United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: LinTech Global Inc., Appellant, Appealed From Size Determination No. 04-2024-008	SBA No. SIZ-6287 Decided: May 29, 2024

APPEARANCES

Michelle F. Kantor, Esq., Bryan Kostura, Esq., McDonald Hopkins LLC, Chicago, Illinois, for Appellant

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION[1]

I. Introduction and Jurisdiction

On December 15, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2024-008, concluding that LinTech Global Inc. (Appellant) is not a small business for the subject task order issued against a U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) contract. 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.

[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.

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 timely filed the instant appeal on January 2, 2024.[2] Accordingly, this matter is properly before OHA for decision.

II. Background

A. FSS Contract and BPA

On December 7, 2020, GSA awarded Appellant FSS Contract No. 47QTCA21D0029, with a five-year base period and three additional five-year options. Appellant self-certified as a small business under North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, which at that time had a corresponding size standard of $30 million average annual receipts.

On July 27, 2021, U.S. Environmental Protection Agency (EPA) issued Request for Quotations (RFQ) No. 68HERD21Q0014, seeking to award one or more Blanket Purchase Agreements (BPAs) to concerns holding an FSS contract with Special Item Number (SIN) 54151S. (RFQ at 1.) The RFQ was set aside entirely for small businesses. (*Id.* at 3.) On June 15, 2022, Appellant was awarded BPA No. 68HERD22A0003.

On December 29, 2022, Digital Intelligence Systems, LLC (DISYS) purchased 100% of Appellant's stock, and Appellant became a wholly-owned subsidiary of DISYS. On January 26, 2023, Appellant notified GSA and EPA of the change in its controlling ownership interest, pursuant to Federal Acquisition Regulation (FAR) clause 52.219-28 and 13 C.F.R. § 121.404(g)(2).

B. The Task Order

On April 13, 2023, EPA issued Task Order Request for Proposals (TORFP) No. 68HERD23R0043 for the award of a task order under the BPAs. The CO set aside the TORFP entirely for small businesses, and assigned NAICS code 541512 with a size standard of $34 million in average annual receipts.[3] The TORFP contained no express language instructing BPA holders to certify, or recertify, size for this task order. Quotations were due May 1, 2023. On October 24, 2023, the CO announced that Appellant was the apparent awardee.

---

[2] Ordinarily, a size appeal must be filed within 15 calendar days after receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on December 15, 2023. Fifteen calendar days after December 15, 2023 was December 30, 2023. Because December 30, 2023 was a Saturday, and Monday, January 1, 2024 was a federal holiday, the appeal petition was due the next business day: Tuesday, January 2, 2024. 13 C.F.R. § 134.202(d)(1)(ii).

[3] Effective December 19, 2022, SBA increased the size standard for NAICS code 541512 from $30 million to $34 million. 87 Fed. Reg. 69,118, 69,124 (Nov. 17, 2022).

C. Protests

On October 31, 2023, an unsuccessful offeror, Plateau Software, Inc. (Plateau), filed a size protest alleging that Appellant is not small. On November 16, 2023, the Area Office issued Size Determination No. 04-2024-004, dismissing Plateau's protest as untimely. The Area Office found that the TORFP did not require recertification, and as such, a size protest would have been due by December 9, 2020, five business days after Plateau knew, or should have known, that Appellant had been awarded the underlying FSS contract. (Size Determination No. 04-2024-004, at 1-2.) The Area Director, however, initiated her own size protest against Appellant, adopting portions of Plateau's allegations. (Area Director's Protest at 1.) The Area Director explained:

> During the fact-finding phase of the aforementioned size case 04-2024-004, [Appellant] provided [the Area Office] with information pertaining to their required notification to the contracting officers from [GSA] and [EPA] for their contract vehicles 47QTCA21D0029 and 68HERD22A0003, respectively, regarding a change in ownership as required by FAR 52.219-28 and 13 CFR 121.404(g). [Appellant] notified each agency that it was other-than-small (OTS) by informing the agencies of the recent change in ownership, and by referencing their revised System for Award Management (SAM) representations and certifications, which indicated that they were OTS as a result of the change in ownership.

(*Id.*) Due to its acquisition by DISYS, Appellant "appears not to have been eligible to participate in any future orders as a small business" once it recertified as other than small following the acquisition. (*Id.*) Because Appellant was no longer small at the time Appellant submitted a proposal for the TORFP, "it is appropriate to question [Appellant's] size and eligibility to participate in the TORFP as a small business." (*Id.* at 2.)

D. Protest Response

On November 28, 2023, Appellant responded to the Area Director's protest. Appellant highlighted that neither the BPA nor the TORFP contained explicit language requiring recertification. (Protest Response at 4-5.) Appellant argued that "[t]here are two different recertification requirements in play regarding [its] contract award": (1) a post-award small business re-representation under FAR clause 52.219-28; and (2) recertification under 13 C.F.R. § 121.404(g). (*Id.* at 4.) According to Appellant, neither of these provisions precluded Appellant from submitting a proposal in response to the TORFP or from being awarded the task order. (*Id.*) Appellant maintained that its size and eligibility for the order should be assessed as of the date it submitted the offer for the base FSS contract. (*Id.* at 7.)

Appellant claimed that 13 C.F.R. § 121.404(g)(1) — (3) are inapplicable because the TORFP was issued under an FSS contract. (*Id.* at 8.) Furthermore, 13 C.F.R. § 121.404(a)(1)(ii)(A) states, in relevant part:

> ***Unrestricted Multiple Award Contracts***. For an unrestricted Multiple Award Contract, if a business concern . . . is small at the time of offer and contract-level recertification for discrete categories on the Multiple Award Contract, **it is small**

> **for goaling purposes for each order issued against any of those categories, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement. Except for orders or Blanket Purchase Agreements issued under any Federal Supply Schedule contract. . . .** However, where the underlying Multiple Award Contract has been awarded to a pool of concerns for which small business status is required, **if an order or a Blanket Purchase Agreement under that Multiple Award Contract is set-aside exclusively for concerns in the small business pool, concerns need not recertify their status as small business concerns (unless a contracting officer requests size certifications with respect to a specific order or Blanket Purchase Agreement)**.

(*Id.* at 5-6 (emphasis added by Appellant).) In the preamble accompanying rule revisions in 2020, SBA expressed its rationale for exempting FSS contracts from the requirement to recertify at the task order level:

> Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, **except for orders or Blanket Purchase Agreements issued under any FSS contract**, if an order under an unrestricted [multiple-award contract (MAC)] is set-aside exclusively for small business . . . A concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order.
>
> . . .
>
> **SBA believes that size and status should flow from the underlying MAC to individual orders issued under that MAC, and the firm can continue to rely on its representations for the MAC itself unless a contracting officer requests recertification of size and/or status with respect to a specific order**. SBA makes that revision in this final rule.
>
> . . .
>
> **[T]he FSS program operates under a separate statutory authority and [] set-asides are discretionary, not mandatory, under this authority**. SBA and GSA worked closely together to stand up and create this discretionary authority . . . This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111-240) and implemented in FAR 8.405-5 in November 2011 . . . **Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification**

> **requirement to the FSS program**. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

(*Id.* at 6-7, quoting 85 Fed. Reg. 66,146, 66,151-52 (Oct. 16, 2020) (emphasis added by Appellant).) Appellant argued that the instant FSS contract was a restricted MAC as it "specifically identifies" Appellant as a small business. (*Id.* at 7.) EPA did not request recertification for the TORFP, so Appellant's size and status as a small business flow from the underlying FSS contract. (*Id.*, citing 13 C.F.R. § 121.404(a)(1)(ii)(B).) Thus, Appellant remained small when it submitted its proposal for the TORFP. (*Id.*) Even if the FSS contract were unrestricted, though, FSS contracts are also broadly exempted from the rules that otherwise apply to unrestricted MACs. (*Id.*) In the instant case, then, "it does not matter" whether the FSS contract was restricted or unrestricted. (*Id.* at 5.)

Next, Appellant argued that, although Appellant complied with FAR clause 52.219-28 and re-represented its size following its acquisition, "OHA has held that FAR 52.219-28 does not relate to recertification at the task order level." (*Id.* at 8, citing *Size Appeal of Odyssey Sys. Consulting Grp., Ltd.*, SBA No. SIZ-6135 (2021).) "OHA also stated that a contract clause that implements FAR 52.219-28 '***does not address recertification at the task order level***.'" (*Id.*, emphasis Appellant's.) Because recertification due to a merger, sale, or acquisition is not the same as recertification for a particular task order, Appellant was not precluded from bidding on the TORFP through FAR clause 52.219-28. (*Id.*)

Appellant challenged the Area Director's reliance on 13 C.F.R. § 121.404(g) in questioning its eligibility to bid on the TORFP. Appellant recited provisions under 13 C.F.R. § 121.404(g)(1) — (3) and argued that none of these provisions precludes Appellant from competing for or being awarded the TORFP.

Appellant asserted that 13 C.F.R. § 121.404(g)(1) is plainly inapplicable to this case as it "only applies to contract novations." (*Id.* at 8.) Appellant argued inapplicability of 13 C.F.R. § 121.404(g)(2) in greater detail:

> In the case of a merger, acquisition, or sale which results in a change in controlling interest under § 121.103, . . . 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**.

(*Id.* at 8-9, emphasis added by Appellant.) In Appellant's view, 13 C.F.R. § 121.404(g)(2)(i) "expressly" provides that recertification as other than small as a result of a merger, sale, or acquisition impacts the procuring agency's ability to claim small business credit on the task order contract from that point forward, but "does not state that such recertification renders a concern with an existing MAC or [Multiple-Award Schedule (MAS)] contract ineligible for set-aside orders under that MAC or MAS (whether unrestricted or not)." (*Id.* at 9, emphasis Appellant's.)

Appellant further highlighted that OHA precedent is "clear that recertification under [13 C.F.R.] § 121.404(g)(2) based on a merger, sale, or acquisition does not apply to task orders where recertification is not explicitly required." (*Id.*, emphasis Appellant's.) In particular, Appellant pointed to *Odyssey* wherein OHA held that recertification was not required as a result of a merger, sale, or acquisition under 13 C.F.R. § 121.404(g)(2) "without specific language in the task order solicitation" or a CO's request. (*Id.* at 11-12, also citing *Size Appeal of Glacier Techs., LLC*, SBA No. SIZ-6217 (2023).) Appellant further cited multiple OHA cases in arguing that it has been OHA's position that "'**[t]he determination of whether an individual order required recertification is made primarily on the basis of the *task order solicitation and relevant provisions in the underlying contracts*.**'D' (*Id.* at 12, emphases Appellant's.)

Appellant argued that OHA's ruling in *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139 (2022) "strengthens" Appellant's position. (*Id.* at 11.) *EBA Ernest Bland* involved a 100% set-aside task order issued against a "GSA FSS MAC with a duration of longer than 5 years," where the task order solicitation did not explicitly request or require recertification from the FSS contractors. (*Id.*) The protestor in *EBA Ernest Bland* alleged that the challenged concern no longer qualified as a small business at the time of the task order solicitation due to a merger. (*Id.*) OHA determined that "the protested firm had certified as small when it was awarded a [FSS] contract, [and] was still eligible to compete for a task order set aside under the FSS even after it had merged with another firm and was no longer small." (*Id.*) In *EBA Ernest Bland*, the protestor also argued that 13 C.F.R. § 121.404(g)(2) "mandates recertification as a result of a merger, sale, or acquisition." (*Id.*) OHA, however, flatly rejected that argument, concluding that "'[a]bsent expressed language in the task order [solicitation] requesting size recertification for the individual task order, a plain text reading of § 121.404(g)(2) does not mandate recertification as a result of a merger, sale, or acquisition."D' (*Id.*, quoting *EBA Ernest Bland*, SBA No. SIZ-6139, at 6.) Similarly, in the instant case, EPA did not request recertification "explicitly or implicitly" for the instant task order, issued against an FSS contract. (*Id.*) 13 C.F.R. § 121.404(g)(2)(iii) "addresses mergers or acquisitions occurring between the offer and award" and "does not speak" to orders under FSS contracts, whether restricted or unrestricted. (*Id.*) Thus, § 121.404(g)(2)(iii) has no bearing here. (*Id.*)

13 C.F.R. § 121.404(g)(3) states:

> For the purposes of contracts (including Multiple Award Contracts) with durations of more than five years (including options), a contracting officer must request that a business concern recertify its small business size status no more than 120 days prior to the end of the fifth year of the contract, and no more than 120 days prior to exercising any option thereafter. **If the contractor certifies that it is other than small, the agency can no longer count the options or orders issued pursuant to the contract towards its small business prime contracting goals**. A contracting officer may also request size recertification, as he or she deems appropriate, prior to the 120-day point in the fifth year of a long-term multiple award contract. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new size status.

(*Id.* at 12, emphasis Appellant's.) According to Appellant, this section explains that under a long-term MAC, if a contractor recertifies as other than small upon the five-year option period, the procuring agency cannot claim credit for small business goaling purposes. (*Id.*) Because the underlying "GSA-MAS option has not yet arisen," this section is also inapplicable here. (*Id.*)

Lastly, Appellant claimed that the "utmost important" provision for the Area Office to consider is § 121.404(g)(4). (*Id.* at 12.) 13 C.F.R. § 121.404(g)(4) provides that:

> The requirements in paragraphs (g)(1), (2), and (3) of this section 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 or pending orders issued pursuant to the contract, from that point forward, towards its small business goals**.

(*Id.* at 13, emphasis added by Appellant.) Appellant argued that because it was awarded the FSS contract as a small business, and later recertified as other than small, under 13 C.F.R. § 121.404(g)(4) Appellant remains eligible to compete for and receive future orders issued against the FSS contract. (*Id.*) The consequence imposed by this section is that such orders "cannot be counted toward the procuring agency's small business goals." (*Id.*) Appellant maintained that, even if the Area Office were to conclude that the FSS contract was unrestricted, the result should be no different because the FSS contract exemption permits Appellant to be considered small for the life of the FSS contract. (*Id.*)

E. Size Determination No. 04-2024-008

On December 15, 2023, the Area Office issued Size Determination No. 04-2024-008, concluding that Appellant is not a small business for the task order. The Area Office found that, because the TORFP is an order issued under an FSS contract, a type of MAC, Appellant "lost its small business status" on January 26, 2023, when Appellant recertified as other than small on the FSS contract after its acquisition by DISYS. (Size Determination at 5.) The "[r]egulation at 13 C.F.R. § 121.404(g) is clear that 'a required certification' is what changes a firm's status, not 'a CO updating a firm's status in a computer system' or similar." (*Id.*)

The Area Office first noted that the following facts and timeline are undisputed:

· September 2, 2020: Appellant submitted its initial offer for the underlying FSS contract;
· August 30, 2021: Appellant submitted its initial offer for the BPA;

· December 29, 2022: Appellant became other than small due to a change in ownership;

> · January 26, 2023: Appellant notified the GSA and EPA COs that it was no longer small for the FSS contract and BPA, respectively; and
>
> · May 1, 2023: Appellant offered on the TORFP.

(*Id.* at 3.) The Area Office further acknowledged that "[t]here is no dispute that [Appellant's] change in ownership did not trigger a CO-required recertification." (*Id.*)

The Area Office addressed Appellant's contentions that (1) its initial status as small on the FSS contract carries forward for the life of that contract; (2) the change of ownership did not trigger a required recertification; and (3) 13 C.F.R. § 121.404(g)(2)(i) merely prevents the counting of any issued orders, from that point forward, towards the agency's small business goals. (*Id.* at 3-4.)

The Area Office observed that, according to 13 C.F.R. § 121.404(g):

> Where 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.* at 2, 4 (emphasis added by Area Office).) Although the Area Office agreed with Appellant that § 121.404(g)(2)(i) limits the counting of orders towards small business goals, the Area Office did "not agree that the treatment of issued orders for goaling purposes permits that the contractor be treated as a small business for all future orders." (*Id.* at 4.) According to the Area Office, § 121.404(g) "clearly shows" that recertification as other than small under § 121.404(g)(2) "changes the firm's status for future orders issued pursuant to the contract." (*Id.*) The Area Office distinguished *EBA Ernest Bland* on the grounds that the FSS contract at issue in that case was set-aside, whereas the contract here was not. (*Id.*) "As the OHA cases cited by [Appellant] were highly fact-dependent upon the underlying MAC being set-aside for small business, their treatment does not transfer to the instant protest, as the underlying MAC is not set-aside." (*Id.*)

With regard to Appellant's argument that orders under FSS contracts are exempt from recertification requirements, the Area Office commented:

> The Area Office does not disagree with this treatment and agrees that [Appellant] was not required to recertify its size and status at the time it submitted its offer for the TORFP. Instead, [Appellant] was required to recertify its size and status due to a change in ownership under the terms and conditions of the underlying contract, which was prior to [Appellant's] offer for the TORFP. Since size status flows from the underlying MAC to individual orders issued under that MAC, as detailed in the [Area Office's] rationale above, the Area Office must conclude that [Appellant's] size status for the underlying MAC at the time of offer for the TORFP flows through the BPA to the individual order.

(*Id.* at 5.)

The Area Office concluded that because Appellant lost its small business status when it recertified as other than small on the underlying FSS contract, it was ineligible to bid as a small business for the TORFP. (*Id.*)

F. Appeal

On, January 2, 2024, Appellant filed the instant appeal. Appellant maintains that its recertification following an acquisition did not preclude Appellant from the award of the task order. (Appeal at 5.)

Appellant maintains, first, that the Area Office misinterpreted 13 C.F.R. § 121.404(g). (*Id.*) In Appellant's view, the Area Office "chose to ignore key words" in the regulation — that the enumerated sections (1), (2), and (3) "only apply to the exercise of options under the base contract." (*Id.* at 7.) According to Appellant, "[t]his provision [*i.e.*, § 121.404(g)] simply states that the life of the contractor's designation as a small business under its base contract can end upon an agency's decision to exercise an option, if there is an acquisition under (g)(2)." (*Id.*) Here, Appellant's FSS contract "is not at an option period." (*Id.*) Moreover, "SBA would have surely" stated in the regulation if its intent had been to prevent businesses that become other than small during the duration of a long-term contract from competing for small business task orders. (*Id.*)

Appellant argues that the Area Office erroneously equated "exercise of options" to mean "future options and orders" in concluding that 13 C.F.R. § 121.404(g) precluded Appellant from award of the task order. (*Id.*) Appellant reiterates that, under its plain language, 13 C.F.R. § 121.404(g)(2)(i) only impacts the procuring agency's ability to claim small business goaling credit, not a contractor's eligibility for award for a task order under an existing MAC or MAS, whether unrestricted or not. (*Id.* at 8-9.)

Furthermore, OHA has made clear that recertification under 13 C.F.R. § 121.404(g)(2) does not impact task orders where recertification is not explicitly required in the task order solicitation. (*Id.* at 9.) "[T]he requirement under § 121.404(g)(2) is not 'equivalent to a CO's request for size recertification in connection with a particular task order.'" (*Id.*, quoting *Odyssey*, SBA No. SIZ-6135, at 19.) Appellant maintains:

> [T]here 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, is equivalent to a CO's request for size recertification in connection with a particular task order.

(*Id.*, citing *Size Appeal of Davis Def. Grp., Inc.*, SBA No. SIZ-6016 (2019); *Size Appeal of U.S. Info. Techs., Corp.*, SBA No. SIZ-5585 (2014); *Size Appeal of Comput. World Servs. Corp.*, SBA No. SIZ-6208 (2023); *EBA Ernest Bland*; *Size Appeal of 22nd Century Techs., Inc.*, SBA No. SIZ-6122 (2021); and *Size Appeal of Advanced Mgmt. Strategies Grp., Inc./Reefpoint Grp., LLC*, SBA No. SIZ-5905, at 5 (2018).) As the Area Office itself recognized, the instant TORFP did not

require recertification at the task order level, and thus 13 C.F.R. § 121.404(g)(2) "does not apply" to the TORFP. (*Id.* at 10.)

Appellant argues that the instant case is analogous to OHA's recent decision in *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023). In *Forward Slope*, a set-aside task order was issued under a MAC; the task order solicitation did not require recertification; the challenged firm became other than small after award of the MAC as a result of an acquisition; the challenged firm submitted an offer for the task order; and the Area Office found the challenged firm other than small for the task order under 13 C.F.R. § 121.404(g)(2)(i) because its offer was submitted after the acquisition. (*Id.*) OHA reversed, explaining:

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. A contracting officer has the discretion to request recertification of a concern's size for an individual order. Merely setting a task order aside for small business does not constitute a request for recertification. 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 [MAC], 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 [MAC], 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 [MACs]. If a business is small for a size standard assigned to a NAICS code at the time of offer for a [MAC], 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 [MAC].

(*Id.*, quoting *Forward Slope*, SBA No. SIZ-6258, at 3-4 (citing 78 Fed. Reg. 61,114, 61,119 (Oct. 2, 2013)) (emphasis added by Appellant) (internal citations omitted).) Given OHA's reasoning in *Forward Slope*, Appellant was eligible to be awarded the order notwithstanding that it had been acquired prior to the task order competition. (*Id.* at 11.)

Appellant maintains that the Area Office additionally erred by failing to apply the FSS exemption under 13 C.F.R. § 121.404(a)(1)(ii)(A). (*Id.*) According to Appellant, 13 C.F.R. § 121.404(a)(1)(ii)(A) clearly provides exemption from recertification requirements for "orders and [BPAs] issued under any [FSS] contract." (*Id.*) In rejecting this argument, the Area Office misinterpreted the exemption language in the regulation itself, as well as in the 2020 Preamble, and "provided no sound rationale" for its conclusion that the FSS exemption did not apply here. (*Id.* at 11-14.) Appellant reiterates that the instant appeal involves "many of the same operative facts" as *EBA Ernest Bland* — notably, that an FSS prime contractor was found to be ineligible for the award of a small business set-aside task order following a merger. (*Id.* at 14.) OHA held that the challenged firm, which certified as small when it was awarded the FSS contract, was still eligible to compete for a set-aside task order under the FSS contract even after it merged with another firm and was no longer small. (*Id.*) Despite the clear parallels with OHA's holding

in *EBA Ernest Bland*, the Area Office failed to explain why this precedent was not controlling. (*Id.*)

G. SBA's Comments

OHA invited SBA to submit comments in response the appeal. In its Comments, SBA contends that its intent has been "extremely clear" since 2013 that "'[a] concern that has recertified as other than small will also not be eligible for orders that are set aside for small business concerns"D'. (SBA Comments at 3-4, quoting 78 Fed. Reg. 61,114, 61,126 (Oct. 2, 2013).) According to SBA:

> SBA has been clear since updating its rules for [MACs] that recertification because of merger and acquisition means replacing the original certification on the contract, and that after the firm recertifies it would no longer be eligible for contracts (task orders) set-aside for small businesses.

(*Id.* at 1-2.) SBA adds that the "base rule" is that when a recertification occurs, the new certification replaces the old, and the old certification "no longer exists." (*Id.* at 5.) "The other rules and regulations around this base understanding are meant to clarify how these new certifications should be treated in various ways." (*Id.*) While some situations "may deviate" from the base rule, SBA's "main goal" is "maintain[ing] a balance on [MACs] that allow[s] for firms to naturally grow, and for procuring [a]gencies to have some certainty about goaling." (*Id.*)

With respect to the exemption for FSS acquisitions, SBA asserts that "[t]here is no general exception for GSA schedule contracts for the requirement to recertify in the case of a merger or acquisition." (*Id.*) Rather, FSS contracts are broadly exempted from the "requirement that was being introduced [in 2020] . . . for unrestricted MACs, [whereby] SBA was taking away CO discretion, and was requiring recertification for each order." (*Id.*) In support, SBA points to a portion of the 2020 Preamble, in which SBA commented that "this final rule does **not apply the modified recertification requirement** to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business."' (*Id.*, quoting 85 Fed. Reg. 66,146, 66,152 (Oct. 16, 2020) (emphasis added by SBA).)

SBA summarizes its position:

> Contrary to [Appellant's] argument, the [e]ffect of recertifying size for a [MAC] (whether priced, unpriced, restricted, unrestricted, whether schedule or not) has not changed since 2013. Large companies cannot buy into small business contracting and contracts. Mergers and acquisitions require a recertification, and that recertification replaces the original certification and renders the large business ineligible for future small business contracts (in this case task orders).

(*Id.*)

H. Appellant's Comments

On January 30, 2024, Appellant replied to SBA's Comments. In Appellant's view, SBA's Comments are mere "conclusory opinions unsupported by the 2020 Regulations or OHA precedent." (Appellant's Comments at 3-4.)

Appellant maintains that both the Area Office and SBA misinterpret the language of 13 C.F.R. § 121.404(g) by "ignoring" that (g)(1) — (3) directly relate to the exercise of options, and by disregarding OHA precedent holding that acquisition and recertification do not preclude a concern from competing for and being awarded task orders. (*Id.* at 5-13.) In particular, SBA's reliance on commentary in a 2013 preamble is "erroneous as that language was never incorporated into the 2013 version of 13 C.F.R. § 121.404 and the 2020 Final Regulations address the issues in the Appeal." (*Id.* at 6.) It is improper for SBA to rely upon "a 'clear policy' that was never formally enacted in the first instance. (*Id.* at 9.) Furthermore, the 2020 Final Rule change, and OHA case precedent interpreting those changes, contradict SBA's Comments. (*Id.*)

Appellant highlights that, in *Forward Slope*, OHA squarely addressed 13 C.F.R. § 121.404(g)(4):

> **[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 [the contrary] 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.

(*Id.* at 12-13, quoting *Forward Slope*, SBA No. SIZ-6258, at 4-5 (emphasis added by Appellant).) A recertification under 13 C.F.R. § 121.404(g)(2) is a contract-level recertification and does not impact Appellant's eligibility at the task order level even after the acquisition. (*Id.* at 13.) In effect, SBA's Comments ask OHA to "make new law that stands for the proposition that a recertification on a [MAC] should be deemed a 'new certification replacing the old certification' and the 'old certification goes away"'. (*Id.* at 13.) "These comments suggest that 2013 Rules should override the 2020 Rules." (*Id.*)

With respect to the exemption for FSS procurements, instead of addressing "whether the Area Office was correct in it[s] interpretation of the FSS exception, the SBA Comments are attempting to convince [] OHA that the FSS exception contained in the 2020 Final Rule does not apply." (*Id.* at 16.) While it is true that the 2020 Final Rule removed the CO's discretion to request recertification for set-aside orders issued under unrestricted MACs, the Final Rule also "**adds and makes clear that the FSS Exception exempts contractors from recertification under both under 13 C.F.R. § 121.404(a)(1)(i)(A) and 13 C.F.R. § 121.404(a)(1)(ii)(A)**." (*Id.* at 17, emphasis Appellant's.) "SBA muddies the water by taking the entire Preamble explanation as to why [FSS] are exempted, and reinterprets [the] language in an irrational way." (*Id.*) Additionally, despite SBA's claim that its policy has remain unchanged since 2013, the FSS exemption language was not included in the 2013 version of 13 C.F.R. § 121.404. In fact, the 2020 Preamble "makes clear how and why [] SBA is including the new Federal Supply exemption," by stating, in relevant part:

> Because discretionary set-asides under the FSS programs have proven effective in making awards to small business under the program and SBA did not want to add unnecessary burdens to the program that might discourage the use of set-asides, the proposed rule provided that, **except for orders or Blanket Purchase Agreements issued under any FSS contract**, if an order under an unrestricted MAC is set-aside exclusively for small business . . . [a] concern must recertify its size status and qualify as such at the time it submits its initial offer, which includes price, for the particular order . . . **[T]he FSS program operates under a separate statutory authority and [] set-asides are discretionary, not mandatory under this authority**. SBA and GSA worked closely together to stand up and create this discretionary authority and it has been very successful. This discretionary set-aside authority was authorized by the Small Business Jobs Act of 2010 (Pub. L. 111-240) and implemented in FAR 8.405-5 in November 2011. . . . **Although SBA again considered applying the recertification requirement to the FSS program (and allow the FSS, as with any other MAC, to establish reserves or pools for business concerns with a specified size or status), SBA believes that is unworkable at this time**. Consequently, consistent with the proposed rule, this final rule does not apply the modified recertification requirement to the FSS program. Doing so would pose an unnecessary risk to a program currently yielding good results for small business.

(*Id.* at 17-18, quoting 85 Fed. Reg. at 66,151-52, emphasis added by Appellant.) In Appellant's view, SBA regulations are clear that for orders or BPAs under any FSS contract, the recertification requirement at the task order level does not apply. (*Id.*) Furthermore, Appellant reiterates that neither SBA nor the Area Office offered "any rationale" as to why OHA's decision in *EBA Ernest Bland* would not be controlling here, despite "many of the same operative facts." (*Id.*) Significantly, OHA concluded in *EBA Ernest Bland* that "the protested firm had certified as small when it was awarded a [FSS] contract, [and] **was still eligible to compete for a task order set aside under the FSS even after it had merged with another firm and was no longer small**." (*Id.* at 18-19, emphasis Appellant's.) SBA has not provided any legal support from OHA precedent, the 2020 Preamble, or the 2020 Final Rule for its position that "tak[ing] away a CO discretion is the **only exemption**" it intended. (*Id.* at 19, emphasis Appellant's.)

III. Discussion

A. Standard of Review

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

B. Analysis

I agree with Appellant that the Area Office incorrectly concluded that Appellant is not a small business for the subject task order. As a result, this appeal must be granted.

The Area Office found, and all parties agree, that Appellant submitted its proposal for the task order on May 1, 2023. Sections II.B and II.E, *supra*. SBA regulations in effect on that date specified that, as a general rule, a concern that is small at the time a contract is awarded remains small throughout the life of that contract. 13 C.F.R. § 121.404(a). SBA regulations set forth special rules with regard to orders under Multiple-Award Contracts (MACs), instructing that, when the underlying MAC was awarded on an unrestricted basis, a contractor must recertify its size if it chooses to compete for an order set aside for small businesses. *Id.* § 121.404(a)(1)(ii)(A). This latter requirement, however, is inapplicable to orders under FSS contracts. 13 C.F.R. § 121.404(a)(1)(ii)(A); *see also Size Appeal of Oxford Gov. Consulting LLC*, SBA No. SIZ-5732 (2016). SBA has explained that applying the requirements of § 121.404(a)(1) to the FSS program "would pose an unnecessary risk to a program currently yielding good results for small business." 85 Fed. Reg. 66,146, 66,152 (Oct. 16, 2020).

In the instant case, the Area Office determined that the TORFP was set aside for small businesses and that the underlying MAC was unrestricted. Sections II.B and II.E, *supra*.

Because the MAC in question was an FSS contract, though, recertification at the task order level was not required. The Area Office thus agreed with Appellant that, under 13 C.F.R. § 121.404(a)(1)(ii)(A), "the contractor was not required to recertify its size and status at the time it submitted its offer for the TORFP." Section II.E, *supra*.

The Area Office found, however, that Appellant nevertheless is not eligible for the instant order pursuant to a different paragraph of § 121.404, specifically paragraph (g), which addresses recertification stemming from a contract novation, merger, or acquisition. Section II.E, *supra*.

In the instant case, Appellant was acquired by DISYS on December 29, 2022, and in accordance with § 121.404(g)(2)(i), Appellant informed procuring agencies that it was no longer small on January 26, 2023. Section II.A, *supra*. The Area Office thus concluded that, after Appellant became other-than-small at the FSS contract level, Appellant could not compete for

any FSS task orders set aside for small businesses. Section II.E, *supra*. The Area Office based its decision on the penultimate sentence of paragraph (g), which states that: "Where 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." 13 C.F.R. § 121.404(g).

Having reviewed the record and the arguments of the parties, I agree with Appellant that the Area Office misinterpreted the sentence in question. In particular, the Area Office erred by focusing on a single sentence and ignoring the context in which that sentence appears. The Area Office's decision also is contrary to several OHA decisions interpreting § 121.404(g).

The full text of paragraph (g) reads, in pertinent part, as follows:

> (g) ***Effect of size certification and recertification***. A concern that represents itself as a small business and qualifies as small at the time it submits its initial offer (or other formal response to a solicitation) which includes price is generally considered to be a small business throughout the life of that contract. Similarly, a concern that represents itself as a small business and qualifies as small after a required recertification under paragraph (g)(1), (2), or (3) of this section is generally considered to be a small business throughout the life of that contract. Where 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. The following exceptions apply to this paragraph (g):
>
> . . .
>
> (2)(i) In the case of a merger, sale, or acquisition, 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.
>
> . . .
>
> (4) The requirements in paragraphs (g)(1), (2), and (3) of this section 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 or pending orders issued pursuant to the contract, from that point forward, towards its small business goals.

13 C.F.R. § 121.404(g).

Read in context, then, paragraph (g) discusses the circumstances under which, in the event of a merger or acquisition, a procuring agency may exercise options and count the award towards its small business goals. Paragraph (g) sets forth the general rule that a procuring agency ordinarily may do so. An "exception" exists, however, when a concern re-certifies as other than small following a merger or acquisition. In that situation, under § 121.404(g)(2)(i), 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." Section 121.404(g)(4) explains that the same general approach applies to MACs. In particular, if the underlying MAC was set-aside for small businesses, and the contractor recertifies as other than small after a merger or acquisition, "the [procuring] agency cannot count any new or pending orders issued pursuant to the contract, from that point forward, towards its small business goals."

Accordingly, based on the full text of the rule as quoted above, it is clear that the Area Office misunderstood § 121.404(g). The rule does not state that, if a contractor recertifies as other than small following a merger or acquisition, the contractor is no longer eligible for any future orders. Indeed, the rule is almost completely silent as to any effects of a merger or acquisition on the contractor. Rather, the focus of the rule is on whether a procuring agency may exercise options and count the awards towards its small business goals.

As Appellant observes, OHA has interpreted paragraph (g) in several prior decisions, and has consistently arrived at this same conclusion. OHA thus has reasoned:

> [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 [the contrary] 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.

Size Appeal of Forward Slope, Inc., SBA No. SIZ-6258, at 4 (2023) (quoting *Size Appeal of Odyssey Sys. Consulting Grp., Ltd.*, SBA No. SIZ-6135, at 20 (2021)). OHA reached this same result in *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139 (2022), a case that pertained specifically to an order against an FSS contract. There, OHA rejected the claim that "a prime contractor who recertifies as other than small as a result of a merger or acquisition is not eligible to receive a small business set aside award," finding the contention "contrary to established OHA precedent" as well as inconsistent with "the express language" of § 121.404(g). *EBA Ernest Bland*, SBA No. SIZ-6139, at 6.

In the size determination, the Area Office suggests that *EBA Ernest Bland* is distinguishable from the instant case, because the underlying MAC here was awarded on an unrestricted basis. Section II.E, *supra*. OHA, though, has applied precisely the same reasoning in the context of unrestricted MACs. *Size Appeal of Saalex Corp. d/b/a Saalex Solutions, Inc.*, SBA No. SIZ-6274, at 11 (2024) (on an unrestricted MAC, a contractor's "concession that it is no longer small as of January 2018 does not equate to ineligibility for future task orders, but instead means the [procuring agency] cannot claim goaling credit for that task order."). I therefore see no basis to conclude the result of this case is dependent upon whether the MAC is restricted or unrestricted. Likewise, paragraph (g) of § 121.404 does not indicate that restricted and unrestricted MACs are treated differently with regard to a merger or acquisition involving a prime contractor. Indeed, the only mention of this issue in paragraph (g) is in § 121.404(g)(4), which instructs that that if a MAC was awarded on a restricted basis and a contractor recertifies as other than small, "the [procuring] agency cannot count any new or pending orders issued pursuant to the contract, from that point forward, towards its small business goals." Again, though, the rule does not provide that the contractor will be barred from competing for future orders.

In sum, I agree with Appellant that OHA's decisions in *Forward Slope, Saalex*, and *EBA Ernest Bland* are squarely on point here. Like in those cases, due to an acquisition, Appellant became other than small after its MAC was originally awarded but prior to submitting an offer for a task order that set-aside for small businesses. Appellant's acquisition triggered a requirement to recertify at the contract level, thereby limiting the procuring agency from exercising options or counting awards towards small business goals. 13 C.F.R. § 121.404(g). Neither the plain language of the regulation nor OHA case law, though, bars the contractor from competing for, or being awarded, future task orders, even if those orders are set aside or restricted for small business. If the contractor were so prevented, there would be no logical reason for the regulation to specify in § 121.404(g)(4) that such awards could not be counted towards small business goals.

In response to the appeal, SBA highlights that FSS contractors are exempted from the requirements of § 121.404(a), but not from the requirements of § 121.404(g). Section II.G, *supra*. While I agree with SBA on this point, SBA's observation further demonstrates that the Area Office here misinterpreted § 121.404(g). As the U.S. Government Accountability Office (GAO) noted in a recent bid protest case, the Area Office's interpretation of § 121.404(g) would create a curious "exception to [the] exception," whereby an FSS contractor is exempt from the recertification requirements of paragraph (a), even if an order is set aside for small businesses under an unrestricted MAC, but nevertheless is ineligible to compete for that same order under paragraph (g). *Washington Bus. Dynamics, LLC*, B-421953, B-421953.2, Dec. 18, 2023, 2023 U.S. Comp. Gen. LEXIS 356, at fn.11. There is no indication in text of the rule or in the regulatory history that SBA intended this result, and such an outcome appears inconsistent with SBA's stated aim to avoid imposing "unnecessary burdens" and "unnecessary risks" on the FSS program, which already "yield[s] good results for small business." 85 Fed. Reg. at 66,151-52.

Lastly, SBA asserts that its overarching policy goal — that large entities should not be permitted to buy their way into small business set-asides through a merger or acquisition — has remained unchanged since 2013. Section II.G, *supra*. In order to be given legal effect, though,

SBA's general policy must be reflected in the regulations themselves. The plain text of § 121.404(g), and OHA case precedent, confirm that Appellant here was eligible to compete for, and be awarded, the instant task order.

IV. Conclusion

Appellant has shown that the size determination was based upon an error of law.

Accordingly, the appeal is GRANTED and the size determination is REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge