

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

SIZE APPEALS OF:

Tech-Marine Business, Inc.,

Appellant,

Appealed From

Size Determination Nos. 02-2024-002,
02-2024-003

SBA No. SIZ-6280

Decided: April 29, 2024

APPEARANCES

John R. Tolle, Esq., Baker, Cronogue, Tolle & Werfel, LLP, McLean, Virginia, for Tech-Marine Business, Inc.

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DECISION¹

I. Introduction and Jurisdiction

On November 14, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination Nos. 02-2024-002 and 02-2024-003, concluding that Tech-Marine Business, Inc. (Appellant) is not a small business

¹ 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.

for the subject task order. The Area Office found that Appellant was required to recertify its size for the task order, because the task order was set-aside for small businesses but the underlying Multiple-Award Contract (MAC) was unrestricted. Appellant appeals both determinations, maintaining that they are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. Because the two appeals involve the same challenged firm, the same task order, and the same issues, OHA consolidated them into a single proceeding for adjudication. For the reasons discussed *infra*, the appeals are granted and the size determinations are reversed.

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 appeals within 15 days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The MAC

On June 1, 2018, the U.S. Department of the Navy (Navy) issued Request for Proposals (RFP) No. N00178-18-R-7000 for the SeaPort — Next Generation (SeaPort-NxG) MAC. The RFP explained that SeaPort-NxG would be a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) procurement for engineering and program management services. (RFP at 7.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with the exception for Military and Aerospace Equipment and Military Weapons. The RFP stipulated that the Navy would conduct “no evaluation of contract price and/or cost,” and offerors were not asked to provide pricing information in their proposals. (*Id.* at 57, 63.) Offers were due July 2, 2018. (*Id.* at 56.)

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

On January 2, 2019, the Navy awarded a SeaPort-NxG prime contract to Appellant. Appellant self-certified as a small business at the SeaPort-NxG contract level.

B. The TORFP

On March 2, 2022, the Naval Surface Warfare Center — Crane Division issued Task Order Request for Proposals (TORFP) No. N0016423F3013 under the SeaPort-NxG MAC. The TORFP sought a contractor to perform professional support services in the areas of “Program Management & Administrative Services”; “Corporate Operations: Human Resources, Security & Facilities”; “Information Technology & Data and Infrastructure Management”; and “Congressional & Public Affairs.” (TORFP at 7.) The TORFP was set aside entirely for small businesses. (*Id.* at 80, 98.) The TORFP did not, however, contain any explicit request for recertification of size at the task order level. The TORFP, rather, stated: “[t]he size standard certified by the Prime for their basic SeaPort-NxG Contract is valid for the base ordering period and duration of any resultant Task Order issued against this Solicitation.” (*Id.* at 98.) Appellant submitted its initial offer for the task order on April 8, 2022, and the final proposal revisions on August 1, 2023. On September 28, 2023, the Navy announced that Appellant was the apparent awardee.

C. Protests and Responses

1. The Protests

On October 5, 2023, Strategic Insight, Ltd. (Strategic), an unsuccessful offeror, filed a protest challenging Appellant's size. Strategic alleged that because the TORFP was a small business set-aside issued against an unrestricted MAC, Appellant was required to recertify its size and qualify as a small business at the time it submitted its initial offer for the TORFP, pursuant to 13 C.F.R. § 121.404(a)(1)(i)(A). (Strategic Protest at 2.) Strategic claimed that Appellant “did not and could not” recertify as small at the time of its initial proposal in April 2022, because Appellant had “represented and certified on [the System for Award Management (SAM)] that it does not qualify as small under NAICS code 541330 at all times since November 24, 2021.” (*Id.*) Strategic concluded that Appellant therefore was ineligible for award of the TORFP. (*Id.* at 2-3.)

On October 5, 2023, Patrona Corporation (Patrona), another unsuccessful offeror, also filed a protest challenging Appellant's size. Patrona highlighted that Appellant was no longer small at the time it submitted its offer in response to the TORFP. (Patrona Protest at 2.) According to Appellant's SAM profile, Appellant is not small under the applicable size standard. (*Id.*) Furthermore, USASpending.gov shows that Appellant's five-year annual average revenues, from 2017 to 2021, “from government contracts alone” exceeded the applicable size standard. (*Id.*)

Patrona argued that language in the SeaPort-NxG contracts and the TORFP — indicating “that the size standard certified by the Prime for their basic SeaPort-NxG contract is valid for the base ordering period and the duration of any resultant task order” — should not be controlling because it “is in direct conflict with SBA regulations” that require recertification for a small business set-aside task order under an unrestricted MAC. (*Id.* at 2-3, citing 13 C.F.R. §

121.404(a)(1)(i)(A).) Patrona urged that Appellant was required to have recertified its size at the time it submitted its offer for the TORFP. (*Id.* at 3.)

2. Appellant's Protest Responses

On October 16, 2023, Appellant responded to the size protests.² Appellant maintained that it was not required to recertify its size when it submitted its proposal in response to the TORFP. (Response at 4.) More specifically, Appellant contended that recertification at the task order level was not required. (*Id.* at 4-5.) According to Appellant, neither the SeaPort-NxG MAC nor the TORFP instructed offerors to recertify size at the task order level. (*Id.* at 4.) Appellant further claimed that, under 13 C.F.R. § 121.404, recertification would only have been necessary if the CO had specifically requested it. (*Id.* at 5.) Because the instant TORFP contained no express language requiring recertification, Appellant remained small and eligible for award of the task order. (*Id.* at 5-6, citing *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 (2022).)

D. Size Determinations

On November 14, 2023, the Area Office issued Size Determination Nos. 02-2024-002 and 02-2024-003, concluding that Appellant is not a small business for the task order.³ The Area Office determined that, because the TORFP was set aside for small businesses and was issued under SeaPort-NxG, an unrestricted MAC, Appellant was required to recertify when it submitted its offer for the task order. (Size Determination at 6.)

The Area Office first explained that, according to SBA regulations promulgated in 2020, “if an order or Blanket Purchase Agreement for a discrete category under an unrestricted [MAC] is set-aside exclusively for small business (i.e., small business set, 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 4-5, quoting 13 C.F.R. § 121.404(a)(1)(i)(A).) Here, SeaPort-NxG was an unrestricted MAC, but allowed for individual orders to be set-aside for small businesses, such as the instant TORFP. (*Id.* at 5.) The Area Office found that “per regulation regardless of whether it was explicitly [requested] or not, recertification was required at the order level.” (*Id.*) The Area Office cited OHA's decision in *Size Appeal of Avenge, Incorporated*, SBA No. SIZ-6178 (2022) for the proposition that the 2020 revisions to 13 C.F.R. § 121.404 apply to all orders issued after November 16, 2020. (*Id.* at 5-6.)

Based on Appellant's five-year average annual receipts as of the date of Appellant's initial offer for the subject task order on April 8, 2022, the Area Office concluded that Appellant is not small for the subject task order. (*Id.* at 8-9.)

² Appellant's responses to the size protests were substantively identical. Citations in this decision are to Appellant's response to Strategic's protest.

³ The Area Office issued two separate size determinations, which are substantively identical. Citations within this decision are to the Size Determination No. 02-2024-002.

E. Appeals

On November 29, 2023, Appellant filed the instant appeals.⁴ Appellant maintains that the Area Office incorrectly found that Appellant was required to recertify its size for the instant task order. (Appeal at 3.) In Appellant's view, recertification at the task order level was not required, so Appellant was entitled to rely upon its small business status at the SeaPort-NxG contract level. (*Id.*)

Appellant contends that the Area Office “basically ignored all of the provisions” in the SeaPort-NxG MAC and the TORFP in concluding that recertification was required at the task order level. (*Id.*) According to Appellant, the central issue in these appeals is whether “the language in the relevant contract documents govern” or whether the 2020 version of 13 C.F.R. § 121.404(a)(1)(i)(A) applies retroactively to the SeaPort-NxG MAC. (*Id.* at 4.) Based on OHA precedent, the Area Office should have sought and given significant weight to the CO's views, and should have closely considered the language of the MAC and the TORFP. (*Id.*, citing *Avenge*, SBA No. SIZ-6178, at 17.) Notably, unlike the situation in *Avenge*, the CO here “did not utilize the terms ‘certify’ or ‘recertify’” in the TORFP. (*Id.*) Nor did the CO initiate her own size protest against Appellant. (*Id.*) The Area Office failed to examine the “clear language” of the MAC and the TORFP, which “goes entirely against basic contract law where the plain meaning of a contract governs.” (*Id.*, citing *Barron Bancshares, Inc. v. Masterson*, 366 F.3d 1360 (Fed. Cir. 2004).)

F. Strategic's Response

On December 14, 2023, Strategic responded to the appeals. Strategic adopts its protest in its entirety in support of its position that the Area Office correctly found Appellant other than small. (Strategic's Response at 1.)

G. CO's Response

On December 14, 2023, the CO responded to the appeals. The CO agrees with Appellant that the Area Office erroneously determined Appellant's size as of April 8, 2022, the date of Appellant's initial offer for the subject task order. (CO's Response at 2.) Rather, Appellant's size should have been assessed as of the date Appellant submitted its initial offer for the SeaPort-NxG MAC. (*Id.* at 1.) This approach is consistent with the terms of the MAC and the TORFP, SBA regulations in effect at the time the MAC was awarded, as well as with the terms of a memorandum of understanding (MOU) between the Navy and SBA, entered into as a result of a Court decision in *Res. Mgmt. Concepts, Inc. v. U.S. Small Business Administration*, 2022 WL 971311 (D.D.C. Mar. 31, 2022) (“*RMC*”). (*Id.*) The CO supports Appellant's position that the Area Office “failed to address or even consider” the terms of the MAC and TORFP, or the CO's intent. (*Id.* at 2.)

⁴ Appellant filed a separate appeal for each size determination, but the appeals are substantively identical. Citations within this decision are to the appeal of Size Determination No. 02-2024-002.

The CO attacks the Area Office's reliance on *Avenge* in determining that the 2020 regulatory revisions apply to all orders after November 16, 2020. (*Id.* at 9.) The CO explains that the Area Office overlooked “a significant factual distinction” between the underlying MAC in *Avenge* and the SeaPort-NxG MAC. (*Id.* at 11.) The MAC in *Avenge* contractually required recertification at the task order level. (*Id.*) The SeaPort-NxG MAC does not do so, and instead makes clear that size is determined at the contract level. (*Id.*)

Furthermore, applying the 2020 rule changes would have an improper retroactive effect. (*Id.*) Because Appellant was awarded its SeaPort-NxG contract in 2019, applying 2020 rule changes would impair Appellant's “vested rights” acquired through the SeaPort-NxG contract under SBA's prior rule. (*Id.* at 16.) Under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the CO contends that “OHA's decision should be guided by considerations of fair notice, reasonable reliance, and settled expectations.” (*Id.*) Appellant, as well as other SeaPort-NxG prime contractors, reasonably relied on the belief it would retain its size status for the duration of the contract. (*Id.* at 17.) Absent any guidance to the contrary, this was a settled expectation and an application of the 2020 rule changes would strip Appellant of its vested rights. (*Id.* at 17-18.)

Lastly, the CO addresses the *RMC* decision. (*Id.* at 6-7.) In *RMC*, the plaintiff brought suit against SBA, requesting the Court to “declare the SBA's November 16, 2020 regulations unlawful and to enjoin their application to task order competitions under previously awarded SeaPort[-]NxG MACs.” (*Id.* at 6.) During the course of the litigation, SBA issued “a correcting amendment to the November 16, 2020 changes,” adding “§ 121.404(a)(1)(iv), which concerned when the size of a concern is determined for [MACs] for which offerors are not required to submit price.” (*Id.* at 7.) The CO continues:

[The plaintiff] believed that the correcting amendment fixed its problem — in other words, instead of reading § 121.404(a)(1) to require [the plaintiff] to recertify its size status at the task order level, [the plaintiff] interpreted § 121.404(a)(1)(iv)'s silence regarding recertification for orders set aside exclusively for small business that are issued under unrestricted [MACs], where concerns are not required to submit price as part of the offer for the [] contract, to mean that recertification was not required.

(*Id.* at 7.) In response, SBA claimed that orders under priced and unpriced MACs were governed by the same rules. (*Id.*) The Court ultimately declined to grant summary relief to either party. (*Id.*) Following the Court's decision, an agreement was reached to dismiss the case “because SBA will agree not to enforce certain size regulations against [the plaintiff] in light of the [Court's denial of summary judgement].” (*Id.*)

H. Patrona's Response

On December 22, 2023, Patrona responded to the appeals. Patrona maintains that the Area Office correctly found Appellant other than small for the instant task order. (Response at 2.) Patrona argues that the regulations effective at the time of the task order proposal submission supersede language in the underlying SeaPort-NxG contract or the TORFP. (*Id.*) According to

Patrona, contrary to Appellant's suggestions, the CO's intentions or opinions are irrelevant to whether recertification was required, because 13 C.F.R. § 121.404(a)(1)(i)(A) requires recertification at the task order level irrespective of whether or not the CO intended to require it. (*Id.* at 3.)

I. OHA's Request for Comments

On January 18, 2024, OHA requested that SBA submit comments on the issues presented in the appeals. Specifically, OHA asked that SBA address Appellant's arguments that the Area Office unfairly and improperly applied regulatory changes to 13 C.F.R. § 121.404(a) to Appellant retroactively. (OHA's Order at 1.) OHA further requested that SBA discuss the *RMC* decision, as well as OHA's decision in *Size Appeal of McLaughlin Rsch. Corp., LLC*, SBA No. SIZ-6253 (2023), which also pertained to SeaPort-NxG.

J. SBA Comments

On February 2, 2024, SBA submitted comments in response to OHA's request. SBA maintains that the Area Office correctly determined that Appellant was required to recertify its size for the instant task order. (SBA Comments at 1.) SBA rejects Appellant's contention that its regulations were applied retroactively. (*Id.*)

SBA first argues that the Area Office's size analysis is correct and consistent with *McLaughlin*, which also concerned the SeaPort-NxG MAC. (*Id.* at 3.) In *McLaughlin*, OHA concluded that, under the 2020 regulations, the appropriate date for determining size was the date the challenged firm submitted an offer for a set-aside task order. (*Id.*, citing *McLaughlin*, SBA No. SIZ-6253, at 8.) In the instant case, then, the Area Office correctly found that Appellant was required to recertify at the task order level. (*Id.* at 3-4.) The Area Office properly examined Appellant's size as of the date it submitted its offer, including price, for the TORFP, and correctly determined that Appellant was no longer small at that time. (*Id.*)

SBA denies that its regulations are being applied to Appellant retroactively. (*Id.* at 5.) Instead, SBA regulations apply to future contracts, or task orders, awarded after a new regulation becomes effective. (*Id.*) Forbidding new regulations from applying to future task orders issued against long-term contracts would render Government contracting unduly burdensome. (*Id.*) If OHA were to accept Appellant's retroactivity reasoning, SBA would be left unable to implement needed changes for task orders issued against long-term MACs, as some such vehicles extend over 20 years in duration. (*Id.*) Furthermore, SBA notes, the U.S. Supreme Court has recognized that orders are new “contracts.” (*Id.* at 6, citing *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 174 (2016).) The 2020 recertification regulations only impact task orders after the regulations became effective. (*Id.*)

Lastly, SBA offers its view of the *RMC* decision. (*Id.* at 8.) The main issue in that case was the “different treatment of priced and unpriced MACs” in SBA regulations. (*Id.*) In particular, the 2020 version of 13 C.F.R. § 121.404(a) addressed orders under priced MACs. (*Id.*) Because SBA could see no justification for differing treatments of orders under priced and unpriced MACs, SBA “clarified its position” in May 2023 by formally revising 13 C.F.R. §

121.404(a)(1)(iv), such that the same recertification rules for set-aside orders apply to unpriced MACs as well as to priced MACs. (*Id.* at 9.)

K. CO's Comments

On February 9, 2024, the CO responded to SBA's comments. The CO maintains that the Area Office erred in retroactively applying the 2020 rule changes to Appellant's SeaPort-NxG contract, and in determining Appellant's size as of the date of initial offer for the subject task order. (CO's Comments at 1.)

The CO, first, claims that SBA “misread[s]” the *RMC* decision and fails to address the settlement agreement between the plaintiff and SBA. (*Id.* at 2.) “[T]o settle litigation in federal district court, [] SBA agreed not to apply the SBA's 2020 rule changes in determining [the plaintiff's] size for purposes of SeaPort[-]NxG task order awards.” (*Id.*) If OHA were to find that the 2020 rule changes do apply to the Sea-Port NxG MAC and affirm the Area Office's determinations, it will result in disparate treatment between the *RMC* plaintiff and other Sea-Port NxG MAC prime contractors, such as Appellant. (*Id.*)

The CO challenges SBA's reliance on *McLaughlin*, because the issues presented in the instant appeals — “namely, the SBA's settlement agreement with [the *RMC* plaintiff] and the illegal retroactive effect of applying the SBA's 2020 rule changes to [Appellant]” — were neither raised nor adjudicated in that case. (*Id.* at 3.)

Lastly, “SBA *does not even attempt*” to address why application of the 2020 rule in determining Appellant's size does not take away or impair its vested rights acquired under the SeaPort-NxG MAC. (*Id.* at 4 (emphasis CO's).)

L. Strategic's Comments

On February 9, 2024, Strategic responded to SBA's comments. Strategic concurs with the Area Office and SBA that the 2020 regulatory revisions apply to future SeaPort-NxG task orders. (Strategic's Comments at 3.) Strategic insists that *McLaughlin* is indistinguishable from the instant appeal as it involves the same MAC and its holding “aligns with express intent of the SBA.” (*Id.*) Moreover, the claim of retroactivity is meritless as “the 2020 [r]egulations are being applied to a task order solicitation *in 2022*.” (*Id.* at 5, emphasis Strategic's.) Lastly, Strategic argues that *RMC* is not binding on OHA and is unpersuasive. (*Id.* at 6-10.) Strategic asserts that the Court in *RMC* expressed “serious reservations” about its interpretation of the 2020 regulations. (*Id.* at 7.) In Strategic's view, the Court misinterpreted 13 C.F.R. § 121.404(a)(1)(i)(A) by using the “scope-of-subparts canon” and concluded that the regulation only applies to priced MACs. (*Id.* at 8.) However, according to Strategic, the 2020 regulations “clearly state” that the recertification requirement for task orders applies to unrestricted MACs, whether priced or unpriced. (*Id.* at 7.) As indicated in SBA's comments, Strategic argues that SBA never intended to treat priced and unpriced MACs differently. (*Id.* at 10.) Furthermore, the Court in *RMC* ultimately did not resolve this question since the parties agreed to settle their dispute. (*Id.* at 7.) The CO's reference to the *RMC* settlement agreement is irrelevant to the instant case because “by the CO's own acknowledgment, the agreement only applies to the

specific plaintiff in [RMC].” (*Id.* at 10-11.) Nor does the CO offer “any documentation of that settlement agreement.” (*Id.*)

M. Patrona's Comments

On February 9, 2024, Patrona responded to SBA's comments. Patrona echoes SBA's position that 13 C.F.R. § 121.404(a)(1)(i)(A) requires recertification at the task order level for set-aside orders issued against unrestricted MACs. (Patrona's Comments at 2.) The *RMC* settlement “does not suggest a different interpretation of the plain terms of 13 C.F.R. § 121.404(a)(1)(i)(A) or the regulatory guidance issued by the SBA contemporaneously with the 2020 amendments.” (*Id.* at 3-4.) SBA further clarified its intent when it explained in 2023 that “SBA never intended to allow a firm's self-certification for the underlying unrestricted [MAC] to control whether a firm is small at the time of an order is set-aside for small business years after the [MAC] was awarded.” (*Id.* at 4, quoting 88 Fed. Reg. 26,164, 26,168 (Apr. 27, 2023).) Patrona further concurs with SBA that 13 C.F.R. § 121.404(a)(1)(i)(A) has no retroactive effect here because each task order “creates a new contract.” (*Id.* at 5, quoting *Kingdomware Techs., Inc. v. U.S.*, 579 U.S. 162, 174 (2016).) According to Patrona, “[Appellant's] vested rights have not been impaired due to application of the 2020 amendments” because Appellant was “never guaranteed that it would be eligible to bid on small business set-aside task orders under the MAC after it outgrew its small business size status.” (*Id.* at 5-6.)

N. Appellant's Comments

On February 9, 2024, Appellant responded to SBA's comments. Appellant finds it “striking” as to “what the SBA failed to discuss,” notably the terms of the SeaPort-NxG prime contracts, Appellant's retroactivity arguments, and OHA's decision in *Size Appeal of Forward Slope, Inc.*, SBA No. SIZ-6258 (2023). (Appellant's Comments at 1-2.)

The key issue of “whether it is the language in the relevant contract documents [that] govern or a regulation that is not even referenced in any of the relevant contract documents, and was enacted after the [MAC] was awarded” is not squarely addressed by SBA. (*Id.* at 2.) Appellant points to a provision in the SeaPort-NxG prime contracts, C.12 Contractor Size Status; the CO's response; and a portion of the MOU referenced in the CO's response, in arguing that SBA never explains why previously-awarded contracts are “over-ruled” by SBA's regulations. (*Id.* at 2-4.) Additionally, Appellant argues, SBA fails to refute the CO's detailed analysis as to why applying 2020 rule to the SeaPort-NxG MAC would have an improper retroactive effect. (*Id.* at 4.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. 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

OHA's recent decisions in *Size Appeal of Imagine One Tech. & Mgmt., Ltd.*, SBA No. SIZ-6271 (2024); *Size Appeal of McLaughlin Rsch. Corp.*, SBA No. SIZ-6273 (2024); and *Size Appeal of Saalex Corp. d/b/a Saalex Sols., Inc.*, SBA No. SIZ-6274 (2024) are dispositive of the instant appeals. In each of those decisions, OHA considered whether a SeaPort-NxG prime contractor was required, pursuant to 13 C.F.R. § 121.404(a)(1)(i)(A), to recertify its size for a task order which had been set aside entirely for small businesses. OHA reviewed the regulatory history of § 121.404(a), and found that, during the period from October 2020 until May 2023, SBA regulations “drew a distinction between orders under priced MACs and orders under unpriced MACs.” *Imagine One*, SBA No. SIZ-6271, at 15; *McLaughlin*, SBA No. SIZ-6273, at 10; *Saalex*, SBA No. SIZ-6274, at 10. More specifically, 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 is an unpriced MAC. *Id.* 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.

13 C.F.R. § 121.404(a)(1)(iv) (2022). OHA noted that “SBA itself acknowledged that the 2022 version of its regulations treated orders under unpriced MACs differently than orders under priced MACs.” *Imagine One*, SBA No. SIZ-6271, at 16 (citing 87 Fed. Reg. 55,642, 55,643-44 (Sept. 9, 2022)); *Saalex*, SBA No. SIZ-6274, at 10. Deeming this result to be poor public policy, SBA therefore proposed, and eventually 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. *Id.*

OHA further found that the Court's decision in *RMC*, while not binding on OHA, is nevertheless “instructive,” because the Court recognized that SBA regulations prior to May 2023 distinguished between orders under priced MACs and orders under unpriced MACs. *Imagine One*, SBA No. SIZ-6271, at 16-17.

In the instant case, there is no dispute that SeaPort-NxG is an unpriced MAC. Section II.A, *supra*. Furthermore, like the circumstances seen in *Imagine One*, *McLaughlin*, and *Saalex*, the task order competition was conducted in 2022. The TORFP in question was issued in March 2022, and initial offers, including price, were due in April 2022. Section II.B, *supra*. Accordingly, at the time of the task order competition in 2022, there was no requirement 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 SeaPort-NxG MAC in 2018, and was a small business at the contract level. Section II.A, *supra*. The Area Office thus clearly erred in finding that Appellant was required to recertify for the subject TORFP in 2022.

As OHA explained in *Imagine One* and *Saalex*, the 2023 version of 13 C.F.R. § 121.404(a)(1)(iv) may appropriately be applied to future SeaPort-NxG task orders, as well as future orders issued under other unrestricted MACs, irrespective of whether such MACs are priced or unpriced. *Imagine One*, SBA No. SIZ-6271, at 17; *Saalex*, SBA No. SIZ-6274, at 11. “The problem here arises because Appellant submitted its proposal for the instant task order in 2022, well before the revisions to 13 C.F.R. § 121.404(a)(1)(iv) became effective on May 30, 2023.” *Id.*

IV. Conclusion

For the above reasons, the appeals are **GRANTED**. Given the version of SBA regulations in effect in April 2022, when Appellant submitted its offer for the subject task order, the Area Office clearly erred in concluding that Appellant was required to recertify its size at the task order level. Size Determinations Nos. 02-2024-002 and 02-2024-003 therefore are **REVERSED**. Appellant remains eligible for award of the TORFP due to its contract-level certification made when submitting its offer for the SeaPort-NxG MAC. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge