

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

SIZE APPEAL OF:

Forward Slope, Inc.,

Appellant,

Appealed From  
Size Determination No. 06-2023-026

Solicitation No. N66001-23-R-3506

SBA No. SIZ-6258

Decided: December 15, 2023

APPEARANCE

Devon E. Hewitt, Esq., Devon Law Group, for Forward Slope, Inc.

DECISION

I. Introduction and Jurisdiction

On June 16, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2023-026, concluding that Forward Slope, Inc. (Appellant) is not a small business for the subject procurement. On appeal, Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is GRANTED and the size determination is REVERSED.

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 after 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.

II. BACKGROUND

A. Seaport-NxG Multiple Award Contract (MAC)

On July 14, 2021, the U.S. Department of the Navy (Navy) awarded Appellant the Seaport-NxG Multiple Award Contract (MAC) No. N0017821D9078. Appellant had self-certified itself as a small business under this contract.

On October 25, 2022, the Navy issued Solicitation No. N66001-23-R-3506, a Request for Quotations (RFQ) as a Task Order under the same MAC. The RFQ was 100% small business set aside, designated under North American Industry Classification System (NAICS) code 541330, Engineering Services, under the Military and Aerospace Equipment and Military Weapons exception, with a corresponding \$41.5 million annual receipts size standard. Proposals, including price, were due November 29, 2022. The RFQ did not contain a request or requirement to new certifications or re-certifications as to the offeror's size status.

On November 9, 2022, Trive Capital, a Texas-based private equity firm, acquired a controlling interest in Appellant. As a result of this acquisition, Appellant was no longer small under the \$41.5 million size standard.

On November 29, 2022, Appellant submitted an offer in response to the RFQ. The Navy made an award to Appellant.

#### B. Size Determination No. 06-2023-026

On May 18, 2023, the Area Office received a protest, alleging Appellant was other than small. On May 24, 2023, the Area Office dismissed the protest for lack of standing, but initiated its own size investigation. (Size Determination, at 2-3.) On June 13, 2023, Appellant responded to SBA's protest and acknowledged to the Area Office that it was other than small as a result of Trive Capital's acquisition. (*Id.*, at 3.)

On June 16, 2023, the Area Office issued the instant Size Determination finding Appellant was other than small for this procurement. The Area Office found that under 13 C.F.R. § 121.404(g)(2)(i), because its offer was subsequent to its acquisition by Trive Capital, Appellant was obligated to recertify its size status to the procuring agency or inform it that it was other than small. Yet, Appellant did not do so. (*Id.*, at 4.) The Area Office found that Appellant was other than small for this procurement, and the Navy could not count any subsequent options or orders issued pursuant to the original MAC towards its small business goals. The Area Office further directed the Navy and Appellant to immediately revise all applicable Federal contract databases to reflect the new size status. (*Id.*)

#### C. Appeal

On, July 3, 2023, Appellant filed the instant appeal. Appellant first noted that the underlying MAC had advised the Navy would conduct competitions for task orders on an unrestricted basis or on a restricted basis among only Small Businesses, Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), Women-Owned Small Businesses (WOSBs), 8(a) businesses (8(a)), or HUBZone small businesses (HUBZones). For award of a task order for SDVOSBs, WOSBs, 8(a)s, or HUBZone businesses, the offeror had to have the requisite size and status at the time of task order proposal submission. The MAC Contract, however, did not have a similar requirement for task orders set aside only for small business. (MAC Contract, at § C.8.2.) Additionally, the Task Order solicitation did not include a requirement that offerors recertify their size. (Appeal, at 3-7.)

Appellant first argues that the Area Office erred in concluding Trive Capital's acquisition of Appellant made Appellant ineligible to receive the task order pursuant to the solicitation. (*Id.*, at 6.) Appellant explains that SBA's general rule and policy is that a concern which represents itself as small at the time of award remains small for the life of the contract. The exception is if the contracting officer asks offerors to recertify their size with their responses to a task order procurement under a multiple award contract. (*Id.*, at 7, citing 13 C.F.R. § 121.404(a)(1)(iii).)

The Area Office relied upon the regulation which requires a concern which has been the subject of a merger, sale or acquisition to recertify its size status to the procuring agency or to inform the agency that it is other than small. If it is other than small, the procuring agency can no longer count orders from that firm toward its small business goals. (*Id.*, citing 13 C.F.R. § 121.404(g)(2)(i).) Appellant takes issue with the Area Office's reading of this regulation to find Appellant "other than small" following its acquisition by Trive Capital, and therefore, it could not receive the task order pursuant to the Solicitation. Appellant argues that while the recertification requirement means a procuring agency can no longer count orders from the concern towards its small business goals, it does not mean that the concern is not entitled to continue to perform under a small business contract or to perform an order under such a contract. (*Id.*, at 7-8, citing *Size Appeal of Odyssey System Consulting Group*, SBA No. SIZ-6135 (2021).)

Appellant further asserts that this RFQ did not require offerors to certify their size for this task order, even though it was set aside for small business. Nor does the inclusion of standard FAR clauses mandate recertification. Furthermore, Appellant affirms that the CO has confirmed he did not intend for offerors to recertify their size. (*Id.*, at 8-9.)

### III. Discussion

#### A. Standard of Review

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

#### B. Analysis

The appeal was filed and served within 15 days after Appellant received the size determination. Thus, the appeal is timely for this procurement. 13 C.F.R. § 134.304(a).

It is settled, both as a matter of law and of SBA policy that a concern which certifies itself as small at the time it submits its initial offer remains small for the life of the contract. 13 C.F.R. § 121.404(g); *Size Appeal of Valiant Solutions, LLC*, SBA No. SIZ-6224 at 7 (2023). A contracting officer has the discretion to request recertification of a concern's size for an individual order. *Id.* Merely setting a task order aside for small business does not constitute a request for recertification. *Id.* If the contracting officer does request a new size certification for

an order against a MAC, then SBA will determine size as of the date of the initial offer including price for that order. 13 C.F.R. § 121.404(a)(1)(iii). SBA has explained this policy:

[R]equiring a business to certify its size at the time of offer for a multiple award contract, and not for each order issued against the contract, strikes the right balance and is consistent with SBA's current policy. If the contract were not a multiple award contract, then the business would represent its size at the time of offer and if it were small, it would be considered small for the life of the contract up to and including the fifth year. This policy should be the same for multiple award contracts. If a business is small for a size standard assigned to a NAICS code at the time of offer for a multiple award contract, then it is small for all orders with that same NAICS code and size standard for the life of the contract up to and including the fifth year of the multiple award contract.

78 Fed. Reg. 61,114, 61,119 (Oct. 2, 2013).

Here, there is no evidence of the CO requesting a recertification, nor did the Area Office find that there was a CO's request for recertification. The Area Office based its finding on the fact that Trive had acquired a controlling interest in Appellant.

The regulation requires that:

In the case of a merger, sale, or acquisition, which results in a change in controlling interest under § 121.103, where contract novation is not required, the contractor must, within 30 days of the transaction becoming final, recertify its small business size status to the procuring agency, or inform the procuring agency that it is other than small. If the contractor is other than small, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

13 C.F.R. § 121.404(g)(2)(i).

The Area Office determined that because the merger here took place on November 9, 2022, that Appellant's size must be determined as of November 29, 2022, the date of its submission of its offer on the Task Order, and therefore Appellant was other than small. However, this was a task order on a MAC contract on which there was no request for recertification. Therefore, there was no requirement to determine Appellant's size as of the date of its offer in response to this Task Order. The regulation requires that in the case of a merger or acquisition:

The requirements in paragraphs (g)(1), (2), and (3) of this section [[121.404] apply to Multiple Award Contracts. However, if the Multiple Award Contract was set-aside for small businesses, partially set-aside for small businesses, or reserved for small business, then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than

small, the agency cannot count any new orders issued pursuant to the contract, from that point forward, towards its small business goals. This includes set-asides, partial set-asides, and reserves for 8(a) BD Participants, certified HUBZone small business concerns, SDVO SBCs, and ED/WOSBs.

13 C.F.R. § 121.404(g)(4).

In interpreting this regulation, OHA has held:

[T]he consequence of a merger or acquisition involving a prime contractor is not that the prime contractor becomes ineligible for award of pending or future task orders, but rather that the procuring agency cannot claim goaling credit for those orders. If Appellant's interpretation were correct, § 121.404(g)(4) would become largely meaningless, as there would be no need to clarify that a procuring agency could not claim goaling credit for new orders issued to a prime contractor following a merger or acquisition, if the prime contractor were not eligible for such orders in the first instance.

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. Indeed, such an approach would be contrary to SBA's long-standing regulatory scheme, discussed above, whereby a prime contractor that is small at the time of contract award remains small for all orders issued under the contract, unless the CO, in his or her sole discretion, chooses to request recertification on an individual order-by-order basis.

*Odyssey System Consulting Group, supra*, at 17-18.

I find that this case is squarely on point with the *Odyssey System Consulting Group* precedent, which OHA has recently reaffirmed. *Size Appeal of Computer World Services Corp.*, SBA No. SIZ-6208, at 11 (2023). Trive Capital's acquisition of Appellant triggered a requirement to recertify with SBA, but this was not equivalent to a contracting officer's request for certification in connection with a procurement. Therefore, Appellant remained a small business under the certification it made for the underlying MAC in 2021. The Area Office erred in finding that Appellant's size for this procurement must be determined as of the date of its submission of its offer to this Task Order, as a result of its acquisition by Trive Capital. Rather, because there was no request for recertification, Appellant was to be considered small for the life of the instant MAC.

Accordingly, I find that the Area Office's size determination was based on an error of law, and that Appellant is an eligible small business for this instant procurement.

IV. Conclusion

I conclude that the Area Office's size determination was based upon an error of law. I therefore GRANT the instant appeal and REVERSE the instant size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d)

CHRISTOPHER HOLLEMAN  
Administrative Judge