United States Small Business Administration
Office of Hearings and Appeals

SIZE Appeal of: Secise, LLC, Appellant, Re: Sabre Systems, LLC Solicitation No. N0042123R0007	SBA No. SIZ-6337 Decided: February 19, 2025

APPEARANCES

Gregory R. Hallmark, David S. Black, Kelsey M. Hayes, Roza Sheffield, Holland & Knight LLP, Tysons, Virginia, for Appellant

Damien C. Specht, James A. Tucker, Thomas Lee, Morrison & Foerster LLP, *1 Washington, DC, for Sabre Systems, LLC.

DECISION[1]

I. Introduction and Jurisdiction

On November 22, 2024, U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2025-023, dismissing the protest of Secise, LLC (Appellant) contending that Sabre Systems, LLC (Sabre) was not an eligible small business for the U.S. Department of the Navy, Naval Air Systems Command, Naval Air Warfare Center (the "Navy" or the "Agency") issued Solicitation No. N0042123R0007, the subject procurement. On appeal, Appellant contends the Size Determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is DENIED and the size determination is AFFIRMED.

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

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties 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.

15 calendar days[2] 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. Solicitation, Protest, and Size Determination

On August 1, 2023, the Navy issued Solicitation No. N0042123R0007 for Systems Engineering Contractor Support Services. The Contracting Officer (CO) set the procurement entirely aside for small businesses, and designated NAICS Code 541715 — Aircraft, Aircraft Engine and Engine Parts with a corresponding 1,500 employee size standard, as the appropriate code. Initial proposals were due on October 2, 2023.

On February 22, 2024, the Navy informed Appellant it was forming a competitive range and engaging in discussions with offerors. On May 14, 2024, the Navy notified Appellant discussions were closed and requested a final proposal revision no later than May 17, 2024. (Size Protest at 3). On November 5, 2024, the Navy issued an unsuccessful offeror notice to Appellant informing it the Navy was awarding the procurement to Sabre. (Ex. A at 1.)

On November 13, 2024, Appellant filed a size protest, alleging that Sabre is not an eligible small business concern for this Solicitation due to its acquisition by a private equity firm, CM Equity Partners ("CMEP") within 180 days following the submission of an offer in response to the Solicitation, citing 13 C.F.R. § 121.404(g)(2)(iii). (Size Protest at 1). Final proposal revisions were due May 17, 2024. Because CMEP acquired Sabre by September 26, 2024, Appellant argued that the acquisition took place within the 180-day period following Sabre's submission of its final proposal revision, rendering Sabre other than small for this procurement. Furthermore, almost immediately after the acquisition, Sabre recertified as other than small, amending its Small Business Program Representations (FAR 52.219-1) on SAM.gov on October 2, 2024, to acknowledge that it was no longer a small business concern. (*Id.*, at 3, citing Exh. H. at 28).

Appellant argues that while the general rule is a firm's size is determined as of its initial offer, (13 C.F.R. § 121.404(a)) there is an exception for the situation in which a firm is sold to, acquires, or merges with another firm in the period between offer and award. (*Id.*, citing 13 C.F.R. § 121.404(g)(2)(iii).) This requires a firm to recertify its size to the contacting officer prior to award if it is involved in a merger, sale, or acquisition "after offer but prior to award." If the offeror is unable to recertify as small, and the merger, sale, or acquisition in question occurred within 180 days of the offer, then the offeror will not be eligible as a small business to receive the award of the procurement. (*Id.*, at 4.)

On November 22, 2024, the Area Office dismissed the protest for lack of merit due to its failure to make any allegation that the protested firm does not meet the regulatory requirements to be eligible for award as a small business. The Area Office informed Appellant:

[2] Because the fifteenth calendar day falls on a Saturday, this appeal, filed Monday, December 9, is timely. *See* 13 C.F.R. § 134.202(d)(1)(ii).

> [Y]ou make no allegation that Sabre was acquired within 180 days of initial offer. . . . [Th]e regulation clearly states that it only applies to situations where acquisition is within "180 days of the date of an offer." The purpose of this regulation is to prevent firms that have been effectively acquired prior to initial offer from being eligible to offer on small business set-asides as small businesses. Here, Sabre made its initial offer on October 2, 2023, and was acquired almost a full year later in September 2024.
>
> Consequently, your protest is being dismissed for lack of merit.

Size Determination, at 3.

B. The Appeal

On December 9, 2024, Appellant filed the instant appeal. Appellant argues the Area Office erred as a matter of law in dismissing its protest. Appellant maintains it has established that Sabre is ineligible as a small business under this Solicitation because CMEP acquired it within 180 days after Sabre's submission of its final proposal revision. Sabre is therefore ineligible for award under the plain language of 13 C.F.R. § 121.404(g)(2)(iii). The regulation states that if a merger, sale or acquisition of a concern occurs within 180 days of "the date of an offer relating to the award of a contract" and the concern is unable to recertify as small it is ineligible for a small business award. Final proposal revisions were due May 17, 2024 and Sabre was sold to a private equity firm no later than September 26, 2024, 132 days later. Sabre updated its SAM registration on October 2, 2024 to change its size representation to other than small. Award was made on November 4, 2024. Because the acquisition occurred less than 180 days following the final proposal revision it resulted in Sabre being unable to recertify as small, Sabre is ineligible for award. (Appeal, at 5-6.)

The Area Office dismissed the appeal because Appellant made "no allegation that Sabre was acquired within 180 days of ***initial offer***." (emphasis supplied.) The Area Office concluded that the 180-day rule period of 13 C.F.R. § 121.404(g)(2)(iii) is triggered only by the "initial offer" and not a Sabre's subsequent proposal revision. The Area Office's explanation for its interpretation is "[T]he purpose of this regulation is to prevent firms that have been ***effectively acquired prior to initial offer*** from being eligible to offer on small business set-asides as small businesses." (emphasis supplied.) This interpretation disregards the plain text of the regulation in favor of a policy argument, and therefore should be rejected. (*Id.*, at 7, citing *Size Appeal of LinTech Global Inc.*, SBA No. SIZ-6287 (2024); *Matter of Analytic Strategies, Inc.*, SBA No. VET-268, (2018).)

Appellant argues that the Area Office replaced the phrase "an offer" in the regulation with "an initial offer." The regulation at 13 C.F.R. § 121.404(g)(2)(iii) is identified as an exception to the general rule a that size is determined as of the date of a concern's initial offer including price. The regulation refers to "an offer." SBA has used the phrase "initial offer which includes price" as a legal standard frequently in the regulation. *See* 13 C.F.R. § 121.404(a); *id.* at § 121.404(a)(1)(i); *id.* at § 121.404(a)(1)(i)(A); *id.* at § 121.404(a)(1)(ii); *id.* at §

121.404(a)(1)(ii)(A); *id.* at § 121.404(a)(1)(iii); *id.* at § 121.404(a)(1)(iv); *id.* at § 121.404(a)(2); *id.* at § 121.404(g); *id.* at § 121.404(h). (*Id.*, at 7-8.)

In the regulation at issue here, SBA used the phrase "an offer" rather than "initial offer," implying that more than one offer could be made in the course of one procurement, each of which would start a 180-day period under the regulation. (*Id.*, at 8.)

Appellant points to the FAR definition of "offer" as "a response to a solicitation that, if accepted would bind the offeror to perform the resultant contract," arguing a final proposal revision fits this definition. (*Id.*, at 8, citing FAR 2.101.) A proposal revision revokes and takes the place of the initial proposal as the concern's offer to perform the contract. (*Id.*, at 8-9, citing *Integrated Bus. Sols., Inc. v. United States*, 58 Fed. Cl. 420, 426 (2003).) A concern's submission of a proposal revision is an "offer" that starts a 180-day period within which a merger, sale, or acquisition of the offeror results in it being unable to recertify as small and renders it ineligible for award under 13 C.F.R. § 121.404(g)(2)(iii). (*Id.*)

Further, Appellant argues the regulation's scope is not limited to firms that are "effectively acquired prior to initial offer." The regulation does not depend on any finding that the acquisition had been effectively completed before submitting an offer. It disqualifies offerors that were acquired up to 180 days after an offer, which could include transactions that were not even contemplated prior to the offer. The regulation disqualifies concerns acquired up to 180 days after "an offer," not "an initial offer." The purpose of the regulation is clear, to prevent firms which have been acquired and thus are other than small from receiving contract awards set aside for small business. Appellant asserts this will happen here if OHA affirms the Area Office decision. (*Id.*, at 9-10, citing Contracting Officer's Memorandum.)

C. Sabre Response

On December 26, 2024, Sabre filed a response to the appeal. Sabre begins by setting out the relevant dates (Response to Appeal at 2.):

> *4 · On October 2, 2023, Sabre submitted its initial offer including price under Solicitation No. N00421-23-R-0007.
>
> · On May 17, 2024, following discussions, Sabre submitted its final proposal revisions.
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> · In September 2024, nearly a year after initial proposal submission, CEMP acquired Sabre.
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> · On October 2, 2024, Sabre timely updated its System for Award Management profiles to recertify as other than small for the relevant size standard.
>
> · On November 5, 2024, the Agency awarded the contract to Sabre.

Sabre argues the regulation at 13 C.F.R. § 121.404(g)(2)(iii) is a careful balancing test. Sabre points to the Federal Register preamble to the final rule. SBA does not want a concern to be eligible for award when it becomes other than small due to merger or acquisition, nor does it wish to artificially delay mergers and acquisitions where a proposal is pending while a long, drawn-out procurement is underway. Sabre points to the preamble's discussion of the comments on the proposed rule. These comments expressed concern that lengthy procurements could discourage legitimate business decisions that could materialize months after submission of an offer, even though the concern had no plans to sell or merge at the time of it offer. SBA relayed that the commenters recommended an intermediate position of requiring recertification if a merger or acquisition occurred within a certain amount of time from either the offer or the date for receipt of offers set forth in the solicitation. Sabre maintains SBA adopted a balanced approach, requiring recertification when it occurs close in time to a concern's offer, but it would not be beneficial to discourage legitimate business transactions that arise months after an offer's submission. (Response at 3-4, citing 85 Fed. Reg. 66,146, 66,153-54 (Oct. 16, 2020).)

Sabre argues the final rule thus created a ***single*** period of 180 days after "an offer" is first submitted for a set-aside contract. If a transaction causes an offeror to become other than small during that 180-day period, the offeror is ineligible for award; if a transaction which causes an offeror to become other than small occurs after that bright-line period but before award, the offeror remains eligible, but the agency may not count the award toward its small business goals. (*Id.*, at 4.)

Sabre argues the Appeal would turn the rule on its head, that rather than one 180-day period after a concern's initial offer is submitted in which a merger or acquisition would render the concern ineligible, Appellant's interpretation would result in multiple nonconsecutive or even overlapping 180-day periods after every proposal revision. This would undercut SBA's stated purpose for creating the 180-day rule: to avoid holding up legitimate business transactions when a procurement is drawn out for more than an initial bright-line period of 180 days. This destroys the balance SBA designed the rule to achieve. (*Id.*, at 5, citing *Size Appeal of IQ Solutions, Inc.*, SBA No. SIZ-4711 (2005) for rejecting "plain language" argument in favor of a clear policy.)

Sabre maintains Appellant's argument would create absurd results. Instead of one 180-day window, there would be several. Here there would be one such window after October 2, 2023, and another after May 17, 2024. Under this reading, Sabre would be eligible if its transaction had occurred in April 2024 but is not because it occurred in September 2024. (*Id.*, at 6.)

D. Secise's Reply

On January 8, 2024, Appellant filed a Motion for Leave to Reply to Sabre's Response, together with the Reply. Appellant informed OHA that counsel for Sabre opposed the motion. Sabre has not filed an opposition.

Appellant argues that Sabre introduces new issues by arguing policy questions in its Response and wishes to Reply. I find that permitting Sabre to respond on the policy issues would lead to a complete record, and GRANT the Motion.

Appellant notes Sabre relies on the commentary to the promulgation of the regulation at issue here — 13 C.F.R. § 121.404(g)(2)(iii)(2024) — to argues that the phrase "an offer" in the regulation means "an initial offer." Appellant asserts Sabre cites to no regulatory text or case law to support its argument but argues policy. (Appellant's Reply at 2.) Appellant argues this cannot override the plain text of the regulation. Appellant maintains the plain text of the regulation must prevail over policy arguments. (*Id.* at 3, citing *Size Appeal of LinTech Global Inc.*, SBA No. SIZ-6287 (2024).) That applying the plain language of the text would result in multiple 180-day periods in a given procurement is simply the way SBA has chosen to draft the text, not an "absurd and pointless" effect that must be avoided by constructively re-writing the regulation. (*Id.*)

Appellant notes Sabre relies upon the comments in response to the proposed rule, as discussed in the preamble to the final rule. These comments expressed concern that lengthy procurements could discourage legitimate business decisions that could materialize months after submission of an offer, even though the concern had no plans to sell or merge at the time of its offer. SBA relayed that some commenters recommended an intermediate position of requiring recertification if a merger or acquisition occurred within a certain amount of time from either the offer or the date for receipt of offers set forth in the solicitation. (*Id.*) Appellant notes that SBA relayed the commenters' opinions but did not adopt them as its own. SBA only agreed it would not be beneficial to discourage legitimate business transactions which arise months after an offer is submitted. It accordingly adopted the rule. (*Id.*, at 4.)

Appellant disputes Sabre's argument that the rule creates a single 180-day period after an offer is submitted within which a merger disqualifies a concern. The discussion in the preamble does not address whether the 180-day period starts only on the submission of an initial offer or is also triggered by the submission of a revised offer following discussions or the issuance of a solicitation modification. (*Id.*, at 4-5.)

Appellant disputes Sabre's argument that applying the plain meaning of "an offer" would be contrary to SBA's policy goals. Appellant's plain language interpretation would allow offerors to receive small business set asides even if involved in business transactions that take place more than 180 days after submission of a revised proposal. Further, Appellant's interpretation is consistent with SBA policy of viewing growth through mergers and acquisitions as different from natural growth. An award to a firm that is no longer small due to merger or acquisition frustrates the purpose of small business set-asides. Here, an award to Sabre would mean an award intended for a small business would otherwise go to an other than small corporate family. (*Id.*, at 5-6.)

E. Comment by SBA OGC

On February 3, 2025, the SBA Office of General Counsel (OGC), at OHA's request, filed comments on the instant appeal. SBA OGC takes the position that the phrase "an offer" in the regulation means "an initial offer."

SBA OGC first noted the general rule regarding the date to determine a concern's size is that the determination is made as of the date of the concern's self-certification that it is small submitted with its initial offer, including price. (SBA OGC Comment at 1, citing 13 C.F.R. § 121.404(a).) There are limited exceptions, one of which is 13 C.F.R. § 121.404(g)(2)(iii). The regulation requires recertification if a merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size prior to award. If the merger, sale or acquisition occurs within 180 days of "an offer" relating to contract award and the offeror is unable to recertify as small, it is ineligible for award. The regulation has two purposes. First, it prevents small business set-asides from being awarded to concerns that are no longer small following a merger or acquisition. Second, it provides concerns with certainty and leeway to grow and consider merger during the procurement process without having to forfeit small business eligibility. The rule takes into consideration that there may a long period of time between offer and award. The 180 period is a compromise, derived from stakeholder feedback during the rulemaking process. (*Id.*, at 2, citing 85 Fed. Reg. 66,146, 66,153-54 (Oct. 16, 2020).)

SBA OGC argues that in accordance with SBA's intent and the language of the regulation the phrase "an offer" should be read to refer to a concern's initial offer. This is consistent with the general rule and the commonly referenced legal standard that appears throughout the regulation. The precise commencement date is essential to uniformly and practicably calculating this period of time, thus fulfilling the regulation's purpose. (*Id.*, at 3.)

SBA OGC points to the comments for the proposed rule which simply required recertification following a merger, after which, if a concern was other than small it would not be eligible for a small business award, but did not impose the 180-day recertification requirement. (*Id.* citing 84 Fed. Reg. 60,846, 60,851, 60,870 (Nov. 8, 2019) (locating the proposed rule at 13 C.F.R. § 121.404(g)(2)(ii)(D).)

The preamble to the final rule mentioned that some commenters supported the proposed rule to ensure awards were not made to other than small concerns. Commenters pointed out the lack of a defined timetable establishing when post-merger certification was required created uncertainty. Other commenters believed if a concern was small at the time it submitted its proposal, it should remain small because size is generally determined as of the date of initial offer. Some commenters opposed the proposed rule because it could adversely affect small businesses due to the lengthy contract award process. Contract award can occur 18 months or more after the due date for offers. A concern could submit an offer with no plans to merge or sell the business at that time. If a long period of time passes, some commenters argued the concern should not be put in the position of declining to make a legitimate business decision concerning a possible merger or sale merely because it is hopeful of receiving a small business award. Several commenters advocated an intermediate position where recertification must occur within a certain amount of time from the concern's offer or the date for receipt of offers. This would allow SBA to prohibit awards to concerns that may have simply delayed a contemplated action prior to submitting offer, but not prohibit legitimate business decisions that could materialize months later. The preamble stated SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer but agreed that it would not be beneficial to discourage legitimate business transactions that arise months after offer submission. (*Id.*, at 3-5, citing 85 Fed. Reg. 66,146, 66,153-54 (Oct. 16, 2020).)

SBA OGC argues that when read in the context of SBA's preamble to the final rule, that SBA intended the phrase "an offer" to refer to the initial offer. The preamble only makes sense if read this way. SBA understood that a clear fixed timetable is necessary to provide certainty during the often lengthy procurement process. This enables concerns to make business decisions during that time regarding mergers. SBA contemplated that the fixed time when the 180-day period would commence should be when the concern submitted its initial offer, in accordance with the general rule that size is determined on that date. SBA struck this compromise after considering stakeholder feedback on the proposed rule's lack of clarity. (*Id.*, at 5.)

Appellant seeks to revert back to the language of the proposed rule, which contained no compromise regarding a clear timetable for post-merger recertification. SBA specifically rejected this position during the rulemaking process. Appellant's position is contrary to the intent of the final rule - to create a fixed timetable for recertification and realize the regulation's intended purpose. (*Id.*)

SBA OGC argues there are policy considerations that support the use of a concern's initial offer as the fixed starting point for the 180-day term. An expansive interpretation of "an offer" to include other offers or final proposal revisions frustrates the regulation's purpose. It permits concerns to select arbitrary and rolling 180-day terms they can strategically manipulate and control. It permits gamesmanship and abuse of the size determination process. It has the potential to chill concerns' effort to grow out of fear others will exploit the ambiguity of the 180-day period to defensively contest awards. Increased litigation costs could arise from the vagueness of a broad interpretation of "an offer." (*Id.*, at 5-6.)

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 general rule is that SBA determines a concern's size as of the date of its initial offer including price, and that once awarded a contract as a small business, a concern is considered to be small throughout the life of the contract. 13 C.F.R. § 121.404(a). However, SBA is concerned about those firms who become other than small not through natural growth, but through merger or being acquired. On November 8, 2019, SBA issued a proposed rule dealing with the issue of small concerns which are merged with or are acquired by an other than small concern between the time they submit an offer for a procurement and the award of the resulting contract:

> If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the offeror is unable to recertify as small, it will not be eligible as a small business for the award of the contract.

84 Fed. Reg, 60,846, 60,870 (Nov. 8, 2019) (locating the proposed rule at 13 C.F.R. § 121.404(g)(2)(ii)(D)).

In the preamble to the proposed rule, SBA explained:

> Additionally, the proposed rule clarifies that if a merger or acquisition causes a firm to recertify as an other than small business concern between time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under this proposed rule, SBA would accept size protests with specific facts showing that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award.

84 Fed. Reg, at 60,851.

The proposed rule generated a number of comments, which SBA considered in crafting the final rule. SBA issued the following commentary in the preamble to publication of the final rule:

> Additionally, the proposed rule clarified that if a merger or acquisition causes a firm to recertify as an other than small business concern between the time of offer and award, then the recertified firm is not considered a small business for the solicitation. Under the proposed rule, SBA would accept size protests with specific facts that an apparent awardee of a set-aside has recertified or should have recertified as other than small due to a merger or acquisition before award. SBA received comments on both sides of this issue. Some commenters supported the proposed provision as a way to ensure that procuring agencies do not make awards to firms who are other than small. They thought that such awards could be viewed as frustrating the purpose of small business set-asides. Other commenters opposed the proposed change. A few of these commenters believed that a firm should remain small if it was small at the time it submitted its proposal. SBA wants to make it clear that is the general rule. Size is generally determined only at the date of offer. If a concern grows to be other than small between the date of offer and the date of award (e.g., another fiscal year ended and the revenues for that just completed fiscal year render the concern other than small), it remains small for the award and performance of that contract. The proposed rule dealt only with the situation where a concern merged with or was acquired by another concern after offer but before award. As stated in the supplementary information to the proposed rule, SBA believes that situation is different than natural growth. Several other commenters opposing the proposed rule believed such a policy could adversely affect small businesses due to the often lengthy contract award process.

> Contract award can often occur 18 months or more after the closing date for the receipt of offers. A concern could submit an offer and have no plans to merge or sell its business at that time. If a lengthy amount of time passes, these commenters argued that the concern should not be put in the position of declining to make a legitimate business decision concerning the possible merger or sale of the concern simply because the concern is hopeful of receiving the award of a contract as a small business. Several commenters recommended an intermediate position where recertification must occur if the merger or acquisition occurs within a certain amount of time from either the concern's offer or the date for the receipt of offers set forth in the solicitation. This would allow SBA to prohibit awards to concerns that may appear to have simply delayed an action that was contemplated prior to submitting their offers, but at the same time not prohibit legitimate business decisions that could materialize months after submitting an offer. Commenters recommended requiring recertification when merger or acquisition occurs 30 days, 60 days, and six months after the date of an offer. SBA continues to believe that recertification should be required when it occurs close in time to a concern's offer but agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted. In response, the final rule continues to provide that if a merger, sale or acquisition occurs after offer but prior to award the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principal [*sic*]) occurs within 180 days of the date of an offer, the concern will be ineligible for the award of the contract. If it occurs after 180 days, award can be made, but it will not count as an award to small business.

85 Fed. Reg. 66,146, 66,153-54 (Oct. 16, 2020).

With the publication of the final rule, the regulation at issue reads:

> If the merger, sale or acquisition occurs after offer but prior to award, the offeror must recertify its size to the contracting officer prior to award. If the merger, sale or acquisition (including agreements in principle) occurs within 180 days of the date of an offer relating to the award of a contract, order or agreement and the offeror is unable to recertify as small, it will not be eligible as a small business to receive the award of the contract, order or agreement. If the merger, sale or acquisition (including agreements in principal [*sic*]) occurs more than 180 days after the date of an offer, award can be made, but it will not count as an award to small business.

13 C.F.R. § 121.404(g)(2)(iii).[3]

[3] SBA has revised this regulation since the Area Office issued the Size Determination. The regulation is now at 13 C.F.R. § 125.12. 89 Fed. Reg. 102,448, 102,465, 102,493 (Dec. 17, 2024).

The primary purpose of the regulation is to prevent firms which become other than small through merger or acquisition from benefiting from small business set-asides. Appellant's case is based upon the "plain meaning" of the word "offer" in the regulation. It is true that a final proposal revision meets the definition of an offer at FAR 2.101: "[A] response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract." It is also true that SBA's regulations use the term "initial offer" at other parts of 13 C.F.R. § 121.404, as noted in the Appeal. Appellant argues then that the word "offer" in the regulation must not be limited to initial offers, but include final proposal revisions, which are covered by the term "offer."

Appellant's argument has the appeal of simplicity, and of the appearance of fidelity to the plain text of the regulation. However, it would lead to absurd results. Here, Sabre submitted its initial offer on October 2, 2023. Then began the 180-day period within which, if it was acquired by or merged with another firm, and there had as yet been no award made, it would no longer be eligible for award. That period ended March 30, 2024. Because the acquisition here took place in September 2024, Sabre was outside of the period and was eligible for award. Sabre's final proposal revision was submitted May 17, 2024. By Appellant's reckoning, this would have started a second 180-day period within which an acquisition prior to award would have rendered Sabre ineligible. It was within this period, in September 2024, that CMEP acquired Sabre, prior to the November 5, 2024 award to Sabre. Appellant argues Appellant was not eligible for award because the acquisition occurred during this second 180-day period. An acquisition which took place in April would still have resulted in Appellant being eligible for award, but from May to November, ineligible.

This is contrary to SBA's careful consideration of the issue in the regulatory history. SBA's proposed rule simply provided that once a merger took place that rendered a concern other than small, it was no longer eligible for an award as a small business, even if it had made an offer on a pending procurement at the time it was small. The preamble to the final rule shows that SBA carefully considered the consequences of the rule in the context of what can be a long, drawn-out procurement process. As happened here, there can easily be more than a year between a concern's initial offer and the eventual award of a contract. During that time a concern's business conditions may change, and an acquisition or merger may be appropriate. SBA noted commenters' concerns and "agrees that it would not be beneficial to discourage legitimate business transactions that arise months after an offer is submitted." 85 Fed. Reg. at 66,153-54. SBA then adopted the intermediate position advocated by some commenters, of creating a period after submission of a concern's initial offer during which a merger or acquisition that rendered a concern other than small would also render it ineligible for award, but mergers and acquisitions after that period would not. The language of the preamble shows SBA's concern over the need of businesses for some certainty, and an appreciation of their need for planning, and the changes in a business's conditions that can arise over a long, drawn-out procurement process. The rule is meant to provide some certainty and leeway to grow for small businesses while dealing with the procurement process. While SBA did not explicitly state that it was adopting the comments, its adoption of the rule they advocated make it clear that it did. Accordingly, SBA adopted the rule that once a concern submits its offer, if it then merges or is acquired within 180 days and is then other than small, it is no longer eligible for award. If it merges or is acquired after that time, it is eligible for award, but the procuring agency may not count the award as an award to small business.

Appellant's reading of the regulation would, however, create a chaotic process. Every new offer made during a long procurement would create another 180-day period during which, if a sale or merger occurred, the concern would no longer be eligible for award. This case provides a good example, where under Appellant's reading Sabre would have been eligible for award in April 2024, and until May 16th, but the submission of its final proposal revisions would have rendered it ineligible for another 180 days.

OHA has considered the question of a "plain meaning" of a regulation which would have rendered an absurd result. In *Size Appeal of IQ Solutions, Inc.*, SBA No. SIZ-4711 (2005) the appellant argued that the size protest regulation does not state or imply that the apparent successful offeror and the offeror against which a size protest is filed must be one and the same and attempted to protest the size of a concern that was not an awardee. OHA relied upon the regulatory history of the regulation in contrast to simply relying upon the regulation's "plain meaning" to find that a protest could only be filed against the apparent successful offeror. In *Matter of Soncoast Procurement, LLC*, SBA No. WOSB-117 (2022), OHA rejected a "plain meaning" argument that because a firm remained eligible for the life of a contract, it was eligible for other contracts, even though it was no longer an eligible concern.

Careful consideration of the regulatory history thus leads to the conclusion that SBA clearly meant that the word "offer" in the regulation meant a concern's initial offer and that would create one single 180-day period within which a merger or acquisition which rendered the concern other than small would also make it ineligible for award. If the merger or acquisition took place after the 180-day period, the concern is eligible for award, but the award no longer counts as an award to a small business. Here, Sabre's merger took place long after it submitted its initial offer, and so it remained eligible for award. Accordingly, the Area Office properly dismissed Appellant's protest, as I must deny the instant appeal.

IV. Conclusion

Appellant has not established that the Size Determination is based upon a clear error of fact and law. Accordingly, I DENY the instant appeal and AFFIRM the Size Determination.

Sabre is an eligible small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge