

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

SIZE APPEAL OF:

Avenge, Incorporated,

Appellant,

Appealed From
Size Determination Nos. 05-2022-019 and
-020

SBA No. SIZ-6178

Decided: November 15, 2022

APPEARANCES

David S. Black, Esq., Gregory R. Hallmark, Esq., Holland & Knight LLP, Tysons, Virginia, for Appellant

Laurel A. Hockey, Esq., David S. Cohen, Esq., Rhina M. Cardenal, Esq., Jason Moy, Esq., Cordatis, LLP, Arlington, Virginia, for Data Systems Analysts, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 1, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination Nos. 05-2022-019 and 05-2022-020, finding that Avenge, Incorporated (Appellant) is not a small business for the instant task order. On appeal, Appellant contends that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) remand the matter for new size determinations. 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 15 days of receiving the size determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

II. Background

A. The Procurement

On March 25, 2015, the U.S. Department of the Army (Army) issued Request for Proposals (RFP) No. W15P7T-15-R-0008 for the Responsive Strategic Sourcing for Services (RS3) indefinite-delivery indefinite-quantity (ID/IQ) multiple-award contracts (MAC). The RFP explained that RS3 contractors will provide knowledge-based support services for Command, Control, Communications, Computers, Intelligence, Surveillance, and Reconnaissance (C4ISR) requirements. (RFP at 3.) Specific services will be defined in task orders issued after award of the RS3 contracts.

The RS3 RFP was not set aside or restricted to small businesses, and the RFP stated that the Army planned to award contracts to both large and small businesses. (*Id.* at 16-17.) However, according to the RFP, individual task orders could be restricted to small businesses under certain circumstances. (*Id.* at 45.) In such situations, “[t]he task order RFP shall indicate if the task order is restricted to small businesses.” (*Id.*) The Contracting Officer (CO) originally assigned to the RFP North American Industry Classification System (NAICS) code 541712, Research and Development in the Physical, Engineering, and Life Sciences (except Biotechnology), with a corresponding 500 employee size standard. (*Id.* at 112.) In 2018, the CO amended the assigned NAICS code to 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology), with an associated size standard of 1,000 employees. Appellant and Data Systems Analysts, Inc. (DSA) are RS3 prime contractors.

Section H.2 of the RS3 prime contracts provides that “[i]n the event of any inconsistency between a task order and the contract, the contract shall control.” (Contract No. W15P7T-19-D-0010, at 31.) Regarding task orders that are set-aside or restricted to small businesses, § H.3.2 states that “[t]he task order RFP shall indicate if the task order is restricted to small businesses.” (*Id.*) According to § H.2.4 of the contract:

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 RFP.

(*Id.*) Conversely, under § H.2.5 of the contract:

If 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.3.5 of the contract provides that:

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 54171[5] assigned to contract number TBD.

(*Id.*) Additionally, under § H.6.1 of the contract:

Small business participation goals shall be proposed for each task order in accordance with the RFP for the task order. Proposed small business participation goals for each task order shall be incorporated in the task order as a commitment and contractual requirement.

(*Id.* at 33.)

On May 12, 2021, the Army issued Task Order Request for Proposals (TORFP) No. RS3-20-0022 under the RS3 contracts. The TORFP sought a contractor to perform “Technology Enabled Analytics (TEA)” services in support of the Army's Intelligence and Information Warfare Directorate. (TORFP, at 1.) The TORFP “was released to all eligible RS3 contract holders but restricted to small business prime contract holders only.” (Letter from [XXXX] to [XXXX] (May 26, 2022), at 1.) The TORFP stated:

IAW base contract clause H.2.5, this TO RFP is Restricted Full and Open Competition under the current RS3 IDIQ contract. This TO is being competed in accordance with the terms and conditions set forth under the RS3 Basic IDIQ Service Contract. Contract Holders under the Restricted suite are permitted to submit TO Request For proposal (RFP) for this effort. In accordance with (IAW) the basic contract clause H.2.5 this task order RFP is Restricted to RS3 multiple award IDIQ contract holders.

(TORFP at 1.) The TORFP did not reference an assigned NAICS code. The TORFP included the full text of Federal Acquisition Regulation (FAR) clause 52.204-19, “Incorporation by Reference of Representations and Certifications (Dec 2014),” which states:

The Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.

(*Id.* at 54.) The TORFP also contained the following provisions:

Volume III — SMALL BUSINESS PARTICIPATION AND SUBCONTRACTING

Offerors shall submit RFP Attachment 0002, Small Business Participation and Subcontracting, with their proposal as a separate document xxxxSBxxxx.docx. The Offeror shall propose a total Small Business Participation minimum requirement of 51% of total contract dollars. The successful Offeror's proposed small business participation requirements will be incorporated as Attachment 0002

in the awarded task order as a commitment and contractual requirement in accordance with clause H.6 of the RS3 base contract.

Volume IV — SYSTEM FOR AWARD MANAGEMENT (SAM)

Offerors shall submit a current copy of their SAM record (entity dashboard view) with their proposal, printed directly from the SAM, dated within two (2) business days prior to proposal.

(*Id.* at 71.)

The Army released a “Questions & Answers” document for the TORFP, dated June 10, 2021. Asked whether the TORFP was restricted to RS3 small business prime contractors, the Army stated:

[The] TEA [task order] is restricted to small business primes only in accordance with the base RS3 contract clause H.2.4. Only contractors eligible to compete as a small business may submit a proposal in response to the [TORFP].

(Q&A, at 23-24.)

In response to the TORFP, the Army received proposals from six RS3 prime contractors, including Appellant and DSA. (Letter from [XXXX] to [XXXX] (May 26, 2022), at 1.) In its proposal for the task order, Appellant stated:

[Appellant] is a wholly owned subsidiary of Semper AASKI Alliance, Inc. (SAAI), which is a [SBA] All Small Mentor Protégé Program (ASMPP) Joint Venture (JV). SAAI is comprised of Semper Valens Solutions (SVS) and AASKI Technology (AASKI), utilizing [Appellant's] (purchased by SAAI, operating as a wholly owned subsidiary) RS3 Prime Small Business Position.

(Appellant's Task Order Proposal, Vol. III, at 2.)

B. Protests

Appellant was selected as the apparent awardee of the task order, but on May 31, 2022, the CO filed a protest challenging Appellant's size. The CO noted that, in response to the TORFP, Appellant stated that it had been acquired by, and is a subsidiary of, SAAI, a joint venture between SVS and AASKI. (CO's Protest at 1.) The CO requested that the Area Office conduct a “size protest pursuant to the Federal Acquisition Regulation (FAR) 19.302 based on the buying and selling of [Appellant].” (*Id.*)

Accompanying her size protest, the CO submitted a “Size Protest Checklist” to the Area Office, explaining:

The [TORFP] was restricted to small business prime contract holders only; the [TORFP] did not identify a NAICS [code] and size standard for the order. The original NAICS [code] and size standard for the RS3 solicitation was 541712 [and] 500 employees.

(Size Protest Checklist, at 1.)

On June 3, 2022, DSA filed a protest challenging Appellant's size for the TEA task order. DSA argued, first, that the Area Office must examine size at the task order level, because the task order was restricted only to RS3 prime contractors that are small businesses. (DSA's Protest at 8-9.) Specifically, June 25, 2021, the date of proposals for the task order, is the relevant date to determine size. (*Id.* at 8.) DSA alleged that Appellant already was “other than small when it submitted its proposal for the task order.” (*Id.*) According to DSA, Appellant itself has approximately 290 employees, but Appellant is affiliated with at least four other concerns including SAAI, SVS, and AASKI. (*Id.* at 8-10.) Appellant and these affiliates collectively have more than 2,000 employees, so Appellant therefore is not small. (*Id.* at 9.) The CO forwarded DSA's size protest to the Area Office for review.

C. Protest Response

On June 8, 2022, Appellant responded to the size protests. Appellant asserted that the correct date to determine size is May 5, 2015, the date that Appellant submitted its proposal, including price, for the underlying RS3 prime contract. (Protest Response at 1.) Appellant argued that, although “[t]he Army indicated that the [TORFP] was restricted to small business contract holders,” the CO did not request a size re-certification or re-representation in conjunction with the task order. (*Id.* at 4.) According to Appellant, there is no dispute that Appellant was “small” as of May 5, 2015. (*Id.*) However, separate corporate transactions led Appellant to be acquired by MAG DS Corp. d/b/a MAG Aerospace (MAG) in 2018, and subsequently by SAAI in 2020. (*Id.* at 2-3.)

Appellant further argued that, even if the appropriate date to determine size is June 25, 2021, Appellant is small under the size standard associated with the procurement, because Appellant is affiliated only with SAAI and SVS, but not AASKI. (*Id.* at 5.) Appellant reasoned that it is owned and controlled by SAAI, a joint venture, which in turn is controlled by its majority owner, SVS. (*Id.*) AASKI, the SBA-approved mentor of SVS, has no power to control Appellant. (*Id.* at 6.) Appellant maintained that the combined employees of Appellant, SVS, and SAAI do not exceed the 1,000-employee size standard. (*Id.*)

D. Area Office Proceedings

In response to an inquiry from the Area Office, the CO stated that the TORFP required “SAM verification” but “did not specify anything about re-certification.” (E-mail from [XXXX] to [XXXX] (June 10, 2022).) The CO “did a search [of the TORFP] for [the words] re-certify,

recertify, certificate, [and] certify and [did] not see any mention of ‘recertify as a small business’ using that language.” (*Id.*) The CO also noted that, although Appellant did notify the Army that Appellant was “purchased by [SAAI] in June 2020,” “[n]o action was taken [at that time] to modify the contract to change [Appellant’s] status from a small [business] to a large [business] because [Appellant] did not provide any information that could indicate a size status change.” (*Id.*)

E. Size Determinations

On June 30, 2022, the Area Office issued Size Determination Nos. 05-2022-019 and 05-2022-020, concluding that Appellant is not a small business for the TEA task order.² The Area Office found that, because the TORFP required size re-certification, the appropriate date to determine Appellant’s size is June 25, 2021, the date Appellant submitted its proposal, including price, in response to the TORFP. (Size Determination No. 05-2022-019, at 4-5.)

The Area Office first explained that, according to SBA regulations:

if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, 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.

(*Id.* at 4, quoting 13 C.F.R. § 121.404(a)(1)(i)(A) (emphasis added by Area Office).) Here, the RS3 MAC was unrestricted, but allowed for orders to be set-aside for small businesses, such as the instant TORFP. (*Id.* at 4.) The Area Office found that the TORFP “did not contain an explicit recertification by using the words ‘certify’ or ‘recertify’,” but that the TORFP nevertheless included provisions sufficient to request a size representation specifically for the task order. (*Id.* at 4-5.) The Area Office cited OHA’s decision in *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021) for the proposition that:

[A] task order solicitation [that] asks each offeror to verify that it was a small business is equivalent in substance to a certification, even when the procuring agency did not utilize the words “certify” or “recertify” in its task[] order solicitation.

(*Id.* at 4.) Because § H.3.5 of the RS3 prime contracts required that “any Task Orders Restricted to Small Business include a size representation,” the Area Office concluded that “it was a condition of RS3 that each order set-aside for small businesses required the offerors to recertify their size.” (*Id.*)

The Area Office further determined that the TORFP contained FAR clause 52.204-19, and therefore “incorporated the contractor’s representations and certifications from SAM, which

² The Area Office issued separate size determinations, addressing each of the two size protests. The size determinations are substantively identical. Citations in this decision are to Size Determination No. 05-2022-019.

included [Appellant's] size status for NAICS [code] 541715.” (*Id.*) As a result, “recertification was required and accomplished through the inclusion of FAR [clause] 52.204-19.” (*Id.*)

The Area Office found that, even if the TORFP had not required recertification, the date to determine size still would not be May 5, 2015, the date proposals were due for the underlying RS3 prime contracts. (*Id.* at 5 n.2.) Instead, Appellant has undergone at least two corporate transactions since 2015, and was required to recertify its size after each acquisition, pursuant to SBA regulations at 13 C.F.R. § 121.404(g). As such, Appellant's size must now be “considered in conjunction with its ownership by SAAI.” (*Id.*)

The Area Office next turned to the affiliation allegations. The Area Office determined that, as of June 25, 2021, Appellant is affiliated with SAAI, SVS, AASKI, and several additional concerns. (*Id.* at 10-11.) Appellant acknowledged that these concerns collectively have more than 1,000 employees, and thus exceed any applicable size standard. (*Id.* at 11.) The Area Office rejected Appellant's contention that Appellant is not affiliated with AASKI. SAAI, which currently owns Appellant, is a joint venture between AASKI and SVS, and thus “cannot exist without [AASKI's] involvement.” (*Id.* at 8.) Furthermore, although AASKI and SVS are an SBA-approved mentor and protégé, the exception to affiliation for mentor-protégé joint ventures applies only when the joint venture itself is bidding on a federal contract. (*Id.*)

F. Appeal

On July 15, 2022, Appellant filed the instant appeal. Appellant does not challenge the Area Office's findings that Appellant was affiliated with SAAI, SVS, and AASKI as of June 25, 2021, nor does Appellant dispute that Appellant no longer was a small business as of June 25, 2021.³ Instead, Appellant's sole argument on appeal is that the Area Office utilized the wrong date in examining Appellant's size. (Appeal at 8-14.) Appellant maintains that the CO did not request size recertification or re-representation in connection with the TEA task order, so the correct date to determine size is May 5, 2015, the date that Appellant submitted its proposal for the RS3 prime contract. (*Id.* at 9.)

Appellant argues, first, that the Area Office erred by finding that § H.3.5 of the RS3 contracts and FAR clause 52.204-19 required recertification for any task orders restricted to small businesses. (*Id.* at 8.) In Appellant's view, “the [CO] clearly and unequivocally elected to omit” § H.3.5 from the TORFP. (*Id.* at 13.) Since § H.3.5 was not expressly included in the TORFP, Appellant asserts that “the [CO] did not sufficiently request a new size determination in the Solicitation for this task order.” (*Id.*) Accordingly, the instant case is distinguishable from OHA's decision in *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021), where OHA concluded that the CO had “included the language set forth in § H.3.5 in a task order solicitation issued under the RS3 MAC.” (*Id.* at n.5 (emphasis Appellant's).)

³ When an issue in a size determination is not contested on appeal, the area office's determination “remains the final decision of the SBA.” *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012)

Although FAR clause 52.204-19 was included in the TORFP, this is merely a “general mandatory clause that incorporates by reference *all* of an offeror's representations and certifications in the System for Award Management,” and the Area Office's reliance on this clause to conclude that the CO requested a new size certification for the task order is clear error. (*Id.* at 14 (emphasis Appellant's).) OHA case law instructs that “recertification does not occur simply because mandatory FAR clauses were incorporated.” (*Id.*, citing *Size Appeal of ReliaSource*, SBA No. SIZ-5536, at 4 (2014) and *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016).) Furthermore, Appellant asserts, nothing about this generic FAR clause indicated that the CO intended to rely on current size representations. (*Id.* at 14.)

Appellant argues, next, that the Area Office erred by applying the current version of SBA regulations at 13 C.F.R. § 121.404 in examining Appellant's size. (*Id.* at 9.) The version of the regulations in effect on May 5, 2015, the date Appellant self-certified as small for the RS3 MAC, should govern Appellant's size for all task orders, unless the CO requested size recertification for a particular order. (*Id.*) In the instant case, as of May 5, 2015, SBA regulations stated:

A concern that represents itself as a small business and qualifies as small at the time of its initial offer (or other formal response to a solicitation), which includes price, is considered to be a small business throughout the life of that contract. **This means that if a business concern is small at the time of initial offer for a Multiple Award Contract (see § 121.1042(c) for designation of NAICS codes on a Multiple Award Contract), then it will be considered small for each order issued against the contract with the same NAICS code and size standard**, unless a contracting officer requests a new size certification in connection with a specific order.

(*Id.* at 10, quoting 13 C.F.R. § 121.404(g) (2015) (emphasis added by Appellant).) At the time, SBA regulations drew no distinction between restricted and unrestricted MACs. (*Id.* at 11.) Appellant highlights that, in its commentary accompanying proposed changes to these rules, dated November 8, 2019, SBA explained:

Under the *current process*, size status for an unrestricted MAC is generally determined as of the date a firm submits its offer for the MAC. If a concern self-certifies as small at the time of its offer for the underlying MAC, the concern is generally considered to be small for goaling purposes for each order issued against the contract, unless a contracting officer requests a new size certification in connection with a specific order. Therefore, **when a contracting officer seeks to set-aside an order for small business off an unrestricted MAC, the firm's size relates back to its self-certification for the underlying MAC.**

(*Id.* at 11, quoting 84 Fed. Reg. 60,846, 60,849 (Nov. 8, 2019) (emphasis added by Appellant).)

Although 13 C.F.R. § 121.404 was amended, effective November 16, 2020, to provide that, for unrestricted MACs, size is determined for each set-aside task order at the time of proposal submission for such task order, SBA expressly stated that the final rule amending the regulation “*does not have retroactive or preemptive effect.*” (*Id.* at 11 n.4., quoting 85 Fed. Reg.

66,146, 66,176 (Oct. 16, 2020) (emphasis added by Appellant.) The Area Office therefore could not appropriately apply the current iteration of 13 C.F.R. § 121.404 in the instant case. Both the U.S. Court of Federal Claims and OHA have recognized that SBA regulations in effect at the time that an agency issues a MAC govern task orders under the MAC. (*Id.* at 10 citing *Int'l Mgmt. Servs., Inc. v. U.S.*, 80 Fed. Cl 1 (2007) and *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323 (2012).

G. DSA's Response

On August 2, 2022, DSA responded to the appeal. DSA contends that the Area Office correctly examined Appellant's size as of June 25, 2021, the date of task order proposal submissions. (Response at 2.) The appeal should therefore be denied. DSA observes that Appellant “did not appeal the Area Office's finding that [Appellant] was other than small on June 25, 2021, thereby conceding this issue. Any challenge to the Area Office[']s finding regarding [Appellant's] size on June 25, 2021, is now untimely.” (*Id.* at n.5, citing 13 C.F.R. § 134.304.)

DSA argues, first, that the CO did request recertification at the task order level. (*Id.* at 3.) OHA has recognized that a request for recertification need not utilize particular “magic words” such as “certify” or “recertify” in the task order solicitation. (*Id.*, citing *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122, at 17 (2021) and *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456, at 9 (2013).) Instead, the relevant inquiry is whether the solicitation includes language that “is reasonably understood as a request [to] recertify at the task order level.” (*Id.*, quoting *Metters*, SBA No. SIZ-5456, at 10.) In determining whether recertification was requested in a task order, OHA will “primarily consider the task order solicitation and the relevant provisions in the underlying contract,” and also will give weight to the CO's opinion of whether recertification was requested. (*Id.*, citing *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139, at 5 (2022) and *Metters*, SBA No. SIZ-5456, at 11.)

Here, although the RS3 contracts were awarded to both large and small businesses, individual task orders could be restricted to small business prime contractors. (*Id.* at 4.) According to DSA, § H.3.5 of the RS3 prime contracts “makes clear that when a task order is restricted to small businesses, **the Contractor** is obligated to include a representation in its task order proposal representing its current size status.” (*Id.* (emphasis DSA's).) Given this contractual framework, an RS3 prime contractor must recertify when competing for a restricted task order, regardless of whether the CO repeats § H.3.5 in the task order solicitation. (*Id.*)

The instant TORFP stated that the task order was “Restricted,” and further indicated that the order “is being completed in accordance with the terms and conditions set forth under the RS3 Basic IDIQ Service Contract,” which, in DSA's view, includes the contractual terms and conditions at §§ H.3.2 and H.3.5. (*Id.* at 4-5.) The Army also reiterated in a Q&A that:

[The] TEA [task order] is restricted to small business primes only in accordance with the base RS3 contract clause H.2.4. Only contractors eligible to compete as a small business may submit a proposal in response to the [TORFP].

(*Id.* at 5, quoting Q&A # 57 (emphasis added by DSA).) DSA observes that § H.2.4 in turn references § H.3, the provision that sets forth the contractual “ground rules” for restricting task orders to small businesses. (*Id.* at 5.)

Next, DSA highlights that, in its proposal for the instant task order, Appellant disclosed that it is wholly-owned by SAAI, a joint venture between SVS and AASKI. (*Id.*) SAAI, though, was formed in 2017, and SAAI's purchase of Appellant occurred in 2020. (*Id.*) Because Appellant referenced events occurring after 2015 in its proposal for the TEA task order, it is implausible that Appellant genuinely “believed it was an eligible small business based on its size in 2015.” (*Id.*) On the contrary, “[Appellant] understood that it was required to represent itself and to qualify as a small business at the time of its task order proposal submission.” (*Id.* at 6.)

DSA disputes Appellant's contention that CO purposefully omitted § H.3.5 from the TORFP. (*Id.* at 7-8.) Appellant offers no evidence to support this speculative assertion, and the CO's size protest demonstrates that the CO did intend “to limit competition only to small businesses and to require contractors to recertify at the task order level.” (*Id.* at 8.) The CO based her size protest on “the buying and selling of [Appellant],” events which transpired long after the award of the RS3 prime contracts in 2015. (*Id.*) If the CO had believed that Appellant's size should be determined as of 2015, the CO would not have been concerned about the acquisitions that Appellant underwent in 2017 and 2020. (*Id.*)

DSA maintains that, although the Area Office correctly concluded that the instant TORFP required offerors to recertify their size, the Area Office also could have based its decision on revisions to SBA regulations during 2020. Those regulatory revisions would require recertification here “because this was a *restricted* task order issued under an *unrestricted MAC*.” (*Id.* at 8-9, citing 13 C.F.R. § 121.404(a)(1)(i)(A) (emphasis DSA's).) Appellant does not dispute that the underlying RS3 contracts were solicited on an unrestricted basis, nor that the instant task order was restricted to small businesses. (*Id.* at 9.) Instead, Appellant asserts in its appeal that the 2020 regulatory revisions should not apply “retroactively.” (*Id.*) The revisions in question, though, became effective November 16, 2020 and thus were “undisputedly in effect when this [TORFP] was issued in May 2021.” (*Id.*) DSA observes that SBA did not limit the applicability of the regulatory revisions only to situations where the entire unrestricted MAC was awarded after November 16, 2020. (*Id.*) Furthermore, in *Size Appeal of Potomac River Enter. Solutions, LLC*, SBA No. SIZ-6138 (2022), OHA applied the 2020 revisions to an unrestricted MAC awarded in 2018. (*Id.*)

In *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021), OHA found that an RS3 task order solicitation required recertification, and OHA therefore did not need to decide whether the 2020 revisions to 13 C.F.R. § 121.404 would apply. OHA requested comments on this question from SBA, however, and OHA's decision indicates that:

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 [that task orders intended for small businesses are being made to firms which are no longer small]. 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 regulations 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.* at 10, quoting *22nd Century Techs.*, SBA No. SIZ-6122, at 12 (internal citations omitted) (emphasis added by DSA).) As in *22nd Century Techs.*, the instant dispute involves a restricted task order under the unrestricted RS3 MAC, and thus, Appellant's size in 2015 should not determine its eligibility for this task order. (*Id.* at 10.)

DSA challenges Appellant's claim that OHA and the U.S. Court of Federal Claims “have held that the SBA regulations in effect at the time the agency **issued the MATOC solicitation** governs the solicitations of task orders competed under the contract.” (*Id.* at 11, citing *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323 (2012) and *Int'l Mgmt. Servs., Inc. v. U.S.*, 80 Fed. Cl. 1 (2007) (emphasis in original).) The instant case is clearly distinguishable from these prior rulings. The Court's decision in *Int'l Mgmt. Servs.* is not analogous to the facts here because that case involved neither a MAC nor a competition for a task order. (*Id.* at 12.) In *Tyler*, the SBA regulation at issue established “compliance dates” separate from the effective date, whereas in the instant case, the 2020 final rule amending § 121.404 had “no similar compliance dates that would render the 2020 regulations inapplicable” to the instant TORFP. (*Id.* at 11-12.) Also, unlike the unrestricted MAC here, the MAC in *Tyler* was set aside for small businesses. (*Id.* at 12.) According to DSA, insofar as *Tyler* has any relevance to the instant case, it stands for the proposition that OHA will rely upon SBA, the drafter of the regulations, in determining the applicability of new regulations. Here, OHA should find SBA's comments in *22nd Century Techs.* persuasive in understanding SBA's intent in promulgating the 2020 regulatory revisions. (*Id.*)

Finally, DSA contends that the mere fact that the 2020 regulations were not retroactive does not preclude OHA from applying those regulations to the TORFP. (*Id.* at 12-13.) DSA reiterates that the TORFP “was issued on May 12, 2021, **after** the effective date of the Final Rule on November 16, 2020.” (*Id.* (emphasis DSA's).) As such, application of the 2020 regulatory revisions to the instant TORFP would be “prospective, not retroactive or preemptive, as the [TORFP] had not yet been issued when the 2020 regulation went into effect.” (*Id.* at 13.)

H. Appellant's Reply

On August 16, 2022, Appellant moved for leave to reply to DSA's Response. There is good cause to permit a Reply, Appellant argues, because OHA will “benefit from additional briefing regarding the legal and factual issues in the appeal and to respond to arguments presented by DSA.” (Motion at 1.) DSA does not oppose the motion. Accordingly, Appellant's motion is GRANTED and the proposed Reply is ADMITTED.

In its Reply, Appellant reiterates its contention that the Area Office committed clear error in concluding that the TORFP required a size recertification. In accordance with SBA

regulations, no recertification was required in the absence of an express request by the CO. (Reply at 2 and 9.)

Appellant asserts that, unlike the situation in *22nd Century Techs.*, the TORFP here was devoid of any language requiring offerors “to recertify or even represent their size for purposes of the task order.” (*Id.* at 2.) Also, in *22nd Century Techs.*, the task order solicitation provided that “[i]n accordance with base contract clause H.2.4, this task order is restricted to small businesses in accordance with H.3,” whereas in the instant case, the TORFP referenced § H.2.5 of the RS3 prime contracts, rather than § H.2.4. (*Id.* at 6.)

Appellant disputes the notion that the Q&A amended the TORFP to require compliance with § H.2.4. Instead, Appellant claims that “the [Army's] answer to Question No. 57 was *never formally incorporated in to the [TORFP]*,” and the Area Office therefore erred by concluding that the TORFP expressly referenced § H.2.4. (*Id.* at 3, 5 (emphasis Appellant's).) Further, a conformed version of the TORFP issued with Amendment 0002 on June 23, 2021 continued to state only that the TEA task order was restricted to “RS3 multiple award IDIQ contract holders” in accordance with “the **base contract clause H.2.5.**” (*Id.* at 4-5, quoting TORFP (emphasis added by Appellant).) OHA case law instructs that Q&A documents that are not formally incorporated into a solicitation have no effect on whether a Contracting Officer required task order size recertification. (*Id.* at 5-6, citing *Size Appeals of DNT Solutions, LLC, et al.*, SBA No. SIZ-5962 (2018) and *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013).) Appellant concludes that “it was clear error for the Area Office to conclude that the [TORFP] was sufficiently drafted to require a task order-specific size representation.” (*Id.* at 6.)

Next, Appellant asserts that the TORFP's incorporation of FAR clause 52.204-19 was insufficient to require an order-specific recertification, since the clause is required for all solicitations and contracts “regardless of size or set-aside statutes.” (*Id.* at 7.) Similarly, DSA's claim that the TORFP was subject to § H.3.5 of the RS3 contracts fails because the “size representation requested by [§] H.3.5 only applies to a task order *if the TO Solicitation was issued in accordance with H.2.4.*” (*Id.*, emphasis Appellant's.) Appellant reiterates its view that § H.2.4 was not specifically referenced in the TORFP nor in subsequent amendments. (*Id.* at 7-8.)

Appellant denies that its proposal for the TEA task order included a formal size representation. (*Id.* at 8.) Rather, the statement in Appellant's proposal regarding ownership by SAAI was “in response to the [TORFP's] request for a rationale as to why [Appellant] was proposing no subcontracting opportunities for small businesses under the [TORFP's] requirement to explain planned small business participation and subcontracting.” (*Id.*) Further, because the TORFP did not reference § H.3.5 or otherwise request a size representation or certification, the TORFP did not require offerors to “provide a statement, representation, or certification about their size status at the time of task order proposal including price.” (*Id.* at 8-9.)

Finally, Appellant disputes DSA's claim that the 2020 amendments to 13 C.F.R. § 121.404 apply to the underlying RS3 MAC awarded in 2015. (*Id.*) Instead, a regulatory amendment that “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past” cannot be given retroactive effect to previously solicited contracts. (*Id.* at 10-12, quoting *Kearfott Guidance & Navigation Corp. v.*

Rumsfeld, 320 F.3d 1369, 1374 (Fed. Cir. 2003).) In *Tyler Constr. Group*, OHA recognized that it would not “apply regulatory amendments to MACs *solicited prior to the effective date* of the amendment even though a task order under the MAC is solicited after the effective date.” (*Id.* at 10 (emphasis Appellant's).) Also, although *Int'l Mgmt. Servs.* did not involve size issues, the case is relevant because it is another example of a tribunal “applying core principles of Constitutional and administrative law” to avoid the “retroactive application of new regulations to existing contracts.” (*Id.*)

In the instant case, Appellant asserts that the regulatory changes to 13 C.F.R. § 121.404 to require a size recertification for a restricted task order under an unrestricted MAC, impose a new “obligation, duty, or disability” and therefore, these regulatory changes are not applicable to the instant TORFP. (*Id.* at 11-13.) Instead, SBA “must wait for existing MACs to expire and be re-solicited before new regulations apply.” (*Id.* at 12.) Appellant maintains that it would be clear error for OHA to conclude that the November 2020 final rule applied to the RS3 MAC. (*Id.* at 13.)

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 determinations are 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

I agree with the Area Office and DSA that the instant case is highly analogous to OHA's decision in *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021). That decision, like the instant case, involved a task order competition under the RS3 MAC. *22nd Century Techs.*, SBA No. SIZ-6122, at 15. Furthermore, as in the instant case, the task order solicitation in *22nd Century Techs.* did not contain language expressly instructing RS3 contractors to “certify” or “recertify” size at the task order level. *Id.* OHA concluded, however, that the absence of such “missing words” from the task order solicitation was immaterial, because recertification nevertheless was required. *Id.* at 17. OHA observed that the underlying RS3 contracts contain provisions requiring recertification in situations when a task order is restricted or set aside for small businesses. *Id.* at 16-17. The task order solicitation in *22nd Century Techs.* stated that the order was “restricted” and thus “clearly was” a small business set aside. *Id.* at 15. Because recertification at the task order level was required, and because the challenged firm in *22nd Century Techs.* was no longer small at the time of task order proposal, the challenged firm was not eligible for award of the order.

Here, Appellant advances several arguments in an effort to distinguish the instant case from *22nd Century Techs.* Appellant highlights that the TORFP was phrased somewhat

differently than the task order solicitation in *22nd Century Techs.* The task order solicitation in *22nd Century Techs.* specifically referenced § H.2.4 of the RS3 prime contracts — a provision pertaining to orders restricted to small businesses — whereas the instant TORFP did not do so. Sections II.A and II.H, *supra*. As a result, in comparison with *22nd Century Techs.*, it may be less clear that the instant TORFP actually was conducted as a small business set aside. Furthermore, the task order solicitation in *22nd Century Techs.* included the text of § H.3.5, instructing RS3 contractors to represent whether they are or are not small businesses, whereas the instant TORFP omitted such verbiage. *Id.*

Although it is true that the TORFP here is not identical to the task order solicitation at issue in *22nd Century Techs.*, Appellant has not persuasively shown that these differences are sufficiently significant to compel a different result. The instant TORFP did not specifically reference § H.2.4 of the RS3 prime contracts, but the TORFP nevertheless did repeatedly state that the TEA order was “Restricted” and limited to the “Restricted suite” of RS3 contractors. Section II.A, *supra*. Given the context, whereby the TEA task order was being competed among firms that had been awarded RS3 prime contracts, statements that the order was “Restricted” could only have meant that the order was restricted to RS3 prime contractors that are small businesses. Insofar as there was any uncertainty on this point, the Army also then clarified the issue in a subsequent Q&A, referencing § H.2.4:

[The] TEA [task order] is restricted to small business primes only in accordance with the base RS3 contract clause H.2.4. Only contractors eligible to compete as a small business may submit a proposal in response to the [TORFP].

Section II.A, *supra*. Appellant observes that the Q&A document was not formally incorporated into the TORFP by a solicitation amendment. Section II.H, *supra*. However, because the Q&A merely clarified language already in the TORFP (*i.e.*, that the TEA order was “Restricted”), rather than altering or adding substantive terms or provisions, it is not clear that a formal amendment to the TORFP was necessary. *See* FAR 15.206(a) (amendment to a solicitation generally is required when “the Government changes its requirements or terms and conditions”). Moreover, even if OHA were to agree with Appellant that, absent an amendment, the TEA order was not set aside or restricted to small businesses, Appellant has not explained why the Q&A document itself would not have sufficed as a TORFP amendment. Indeed, the U.S. Government Accountability Office (GAO) has long held, as a matter of procurement law, that “information disseminated during the course of a procurement that is in writing, signed by the contracting officer, and provided to all vendors, contains all of the essential elements of an amendment — even where not designated as an amendment — and is sufficient to operate as such.” *Energy Eng’g & Consulting Servs., LLC*, B-407352, Dec. 21, 2012, 2012 CPD ¶ 353 at 3 (quoting *Linguistic Sys., Inc.*, B-296221, June 1, 2005, 2005 CPD ¶ 104 at 2). I therefore conclude that the instant TORFP, like the task order in *22nd Century Techs.*, was set aside for small businesses.

Similarly, the fact that § H.3.5 was not expressly mentioned in the instant TORFP is not dispositive. The Area Office found that “it was a condition of RS3 that each order set-aside for small businesses required the offerors to recertify their size.” Section II.E, *supra*. As DSA observes in its response to the appeal, the Area Office's finding was correct because the RS3

contracts clearly stipulate “[a]ny proposals submitted for a task order restricted to small businesses shall include” a size recertification. Section II.A, *supra*. Under the RS3 contracts, then, any RS3 prime contractor choosing to compete for a restricted task order must represent its current size. Pursuant to this contractual framework, Appellant was required to recertify its size for the restricted TEA task order, irrespective of whether § H.3.5 was referenced, or repeated, in the TORFP.

It is worth noting that, in determining whether recertification was required for a given task order, OHA will give weight to the CO's opinion on such matters. *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139, at 5 (2022); *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456, at 11 (2013). In the instant case, the CO's actions strongly suggest that recertification was required. As in *Metters*, the CO took the unusual step of initiating her own size protest against Appellant. Section II.B, *supra*. Moreover, the rationale behind the CO's size protest was that Appellant had undergone acquisitions during 2017 and again in 2020. *Id.* Such transactions would be irrelevant if the CO believed that Appellant's size should be determined as of 2015, when the RS3 prime contracts were awarded. The CO's actions thus demonstrate that, although she did not utilize the terms “certify” or “recertify” in the TORFP, she nevertheless believed that contractors were required to recertify their size for the set-aside TEA task order.

Ultimately, Appellant has not shown that the Area Office erred in concluding that the TORFP was set aside for small businesses. Likewise, the Area Office did not err in determining that, pursuant to provisions in the underlying RS3 contracts, recertification at the task order level was required. Because the instant TORFP required recertification, the Area Office correctly examined Appellant's size as of June 25, 2021, the date of Appellant's proposal, including price, for the task order. Appellant does not dispute that Appellant was no longer a small business as of June 25, 2021. Section II.F, *supra*. Accordingly, the Area Office properly determined that Appellant is not eligible for award of the TEA task order.

On appeal, the parties also debate whether revisions to SBA regulations at 13 C.F.R. § 121.404(a)(1)(i)(A), which became effective November 16, 2020, apply to the instant task order. The regulation, as revised, generally requires recertification of size for any restricted task order issued under an unrestricted MAC. I agree with DSA that the revisions to 13 C.F.R. § 121.404(a)(1)(i)(A) do apply here, and thus further bolster the Area Office's decision. Appellant highlights that, in the final rule adopting the revisions to § 121.404(a)(1)(i)(A), SBA commented that the rule “does not have retroactive or preemptive effect.” 85 Fed. Reg. 66,146, 66,176 (Oct. 16, 2020). This remark by itself sheds no light on whether SBA intended that the revisions to § 121.404(a)(1)(i)(A) would apply to all orders issued after November 16, 2020, or only to orders if the entire unrestricted MAC was awarded after November 16, 2020. Elsewhere in the regulatory preamble, however, SBA explained that its intent was to close a loophole in its regulations, whereby set-aside orders might be awarded to large businesses under unrestricted MACs, even though the contractor's “size and status were not relevant to the award of the underlying MAC.” *Id.* at 66,150 — 66,151. Given SBA's stated concerns, the revisions to § 121.404(a)(1)(i)(A) are most reasonably understood as applying to all orders issued after November 16, 2020. This is true because there is no indication in the regulations or the accompanying commentary that SBA intended to permit the loophole to continue indefinitely, until such time as all unrestricted MACs expired. Certainly, SBA could have included language

in the rule exempting previously-awarded MACs if that had been SBA's intent. Accordingly, as the instant TORFP was issued on May 12, 2021, after the revisions to § 121.404(a)(1)(i)(A) had become effective, the revised regulations do apply to the instant order. As DSA observes, this result also is consistent with OHA's decision in *Size Appeal of Potomac River Enter. Solutions, LLC*, SBA No. SIZ-6138 (2022), where OHA applied the 2020 regulatory revisions to an unrestricted MAC awarded in 2018.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge