

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

SIZE APPEAL OF:

Imagine One Technology & Management,  
Ltd.,

Appellant,

Appealed From  
Size Determination No. 02-2023-049

SBA No. SIZ-6271

Decided: March 11, 2024

APPEARANCES

John R. Tolle, Esq., H. Todd Whay, Esq., Baker, Cronogue, Tolle & Werfel, LLP,  
McLean, Virginia, for Imagine One Technology & Management, Ltd.

Jayna Marie Rust, Esq., Katherine S. Nucci, Esq., Scott F. Lane, Esq., Thompson Coburn  
LLP, Washington, D.C., for MANDEX Inc.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business  
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DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On December 19, 2023, the U.S. Small Business Administration (SBA) Office of  
Government Contracting — Area II (Area Office) issued Size Determination No. 02-2023-049,  
concluding that Imagine One Technology & Management, Ltd. (Appellant) is not a small  
business for the subject task order. The Area Office found that Appellant was required to  
recertify its size for the task order, because the task order was set-aside for small businesses but  
the underlying Multiple-Award Contract (MAC) was unrestricted. On appeal, Appellant  
maintains that the size determination was clearly erroneous, and requests that SBA's Office of

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<sup>1</sup> 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.

Hearings and Appeals (OHA) reverse. 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 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.

## II. Background

### A. The MAC

On June 1, 2018, the U.S. Department of the Navy (Navy) issued Request for Proposals (RFP) No. N00178-18-R-7000 for the SeaPort — Next Generation (SeaPort-NxG) MAC. The RFP explained that SeaPort-NxG would be a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) procurement for engineering and program management services. (RFP at 7.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with the exception for Military and Aerospace Equipment and Military Weapons. The RFP stipulated that the Navy would conduct “no evaluation of contract price and/or cost,” and offerors were not asked to provide pricing information in their proposals. (*Id.* at 57, 63.) Offers were due July 2, 2018.

SeaPort-NxG was not set aside or restricted to small businesses at the contract level, and the RFP explained that the Navy planned to award contracts to “each and all qualifying offerors.” (*Id.* at 13-14, 63.) Offerors were instructed, however, to identify their size status, and the RFP stated that “[c]ontractors will be required to recertify at the 5 year Option renewal” while “[r]epresentations of WOSB, SDVOSB, 8(a) and HUBZone shall be monitored for award eligibility in set-asides at the Task Order level.” (*Id.* at 14.) For individual task orders issued against the SeaPort-NxG MAC, the Navy might “conduct unrestricted competition [or] elect to restrict competition for Task Orders totally to Small Businesses, Service Disabled Veteran Owned Small Businesses (SDVOSB), Women-Owned Small Businesses, 8(a) Businesses, or HubZone Businesses.” (*Id.* at 11.) Furthermore, “[t]o be eligible as a Small Business, Service-Disabled Veteran Owned Small Business (SDVOSB), Women-Owned Small Business, 8(a) Business, or HubZone Business during the competitive ordering process, the Offeror must have had that status at the time of Task Order proposal submission.” (*Id.*) The SeaPort-NxG RFP incorporated by reference Federal Acquisition Regulation (FAR) clause 52.219-8, “Utilization of Small Business Concerns (NOV 2016).” (*Id.* at 24.)

On January 2, 2019, the Navy awarded a SeaPort-NxG prime contract to Appellant. Appellant self-certified as a small business at the SeaPort-NxG contract level.

### B. The TORFP

On September 14, 2022, the Naval Information Warfare Center — Atlantic issued Task Order Request for Proposals (TORFP) No. N6523622R3030 under the SeaPort-NxG MAC. The TORFP sought a contractor to perform technical solutions and support for the U.S. Marine

Corps. (TORFP at 9-10.) The TORFP was set aside entirely for small businesses. (*Id.* at 2, 77-78.) The TORFP did not, however, contain any explicit request for recertification of size at the task order level. Appellant submitted its offer for the task order on October 14, 2022. On April 14, 2023, Appellant was selected as the apparent awardee of the task order.

### C. Protest

On April 24, 2023, MANDEX Inc. (MANDEX), an unsuccessful offeror, filed a protest challenging Appellant's size. MANDEX alleged that Appellant did not qualify as a small business concern at the time it submitted its offer in response to the TORFP, nor when Appellant submitted its offer in 2018 in connection with the SeaPort-NxG MAC. (Protest at 1.)

MANDEX argued, first, that Appellant was required to recertify size when submitting its offer for the subject TORFP. (*Id.* at 4-5.) Under SBA regulations, when competing for a set-aside order issued against an unrestricted MAC, an offeror “must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order.” (*Id.* at 4-5, quoting 13 C.F.R. § 121.404(a)(1)(i)(A).) Here, Appellant submitted its proposal for the set-aside task order on October 14, 2022. (*Id.* at 5.) According to Appellant's SAM.gov registration in 2022, though, Appellant was not then a small business under the applicable size standard. (*Id.*) Therefore, MANDEX contended, Appellant is ineligible for the task order award. (*Id.*) Alternatively, if size is determined as of the date Appellant submitted its offer in 2018 at the SeaPort-NxG contract level, Appellant's SAM.gov registration reflects that Appellant also was not small in 2018. (*Id.* at 5-6.)

MANDEX additionally alleged that Appellant would have been required to recertify because it was “acquired” by an Employee Stock Ownership Plan (ESOP). (*Id.* at 6.) MANDEX asserted that Appellant's owner, Ms. Nancie Lumpkins, sold some of her ownership interest in Appellant to an ESOP after Appellant was awarded its SeaPort-NxG prime contract. (*Id.*) MANDEX urged that Appellant therefore was required to have recertified its size under 13 C.F.R. § 121.404(g)(2)(i). (*Id.*)

### D. Protest Response

On May 5, 2023, Appellant responded to the size protest. Appellant maintained that MANDEX's protest should be dismissed as untimely under 13 C.F.R. § 121.1004(a)(2), because the protest pertained to the award of a task order that did not require recertification. (Protest Response at 3-4.) Appellant denied that it was required to recertify its size. (*Id.* at 4-6.)

Appellant acknowledged that it was not small when it initially submitted its proposal for the SeaPort-NxG procurement. (*Id.* at 3.) After SBA increased the applicable size standard, however, the Navy permitted offerors to recertify their size. (*Id.*) Appellant did not exceed the new size standard and thus is properly considered small at the SeaPort-NxG contract level. (*Id.*) Appellant argued that, under 13 C.F.R. § 121.1004(a)(2), a size protest challenging Appellant's award of the original SeaPort-NxG MAC is untimely at this juncture. (*Id.* at 4, citing *Size Appeal of Special Operations Grp., Inc.*, SBA No. SIZ-6183 (2022).)

With regard to the subject TORFP, Appellant emphasized that recertification at the task order level was not required. (*Id.* at 5.) Under 13 C.F.R. § 121.404, according to Appellant, recertification only would have been necessary if the CO had explicitly requested it. (*Id.*) Because the instant TORFP contain no express language requiring recertification, Appellant remained small and eligible for award of the task order. (*Id.* at 5-6, citing *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022).)

Lastly, Appellant disputed that it was “acquired” by an ESOP. (*Id.* at 6.) The ESOP has been a shareholder of Appellant since 2014, and Appellant offered copies of its federal tax returns purporting to show that [XXXXXXXXXXXXX]. Specifically, Ms. Lumpkins owns [a majority] of Appellant and the ESOP [XX]%. (Appellant's 2017 Tax Return, Schedule K-1.) Furthermore, Appellant contended, even if the partial ownership change had triggered a requirement to recertify, this would only have impacted the Navy's ability to claim small business goaling credit but would not alter Appellant's eligibility for award. (*Id.*, citing 13 C.F.R. § 121.404(g)(4) and *Size Appeal of Mod. Healthcare Servs., J.V. LLC*, SBA No. SIZ-6114 (2021).)

#### E. Size Determination

On December 19, 2023, the Area Office issued Size Determination No. 02-2023-049, concluding that Appellant is not a small business for the task order. The Area Office found that, because the TORFP is a set-aside order issued under SeaPort-NxG, an unrestricted MAC, Appellant was required to recertify its size in response to the TORFP. (Size Determination at 6.) The Area Office additionally found that Appellant was required to recertify after a change of controlling ownership interest. (*Id.* at 7.)

The Area Office first explained that, according to SBA regulations enacted in 2020, “if an order or Blanket Purchase Agreement for a discrete category under an unrestricted [MAC] is set-aside exclusively for small business (i.e., small business set, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer.” (*Id.* at 5-6, quoting 13 C.F.R. § 121.404(a)(1)(ii)(A).) Here, SeaPort-NxG was an unrestricted MAC, but allowed for individual orders to be set-aside for small businesses, such as the instant TORFP. (*Id.* at 6.) The Area Office found that “per regulations regardless of whether it was explicitly required or not, recertification was required at the order level.” (*Id.*) The Area Office cited OHA's decision in *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022) for the proposition that the 2020 revisions to 13 C.F.R. § 121.404(a)(1)(i)(A) applied to all orders issued after November 16, 2020. (*Id.* at 6-7.)

The Area Office determined that Appellant was “not acquired” by the ESOP. (*Id.* at 7.) However, the ESOP's ownership of Appellant grew from [XX]% to [XX]% between 2015 to 2018. (*Id.*) At the time Ms. Lumpkins sold part of her interest to the ESOP, this resulted in “a change in ownership of the controlling interest” of Appellant. (*Id.*) Therefore, under 13 C.F.R. § 121.404(g)(2)(i), Appellant was required to recertify its size status. (*Id.*) The Area Office found it unnecessary to explore this question in greater detail, because it considered the issue “moot as recertification was required at the task order level as discussed above.” (*Id.*)

The Area Office reiterated that Appellant was required to recertify for the task order as of October 14, 2022, when Appellant submitted its offer for the TORFP. (*Id.* at 8.) Appellant conceded that it was not small under the applicable size standard in 2022. (*Id.*) Based on that admission, the Area Office concluded that Appellant was not small for the subject task order. (*Id.*)

#### F. Appeal

On January 2, 2024, Appellant filed the instant appeal. Appellant maintains that the Area Office incorrectly found that Appellant was required to recertify its size in connection with the instant task order. Recertification at the task order level was not required, so Appellant was entitled to rely upon its small business status at the SeaPort-NxG contract level. (Appeal at 10.)

Appellant contends, first, that the Area Office should have dismissed MANDEX's protest as untimely in accordance with *Size Appeal of Quality Innovation, Inc.*, SBA No. SIZ-6164 (2022). (*Id.*) There, OHA found that, because an underlying MAC was not awarded on an unrestricted basis, the challenged firm did not have to recertify for a task order under 13 C.F.R. § 121.404(a)(1)(i)(A). (*Id.* at 13.) Likewise, Appellant urges, the SeaPort-NxG MAC was not awarded on an unrestricted basis, because it permitted both unrestricted and set-aside orders. (*Id.* at 14.)

Even assuming MANDEX's size protest was timely, Appellant asserts that the Area Office nonetheless erred by applying SBA's 2020 revisions to 13 C.F.R. § 121.404(a) to the SeaPort-NxG MAC. (*Id.*) The Area Office relied solely on *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022) when determining that the rule changes apply to all orders after November 16, 2020. (*Id.*) However, the underlying MAC in *Avenge* had explicitly required recertification at the task order level. (*Id.* at 17.) The SeaPort-NxG MAC does not do so, and instead indicates that size status for task orders will be determined at the contract level. (*Id.*)

Furthermore, applying the 2020 rule changes would have an improper retroactive effect. (*Id.*) Because Appellant was awarded its SeaPort-NxG contract in 2019, applying 2020 rule changes would impair Appellant's vested rights earned through the SeaPort-NxG contract. (*Id.* at 22-23.) Under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), Appellant contends that “OHA's decision should be guided by considerations of fair notice, reasonable reliance, and settled expectations.” (*Id.* at 23.) Appellant, as well as other SeaPort-NxG prime contractors, reasonably relied on the belief it would retain its size status during the duration of the contract. (*Id.* at 24.) Absent any guidance to the contrary, this was a settled expectation and an application of the 2020 rule changes would strip Appellant of its vested rights. (*Id.* at 25.)

Appellant also argues that the Area Office erred in concluding that Appellant was required to recertify due to a change in controlling interest. (*Id.*) The Area Office, with little explanation, determined that a partial sale of stock to the ESOP resulted in a change of the controlling interest in Appellant. (*Id.*) However, when Ms. Lumpkins sold the shares in question to the ESOP, she remained trustee of the ESOP. (*Id.*) The ESOP can exert no control over Appellant since it holds no voting rights. (*Id.* at 26.) In addition, Ms. Lumpkins continued to

control Appellant through her majority ownership interest. (*Id.*) Therefore, the Area Office should not have found a change in control of Appellant. (*Id.*)

Even if there had been a change in the controlling interest, Appellant contends that SBA regulations would not require recertification at the task order level, based on OHA precedent. (*Id.*) In *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023), a case which also involved a SeaPort-NxG prime contractor, OHA determined that the challenged concern did not have to recertify after a change of control because the underlying task order solicitation did not require recertification. (*Id.* at 29.) Here, the instant TORFP likewise did not require recertification, so *Forward Slope* is directly on point and OHA must find that Appellant remained small despite the partial stock sale. (*Id.* at 30.) Appellant also highlights that the regulation cited by the Area Office, 13 C.F.R. § 121.404(g)(2)(i), merely provides that, when a merger or acquisition occurs, “the [procuring] agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.” (*Id.*) In other words, irrespective of any recertification required by § 121.404(g)(2)(i), Appellant still would remain eligible for award of a set-aside order, but the Navy could not consider any such award to Appellant for its small business goals. (*Id.* at 31.)

#### G. OHA's Request for Comments

On January 4, 2024, OHA requested that SBA submit comments on the issues presented in this appeal. More specifically, OHA asked that SBA address Appellant's arguments that the Area Office unfairly and improperly applied regulatory changes to 13 C.F.R. § 121.404(a) to Appellant retroactively. (OHA's Order at 1.) OHA further requested that SBA address *Res. Mgmt. Concepts, Inc. v. U.S. Small Bus. Admin.*, 2022 WL 971311 (D.D.C. Mar. 31, 2022) (“*RMC*”) — a case referenced by Appellant involving the SeaPort-NxG MAC — as well as OHA's recent decision in *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023), which also pertained to SeaPort-NxG.

#### H. SBA Comments

On January 19, 2024, SBA submitted comments in response to OHA's request. SBA maintains that the Area Office correctly determined that Appellant was required to recertify its size for the instant task order. (SBA Comments at 1.) SBA rejects Appellant's contention that its regulations were applied retroactively. (*Id.*)

SBA first attacks Appellant's reliance on *Size Appeal of Quality Innovation, Inc.*, SBA No. SIZ-6164 (2022). (*Id.* at 2.) There, OHA found that, because the underlying procurement reserved a pool of awards for small businesses, recertification was not required at the task order level. (*Id.*, citing *Quality Innovation*, SBA No. SIZ-6164, at 15.) Since the SeaPort-NxG MAC was unrestricted and the TORFP was set-aside for small businesses, *Quality Innovation* is inapposite. (*Id.* at 3.) SBA asserts that the more relevant precedent is *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023). (*Id.*) *McLaughlin* also concerned the SeaPort-NxG MAC, and OHA concluded that a size protest was timely under 13 C.F.R. § 121.1004(a)(2)(iii) since the protest challenged the award of a set-aside task order issued against an unrestricted MAC. (*Id.*, citing *McLaughlin*, SBA No. SIZ-6253, at 7.) OHA further observed

that, under 13 C.F.R. § 121.404(a)(1)(i)(A), the appropriate date for determining size was the date the challenged firm submitted an offer for the task order. (*Id.* at 5, citing *McLaughlin*, SBA No. SIZ-6253, at 8.) In the instant case, then, the Area Office correctly found that Appellant was required to recertify at the task order level. (*Id.* at 3-4.) The Area Office properly examined Appellant's size as of the date it submitted its offer, including price, for the order, on October 14, 2022. (*Id.* at 5.)

SBA argues that the Area Office also reasonably concluded that Appellant was required to recertify due to a change of controlling interest. (*Id.*) SBA regulations dictate recertification when there is a change in controlling interest. (*Id.* at 6, citing 13 C.F.R. § 121.404(g)(2)(i).) Furthermore, “[w]here a concern grows to be other than small, the procuring agency may exercise options and still count the award as an award to a small business, except that a required recertification as other than small under paragraph g(1), (2), or (3) of this section changes the firm's status for future options and orders.” (*Id.*, quoting 13 C.F.R. § 121.404(g).) SBA asserts that the Area Office properly determined that Ms. Lumpkin's sale of stock to the ESOP was a change in ownership of the controlling interest of Appellant, thus necessitating recertification. (*Id.*) Appellant's argument that there was no change because Ms. Lumpkin is trustee of the ESOP should fail, as Appellant disregards that ownership changed from an individual to a trust. (*Id.*) Under 13 C.F.R. § 121.404(g)(2)(i), SBA argues, “Appellant was required to recertify its small business status within 30 days of the change in controlling ownership that took place when the ESOP became the controlling owner.” (*Id.* at 7.)

SBA denies that its regulations are being applied to Appellant retroactively. (*Id.*) Instead, SBA regulations apply to future contracts, or task orders, awarded after a new regulation becomes effective. (*Id.* at 8.) Forbidding new regulations from applying to future task orders issued against long-term contracts would make Government contracting unduly burdensome. (*Id.*) If OHA were to accept Appellant's retroactivity reasoning, SBA would be left unable to implement needed changes for task orders issued against long-term MACs, as some such vehicles extend over 20 years in duration. (*Id.*) Furthermore, SBA notes, the U.S. Supreme Court already has recognized that orders are new “contracts.” (*Id.* at 10, citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 174 (2016).) The 2020 recertification regulations only impact new task orders after the regulations became effective. (*Id.*)

Lastly, SBA offers its view of the *RMC* decision. (*Id.* at 11.) The main issue in that case was the “different treatment of priced and unpriced MACs” in SBA regulations. (*Id.*) In particular, the 2020 version of 13 C.F.R. § 121.404(a) addressed orders under priced MACs, whereas SeaPort-NxG was unpriced. (*Id.* at 11-12.) Because SBA could see no justification for differing treatments of orders under priced and unpriced MACs, SBA “clarified its position” in May 2023 by formally revising 13 C.F.R. § 121.404(a)(1)(iv), such that the same recertification rules for set-aside orders apply to unpriced MACs as well as to priced MACs. (*Id.* at 12.)

### I. CO's Response

On January 26, 2024, the CO responded to SBA's comments. The CO maintains that SBA's comments are marred by several factual and legal errors. (CO's Response at 2.)

The CO first disputes SBA's and the Area Office's reliance on 13 C.F.R. § 121.404(a)(1)(i)(A). (*Id.* at 6.) This section expressly states that it applies only to “initial offer[s] (or other formal response to a solicitation) **which includes price** for a Multiple Award Contract.” (*Id.*, emphasis added by the CO.) Because SeaPort-NxG was an unpriced MAC, this provision is not applicable, and the Area Office clearly erred in relying upon it when considering whether Appellant was required to recertify for this order. (*Id.*)

The Court in *RMC* found that § 121.404(a)(1)(i)(A) does not apply to SeaPort-NxG. (*Id.* at 6-7.) In particular, the 2020 revisions to § 121.404(a) did not mention unpriced MACs. In 2021, SBA amended its regulations to state that, for unpriced MACs, “size will be determined as of the date of initial offer, which may not include price.” (*Id.*, quoting 13 C.F.R. § 121.404(a)(1)(iv) (2021).) SBA attempted to persuade the Court in *RMC* that section (iv) allowed SBA to apply sections (i) and (ii) to task orders issued against unpriced MACs. (*Id.* at 7, citing *RMC* at \*3.) However, the Court found that sections (i) and (ii) “apply only to unrestricted MACs that *include price*” and do “not naturally apply to IDIQ MACs that do not include price.” (*Id.*, citing *RMC* at \*4.) Evidently dissatisfied with this decision, SBA then revised its regulations again in May 2023, stating that, for unpriced MACs, “[s]ize for set-aside orders will be determined in accordance with subparagraphs (i)(A), (i)(B), (ii)(A), or (ii)(B), as appropriate.” (*Id.*, quoting 13 C.F.R. § 121.404(a)(1)(iv) (2023).) These latest revisions to § 121.404(a)(1)(iv), though, became effective well after Appellant submitted its proposal for the TORFP on October 14, 2022, and even after Appellant had been awarded the task order on April 14, 2023. (*Id.* at 8.) The CO contends that the Court's reasoning in *RMC* should be adopted here, and that retroactively applying 13 C.F.R. § 121.404(a)(1)(iv) (2023) to the instant TORFP is clearly improper. (*Id.* at 7-8.)

The CO further disputes the Area Office's reliance on *Avenge*. (*Id.* at 8.) That decision, unlike here, concerned a priced MAC. (*Id.* at 8, citing *Avenge*, SBA No. SIZ-6178, at 4.) *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023) also is distinguishable. (*Id.*) Although that case involved a task order under the SeaPort-NxG MAC, there was no argument or discussion of the fact that SeaPort-NxG was an unpriced MAC. (*Id.*) The CO argues that the most relevant case is *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023). (*Id.*) This case also concerned SeaPort-NxG, and OHA found that recertification was not required after the concern had been acquired because the subject task order did not request recertification. (*Id.* at 8-9, citing *Forward Slope*, SBA No. SIZ-6258, at 5.) Recertification likewise was not requested in the instant TORFP, so the CO asserts that Appellant's size remains the same as when it certified its size at the SeaPort-NxG contract level. (*Id.* at 9.)

Lastly, the CO disagrees with SBA's interpretation of 13 C.F.R. § 121.404(g)(2)(i). (*Id.*) Recertification under this provision does not render a formerly-small concern ineligible for a task order award, but rather requires only that “the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.” (*Id.*) The CO agrees with Appellant that, even if Appellant were required to recertify under this provision, Appellant would remain small for SeaPort-NxG task orders. (*Id.*) The Navy, however, could not count any award to Appellant towards its small business goals. (*Id.*)



### J. MANDEX's Response

On January 26, 2024, MANDEX responded to SBA's comments. MANDEX concurs with the Area Office and SBA that Appellant was required to recertify its size for the subject TORFP under 13 C.F.R. § 121.404(a)(1)(i)(A). (MANDEX Response at 2.)

MANDEX insists that its protest was timely under 13 C.F.R. § 121.1004(a)(2)(iii), since the protest was filed within five business days after award of a set-aside task order issued against an unrestricted MAC. (*Id.* at 3.) Furthermore, the Area Office properly applied 13 C.F.R. § 121.404(a)(1)(i)(A) to conclude that Appellant was required to recertify its size at the task order level as of October 14, 2022. (*Id.*) Because the TORFP was set-aside for small businesses and SeaPort-NxG was an unrestricted MAC, the Area Office committed no error. (*Id.*)

MANDEX argues that Appellant's reliance on *Size Appeal of Quality Innovation, Inc.*, SBA No. SIZ-6164 (2022) is misplaced. (*Id.* at 4.) The underlying MAC in *Quality Innovation* established a pool of small business reserves, unlike SeaPort-NxG which was awarded on an unrestricted basis. (*Id.*) OHA should reject Appellant's contention that SeaPort-NxG was restricted because it allows the Navy to issue set-aside task orders. (*Id.*) Contrary to Appellant's claims, OHA in *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023) and *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022) conclusively determined that SeaPort-NxG was unrestricted. (*Id.*) Furthermore, Appellant did not attempt to convince the Area Office that SeaPort-NxG was a restricted MAC. (*Id.* at 5.) Appellant's reliance on the competitive ordering procedures does not, in any event, show that SeaPort-NxG was awarded on a restricted basis at the contract level. (*Id.*)

MANDEX disputes Appellant's and the CO's claim that applying 13 C.F.R. § 121.404(a)(1)(iv) to SeaPort-NxG would be improperly retroactive. (*Id.* at 6.) As SBA noted when revising the regulation in 2023, SBA intended to apply the revised rule to all future set-aside task orders regardless of when the underlying MAC was awarded. (*Id.* at 6-7, citing 88 Fed. Reg. 26,164, 26,167-68 (Apr. 27, 2023).) OHA observed in *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022) that SBA could have exempted previously-awarded MACs from being subject to regulatory changes, yet did not do so. (*Id.* at 7.)

MANDEX also finds *RMC* unpersuasive. (*Id.*) MANDEX allows that there was an issue in *RMC* as to whether 13 C.F.R. § 121.404(a)(1)(i)(A) applies to unpriced MACs. (*Id.* at 8.) However, the Court ultimately did not decide this question since the parties agreed to settle their dispute. (*Id.*) Furthermore, SBA eliminated any uncertainty on this point in 2023 by revising 13 C.F.R. § 121.404(a)(1)(iv), upon finding that there was no sound policy justification “for treating orders issued on these contracts differently, simply because the contract did not require price with initial offer.” (*Id.* at 9, quoting 88 Fed. Reg. at 26,167.) MANDEX therefore asserts that any settlement reached in *RMC* applies only to those particular litigants. (*Id.*) All other SeaPort-NxG prime contractors submitting offers for set-aside orders should be required to recertify size at the task order level under 13 C.F.R. § 121.404(a)(1)(iv). (*Id.*)

### K. Appellant's Response

On January 26, 2024, Appellant filed a response to SBA's comments. Appellant finds it “striking as to what the SBA failed to discuss,” notably specific provisions of SeaPort-NxG, Appellant's retroactivity argument, and OHA's *Forward Slope* decision. (Appellant Response at 1-2.)

Appellant emphasizes that it was not required to submit price with its offer for SeaPort-NxG. (*Id.* at 2.) Because of this dispositive fact, SBA mistakenly relies on 13 C.F.R. § 121.404(a)(1)(i)(A) and *McLaughlin* to find recertification was required. (*Id.*) Provisions in the SeaPort-NxG contracts and communications with the Navy further show that offerors were only required to certify their size when submitting initial offers at the contract level. (*Id.* at 2-3, citing SeaPort-NxG at 15, 30.) The Navy advised that an offeror's size would be determined at the contract level unless an offeror was required to recertify due to a merger or acquisition. (*Id.* at 3.)

Appellant disagrees with SBA's interpretation of the *RMC* decision. (*Id.* at 4.) In both *RMC* and the case presently at hand, the same version of 13 C.F.R. § 121.404(a)(1)(iv) was in effect when the task orders were issued. (*Id.* at 5.) The same analysis therefore should apply, and absent a request from the CO for Appellant to recertify its size status, Appellant's size should be determined based on its certification as small on the SeaPort-NxG contract, not for an individual task order. (*Id.*)

Appellant reiterates its argument that applying 2020 rule changes would have an improper retroactive effect. (*Id.*) Likewise, the May 30, 2023 revision to 13 C.F.R. § 121.404(a)(1)(iv) cannot apply. (*Id.*) Since the deadline to submit an offer for the TORFP was October 14, 2022, and Appellant was awarded the order on April 14, 2023, applying the 2023 revision to § 121.404(a)(1)(iv) in this case would be improper. (*Id.* at 6.)

Lastly, Appellant again disputes that it was required to recertify due to a change in controlling interest. (*Id.*) Appellant maintains that there was no change in controlling interest of Appellant when Ms. Lumpkins sold some of her shares to the ESOP. (*Id.*) In its comments, SBA also failed to refute Appellant's contention that, under *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023), Appellant was not required to recertify absent a request from the CO. (*Id.* at 6-7.) Furthermore, even if Appellant had been required to recertify, Appellant argues that it would still be eligible for the instant task order. (*Id.* at 8.) SBA and the Area Office claimed that recertification was required under 13 C.F.R. § 121.404(g)(2)(i). (*Id.*) However, this section merely states that, when an acquisition or merger occurs, “the [procuring] agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its small business goals.” (*Id.*, quoting 13 C.F.R. § 121.404(g)(2)(i).) Appellant highlights that the regulation does not say that the contractor would no longer be eligible for future task orders. (*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 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 key issue presented here is whether Appellant was required to recertify its size when competing for the subject task order in 2022. The issue is critical because, if recertification was not required, Appellant was entitled to rely upon its contract-level size certification, and there is no dispute that Appellant is small at the SeaPort-NxG contract level. Section II.A, *supra*. Upon review of the record, the parties' arguments, and the regulatory history surrounding applicable SBA regulations, I must agree with Appellant and the CO that recertification was not required for the instant task order. This appeal must therefore be granted.

##### 1. 13 C.F.R. § 121.404(a)

In the size determination, the Area Office found that Appellant was required to recertify its size at the task order level pursuant to SBA regulations at 13 C.F.R. § 121.404(a). Section II.E, *supra*. As currently drafted, those regulations generally require that a concern must recertify its size if it chooses to compete for a set-aside order issued under an unrestricted MAC. *Id.* The Area Office appears to have overlooked, however, that SBA revised § 121.404(a) multiple times over the period from October 2020 through May 2023. Appellant submitted its offer for the subject TORFP on October 14, 2022, precisely in the midst of these changes. Section II.B, *supra*. An understanding of the regulatory history of § 121.404(a), and exactly which version of the rule applies in the instant case, is thus essential to resolution of this appeal.

On October 16, 2020, SBA promulgated a final rule which, among other changes, substantially revised § 121.404(a). 85 Fed. Reg. 66,146 (Oct. 16, 2020). In particular, as is pertinent here, SBA introduced provisions pertaining to MACs whereby, if an individual order is set aside for small businesses but the underlying MAC was unrestricted, a contractor is required to recertify its size if it competes for such an order. *Id.* at 66,180-81. SBA commented that “[t]o allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.” *Id.* at 66,151.

As originally promulgated, the 2020 version of § 121.404(a) did not fully reflect SBA's intentions. SBA therefore proceeded to issue four “sets of corrections” to the rules. *See* 85 Fed. Reg. 72,916 (Nov. 16, 2020); 86 Fed. Reg. 2,957 (Jan. 14, 2021); 86 Fed. Reg. 10,732 (Feb. 23, 2021); and 86 Fed. Reg. 38,537 (July 22, 2021). In its fourth set of corrections, SBA added a

provision at § 121.404(a)(1)(iv) pertaining to unpriced MACs. The new § 121.404(a)(1)(iv) stated:

(iv) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

86 Fed. Reg. 38,537, 38,538 (July 22, 2021). SBA explained its rationale for this change as follows:

In the [October 2020] final rule, SBA amended § 121.404(a)(1) to revise and clarify when the size status of a business concern is determined for a multiple-award contract. In doing so, SBA inadvertently removed § 121.404(a)(1)(iv), which concerned when the size of a concern is determined for multiple-award contracts for which offerors are not required to submit price as part of the offer. SBA did not intend to delete that provision. This document adds back in § 121.404(a)(1)(iv) as it appeared in SBA's regulations prior to the final rule.

*Id.*

On September 9, 2022, SBA issued a proposed rule with additional changes to § 121.404(a). 87 Fed. Reg. 55,642 (Sept. 9, 2022). In particular, SBA expressed concern that, based on its regulations that were at that time in effect, orders under unpriced MACs were treated differently than orders under priced MACs. To address this issue, SBA proposed to amend § 121.404(a)(1)(iv) to read:

(iv) *Multiple award contract where price not required.* For a Multiple Award Contract, where concerns are not required to submit price as part of the offer for the contract, size for the contract will be determined as of the date of initial offer, which may not include price. Size for set-aside orders will be determined in accordance with paragraph (a)(1)(i)(A) or (B) or (a)(1)(ii)(A) or (B) of this section, as appropriate.

*Id.* at 55,665. In its commentary accompanying the proposed rule, SBA offered the following explanation for the proposed change:

SBA proposes to clarify § 121.404(a)(1)(iv), which provides that size is determined for a multiple award contract at the time of initial offer on the contract even if the initial offer might not include price. As stated in the existing regulation, this size determination applies to the contract. However, SBA never intended that orders issued pursuant to that contract follow the same rule. SBA is aware of some confusion on that point. Accordingly, the proposed clarification would make clear that orders issued pursuant to such a multiple award contract that do not include price are treated similarly to orders under multiple award contracts generally. SBA believes there is no justification for exempting orders issued on these contracts

differently, simply because the contract did not require price with initial offer. Thus, the proposed rule would specifically add that size for set-aside orders will be determined in accordance with paragraph (a)(1)(i)(A) or (B) or (a)(1)(ii)(A) or (B), as appropriate.

*Id.* at 55,643-44.

On April 27, 2023, SBA promulgated a final rule formally adopting the proposed revisions to § 121.404(a)(1)(iv). 88 Fed. Reg. 26,164 (Apr. 27, 2023). SBA acknowledged that some commenters had opposed the proposed change, but reiterated its position “there is no justification for treating orders issued on [unpriced MACs] differently, simply because the contract did not require price with initial offer.” *Id.* at 26,167. The final rule was effective May 30, 2023, and “applies to all solicitations issued on or after that date.” *Id.* at 26,216.

Based on the above regulatory history, it is clear that the Area Office incorrectly concluded that Appellant was required to recertify its size in 2022 when Appellant submitted its offer for the subject task order. There is no dispute that SeaPort-NxG was an unpriced MAC, and offerors were not required to submit price as part of the initial offer. Section II.A, *supra*. SBA regulations in effect on October 14, 2022 — when Appellant submitted its offer for the task order — drew a distinction between orders under priced MACs and orders under unpriced MACs. Specifically, for orders under unpriced MACs, SBA regulations stated that size would be determined at the contract level:

(iv) For an indefinite delivery, indefinite quantity (IDIQ), Multiple Award Contract, where concerns are not required to submit price as part of the offer for the IDIQ contract, size will be determined as of the date of initial offer, which may not include price.

13 C.F.R. § 121.404(a)(1)(iv) (2022). SBA itself acknowledged that the 2022 version of its regulations treated orders under unpriced MACs differently than orders under priced MACs. 87 Fed. Reg. 55,642, 55,643-44 (Sept. 9, 2022). Deeming this result to be poor public policy, SBA therefore proposed, and ultimately adopted, a new version of § 121.404(a)(1)(iv) eliminating the disparate treatment. *Id.* The revised version of § 121.404(a)(1)(iv), though, did not become effective until May 30, 2023, and thus cannot apply to a task order competition conducted in 2022.

The Court's decision in *Res. Mgmt. Concepts, Inc. v. U.S. Small Business Administration*, 2022 WL 971311 (D.D.C. Mar. 31, 2022), although not binding on OHA, is nevertheless instructive. There, a federal district court considered SBA's regulations at § 121.404(a) as they applied to SeaPort-NxG. The plaintiff brought suit against SBA, claiming that the 2020 changes to 13 C.F.R. § 121.404(a) improperly applied retroactively to SeaPort-NxG. *RMC* at 4. During the course of the litigation, SBA issued its “fourth set of corrections” to § 121.404(a), adding § 121.404(a)(1)(iv). *Id.* at 4-5. The plaintiff maintained that the corrections rendered the case moot, as they further showed that regulatory provisions pertaining to orders under priced MACs did not apply to SeaPort-NxG, which “did not require pricing at the time of the MAC.” *Id.* at 5. In

response, SBA claimed that orders under priced and unpriced MACs were governed by the same rules. *Id.*

Although the Court declined to grant summary relief to either party, the Court opined that it was “not persuaded” by SBA's argument, and that “SBA's interpretation has no basis in the regulatory text and structure.” *Id.* at 7. According to their plain language, “the 2020 Regulations apply only to unrestricted MACs that *include price.*” *Id.* (emphasis in original). Similarly, the 2021 set of corrections, which added § 121.404(a)(1)(iv), contained “no recertification requirement” at the task order level for unpriced MACs. *Id.*

Here, like in the *RMC* decision, SBA regulations in effect at the time of the task order competition distinguished between orders under priced MACs and orders under unpriced MACs. *See* 13 C.F.R. § 121.404(a)(1)(iv) (2022). Since SeaPort-NxG is an unpriced MAC, there was no requirement during 2022 that Appellant recertify its size at the task order level. Instead, based on the 2022 version of 13 C.F.R. § 121.404(a)(1)(iv), Appellant's size is determined at the contract level, as of the date Appellant submitted its offer for the underlying SeaPort-NxG MAC. Appellant submitted its offer for the MAC on July 2, 2018, and was a small business at the contract level. The Area Office thus clearly erred in finding that Appellant was required to recertify for the instant task order in 2022.

OHA's decision in *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023) does not compel a different result. There, OHA found that an area office had incorrectly dismissed, as untimely, a size protest against the award of a task order under the SeaPort-NxG MAC. *McLaughlin*, SBA No. SIZ-6253, at 5-6. OHA therefore remanded the matter to the area office for a new size determination. *Id.* at 7. Notably, the parties did not argue, nor did OHA address, whether SeaPort-NxG was a priced or an unpriced MAC. Likewise, as the dispositive question in the case was protest timeliness, OHA had no need to consider which version of 13 C.F.R. § 121.404(a) would have been applicable at the time of task order proposal submission.

As a final matter, I must agree with SBA that the revised regulations at 13 C.F.R. § 121.404(a) do apply to future SeaPort-NxG task orders, as well as future orders issued under other unrestricted MACs, irrespective of whether such MACs are priced or unpriced. As SBA correctly observes, future task orders are legally considered a type of new “contract.” *Kingdomware Techs., Inc. v. U. S.*, 579 U.S. 162 (2016). As a result, SBA's revised regulations at 13 C.F.R. § 121.404(a) may appropriately be applied to future orders without any retroactive effect. The problem here arises because Appellant submitted its proposal for the instant task order in 2022, well before the revisions to 13 C.F.R. § 121.404(a)(1)(iv) became effective on May 30, 2023.

## 2. 13 C.F.R. § 121.404(g)(2)(i)

The Area Office also found that Appellant was required to recertify due to a change in controlling ownership under 13 C.F.R. § 121.404(g)(2)(i). Section II.E, *supra*. This finding too was clearly erroneous. The Area Office reached its conclusion after determining that the ESOP's ownership stake in Appellant grew from [XX]% to [XX]% between 2015 and 2018. Section II.E, *supra*. The Area Office apparently viewed this as a change of the controlling ownership

interest of Appellant. *Id.* The Area Office neglected to consider, however, that Ms. Lumpkins still retained a [majority] ownership interest. Section II.D, *supra*. As a result, there was no change in the controlling interest [XXXXXXXXXX].

As Appellant correctly observes, even assuming there had been a change in the controlling ownership interest, SBA regulations would not preclude Appellant from being awarded the task order. OHA thus has explained that:

[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.

*Size Appeal of Odyssey Sys. Consulting Grp., Ltd.*, SBA No. SIZ-6135, at 20 (2021). OHA has affirmed this same reasoning in subsequent cases, including in *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023), a case which dealt specifically with a SeaPort-NxG prime contractor. *See also Size Appeal of Computer World Servs. Corp.*, SBA No. SIZ-6208, at 11 (2023). Even if there had been a change in Appellant's controlling ownership, then, the Area Office erred in finding that any associated recertification rendered Appellant other-than-small for the instant task order. Instead, Appellant would remain small under the contract-level certification it made for the underlying SeaPort-NxG MAC in 2018, although the Navy could no longer count awards to Appellant for goaling purposes.

#### IV. Conclusion

For the above reasons, the appeal is GRANTED. Given the version of SBA regulations in effect in 2022, the Area Office clearly erred in concluding that Appellant was required to recertify its size for the instant task order. Likewise, the Area Office incorrectly found Appellant is not eligible for the task order due to the sale of part of Ms. Lumpkins's ownership interest to the ESOP. Size Determination No. 02-2023-049 therefore is REVERSED. Appellant remains eligible for award of the TORFP due to its contract-level certification made when submitting its offer for the SeaPort-NxG MAC. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge