

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

SIZE APPEAL OF:

Computer World Services Corporation,

Appellant,

RE: VariQ-CV JV, LLC

Appealed From
Size Determination No. 2-2023-001

SBA No. SIZ-6208

Decided: April 25, 2023

APPEARANCES

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox, II, Esq., Ian. P. Patterson, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, for Appellant

Isaias “Cy” Alba, IV, Esq., Daniel J. Figenick, III, Esq., PilieroMazza PLLC, Washington, D.C., for VariQ-CV JV, LLC

DECISION¹

I. Introduction and Jurisdiction

On November 1, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2023-001, dismissing a size protest filed by Computer World Services Corporation (Appellant) against VariQ-CV JV, LLC (VQCV). The Area Office determined that the protest was untimely, because the protest had been filed against the award of a task order that did 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) remand the matter for a new size determination. 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 determination, so the appeal is timely. 13 C.F.R. § 134.304(a). A

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017).

II. Background

A. RFP and TOR

On March 14, 2016, the National Institutes of Health (NIH), Information Technology Acquisition and Assessment Center, issued Request for Proposals (RFP) No. NIHJT2016015 for the Chief Information Officer—Solutions and Partners 3 (CIO-SP3) Small Business Government-Wide Acquisition Contract (GWAC).² (RFP § B.1.) The RFP sought qualified small businesses, including Historically Underutilized Business Zone (HUBZone) small businesses, to “provide Information Technology (IT) solutions and services as defined in [Federal Acquisition Regulation (FAR)] 2.101(b) and further clarified in the Clinger-Cohen Act of 1996.” (*Id.* §§ B.1 and G.7.2.) Specific work would be described in task orders issued after award of the base contracts. (*Id.*) The RFP permitted that “any duly warranted Federal Government Contracting Officer (as that term is defined in FAR 2.1) in good standing with the appropriate contracting authority is authorized to award task orders under this contract.” (*Id.* § B.3.) NIH assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, which at that time had a corresponding size standard of \$27.5 million average annual receipts, to the RFP.³ (*Id.* § J.5.) In September 2018, VQCV was awarded a CIO-SP3 Small Business prime contract.

On July 6, 2022, the U.S. Department of Energy (DOE), Energy Information Administration (EIA), issued Task Order Request (TOR) No. 89303022REI000082 for a task order under the CIO-SP3 Small Business GWAC.⁴ The TOR sought a contractor to “provide direct applications support (application software development and implementation) to all EIA program offices and coordinate the use of common software development productivity tools.” (TOR at 1.) The Contracting Officer (CO) set aside the task order entirely for HUBZone small businesses, and assigned NAICS code 541512, with a corresponding size standard of \$30 million in average annual receipts. (*Id.* at 1-2.) The TOR contains the following provisions pertinent to this appeal:

² NIH issued a conformed version of the RFP with Amendment 0004. Citations within this decision are to the conformed RFP.

³ In 2019, SBA increased the size standard for NAICS code 541512 to \$30 million. 84 Fed. Reg. 34,261 (July 18, 2019). In 2022, SBA again increased the size standard to \$34 million. 87 Fed. Reg. 69,118 (Nov. 17, 2022).

⁴ A revised version of the TOR was issued with Amendment 0001. Citations within this decision are to the TOR as revised by Amendment 0001

II. GENERAL INFORMATION

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d. Notice of Order Set-Aside

This [TOR] is set aside for Hub-Zone small business concerns. Responses received from concerns that are not Hub-Zone small business concerns shall be rejected. Only contract holders that are currently identified as Hub-Zone small business concerns under [the] CIO-SP3 Small Business [GWAC] may submit a response to this [TOR]. This does not include CIO-SP3 Small Business contract holders who have since graduated to “other than small business” size status but remain CIO-SP3 Small Business contract holders (per the memorandum, “Rerepresentation of Business Size” from the GWAC Program Office dated August 9, 2020). (See FAR 52.219-3, Notice of Hub-Zone Set-Aside or Sole-Source Award, for additional information.)

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VII. RESPONSE PREPARATION INSTRUCTIONS AND SUBMISSION

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b. Technical Submission Instructions

Volume 1 — Offer and Other Documents (Unlimited pages)

...

(g) Representations and certifications.

(1) If the offeror has completed the annual representations and certifications electronically via the System for Award Management website in accordance with the provision at FAR 52.204-8, Annual Representations and Certifications, and those representations and certifications are current, accurate, complete, and applicable to this solicitation, the offeror does not need to resubmit such representations and certifications in response to this solicitation. However, if any of these annual representations and certifications requires a change, the offeror shall submit those changes in accordance with FAR 52.204-8. The offeror shall also complete any additional representations, certifications or other statements required in this solicitation's Representations, certifications, and other statements of the offeror.

(2) If the offeror has not completed the annual representations and certifications electronically via the System for Award Management, the offeror

shall complete and provide all of the representations, certifications, and other statements of the offeror as required in this solicitation.

(*Id.* at 2-4.) The TOR did not contain specific language directing that CIO-SP3 Small Business prime contractors recertify their size for this task order. Offers were due July 15, 2022. On September 26, 2022, the CO announced that VQCV was the apparent awardee.

B. Protest

On October 3, 2022, Appellant filed a protest with the CO challenging VQCV's size. Appellant observed that VQCV is a joint venture between Conviso, Inc. (Conviso) and VariQ Corporation (VariQ). (Protest at 2.) Conviso is a HUBZone small business, and VariQ is Conviso's SBA-approved mentor under the All-Small Mentor-Protégé Program (ASMPP). (*Id.*)

Appellant noted that VQCV was awarded a CIO-SP3 Small Business prime contract on September 18, 2018. (*Id.*) On December 1, 2021, however, VariQ, one of the participants in VQCV, was acquired by Capgemini Government Solutions LLC (Capgemini), a subsidiary of a large French multinational company. (*Id.* at 1, 4.) According to Appellant, VariQ's acquisition should have triggered several regulatory requirements: (1) VariQ, as an SBA-approved mentor, should have informed SBA of its change in ownership pursuant to ASMPP regulations at 13 C.F.R. § 125.9(e)(8); (2) Conviso, the protégé, likewise should have notified SBA of changes in its mentor-protégé agreement under § 125.9(g)(3); (3) SBA should have been afforded the opportunity to review, and approve in advance, changes to the mentor-protégé arrangement, under § 125.9(e)(7); and (4) because one of the participants in VQCV underwent an acquisition after the CIO-SP3 Small Business GWAC was awarded, VQCV should have recertified its size pursuant to § 121.404(g)(2)(ii)(C). (*Id.* at 3-5.) Appellant alleged that VQCV did not comply with these requirements following the acquisition of VariQ, so Conviso and VariQ should no longer be considered to have a valid mentor-protégé agreement, and VQCV should no longer be considered small. (*Id.* at 5-6.) Appellant highlighted that VariQ, following the acquisition by Capgemini, is “a large business under the [TOR]'s NAICS code.” (*Id.*) As a result, affiliation between VariQ and Conviso would have “a significant impact on [VQCV's] size.” (*Id.*)

C. Size Determination

The CO forwarded Appellant's protest to the Area Office for review. On November 1, 2022, the Area Office issued Size Determination No. 2-2023-001, dismissing the protest as untimely.

The Area Office explained that the protest was filed against the award of a task order under CIO-SP3 Small Business GWAC, a long-term contract. (Size Determination at 1.) SBA regulations permit that a size protest may be filed only at three points during the life of a long-term contract: (1) within five business days after the long-term contract is initially awarded; (2) within five business days after an option is exercised; and (3) within five business days after the award of an individual order, if the CO requested recertification of size in connection with that order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3).)

OHA has repeatedly held that a size protest pertaining to an individual order under a long-term contract will be timely only if the CO requested recertification of size for that order. (*Id.* at 2.) Thus, 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.*, quoting *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016).) Furthermore, “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.” (*Id.*, quoting *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139, at 5 (2022).)

The dispositive issue in this case, then, is whether the CO requested recertification of size in conjunction with the TOR, thereby triggering Appellant's right to protest VQCV's size under 13 C.F.R. § 121.1004(a)(3)(iii). (*Id.*) The Area Office found that “recertification **was not** a requirement at the task order level,” and that size instead was to be determined at the GWAC level. (*Id.*, emphasis Area Office's.) Although the TOR was set aside for HUBZone small businesses, language in a task order solicitation indicating that an award is set aside, or restricted, to small businesses does not constitute a recertification requirement. (*Id.*, citing *Size Appeals of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 23 (2010).) In addition, “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 request for recertification, a size protest against an order under a long-term contract is untimely. (*Id.*)

D. Appeal

On November 16, 2022, Appellant filed the instant appeal. Appellant contends that the Area Office erred by discounting “key differentiating facts” that distinguish this case from prior OHA decisions. (Appeal at 4-5.) In particular, the Area Office failed to consider that “notification to the [ASMPP] was required and [VQCV] had a *regulatory requirement* to recertify.” (*Id.*, emphasis Appellant's.)

Appellant argues that the benefits of the ASMPP are conditioned on (1) “SBA approval of the mentor-protégé agreement before the firms submit an offer as a joint venture”; (2) “the joint venture's adherence to the requirements of [ASMPP regulations]”; and (3) “the protégé's continuing size eligibility.” (*Id.* at 5-6, citing 13 C.F.R. §§ 125.8 and 125.9.) A “key requirement” is that a mentor notify SBA if its control changes. (*Id.* at 6, citing 13 C.F.R. § 125.9(e)(8).) The Area Office failed to consider whether VQCV, as a mentor-protégé joint venture, should have recertified after VariQ's acquisition. (*Id.*) The Area Office instead incorrectly focused on whether the CO had requested recertification for the TOR. (*Id.* at 6-7.)

Appellant maintains that VQCV also had a regulatory requirement to recertify under 13 C.F.R. § 121.404(g)(2)(i) and (ii)(C). (*Id.* at 7.) Under these rules, recertification was required “independent of a [CO's] request.” (*Id.*)

Appellant contends that the Area Office further erred because “the [TOR] *did* require recertification.” (*Id.*, emphasis Appellant's.) Appellant points in particular to section VII(g) of the TOR, which required that “if the offeror's representations and certifications on [the System

for Award Management (SAM)] were accurate, then it need take no action. But if they were not, it needed to recertify.” (*Id.*) VQCV's SAM profile inaccurately states that it qualifies as a HUBZone joint venture, so VQCV should have recertified. (*Id.* at 7-8.) As additional evidence that recertification was “required,” the applicable size standard for the underlying GWAC was \$27.5 million, yet the size standard identified in the TOR was \$30 million. (*Id.* at 8.) The TOR also incorporated FAR clause 52.219-3, “Notice of HUBZone Set-Aside or Sole-Source Award.” (*Id.*)

The Area Office's reliance on *CodeLynx* for the proposition that “recertification does not occur simply because mandatory FAR clauses were incorporated” is “wrong.” (*Id.* at 8-9.) The TOR's use of “a new size standard and the admonition that *only* HUBZone joint ventures meeting the applicable regulatory requirements would be eligible [] shows that recertification was required.” (*Id.* at 9, emphasis Appellant's.) Like *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021), in which OHA recognized that “recertification was required where the task order solicitation updated the NAICS code . . . even where [the words] ‘certify’ or ‘recertify’ were not used,” the “plain language” of the instant TOR required VQCV to “specify [its] size status,” and thus recertification was required. (*Id.*)

Appellant argues that the instant appeal is distinguishable from OHA's decision in *Size Appeal of Odyssey Sys. Consulting Group, Ltd.*, SBA No. SIZ-6135 (2021), in two respects: (1) “VQCV is a mentor-protégé joint venture consisting of [a] large business mentor, which therefore deserves additional scrutiny”; and (2) the TOR required recertification “because it has a different size standard” than the underlying GWAC, and contemplated that “SAM must be updated.” (*Id.* at 9, fn.1.) Insofar as OHA nonetheless concludes that *Odyssey* is controlling, OHA should “revisit” *Odyssey* because “when SBA proposed to update the recertification requirement in section 121.404(g)[,] it did intend to create a protest cause of action.” (*Id.*, citing 84 Fed. Reg. 60,846, 60,851 (Nov. 8, 2019).)

Lastly, Appellant contends that the Area Office incorrectly relied on 13 C.F.R. § 121.1004 for the proposition that recertification is not required absent a specific request from the CO. (*Id.* at 10.) According to Appellant, “13 C.F.R. § 121.404(g)(2) makes recertification to the [CO] *mandatory*; thus, under 13 C.F.R. § 121.1004(a)(2) and (3), the [CO] effectively did require such recertification, at least regarding VQCV.” (*Id.*, emphasis Appellant's.) If OHA were to affirm the Area Office's interpretation, “SBA's recertification requirement is toothless” because “[a] mentor/protégé joint venture could simply ignore its obligations under SBA's regulations, all while competing for (and winning) work that it is no longer eligible to receive.” (*Id.* at 10-11.)

E. VQCV's Response

On December 2, 2022, VQCV responded to the appeal. VQCV maintains that Appellant's size protest was correctly dismissed, because the CIO-SP3 Small Business GWAC was awarded in 2018 and Appellant did not file its size protest until 2022. (Response at 1.) VQCV claims that Appellant's arguments on appeal are “fundamentally flawed and contrary to clear and long-standing OHA precedent.” (*Id.*)

VQCV, first, argues that Appellant's size protest is untimely under SBA regulations. For long-term contracts, such as the CIO-SP3 Small Business GWAC, “protests challenging an awardee's size can only be brought under specific circumstances”: (1) “a size protest can be filed within five days after a protester receives notice of the identity of an awardee for a long-term contract”; (2) “size protests can be brought within five days after notice of a size certification made by a firm recertifying for an option period exercised under the long-term contract”; and (3) “a size protest can be brought five days after a contracting officer requests a size certification in connection with a task/delivery order under the long-term contract.” (*Id.* at 3, citing 13 C.F.R. § 121.1004(a)(3).) Appellant had until September 24, 2018 to timely file a size protest against the award of the underlying GWAC. (*Id.* at 4.) Moreover, the instant TOR was issued under the CIO-SP3 Small Business GWAC with “no express request for recertification.” (*Id.*) As a result, “there was never any revival of the size protest period” for Appellant to timely file a size protest. (*Id.*)

Rather than attempt to explain how its size protest is timely under applicable regulations, Appellant contends that the TOR “actually required recertification.” (*Id.*) Appellant's analysis is flawed, because Appellant “attempts to create parity between ‘submitting changes in accordance with FAR 52.204-8’ and ‘recertifying one's small business size status.’” (*Id.*) The referenced FAR clause, 52.204-8, “allows an offeror to submit changes “applicable to this solicitation only, and do not result in an update to the representations and certifications posted on SAM.” (*Id.*, quoting FAR 52.204-8(d).) Accordingly, FAR 52.204-8 does not require a firm to update its annual representations and certifications on SAM.gov. (*Id.*) Nor does the clause require small business size recertification. (*Id.*) Appellant's claim that “if an offeror's representations and certifications are not accurate, then an offeror must ‘recertify’” is thus incorrect. (*Id.*) Additionally, as the Area Office observed, OHA has repeatedly held that “language identical to that which [Appellant] points to now does not constitute an ‘express’ request for recertification.” (*Id.* at 5, citing *CodeLynx*, SBA No. SIZ-5720, at 6; *ReliaSource*, SBA No. SIZ-5536, at 4; *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5614, at 5 (2014); and *Safety and Ecology*, SBA No. SIZ-5177, at 21.) VQCV insists that there was no recertification requirement in the TOR. (*Id.*)

Appellant's reliance on *22nd Century* also is misplaced. (*Id.*) In *22nd Century*, “OHA found recertification was required at the task order level because each task order was required to include the following certification: “The Contractor represents that it [] is, [] is not a small business concern under NAICS Code 541715 assigned to contract number TBD.” (*Id.*) The instant TOR, though, contains no comparable language or provision. (*Id.*) Appellant also points to changes in the size standard as evidence that recertification is required. (*Id.*) In *22nd Century*, however, “there was an actual change to the applicable NAICS code between the bid for the underlying long-term contract and the task order at issue due to the fact that the code issued under the long-term contract had been replaced by a successor code as a result of an official 5-year NAICS code update.” (*Id.* at 6.) Conversely, in the instant case, the assigned NAICS code “never changed,” only “the monetary threshold” pertaining to NAICS code 541512 has been updated, “presumably to reflect inflation.” (*Id.*) An adjustment of the size standard, thus, does not require recertification. (*Id.*)

VQCV next asserts that Appellant erroneously argues that the recertification requirement at 13 C.F.R. § 121.404(g)(2)(ii)(C) is an exception to the size protest timeliness rules. (*Id.*) OHA has consistently rejected such arguments in prior decisions. (*Id.*, citing *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139 (2022); *Size Appeal of Davis Def. Grp., Inc.*, SBA No. SIZ-6016 (2019); and *Size Appeal of U.S. Info. Techs. Corp.*, SBA No. SIZ-5585 (2014).) “Regardless of which certification requirement Appellant points to, the result will be the same: the [CO] did not request recertification and thus, the [s]ize [p]rotest is untimely.” (*Id.* at 7.) Appellant offers no legal authority to show that “the recertification requirements under 13 C.F.R. § 121.404(g) provide an exception to the protest timeliness rules at 13 C.F.R. § 121.1004(a)(3).” (*Id.*)

VQCV also refutes Appellant's arguments pertaining to the ASMPP. Appellant “conveniently misquote[s]” 13 C.F.R. § 125.9(d)(1)(ii). (*Id.* at 7.) A proper reading of the regulation demonstrates that, even assuming VariQ failed to notify SBA of the change in control, VQCV was “never in violation of the joint venture requirements set forth in 13 C.F.R. § 125.8(b)(2), (c), and (d), and thus would still be afforded the exclusion from affiliation.” (*Id.* at 8.) Specifically, nothing in § 125.8(b)(2), (c), or (d) obligates an AMSPP mentor to notify SBA of a change in control. (*Id.*) Because the mentor-protégé exception to affiliation was not invalidated, VQCV's size is based solely on that of Conviso, the protégé member of VQCV. Had the Area Office reached the merits of Appellant's size protest, then, it would have concluded that VQCV still qualifies as a HUBZone joint venture. (*Id.* at 8.) Any error in dismissing the protest therefore was harmless. (*Id.*)

Lastly, VQCV refutes Appellant's reading of *Odyssey* and the proposed rule change at 84 Fed. Reg. 60,846 (Nov. 8, 2019). (*Id.* at 9.) VQCV observes that “[f]or joint ventures, [the proposed rule] clarified that SBA would require ‘only the partner to the joint venture that has been acquired, is acquiring, or has merged with another business entity [to] recertify its size status in order for the joint venture to recertify its size.’” (*Id.*, quoting 84 Fed. Reg at 60,851.) Contrary to Appellant's suggestions, SBA's “unmistakable” intent was “only to require the affected joint venture member (the one that underwent an acquisition or merger) to recertify.” (*Id.*) Here, VariQ, the mentor, underwent an acquisition and thus is the “‘affected’ joint venture partner.” (*Id.*) Under 13 C.F.R. § 125.9(d)(1)(ii), though, the size of the mentor is “irrelevant” in assessing the size of a mentor-protégé joint venture. (*Id.*) Conviso, the protégé member of the joint venture, was unaffected by the merger and was not required to recertify. (*Id.*)

Furthermore, OHA has repeatedly held that “a concern that initially certifies and qualifies for a given status will retain that status for the life of a contract, including long-term contracts.” (*Id.*, citing *Odyssey* and *EBA Ernest Bland Assocs.*) The CIO-SP3 Small Business GWAC was restricted to small businesses, and VQCV “properly certified” as small at the time of its initial offer. (*Id.* at 10.) Thus, VQCV remains small for the life of the GWAC, “regardless of its size at the time of its offer under the [TOR].” (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant has not shown that the Area Office clearly erred in dismissing Appellant's size protest. This appeal therefore must be denied.

The underlying contract here is a long-term contract — the CIO-SP3 Small Business GWAC — under which task orders may be issued. Section II.A, *supra*. As the Area Office correctly recognized, SBA regulations provide that a concern which is small at the time a long-term contract is awarded remains small for the duration of the contract, including for orders issued under the contract. 13 C.F.R. § 121.404(g). Further, under SBA regulations, there are only three instances when a concern's size may be protested in the context of a long-term contract. First, a concern's size may be protested within five business days after the long-term contract is initially awarded. *See* 13 C.F.R. § 121.1004(a)(3)(i). Second, a concern's size may be protested within five business days after an option on a long-term contract is exercised. *Id.* § 121.1004(a)(3). Third, a concern's size may be protested within five business days after award of an individual order under a long-term contract, if the CO requested recertification of size in connection with that order. *Id.* § 121.1004(a)(3)(iii). Distilling 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*, SBA No. SIZ-5720, at 6 (quoting *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683, at 3 (2015)); *see also AIS Eng'g*, SBA No. SIZ-5614, at 4; *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, there is no dispute that the CIO-SP3 Small Business GWAC is a long-term contract within the meaning of SBA regulations. VQCV was awarded its prime contract in 2018 and there was no timely size protest of that award, nor have any options been exercised. The key issue presented, then, is whether the instant TOR required recertification, such that Appellant could timely file a size protest within five business days after award of that order.

The determination of whether a particular order required recertification is made primarily on the basis of the task order solicitation and relevant provisions in the underlying contracts. *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178, at 16-17 (2022); *EBA Ernest Bland Assocs.*, SBA No. SIZ-6139, at 5; *22nd Century Techs.*, SBA No. SIZ-6122, at 15-16; *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 give weight to the CO's opinion of whether recertification was required, although the CO's views are not dispositive. *Avenge*, SBA No. SIZ-6178, at 17; *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456, at 11 (2013). OHA has explained that “recertification does not occur simply because mandatory FAR clauses were incorporated” into the task order solicitation. *ReliaSource*, SBA No. SIZ-5536, at 4; *see also CodeLynx*, SBA No. SIZ-5720, at 6; *AIS Eng'g*, SBA No. SIZ-5614, at 5. Likewise, “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 *Safety and Ecology*, SBA No. SIZ-5177, at 23).

In the instant case, upon reviewing the TOR, considering the underlying GWAC, and consulting the CO, the Area Office reasonably concluded that there was no request for recertification at the task order level. Section II.C, *supra*. The TOR did not contain language expressly instructing CIO-SP3 Small Business contractors to represent, certify, or recertify their size for the task order. Section II.A, *supra*. In addition, the TOR permitted that “contract holders that are currently identified as Hub-Zone small business concerns under [the] CIO-SP3 Small Business [GWAC] may submit a response to this [TOR],” thus suggesting that DOE intended to rely on existing contract-level certifications, without seeking any new certification or recertification of size. *Id.* Because the TOR was issued under the CIO-SP3 Small Business GWAC, a long-term contract, and because no express request for recertification was present, the Area Office correctly found that Appellant's size protest was untimely.

On appeal, Appellant highlights that the TOR made references to FAR clause 52.204-8, “Annual Representations and Certifications,” and indicated that “if any of these annual representations and certifications requires a change, the offeror shall submit those changes in accordance with FAR 52.204-8.” Section II.A, *supra*. As discussed above, however, OHA has repeatedly declined to find that references to standard FAR provisions constitute requests for recertification. Moreover, although the FAR clause in question here may require that an offeror be a small business on its underlying contract, the clause contains no discussion of certifying or recertifying size for individual orders. It therefore does not follow that, merely because FAR 52.204-8 was referenced in the TOR, the CO requested recertification for this particular order.

Appellant attempts to analogize the instant case with OHA's decision in *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021), but that case is distinguishable. In *22nd Century Techs.*, OHA found that the underlying contracts required recertification for all orders that were restricted to small businesses. *Avenge*, SBA No. SIZ-6178, at 16-17; *22nd Century Techs.*, SBA No. SIZ-6122, at 16-17. Appellant, conversely, points to no comparable terms in the CIO-SP3 Small Business GWAC.

Appellant also contends that VQCV had a regulatory requirement to recertify under 13 C.F.R. § 121.404(g)(2)(i) and (ii)(C), independent of any request from the CO to recertify. Section II.D, *supra*. This argument fails because it is well-settled law that the recertification requirements under § 121.404(g) do not create exceptions to the protest timeliness requirements of § 121.1004. *EBA Ernest Bland Assocs.*, SBA No. SIZ-6139, at 6; *Odyssey*, SBA No. SIZ-6135, at 19 (“There is no indication in § 121.404(g)(2) that a requirement to recertify as a result of a merger, sale, or acquisition is, without specific language in the task order solicitation,

equivalent to a CO's request for size recertification in connection with a particular task order.”); *Size Appeal of Davis Def. Grp., Inc.*, SBA No. SIZ-6016 (2019); *Size Appeal of U.S. Info. Techs., Corp.*, SBA No. SIZ-5585 (2014).

Lastly, VQCV argues that any error in dismissing Appellant's protest was harmless, because Appellant did not advance any valid grounds from which the Area Office could have concluded that VQCV is not an eligible HUBZone joint venture. Section II.E, *supra*. VQCV reasons that, as VQCV is a joint venture between an SBA-approved mentor and protégé, only the size of Conviso, the protégé member of the joint venture, is relevant in assessing VQCV's size. *Id.* Therefore, any failure by VariQ, the mentor member of VQCV, to inform SBA of the acquisition by Capgemini would have no bearing on VQCV. *Id.* I find it unnecessary to resolve this question because, as discussed above, the Area Office correctly determined that Appellant's protest was not timely filed within five business days after award of an order that required recertification.

IV. Conclusion

The Area Office properly dismissed Appellant's size protest as untimely. 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).

KENNETH M. HYDE
Administrative Judge