

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

SIZE APPEAL OF:

Saalex Corp. d/b/a Saalex Solutions, Inc.,

Appellant,

Appealed From
Size Determination No. 06-2024-011

Solicitation No. N0025321R3005

Naval Sea Systems Command
The United States Department of the Navy

SBA No. SIZ-6274

Decided: March 20, 2024

APPEARANCES

Edward J. Kimberg, Esq., Blake B. Stewart Esq., Stewart Law, CS, LLC, for Saalex Solutions, Inc.

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

Meghan F. Leemon, Esq., Ustina M. Ibrahim, Esq., PilieroMazza PLLC, Washington, D.C., for McLaughlin Research Corporation, LLC.

DECISION¹

I. Introduction and Jurisdiction

On December 8, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination 06-2024-011, concluding that Saalex Corp. d/b/a Saalex Solutions, Inc. (Appellant) is other than small for Task Order No. N0025321R3005 (TORFP) from the Department of the Navy (Navy) Naval Sea

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

Systems Command's Solicitation No. N0017819D8447. On appeal, Appellant contends that the Area Office erred in selecting the date to determine size, and request that SBA's Office of Hearings and Appeals (OHA) remand the matter for a new size determination. For the reasons discussed *infra*, the appeal is GRANTED, and the Size Determination No. 06-2024-011 is VACATED and REMANDED to the Area Office for a new size determination.

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 after 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. SeaPort-NxG MAC and TORFP

On June 1, 2018, the Navy issued Request for Proposals (RFP) No. N00178-18-R-7000, known as the SeaPort - Next Generation (SeaPort-NxG RFP). The SeaPort-NxG is a base Multiple Award Contract (MAC) for Engineering Services and Program Management Services. (SeaPort-NxG RFP at 7.) The SeaPort-NxG RFP designated North American Industry Classification System (NAICS) code 541330, Engineering Services, with the exception for Marine Engineering and Naval Architecture, which at that time had a corresponding \$38.5 million annual receipts size standard.² Offers were due on July 2, 2018. (*Id.* at 1, 7.) On January 2, 2019, the base contract award was made to Appellant. (Saalex Seaport Contract No. N0017819D8447.) The SeaPort-NxG MAC was not set aside or restricted to small businesses, and the RFP stated that the Navy planned to award contracts to both large and small businesses. (SeaPort-NxG RFP at 14.) Under the Evaluation Process, there was “no evaluation of contract price and/or cost.” (*Id.* at 62.)

On March 15, 2022, the Navy issued Task Order No. N0025321R3005 (TORFP) under the Saalex Seaport Contract No. N0017819D8447. (TORFP at 1). The purpose of this TORFP is “to obtain In-Service Engineering (ISE) support services follow-on in support of the Naval Undersea Warfare Center Division Keyport, (NUWC Keyport), Keyport, WA, to ensure Fleet operational readiness through life-cycle systems support for a variety of in-service engineering tactical, non-tactical, other systems, and corporate information technology infrastructure, used in support of the operational and administrative functions.” (TORFP, at 189.) The TORFP was 100% set-aside for small business. (*Id.* at 177.) The TORFP designated North American Industry Classification System (NAICS) code 541330, Marine Engineering and Naval Architecture, with the exception for Marine Engineering and Naval Architecture, which at that time had a corresponding \$41.5 million annual receipts size standard, as the appropriate NAICS code. (*Id.*) Offers were due April 28, 2022. (TORFP Amendment 0006, at 3.) Appellant submitted its offer

² Currently, NAICS code 541330 has a corresponding \$47 million annual receipts size standard.

on April 28, 2022. On May 15, 2023, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror.³

B. Prior Proceedings

On May 25, 2023, McLaughlin Research Corporation, LLC (McLaughlin) filed a size protest with the Area Office. (Protest at 1.) On June 8, 2023, the Area Office issued Size Determination No. 06-2023-030 dismissing McLaughlin's size protest as untimely and finding Appellant an eligible small business for the TORFP. On June 23, 2023, McLaughlin appealed to OHA and contended that the Area Office's determination was a clear error of fact and law and requested that OHA reverse the decision.

On November 16, 2023, OHA granted the appeal and remanded Size Determination No. 06-2023-030 to the Area Office. *Size Appeal of McLaughlin Research Corporation, LLC*, SBA No. SIZ-6253 (2023) (*McLaughlin I*). OHA held the Area Office erred when it dismissed the Protest as untimely. More specifically, the Area Office “did not take into account the revision of the regulation in effect when the TORFP was issued on March 15, 2022 at 85 Fed. Reg. 66,146, 66,154, 66,182-3 (Oct. 20, 2020.)” (*McLaughlin I*, at 7.) Because the SeaPort-NxG MAC was awarded on an unrestricted basis, and the TORFP was a small business set-aside, McLaughlin's protest was timely under the revised rules. (*Id.*, citing *Size Appeal of Potomac River Enterprise Solutions, LLC*, SBA No. SIZ-6138, at 5 (2022).) Thus, the Area Office's determination was vacated and remanded for a new size determination.

C. Size Determination

On December 8, 2023, the Area Office issued Size Determination No. 06-2024-011, finding that Appellant is not a small business for the TORFP. (Size Determination, at 1-2.) The Area Office determined that McLaughlin's protest was timely under 13 C.F.R. § 121.1004(a)(2)(iii) because the CO notified unsuccessful offerors of the apparent successful offeror on May 15, 2023, and the CO received McLaughlin's size protest on May 22, 2023. (*Id.* at 1.)

The Area Office further determined that the proper date to determine size for a set-aside task order issued under an unrestricted MAC is the date the offeror submits its initial offer, including price, at the task order level. (*Id.* at 2-3.) Thus, citing SBA regulations, the appropriate date to determine size for Appellant is April 28, 2022, the date it submitted its offer for the subject TORFP. (*Id.*, citing 13 C.F.R. § 121.404(a)(1)(i)(A).)

³ On February 1, 2024, the CO informed OHA that the Navy has “completed a reevaluation of the proposals for subject TORFP No. N00253221R3005” and based on the reevaluation, it has awarded the TORFP to a new awardee. (E-mail from A. Constant (Feb. 8, 2024).) On February 15, 2024, OHA issued an Order to proceed with adjudication of the appeal after finding the Size Determination was not contract specific. (OHA's Order, at 1 (Feb. 15, 2024).)

First, the Area Office determined Appellant is affiliated with Netsimco because Appellant holds 100% ownership and has the power to control the company. (*Id.* at 3, citing 13 C.F.R. §§ 121.103(c)(1); (a)(1).) The Area Office further determined Appellant is affiliated with Valeo Networks (Valeo) because Travis Mack, the CEO with 60% ownership interest in Appellant, also holds 88% ownership interest in Valeo and thus has the power to control Valeo. (*Id.* citing 13 C.F.R. § 121.103(c)(1).) Moreover, because Mr. Mack holds 100% ownership interest in Sentry Storage, J3M Enterprises, Greenwood Capital Management LLC, and Greenwood Self Storage Fund, LP, SBA determined that these companies are affiliated with Appellant under 13 C.F.R. § 121.103(a)(1). (*Id.* at 4.)

Second, the Area Office reviewed Appellant's combined gross receipts for the most recently completed five fiscal years prior to the date that SBA uses to determine size and concluded “[Appellant], as a standalone entity, exceeds the \$41.5 million annual receipts based size standard.” (*Id.* at 4.) Thus, the Area Office determined that the combined annual receipts of Appellant and its affiliates exceed the applicable size standard and Appellant is other than small for the procurement. (*Id.* at 5.)

D. Appeal

On December 22, 2023, Appellant filed an appeal and asserts “Area Office erred by applying the current version of SBA regulations at 13 C.F.R. § 121.404 in examining and interpreting revised SBA Regulations to [Appellant's] size.” (*Id.* at 6.) Appellant emphasizes SeaPort-NxG RFP was not limited to small business and did not require price. (*Id.*) At the time of award, Appellant was a small business for NAICS code 541330, but on February 4, 2019, Appellant updated its Sam.gov profile as other than small for the NAICS code. (*Id.*) Appellant notes, its size “was not impacted by merger or acquisition by another company within five (5) years of award of the MAC.” (*Id.* at 6.) Appellant also notes, the SeaPort-NxG contract was awarded on an unrestricted basis; therefore, the Area Office erred when it retroactively applied the 2020 Regulations to an unpriced MAC which had already been awarded. (*Id.* at 7.) Appellant further cites to a decision of the U.S. District Court for the District of Columbia (Federal Court) which held the “the 2020 Regulations apply only to unrestricted MACs that include price.” (*Id.* at 7, citing *Res. Mgmt. Concepts, Inc. v. U.S. Small Bus. Admin.*, 2022 WL 971311, *4 (D.D.C. Mar. 31, 2022).) According to Appellant, the governing regulations are the regulations in effect on July 2, 2018, the date Appellant certified as small for SeaPort-NxG RFP, and this should govern Appellant's size for any subsequent task orders, unless the CO requests recertification. (*Id.*)

Appellant goes on to assert the Area Office's Size Determination was based on an “impermissible retroactive application” of SBA's regulations. (*Id.* at 14.) Appellant rejects the Area Office's decision to determine size at the date the Appellant submitted its initial offer, which included price, at the task order level. (*Id.*) Appellant asserts that the 2020 Regulations neither considered the impact on small business nor attempted to provide alternatives that would allow compliance without undue burden. Further, the 2020 Regulations fail to specify, as required under Executive Order 12988, “in clear language the effect on existing Federal regulation or the retroactive effect to be given to it, except that it says that it has no retroactive effect.” (*Id.* at 16.) Appellant contends that the 2020 Regulations “are a self-operative

administrative rule which would require Plaintiff to refrain from competing on small business set aside task order solicitations under the SeaPort-NxG contract or face civil or criminal penalties under the law if it does compete.” (*Id.* at 16.) Thus, Appellant reasoned that it was “highly prejudicial and impermissible” for the Area Office to retroactively apply the 2020 Regulations to a MAC awarded in 2018. (*Id.* at 17.) Appellant notes that the Area Office retroactively applied the 2020 Regulation despite emphasis in the Federal Register that the final regulations have “no retroactive or preemptive effect.” (*Id.* at 17-18, citing 84 Fed. Reg. 60,846, 60,865 (Nov. 8, 2019); 85 Fed. Reg. 66,146, 66,176 (Oct. 16, 2020).) Appellant concludes “[w]hile Area VI could consider the change in regulation and review the size of [Appellant] as of the date the TORFP was issued, it was required to make a further finding that [Appellant's] size as of the date the TORFP was issued is irrelevant as the regulations and the clear intent of the [CO] in issuing the TORFP was that size would be determined as of the date of award of the base contract.” (*Id.* at 18.)

Additionally, Appellant asserts the Area Office misapplies 13 C.F.R. § 121.103 in contravention to the provisions of the TORFP and the CO's direction. Appellant asserts the Area Office has violated the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) by relying upon an unauthorized retroactive regulation. (*Id.*) Citing a February 2018 Q & A, the Appellant asserts “the CO's intent prior to awarding the MAC undeniably establishes that affiliation is not to be considered in subsequent affiliation and/or growth inside of a 5-year period after the MAC award.” (*Id.* at 21.) Citing inquiry from S. Tomaiko, Director - Undersea Systems Contracts Division, Appellant asserts “Area VI's decision is in direct contravention of the CO's express statements and consequently [Appellant's] determination as to whether to dedicate substantial risk and resources to pursuit of the MAC and subsequent Task Orders.” (*Id.* at 22.) In further support, Appellant asserts Section K and Section L of the TORFP has “no requirement for recertification of a business that qualifies as ‘other than small’.” (*Id.* at 22-23.) Appellant concludes “[1] in viewing queries for the SeaPort-NxG and an administering CO's response to inquiry prior to entry of the same underlying MAC at issue; [2] S. Tomaiko's email correspondence after issuance of the MAC; and [3] Sections K & L of the TORFP addressing recertification requirements — all confirm, re-confirm, and expressly provide in clear and identifiable terms if a business is small at the time of offer for the MAC, it is small for each order issued against the contract for a period of up to five years or unless the MAC contracting officer requests a new size certification.” (*Id.* at 24.)

Lastly, Appellant notes it is no longer a small business as of January 2019, but that is “immaterial” because Appellant was a small business when it submitted a proposal for the MAC in 2018. Appellant asserts it was awarded the TORFP on June 16, 2023, from the SeaPort-NxG contract, which was originally awarded on “December 3, 2018, on an unrestricted basis and without price.” (*Id.* at 25.) Appellant maintains the Area Office properly dismissed McLaughlin's size protest in Size Determination 06-2023-030 for untimeliness under 13 C.F.R. § 121.1004(a)(3). Appellant asserts McLaughlin's arguments have “resulted in the subsequent trigger of the size determination by Area VI resulting in the attempted and impermissible retroactive application of relevant SBA regulations relied upon in the December 8, 2023 Area VI decision.” (*Id.* at 25.) Further the Area Office failed to consider that “neither the contract nor the CO has required a recertification of size in connection with the Task Order.” (*Id.*) More specifically, the TORFP did not include recertification requirements, but rather “incorporate[d]

the re-representation requirements of FAR 52.219-28 into the MAC.” (*Id.* at 26.) Recertification by Appellant was not required under the clause, because Appellant has neither merged with nor been acquired by another business concern. (*Id.*) Citing OHA case law, Appellant notes “recertification does not occur simply because mandatory FAR clauses were incorporated.” (*Id.* citing *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178, at 7 (2022).) The revisions of 13 C.F.R. § 121.404(g)(2)(iii) do not require recertification with task order proposals and the preamble reiterates contracting officer discretion on recertification. (*Id.*)

Appellant concludes “Area VI’s decision issued on December 8, 2023, further is in direct contravention of [1] the CO’s intent; [2] express purpose and mandates of the original MAC; and [3] provisions of the at issue TORFP in violation of fundamental and well-established law and statutory mandates.” (*Id.* at 29.)

E. SBA Comments

On January 2, 2024, OHA requested that SBA submit comments on the issues presented in this case. More specifically, OHA asked SBA to address the issue of applying the 2020 version of 13 C.F.R. § 121.404(a)(1)(ii)(A) retroactively to the SeaPort-NxG contracts when Appellant was awarded the contract in 2019. (OHA’s Order at 1 (Jan. 2, 2024).) SBA was also instructed to address the *Res. Mgmt. Concepts, Inc. v. U.S. Small Bus. Admin.*, 2022 WL 971311 (D.D.C. Mar. 31, 2022) and *Size Appeal of McLaughlin Research Corp., LLC*, SBA No. SIZ-6253 (2023) decisions. (*Id.*) Parties were afforded an opportunity to respond to SBA’s comments.

On January 17, 2024, SBA filed Agency Comments and asserts the Area Office properly determined Appellant is other than small for the instant procurement. (SBA Comments, at 3.) First, SBA addressed *McLaughlin I*, and asserts the Area Office, “correctly performed its size analysis based on OHA’s decision in *McLaughlin*.” (*Id.* at 3.) Specifically, SBA states “OHA’s guidance on this issue is a correct interpretation of SBA’s regulations and Area VI followed this instruction and used the correct date in finding [Appellant] is other than small and therefore ineligible to be awarded this small business set-aside TORFP.” (*Id.* at 3.)

Next, SBA contends Appellant was required to recertify per 13 C.F.R. § 121.404(g)(ii) when it acquired Valeo on December 8, 2020. (*Id.* at 4.) SBA asserts an acquisition triggers size recertification “[b]ecause that merger or acquisition fundamentally changes the nature of the entity and could affect its size status.” (*Id.* at 5.) The Area Office rejects Appellant’s argument that growing larger prior to 2019 exempts Appellant from recertification requirements after its acquisitions, and instead the Area Office asserts that regardless of whether Appellant was large prior to its acquisitions, its purchase of other companies triggered the recertification requirement. (*Id.* at 6, citing 13 C.F.R. § 121.404(g)(2), FAR 52.219-28(b), and *McLaughlin I* at 8.)

SBA further asserts “regulations are not retroactive and only apply to future contracts.” (*Id.* at 6.) SBA rejects Appellant’s argument that small business status is determined by the terms of the contract regulations in effect at the time of contract award and the intent of the CO; and asserts this argument is “not an accurate reflection of how Government contracting” works, “does not make sense” and “would make contracting with and by the government even more burdensome and cumbersome than it already is.” (*Id.* at 6.) SBA maintains that task orders and

purchase orders from MACs are new contracts. (*Id.* at 7.) SBA also asserts “new regulations and laws when enacted do not retroactively affect new contracts (orders) off already existing contracts or Blanket Purchase Agreements.” (*Id.* at 7.) SBA characterizes Appellant's argument as stating the Government cannot change regulations to affect future contracts and asserts Appellant has failed to provide a basis for this contention. (*Id.*) SBA notes Appellant relies upon *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022), but that Appellant misconstrues it. While that appellant argued that applying new regulations to future orders off existing contracts is impermissible, the case was decided on other grounds. (*Id.*)

Next, SBA reasoned that the 2020 revisions attempt to “balance the issue that firms can grow to be other than small naturally during performance of contract.” (*Id.* at 8.) To find a balance, SBA made additional changes to the regulations but “did not apply these changes to contracts (in this case orders) that had already been awarded under the old rules, however it did apply it to future contracts set-aside for small businesses,” more specifically, “task orders off already awarded MACs.” (*Id.*) SBA asserts “new task orders are new contracts” relying upon the Supreme Court's decision in *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 174, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016). SBA maintains Appellant does not accurately represent what if any changes were made to the MAC. The base contract was not set aside and did not use provisions of the Small Business Act to restrict competition. (*Id.*) SBA characterizes its regulatory change as a change in the discretion offered to contracting officers and how that discretion would affect future contracts, but not a change in the terms of the MAC. (*Id.* at 9.) SBA notes that it “heard the comments on this issue, and through the normal process of notice and rulemaking has responded to and rejected those arguments.” (*Id.* at 10, citing 88 Fed. Reg. 26,168 (Apr. 27, 2023).)

Lastly, SBA addresses the decision in *Res. Mgmt. Concepts, Inc. v. U.S. Small Bus. Admin.*, 2022 WL 971311, *4 (D.D.C. Mar. 31, 2022), and characterizes the issue as the “different treatment of priced and unpriced MACs.” (*Id.* at 10.) SBA argues the original 2020 rule “only has an application to priced MACs,” but “[t]here is little to no policy reason to treat priced and unpriced MACs differently for purposes of size.” (*Id.*) Thus, SBA explained that it clarified its position on this matter in 2023 by updating the regulations:

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

(*Id.* at 11, citing 13 C.F.R. § 121.404(a)(1)(iv).)

SBA denies it failed to follow the applicable guidelines in promulgating its regulations. It contends that it had no intention to “create a special carve out to benefit large businesses only on unrestricted MACs that did not have pricing.” (*Id.* at 11, citing 88 Fed. Reg. 26,164, 26,167, 26,168 (Apr. 27, 2023).) SBA notes its awareness that the rule would impact .47% of annual new MAC orders but asserts it “correctly concluded based on its analysis and comments (and lack of comments) from the public that the regulation would not have a substantial impact

on a substantial number of small entities.” (*Id.*) While SBA understands that Appellant is impacted by the regulation, SBA determined Appellant's “singular experience is not evidence that SBA's analysis was incorrect.” (*Id.* at 11-12.)

F. Response to SBA Comments

On January 24, 2024, Appellant filed a motion, requesting leave to reply to SBA's comments. (Motion, at 1.) OHA issued a request for SBA Comment on January 2, 2024; any response to the comments were due January 24, 2024. (OHA's Order at 2 (Jan. 2, 2024).) Appellant submitted a timely response to the SBA Comments.

Appellant asserts SBA made “numerous incorrect or inaccurate statement[s]” (Response, at 1.) First, Appellant asserts recertification for the MAC is not a requirement, and this is further confirmed in the TORFP. (*Id.* at 4.) Next, Appellant contends that TORFPs are “issued under an existing contract and are not a complete new agreement.” (*Id.* at 4.) SBA's comment contradicts the contract document and is “inconsistent with the [CO's] intent.” (*Id.*) Further, Appellant contends that SBA “commingles” recertification requirements for mergers and acquisitions under 13 C.F.R. § 121.404(g)(ii) with affiliation under 13 C.F.R. § 121.103. (*Id.*) Appellant asserts this is “improper confusion of the finding of the facts.” (*Id.* at 5.) Appellant reiterates “task orders under the MAC are not new contracts, they are modifications to the existing contract.” (*Id.*) According to Appellant, the task order here “incorporated a number of modifications to the contract [;] [h] owever, it did not include a requirement to recertify size for a generic small business.” (*Id.*)

Next, Appellant “admits” that it exceeds the size standard “after the MAC was awarded but before it acquired any other companies and that [Appellant] timely change[d] its SAM registration.” (*Id.* at 6.) Appellant reasons that the task order was issued “under the authority of the MAC,” thus, “[i]f the requirement was not issued under the MAC, the [CO] could not have limited the request for offers to those companies that were awarded the right to compete under the MAC.” (*Id.*) Appellant summarizes the issue here “is the application of amended regulations to the new contracts requiring certain recertifications where the express language of the contract documents (the MAC and TORFP at issue) does not require the same and is in direct contravention of the new regulation stating that recertification is not required under the parameters that are present here.” (*Id.* at 7.) Further, SBA fails to discuss the “express contractual language” in the MAC and TORFP that do not require recertification when “SBA regulation amendments in effect change these requirements contrary to contractual language.” (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the

Area Office erred in making its key finding of fact or law. *Size Appeal of Taylor Consultants, Inc*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

In *McLaughlin I*, the Area Office erred when it failed to apply the 2020 revision of SBA regulations in effect when the TORFP was issued on March 15, 2022. *McLaughlin I*, citing 13 C.F.R. § 121.1004(a)(2)(iii). According to the procedural rules for a size protest, a protest is timely if “received by the [CO] prior to close of business on the 5th day . . . after the CO notified the protestor . . . where the underlying [MAC] was awarded on an *unrestricted basis*” 13 C.F.R. § 121.1004(a)(2)(iii) (emphasis added.) The underlying base contract, SeaPort-NxG MAC, was awarded on an unrestricted basis and the TORFP was set-aside for small business; therefore, the Area Office erred when it determined in *McLaughlin I* that the protest was untimely. I therefore reaffirm my holding in *McLaughlin I* that this matter was properly remanded to the Area Office.

The key issue here is whether the Area Office applied the correct regulations under 13 C.F.R. § 121.404(a)(1) when it considered the date Appellant submitted its offer, including price, for the TORFP as the correct date to determine Appellant's size for the procurement. Upon review of the record and the arguments, I find Appellant has demonstrated the Area Office clearly erred in its Size Determination. Thus, I must grant this appeal.

This matter is analogous to *Size Appeal of Imagine One Technology & Management, Ltd.*, SBA No. SIZ-6271 (2024). Like *Imagine One*, the TORFP was issued March 15, 2022, during the midst of various changes to 13 C.F.R. § 121.404(a). *See generally, Size Appeal of Imagine One Technology & Management, Ltd.*, SBA No. SIZ-6271 (2024) (providing a procedural history analysis of SBA's various amendments to 13 C.F.R. § 121.404(a)(1)(iv) over time from October 16, 2020 through May 30, 2023.) In *Imagine One*, OHA analyzed the distinction between priced and unpriced MACs under the regulations in effect in 2022. Specifically, OHA determined:

SBA regulations in effect on October 14, 2022 - when Appellant submitted its offer for the task order - drew a distinction between orders under priced MACs and orders under unpriced MACs. Specifically, for orders under unpriced MACs, SBA regulations stated that size would be determined at the contract level:

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

13 C.F.R. § 121.404(a)(1)(iv) (2022). SBA itself acknowledged that the 2022 version of its regulations treated orders under unpriced MACs differently than orders under priced MACs. 87 Fed. Reg. 55,642, 55,643-44 (Sept. 9, 2022). Deeming this result to be poor public policy, SBA therefore proposed, and ultimately adopted, a new version of § 121.404(a)(1)(iv) eliminating the

disparate treatment. *Id.* The revised version of § 121.404(a)(1)(iv), though, did not become effective until May 30, 2023, and thus cannot apply to a task order competition conducted in 2022.

Imagine One Technology & Management, Ltd., SBA No. SIZ-6271 at 13. OHA concluded, *inter alia*, as follows:

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

Id. at 14.

I conclude the distinction between priced and unpriced MACs at issue in *Imagine One* is analogous here. It is not in dispute that the SeaPort-NxG MAC is unrestricted and unpriced. Appellant submitted its offer in response to the TORFP on April 28, 2022. The version of 13 C.F.R. § 121.404(a)(1)(iv) in effect at that time, as in *Imagine One*, created a distinction between priced and unpriced MACs. SBA regulations specifically stated:

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

13 C.F.R. § 121.404(a)(1)(iv) (2022) (emphasis added).

Here, Appellant was not required to submit price with its initial offer for the SeaPort-NxG MAC. Indeed, the SeaPort-NxG MAC notes contract price and cost is not part of the evaluation process. Section II.A, *supra*. The governing regulation for this TORFP is 13 C.F.R. § 121.404(a)(1)(iv) (2022). Based on “the 2022 version of 13 C.F.R. § 121.404(a)(1)(iv), Appellant's size is determined at the contract level, as of the date Appellant submitted its offer for the SeaPort-NxG MAC.” *Imagine One Technology & Management, Ltd.*, SBA No. SIZ-6271, at 14. Thus, the Area Office erred when it considered size certification requirements as of the date Appellant submitted its offer, including price, for the instant TORFP on April 28, 2022. The date to determine size here is July 2, 2018, the date Appellant submitted its initial offer for the SeaPort-NxG MAC.

SBA contends that there is “no policy reason to treat priced and unpriced MACs differently” and thus, “SBA upon noticing the discrepancy updated its regulations” effective May 30, 2023. Section II.E, *supra*. However, whatever the policy reason for the change, as SBA concedes, “SBA's regulations are not retroactive and only apply to future contracts” and task orders are new contracts. *Id.* Thus, OHA cannot retroactively apply the 2023 regulatory change

to the subject TORFP issued in 2022. Because the SeaPort-NxG MAC is unrestricted and unpriced and the TORFP was issued and Appellant's offer, including price, in response was submitted in 2022, the governing regulation is the 2022 version of 13 C.F.R. § 121.404(a)(1)(i)(A). Notwithstanding, OHA has determined that “the revised regulations at 13 C.F.R. § 121.404(a) [2023] do apply to future SeaPort-NxG task orders, as well as future orders issued under other unrestricted MACs, irrespective of whether such MACs were priced or unpriced.” *Imagine One Technology & Management, Ltd.*, SBA No. SIZ-6271 at 14.

The subsequent issue here is whether Appellant was required to recertify its size for the subject TORFP. SBA contends Appellant was required to recertify under 13 C.F.R. § 121.404(g)(2)(ii)(A) because Appellant acquired Valeo in 2020, thus triggering recertification requirements. Section II.E, *supra*. I find this argument unpersuasive and contrary to SBA's own interpretation of 13 C.F.R. § 121.404(g)(2) that “the consequence of a merger or acquisition involving a prime contractor is not that the prime contractor becomes ineligible for award of pending or future task orders, but rather that the procuring agency cannot claim goaling credit for those orders.” *Size Appeal of Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 19 (2021); *see also Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6285, at 5 (2023) (reasoning that “[t]here is no indication in § 121.404(g)(2) that a requirement to recertify as a result of a merger, sale, or acquisition is, without specific language in the task order solicitation, equivalent to a CO's request for size recertification in connection with a particular task order.”) In addition, Appellant concession that it is no longer small as of January 2018 does not equate to ineligibility for future task orders, but instead means the Navy cannot claim goaling credit for that task order. *Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 19; *Forward Slope, Inc.*, SBA No. SIZ-6285, at 5; *EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139, at 6. As argued by Appellant, the CO did not request recertification for the TORFP, and SBA maintains a longstanding rule that a concern that represents itself as small at the time of the contract award, remains small for the lifetime of the contract, including orders issued under the contract unless the CO requires recertification. 13 C.F.R. § 121.404(g); *Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 19; *EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139, at 6. Thus, considering these factors, I find Appellant was not required to recertify its size.

I find Appellant has demonstrated the Area Office clearly erred in its Size Determination. Specifically, the Area Office improperly determined the date Appellant submitted its offer, including price, for the TORFP as the proper date to determine size. Appellant's size is determined as of July 2, 2018, the date Appellant submitted its offer for the SeaPort-NxG MAC.

IV. Conclusion

Appellant has established that the Size Determination No. 06-2024-011 is based upon a clear error of law. Accordingly, I GRANT the instant appeal, and I REMAND the case to the Area Office for a new size determination. The Area Office is instructed to consider Appellant's size at the date Appellant submitted its offer for the SeaPort-NxG MAC.

CHRISTOPHER HOLLEMAN
Administrative Judge