

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

DECISION FOR PUBLIC RELEASE

IN THE MATTER OF:

Analytic Strategies, Inc.

Appellant,

Solicitation No. HSSA01-17-Q-1813, and
Contract No. GS00Q14OADS104

SBA No. VET-268

Decided: January 29, 2018

APPEARANCES

Damien C. Specht, Esq., Ethan E. Marsh, Esq., Morrison & Foerster LLP, McLean, Virginia, for Appellant

Reid A. MacHarg, Esq., Office of the General Counsel, U.S. Department of Homeland Security, for the Procuring Agency

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DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) that Analytic Strategies, Inc. (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). Appellant maintains the D/GC clearly erred in concluding Appellant is no longer an SDVO SBC, because Appellant was an SDVO SBC at the time of initial offer and the Contracting Officer on

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions. OHA did not receive any requests for redactions, and now issues the decision for public release.

the instant procurement did not request recertification. For the reasons discussed *infra*, the appeal is granted and the D/GC's determination is vacated.

OHA decides appeals of SDVO SBC status determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. Appellant filed the instant appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitations and Protests

On April 9, 2014, the General Services Administration (GSA) awarded Contract No. GS00Q14OADS104 to Appellant under the One Acquisition Solution for Integrated Services (OASIS) Small Business (SB), Pool I. According to the solicitation, GSA's OASIS SB contract “is designed to address agencies' need for a full range of services requirements that integrate multiple professional service disciplines and ancillary services/products with the flexibility for all contract types and pricing at the task order level.” (GSA Solicitation, at B.1.) OASIS SB is a family of 7 separate Government-wide Multiple Award, Indefinite Delivery, Indefinite Quantity (MA-IDIQ) task order contracts, and “each of the 7 separate MA-IDIQ task order contracts will be individually referred to as ‘Pools’ within OASIS SB.” (*Id.*) “In addition to total small business set-asides, OASIS SB set-asides can be based on specific socio-economic groups,” and each “task order may be a sole-source direct award for a specific socio-economic group or a competitive set-aside for a specific socio-economic group.” (*Id.*, § H.3.1, emphasis removed.) The solicitation lists SDVO SBC as one of the eligible groups. (*Id.*) As part of its proposal submitted on October 29, 2013, Appellant represented itself as an SDVO SBC.

On July 31, 2016, Appellant was acquired by PlanetRisk, Inc. (PlanetRisk), a non-veteran owned concern. (Letter from D. Specht to S. Crean, at 3 (Nov. 17, 2017).) Appellant updated its registration in the System for Award Management (SAM) to reflect it no longer qualified as an SDVO SBC, and notified GSA of the change in status due to acquisition within 30 days, on August 23, 2016. (*Id.*) Upon notification of Appellant's change in status, GSA's CO informed Appellant that “on OASIS orders you will still be considered SDVO [SBC].” (E-mail from V. Bindel to D. Clements (Aug. 23, 2016).)

On June 8, 2017, the U.S. Department of Homeland Security (DHS) issued Request for Quotations (RFQ) No. HSSA01-17-Q-1813 seeking “program management, budget and financial management support services and procurement support services” for the Network Security Deployment (NSD) Division” from holders of OASIS SB Pool 1 contracts. (DHS RFQ, §§ C.2, M.1.) DHS' CO set aside the task order for SDVO SBCs. (*Id.*, §§ M.1, M.5.) The CO did not request recertification in connection with DHS's task order. Proposals were due on June 23, 2017, and Appellant submitted an offer on that date. (*Id.*, § L-1; D/GC Determination, at 7.) On August 29, 2017, the CO awarded the task order to Appellant.

On September 11, 2017, OBXtek, Inc. (OBXtek), an unsuccessful offeror, filed a bid protest with the Government Accountability Office (GAO), asserting Appellant had

misrepresented its status for the DHS RFQ. *OBXtek, Inc.*, B-415258 (Dec. 12, 2017). During the proceeding, GAO requested comments from SBA regarding GAO's jurisdiction over the protestor's allegation that Appellant had misrepresented its status as an SDVO SBC in connection with the RFQ. In response, SBA "request[ed] that [GAO] dismiss this allegation because the material misrepresentation issue turns on the interpretation of SBA regulations" and whether a concern qualifies as an SDVO SBC is a matter determined by SBA. *Id.*, at 3.

On November 2, 2017, SBA initiated its own status protest regarding Appellant's status as an SDVO SBC for DHS' task order and GSA's OASIS SB Pool 1 contract. (Letter from S. Crean to D. Clements (Nov. 2, 2017).) In its letter notifying Appellant of the protest, SBA recounted "[a]fter receiving the OBXtek GAO protest, SBA's own research found that [Appellant] is classified on OASIS SB, Pool 1, as an SDVO SBC, even though [Appellant] is no longer owned and controlled by one or more service-disabled veterans." (*Id.*, at 1.) In its letter, SBA stated "[u]nless an exception applies, the SDVO SBC will be considered an SDVO SBC throughout the life of the Multiple Award Contract" and highlighted one exception "where the firm performing an SDVO SBC contract acquired, is acquired, or merges with another concern and contract novation is not required." (*Id.*, at 2.) In that instance, SBA stated, the concern must recertify its SDVO SBC status or "inform the procuring agency that it is no longer an SDVO SBC" and "immediately revise all applicable Federal contract databases to reflect the new status." (*Id.*) SBA further specified, "a concern that informs the procuring agency that it is no longer an SDVO SBC is no longer eligible for orders set aside for SDVO SBCs. There is no authority permitting a concern that loses SDVO SBC status after a merger or acquisition to continue to receive SDVO SBC set-aside orders." (*Id.*)

B. D/GC Determination

On December 4, 2017, the D/GC issued its status determination, finding that Appellant is not an eligible SDVO SBC for DHS' set-aside task order or GSA's OASIS SB Pool 1 contract. (D/GC Determination, at 1.) The D/GC concluded Appellant conceded that it is not currently qualified as an SDVO SBC because of its acquisition by Planet Risk in July 2016, and was not an SDVO SBC at the time of its offer for DHS' task order set aside for SDVO SBCs. (*Id.*, at 5.) The D/GC stated SBA regulations permit a concern to retain its SDVO SBC status for the life of a contract, and will be considered an SDVO SBC for each order issued against that contract. (*Id.*) However, the D/GC pointed to the recertification rule at 13 C.F.R. § 125.18(e). (*Id.*) The D/GC asserted the regulation creates an exception to this general rule for mergers and acquisitions, requiring a concern to recertify its SDVO SBC status or notify the procuring agency within 30 days of the merger or acquisition that it is no longer an SDVBO SBC. (*Id.*, citing 13 C.F.R. § 125.18(e)(1)(ii).) In that case, the D/GC determined, the concern is ineligible for award of an SDVO SBC set-aside task order, and ineligible as an SDVO SBC for the contract going forward. (*Id.*, at 7.) The D/GC specified, "a concern that informs the procuring agency that it is no longer an SDVO SBC is no longer eligible for orders set aside for SDVO SBCs." (*Id.*) Therefore, the D/GC reasoned, Appellant is not eligible for DHS' task order or for any future orders pursuant to GSA's OASIS SB Pool 1 contract, so long as it is not an SDVO SBC. (*Id.*) The D/GC noted, however, that a subsequently-unqualified concern, including Appellant, "still may be eligible for non-set-aside orders, or orders set aside for small businesses (assuming it recertified as small[.])."

(*Id.*) The D/GC also noted the procuring agency cannot count any options or orders issued pursuant to that contract toward its SDVO SBC goals, from that point forward.

The D/GC maintained that his interpretation of the rule furthers the statutory policy of directing contracting dollars to service-disabled veterans and the businesses they own. (*Id.*, at 8.) The D/GC points to the statute authorizing the SDVO SBC program, Section 36 of the Small Business Act. (*Id.*, citing 13 U.S.C. § 657f.) Quoting Section 36, the D/GC stated “a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.” (*Id.*) “Nowhere does the statute authorize a non-veteran-owned firm to receive a set-aside award,” the D/GC continued. (*Id.*) The D/GC pointed to the statute's legislative history, emphasizing that statute's purpose is to increase contract awards to service-disabled veterans. (*Id.*, at 8-9, citing H.Rep. No. 108-142 at 6, 11 (2013).) Therefore, the D/GC concluded, this interpretation does not make new policy, but implements the policy expressed by Congress. (*Id.*, at 9.) Therefore, a contrary interpretation is divergent from the “unambiguously expressed intent of Congress” and thus fails the first step of *Chevron* analysis. (*Id.*, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984).)

The D/GC further asserted his interpretation of the rule ensured that agencies would not award SDVO SBC set-aside contracts or orders to non-SDVO SBC concerns. (*Id.*, at 10.) The D/GC maintained the recertification rule ensures that agencies are aware of a concern's change in status. (*Id.*) Pointing to the preamble to the rule, the D/GC found the rule provides that “[a] concern that has recertified as other than will also not be eligible for orders that are set aside for small business concerns.” (*Id.*, citing 78 Fed. Reg. 61113, 61126 (October 2, 2013).) The D/GC also maintained that, by analogy, the same consequence applied when a former SDVO SBC recertified as non-veteran owned because of an acquisition. (*Id.*)

The D/GC concluded the SDVO SBC recertification rule operates in the same way as the size certification rule, which bars an other-than-small concern from receiving future small business set-aside orders. (*Id.*, citing 13 C.F.R. § 121.404(g).) The D/GC highlighted similar rules for the HUBZone, WOSB and SBIR programs. (*Id.*, at 11, citing 13 C.F.R. §§ 126.601(h), 127.503(h), 121.704(b).) The OASIS contract itself provides that a concern that recertifies as other-than-small after a merger or acquisition will be excluded from future set-aside orders. (*Id.*, citing OASIS contract, § G.3.10.)

The D/GC speculated that if his interpretation of the regulation did not prevail, recertified non-veteran-owned businesses could win SDBO set aside awards, and recertified large businesses could win small business set-aside awards. (*Id.*) SBA issued the size recertification rule, which uses language identical to the SDVO SBC recertification rule, to address this problem. Quoting the regulation promulgating the recertification rule in size, the D/GC stated:

the prior system led to skewed and, in SBA's view, misleading results. [Long term] contracts may have terms of five, ten, or twenty years, and can be amended to incorporate goods and services with varying size standards, and unlimited

quantities. Therefore, order to concerns receiving such contracts would be considered to be awards to small business even though a concern had grown to be large (either through natural growth or by merger or acquisition) during the term of the contract.

(*Id.*, citing 68 Fed. Reg. 20350 (April 25, 2003).) In the D/GC's view, Appellant's interpretation of the recertification rule regulation would "return the situation to the pre-recertification days." (*Id.*)

Thus, the D/GC rejected Appellant's arguments that it retained its status for the life of the contract and remained eligible for SDVO SBC set asides, stating such an interpretation would be contrary to the statutory authority for the SDVO SBC set aside program and would wrongfully permit non-veteran-owned concerns to reap the benefits of that program, and concluded Appellant was not an eligible SDVO SBC.

C. Appeal

On December 14, 2017, Appellant filed the instant appeal of the D/GC's determination, arguing the D/GC erred in finding Appellant ineligible for DHS's task order set aside for SDVO SBCs and GSA's OASIS SB Pool I contract.

Appellant maintains it qualified as an SDVO SBC at the time of its initial offer for GSA's OASIS SB Pool 1 contract in October 2013. (Appeal, at 3.) Appellant concedes that it no longer qualified as an SDVO SBC after it was acquired by PlanetRisk in July 2016, and points out that it notified GSA and updated its registration in SAM in August 2016. (*Id.*) But, Appellant asserts that it retains its SDVO SBC for the life of GSA's OASIS SB Pool I contract, and suggests GSA confirmed that when stating "on OASIS orders you will still be considered SDVOSBC." (*Id.*, at 3-4.)

Appellant contends SBA regulations clearly indicate that a concern retains its SDVO SBC status for the life of a contract if it qualified at the time of initial offer and the CO did not request recertification in connection with a specific order. (*Id.*, at 2, 5.) Appellant asserts the CO's request for recertification is the only instance "in which a multiple award contractor must recertify for the purposes of eligibility to compete for task orders." (*Id.*, at 5.) Even then, Appellant posits, the status represented in that offer "applies only with respect to that particular task order," and not to the underlying contract. (*Id.*, 5-6.)

Appellant maintains the provisions under § 125.18(e)(1)(i-iii) have the limited effect of preventing the procuring agency from counting options and orders issued to unqualified concerns toward its socioeconomic procurement goals. (*Id.*, at 6.) In Appellant's view, these are not exceptions to the general rule that a concern retains its SDVO SBC status for the life of the contract. (*Id.*) These provisions come immediately after another rule related to counting as stated in the regulation (*i.e.*, "Where a concern later fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC.") and therefore are exceptions to that rule. (*Id.*) Appellant stresses, the remedy provided in the three exceptions is that "the agency can no longer count the options or orders issued pursuant to the

contract, from that point forward, towards its SDVO [SBC] goals,” not that the agency can no longer issue orders. (*Id.*, at 7.) Appellant argues the date for determining a concern's SDVO SBC status remains the date of the initial offer, and the regulations clearly treat eligibility and credit differently. (*Id.*)

Appellant also contends OHA has consistently affirmed this interpretation of the recertification rule. Citing *Matter of Redhorse Corporation*, SBA No. VET-263 (2017) (PFR), Appellant suggests OHA held the provision “merely cautions there may be limits on exercising options or counting awards “toward the agency's SDVO SBC goals after an acquisition.” (*Id.*, at 8, citing *Matter of Redhorse Corporation*, SBA No. VET-263, at 5 (2017) (PFR) (*Redhorse II*)). Appellant further suggests OHA expressly rejected the argument that § 125.18(e)(1)(i-iii) are exceptions to the general rule that a concern retains its SDVO SBC status for the life of a contract. (*Id.*, at 8-9, citing *Matter of Redhorse Corporation*, SBA No. VET-261 (2017) (*Redhorse I*)).

Appellant similarly suggests OHA has affirmed this interpretation of the recertification rule in the size context, and SBA intended the recertification rules to mirror one another. (*Id.*, at 9, citing 78 Fed. Reg. 61114, 61127.) According to Appellant, OHA has consistently held a concern that initially qualifies as a small business concern, but later recertifies as other than small, retains its status as the date to determine size is not modified by the recertification regulation. (*Id.*, at 9-10, citing *Size Appeal of Tescom*, SBA No. SIZ-5641 (2015), *Size Appeal of Mistral, Inc*, SBA No. SIZ-5737 (2016), and *Size Appeal of W.I.N.N. Group*, SBA No. SIZ-5360 (2012).) However, Appellant suggests, OHA distinguishes eligibility from counting, stating the procuring agency may no longer count those awards and options toward its small business procurement goals. (*Id.*, at 9-10.)

In addition, Appellant points to the arguments SBA made in *Size Appeal of Digital Management*, SBA No. SIZ-5709 (2015) where SBA argued that a concern which recertifies as other than small can continue to perform on a contract and receive task orders and options, but the procuring agency may not count such awards towards its small business goals. (*Id.*, at 10, citing *Size Appeal of Digital Management*, SBA No. SIZ-5709 (2015).) Appellant quotes OHA's paraphrase of SBA's argument: “[t]his recertification requirement balances SBA's interest in ensuring agencies' small business contracting data correctly reflects the amount spent on small business with small business contractors' interest in having certainty over whether they are eligible for contract award and continued contract performance.” (*Id.*, citing *Digital*, at 7-8.)

Appellant disputes SBA's reliance on the preamble of the final rule implementing the recertification rule for size, particularly because the statement was made in the context of off-ramping concerns that no longer qualify rather than in the context of the general rule itself. (*Id.*, at 12-13, citing 78 Fed. Reg. 61114, 61125-26.) Appellant posits SBA initially proposed a mandate for contracting agencies to “off-ramp any contractor that re-certified as other than small as a result of an acquisition.” (*Id.*, at 12, citing 77 Fed. Reg. 29130, 29159.) According to Appellant, in response to comments, SBA removed the mandatory off-ramp and “left it to the agency to decide whether a contractor should be off-ramped completely, or could move to the non-set-aside portion of a contract.” (*Id.*, citing 78 Fed. Reg. 61114, 61125, 61126.) Appellant further stated SBA's revised rulemaking stated “if a business has recertified that it is other than

small because there was a merger or acquisition or the contract exceeded five years, it is best left to the contracting agency to determine continuation of the contract.” (*Id.*)

Even so, Appellant argues any reliance on statements from the preamble is misplaced when the regulatory text is clear and unambiguous. (*Id.*, at 13, citing *Minority Temp. Agency*, SBA No. DSBA-166, at 10 (2006) (stating “[w]hile a regulation's preamble provides insight into an agency's contemporaneous understanding of its proposed rules; the language of the preamble is not controlling over the language of the regulation).) In Appellant's view, it is clear from the regulation's text that a “concern that represents itself and qualifies as an SDVO SBC at the time of initial offer . . . is considered an SDVO SBC throughout the life of the contract” and that the only exception to this general rule is if the CO requests recertification in connection with a specific order. (*Id.*, at 13, citing § 125.18(e)(1).) Appellant continues, suggesting it is clear the effect of the recertification rule's acquisition provision is the procuring agency's inability to count the options or orders toward its SDVO SBC goals. (*Id.*, at 13.) “Nowhere in the text of the rule is there any indication whatsoever that a contractor re-certifying as a result of an acquisition will become ineligible to compete for new orders.” (*Id.*, at 13-14.) Appellant asserts any departure from this clear meaning would create a new regulation without undertaking the required notice and comment rulemaking under the Administrative Procedure Act. (*Id.*, at 14.)

Appellant also disputes SBA's policy arguments regarding non-veteran owned concerns receiving SDVO SBC set asides. Appellant contends SBA “made a conscious policy choice to allow concerns that had changed status to continue to receive awards because a strict rule limiting set-aside orders to firms that are SDVO SBCs on the date an order proposal is submitted would have had a number of negative consequences on procuring agencies and contractors.” (*Id.* at 14.) Appellant characterizes SBA's regulatory alternative as requiring recertification only at certain points, and providing discretion to the CO to request recertification that would restrict eligibility. Appellant suggests SBA's interpretation would require recertification for each order, a policy SBA expressly rejected during the regulatory process. (*Id.*, at 15-17.)

In addition, Appellant points to GSA's OASIS SB Pool I contract, which suggests a concern retains its status throughout the life of a contract unless the CO requests recertification in connection with a specific order. Appellant maintains its interpretation of SBA's regulatory scheme is commonplace, and quotes the GSA CO's comments that Appellant “will still be considered [an] SDVO SBC” for OASIS orders. (*Id.*, at 18.)

D. Intervention

On December 15, 2017, OBXtek moved to intervene in Appellant's status appeal, asserting it has a direct stake in the outcome of the subject appeal. (Motion, at 1.) In its motion, OBXtek argued it has a substantial chance of receiving the subject award if Appellant is found ineligible. (*Id.*, at 1.) On December 20, 2017, Appellant objected to OBXtek's intervention, arguing OBXtek is not an interested party, asserting OBXtek was third in line for award and, thus, does not stand a substantial chance of receiving the award in lieu of Appellant. (Objections, at 1.) Appellant stated, citing GAO, “the SSA [Source Selection Authority] found that while OBXtek met the minimum requirements, its quotation could not be viewed as preferable to the quotation of [Appellant] or the other technically-acceptable vendor.” (*Id.*, at 1, citing *OBXtek*,

Inc., B-415258, 2017 CPD ¶ __ at 4.) Appellant also stated “GAO denied all of OBXtek's challenges to its own evaluation, and did not raise any challenges to the evaluation of the second-in-line offeror.” (*Id.*, at 1-2.)

On December 28, 2017, OHA denied OBXtek's motion to intervene. In its order, OHA held OBXtek does not have a *direct* stake in the instant appeal because OBXtek's status as an SDVO SBC is not at issue, nor does Appellant's status have any bearing on OBXtek's ability to submit bids on similar procurements. In similar circumstances involving alleged affiliates and proposed subcontractors OHA has denied motions to intervene for lacking a direct stake in the outcome. *See Size Appeal of Magnum Opus Techs., Inc.*, SBA No. SIZ-5372, at 4-5 (2012) (citing *Size Appeal of Ma-Chis Lower Creek Indian Tribe Enters., Inc.*, SBA No. SIZ-5333, at 2 (2012), and *Size Appeal of Control Sys. Research, Inc.*, SBA No. SIZ-5012 (2008)). OHA also held OBXtek lacked a direct stake in the outcome because the SSA found the second technically-acceptable offeror is preferable to OBXtek for the subject procurement, suggesting the second offeror would likely receive the award instead of OBXtek. *OBXtek, Inc.*, B-415258, 2017 CPD ¶ __ at 4.

E. DHS' Response

On January 2, 2018, DHS, the procuring agency, responded to the appeal, arguing Appellant retains its SDVO SBC status for the life of the OASIS SB Pool 1 contract and is eligible for DHS' task order. DHS argues the provisions found at § 125.18(e)(1)(i-iii) directly follow the provision that a “procuring agency may exercise options and still count the award as an award to an SDVO SBC”, and therefore are applicable only to the agency's ability to count awards toward its SDVO SBC goals. (*Id.*, at 4-5.) According to DHS, the exception under § 125.18(e)(1)(ii) regarding mergers and acquisitions further specifies the result of an acquisition is not ineligibility, but rather a prohibition on counting the award toward the agency's SDVO SBC goals. (*Id.*, at 5.) DHS asserts the regulation's silence as to ineligibility further suggests a concern retains its status even after an acquisition. (*Id.*) DHS posits, “the regulation most certainly would not state the procuring agency can no longer count options or orders issued thereafter because the agency would not be issuing such options or awards.” (*Id.*) In addition, DHS posits that SBA's interpretation of the provision does not comport with the clause excepting recertification at the request of the CO because SBA's interpretation would give the provisions at § 125.18(e)(1)(i-iii) the same effect as an explicit request for recertification, “which is inconsistent with the text and structure of [the regulation] as a whole.” (*Id.*)

DHS also contends OHA has previously rejected SBA's interpretation. In *Redhorse II*, according to DHS, OHA recognized the provisions in § 125.18(e)(1)(i-iii) are exceptions to the agency's ability to count orders or options, and do not create an exception to the concern's eligibility for such orders and options. (*Id.*, citing *Redhorse II*, SBA No. VET-263, at 5 (2017).) Therefore, according to DHS, a merger or acquisition “only impacts the procuring agency's ability to count the order or options issued thereafter towards its small business goals.” (*Id.*, at 6.)

DHS analogizes the instant appeal to size appeals in which OHA has held that, where a multiple award contract holder no longer qualified as a small business following an acquisition, and the CO did not request recertification, the concern was still eligible for subsequent task

orders while the procuring agency cannot count the awards. (*Id.*, citing *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5737 (2016); *Size Appeal of TesCom*, SBA No. SIZ-5641 (2015) and *Size Appeal of W.I.N.N. Group*, SBA No. SIZ-5360 (2012).) DHS further suggests the recertification rule in status was intended to mirror the recertification rule in size, and SBA's interpretation in the instant appeal contradicts its application of the recertification rule in size, under which mergers and acquisitions do not render a concern ineligible in the size context. (*Id.*, at 6-7.)

F. SBA's Response

On January 4, 2018, SBA responded to the appeal. In its response, SBA characterizes Appellant and DHS as not contesting the D/GC's determination that Appellant is not eligible for continued SDVO SBC status under the GSA contract, while they contest the D/GC's determination that Appellant is ineligible for award of DHS's SDVO SBC task order. (SBA's Response, at 3.) SBA further asserts GSA, after notification of Appellant's change in status, mistakenly failed to remove Appellant from the list of SDVO SBC concerns for its OASIS SB Pool I contract, as required by 13 C.F.R. § 125.18(e)(1)(ii). SBA speculates Appellant would not have been awarded DHS' task order if GSA had removed Appellant. SBA asserts the D/GC's determination orders GSA to correct its mistake. SBA argues Appellant has not disputed this determination, and requests that OHA uphold the D/GC's determination that Appellant does not qualify for continued SDVO SBC status, and should reiterate to GSA that it should change Appellant's status in its database. (*Id.* at 4-5.)

SBA maintains the recertification rule contains several exceptions to the general rule that a concern retains its status for the life of a contract, one of which is for concerns subsequently acquired or merged with another concern. (*Id.*, at 6-7.) SBA asserts “The occurrence of a merger or acquisition is an exception to the general rule that the SDVO SBC is considered an SDVO SBC throughout the life of the contract.” Further, “a concern that informs the procuring agency that it is no longer an SDVO SBC is no longer eligible for orders set aside for SDVO SBCs,” but the CO retains discretion to award other task orders to the concern for which it is eligible (openly competed, small business set asides where the concern recertifies as small) instead of terminating the contract. (*Id.*, at 7.)

SBA disputes Appellant and DHS' construction of the recertification rule following “however,” arguing the proper construction applies the exceptions following “however” to the entire provision, rather than to solely counting toward procurement goals. SBA argues that counting and consideration are linked. If one of the exceptions following “however” applies, a concern is not considered an SDVO SBC at task order award and a procuring agency cannot claim credit for a task order award to the concern. (*Id.*, at 8.) In fact, SBA contends its interpretation of the regulation “must be given substantial deference unless ‘plainly erroneous or inconsistent with the regulation.’” (*Id.*, at 8, citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997).) SBA maintains that it intended the exceptions following “however” to apply to the full provision and address the previous rule's “unsatisfactory results, with contractors retaining their size status for decades, well after they have outgrown the size standard or merged with or been acquired by a large business concern.” (*Id.*, at 10.)

SBA contends its regulatory scheme as a whole supports its interpretation of the regulation. In particular, SBA points to three regulatory references that provide needed context to the recertification rule for status. First, SBA highlights the requirement that agencies immediately update all applicable Federal contract databases upon receiving a notice of recertification from a concern that is now ineligible following a merger or acquisition. (*Id.*, at 12, citing 13 C.F.R. § 125.18(e)(1)(ii).) SBA argues “[t]he change to contract databases therefore drives the inability of a recertified firm to win future set aside orders for which it is no longer qualified,” and further asserts DHS would not have awarded its SDVO SBC task order to Appellant if GSA had updated the applicable database. (*Id.*) Second, SBA points to an agency's inability to count an award to a concern that has recertified as ineligible. In SBA's view, procuring agencies set aside orders for the purpose of fulfilling socioeconomic goals and “that purpose is entirely thwarted if the agency issues an award to a non-veteran owned firm and does not receive socioeconomic credit.” (*Id.*) SBA argues under Appellant's interpretation, an agency could issue a set-aside order, be required to consider the offer of an already ineligible concern, may award to that concern, and may receive no socio economic credit for the award. (*Id.*, at 13.) Third, SBA highlights the ability of third parties to protest size based on a concern's recertification for an option. 13 C.F.R. § 121.1004(a)(3)(ii). SBA suggests that such protests only make sense if size recertification affects the concern's eligibility for future awards. According to SBA, under Appellant and DHS's interpretation, the recertification for the option has no effect on eligibility for future task orders, and leaves “no incentive for a contractor to file a size protest.” (*Id.*, at 14.)

SBA distinguished the OHA cases relied on by Appellant and DHS, suggesting each addresses situations other than those present in this case. SBA argues that OHA simply addressed whether the recertification rule applied in *Redhorse*, not whether the concern was eligible for a set-aside award. SBA also argues *Redhorse* is distinguishable because it did not involve an acquisition or even a concern that recertified.

SBA asserts *Tescom*, *Mistral*, and *W.I.N.N.*, are inapposite here, because the acquisitions in each case took place after the offer was submitted. SBA concedes that an award of the set aside would be permissible in those situations, but not, as here, where the acquisition or change in status took place before the offer was submitted. (*Id.*, at 14-15.) SBA also argues its litigating position in *Digital Management* is inapposite, because, that case involved whether a concern that recertified as ineligible could receive orders at all and whether the contract had to be terminated. (*Id.*, at 15.)

SBA asserts the effect of a concern recertifying is not that the concern becomes ineligible for all future task orders, but that if the task order requires that an offeror be eligible within a particular socioeconomic category, the concern is not eligible if it has already recertified as ineligible within that category. If an agency issues a task order that does not require eligibility within a category the concern has not recertified itself as being ineligible for, the concern may compete for that task order. (*Id.*, at 16.)

SBA argues Appellant's reading would allow a large concern to gain access to SDVO SBC set-asides by acquiring a qualified SDVO SBC. Agencies would be penalized for setting aside orders, because they would lose credit on the awards, making set aside less likely. SBA

asserts the word “however” appears in the same place in all of its recertification rules, including the small business set aside program. Appellant's reading of “however” would mean a recertified other than small business can win small business set-aside orders, despite a regulation which prohibits that. (*Id.* at 17, citing 13 C.F.R. §§ 121.404(g), 121.704(b), 126.601(h), 127.503(h).)

SBA also asserts that its interpretation of the recertification rule is widely accepted by other, procuring agencies, and Appellant's interpretation would constitute a drastic shift. SBA points to GSA's Alliant Small Business Contract, in which GSA allows concerns recertifying as other than small to “maintain visibility of new requirements in order to offer their services as a mentor of, or subcontractor to their small business counterparts.” (*Id.*, at 18.) SBA also highlights GSA's VET 2 Governmentwide Acquisition Contract (GWAC), which states a concern that recertifies as other than small or non-SDVO SBC due to merger “will trigger a no cost contract cancellation, initiated by the Contractor.” (*Id.*, at 19.) SBA, second, points to NASA's SEWP GWAC, which states a contract holder that recertified as other than small “remains in their group and is not able to respond to RFQs set aside for small business.” (*Id.*, at 19.) Third, SBA points to NIH's CIO-SP3 Small Business GWAC, which allows a concern recertifying as other than small to retain its contract, but leaves the decision to exclude the ineligible contractor from competition for any individual task order. (*Id.*, at 19.) Notably, SBA points next to DHS' EAGLE II contract, which states that a no-longer-eligible contractor “can no longer participate in any future task order competitions under the EAGLE II program, but will be able to complete the work on current task orders. (*Id.*, at 19-20.)

SBA also contends Appellant and DHS' interpretation does not meet the test under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), because it conflicts with the “unambiguous expressed intent” of the Small Business Act and, therefore, is not a “permissible construction”. According to SBA, it is clear that Congress' intent with Section 36 of the Small Business Act was to award contracts to veteran-owned concerns on the basis of socioeconomic status, and did not authorize any incidental awards to non-veteran owned concerns. (*Id.* at 20-21.) Section 36 limits the awards of contracts to qualified SDVO SBCs. SBA points out that “orders” must be considered “contracts”. *Kingdomware Techs. v. U.S.*, 136 S.Ct. 169, 19788 (2016). SBA suggests eliminating concerns that recertify as non-SDVO SBC from award merely comports with Congress' intent.

G. Appellant's Reply

On January 8, 2018, Appellant moved to reply to SBA's response. In its motion, Appellant contends the SBA raised two arguments for the first time on appeal, specifically that Appellant does not dispute it should not retain its “status for the Contract” (*i.e.*, GSA's OASIS SB Pool I contract) and that “every major agency with a small business GWAC uses the same interpretation of the recertification rule.” (Motion for Leave to File a Reply, at 1.)

In its reply, Appellant strongly disputes SBA's characterization of the appeal, stating “the only multiple award contract at issue here is the GSA OASIS SB [Pool I] contract.” (Reply, at 2.) Appellant, quoting its appeal petition, states it specifically mentions the GSA OASIS SB contract. Appellant also asserts SBA incorrectly suggests every major agency uses SBA's interpretation of the recertification rule and even cites examples actually reflecting Appellant's

interpretation. In Appellant's view, NIH's deference to the CO as to whether to exclude a now-ineligible contractor from competing for a task order fits exactly with the interpretation Appellant advocates. (*Id.*, at 3.) In addition, Appellant distinguishes the remaining references offered by SBA as examples of off-ramp provisions and descriptions of how an off-ramp provision works. Appellant suggests SBA considered mandatory off-ramps when promulgating the rule, but eventually left implementation to the discretion of the particular CO. In Appellant's view, if the recertification rule itself requires the procuring agency to off-ramp a now-ineligible contractor, then separate off-ramp provision implemented at the CO's discretion would be superfluous. (*Id.*, at 4-5.)

III. Discussion

A. Threshold Matters

Appellant filed a Motion for Leave to File a Reply accompanied by a proposed Reply addressing SBA's arguments on appeal. *See* Section II.G, *supra*. In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. §§ 134.501(b), 134.206(e). However, SBA raises two arguments for the first time in its response and Appellant's reply directly addresses these arguments without merely regurgitating its appeal petition. Thus, for good cause shown, the Motion is hereby GRANTED and the accompanying proposed Reply is ADMITTED to the record. *See Matter of KRR Partners Joint Venture*, SBA No. VET-239 (2013); *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013).

B. Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. OHA reviews the D/GC's decision to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

C. Analysis

The instant appeal requires interpretation of the SBA regulation establishing the recertification rule in the context of SDVO SBC status. The regulation, in the pertinent part, states:

(e) *Recertification*. (1) A concern that represents itself and qualifies as an SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDVO SBC throughout the life of that contract. This means that if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a

specific order. Where a concern later fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC. However, the following exceptions apply:

(i) Where an SDVO contract is novated to another business concern, the concern that will continue performance on the contract must certify its status as an SDVO SBC to the procuring agency, or inform the procuring agency that it does not qualify as an SDVO SBC, within 30 days of the novation approval. If the concern is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, toward its SDVO goals.

(ii) Where a concern that is performing an SDVO SBC contract acquires, is acquired by, or merges with another concern and contract novation is not required, the concern must, within 30 days of the transaction becoming final, recertify its SDVO SBC status to the procuring agency, or inform the procuring agency that it no longer qualifies as an SDVO SBC. If the contractor is not an SDVO SBC, the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals. The agency and the contractor must immediately revise all applicable Federal contract databases to reflect the new status.

(iii) Where there has been an SDVO SBC status protest on the solicitation or contract, *see* § 125.27(e) for the effect of the status determination on the contract award.

13 C.F.R. § 125.18(e)(1)(i-iii). The regulation permits a concern that initially qualifies as an SDVO SBC for a contract, including a Multiple Award Contract, to retain its SDVO SBC status for the life of that contract with certain exceptions. Appellant asserts the only exception to this general rule occurs when a contracting officer requests recertification in connection with a specific order. SBA asserts that, in addition, exceptions for novations, mergers, acquisitions, and negative status determinations as articulated in § 125.18(e)(1)(i-iii) also apply to this general rule.

When interpreting a regulation, the federal courts must consider whether to defer to an agency's interpretation of its own regulations, "as the promulgating agency is particularly well-suited to know its intended meaning for a regulation." *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1363-64 (Fed. Cir. 2005). However, the courts have afforded such deference only in instances where: (1) "the language of the regulation is ambiguous", *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); and (2) the agency's interpretation is not "plainly erroneous or inconsistent with the regulations being interpreted", *Mason v. Shinseki*, 743 F.3d 1370, 1374-75 (Fed. Cir. 2014). *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The courts have held "[t]o defer to an agency's position [where the regulation is not ambiguous] would be to permit the agency, under the guise of interpreting a regulation to create de facto a new regulation." *Christensen*, 529 U.S. at 588. The U.S. Court of Appeals for the Federal Circuit has also held "[t]he construction of a regulation is a question of law" and "[t]o interpret a regulation we must look at its plain

language and consider the terms in accordance with their common meaning.” *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006); *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997). In addition, *Auer* deference, according to the courts, is particularly warranted where the agency's interpretation is consistent with prior interpretations. But, the courts have refrained from deferring when the agency's present position conflicts with prior interpretations or is merely a convenient litigating position for the agency. *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) and *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 213 (1988)).

I find *Auer* deference is unwarranted regarding § 125.18(e)(1) because the subject regulatory language is not ambiguous. First, SBA's regulatory scheme for size and other socioeconomic status programs comprises discrete notions of eligibility and counting. SBA regulations indicate a concern must satisfy certain requirements (*i.e.*, control, ownership) to qualify for a particular SBA program (e.g., SDVO SBC, WOSB, 8(a)) and compete for contracts set aside for concerns under that program. *See* 13 C.F.R. § 125.12. Congress determined service-disabled veteran-owned concerns warranted specific preferences in government contracting, and enacted Section 36 of the Small Business Act to permit agencies to set aside certain contracts and orders for these concerns. *See* Section II.B, *supra*, citing H.Rep. No. 108-142 at 6, 11 (2013). Congress also established contracting goals for procuring agencies based on these socioeconomic categories, directing agencies to award a certain percentage of contracts to these groups. *See* 15 U.S.C. § 644(g)(1)(A)(ii) (stating “[t]he Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year”). SBA regulations tie a concern's status to a procuring agency's ability to count awards toward these goals.

Under the plain language of SBA's recertification regulation for SDVO SBCs, a concern that initially qualifies as an SDVO SBC may retain its status for the life of a contract. The regulation specifically contemplates that this retention of eligibility extends to Multiple Award Contracts, such as the OASIS SB Pool I contract at issue here. The only exception to this general rule occurs if the contracting officer requests recertification in connection with a specific order. *See* 13 C.F.R. § 125.18(e)(1). This exception is articulated immediately following the regulation's statement of the general rule, and there are no other exceptions enumerated at this point in the regulation.

The regulation then contains an intervening sentence dictating that when a concern no longer qualifies as an SDVO SBC, a procuring agency may exercise options and still count the award as an award to an SDVO SBC toward meeting the agency's socioeconomic contracting goals. *See id.* The regulation plainly contemplates the award of an option or order to a subsequently-unqualified concern, and nonetheless permits the procuring agency to count the option or order toward its socioeconomic goals so long as the concern satisfies the general rule. The regulation then states that “However, the following exceptions apply” and discusses exceptions for novation, merger and negative status determination. *See* 13 C.F.R. § 125.18(e)(1)(i-iii). For each of these exceptions, the remedy articulated in the regulation is that “the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, toward its SDVO [SBC] goals.” *Id.* For example, under the regulation, if a

concern initially qualifies as an SDVO SBC for a contract, but later fails to qualify as an SDVO SBC, the procuring agency may still exercise the options and issue orders pursuant to the contract and count them toward its socioeconomic goals. However, if the SDVO SBC concern later merges, acquires, or is acquired and no longer qualifies as an SDVO SBC, the agency cannot count any “options or orders pursuant to the contract, from that point forward, toward its procurement goals.” The regulation *does not* prohibit the procuring agency from exercising these options or issuing orders, and does not otherwise deem the concern ineligible for award. Based on the placement of the exceptions in the regulatory provision and the exceptions' specific remedies regarding counting, these exceptions clearly apply to the immediately foregoing sentence discussing an agency's ability to exercise options and still receive credit.

Notably, SBA regulations specifically address eligibility when discussing the effect of status determinations. Specifically, under § 125.30(g)(2), “[a] contracting officer shall not award a contract to a protested concern that the D/GC has determined is not an eligible SDVO [SBC] for the procurement in question.” 13 C.F.R. § 125.30(g)(2). The provision specifically dictates, if the contracting officer receives the protest after award, the “contracting officer shall terminate the award” if the D/GC determines the awardee is ineligible and no OHA appeal has been filed. *Id.*, at § 125.30(g)(2)(i). Similarly, if the determination is appealed and affirmed after the contracting officer awards the contract, the contracting officer “shall terminate the contract or not exercise the next option.” *Id.*, at § 125.30(g)(2)(ii). In both cases, SBA specifies the remedy for ineligibility is contract termination or, at the least, prohibition on continuing the contract by exercising an option. In contrast, the remedy under § 125.18(e)(1) for a concern which was eligible at the time of contract award, but is no longer, is a prohibition on counting the award of options or orders toward the procuring agency's socioeconomic goals *in certain circumstances*. *See id.*, at § 125.18(e)(1)(i-iii). Thus, the concern remains eligible under the contract unless the CO has requested recertification in connection with a particular order. As noted above, the regulation specifically contemplates that this retention of eligibility extends to Multiple Award Contracts. Thus, SBA's interpretation that the recertification rule governs eligibility for award is flatly inconsistent with the plain language of the regulation.

This interpretation of § 125.18(e)(1) is also consistent with OHA's previous SDVO SBC decisions. In *Redhorse I*, OHA held a concern which had certified itself as an SDVO SBC when it received a Multiple Award Contract was considered an SDVO SBC for the life of the contract, absent a request for recertification by the CO. *Redhorse I*, SBA No. VET-261, at 4. Accordingly, the SDVO SBC protest of an award of a task order where no recertification was required was untimely, and OHA vacated the determination the D/GC issued in response to it. (*Id.*) Upon reconsideration, in *Redhorse II*, OHA held the exceptions listed at 13 C.F.R. § 125.18(e)(1)(i-iii) are “exceptions to a procuring agency's ability to ‘exercise options and still count the award’ towards its SDVO SBC contracting goals.” *Redhorse II*, SBA No. VET-263, at 5. OHA did not conclude these exceptions applied to the general rule that an initially qualified SDVO SBC retains its status for the life of the contract. Rather, OHA concluded these exceptions applied to the rule that, if a concern later fails to qualify as an SDVO SBC, an agency may still exercise options and count those awards as ones to an SDVO SBC. *See* 13 C.F.R. § 125.18(e)(1). The *Redhorse* cases thus support Appellant's interpretation that an initially qualified SDVO SBC retains its status for the life of a Multiple Award Contract and remains eligible for options and orders, unless the contracting officer requests recertification in connection with a specific order.

The *Redhorse* cases also further suggest the exception for mergers and acquisitions applies to the procuring agency's ability to count an award towards its socioeconomic goals, not an exception to a concern's eligibility for award.

While the SDVO SBC regulation differs from the regulation establishing the recertification rule in size, SBA intended for both regulations to operate similarly. *See* 78 Fed. Reg. 61114, 61127 (Oct. 2, 2013) (stating “SBA received only one comment supporting application of ‘the recertification rule’ (the recertification requirements used to determine size) to its status programs,” and adopting the rule for SDVO SBCs). Under § 121.404(g), the recertification rule for size status, a concern that initially qualifies as small for a contract shall retain its size status for the life of the contract. 13 C.F.R. § 121.404(g). As with the recertification rule for SDVO SBC status, the size regulation contemplates a concern may become unqualified during the life of the contract and the procuring agency may nonetheless exercise options and issue orders to the subsequently-unqualified concern pursuant to the contract. *Id.* The size regulation similarly permits the procuring agency to count these awards towards its socioeconomic goals, except in certain circumstances such as novation, merger, acquisition, or a negative size determination. *Id.*, at § 121.404(g)(2)(i).

OHA has affirmed this interpretation of the recertification rule in several cases, and consistently concluded the recertification rule does not require termination of a contract award to a subsequently-unqualified concern. In these cases, OHA held the recertification rule merely prohibited the procuring agency from counting the award toward its socioeconomic goals in certain circumstances. *See Size Appeal of Mistral, Inc.*, SBA No. SIZ-5737 (2016); *Size Appeal of TesCom*, SBA No. SIZ-5641, at 4 (stating, under the recertification rule, “[t]he result of the acquisition of [the challenged firm] is not elimination of the contract award as the [protestor] contends, but that the [procuring agency] cannot count any option or order issued under this contract to [challenged firm] towards its small business goals”); *Size Appeal of W.I.N.N. Group*, SBA No. SIZ-5360 (2012) (holding the recertification rule does not alter the date for determining the size of the challenged firm, but prohibits the procuring agency from counting the options or orders issued pursuant to underlying contract toward its procurement goals).

SBA's interpretation of the recertification rule flatly contradicts the plain language of § 125.18(e) and SBA's application of the similar recertification rule for size status. SBA's interpretation also contravenes the intent expressed when promulgating the regulation, specifically to afford the contracting officer discretion in exercising options and issuing orders to a subsequently-unqualified concern pursuant to an on-going procurement. *See* 78 Fed. Reg. 61114, 61126 (Oct. 2, 2013) (stating “SBA believes that it would be a decision of the contracting agency as to whether and how a business would move to the non-set-aside portion of a multiple award contract if it did not initially submit an offer for the non-set-aside portion”). As Appellant points out, SBA considered mandatory on-ramps and off-ramps for subsequently-unqualified concerns under the proposed recertification rule, but demurred and deferred to contracting officers to decide how to handle such situations. When promulgating the final rule, SBA stated it “believes that if a business has recertified that it is other than small because there was a merger or acquisition or the contract exceeded five years, *it is best left to the contracting agency to determine continuation of the contract.*” (*Id.*, emphasis added.) SBA, however, did not afford

such discretion to procuring agencies regarding counting awards toward their socioeconomic goals.

Moreover, the GWAC clauses highlighted by SBA evidence the discretion provided to contracting agencies on how to manage subsequently-unqualified concerns. *See* Section II.F, *supra*. GSA's Alliant Small Business Contract facilitates subcontracting and mentorship agreements with no-longer-qualified concerns, while its VET 2 GWAC terminates the contract with the now-unqualified concern. *Id.* DHS' EAGLE II contract and NASA's SEWP GWAC prohibits now-unqualified concerns from competing for future orders, while NIH's CIO SP3 Small Business GWAC allows the particular contracting officer to determine whether to exclude now-unqualified concerns from competition for a task order. *Id.* The variety in each instance demonstrates the contracting agency's ability to determine how best to continue these contracts.

While it may appear that permitting an agency to award an SDVO SBC set aside task order to a non-SDVO SBC may contravene the purpose of the program, SBA balanced the costs to contractors of securing awards with the costs of requiring recertification when it promulgated the recertification rule. In *Tescom*, OHA recognized “that it is unfair to disqualify a firm from consideration after a firm has spent considerable time and resources pursuing a contract for which it was eligible at the time of initial offer.” *Tescom*, SBA No. SIZ-5641, at 3 (2015). OHA continued, stressing the remedy was to prohibit counting the award toward the procuring agency's goals, not to terminate the contract award. *Id.* SBA's regulations, in effect, permit a concern to secure a government contract award, including a Multiple Award Contract, and continue to grow and develop over the life of the contract for no more than five years. *See* 13 C.F.R. § 125.18(e)(2) (mandating that a contracting officer request recertification by a concern no later than 120 days before the fifth year of a Multiple Award Contract exceeding five years). Unlike SBA's characterization of Appellant's interpretation of § 125.18(e), a concern does not retain its status indefinitely, and cannot rely on its status under one contract to compete for other contracts. *See* Section II.F, *supra*. The regulation establishing the recertification rule affords the procuring agency the discretion to shrink this five year period by requesting recertification for specific task orders and, thereby, restricting competitions solely to qualified concerns. In addition, contrary to SBA's reasoning, the revisions to “all applicable Federal contract databases” required under § 125.18(e)(1)(ii) do not affect the award options or task orders pursuant to an existing contract, but prevent award of future contracts to a now-unqualified concern. *See* 13 C.F.R. § 125.18(e)(1)(ii); Section II.F, *supra*.

In sum, I find *Auer* deference is wholly inappropriate because the language of the regulation is not ambiguous, and, even so, SBA's interpretation is inconsistent with the regulatory history and with its previous interpretations in both the SDVO SBC and size contexts. It would be wholly inappropriate for OHA to undo this scheme through adjudication as such a change to SBA's regulatory scheme requires notice and comment rulemaking. Further, SBA's attempts to bolster its arguments with *Chevron* are unpersuasive. OHA has previously held the D/GC's determination is not entitled to *Chevron* deference as “[that] type of deference . . . is reserved for notice and comment rulemaking or other final agency action on review in a Federal Court.” *In the Matter of Ferrotherm Corp.*, SBA No. VET-118, at 4 (2007). “Rather, it is OHA's final agency decision which is entitled to *Chevron* deference when it is reviewed by a Federal court.” *Id.*, citing 13 C.F.R. § 134.515(a).

Here, applying the regulation as interpreted *infra*, DHS may award the subject task order, an SDVO SBC set aside, to Appellant even though it no longer qualifies as an SDVO SBC. SBA does not dispute that Appellant qualified as an SDVO SBC at the time of its initial offer for GSA's OASIS SB Pool I contract, nor that DHS did not require recertification for the instant task order. *See* Section II.F, *supra*. Absent a request for recertification by DHS, the general rule under § 125.18(e) governs, and Appellant retains its SDVO SBC status for GSA's OASIS SB Pool 1 contract. However, under the same regulation, DHS is prohibited from counting this award to Appellant toward its SDVO SBC goals because Appellant could not recertify as an SDVO SBC after being acquired by PlanetRisk, a non-veteran owned concern. In its brief, DHS concedes it cannot count this award toward its socioeconomic goals because Appellant could not recertify as an SDVO SBC following its acquisition by PlanetRisk. *See* Section II.E, *supra*. As SBA asserts, prohibiting an agency from counting such awards to unqualified concerns toward the agency's procurement goals incentivizes agencies to ensure only qualified concerns receive awards. SBA defers to the procuring agencies, DHS and GSA in the instant appeal, as to whether and how best to address subsequently-unqualified concerns performing an ongoing contract. If DHS had requested recertification in connection with this order, Appellant would not have been able to represent itself as an SDVO SBC and would have been ineligible for award based on the contracting officer's request.

IV. Conclusion

For the above reasons, I GRANT the appeal and VACATE the D/GC's determination. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.515(a).

CHRISTOPHER HOLLEMAN
Administrative Judge