Cite as: *Size Appeal of Federal Performance Management Solutions, LLC*, SBA No. SIZ-6246 (2023)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Federal Performance Management Solutions, LLC, Appellant, Appealed From Size Determination No. 02-2023-051	SBA No. SIZ-6246 Decided: September 26, 2023

APPEARANCES

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DECISION[1]

I. Introduction and Jurisdiction

On June 26, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office) issued Size Determination No. 02-2023-051, concluding that Federal Performance Management Solutions, LLC (Appellant) is not a small business for the subject procurement. Appellant is a joint venture between PM Consulting Group LLC (PM Consulting) and its SBA-approved mentor, Apprio, Inc. (Apprio). On appeal, Appellant contends that the size determination is clearly erroneous, and urges that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within 15 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[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.

II. Background

A. The Procurement

On December 16, 2022, the U.S. Department of the Army (Army) issued Request for Proposals (RFP) No. W81K04-23-R-0019, seeking a contractor to "provide credentialing branch support services to the US Army Reserve Command." (RFP No. W81K04-23-R-0019, at 65.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, which at that time had a corresponding size standard of $32.5 million average annual receipts.[2] (*Id*. at 1.) Proposals were due February 27, 2023. (RFP No. W81K04-23-R-0019, Amendment 0005 at 2; E-mail from S. Edington (Feb. 21, 2023).)

The RFP explained that the Army considered the solicitation a continuation of a previously-issued solicitation, RFP No. W81K04-22-R-0017. The RFP stated:

> For administrative reasons, after cancellation of [an earlier award], it was necessary to renumber Solicitation No. W81K04-22-R-0017 as Solicitation No. W81K04-23-R-0019. Despite the new solicitation number, this constitutes a solicitation amendment rather than the issuance of a new solicitation. Accordingly, offerors shall submit Volumes I through IV, revised as appropriate to the extent the offeror considers to be necessary as a result of the amended solicitation, on separate files.

(RFP No. W81K04-23-R-0019, at 125.)

Appellant and Cognito Systems, LLC (Cognito) submitted timely proposals. On May 2, 2023, the CO announced that Appellant was the apparent awardee.

B. Protest and Response

On May 8, 2023, Cognito filed a size protest with the CO challenging Appellant's size. Cognito alleged that Appellant is "not eligible to receive award pursuant to the joint venture 2 year rule." (Protest at 3.) Citing SBA regulations, Cognito maintained that, under both the prior and current versions of joint venture rules, "a joint venture cannot continue to submit proposals for new contracts two years after the date of its first contract award . . . [,] [i]f a joint venture continues to pursue new contracts after this two-year period, the joint venture members are deemed affiliated for all purposes - *even if they are both small or a mentor-protege team"* (*Id.*, citing 13 C.F.R. § 121.103(h) (emphasis Cognito's).) Here, Cognito contended, Appellant was awarded a contract on September 15, 2018, and thus the "two-year window for the joint venture to submit new proposals ended on September 14, 2020." (*Id*. at 3-4.) Appellant, though, submitted proposals for the instant procurement in 2022 and 2023, and such dates "are well

[2] Effective December 19, 2022, SBA increased the size standard for NAICS code 541513 to $37 million. 87 Fed. Reg. 69,118, 69,124 (Nov. 17, 2022). According to SBA regulations, "the size standard in effect on the date the solicitation is issued" is controlling, unless the CO amends the solicitation to incorporate the new size standard. 13 C.F.R. § 121.402(a).

beyond the allowable 2 year rule." (*Id.*) Cognito urged that Appellant's joint venturers, PM Consulting and Apprio, should be deemed affiliated and thus, their "annual receipts must be combined in determining size status for this procurement." (*Id*. at 4.)

The CO forwarded the protest to the Area Office for review. On May 22, 2023, Appellant responded to the protest and provided various supporting documentation. Appellant highlighted that PM Consulting and Apprio are an SB A-approved mentor and protege. (Protest Response at 3.) The Mentor-Protege Agreement (MPA) between the two companies "shields" them from affiliation with one another. (*Id.*, citing 13 C.F.R. §§ 125.9(d) and 121.103(b)(6).) Appellant further asserted that, under SBA regulations, Appellant remains "an eligible small business for this procurement as long as [the protege, PM Consulting,] was an eligible small business on the date [Appellant] submitted its initial proposal that included price on June 7, 2022." (*Id*. at 3, 6.) As of June 7, 2022, PM Consulting "was significantly under the size standard of $32.5 million that applied to this procurement." (*Id*. at 6-8.) Thus, "[b]ecause [PM Consulting] was an eligible small business for this procurement, so was [Appellant]." (*Id.*)

Appellant contended that Cognito's allegations also were flawed because Cognito failed to "account for the chronology of changes to SBA's joint venture regulations since [Appellant] was formed in 2017." (*Id*. at 8.) Appellant did not violate the current "2-year Bidding Rule" because Appellant did not receive a second contract after the rule took effect on November 16, 2020. Appellant noted that "SBA's [2020] Final Rule expressly had no 'retroactive' effect," and thus claimed that the current version of the rule "did not apply to [Appellant's] 2018 contract award." (*Id.*)

Appellant reiterated its position that it did not violate either the 3-in-2 Rule or the 2-year Bidding Rule. (*Id*. at 8-11.) Appellant argued that it was in compliance with the older 3-in-2 Rule prior to the November 16, 2020 effective date of the revised rule; in particular, Appellant "received two or fewer contracts" prior to the expiration of the 3-in-2 Rule. (*Id*. at 9-10.) Appellant maintained that it is in compliance with the 2-year Bidding Rule which became effective November 16, 2020 because that regulation "does **not have retroactive or preemptive effect."** (*Id*. at 11, quoting 85 Fed. Reg. 66,146, 66,176 (Oct. 16, 2020) (emphasis added by Appellant).) Appellant urged that only contract awards for solicitations that were "issued after November 16, 2020" could trigger the rule. (*Id*.) Here, although Appellant submitted its proposal for the subject procurement on June 7, 2022, Appellant had not received any contract awards for solicitations that were issued after November 16, 2020; therefore, the 2-year bidding period "did not commence until [Appellant] received [a] bridge contract award [in September 2022]." (*Id*.) Accordingly, Appellant reasoned, Appellant did not violate the current 2-year Bidding Rule when it submitted its proposal for the RFP on June 7, 2022. (*Id*.)

Appellant did not submit Apprio's tax returns to the Area Office, instead conceding that "[Appellant's] mentor member, [Apprio], is a large business for purposes of the size standard for this procurement." (*Id*. at 2 fn.6.)

C. Size Determination

On June 26, 2023, the Area Office issued Size Determination No. 02-2023-051, concluding that Appellant is not a small business for RFP No. W81K04-23-R-0019.

First, the Area Office examined the applicable date for determining size. (Size Determination at 3.) The Area Office found that an earlier iteration of the solicitation, RFP No. W81K04-22-R-0017, was "cancelled" by the CO, and the subject RFP No. W81K04-23-R-0019 was issued on December 16, 2022. (*Id.*) Citing OHA case law, the Area Office determined that "the instant size protest is not against the original, cancelled solicitation or it would be moot." (*Id.*, citing *Size Appeal of SiloSmashers, Inc.*, SBANo. SIZ-6123 (2021).) The Area Office noted that "June 7, 2022, is the date that [Appellant] made its initial offer on [RFP No.] W81K04-22-R-0017," but "February 23, 2023, is the date that [Appellant] made its initial offer on W81K04-23-R-0019." (*Id.*) The Area Office concluded that since Appellant self-certified as small for the instant procurement on February 23, 2023, that is the appropriate date to determine size. (*Id*. at 3-4.)

Next, the Area Office determined the date of Appellant's initial award under the 3-in 2 Rule/2-Year Rule. (*Id*. at 4.) The Area Office observed that both Appellant and Cognito "agree that [Appellant] was awarded a contract on September 15, 2018." (*Id*.) However, "[t]he dispute is that [Cognito] views this as [Appellant's] first award for the purposes of the 3-in-2 Rule/2 -Year Rule and [Appellant] does not." (*Id.*) While Appellant, in response to Cognito's protest, urged that the 2018 award should "not count due to the update to SBA's regulation changing the 3-in-2 Rule to the 2-Year Rule," the Area Office rejected this argument as "absurd." (Id.) Under Appellant's reasoning, Appellant "should not be bound by the 3-in-2 Rule" at all because "that rule has been updated" and "any award [Appellant] received before the rule change does not count for the purposes of the updated version of the rule (which notably did not change the 2-year restriction)." (*Id*.) The Area Office found that SBA's intent in revising the 3-in-2 Rule to the 2-Year Rule was "not that any firms already in their two-year period received an additional two years from the date of the rule change, but rather than any firms in their two year period could benefit from the removal of the restriction to three awards." (*Id*.) Thus, the Area Office determined, September 2018 must be considered the date of Appellant's first award. (*Id*.)

The Area Office proceeded to examine Cognito's allegations of affiliation between PM Consulting and Apprio. (*Id*. at 5.) The Area Office reviewed the versions of 13 C.F.R. § 121.103(h) in effect on the date of Appellant's offer for RFP No. W81K04-23-R-0019, the date of Appellant's initial award in September 2018, and the date of Appellant's establishment in January 2017. (*Id*. at 5-6.) Although the versions differ in certain respects, the Area Office found that "[r]egardless of year, the two-year limitation has existed from [Appellant's] date of establishment through the present." (*Id*. at 6.) Appellant's first contract award, which occurred on or about September 15, 2018, is more than two years before the date of Appellant's initial offer including price for the instant RFP. (*Id.*) The Area Office concluded that any argument regarding the applicable version of SBA's joint venture regulations is "irrelevant when the issue is that the joint venture has greatly exceeded the two-year mark." (*Id*.) Therefore, Appellant "is in violation of this rule regardless of version and its members are treated as generally affiliated for the purposes of [Appellant's] size." (*Id*.) Appellant acknowledged that Apprio "is a large business for

purposes of the size standard for this procurement." (*Id*.) As a result, the combined receipts of PM Consulting and Apprio exceed the size standard, and Appellant "cannot be small for the applicable NAICS code and size standard." (*Id*.)

D. Appeal

On July 11, 2023, Appellant filed the instant appeal. Appellant contends that the Area Office erred by applying the incorrect version of 13 C.F.R. § 121.103(h) and by utilizing the incorrect date for determining Appellant's size. (Appeal at 8.)

First, Appellant asserts that the Area Office erred when it concluded that Appellant "triggered affiliation between [PM Consulting] and Apprio by violating the applicable version of 13 C.F.R. § 121.103(h)." (*Id*. at 9.) The "crux" of the Area Office's error was when it retroactively applied the current version of 13 C.F.R. § 121.103(h), which did not take effect until November 16, 2020, to the contract awarded to Appellant in September 2018. (*Id*. at 10.) Appellant points to the preamble to the final rule changing from the 3-in-2 Rule to the 2-Year Rule and observes that the "Final Rule expressly stated '[t]he action does not have retroactive or preemptive effect."' (*Id*. at 10, quoting 85 Fed. Reg. 66,146, 66,176 (Oct. 16, 2020).) Appellant emphasizes that the only contract it received while the 3-in-2 Rule was in effect was "Contract No. W91YTZ18R0025 for the incumbent credentialing and IT serves work" in 2018. (*Id*. at 10.) There can be no dispute that Appellant "did not violate the 3-in-2 Rule that applied to all solicitations issued prior to November 16, 2020," nor any dispute that Appellant obtained only one contract award "while the 3-in-2 Rule was in effect." (*Id*. at 11.) Appellant posits that "[b]ecause [Appellant] had 'received two or fewer contracts' prior to the termination of the 3-in-2 Rule effective November 16, 2020, [Appellant] did not violate the rule." (*Id*., citing 13 C.F.R. § 121.103(h) (2018).)

Appellant maintains that it "did not violate the 3-in-2 Rule after November 16, 2020, because [the rule] was no longer in effect after that date." (*Id*.) Appellant reasons that the 3-in-2 Rule had been "*deleted* from SBA's regulations" when the CO issued the subject RFP in 2022. (*Id*. at 11 (emphasis Appellant's).) Appellant adds that "[b]ecause SBA *removed* the 3-in-2 Rule from its books by the time the Solicitation for the instant procurement was issued, it was a legal impossibility for [Appellant] to violate the 3-in-2 Rule when [Appellant] submitted its proposal on June 7, 2022." (*Id*. (emphasis Appellant's).) Appellant argues that the Area Office committed clear error when it applied the 2-Year Rule "retroactively" to the contract awarded to Appellant on September 19, 2018[3] - two years prior to the effective date of the 2-Year Rule. (*Id*. at 14.) The Area Office's decision to treat the "September 2018 contract award as the 'first award' for purposes of the 2-Year Bidding Period clearly contradicted SBA's expressed intention that the November 2020 final rule have no retroactive application." (*Id*.)

[3] According to Appellant, the contract in question was awarded "September 19, 2018, rather than September 15 of that year . . .[,] [b]ut this four-day difference has no impact on [Appellant's] status as a small business and is "harmless' error for purposes of this appeal." (*Id*. at 6 fn. 4.)

Next, Appellant claims that the Area Office erred when it "utilized the date of final proposal revisions under the Solicitation rather than the date of submission of initial proposals that included price." (*Id* at 8, 15.) The Area Office's analysis was "riddled with clear errors" because "the parties never agreed that Solicitation No. W81K04-22-R-0017 was cancelled." (*Id*. at 16.) The Army intended only to "amend the Solicitation, not to cancel it." (*Id*. at 8 (emphasis Appellant's).) Appellant proffers an e-mail from the CO as new evidence, and complains the Area Office never questioned Appellant as to whether June 7, 2022 was the proper date to determine its size. (*Id*. at 8-9, 17.) In Appellant's view, the "email makes clear that the [CO] never intended to cancel [RFP No. W81K04-22-R-0017] and instead was required to re-number the Solicitation to resolve a technology glitch when issuing the final amendments." (*Id*. at 17.) Appellant contends that the Area Office erred in concluding that the CO cancelled RFP No. W81K04-22-R-0017 and issued a new solicitation in December 2022. (*Id*. at 9, 18.)

E. Cognito's Response

On July 27, 2023, Cognito responded to the appeal, arguing that the appeal "falls well short of [Appellant's] burden of demonstrating clear error of fact or law." (Response at 5-6.) Cognito contends, first, that Appellant failed to show that the Area Office erred in its determination that Appellant violated 13 C.F.R. § 121.103(h). (Id.) Appellant argues, in essence, that the Area Office erred by "retroactively" applying the 2020 revisions to 13 C.F.R. § 121.103(h); instead, in Appellant's view, the Area Office should have "applied the two-year limitation prospectively" and thus, the 2-year limitation "should begin to run with the first award [Appellant] received after November 2020, which was [in September 2022]." (*Id*. at 6.) OHA should reject Appellant's reasoning because "the Area Office correctly found [that] the version of § 121.103(h) in effect as of September 2018 imposed the same two-year limitation as the post 2020 Final Rule version." (Id.)

Cognito contends that Appellant's interpretation of the 2020 revisions to 13 C.F.R. § 121.103(h) "writes out of the 2018 version of § 121.103(h) language which makes clear that the regulation imposed a two-fold limitation on joint ventures." (*Id*. at 7.) Appellant also "ignores" significant text in the preamble to the 2020 final rule; specifically, SBA "sought to eliminate the three-contract limit for a joint venture, *but continue to prescribe that a joint venture cannot exceed two years from the date of its first award"* (*Id*. at 8, quoting 85 Fed. Reg. 66,146, 66,148 (Oct. 16, 2020) (emphasis added by Cognito).) Cognito thus maintains that Appellant "became ineligible to receive a contract without a finding of affiliation two years from [Appellant's] September 2018 award—that is, by September 2020"; consequently, Appellant ""could not receive further awards in compliance with § 121.103(h) even before the 2020 Final Rule was codified and went into effect, on November 16, 2020." (*Id*. at 9.) Cognito concludes that the Area Office "properly applied the two-year limitation in effect as of September 2018, finding that [Appellant] was not eligible to be awarded a contract in 2023, nearly five years after receiving its first award, without a finding that its joint venture members are affiliated for the purpose of determining size." (*Id*. at 10.)

With regard to the appropriate date for determining size, Cognito argues that whether Appellant's size should be analyzed as of June 2022 or February 2023 is "irrelevant." (Id.) "OHA need not reach this issue . . . for it is entirely moot given the Area Office's legally and factually

sound finding that [Appellant] violated § 121.103(h).” (*Id*.) Appellant itself conceded that Apprio was not small as of June 2022. (*Id*.) Accordingly, given that “the Area Office correctly determined [Appellant] is non-compliant with § 121.103(h), meaning the annual receipts of both joint venture members are counted for determining size, [Appellant] would not qualify as small as of either February 23, 2023 or June 7, 2022.” (*Id*.) Cognito concludes that selecting February 2023 as the date for determining size was, at most, “harmless error” and “not a basis for reversal” of the size determination. (*Id.*, citing *Size Appeal o/OSG, Inc.*, SBA No. SIZ-5728 (2016).)

F. Appellant's Reply and Cognito's Opposition

On August 4, 2023, Appellant moved for leave to reply to Cognito's Response. There is good cause to permit a reply, Appellant maintains, to allow “additional briefing regarding the legal and factual issues in the appeal,” and to permit “[Appellant] to respond to Cognito's accusation that [Appellant] misled OHA.” (Motion at 1.)

In its proposed Reply, Appellant reiterates its view that the Area Office erred when it “concluded that [Appellant's] ‘initial award’ for purposes of this analysis was September 2018, in contradiction of SBA's statement in the [preamble to the] 2020 Final Rule that the rule change had no retroactive effect.” (Reply at 2.) Appellant asserts that Cognito confuses SBA actions “as a matter of policy” with SBA actions “as a matter of law” and urges that Cognito's “policy suggestions are not controlling.” (*Id*. at 3.) In Appellant's view, “the Final Rule had the legal effect of creating a new rule for determining the limits of a joint venture, which can only be applied prospectively starting from the November 16, 2020 effective date of the Final Rule.” (Id.) Regarding Cognito's references to the preamble of the final rule, Appellant counters that “[t]his explanatory comment is not in the regulatory text itself and is “not at all inconsistent with [Appellant's] Appeal.” (*Id.*) Appellant emphasizes that “the Final Rule has no retroactive effect” and interpreting the rule differently would “give it retroactive effect by applying it to contract awards that occurred before the effective date of the regulation—something SBA expressly prohibited.” (*Id*. at 4.) Appellant concludes that “a contract award prior to November 16, 2020, cannot, as a matter of law, constitute the first contract awarded to a joint venture for purposes of applying the 2-Year Bidding Period Rule that was enacted in the November 2020 revision of § 121.103(h).” (*Id*.)

Appellant disputes the notion that Appellant attempted to “mislead OHA” and asserts that it quoted from “the core part of the regulation,” which “clearly included the fact that a two-year period was part [of] the 3-in-2 Rule, contrary to Cognito's suggestion.” (*Id*. at 4-5.) Appellant asserts that “Cognito relies on language that no longer existed in the regulation as of the relevant date to argue that [Appellant's] two-year period began in 2018.” (*Id*.) Further, “[b]y acknowledging that its interpretation of § 121.103(h) relies upon regulatory text that no longer existed as of issuance of the solicitation, Cognito effectively admits that its position depends on applying an outdated version of the regulation.” (*Id*.) Appellant repeats its contention that because SBA did not intend to apply the 2020 revisions retroactively, those revisions should not apply to contract awards before November 2020. (*Id*.) Consequently, “the ‘first award’ for the purpose of measuring the commencement of the two-year period for the new 2-Year Bidding Period Rule . . . commences on the date of first award after November 16, 2020.” (*Id*.)

Appellant also reiterates its view that "the [Army] merely re-numbered the original solicitation for administrative reasons in what the [Army] expressly called an 'amendment' to the original solicitation 'rather than the issuance of a new solicitation.'" (*Id*. at 6.) Thus, the "first offer including price in this procurement . . . was June 7, 2022, prior to the re-numbering." (*Id*.) Appellant highlights that Cognito does not expressly dispute Appellant's assertion that June 7, 2022 is the appropriate date to determine size; rather, in its Response, Cognito "limits" its argument to stating that "OHA need not reach this question. . . ." (*Id*. at 6.)

Cognito opposes Appellant's motion to reply. According to Cognito, Appellant's proposed Reply does not add "any *new substantive argument* that [Appellant] would like OHA to consider beyond those already raised in the [] Appeal" and thus, fails to satisfy the good cause standard. (Opp. at 2 (emphasis Cognito's).)

In OHA practice, a reply to a response generally is not permitted, unless OHA directs otherwise. 13 C.F.R. §§ 134.206(e) and 134.309(d). No such direction occurred here. OHA may grant a party leave to file a reply in order to address new issues raised for the first time in an opposing party's pleading. *E.g., Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 15 (2023) (denying motion to reply because opposing party's pleading did not raise new substantive issues that would warrant a reply). Similarly, OHA also may grant leave to reply if good cause is shown that OHA will "benefit from additional briefing regarding the legal and factual issues." *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178, at 13 (2022). In the instant case, though, Cognito's Response did not introduce new substantive issues, and Appellant's proposed Reply repeats and reiterates arguments previously advanced in the Appeal. Accordingly, Appellant's motion for leave to reply is DENIED, and the proposed Reply is EXCLUDED from the record.

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 a 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. New Evidence

Accompanying its Appeal, Appellant moved to admit new evidence. Specifically, Appellant seeks to introduce, as Exhibit J-l, an e-mail from the CO explaining that RFP No. W81K04-23-R-0019 is an amended version of RFP No. W81K04-22-R-0017. Appellant also moves to admit, as Exhibit J-2, a copy of RFP No. W81K04-23-R-0019.

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Here, Exhibit J-l, a December 16, 2022 e-mail from the CO, is relevant to the question of whether the Army formally cancelled RFP No. W81K04-22-R-0017. Exhibit J-l is limited in scope and sheds light upon issues raised in the size determination and the appeal. Exhibit J-2, a copy of RFP No. W81K04-23-R-0019, is already included in the Area Office file. Section II.A, *supra*. For these reasons, Appellant's motion to introduce new evidence is GRANTED in PART. Exhibit J-l is ADMITTED into the record, but Exhibit J-2 is not new evidence and therefore is EXCLUDED.

C. Analysis

I agree with Appellant that the Area Office erred in concluding that Appellant's size should be assessed as of February 23, 2023, rather than as of June 7, 2022. In reaching this portion of its decision, the Area Office found that an earlier iteration of the solicitation, RFP No. W81K04-22-R-0017, had been "cancelled" by the procuring agency, and that a new solicitation, RFP No. W81K04-23-R-0019, was issued in its stead. Section II.C, *supra*. As Appellant observes, however, the procuring agency explained in RFP No. W81K04-23-R-0019 that a new solicitation number had been assigned "[f]or administrative reasons," and that "[d]espite the new solicitation number, this constitutes a solicitation amendment rather than the issuance of a new solicitation." Section II.A, *supra*. Similarly, in an e-mail contemporaneous with the issuance of RFP No. W81K04-23-R-0019, the CO commented that "W81K04-23-R-0019 replaces W81K04-22-R-0017," but advised prospective offerors that RFP No. W81K04-23-R-0019 otherwise should be treated as a continuation of RFP No. W81K04-22-R-0017, not a separate solicitation. Section III.B, *supra*. Accordingly, because RFP No. W81K04-22-R-0017 and RFP No. W81K04-23-R-0019 were, fundamentally, the same procurement, the Area Office should have assessed Appellant's size as of June 7, 2022, when Appellant submitted its initial offer including price under RFP No. W81K04-22-R-0017. 13 C.F.R. § 121.404(a).

Nevertheless, Appellant has not shown that this error on the part of the Area Office might in any way have affected the outcome of the case. In analyzing questions of size and affiliation, OHA applies the version of SBA regulations in effect on the date for determining size. *E.g., Size Appeal of GC&VConstr., LLC*, SBANo. SIZ-6236, at fn. 2 (2023); *Size Appeal of Optimal GEO, Inc.*, SBANo. SIZ-6141, at 6 (2022); *Size Appeal of Sevenson Env't Servs., Inc.*, SBANo. SIZ-6087, at 9 (2021); *Size Appeal of BTAS, Inc.*, SBA No. SIZ-6063, at 10 (2020). Here, as of June 7, 2022, SBA regulations stated, in pertinent part:

> Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates.

13 C.F.R. § 121.103(h) (2022).

The Area Office determined - and no party disputes - that Appellant is a joint venture between PM Consulting and Apprio. Sections II.B and II.C, *supra*. Similarly, there is no dispute that Appellant received its first contract award in September 2018. *Id.* Accordingly, pursuant to § 121.103(h), Appellant could properly "submit additional offers" through September 2020, and could continue to be awarded new contracts stemming from any offers that were submitted before the expiration of the two-year period. 13 C.F.R. § 121.103(h) (2022). In the event, however, that Appellant "submitted an offer after two years from the date of the first award," its joint venture partners will be considered affiliated. *Id.* As discussed above, Appellant submitted its initial offer, including price, for the instant procurement on June 7, 2022, more than two years after Appellant's first contract award in September 2018. The joint venturers, PM Consulting and Apprio, therefore are affiliated for this procurement. Because the combined receipts of PM Consulting and Apprio exceed the applicable $32.5 million size standard, the Area Office correctly concluded that Appellant is not small for this procurement.

In seeking to overturn the size determination, Appellant maintains that the Area Office "retroactively" applied the current version of § 121.103(h) to Appellant. Section II.D, *supra*. Appellant highlights that SBA amended § 121.103(h) in November 2020, and maintains that the amended rule should apply only if a joint venture obtained its first contract award after November 2020. *Id.*

I find no merit to Appellant's contentions, for several reasons. As discussed above, the amendments to § 121.103(h) became effective well before Appellant submitted its offer for the instant procurement on June 7, 2022, and OHA applies the version of SBA regulations in effect on the date for determining size. Furthermore, contrary to Appellant's suggestions, the text of the amended rule does not attach significance to whether a joint venture's first award occurred before, or after, November 2020; rather, the rule provides that joint venturers will be deemed affiliated with one another if "the joint venture submits an offer after two years from the date of the first award," irrespective of when that first award occurred. 13 C.F.R. § 121.103(h) (2022). It is well-settled law that all persons are charged with knowledge of federal regulations. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). At the time Appellant submitted the offer in question here, then, Appellant knew, or should have known, that doing so would likely result in affiliation between PM Consulting and Apprio, as more than two years had been passed since

Appellant's first contract award in September 2018. Notably, the text of § 121.103(h) also indicates that PM Consulting and Apprio could have avoided such affiliation by "creat[ing] [an] additional joint venture[]," instead of continuing to submit new offers on behalf of Appellant, an existing joint venture established in 2017. If PM Consulting and Apprio had done so, § 121.103(h) would have permitted that "each new joint venture entity may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates."

Accordingly, applying the November 2020 revisions to § 121.103(h) to Appellant's offer for the instant procurement is in no sense "retroactive." The revisions were in effect at the time Appellant submitted its offer, and Appellant knew, or should have known, of those revisions. Although Appellant may have harbored the belief that the amended version of § 121.103(h) would apply only if a joint venture received new contract awards after November 2020, this interpretation lacks support in the actual text of § 121.103(h), and Appellant's joint venturers, PM Consulting and Apprio, could easily have avoided affiliation issues altogether simply by establishing a new joint venture to compete for the instant procurement. By choosing not to do so, PM Consulting and Apprio assumed the risk that their interpretation of the November 2020 revisions might be incorrect.

As the Area Office observed in the size determination, an additional problem for Appellant here is that the version of § 121.103(h) prior to November 2020 contained, essentially, the same two-year limit on joint ventures. Appellant received its first contract award in September 2018, and SB A regulations at that time stated:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes.

13 C.F.R. § 121.103(h) (2018). The regulations went on to provide the following example reiterating that joint ventures were subject to a two-year limit:

> *Example 2 to paragraph (h) introductory text*. Joint Venture XY receives a contract on December 19, year 1. It may receive two additional contracts through December 19, year 3. On August 6, year 2, XY receives a second contract. It receives no other contract awards through December 19, year 3 and has submitted no additional offers prior to December 19, year 3. Because two years have passed since the date of the first contract award, after December 19, year 3, XY cannot receive an additional contract award. The individual parties to XY must form a new joint venture if they want to seek and be awarded additional contracts as a joint venture.

Id.; see also Size Appeal of Excellus Solutions, LLC, SBA No. SIZ-5999 (2019). Accordingly, under the version of § 121.103(h) that existed prior to November 2020, Appellant still could not properly have submitted an offer for the instant procurement, because more than two years had passed since the award of Appellant's contract W91YTZ18C0018 in September 2018. Appellant could prevail on this appeal, then, only if OHA were to conclude that Appellant is not bound by either, or any, version of § 121.103(h), a plainly absurd and untenable result.

In sum, the Area Office erred in concluding that Appellant's size should be assessed as of February 23, 2023 rather than as of June 7, 2022. The issue is ultimately immaterial here, though, because Appellant is a joint venture and more than two years had passed between Appellant's first contract award in September 2018 and Appellant's initial offer, including price, for the instant procurement on June 7, 2022. Appellant's approach was improper under the version of § 121.103(h) in effect on June 7, 2022, and likewise would have been barred under the earlier version of that regulation. The Area Office's error in selecting the date for determining size thus was harmless because "rectifying the error would not have changed the result" of the case. *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 17 (2020) (citing *Size Appeal of Melton Sales & Serv., Inc.*, SBA No. SIZ-5893, at 14 (2018) and *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017)).

IV. Conclusion

Appellant has not shown reversible error in the size determination. The appeal therefore 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