

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

SIZE APPEAL OF:

Quality Innovation, Inc.,

Appellant,

RE: 360 Patriot Enterprises, LLC

Appealed From
Size Determination No. 02-2022-032

SBA No. SIZ-6164

Decided: August 11, 2022

APPEARANCES

Aron C. Beezley, Esq., Sarah S. Osborne, Esq., Gabrielle A. Sprio, Esq., Bradley Arant Boult Cummings LLP, for Quality Innovation, Inc.

Elizabeth N. Jochum, Esq., Samarth Barot, Esq., Blank Rome LLP, for 360 Patriot Enterprises, LLC

Christopher Clarke, Esq., U.S. Small Business Administration, Office of General Counsel, for U.S. Small Business Administration

John W. Fields, Contracting Officer, Department of the Army, U.S. Army Contracting Command-New Jersey, Joint Base MDL

DECISION

I. Introduction and Jurisdiction

On May 24, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2022-032 dismissing a size protest filed by Quality Innovations, Inc. (Appellant) against 360 Patriot Enterprises, LLC (Patriot). The Area Office determined that the protest was untimely because the protest was filed against the award of a task order that did not require recertification. On appeal, Appellant contends that the Area Office's determination was a clear error of fact and law, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the Area Office's decision. 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 IDIQ Solicitation and TORFP

On October 21, 2016, the U.S. Army Contracting Command issued Request for Proposal (RFP) Solicitation No. W15QKN-16-R-0002 for Personnel Life-Cycle Support (PLS) for the U.S. Army and other Federal agencies, under a Multiple Award Indefinite Delivery/Indefinite Quantity (MA IDIQ) Contract. (IDIQ Solicitation, at 2.) The purpose of the RFP is for “qualified Contractors to provide support for enterprise level Human Resource (HR) Services for the DoD programs and systems.” (*Id.*) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) Code 541612, Human Resources Consulting Services, with a corresponding \$16.5 million annual receipts size standard. (*Id.*)

The RFP called for “a competitive acquisition, with a portion of the contract awards reserved for Small Businesses, which will result in the award of Multiple Award (MA) IDIQ contracts with a five-year base period and five, 12-month option periods.” (*Id.* at 3.) The RFP further “intends to award approximately 12 to 16 MA IDIQ contracts which will include a minimum of six contract awards to Small Businesses, presuming six or more Small Businesses are included in the competition . . . [a]ny additional awardees needed to meet the intended number of awards will be selected from the remaining best valued proposals without regard to business size.” (*Id.* at 3.)

On January 27, 2022, the CO issued a Task Order Request for Proposal, Solicitation No. W15QKN-22-R-0017 (TORFP) to all prime contractor holders under the Human Resource Solutions (HRS) PLS MA IDIQ Contract. (TORFP, at 1.) This TORFP is “a 100% small business set-aside” under NAICS Code 541612. (*Id.*) Proposals were due February 17, 2022. (Email from D. Rice (Jan. 27, 2022), at 1.) Appellant and Patriot submitted timely offers.

B. Size Determination

On May 6, 2022, the CO notified all offerors that Patriot was awarded the TORFP. On May 13, 2022, Appellant filed a protest challenging Patriot's size status and eligibility.

On May 24, 2022, the Area Office issued the Size Determination, dismissing Appellant's size protest as untimely. (Size Determination, at 1.) The Area Office explained that the TORFP is under a “long-term contract.” (*Id.*) The Area Office noted the regulation at 13 C.F.R. § 121.1004(a)(3) provides that a size protest related to a long-term contract may be filed only at the three following stages: (1) at the initial award stage of a long-term contract; (2) when an option is exercised; or (3) when a CO requests size recertification for an individual order. (*Id.* at 1-2, citing § 121.1004(a)(3).)

Relying upon OHA precedent, the Area Office determined that a protest of an individual task order in a long-term contract may only be filed when the CO requests recertification. (*Id.*) The Area Office noted that under OHA precedent “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.” (*Id.*, citing *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).) SBA's longstanding rule is that a firm that represents itself as small at the time of award is small for the life of the contract, including for orders issued under the contract. (*Id.*, citing *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); *Size Appeal of EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139 (2022).) The Area Office concluded that, absent a request for recertification, the regulation does not provide a mechanism to protest a challenged concern's size in connection with the task order. (*Id.*)

Therefore, the issue before the Area Office was whether the CO requested recertification in conjunction with the TORFP pursuant to 13 C.F.R. § 121.1004(a)(3)(iii), thereby triggering Appellant's regulatory right to challenge Patriot's size. (*Id.* at 2.) The Area Office concluded that the CO did not require recertification at the task order level, and size was to be determined at the basic contract level. (*Id.*) The Area Office reasoned that Patriot's size is to be determined as of Patriot's submission of its offer for the base contract; therefore, Patriot remains a small business for this procurement. (*Id.*) 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.) The Area Office further noted 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 on a long-term MAC is untimely. (*Id.*, citing *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016).)

C. Appeal

On June 6, 2022, Appellant filed the instant appeal. (Appeal, at 1.) Appellant asserts the Area Office based the size determination on an error of fact and law. Appellant contends that (1) the IDIQ Solicitation for the underlying base contract was awarded on an unrestricted basis to both large and small businesses; and (2) the TORFP was a 100% small business set-aside, issued under the MA IDIQ contract and held by numerous small and large businesses. (*Id.* at 5.) Therefore, Patriot was required to recertify under SBA regulation, regardless of whether there were specific recertification requests by the CO. (*Id.* at 6.) The regulation provides, “[i]f an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for 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.” (*Id.*, citing 13 C.F.R. § 121.404(a)(1)(i)(A).) Appellant concludes that this provision mandates recertification for “all small business set-aside task orders under unrestricted multiple award contracts,” absent specific request from the CO or the solicitation. (*Id.*) Accordingly, Patriot was required to recertify its small business status. (*Id.*)

Second, Appellant argues that the protest is timely under the recent regulation revision to 13 C.F.R. § 121.1004. (*Id.* at 6-7.) Appellant contends that because this TORFP is a 100% small business set-aside issued under an unrestricted MAC, this procurement is governed by subsection § 121.1004(a)(2), and not subsection § 121.1004(a)(3). (*Id.* at 7.) Appellant rejects Area Office's reliance on § 121.1004(a)(3) to determine timeliness, and argues that this regulation applies to long-term contracts and multiple award contracts, but “does not apply to orders issued against such contracts which are instead subject to different timeliness regulations.” (*Id.*) (emphasis added.) Analyzing § 121.1004(a)(2), Appellant argues that size protests filed within five business days after notification of the procurement's awardee under unrestricted multiple award contracts are timely. (*Id.*) Appellant notes that its size protest challenged Patriot's failure to recertify under the TORFP, per 13 C.F.R. § 121.404(a)(1)(i)(A). (*Id.* at 8.) Appellant further notes that it met the regulation requirements when it timely filed the size protest within five business days, per 13 C.F.R. § 121.1004(a)(2). (*Id.*) Appellant concludes that the applicable SBA regulation renders Appellant's appeal timely because the underlying contract was awarded on an unrestricted basis and the TORFP was a 100% small business set-aside; therefore, the Area Office's size determination was based on a clear error of fact and law. (*Id.*, citing *Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138, at 4 (2022).)

Lastly, Appellant argues that Patriot is not a small business and is therefore ineligible for the TORFP. (*Id.* at 9.) Appellant concludes that Patriot “plainly exceeds even the highest \$25.5 million threshold for NAICS 541612, rendering Patriot ineligible for award of the small business set-aside Task Order.” (*Id.* at 10.)

D. Patriot's Response to Appeal

On June 24, 2022, Patriot filed a response to the instant appeal. Patriot contends it was not required to recertify under SBA regulation because it was selected from a pool of small business concerns. (Patriot Response., at 1.) Patriot further contends it was considered a small business at the time it submitted its offer for the IDIQ Solicitation, and therefore remains small for all task orders issued under the IDIQ contract. Patriot asserts the IDIQ Solicitation contemplated creating a pool of small business concerns which could receive awards of task orders from the IDIQ Solicitation. (*Id.*) Patriot argues the regulation provides that where an underlying MAC has been awarded to a pool of concerns for which small business status is required, if an order under that MAC is set aside exclusively for concerns in the small business pool, concerns need not recertify their status, absent the CO requesting recertification. (*Id.*) Therefore, Patriot was not required to recertify its status as a small business. (*Id.*, citing 13 C.F.R. § 121.404(a)(1)(i)(A).)

First, Patriot argues that Appellant's “argument overstates the “unrestricted' nature of the IDIQ and ignores the plain language of 13 C.F.R. § 121.404(a)(1)(i)(A) and 13 C.F.R. § 121.1004.” (*Id.* at 4.) Appellant's reading of § 121.1004(a)(2) renders subsection (iii) of the provision meaningless. (*Id.*) Patriot maintains § 121.1004(a)(2) allows a protestor to file a protest only at the time of award of a MAC, unless the CO mandates recertification. (*Id.*) Patriot argues that permitting protestors to protest size at the task order award level when size was determined at the IDIQ MAC level “would be a significant departure from the norm.” (*Id.*)

Patriot further notes that under 13 C.F.R. § 121.1004(a)(2) a size protest is timely if filed within five business days of the CO's notification to all parties of the awardee of the MAC; and this provision applies to partial set-asides and reserves of MACs. (*Id.*) Patriot rejects Appellant's argument that the underlying contract was a totally unrestricted solicitation and notes the distinction in the regulation between “‘partial set-asides and reserves of Multiple Award Contracts' and contracts that are ‘Multiple Award Contract[s] . . . awarded on an unrestricted basis.’” (*Id.*) Patriot contends that if Appellant's reasoning is applied and the underlying contract is unrestricted, then 13 C.F.R. § 121.404(a)(1)(i)(A) would mandate recertification at the task order award level and render § 121.1004(a)(2) superfluous. (*Id.* at 4-5.) Citing OHA precedent, Patriot notes rejection of regulatory interpretations that renders provisions meaningless. (*Id.* at 5, citing *see, e.g., Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135 (2021).) Patriot concludes that the underlying contract was not an unrestricted contract award but created a reserved pool of small business concerns. (*Id.* at 5.) Therefore, absent a recertification requirement by the CO, Appellant may only file a protest within five business days of the underlying contract award; any other time would be untimely pursuant to § 121.1004(a)(2). (*Id.*)

Second, Patriot argues that even if Appellant's protest is considered timely, Patriot was a small business under the underlying contract and is thereby eligible for the TORFP award. (*Id.* at 5.) Patriot notes that its size was determined during submission of proposals for the IDIQ Solicitation, and Appellant failed to challenge Patriot's size at the time. (*Id.*) Patriot further rejects Appellant's argument that the TORFP was a small business set-aside issued under an unrestricted MAC that required Patriot to recertify as a small business under 13 C.F.R. § 121.404(a)(1)(i)(A). (*Id.*) Patriot contends that SBA's regulation does not require recertification when the underlying MAC established a pool of small business concerns, and the task order issued against the underlying MAC is awarded to a firm within the small business pool. (*Id.* at 6.) To support its argument, Patriot submits the Post Award Brief presentation, which lists Patriot and Appellant as “‘fully vetted’ ‘Small Business Prime Vendors.’” (*Id.*, citing Patriot Response, Exh. 3 at 12, 47.) Patriot concludes that the TORFP was a 100% small business set aside issued against an IDIQ MAC with a reserve pool of small business concerns. Therefore, recertification was not required pursuant to 13 C.F.R. § 121.404(a)(1)(i)(A). (*Id.*)

E. SBA's Comments

On June 30, 2022, SBA filed comments on the appeal. First, SBA notes a distinction when creating a reserve, finding that “it is separate and distinct from a full set-aside, and partially set-aside . . . [and] it is separate and distinct from a full and open competition that later utilizes set-asides. (SBA Comments at 2, citing 13 C.F.R. § 125.2(e)(1)(ii) &(iii).) SBA acknowledges that Appellant's argument would be correct if the underlying contract were a “stand alone full and open competition.” (*Id.* at 2.) However, SBA stated it did not believe that the underlying contract awards to the small business awardees were made on an unrestricted basis as Appellant asserts. (*Id.* at 2.) Specifically, according to SBA, based on the terms of the solicitation and CO's statements the Army utilized a “modified contracting method in order to ‘reserve' multiple awards for small businesses” to promote small business participation. (*Id.*, citing 13 C.F.R. § 125.2.)

Second, SBA rejects Appellant's interpretation of 13 C.F.R. § 121.404(a)(1)(i)(A). SBA contends Appellant's argument that this regulation mandates recertification for task orders under an unrestricted MAC contradicts the plain language of the regulation. (*Id.* at 3.) SBA contends that § 121.404(a)(1)(i)(A) clearly provides that “businesses in the reserved small business pool are not required to recertify size for each order competed exclusively among that pool.” (*Id.* at 3.) SBA concludes that the underlying contract was not awarded using an unmodified full and open competition, but awarded using a small business reserve; therefore, § 121.404(a)(1)(i)(A) did not mandate that the business recertify its size for the TORFP. (*Id.*)

SBA also argues that the underlying contract is a long-term contract, with a duration greater than five years, and thus the governing regulatory provision is 13 C.F.R. § 121.1004(a)(3), not 13 C.F.R. § 121.1004(a)(1) or § 121.1004(a)(2). (*Id.* at 4.) SBA specifically chose to create a different rule for long term contracts. (*Id.*) SBA concludes that because this is a long-term contract and competition was within a reserved small business pool, recertification is not mandatory unless specifically requested. (*Id.*)

F. Patriot's Response to SBA's Comments

On July 12, 2022, Patriot filed a response to SBA's comments. Patriot supports SBA's comments that the IDIQ Solicitation is a long-term contract, and thus Appellant may only file a protest at the times set forth in 13 C.F.R. § 121.1004(a)(3). (Patriot Response to SBA Comments, at 2.) Appellant failed to meet the deadlines for protests at § 121.1004(a)(3); and absent a recertification requirement by the CO, the protest was untimely. (*Id.* at 3.) Patriot agrees with SBA's comments which support its argument that the IDIQ Solicitation was not an unrestricted MAC, but instead created a reserved pool of small business concerns to which task orders are issued and awarded to small businesses within that pool. (*Id.*) Patriot maintains Appellant's position that Patriot is mandated to recertify at the task order level per 13 C.F.R. § 121.404(a)(1)(i)(A) is erroneous. (*Id.*) Considering SBA's comments, Patriot alternatively argues that even if the applicable regulation is 13 C.F.R. § 121.1004(a)(2), the CO did not require Patriot's recertification nor was it mandated by SBA regulation; therefore, Appellant may only file its protest within five business days of the CO's notification of the identity of the awardee of the underlying IDIQ Solicitation. (*Id.*) Therefore, Appellant's protest remains untimely. (*Id.*)

Secondly, Patriot maintains that even if Appellant's protest is timely, it cannot establish that Patriot was required to recertify its status as a small business as part of its submission in response to the task order. (*Id.*, at 3.) Patriot argues that 13 C.F.R. § 121.404 does not require small businesses within a reserved pool of other small businesses to recertify for small business set-aside task orders. (*Id.*) Patriot contends, relying upon the IDIQ Solicitation and SBA Comments, that the intent of the underlying contract was to select a pool of six small businesses, a modified method that reserves awards for small businesses. (*Id.*) Patriot notes that it was selected from a small business pool of “Small Business Prime Vendors,” which includes Appellant. (*Id.*) According to Patriot, the TORFP was specifically set aside for Patriot and other selected small businesses within that reserved pool; therefore, absent a recertification request by the CO, Patriot is not mandated to recertify under SBA regulations nor the TORFP. (*Id.*)

G. Appellant's Response to SBA's Comments

On July 12, 2022, Appellant responded to Patriot and SBA's comments. Appellant maintains that recertification for the TORFP was mandatory under SBA regulations because the underlying contract was an unrestricted contract and the TORFP was a 100% set-aside for small businesses. (Appellant Response, at 8, citing 13 C.F.R. § 121.404(a)(1)(i)(A).) Appellant maintains that contrary to Patriot and SBA's interpretation, an unrestricted MAC is distinguished from a restricted MAC based on whether firms of all sizes may compete for an unrestricted contract or whether competition is restricted using a total or partial set-aside to a certain type of firm. (*Id.* at 4.) According to Appellant, solicitations for a MAC are often unrestricted with a small business reserve. (*Id.* at 4, citing *see, e.g.*, RFP No. W912HY21R00123 at 1.) Nevertheless, Appellant argues that the IDIQ Solicitation omits reference to a complete or partial small business set-aside. (*Id.*) Appellant supports this argument using the CO's response to the IDIQ Solicitation Questions and Answers (IDIQ Q&A) No. 491, concluding that “no portion of the IDIQ Solicitation was intended to be restricted only to small business concerns.” (*Id.* at 5.) Appellant further argues that the IDIQ Solicitation did not properly establish a reserve pool of small business concerns because it failed to incorporate FAR 52.219-31, Notice of Small Business Reserve; and failed to reference evaluation criteria commonly provided in MACs intended to establish a reserve. (*Id.*)

Even if the IDIQ Solicitation established a reserve, Appellant maintains that the MAC “was still awarded on an unrestricted basis,” which still mandates recertification for task orders. (*Id.* at 5.) Appellant rejects Patriot and SBA's argument that recertification is not mandatory when the solicitation creates a reserve for a pool of small business concerns; and argues that the underlying contract was not limited to small businesses, which is evident in the seventeen-vendor pool that included small and large businesses. (*Id.* at 6.) Appellant notes that Patriot did not provide evidence to support its claim that it obtained an award reserved for small businesses; and the Post-Award Briefing does not reference a small business pool. (*Id.* at 6-7.) Appellant instead argues that the Post-Award Briefing provides a list of small and large businesses and referenced seventeen vendors capable of performing the entire scope of the award. (*Id.* at 7, citing Patriot Response, Exh. 3 at 12.) Appellant concludes that “it is impossible to determine the relevance, if any, of an offeror's small business size status to the receipt of a contract award” from the IDIQ Solicitation. (*Id.* at 7.)

Secondly, Appellant argues that SBA incorrectly applied 13 C.F.R. § 121.1004(a)(3) to determine timeliness; and the applicable regulation is 13 C.F.R. § 121.1004(a)(2). Appellant rejects SBA's argument that the governing regulation is § 121.1004(a)(3) when the MAC is a long-term contract with a duration greater than five years. (*Id.* at 9.) Appellant argues that the applicable regulation is § 121.1004(a)(2) because Appellant challenged Patriot's size under the task order level and a different timeline applies to task orders issued against MACs. (*Id.* at 9.) Appellant concludes that while a small business status was not mandated for the underlying contract, it was mandated for the TORFP, which is a 100% set-aside; therefore, Patriot was required to recertify for the TORFP per SBA regulation. (*Id.* at 9.)

Lastly, Appellant argues that Patriot is ineligible for the award because it is not a small business. (*Id.* at 11.) Appellant notes Patriot's argument that it maintained small business status

for the underlying MAC; however, according to Appellant, Patriot “does not contend that it would have qualified as a small business for purposes of the relevant task order.” (*Id.*) Further, Appellant notes that Patriot fails to provide evidence to refute this claim. (*Id.*) Appellant maintains that “recertification was required under the 100% small business set-aside order because the underlying multiple award contract, pursuant to which the task order was issued, was unrestricted.” (*Id.* at 12.) Appellant concludes that Patriot is not a small business in regard to the TORFP and failed to recertify under the TORFP, as required under SBA regulation. (*Id.*) Therefore, because Appellant's protest was timely, Appellant requests that OHA grant the instant appeal. (*Id.*)

H. CO's Comments

On July 12, 2022, OHA issued an Order to the CO, requesting that the CO provide additional comments and evidence to the record. (Order 07.12.2022.) On July 19, 2022, the CO filed comments with OHA. The CO contends that the IDIQ Solicitation established a reserved small business pool. (CO Comments, at 1.) In support of this claim, the CO refers to the plain language of the IDIQ Solicitation, emphasizing the Government's intent to provide 12 to 16 MA IDIQ contracts with a “minimum of six contract awards to Small Businesses” and an “intent of reserving contract awards for small businesses.” (*Id.*, citing IDIQ Solicitation at 3.) The CO further references the IDIQ Q&A Nos. 11 and 633, which discuss a desired minimum of six contract to small businesses, noting that eight (8) were ultimately awarded to small businesses. (*Id.*, citing IDIQ Solicitation Q&A at 3, 151.)

Lastly, the CO maintains that the IDIQ Solicitation omits FAR Clause 52.219-31 because it did not exist at the creation of the IDIQ Solicitation and award. (*Id.* at 2.) FAR Clause 52.219-31 was implemented in March of 2020. (*Id.*, citing 85 Fed. Reg. 11773 (February 21, 2020).) The IDIQ Solicitation was issued October 21, 2016 and an award was made to Patriot on December 21, 2018. (*Id.* at 1.)

I. Patriot's Response to CO Comments

On July 26, 2022, Patriot filed a response to the CO's comments. Patriot supports the CO's comments, finding that the IDIQ Solicitation “contemplated creating a small business pool and reserved awards for small businesses within that small business pool.” (Patriot Response to CO Comments, at 1.) Patriot further argued that because the CO did not request recertification, Appellant's time to challenge Patriot expired five days after award of the underlying MAC contract. (*Id.* at 2.)

Secondly, Patriot refers to its prior argument dismissing Appellant's argument that the IDIQ Solicitation was an unrestricted MAC and concluding that “to consider a contract ‘unrestricted’ even where it is partially set-aside or has a pool or reserve of awards for small businesses would be contrary to the plain language of the 13 C.F.R. § 121.1004(a)(2) . . . [t]hat interpretation would also render (iii) of 121.1004(a)(2) to be meaningless and superfluous and accordingly should be rejected.” (*Id.* at 2, citing see, e.g., Odyssey Sys. Consulting Grp., SBA No. SIZ-6135 (2021).) Lastly, Patriot rejects Appellant's argument that the IDIQ Solicitation fails to include language that would suggest a reserve small business pool, and instead argues

that “[t]here are no magic words that are required to establish a small business reserve . . . the language of the IDIQ Solicitation was explicit in its intention to set up a pool of small business concerns that could be selected for task order awards.” (*Id.* at 4.)

J. Appellant's Response to CO Comments

On July 26, 2022, Appellant filed a response to the CO's comments. Appellant rejects the CO's comments and states that “the CO's citations and conclusory statements simply do not evidence the creation of a reserved pool for which small business status was required under the IDIQ Solicitation.” (Appellant's Response to CO Comments, at 2.) First, Appellant argues that the CO fails to create a reserved pool and instead expresses a “preferential evaluation scheme” that allows small business awardees to participate in an unrestricted MAC solicitation. (*Id.*) According to Appellant, the “Basis of Award” provision cited by CO, does not require that a small business concern be awarded, even if a specific number is reserved for small businesses. (*Id.*) Appellant notes that “expressed intent to give preference to small businesses in evaluation and to ensure that small businesses are represented among the MAC awardees does not convert an unrestricted solicitation to a restricted one. . . .” (*Id.* at 3.)

Second, Appellant rejects CO's references to Q&A Nos. 11 and 633, finding that the CO fails “to explain how these Q&A support the creation of a reserved pool for which small business status was required.” (*Id.* at 4.) According to Appellant, Q&A No. 11” . . . has no bearing on whether the underlying MAC was unrestricted” and Q&A No. 633” . . . merely identifies a preferential evaluation framework under the unrestricted IDIQ Solicitation used to ensure that small businesses are represented among the awardees selected for the MAC.” (*Id.*)

Lastly, Appellant argues that the IDIQ Solicitation lacks traditional elements that create a reserved pool of small businesses. (*Id.* at 5.) In support, Appellant notes that the IDIQ Solicitation did not mandate that small businesses compete, failed to reference a small business reserve, and the evaluating factors did not differentiate between business size, except to create a preference for small businesses. (*Id.*) Appellant concludes that IDIQ Solicitation, the CO Comments, and the Q&A fail to establish the creation of a reserved pool of small business concerns. (*Id.* at 6.)

III. Discussion

A. Standard of Review and New Evidence

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).

Patriot has submitted new evidence on appeal, in the form of the Army's Post-Award Brief Presentation, Exhibit 3 to its Response to the Appeal. Patriot has failed to file it with a

motion establishing good cause for the appeal, as required by the regulation. 13 C.F.R. § 134.308(a)(2). However, because the evidence proffered is relevant to the issues on appeal, does not unduly enlarge them, addresses facts pertinent to the appeal, and clarifies the question of whether the Army had a small business pool for the underlying MAC contract, I will exercise my discretion as a Judge to accept its submission. 13 C.F.R. § 134.208(a)(1); *Size Appeal of Rocky Mountain Medical Equipment, LLC*, SBA No. SIZ-6129, at 12 (2021). The CO submitted documentation from the solicitation and its Questions and Answers at my direction, in order that there be a more complete record. These documents are admitted into the record.

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 instant appeal is from the Area Office's dismissal as untimely a protest of the award of a task order set aside for the small business awardees of the IDIQ MAC contract. This contract is a long-term contract, of over five years duration. 13 C.F.R. § 121.1004(a)(3); Solicitation, at 3. As the Area Office noted, SBA's longstanding rule is that a firm that represents itself as small at the time of award is small for the life of the contract, including for orders issued under the contract. *Size Appeal of Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 16-17 (2021). The rule has been 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 Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR).

Appellant argues that the recent revision of SBA's regulations does provide for protests of task orders in cases where there was no request for certification. Sections II.C., II.G., & II.J., *supra*. That is in cases where an order or Blanket Purchase Agreement was set aside for small business and the underlying MAC was awarded on an unrestricted basis, the contracting officer must receive a size protest within five business days of notification of the identity of the prospective awardee. 13 C.F.R. § 121.1004(a)(2)(iii). Appellant maintains this regulation applies here.

Thus, the initial issue in this instant case is whether the underlying IDIQ Solicitation was an unrestricted MAC or whether it reserved a pool of small business concerns. Section II.A., *supra*. Given that the plain language of the IDIQ Solicitation explicitly states "[t]his Procurement is a competitive acquisition, with a portion of the contract awards reserved for small business," I conclude that the CO intended to establish a reserved pool of small business concerns. IDIQ Solicitation, at 3. As argued by SBA and Patriot, provisions in the IDIQ Solicitation demonstrate the CO's intent to reserve a "minimum of six contract awards to Small Businesses." Sections II.E. & II.F., *supra*. The CO provides additional insight on the Government's intention, noting that eight (8) small businesses were subsequently awarded the IDIQ MAC. Section II.H., *supra*. OHA precedent holds that, while a CO's opinion as to the nature of a contract is not conclusive,

it is entitled to significant weight. *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 10 (2018); see also *Size Appeal of NEIE Medical Waste Servs., LLC*, SBA No. SIZ-5547, at 8 (2014); *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546, at 16 (2014). In reviewing the primary and vital requirements in this instant case, the CO expressed his view that the IDIQ Solicitation was a “reserved Small Business pool.” Section II.H., *supra*. I therefore see no basis to conclude that the IDIQ Solicitation was an unrestricted MAC.

On Appeal and in subsequent pleadings, Appellant maintains that the underlying contract is an unrestricted MAC. Sections II.C., II.G., & II.J., *supra*. Appellant draws attention to the “Basis of Award” provision, and focuses on the last sentence stating “[a]ny additional awardees needed to meet the intended number of awards will be selected from the remaining best valued proposals without regard to business size.” Section II.C., *supra*. Appellant contends that the Area Office's conclusion was based on an error of fact and law because the IDIQ Solicitation was not intended solely for small businesses and failed to reference traditional terms that would create a reserved pool. *Id.* According to Appellant, the CO intended to establish a “preferential evaluation scheme” that allows small business awardees to participate in an unrestricted MAC solicitation. Section II.J., *supra*.

I find Appellant's arguments unconvincing. A “preferential evaluation scheme” seems indistinguishable from the creation of a reserve for small businesses. SBA could reasonably infer that the IDIQ Solicitation intended to reserve a minimum of six (6) out of the 12 to 16 IDIQ MACs solely for small businesses with the intent to promote small business participation. Sections II.B., II.E., & II.H., *supra*. The proposal mentions extending offers to larger businesses if the small business minimum was not met; however, this option did not materialize. *Id.* The CO subsequently provided eight (8) of the contracts to small businesses, thus creating a pool of reserved small businesses, which included Appellant and Patriot. *Id.* The Post Award Brief clearly identified the small business awardees of the MAC and listed them as distinct from the large business awardees, in the manner it would do if creating a reserve or pool. I conclude the SBA could reasonably infer that the TORFP was an 100% small business set-aside issued against the IDIQ Solicitation, a long-term contract with a reserved pool of eight (8) small business concerns.

Appellant contends that the timeline to file a protest is governed by 13 C.F.R. § 121.1004(a)(2)(iii), and the Area Office incorrectly applied 13 C.F.R. § 121.1004(a)(3). Sections II.C. & II.F., *supra*. Appellant maintains that it challenged Patriot's size at the task order level and the underlying MAC was awarded on an unrestricted basis; therefore, the applicable SBA regulation is subsection § 121.1004(a)(2)(iii). *Id.* Appellant relies upon *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138, which held that where an underlying MAC was awarded on an unrestricted basis, but the task order in question was set-aside for small business concerns, a protest filed in response to the award of the task order was timely. However, *Potomac River* is distinguished from the instant appeal because the underlying MAC was fully unrestricted, where here the underlying contract intended and created a reserve. Section II.A., *supra*. Further, the instant MAC is a long-term contract, where the MAC in *Potomac River* was not. Therefore, I find the IDIQ Solicitation here was not awarded on an unrestricted basis, thus *Potomac River* is inapposite, and subsection § 121.1004(a)(2)(iii) is inapplicable.

Further, as previously determined, the TORFP is a 100% small business set aside, issued under a long-term IDIQ MAC contract with a reserved pool of small business concerns. Section II.A., supra. Therefore, the issue is whether the SBA regulation or the TORFP mandated recertification. As noted supra, 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. *Odyssey Sys. Consulting Grp., supra*. For MACs set aside for small businesses, “where the underlying Multiple Award Contract 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 Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns.” 13 C.F.R. § 121.404(a)(1)(i)(A).

In the instant case, the Area Office correctly concluded that the CO did not request recertification for the TORFP. Section II.B., supra. Also, SBA reviewed the TORFP, considered the underlying MAC, and correctly concluded that the underlying MAC created a reserved pool of small business concerns. Section II.E., supra. As SBA accurately observed, the CO contemplated awarding the TORFP to one (1) of the eight (8) small businesses awarded the IDIQ Solicitation, which is a long-term MAC. Sections II.A. & II.E, supra. The TORFP did not obligate offerors to recertify size. Section II.A., supra. Further, the CO informed all Prime Vendors that the TORFP was 100% set-aside for small businesses. *Id.* 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).)

Appellant contends that the TORFP mandated recertification by operation of law, relying upon 13 C.F.R. § 121.404(a)(1)(i)(A). “[I]f an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for 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.” 13 C.F.R. § 121.404(a)(1)(i)(A). Appellant contends that the TORFP was issued against an unrestricted MAC, thus Patriot was required to recertify, even though the CO made no specific request for recertification. Section II.C., supra. As previously discussed, Appellant's interpretation of this type of IDIQ Solicitation is flawed. Here, the IDIQ Solicitation established a reserved pool of eight (8) small business firms and the issued TORFP was a 100% small business set-aside, as opposed to a full and open competition solicitation that would later set aside task orders. This is further evidenced by the record, specifically the Post Award Brief Presentation, which lists both Appellant and Patriot as prime vendors under the category of small businesses, and the CO comments. Sections II.D. & II.H., supra. Thus, I reject Appellant's argument that 13 C.F.R. § 121.404(a)(1)(i)(A) mandates recertification here, because this IDIQ Solicitation is not an unrestricted MAC.

Further, the instant IDIQ Solicitation is a long-term contract, that is a contract of greater than five years duration, against which an order may be issued. Section II.A., supra. SBA has specifically chosen to create a separate rule for long term contracts, and that rule is applicable here. The governing provision is 13 C.F.R. § 121.1004(a)(3), which permits a protestor to file a size protest in connection with the size certifications made by the awardees for such contracts at

only three times. First, an interested party may protest the size of an awardee within five business days of the initial award of the long-term contract. 13 C.F.R. § 121.1004(a)(3)(i). Second, an interested party may protest the size of an awardee within five business days of the exercise of an option. 13 C.F.R. § 121.1004(a)(3)(ii). Third, an interested party may protest the size of an awardee within five business days of the award of an individual order where the awardee has made a size certification in response to a contracting officer's request for size certifications in connection with that individual order. 13 C.F.R. § 121.1004(a)(3)(iii). As noted above, in 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." *CodeLynx, LLC, supra*. Here, the TORFP is a task order from a long-term contract, and there was no request that offerors make a new size certification. Therefore, any protest of the award to Patriot was untimely.

I find that Patriot was not obligated to recertify under 13 C.F.R. § 121.404(a)(1)(i)(A), as this IDIQ Solicitation reserved a pool of small businesses, qualified and vetted for any task orders issued for 100% small business set asides. Further, the TORFP itself had no explicit recertification requirement. I further 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 of an award of a task order that required recertification, pursuant to 13 C.F.R. § 121.1004(a)(3)(iii), 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 of fact or law in the Area Office's 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