

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

SIZE APPEAL OF:

Clearwaters Industries Solutions, LLC,

Appellant

RE: Aptive Resources, LLC

Appealed From  
Size Determination No. 02-2024-003

SBA No. SIZ-6311

Decided: October 17, 2024

APPEARANCES

Frank DiNicola, Esq., Lawrence P. Block, Esq., Winston & Strawn, LLP, Washington, D.C., for Clearwaters Industries Solutions, LLC

Aron C. Beezley, Esq., Nathaniel J. Greeson, Esq., Charles F. Blanchard, Esq., Bradley Arant Boult Cummings LLP, Washington, D.C., for Aptive Resources, LLC.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On July 18, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2024-003 dismissing a size protest filed by Clearwaters Industries Solutions, LLC (Appellant) against Aptive Resources, LLC (Aptive). The Area Office determined that the protest was untimely because it was filed against the award of a task order that did not require recertification. On appeal, Appellant contends the Area Office's determination was a clear error of fact and law, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the determination. For the reasons discussed *infra*, the appeal is DENIED.

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

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). A timely appeal, however, “cannot cure an untimely protest.” *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853, at 2 (2017); *Size Appeal of Ad Med Consulting, Inc.*, SBA No. SIZ-5355, at 2 (2012).

## II. Background

### A. The RFQ and Protest

In August of 2019, the U.S. Department of Veterans Affairs (VA), through the General Services Administration (GSA) awarded Multiple Award Schedule (MAS) contract No. GS-07F-281BA for Professional Services to Aptive. Aptive was a Service-Disabled Veteran-Owned Small Business (SDVOSB) at that time. On January 26, 2024, the VA issued a Request for Quotations (RFQ) No. 36C10B24Q0130 for Strategic Communication Support under that MAS contract. The RFQ was set-aside for SDVOSBs under North American Industry Classification System (NAICS) code 541613, Marketing Consulting Services, with a corresponding \$19 million annual receipts size standard.

As part of the Solicitation process, Questions and Answers (Q&A) were conducted and incorporated into the Solicitation. (Solicitation, Attach. C.) Particularly, on the issue of size certification, it was asked:

Q: Will the contract awardee be required to certify at time of award that they are still within the size standard given some vendors may have sized out, but still hold a GSA contract as a SDVOSB? General Question

A: Yes. Please see E.3 VETCERT VERIFICATION REQUIREMENT FOR SERVICE DISABLED VETERAN OWNED SMALL BUSINESS (SDVOSBs).

(Id., at 11, Q&A No. 61.)

Clause “E.3 VETCERT VERIFICATION” as referenced *supra*, states:

As required by the Vets First Contracting Program (Public Law 109-461), consideration for contract award is limited to SDVOSBs that are registered and verified in the Small Business Administration's (SBA) VertCert database (<https://veterans.certify.sba.gov/>) at time of submission of offer and at time of contract award. Accordingly, quotes submitted by SDVOSBs that do not meet the VetCert verification requirements will not be considered. Offeror shall provide signed clause VAAR 852.219-75.

(Solicitation, at 83.)

On April 9, 2024, the Contracting Officer (CO) informed unsuccessful offerors, including Appellant, that Aptive was the awardee. On April 15, 2024, Appellant protested the award, alleging that Aptive was no longer an eligible small business.

## B. The Size Determination

On July 18, 2024, the Area Office dismissed Appellant's protest as untimely. According to the CO, the subject RFQ was a task order issued under the instant GSA MAS, a long-term contract. The CO further indicated that all offerors were required to be an SDVOSB in VETCERT, but that size recertification was not required. The Area Office noted the instant GSA MAS is a Federal Supply Schedule (FSS) contract and identified Aptive as a small business. (Size Determination, at 1.) The Area Office explained that SBA regulations governing size protests permit a protestor to file a size protest relating to such a contract at only three times: first, an interested party may protest a size certification within five business days after the long-term contract is initially awarded under 13 C.F.R. § 121.1004(a)(3)(i); second, an interested party may protest a size certification within five business days after an option is exercised under 13 C.F.R. § 121.1004(a)(3)(ii); and third, an interested party may protest a size certification made “in response to a contracting officer's request for size certifications in connection with an individual order” under 13 C.F.R. § 121.1004(a)(3)(iii). The Area Office then reiterated OHA's finding in *Size Appeal of EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139 (2022), thereby highlighting:

Interpreting these provisions, OHA has repeatedly held that “SBA will not entertain a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order.” *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016) (quoting *Size Appeal of RX Joint Venture, LLC*, SBA No. SIZ-5683, at 3 (2015)); see also *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5614, at 4 (2014); *Size Appeal of Tyler Constr. Group, Inc.*, SBA No. SIZ-5323 (2012); *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR). . .

. . .

When assessing size for task and delivery order contracts, SBA's longstanding rule is that a concern which represents itself as small at the time of contract award remains small for the lifetime of the contract, including orders issued under the contract. *Size Appeal of Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 16-17 (2021); see also *Size Appeals of: DNT Sols., LLC and Alliant Sols. Partner, LLC*, SBA No. SIZ-5962, at 7 (2018). *Size Appeal of EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139 (2022).

(Size Determination, at 2-3.)

Applying OHA case law and regulation, the Area Office concluded that a protest may be filed in connection with an individual task order only when the CO requests recertification. In completing the Size Protest intake sheet, the CO informed the Area Office that the VA required all offerors to be an SDVOSB in VETCERT and that recertification was not a requirement for this contract. The Area Office thus, determined that requiring a firm to be listed as an SDVOSB in VETCERT did not constitute a recertification requirement at the task order level. Therefore,

Aptive's size was to be determined as of its offer for MAS Contract No. GS-07F-281BA in 2019, rendering Appellant's protest as untimely. The Area Office concluded that Aptive was a small business for this procurement. (*Id.*, at 3.)

### C. The Appeal

On, July 24, 2024, Appellant filed the instant appeal. Appellant first points to the Q&A, which were conducted and incorporated into the RFQ and emphasizes Q&A No. 61. Appellant also asserts that in response to the Q&A, it certified that its "Representations and Certifications in SAM.gov are accurate, complete, and current." (Appeal, at 6-7.)

Appellant argues that this Q&A constitutes a request for recertification and relies upon OHA precedent that a solicitation may require a recertification at the task order level without using the words "certify" or "recertify." (*Id.*, at 10, citing *Size Appeal of 22nd Century Technologies, Inc.*, SBA No. SIZ-6122, at 16 (2021).) Where a task order RFQ requested that an offeror be a small business at time of task order proposal submission and award, such a statement is equivalent in substance to a certification, notwithstanding the procuring agency did not utilize the words "certify" or "recertify" in the task order Solicitation. (*Id.*, citing *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013)).

Appellant also maintains that the VA's unambiguous Q&A requires that an offeror must "certify at time of award that they are still within the size standard," and therefore offerors on this procurement were obligated to certify that they were still within the size standard at the time of award. (*Id.*, at 10-11.) By asserting that Aptive could not have certified because it was no longer a small business, Appellant claims the Area Office's reliance on 13 C.F.R. § 121.404(a)(1)(ii) and *Size Appeal of Odyssey Consulting Group, supra* is misplaced, and that the Area Office disregarded key factual nuances of this procurement. (*Id.*, at 11-12.)

Therefore, Appellant maintains there was a recertification requirement, and Aptive is ineligible for award. (*Id.*, at 12.)

### D. Response

On August 8, 2024, Aptive responded to the Appeal. Aptive maintains the reasonable interpretation of the RFQ, including the Q&A, is that the Solicitation was limited to entities under Contract No. GS-07F-281BA, who were appropriately certified in VETCERT as SDVOSBs. Aptive notes that while the Q&A was incorporated into the RFQ, it was not signed. (Response to Appeal, at 2.)

Aptive asserts the CO's actions prove recertification was not a requirement under the RFQ. Aptive first points to the regulations applicable to competitions such as this one, i.e., those issued off an MAS contract, provide that size is determined as of the date an offeror submits its offer for the base contract, unless a contracting officer definitively requests a size recertification for a specific order. (*Id.*, at 3, citing 13 C.F.R. § 121.404(a)(1)(i)(B).) The regulations governing size protests permit a protestor to file a size protest relating to a long-term contract at only three times: (1) within five business days after the long-term contract is initially awarded; (2) within

five business days after an option is exercised; or (3) in response to a contracting officer's request for size certifications in connection with an individual order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3)(i)-(iii).) SBA will not consider a size protest against the award of an order under a long-term contract, unless the procuring agency requested recertification in conjunction with the order. (*Id.*, citing *Size Appeal of EBA Ernest Bland Associates, P.C.*, SBA No. SIZ-6139 (2022).

Aptive notes that Appellant's protest does not challenge the award of the underlying MAS contract or the exercise of an option, but challenges the award of this task order, asserting the Solicitation includes the CO's request for a size certification. However, for a size protest to be timely a contracting officer must expressly require recertification. (*Id.*, citing *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 at 6 (2016).) OHA historically gives considerable weight to the CO's view as to whether recertification was requested for a particular task order because the decision to request recertification is reserved to the CO's discretion. (*Id.*, citing *Size Appeal of DNT Sols., LLC & Alliant Sols. Partner, LLC*, SBA No. SIZ-5962 at 11 (2018); *see also Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 at 17 (2022); *Size Appeal of EBA Ernest Bland Assocs., P.C.*, SBA No. SIZ-6139 at 5 (2022) (citing *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013)). Here, the CO stated recertification was not a requirement at the task order level.

Aptive contrasts the instant Solicitation with that in *Metters, supra*, which Appellant relies upon. In *Metters*, the solicitation stated:

[I]nstructed each offeror to specify its size status in its task order proposal, and to verify whether its size 'as of the date of [its] task order quotation submission' is the 'same as' the offeror's underlying GSA Schedule. If selected for award, the offeror was required to again confirm its size 'as of the date of [its] signature on the task order award.' Further, the [agency] requested these representations in conjunction with a total small business set-aside, after repeatedly warning that proposals would be accepted only from small businesses.

(*Id.*, at 3-4, citing *Metters*, at 9.)

Aptive asserts there is no language like this in the instant RFQ. Further, the CO in *Metters* initiated his own size protest against the awardee, claiming recertification was required, and OHA treated as significant in finding recertification was required. (*Id.*, at 4, citing *Metters*, also *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178 at 17 (2022).) Here, the CO did not initiate the protest, but rather insisted recertification was not required and the Area Office agreed.

Aptive explains that *Size Appeal of 22nd Century Technologies, Inc.*, SBA No. SIZ-6122 (2021) is distinguishable. There, the procuring agency made clear that in the event a task order was restricted to small business in accordance with that MAS contract, the task order's RFQ would indicate the restriction, and only concerns eligible to compete as a small business could submit a proposal. Here, the CO's actions indicate she did not believe recertification was

required, and Appellant cannot point to any of her actions which support a finding that she did. (*Id.*, at 4.)

Further, neither the underlying MAS contract nor the Solicitation indicate that recertification was required. Appellant points to no language that required each offeror to affirmatively reverify or confirm its size status as of the date of task order submission. This Solicitation did not request a size standard recertification. Appellant, however, maintains this case is more similar to *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 at 6 (2016). There, an RFQ amendment stated “all offerors shall certify in writing that their proposed solution falls within the scope of the referenced GSA Schedule contact(s)” and referenced several FAR clauses pertaining to small business issues. However, that CO confirmed she did not intend to request recertification, and the Area Office determined the RFQ did not request recertification for the task order. Further, recertification is not required merely because mandatory FAR clauses are incorporated, and merely setting aside a task order for small business is not a request for recertification. (*Id.*, at 4-5.)

Thus, Aptive maintains that Q&A No. 61 should be interpreted as citing to a requirement that SDVOSBs must meet VETCERT verification requirements. Aptive argues that at best, it is ambiguous whether VA's response to Q&A No. 61 requires recertification or merely requires compliance with VETCERT verification requirements. The reference to Solicitation ¶ E.3 is not enough to trigger mandatory recertification. (*Id.* at 5, citing *CodeLynx.*)

Further, the language Appellant points to was not in the underlying MAS contract, and the VA regulations do not require recertification. Aptive cites to VA's SDVOSB set-aside procedures, which require the CO to ensure that offerors are registered and verified as eligible in the VIP database at the time of submission of offers and award, and offerors represent their size status corresponding to the contract's NAICS code. (*Id.*, at 5, citing VAAR § 819.7006(b).) Aptive asserts that it meets both of these requirements.

Finally, Aptive points to the GSA MAS Ordering Guide, which states ordering activities should rely on small business size representations made by Schedule contractors at the Schedule contract level and should not rely on SAM for the size of a Schedule contractor for an individual order. (*Id.*, at 5-6.)

Aptive concludes, “The Solicitation's reference to overarching certification requirements, particularly in an unsigned, ambiguously worded reference to existing Solicitation requirements, do not establish a definitive and explicit recertification requirement.” (*Id.*, at 6.)

### 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

The issue here is whether Appellant's protest was timely. The instant procurement is a task order under an FSS contract, GSA MAS Contract No. GS-07F-281BA. Under SBA's regulations, a size protest may be filed against awards under such contracts at only three times. First, within five business days after the initial award of the long-term contract. 13 C.F.R. § 121.1004(a)(3)(i). Second, within five business days of the exercise of an option. 13 C.F.R. § 121.1004(a)(3)(ii). Finally, within five business days of the notification of the identity of the prospective awardee of an individual order when the contracting officer has requested a size certification in connection with that order. 13 C.F.R. § 121.1004(a)(3)(iii).

OHA has consistently held that SBA will not entertain a size protest against the award of a long-term contract, unless the CO of the procuring agency requested recertification in conjunction with the order. *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016). This is in accordance with SBA's longstanding rule that a concern which represents itself as small at the time of contract award remains small for the lifetime of the contract, including for those orders issued under the contract, unless recertification is requested by the CO. *Size Appeal of Odyssey Systems Consulting Group*, SBA No. SIZ-6135, at 16-17 (2021). The instant procurement is neither the award of the long-term contract, nor the exercise of an option, and so the question is whether the CO requested that offerors certify their size with their offers.

I conclude the CO did not. First, the initial Solicitation contains no express certification requirement. It is settled that merely setting aside a procurement for small businesses is not a request for certification. *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 21 (2010). It is further settled that the inclusion in a solicitation of mandatory FAR clauses does constitute a request for recertification. *Size Appeal of ReliaSource*, SBA No. SIZ-5536, at 4 (2014).

The remaining issue is whether Q&A No. 61 constitute a request for recertification. The CO maintains it does not, and OHA gives weight to the CO's opinion on this issue, because the decision to request certification is within the CO's discretion. *Size Appeal of Avenge, Inc.*, SBA No. SIZ-6178, at 16-17 (2022). Further, Q&A No. 61, together with its reference to ¶ E.3 of the Solicitation, refers to registration and verification in SBA's VetCert database, and does not explicitly require an offeror to expressly certify its size, and is thus ambiguous as to whether it is requiring certification. Where there is no instruction to offerors to recertify size, nor to otherwise represent or re-represent their size, there is no request for recertification. *Size Appeal of Odyssey Sys. Consulting Grp.*, SBA No. SIZ-6135, at 16-17 (2021).

Appellant relies upon *Size Appeal of 22nd Century Technologies, Inc.*, SBA No. SIZ-6122, at 16 (2021) and *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456 (2013). However, in *22nd Century Technologies*, the underlying contract laid out a procedure for those orders set aside for small business, where offerors were to check a specific box to certify their size, and that clause was included in the order at issue in that case. This procurement does not have any such

explicit provision in the Solicitation. In *Metters*, as noted in Aptive's Response, the RFQ for the task order explicitly instructed offerors to specify their size status, verify their size as of the date of their quote, and again confirm size at time of award, all in the context of a total small business set aside where the procuring agency repeatedly warned it would only accept proposals from small businesses. The instant Solicitation does not have such specific language. As opposed to this case, in *Metters*, the CO initiated his own size protest, strengthening the CO's intent that certification was required. Thus, Appellant's cases are not apposite here.

Accordingly, I conclude that the instant RFQ did not require offerors to certify their size and therefore, the Area Office was not in error to dismiss Appellant's protest as untimely.

#### IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the Area Office's size determination. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge