

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

SIZE APPEAL OF:

Future Technologies, Inc.,

Appellant

RE: T-Solutions, Inc.

Appealed From  
Size Determination No. No. 02-2024-054

SBA No. SIZ-6318

Decided: November 12, 2024

APPEARANCES

Elizabeth N. Jochum, Esq., Shane Hannon, Esq., Blank Rome LLP, Washington, D.C.,  
for Future Technologies, Inc.

Joel R. Nied, Esq., Price Benowitz LLP, Norfolk, Virginia, for T-Solutions, Inc.

DECISION

I. Introduction and Jurisdiction

On August 23, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-054, dismissing a size protest filed by Future Technologies, Inc. (Appellant) against T-Solutions, Inc. (T-Solutions). The Area Office found that the protest was not specific. On September 6, 2024, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in dismissing the protest, and requests that SBA's Office of Hearings and Appeal (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is granted.

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) Multiple Award Contract (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. (*Id.* at 56.)

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.)

The Navy awarded SeaPort-NxG prime contracts to several concerns, including Appellant and T-Solutions. Both Appellant and T-Solutions self-certified as small businesses at the SeaPort-NxG contract level.

### B. The TORFP

On June 26, 2023, the Naval Surface Warfare Center (NSWC) issued Task Order Request for Proposals (TORFP) No. N0016423R3013 under the SeaPort-NxG MAC. The TORFP sought a contractor to provide professional support services for the AEGIS Technical Representative. (TORFP at 5.) The TORFP was set aside entirely for small businesses. (*Id.* at 2.) The TORFP did not, however, contain any explicit request for recertification of size at the task order level. The TORFP, rather, stated: “[t]he Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into the contract.” (*Id.* at 37.) T-Solutions submitted its initial offer for the task order

on August 4, 2023, and its final proposal revisions on May 3, 2024. On June 17, 2024, NSWC announced that T-Solutions was the apparent awardee.

### C. Protest

On June 23, 2024, Appellant filed a protest with the CO. In its protest, Appellant alleged that T-Solutions should be considered other-than-small for purposes of the TORFP. (Protest at 6.)

Appellant explained, first, that SeaPort-NxG is an unrestricted MAC and was not set-aside, in whole or in part, for small businesses. (*Id.* at 3.) Instead, SeaPort-NxG permits individual task orders to be restricted to small businesses, such as the instant TORFP. (*Id.*) SBA regulations, in turn, mandate that “if an order . . . under an unrestricted [MAC] is set-aside exclusively for small business[es]. . . , a concern 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.*, quoting 13 C.F.R. § 121.404(a)(1)(i)(A) (emphasis added by Appellant).) OHA case law likewise has interpreted this regulation as requiring recertification for set-aside task orders issued under SeaPort-NxG. (*Id.*, citing *Size Appeal of McLaughlin Rsch. Corp.*, SBA No. SIZ-6273 (2024) and *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022).) As such, Appellant maintained, T-Solutions was required to recertify its size at the task order level when submitting its offer for the instant TORFP. (*Id.*)

Had T-Solutions recertified its size, Appellant contended that T-Solutions could not have represented itself as a small business. (*Id.* at 4.) The applicable size standard here is \$47 million in average annual receipts. (*Id.* at 3.) Based on T-Solutions's federal contract awards for the five completed years preceding submission of its initial offer, *i.e.*, 2018 through 2022, Appellant alleged that T-Solutions's average annual receipts exceed \$47 million. (*Id.* at 4.) Appellant further observed that, on July 7, 2023, T-Solutions updated its small business status representation on SAM to reflect that it is not small under NAICS code 541330. (*Id.*) Accordingly, T-Solutions is not an eligible small business for this task order. (*Id.* at 5.)

### D. Size Determination

The CO forwarded Appellant's size protest to the Area Office for review. On August 23, 2024, the Area Office issued Size Determination No. 02-2024-054, dismissing Appellant's protest as nonspecific. (Size Determination at 1.)

The Area Office reviewed recent OHA precedent dealing with the SeaPort-NxG MAC, notably *Size Appeals of Tech-Marine Bus., Inc.*, SBA No. SIZ-6280 (2024). (*Id.* at 3-5.) OHA explained in *Tech-Marine* that, prior to May 30, 2023, 13 C.F.R. § 121.404(a)(1)(iv) did not apply to task orders issued against SeaPort-NxG, because it is an unrestricted and unpriced MAC. (*Id.* at 4-5.) However, after regulatory changes became effective on May 30, 2023, 13 C.F.R. § 121.404(a)(1)(iv) then did apply to all task orders issued against unrestricted and unpriced MACs, including SeaPort-NxG. (*Id.*)

The instant TORFP was for a set-aside task order under the SeaPort-NxG MAC. (*Id.* at 3.) Furthermore, the TORFP was issued on June 6, 2023, which is after May 30, 2023; as a result, the Area Office reasoned, 13 C.F.R. § 121.404(a)(1)(iv) applies to the TORFP. (*Id.* at 5.) This regulation, in conjunction with 13 C.F.R. § 121.404(a)(1)(i)(A), requires size recertification for any set-aside orders issued against unrestricted and unpriced MACs. (*Id.*) The Area Office further observed that “the regulation requires recertification at the order level even if not requested by the CO.” (*Id.*) The Area Office noted, however, that, in the instant case, none of the offerors recertified size for the task order or questioned whether recertification was required. (*Id.*)

The Area Office then opined that “OHA case law has consistently held both a CO's choice to require recertification and any ambiguity in that choice or subsequent inconsistent responses to Q&As have the potential to alter the solicitation.” (*Id.* at 6, citing *Size Appeals of DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962 (2018).) Here, the CO did not request recertification in the TORFP and none of the offerors actually recertified. (*Id.*) Accordingly, the Area Office reasoned, the CO should have rejected all offers. (*Id.*) Because the CO did not do so, however, the “acceptance of these offers without size recertification at the order level with the apparent mutual understanding of all parties that it was not required constitutes a constructive change of the [TORFP], rendering it unrestricted.” (*Id.*) If the TORFP had been unrestricted, then the only specific size protest would be one challenging the use of size status as an evaluation preference. (*Id.*) As such, the Area Office concluded, Appellant's protest should be considered non-specific. (*Id.*)

#### E. Appeal

On September 6, 2024, Appellant filed the instant appeal. Appellant insists that the Area Office committed clear factual and legal errors, and that letting the size determination stand would allow COs to circumvent SBA regulations. (Appeal at 7-8.)

Appellant claims that the Area Office erred when concluding that there was a constructive change to the TORFP that rendered it unrestricted. (*Id.* at 4.) Appellant contends that the Area Office failed to cite any legal authority supporting its conclusion that a set-aside solicitation can become unrestricted after proposals were submitted. (*Id.*) While the FAR does permit a CO to rescind a small business set-aside and resolicit on an unrestricted basis, the CO must “initiate a withdrawal of an individual total or partial small business set aside, by giving written notice to the agency small business specialist and [SBA] . . . stating the reasons” and “prepare a written statement supporting any withdrawal or modification of a small business set-aside.” (*Id.*, quoting FAR 19.502-9.)

Looking at the TORFP, Appellant argues that the CO clearly did not intend for the TORFP to be unrestricted. (*Id.*) Offerors were informed that the TORFP would be a total small business set-aside and that “the Government will verify each Offeror's size status in the IDIQ MAC within the SeaPort-NxG portal to ensure that Offerors are certified as a small business.” (*Id.*, quoting TORFP at 59.) Furthermore, when the CO advised Appellant that T-Solutions was the apparent awardee, the CO reiterated that the TORFP was a small business set-aside. (*Id.* at 5.)

Irrespective of whether the Navy accepted offers without the required recertification, then, the Navy understood and intended that the TORFP was restricted to small businesses. (*Id.*)

Appellant asserts that the Area Office erred by considering whether the CO requested recertification at the order level. (*Id.*) According to 13 C.F.R. § 121.404(a)(1)(i)(A) and (a)(1)(iv), recertification was required as a matter of law. (*Id.*) Unlike the situation in *Size Appeals of DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962 (2018), the CO here was not at liberty to decide whether or not to request size recertification. (*Id.*) Appellant likewise disputes the Area Office's analysis of whether offerors knew that recertification was required or if there was mutual "understanding" that it was not. (*Id.* at 6.) According to Appellant, the subjective intentions of the parties are not relevant, since the regulations mandate recertification in the case of a set-aside order under an unrestricted MAC. (*Id.*)

Lastly, Appellant questions how the Area Office, without any input from the procuring agency, could be empowered to change a small business set-aside procurement to an unrestricted one. (*Id.*) Appellant allows that SBA is authorized to "determine within any industry the concerns . . . which are to be designated 'small business concerns.'" (*Id.*, quoting 15 U.S.C. § 637(b)(6).) The Area Office far exceeding this authority here, though, as the statute does not permit an SBA area office to unilaterally alter another agency's solicitation. (*Id.*)

#### F. T-Solutions' Response

On September 17, 2024, T-Solutions responded to the appeal. T-Solutions contends that the appeal should be dismissed or denied because Appellant fails to persuasively show that the size determination is based upon a clear error of fact or law. (Response at 1.)

T-Solutions maintains first that Appellant is impermissibly attempting to cure the protest's lack of specificity, by introducing new evidence on appeal and by raising new substantive issues for the first time. (*Id.*, citing *Size Appeal of AMETEK SCP, Inc.*, SBA No. SIZ-5518 (2013).) Since OHA cannot adjudicate matters not brought before the Area Office, T-Solutions asserts that the appeal should be rejected on those grounds. (*Id.*, citing 13 C.F.R. § 134.316(c).)

T-Solutions further highlights that SeaPort-NxG specifically instructed contractors that size recertification for MAC holders would be required only (1) upon the five-year option renewal or (2) if the contract holder merges with or is bought by another company. (*Id.* at 2.) A Question and Answer document issued on June 18, 2018 further explained that small business SeaPort-NxG contractors would keep their size status until required to recertify by FAR 52.219-28. (*Id.* at 2-3.) Since the TORFP did not request recertification under FAR 52.219-28, T-Solutions argues that OHA should affirm the Area Office's conclusion that recertification was not required. (*Id.* at 3.)

### 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 findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

Appellant has persuasively shown that the size determination is clearly erroneous. Accordingly, this appeal must be granted.

Both the Small Business Act and SBA regulations indicate that, by choosing to submit an offer for a procurement which has been set aside for small businesses, a concern is deemed to have made an “affirmative, willful, and intentional certification[] of small business size and status.” 15 U.S.C. § 632(w)(2)(A); 13 C.F.R. § 121.108(b). Similarly, when a multiple-award contract (MAC) is unrestricted but an individual order is set aside for small businesses, “a concern 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.” 13 C.F.R. § 121.404(a)(1)(i)(A); *see also Size Appeals of Tech-Marine Bus., Inc.*, SBA No. SIZ-6280 (2024).

In the instant case, the Area Office correctly recognized that, because the TORFP was set-aside for small businesses under an unrestricted MAC, SBA regulations “requir[e] recertification at the [TORFP] level even if not requested by the CO.” Section II.D, *supra*. The Area Office erred, however, by proceeding to examine whether the CO had requested recertification at the task order level, and whether SeaPort-NxG contractors believed that such recertification was required. *Id.* Such questions are immaterial, since recertification was required, as a matter of law, pursuant to 13 C.F.R. § 121.404(a)(1)(i)(A). Indeed, with regard to the SeaPort-NxG MAC in particular, OHA has repeatedly held that § 121.404(a)(1)(i)(A) requires recertification for set-aside task orders issued after May 30, 2023. *Size Appeal of Imagine One Tech. & Mgmt., Ltd.*, SBA No. SIZ-6271 (2024); *Size Appeal of McLaughlin Rsch. Corp.*, SBA No. SIZ-6273 (2024); *Size Appeal of Saalex Corp. d/b/a Saalex Sols., Inc.*, SBA No. SIZ-6274 (2024). Likewise, by submitting an offer for a set-aside task order such as the instant TORFP, SeaPort-NxG contractors are deemed to have recertified themselves as small businesses, irrespective of whether or not they understood the legal import of their actions.

Because the recertification requirement for the instant TORFP occurred automatically by operation of law, it is irrelevant whether the CO requested recertification for the TORFP, or whether T-Solutions and other contractors believed that recertification was necessary. Accordingly, the Area Office clearly erred in concluding that these considerations reflected a constructive change to the TORFP, such that the TORFP no longer was set aside for small

businesses. The Area Office should have analyzed the merits of Appellant's protest in determining whether T-Solutions qualifies as small for the subject set-aside order.

IV. Conclusion

For the above reasons, the appeal is GRANTED, Size Determination No. 02-2024-054 is VACATED, and the matter is REMANDED to the Area Office for a new size determination.

KENNETH M. HYDE  
Administrative Judge