

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

SIZE APPEAL OF:

McLaughlin Research Corporation,

Appellant,

Appealed From  
Size Determination Nos. 01-2024-05 and  
01-2024-06

SBA No. SIZ-6273

Decided: March 20, 2024

APPEARANCES

Robert K. Tompkins, Esq., Richard Ariel, Esq., Holland & Knight LLP, Washington, D.C., for Appellant

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On December 21, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area I (Area Office) issued Size Determination Nos. 01-2024-05 and 01-2024-06, finding that McLaughlin Research Corporation (Appellant) is not a small business for two task orders issued under the SeaPort — Next Generation (SeaPort-NxG) multiple-award contract (MAC). On appeal, Appellant contends that the size determinations are 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 in part.

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 determinations, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. No redactions were requested, and OHA therefore now issues the entire decision for public release.

## II. Background

### A. SeaPort-NxG

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

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

Appellant timely submitted an offer, self-certifying as a small business. On January 2, 2019, the Navy awarded a SeaPort-NxG prime contract to Appellant.

### B. Task Orders

On December 23, 2022, the Naval Undersea Warfare Center Division — Newport, Rhode Island issued Task Order Request for Proposals (TORFP) No. N6660423R3004 for a task order under the SeaPort-NxG MAC. The CO set aside the task order entirely for small businesses. Proposals, including price, were due February 14, 2023. The TORFP did not contain a request or requirement that offerors recertify size for the task order. According to the TORFP, “Size status of offerors is per representation made for the basic contract. The Government is not seeking a representation at this time.” (TORFP No. N6660423R3004, at 65.)

On May 17, 2023, the Naval Undersea Warfare Center Division — Newport, Rhode Island issued TORFP No. N6660423R3000 for a task order under the SeaPort-NxG MAC. The CO set aside the task order entirely for small businesses. Proposals, including price, were due

June 26, 2023. TORFP No. N6660423R3000 did not contain a request or requirement that offerors recertify size for the task order.

### C. Protests

On December 4, 2023, the CO for TORFP No. N6660423R3004 filed a protest challenging Appellant's size. The CO explained that, based on Appellant's representations and certifications in the System for Award Management (SAM), Appellant was not small under NAICS code 541330 on February 14, 2023, when Appellant submitted its proposal for the task order. (TORFP No. N6660423R3004 Protest at 1.) In November 2023, the CO requested that Appellant recertify its size, and Appellant responded by claiming that it is considered small at the SeaPort-NxG contract level. (*Id.* at 1-2.)

On December 5, 2023, the CO for TORFP No. N6660423R3000 also filed a protest challenging Appellant's size. The CO observed that, at the time Appellant submitted its task order proposal on June 24, 2023, Appellant was no longer a small business under NAICS code 541330, based on Appellant's representations and certifications in SAM. (TORFP No. N6660423R3000 Protest at 1.) On December 1, 2023, the CO had asked Appellant to recertify its size. (*Id.* at 2.) Appellant responded that it was considered small throughout the base period of the SeaPort-NxG MAC. (*Id.*)

### D. Protest Response

On December 18, 2023, Appellant responded to the protests. Appellant denied the COs' assertions that its size representations were contradictory and inconsistent. (Protest Response at 1.) Appellant conceded that it is no longer small, and thus its size is accurately reflected in SAM as a large business for NAICS code 541330. (*Id.*) However, based on the terms of the SeaPort-NxG MAC, Appellant is small at the contract level and could continue to compete for the subject task orders. (*Id.*)

Clause C.12 of the SeaPort-NxG contract provides that “[a] SeaPort-NxG Prime MAC holder may retain its size status certified at the base MAC or option award for duration of that MAC contract period.” (*Id.* at 2.) Likewise, the SeaPort-NxG Vendor Concept of Operations (CONOPs) states that “[v]endors are classified as either small or other than small at the MAC level” and “will be required to recertify size status prior to the exercise the additional ordering period option/award term.” (*Id.* at 3, quoting CONOPs 2.1.15.) The base period for the SeaPort-NxG contract extends through December 31, 2023, so Appellant maintained that it retains the size status it held when originally awarded the SeaPort-NxG contract. (*Id.* at 2.)

Appellant acknowledged that, in October 2023, the Navy advised SeaPort-NxG prime contractors that:

**On 2 January 2024**, regardless of what size and socioeconomic status is reflected in the SeaPort portal, all Task Order award eligibilities will be determined at task order solicitation proposal submission to come into compliance with [13] CFR 121.404(a)(1)(i)(A) as the SeaPort-NxG MACs were not specifically awarded to a

pool of concerns where size status would be maintained at the MAC level for the remainder of the order period.

(*Id.*) Appellant contended that this guidance “has not yet been adopted or implemented.” (*Id.*) In addition, for TORFP No. N6660423R3000, the Navy specifically stated that “[a] prospective offeror will not need to recertify their size status in this proposal. The size status under this solicitation will be the one established at the basic contract level unless the offer[or] should have recertified under the basic contract.” (*Id.* at 3.)

#### E. Size Determinations

On December 21, 2023, the Area Office issued Size Determination Nos. 01-2024-05 and 01-2024-06, concluding that Appellant is not a small business for the two task orders.<sup>2</sup> The Area Office found that, because SeaPort-NxG is an “unrestricted” MAC, and because the task orders were set aside for small businesses, SBA regulations required recertification at the task order level. (Size Determination No. 01-2024-05, at 2-3.) The appropriate date to determine Appellant's size is the date Appellant submitted its proposal, including price, in response to each TORFP. (*Id.* at 3.)

The Area Office explained that, according to SBA regulations:

if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.

(*Id.* at 2, quoting 13 C.F.R. § 121.404(a)(1)(i)(A).) OHA in *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022) held that this regulation required offerors to recertify for set-aside task orders issued under SeaPort-NxG, an unrestricted MAC. (*Id.* at 3.)

Here, the date to determine Appellant's size for TORFP No. N6660423R3000 is June 24, 2023. (*Id.*) The date for determining Appellant's size for TORFP No. N6660423R3004 is February 14, 2023. (Size Determination No. 01-2024-06, at 3.) After reviewing Appellant's tax returns, the Area Office concluded that Appellant was no longer small as of these dates under the \$47 million size standard.

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<sup>2</sup> The Area Office issued two separate size determinations, which are substantively identical. Size Determination No. 01-2024-05 pertained to TORFP No. N6660423R3000, and Size Determination No. 01-2024-06 pertained to TORFP No. N6660423R3004. Unless otherwise indicated, citations in this decision refer to Size Determination No. 01-2024-05.

## F. Appeal

On January 5, 2024, Appellant filed the instant appeal. Appellant asserts that the Area Office “erred in finding that [Appellant] was required to re-certify its size at the time of the task order proposals.” (Appeal at 2.) More specifically, in Appellant's view, the Area Office should not have applied 13 C.F.R. § 121.404(a)(1)(i)(A) because SeaPort-NxG is not an “unrestricted” MAC. (*Id.*)

Appellant contends that the Area Office instead should have applied 13 C.F.R. § 121.404(a)(1)(i)(B):

Multiple Award Contract that is set aside **or reserved** for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), if a business concern (including a joint venture) is small at the time of offer and contract-level recertification for the Multiple Award Contract, it is small for each order or Blanket Purchase Agreement issued against the contract, unless a contracting officer requests a size recertification for a specific order or Blanket Purchase Agreement.

(*Id.* at 10 (emphasis added by Appellant).) The regulations further indicate that:

Reserve means, for a Multiple Award Contract, (1) An acquisition conducted using full and open competition where the contracting officer makes— (i) Two or more contract awards to any one type of small business concern (e.g., small business, 8(a), HUBZone, SDVO SBC, WOSB or EDWOSB) and competes any orders solely amongst the specified types of small business concerns if the “rule of two” or any alternative set-aside requirements provided in the small business program have been met; [and] (ii) Several awards to several different types of small businesses (e.g., one to 8(a), one to HUBZone, one to SDVO SBC, one to WOSB or EDWOSB) and competes any orders solely amongst all of the small business concerns if the “rule of two” has been met . . . .

(*Id.* at 11, quoting 13 C.F.R. § 125.1.) Appellant asserts that when the above definition was proposed, SBA intended to allow COs to easily reserve MAC awards, by simply “mak[ing] one or more awards to small businesses.” (*Id.*)

Appellant maintains that SeaPort-NxG meets the definition of a “reserved” MAC. (*Id.*) Specifically, the Navy “made numerous awards to small businesses, and task orders have been repeatedly analyzed for set-aside status and were set aside for all of the small business awardees, as in accordance with SBA's regulations concerning ‘reserved.’” (*Id.*) Because SeaPort-NxG is actually a reserved MAC, 13 C.F.R. § 121.404(a)(1)(i)(B) applies, and Appellant is considered small for any task orders issued under SeaPort-NxG, unless a CO specifically requests recertification in the task order solicitation. (*Id.* at 12.)

Provisions in the SeaPort-NxG contracts regarding small business status are consistent with 13 C.F.R. § 121.404(a)(1)(i)(B). (*Id.*) The RFP and contracts state that “[c]ontractors will be

required to recertify at the 5 year Option renewal. Representations of WOSB, SDVOSB, 8(a) and HUBZone shall be monitored for award eligibility in set-asides at the Task Order level.” (*Id.*, quoting RFP at 14 and Appellant’s SeaPort-NxG prime contract at 15.) Notably absent is any requirement to recertify size at the task order level. (*Id.*) Because small business prime contractors were not expected to recertify their size, the Navy “did not make this acquisition unrestricted” and instead reserved awards for small businesses. (*Id.*) The RFP also strongly encouraged small businesses to submit offers, and noted that the Navy intended to award to all qualifying offerors. (*Id.* at 13, citing RFP at 62.) Since the Navy planned to make awards to all qualifying small businesses, SeaPort-NxG essentially reserved awards for small businesses. (*Id.*)

Appellant highlights that the Navy on multiple occasions told SeaPort-NxG contractors that small businesses would not need to recertify their size for set-aside task orders. (*Id.* at 13.) On June 18, 2018, in response to a question about size recertification in relation to SeaPort-NxG, the Navy said: “The designation of [small business] is made at the time of award of the SeaPort-NxG MAC. Awardees who certify as small maintain that designation until recertification is required.” (*Id.*, quoting Exh. D at 2.) Similarly, the Navy answered a recertification question regarding TORFP No. N6660423R3000, advising that “[a] prospective offeror will not be required to recertify their size status in its proposal” and that “[t]he size status applied under this solicitation will be the one established at the basic contract level unless the offeror should have recertified under the basic contract.” (*Id.* at 14, quoting Exh. H at 1.) In November 2023, the Navy released the SeaPort-NxG CONOPs and Functional User Guide which stated that “SeaPort-NxG re-certification will occur at the MAC level as either small or other than small (large) at time of award and prior to the award term option exercise in accordance with SBA policy. Credit for other small business designations (SDVOSB, Woman Owned Small Business (WOSB), etc.) would be as indicated in the System for Award Management (SAM) at the time of proposal submittal at the task order level.” (*Id.*, quoting Exh. I at 12.) This guidance further indicates that the Navy never considered SeaPort-NxG an unrestricted MAC and meant to reserve awards for small businesses. (*Id.*)

Appellant contends that finding SeaPort-NxG to be an unrestricted MAC would render the above instructions superfluous. (*Id.* at 15.) The requirement that small businesses certify their size at the contract level would be “meaningless.” (*Id.*) The language that small businesses need not recertify their size for set-aside task orders would also be “completely read out.” (*Id.*)

Appellant complains that the OHA decision referenced by the Area Office, *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022), “does not even examine the issue of whether SeaPort-NxG reserved awards for small businesses.” (*Id.*) According to Appellant, in the more recent decision *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023), OHA determined that the SeaPort-NxG MAC was not unrestricted. (*Id.* at 16.) In *Forward Slope*, the appellant was a SeaPort-NxG prime contractor that had been acquired by another company before it submitted an offer on a set-aside task order. (*Id.*, citing *Forward Slope*, SBA No. SIZ-6258, at 1.) OHA found that the appellant was not required to recertify size because it “remained a small business under the certification it made for the underlying MAC.” (*Id.*, quoting *Forward Slope*, SBA No. SIZ-6258, at 5.) Appellant interprets *Forward Slope* to mean that “OHA found that SeaPort-NxG was either set-aside, partially set-aside, or reserved” and that “offerors that

were small at the time of the MAC award remained small through the life of the base five year period of the contract.” (*Id.*)

#### G. Invitation for Comments

On January 29, 2024, OHA invited parties to submit comments as to whether the instant appeal is barred under the doctrine of collateral estoppel. (Order at 1.) OHA noted that, in the appeal, Appellant alleged that the Area Office erred in finding that recertification was required for the task orders under 13 C.F.R. § 121.404(a)(1)(i)(A), because SeaPort-NxG is a reserved, rather than an unrestricted, MAC. (*Id.*) Appellant also was a party, however, in *Size Appeal of McLaughlin Rsch. Corp., LLC*, SBA No. SIZ-6253 (2023), and there argued that SeaPort-NxG was an unrestricted MAC. (*Id.*) OHA subsequently ruled in Appellant's favor in *McLaughlin*, and repeatedly stated that SeaPort-NxG was an unrestricted MAC. (*Id.*)

#### H. Navy's Comments

On February 7, 2024, the CO for TORFP No. N6660423R3000 submitted comments in response to OHA's Order. According to the CO, although the Navy takes no position “as to the merits of [Appellant's] legal arguments or as to the issue of whether the doctrine of collateral estoppel applies,” the Navy nevertheless “maintains that the SeaPort - Next Generation (SeaPort-NxG) Multiple Award Contract (MAC) was solicited and, therefore, awarded on an unrestricted basis.” (E-mail from K. Michael (Feb. 7, 2024).) The CO asserts that the SeaPort-NxG RFP was not set aside or restricted to small businesses, and did not “contain the requisite clauses” that would have been necessary if the SeaPort-NxG procurement had been conducted as a reserve or set-aside. (*Id.*)

#### I. Appellant's Comments

On February 14, 2024, Appellant submitted comments in response to OHA's request. Appellant maintains that its current appeal “presents fundamentally different questions” than those seen in *Size Appeal of McLaughlin Rsch. Corp., LLC*, SBA No. SIZ-6253 (2023). (Comments at 1.) Accordingly, Appellant contends, the instant appeal is not precluded by collateral estoppel. (*Id.* at 3.)

In *McLaughlin*, OHA considered whether a size protest of a task order issued against the SeaPort-NxG MAC was timely in accordance with 13 C.F.R. § 121.1004(a)(2). (*Id.*) “By contrast, the question presented here is whether [Appellant] can continue to rely on its size as self-certified in 2018 with respect to the underlying SeaPort-NxG MAC award in the context of orders issued by the Navy that were set-aside for contract holders that initially certified as a small business for purposes of the underlying MAC.” (*Id.* at 4-5.) *McLaughlin* also concerned the effects of mergers and acquisitions on a concern's size, which is not at issue here. (*Id.* at 8.) \*7 Appellant contends that *McLaughlin* did not fully address whether the SeaPort-NxG RFP reserved awards for small businesses. (*Id.* at 7.) *McLaughlin* relied upon *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022) for the proposition that SeaPort-NxG was an unrestricted MAC. (*Id.*) In *Potomac River*, though, OHA “merely stated” that SeaPort-NxG was unrestricted, without further discussion. (*Id.*) Likewise, in *McLaughlin*, OHA did not conduct a

detailed analysis “of how the Seaport-NxG MAC was unrestricted or why it was not considered reserved.” (*Id.* at 7-8.)

Appellant also contends that changes in the law and surrounding circumstances after *McLaughlin* warrant further review of whether SeaPort-NxG was unrestricted or reserved. (*Id.* at 10.) The *McLaughlin* appeal was filed in June 2023, but the Navy later sent communications to SeaPort-NxG prime contractors which, in Appellant's view, suggest that the Navy was treating SeaPort-NxG as if it established reserves. (*Id.* at 11.) Furthermore, after *McLaughlin*, OHA issued its decision in *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023). (*Id.* at 12.) In *Forward Slope*, OHA applied 13 C.F.R. § 121.404(g)(4), which concerns MACs set-aside for small businesses, partially set-aside for small businesses, or reserved for small businesses. (*Id.* at 12.) Due to OHA's analysis in *Forward Slope*, OHA must have considered SeaPort-NxG to be set-aside or restricted in some way. (*Id.* at 13.)

Lastly, Appellant reiterates its view that the question of whether SeaPort-NxG established reserves was not fully litigated in *McLaughlin*. (*Id.* at 14.) Although Appellant argued in *McLaughlin* that SeaPort-NxG was unrestricted, there is no evidence that other parties contested this point, nor did OHA discuss the issue in detail. (*Id.* at 15.) Accordingly, OHA should not apply collateral estoppel to bar the instant appeal. (*Id.*)

### III. Discussion

#### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determinations are 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

Appellant's principal argument on appeal is that the Area Office erred in finding that recertification was required for the task orders under 13 C.F.R. § 121.404(a)(1)(i)(A), because that regulation pertains only to orders under unrestricted MACs whereas SeaPort-NxG, in Appellant's view, “reserved” a pool of awards for small businesses. Section II.F, *supra*. Appellant urges that the Area Office instead should have applied 13 C.F.R. § 121.404(a)(1)(i)(B), which governs set-aside or reserved MACs. *Id.* Appellant's line of reasoning, however, is flawed in several significant respects.

First, Appellant did not argue to the Area Office that SeaPort-NxG is a reserved, rather than an unrestricted, MAC. Section II.D, *supra*. Indeed, in response to the protests, Appellant cited to 13 C.F.R. § 121.404(a)(1)(i)(A), the very regulation that Appellant now attacks as inapposite. *Id.* Appellant's current arguments, then, are new “substantive issues raised for the first time on appeal,” which OHA cannot adjudicate. 13 C.F.R. § 134.316(c).



Second, contrary to the premise of the appeal, Appellant has made no persuasive showing that SeaPort-NxG did, in fact, reserve a pool of awards for small businesses. As the Navy correctly observes in its comments, a small business “reserve” is a term of art, and applicable law makes clear that a procuring agency seeking to reserve a portion of a MAC for small businesses must make certain determinations during market research, and must include language discussing the reserve in the MAC solicitation. *See* 15 U.S.C. § 644(r)(3); FAR 19.503; 13 C.F.R. § 125.2(e)(4). Here, the procuring agency explains that SeaPort-NxG was not conducted as a small business reserve, but rather “was solicited and, therefore, awarded on an unrestricted basis.” Section II.H, *supra*. Similarly, the SeaPort-NxG RFP contained no language indicating that any portion of the MAC would be reserved for small businesses. Section II.A, *supra*. Accordingly, there is no factual basis for OHA to find that SeaPort-NxG was a reserved MAC.

Third, Appellant has not, on appeal, effectively distinguished prior OHA decisions addressing SeaPort-NxG. In particular, in both *Size Appeal of McLaughlin Rsch. Corp., LLC*, SBA No. SIZ-6253 (2023) and *Size Appeal of Potomac River Enter. Sols., LLC*, SBA No. SIZ-6138 (2022), OHA recognized that SeaPort-NxG was an unrestricted MAC. In *McLaughlin*, after specifically stating that “[t]here was no reserve established for the SeaPort-NxG MAC,” OHA proceeded to apply 13 C.F.R. § 121.404(a)(1)(i)(A) — the same regulation relied upon by the Area Office in the instant case — in analyzing whether “a set-aside order under an unrestricted MAC” required recertification. *McLaughlin*, SBA No. SIZ-6253, at 6-7 and fn.1. OHA thus has expressly, and repeatedly, held in prior decisions that SeaPort-NxG was an unrestricted MAC and did not reserve a pool of awards for small businesses. Appellant offers no plausible grounds for reaching a different result here.

Nevertheless, although the arguments advanced by Appellant on appeal are meritless, the record does suggest that the Area Office may have erred on alternate grounds. Specifically, in *Size Appeal of Imagine One Tech. & Mgmt., Ltd.*, SBA No. SIZ-6271 (2024), OHA explained that SBA regulations in effect prior to May 30, 2023 drew a distinction between orders under priced MACs and orders under unpriced MACs. *Imagine One*, SBA No. SIZ-6271, at 13. Prior to May 30, 2023, the regulation in question here — 13 C.F.R. § 121.404(a)(1)(i)(A) — applied only to orders under priced MACs, whereas SeaPort-NxG was an unpriced MAC. *Id.* at 13-14. Furthermore, for orders under unpriced MACs prior to May 30, 2023, SBA regulations stipulated that size would be determined at the MAC contract level:

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

*Id.* (quoting 13 C.F.R. § 121.404(a)(1)(iv) (2022)). SBA revised 13 C.F.R. § 121.404(a)(1)(iv) effective May 30, 2023, and the revised version “applies to all solicitations issued on or after that date.” *Id.* (quoting 88 Fed. Reg. 26,164, 26,216 (Apr. 27, 2023)).

Taking into account *Imagine One* and the regulatory history of 13 C.F.R. § 121.404(a), it follows that 13 C.F.R. § 121.404(a)(1)(i)(A) may not have applied to the instant TORFPs,

because SeaPort-NxG was an unpriced MAC and because both TORFPs were issued prior to May 30, 2023. Sections II.A and II.B, *supra*. Accordingly, additional review is warranted.

#### IV. Conclusion

For the above reasons, the appeal is GRANTED, in part. The Area Office correctly found that SeaPort-NxG is an unrestricted MAC and did not reserve a pool of awards for small businesses. Insofar as Appellant challenges these aspects of the size determinations, the appeal is DENIED. Given, however, that SeaPort-NxG was an unpriced MAC, and given further that SBA regulations prior to May 30, 2023 distinguished between orders under priced MACs and orders under unpriced MACs, the Area Office may have erred in concluding that Appellant was required to recertify its size for the instant TORFPs. On remand, the Area Office should re-examine this question in light of 13 C.F.R. § 121.404(a)(1)(iv) (2022) and OHA's recent decision in *Size Appeal of Imagine One Tech. & Mgmt., Ltd.*, SBA No. SIZ-6271 (2024).

KENNETH M. HYDE  
Administrative Judge