award.

First, Appellant contends that GES merged with Salas as of January 10, 2020, and GES is therefore ineligible for the award because it no longer qualifies as a small business. (Id., at 2.) Appellant explains that GES failed to meet its obligations under the TORFQ and standard FAR regulations. Specifically, GES argued that TORFQ incorporated FAR 52.212-3, which states under Paragraph (b)(1)(2) that the offeror “shall complete only paragraph (b) of this provision if the Offeror has completed the annual representations and certification electronically in the System for Award Management (SAM).” (Id. at 3.) Appellant asserts that the award to GES is erroneous because GES did not qualify as a small business as of March 16, 2021, the date the TORFQ was issued.

Next, Appellant argues that GES was no longer a small business at the contract level; therefore, the CO could not consider certification at that time. (Id. at 4.) In accordance with SBA's size recertification rules at 13 C.F.R. § 121.404(g)(2)(i), in cases of a merger, “a 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.” (Id. at 3, quoting 13 C.F.R. § 121.404(g)(2)(i).) Appellant presumes GES completed its obligation under § 121.404(g)(2)(i) by informing the CO of its size status change. Appellant argues that this presumed action under § 121.404(g) obligates the agency to request recertification, stating “[r]ecertification is required by regulation, not by [CO] discretion.” (Id. at 4) Based on Appellant's assumption that GES recertified its size status within 30 days of the merger, Appellant argues GES was no longer a small business at the contract level, and therefore did not qualify for the award. In the alternative, Appellant argues that if GES failed to recertify its size status within 30 days of the merger, the Area Office's untimely determination “render[ed] the regulation at 13 C.F.R. § 121.404 utterly meaningless” and offers no penalties or consequences for COs and businesses who neglect their regulatory obligations. (Id. at 6.)

### 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 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 finding of fact or law. Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-4775, at 11 (2006).

## B. Analysis

Upon review of the record and the arguments of the parties, I find that Appellant has not shown that the Area Office clearly erred in dismissing Appellant's protest as untimely. I must therefore deny this appeal.

The underlying contract here is a long-term GSA schedule contract against which orders may be issued. SBA regulations governing size protests permit a protestor to file a size protest relating to such a contract at only three times. First, an interested party may protest a size certification within five business days after the long-term contract is initially awarded. 13 C.F.R. § 121.1004(a)(3)(i). Second, an interested party may protest a size certification within five business days after an option is exercised. *Id.* 13 C.F.R. § 121.1004(a)(3)(ii). Third, an interested party may protest a size certification made “in response to a contracting officer's request for size certifications in connection with an individual order.” *Id.* 13 C.F.R. § 121.1004(a)(3)(iii). Interpreting these provisions, OHA has repeatedly held that “SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order.” *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016) (quoting *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683, at 3 (2015)); see also *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5614, at 4 (2014); *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323 (2012); *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), recons. denied, SBA No. SIZ-5225 (2011) (PFR).

Here, the instant case does not deal with the award of the underlying MAC contract or the exercise of an option. The remaining question is whether the instant TORFQ included a request for recertification. When assessing size for task and delivery order contracts, SBA's longstanding rule is that a concern which represents itself as small at the time of contract award remains small for the lifetime of the contract, including orders issued under the contract. *Size Appeal of Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 16-17 (2021); see also *Size Appeals of: DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962, at 7 (2018). For MACs set aside for small businesses, SBA regulations state, “[a] concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract.” 13 C.F.R. § 121.404(g).

Nevertheless, a CO has the discretion to request recertification of a concern's size for an individual order. The determination of whether an individual order required recertification is made primarily on the basis of the task order solicitation and relevant provisions in the underlying contracts. *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122, at 15-16 (2021); *Size Appeal of Advanced Mgmt. Strategies Group, Inc./ReefPoint Group, LLC*, SBA No. SIZ-5905, at 6 (2018); *CodeLynx*, SBA No. SIZ-5720, at 6. OHA also will attach weight to the CO's opinion of whether recertification was requested, although the CO's views are not dispositive. *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013). OHA has long held that “merely setting [a] task order aside for small businesses” does not constitute a request for recertification. *RX Joint Venture*, SBA No. SIZ-5683, at 4 (quoting *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 23 (2010).) Likewise, “recertification does not occur simply because mandatory FAR clauses were incorporated.” *Size Appeal of ReliaSource*, SBA

No. SIZ-5536, at 4 (2014); see also CodeLynx, SBA No. SIZ-5720, at 6; AIS Eng'g, SBA No. SIZ-5614, at 5.

In the instant case, the Area Office reviewed the TORFQ, considered the prime contract, and correctly concluded that the CO did not request recertification for the task order. As the Area Office accurately observed, the TORFQ here contemplated the award of a task order under GSA Federal Supply Schedule FC00CORP000C, which is a MAC with a duration longer than five (5) years. Section II.A., *supra*. The TORFQ did not obligate offerors to recertify size, nor to represent or re-represent their size. Section II.A, *supra*. Further, the CO informed the Area Office that recertification was not requested for this task order. Section II.C, *supra*. Even though the task order included FAR regulatory language requiring recertification in the event of a merger by reference, this does not mandate recertification by incorporation. OHA has repeatedly declined to find that references to standard FAR provisions constitute a request for recertification. See Taylor Consultants, at 11. Accordingly, I decline to do so here, and find that the TORFQ did not contain a request for recertification.

Citing SBA's recertification rules pertaining to mergers and acquisitions at 13 C.F.R. § 121.404(g)(2), Appellant contends the CO is obligated by operation of law to request recertification after a merger. Section II.E, *supra*. This argument is flawed. Absent expressed language in the task order synopsis to a CO requesting size recertification for the individual task order, a plain text reading of § 121.404(g)(2) does not mandate recertification as a result of a merger, sale, or acquisition. Appellant's argument contradicts SBA's long-standing rule that “a prime contractor that is small at the time of the contract award remains small for all orders issued under the contract, unless the CO, in his or her sole discretion, chooses to request recertification on an individual order-by-order basis.” Odyssey, at 19. I therefore reject Appellant's argument that 13 C.F.R. § 121.404(g)(2) mandates recertification as a result of a merger, sale, or acquisition.

Further, Appellant argues that GES is “not a small business” and therefore does not qualify for a small business set-aside task order. Section II.E, *supra*. Specifically, Appellant contends that under the express language of 13 C.F.R. § 121.404(g)(2)(i), a prime contractor who recertifies as other than small as a result of a merger or acquisition is not eligible to receive a small business set aside award. *Id.* Thus, in Appellant's view, following its merger with Salas, GES no longer qualifies for the instant task order. However, Appellant's view is contrary to established OHA precedent, and consequently, I must reject it. When interpreting the express language of § 121.404(g)(2), OHA has upheld SBA's interpretation that “when as here, the underlying MAC itself was set aside for small businesses, the consequence of a merger or acquisition involving a prime contractor is not that the prime contractor becomes ineligible for award of pending or future task orders, but rather that the procuring agency cannot claim goaling credit for those orders.” Odyssey, at 20.

I therefore conclude that, given this record, the Area Office made no error of law or fact in determining that Appellant's protest was not timely filed within five business days after an award of an order that required recertification, pursuant to 13 C.F.R. § 121.1004(a)(3)(i), and therefore properly dismissed it. Appellant has failed to meet its burden of establishing that the size determination was based upon a clear error of law or fact.

IV. Conclusion

Appellant has not demonstrated clear error in the size determination. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge