

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

HUBZone Appeal of:

BahFed Corporation,

Appellant,

Re: Government Acquisition, Inc.

Solicitation No. 7RTAC21R00000003

Appealed from HUBZone Determination
Department of Homeland Security

SBA No. HUB-104

Decided: April 4, 2025

APPEARANCES

Holly Roth, Esq., Jeremy Burkhart, Esq., Kelsey Hayes, Esq., Holland & Knight LLP, for Appellant BahFed Corporation

Kathy C. Potter, Esq. Sharon A. Roach, Esq., Potter & Murdock, P.C., for Government Acquisition, Inc.

Allison Mueller Amann, Esq., Small Business Administration, Office of General Counsel

DECISION¹

I. Introduction and Jurisdiction

On October 17, 2024, the Director of the U.S. Small Business Administration (SBA) HUBZone Program (D/HUB) issued a HUBZone Determination (Determination), finding Government Acquisition, Inc. (GAI) to be an eligible HUBZone small business concern. On October 31, 2024, BahFed Corporation (Appellant) filed the instant appeal from that HUBZone determination. Appellant argues that the D/HUB's determination is clearly erroneous, and requests that OHA reverse it, and find GAI is not an eligible HUBZone small business concern. For the reasons discussed *infra*, I deny appeal and affirm the D/HUB's determination.

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, so OHA therefore now issues the entire decision for public release.

OHA decides HUBZone appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 126 and 134 and Federal Acquisition Regulation (FAR) 19.1303. Appellant filed the appeal within ten business days of receiving the HUBZone determination, so the appeal is timely. 13 C.F.R. § 134.1303. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On April 20, 2021, the Department of Homeland Security (DHS) issued Solicitation No. 70RTAC21R00000003, to establish FirstSource III, DHS's department-wide vehicle for a wide variety of Information Technology commodities (hardware and software) and value-added reseller services. The Solicitation was set aside 100% for small business in several functional categories. The first was 8(a) concerns. The second was Historically Underutilized Business Zones (HUBZone) concerns. The third was Service-Disabled Veteran Owned Small Businesses, the fourth, Women-Owned Small Business and the fifth, all small business. The designated North American Industry Classification System (NAICS) code is 541519 — Information Technology Value Added Resellers, with a corresponding 150 employee size standard.

The Solicitation calls for a two-phased evaluation in accordance with FAR 12.603 utilizing streamlined acquisition procedures. (Solicitation, ¶ M.2.) Phase I proposals were due June 9, 2021. Phase I proposals would be Volume I. This would be technical proposals, with a cover letter certifying the Offeror has read and agrees to comply with all of the conditions and instructions in the Solicitation, a completed Attachment 6 Compliance Checklist, Representations and Certifications from FAR 52.212-3, 52.204-24, 52.209.2, and Offerors' response to Factor One — Ability to Perform the Work, and Factor Two — Supply Chain Risk Management Approach. After evaluation of the Phase I proposals, offerors will be provided with an Advisory Down-select Notice in accordance with Section M of this solicitation.

Phase II proposals were due January 25, 2025. This will include Volumes II and III and include a cover letter certifying the Offeror has read and agrees to comply with all of the conditions and instructions in the Solicitation. It will include the response to Factor Three — Demonstrated Prior Experience and Factor Four — Past performance. Phase II proposals would also include pricing assumptions and the price proposal in Volume III. (Solicitation, ¶ L.4.2, ¶ 5.)

Thus, under the express submission requirements, offerors were required to provide all relevant certifications and representations, including status certifications, in their Phase I submissions, but not in Phase II submissions. Price was to be included in Phase II submissions, but not in Phase I submissions.

The Solicitation included references to the FAR provisions applicable to each of the socio-economic tracks of the procurement, including FAR part 19.13 for HUBZone concerns. (Solicitation, ¶ B.2.)

On September 10, 2024, DHS issued notices to unsuccessful offerors in the 8(a) and HUBZone categories. GAI was one of the successful offerors. On September 17, 2024, Appellant, an unsuccessful offeror, filed a size protest and a HUBZone protest, alleging that GAI was neither a small business nor a HUBZone concern. The SBA Area Office dismissed the size protest, and OHA affirmed that dismissal in *Size Appeal of BahFed Corp.*, SBA No. SIZ-6327 (2024).

B. Protest

On September 10, 2025, Appellant learned GAI was the apparent successful offeror. On September 17, 2025, Appellant submitted a protest challenging GAI's status as a HUBZone concern. Appellant alleged that approximately 26% of GAI's employees — none of whom are executives — reside in a HUBZone. Furthermore, nearly all of GAI's employees work and live outside of the firm's purported "principal" office in Cincinnati, Ohio, meaning that GAI does not maintain a principal office within a HUBZone, as required by SBA. (Protest at 2.)

Appellant asserted GAI does not meet the HUBZone eligibility requirements of 13 C.F.R. § 126.200. Appellant argues at least 35% of a concern's employees must reside in a HUBZone for a concern to eligible for HUBZone certification. (*Id.*, at 3, citing 13 C.F.R. § 125.201(d)(1).) If a concern fails to maintain compliance with the 35% residency requirement, a HUBZone status protest may be filed. (*Id.*, citing 13 C.F.R. § 126.801(b).) A HUBZone concern must annually represent to SBA that it continues to meet all HUBZone eligibility criteria. (*Id.*, citing 13 C.F.R. § 126.500(a).)

Appellant asserted GAI was originally certified as a HUBZone business on November 19, 2020, and thus would have represented to SBA on November 19, 2023, that it qualified for HUBZone status. However, LinkedIn profiles and real property tax records for current GAI employees featured on GAI's official LinkedIn page demonstrate GAI is not in compliance with the HUBZone residency requirements. Appellant reviewed the LinkedIn profiles of 50 GAI employees featured on GAI's official company LinkedIn page. Out of 50 employees, 37 did not reside in a HUBZone. Therefore, only 26% of GAI's employees reside in a HUBZone. Furthermore, GAI's Treasury Form 5500-SF disclosed it had only 135 employees at the end of 2023. A sample of 50 employees represents nearly 40% of GAI's workforce, so these figures are likely to be representative of GAI's overall workforce. (*Id.*, at 4.)

Appellant further speculated that a HUBZone residency of 26% was likely overstated. GAI employees may list a metropolitan area on their profile but reside outside of the designated HUBZone area. GAI's CEO and CTO use Leesburg, VA as their location on LinkedIn but have their residences outside of the Leesburg area. Of the ten individuals highlighted by GAI as its "Leadership Team," only one may actually live in HUBZone. Three of four job openings GAI is advertising are outside of a HUBZone. (*Id.*, at 3-4.) Appellant characterizes GAI's actions as an abuse of the program of the type SBA has warned against. (*Id.*, at 4, citing 89 Fed. Reg. 68,274, 68,286. (Aug. 23, 2024).)

Appellant also asserted GAI's principal office is not located in a HUBZone. GAI may represent that its office is located in Cincinnati, Ohio, but the majority of its employees perform

their work at other locations. A HUBZone concern's principal office must be located in a HUBZone. (*Id.*, at 5, citing 13 C.F.R. §§ 126.200(c)(1); 126.500(a).) A principal office is the location where the greatest number of a concern's employees at any one location perform their work, and the concern must conduct business at that location. (*Id.*, at 5-6, citing 13 C.F.R. § 126.103.)

Appellant asserts GAI's listing of its Cincinnati, Ohio office is a façade. Of the 50 GAI employees most prominently listed on GAI's official LinkedIn page, only four have Cincinnati addresses. Appellant asserted GAI has 1,087 "associated members" on its LinkedIn page, and only 57 of these are in the greater Cincinnati area. The greatest number of employees appear to be in Northern Virginia or suburban Maryland. (*Id.*) Appellant protested that GAI is not an eligible HUBZone concern.

C. The D/HUB's Determination

On October 17, 2024, the Director of SBA's HUBZone (D/HUB) program denied Appellant's protest. The D/HUB first noted that for two-step procurements, a concern must be a certified HUBZone small business concern as of the date it submits its initial bid or proposal (which may or may include price) during Phase I. (D/HUB Determination, at 2, citing 13 C.F.R. § 126.601(e).) As long as a concern was eligible at the time of its offer (and eligibility relates back to the date of its certification or recertification), it may be awarded a HUBZone contract. (*Id.*, citing 13 C.F.R. § 126.504(c)(1).) The D/HUB referred to the "one-year certification rule" which provides that "Once SBA certifies a concern as eligible to participate in the HUBZone program, the concern will be treated as a certified HUBZone small business concern eligible for all HUBZone contracts for which the concern qualifies as small, for a period of one year from the date of its initial certification or recertification. . . ." (*Id.* citing 13 C.F.R. § 126.501(a).) The D/HUB noted that a concern's eligibility thus relates back to its certification or certification anniversary date. For a two-phase procurement, the offeror must be HUBZone certified at the time of its offer during Phase I, and its eligibility relates back to its certification date (or certification anniversary date) preceding the date of that offer. SBA thus determines the eligibility of a concern which is the subject of a HUBZone status protest as of the date of its certification or most recent certification anniversary date preceding the date of the firms' Phase I offer. (*Id.*, citing 13 C.F.R. § 126.803(a).)

On June 8, 2021, GAI submitted its Phase I offer. On November 19, 2020, SBA had certified GAI as a HUBZone small business concern, which means SBA had found GAI eligible on that date. This finding included determinations that (1) at least 35% of GAI's employees resided in HUBZones and (2) GAI's principal office was located at 720 East Pete Rose Way, Cincinnati, Ohio 45202, and this address was located at a HUBZone as of November 19, 2020. Thus, the D/HUB found GAI was an eligible HUBZone small business concern for all HUBZone contracts for which it qualified as small for a period of one year from November 19, 2020, and thus for this contract. The D/HUB thus declined the protest. (*Id.*)

D. The Appeal

On October 31, 2024, Appellant filed the instant appeal. Appellant argues the D/HUBZone erred in treating the instant procurement as a two-step procurement under 13 C.F.R. § 121.404(f) and determining GAI's status as of November 19, 2020. Rather, it is a two-phase procurement, and the D/HUB should have determined GAI's status as of November 19, 2022. (Appeal at 5.)

Appellant argues the D/HUB erred as a matter of law in failing to apply 13 C.F.R. § 126.601(b), which requires an offeror to be an eligible HUBZone concern on the date it submits its price proposal. The general rule for HUBZone awards is that a concern must be an eligible HUBZone concern as of the date it submits its initial offer, including price. (*Id.*, citing 13 C.F.R. § 126.601(b).) This is the general rule for all of SBA's socioeconomic programs. (*Id.*, citing 13 C.F.R. §§ 121.404(a) (size status); 128.401(a), (d)(i) (SDVOSB status); 127.504(d)(1) (WOSB status).)

Appellant thus argues that the date of GAI's eligibility as a HUBZone concern should have been measured from the last certification anniversary GAI had prior to submitting its price proposal on January 25, 2023. This was its certification anniversary on November 19, 2022. (*Id.*) The D/HUB used November 19, 2020, which was GAI's date of initial certification, and so merely adopted the findings from 2020, and did not make an independent assessment of Appellant's arguments. GAI submitted its price proposal on January 25, 2023, and therefore the D/HUB should have determined its status as of the most recent anniversary, November 19, 2022. The D/HUB should not have been able to rely on the 2020 certification and should have analyzed the merits of Appellant's protest. (*Id.*, at 6-7.)

Appellant argues the D/HUB erred in applying 13 C.F.R. § 126.601(e) because the instant procurement is not a two-step procurement. Appellant notes there are limited exceptions to the rule that HUBZone eligibility is determined as of the date an offeror submits its price proposal. For two-step procurements such as architect-engineering and design-build procurements, a concern must be a certified HUBZone small business concern as of the date it submits its initial proposal, which may or may not include price. (*Id.* at 6, citing 13 C.F.R. § 121.601(e).)

However, Appellant argues that "two-step" procurement refers specifically to two-step sealed bidding under FAR subpart 14.5, two-phase design-build selection procedures under FAR subpart 36.3, or two-phase architect-engineering procurement under FAR subpart 36.6. (*Id.* citing FAR 14.501, FAR 6.102(c).) Two-step sealed bidding provides for "a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available." (*Id.*, citing FAR 14.501.) Two-phase design-build selection procedures under FAR subpart 36.3 are authorized by 10 U.S.C. § 3241 and 41 U.S.C. § 3309, and architect-engineering services are authorized under FAR subpart 36.6. (*Id.*, citing FAR 36.310(b)(2).

Appellant asserts the common thread between these two types of procurement vehicles is they are both used when the government is unable to identify a precise technical solution, such as

when adequate specifications are not available. (*Id.* at 7, citing FAR 14.501(a); 36.301.) The two-phase process gives the government the flexibility to identify all technically qualified solutions and then solicit quotes from those firms in the second phase. (*Id.*, citing FAR 14.501(b); FAR 36.303.)

SBA created an exception to the general rule that eligibility is determined from the date an offeror submits its price proposal. For two-step sealed bidding architect-engineering and design-build procurements SBA measures eligibility from the date of the initial proposal, regardless of whether price was included. Appellant argues this exception is only reserved for two-step procurements under FAR subparts 14.5, 36.3, and 36.6. Appellant maintains the limited application of this exception is clear when reviewing the other regulations on this point. The size regulations require that for architect-engineering, design-build, or two step sealed bidding procurements, a concern must qualify as small as part of initial bid or proposal, which may or may not include price. (13 C.F.R. § 121.404(f).) The regulation for determining the status of Veteran-Owned Small Business (VOSB) or Service-Disabled Veteran-Owned Small Business (SDVOSB), for architect-engineering, design-build, or two-step sealed bidding procurements, a concern must be certified as a VOSB or SDVOSB as of the date it submits its initial bid or proposal (which may or may not include price) during Phase I. (13 C.F.R. § 128.401(h).) While the applicable regulation here (13 C.F.R. § 126.601(e)) does not include the phrase “sealed bidding” it is clear that “two-step procurements” refers only to sealed bidding under FAR subpart 14.5 and architect-engineering, design-build procurements under FAR part 36. (*Id.*, at 7-8.)

Appellant argues that OHA adopted this interpretation in *Size Appeal of Point Blank Enterprises*, SBA No. SIZ-5982 (2019). There, OHA reaffirmed the general rule that size and status eligibility is determined as of the date that an offeror submits its initial offer which includes price. In discussing other regulatory provisions, it stated “For purposes of architect-engineering, design-build or two-step sealed bidding procurements, SBA determines size as of the date the concern certifies it is small as part of its initial bid or proposal (which may or may not include price). 13 C.F.R. § 121.404(f).” (*Id.*, at 8-9, citing *Point Blank Enterprises* at 12, also *Size Appeal of Pyramid Servs., Inc.*, SBA No. SIZ-4879 (2008) (finding a procurement did not meet the requirements of a two-step sealed bidding procurement under FAR 14.501 and therefore 13 C.F.R. § 121.404(f) was not applicable).)

Appellant concludes that 13 C.F.R. § 121.601(e) only applies to two-step sealed bidding under FAR subpart 14.5 and architect-engineering and design-build procurements under FAR part 36. Appellant maintains the D/HUB confused the two-phase evaluation in the instant Solicitation, explicitly conducted under FAR part 12, with a two-step procurement that can only be conducted under FAR subpart 14.5 and FAR part 36. The D/HUB then misapplied 13 C.F.R. § 126.601(e), and determined GAI's initial certification date of November 19, 2020 was the date from which to determine GAI's eligibility, the last certification or certification anniversary prior to GAI's Phase I offer, which did not include price. The D/HUB should have applied 13 C.F.R. § 121.601(b) and determined GAI's status as of its most recent certification anniversary date. This is November 19, 2022, because GAI submitted its price proposal on January 25, 2023. Appellant asks that this matter be remanded to the D/HUB for a new status determination, using what Appellant argues is the correct date for determining eligibility of November 19, 2022. (*Id.*, at 9.)

E. GAI's Response

On November 22, 2024, GAI responded to the appeal. GAI argues the appropriate date for determining its eligibility as a HUBZone concern is November 19, 2020. The Solicitation required two phases. Phase I required offerors to provide certifications for each set-aside category but did not require a submission as to price. GAI argues 13 C.F.R. § 126.601(b) was not applicable because this was a two-step procurement. GAI approves of the D/HUB's following of 13 C.F.R. § 126.601(e), which provides that for two-step procurements (including architect-engineering and design-build procurements) a concern must be a certified HUBZone concern as of the date it submits its initial bid or proposal (which may or may include price) during Phase I. (GAI Response, at 4.)

GAI notes that under the HUBZone “one-year certification rule” a concern is treated as a certified HUBZone concern for one year after certification or recertification. (*Id.*, citing 13 C.F.R. § 126.501(a).) A concern's eligibility relates back to its date of certification or recertification. SBA certified GAI as a HUBZone concern on November 19, 2020. GAI submitted its offer for this procurement on June 8, 2021. GAI thus argues the D/HUB properly determined that GAI's certification of November 2020 applied and found it an eligible HUBZone concern for this procurement. (*Id.*)

GAI argues Appellant's position its eligibility should be determined as of its submission for Phase II, on January 25, 2023, under 13 C.F.R. § 126.601(b) is meritless. First, only Phase I proposals were to include the required HUBZone certification. Phase II proposals were to include price, but they did not include the certification of HUBZone status required by 13 C.F.R. § 126.501(b). GAI argues the requirements of § 126.601(b) would not be met if any offeror's HUBZone status was determined at the time of its Phase II proposal, because no Phase II proposals had the required certification. Further the regulations mandate that only HUBZone small business concerns are eligible to submit offers for a HUBZone contract, therefore if a concern's status is challenged, the logical time would at the time it makes its first offer, consistent with § 126.601(e), which refers to “phase one.” (*Id.*, at 5, citing 13 C.F.R. § 126.601(a)(1).)

Further, the Solicitation incorporated FAR part 19.13 in reference to HUBZone contracts the Agency expected to award. The regulation requires that to be eligible for a HUBZone contract a concern must be an eligible HUBZone small business concern at the time of its initial offer. The regulation makes no mention of a requirement that the offer include price. (*Id.*, at 5, citing FAR 19.1303(d).)

GAI further disputes Appellant's argument that only procurements under FAR subpart 14.5 and architect-engineering and design-build procurements under FAR part 36 can use two-step procurements. Appellant points to 13 C.F.R. § 126.601(e) which refers to “two-step procurements (including architect-engineering and design-build procurements).” Appellant maintains the parenthetical listing of examples is not meant to be exclusive. “Including” is a word of inclusion, and the brief list in the regulation is not exhaustive. The FAR provides that when “sealed bids are not appropriate, contacting officers may use any combination of competitive procedures (e.g., two-step sealed bidding).” (*Id.*, at 6, citing FAR 6.102(c).) The

parenthetical on architect-engineering and design-build procurements should be interpreted to meant here are other types of two-step procurements allowed than architect-engineering and design-build procurements. (*Id.*)

GAI argues the Solicitation is by its own terms a two-step procurement. It incorporated FAR 52.212-3 and required representation regarding HUBZone certification with the Phase I submission. It did not require additional certification with the Phase II submissions. (*Id.* citing Solicitation, L.5.)

GAI further argues that if the D/HUB erred in applying § 126.601(e), it was harmless error. Appellant argues that GAI's eligibility should be determined as of November 19, 2022. GAI argues that all the evidence Appellant proffers is from 2023 and later. GAI characterizes Appellant's evidence as manufactured and unreliable. Appellant made no allegations as to GAI's headquarters or employee locations in November 2022. GAI argues the protest should be dismissed for lack of specificity. (*Id.*, at 7-8.)

F. Supplemental Appeal and GAI's Response

On November 22, 2024, Appellant filed a Motion to File a Supplemental Appeal, together with the Supplemental Appeal. Appellant asserts, based upon its review of the record under the Protective Order, that GAI is 100% owned by SSI IT Acquisition LLC (SSI IT), a holding company owned 100% by Mr. Roger Brown. Mr. Brown is owner or part owner of 17 other companies. Appellant argues that Appellant is affiliated with all of these companies and is thus not an eligible HUBZone concern and is not small under the applicable 150 employee size standard. In order to qualify for an award as a HUBZone firm, a concern must meet the size standard for the NAICS code assigned to the contact in question. (Supplemental Appeal at 6, citing 13 C.F.R. §§ 126.200(b)(2); 126.601(b)(2).) Appellant argues GAI does not meet the size standard because of its affiliations.

Appellant maintains it was error for the D/HUB to conclude GAI was not affiliated with these 17 entities. These affiliations are relevant to the issues of whether GAI meets the requirement that at least 35% of its employees reside in the HUBZone (13 C.F.R. § 126.200(d)(1)), and that its principal office be in the HUBZone (13 C.F.R. § 126.200(c)(1)). (*Id.*, at 7.)

Appellant noted that employees of a HUBZone concern's affiliate may not be counted as its employees if there is a clear line of fracture between the concern and its affiliate. (*Id.*, at 8, citing 13 C.F.R. § 126.204(c).) There is a clear line of fracture if the HUBZone concern does not share employees, facilities, or equipment with the affiliate; has different customers or lines of business (or is distinctly segregated geographically); and does not receive significant contracts or financial assistance from the affiliate. (*Id.*, citing 13 C.F.R. § 126.204(c)(1).)

Appellant asserts the D/HUB erred in not counting the employees of GAI's affiliates in determining whether it met the 35% residency and location of principal office requirements. GAI pays SSI IT a management fee and asserts it did not share business resources with its affiliates, but did not disclaim receiving financial assistance from them. Appellant asserts all these

concerns are affiliated with GAI, and the D/HUB erred in finding GAI eligible, even using the November 19, 2020 date for calculating GAI's eligibility. (*Id.*, at 9.)

On December 14, 2024, GAI responded, opposing the Motion. GAI first argued Appellant had no standing, a position it relied upon in its Motion to Dismiss. *See infra*. GAI further asserted the Supplemental Pleading is based upon speculation as to whether SSI IT and the 17 affiliated concerns had any employees at all. These concerns were all reported to SBA and considered in the D/HUB's analysis of GAI's original application. GAI asserts Appellant is taking data from its 2020 application and combining it with information from the end of 2023 to draw conclusions about its number of employees on November 19, 2022. The regulations require that SBA use a concern's average number of employees for the months preceding its application to determine if it qualifies as a small business. 13 C.F.R. § 121.106(b)(1). GAI maintains Appellant has not alleged any specific facts to demonstrate SBA erred in its approval of GAI as a HUBZone concern on November 19, 2020.

G. Procedural Background and Motion to Dismiss

On November 1, 2024, I issued a Notice and Order in this case. I directed that any Response to the appeal be filed by November 22, 2024. I also directed that the D/HUBZone file the protest file by November 8, 2024. On that same date, I also issued a Protective Order, directing outside counsel to file an application under the Protective Order by no later than November 8, 2024.

On November 12, 2024, counsel for Appellant filed untimely applications for admission under the Protective Order. Following this, on November 13, 2024, I issued an Order denying Appellant's applications for admission under the Protective Order, because Appellant's counsel's submission of the applications was untimely with no excuse for the untimely application, or even an acknowledgement of the untimeliness.

On November 14, 2024, Appellant filed a Motion requesting reconsideration of the Order, this time providing good cause. On November 19, 2024, I excused counsel's neglect and admitted Appellant's counsel under the Protective Order. On the next day, OHA staff shared the HUBZone files with counsel.

On November 21, 2024, Appellant's counsel submitted an email inquiring whether GAI's HUBZone application No. 65686 was in the record. Appellant's counsel requested that the location of the application in the file be pointed out, and that if the application was not in the file that the file be supplemented with the application.

On the same day, GAI responded by requesting time to oppose Appellant's request that its original HUBZone application be included in the protest file before the file is supplemented. GAI also requested the opportunity to view a copy of the original HUBZone application and any additional GAI documents which are to supplement the file, before they are added to the file to be disclosed so that it can ensure that any protected information is marked accordingly.

On November 22, 2024, I granted GAI's request for time to oppose Appellant's request and to view the document requested, GAI's original application. I directed GAI to file its opposition by no later than November 26, 2024. I further extended the date for filing responses to the appeal to December 2, 2024.

Following this Order, on the same day, GAI filed its Response to the appeal. Appellant also filed a Motion for Leave to File a Supplemental Pleading, together with the Supplemental Pleading. Appellant also filed a Motion to Complete the Record, seeking additional documents from SBA's records on GAI.

On December 3, 2024, OHA informed GAI's counsel that because there were no objections to the release of GAI's HUBZone application under the Protective Order, OHA would release it on December 6, 2024.

On December 4, 2024, Counsel for GAI responded to OHA's email and explained that counsel had been on vacation and assumed that because Appellant had filed motions on November 22, 2024, GAI had until December 9, 2024, to respond under 13 C.F.R. § 134.211(c). Following this email explanation, GAI filed a Motion for Extension of Time, followed by an amended Motion, reiterating the background of the events and requesting that its time to file an opposition to Appellant's email request be extended to December 9, 2024, for good cause pursuant to 13 C.F.R. § 134.211(f).

On that day, I ordered that any Responses to Appellant's Motions were due on December 13, 2024.

On December 13, 2024, GAI filed a Motion to Dismiss, a Response to Appellant's Motion to Complete the Record, and a Response to Appellant's Motion to File Supplemental Brief. On December 30, 2024, Appellant opposed GAI's Motion to Dismiss. On Jamaury 2, 2025, I stayed proceedings until I had resolved the Motion to Dismiss and requested the comments of SBA's Office of Geneal Counsel on the issue.

In its Motion to Dismiss, GAI raised issues of standing concerning Appellant's eligibility for award. GAI asserts that Appellant was not awarded a contract in either the HUBZone or general small business track for reasons wholly unrelated to its size and/or status GAI relied upon 13 C.F.R. § 121.1001(a)(6)(i). On December 30, 2024, Appellant filed its Opposition to the Motion. Appellant denied it was eliminated from consideration for award. On January 17, 2025, the SBA Office of General Counsel filed its Comments opposing the Motion to Dismiss. On February 3, 2025, Appellant replied to the SBA OGC comments. On February 3, 2025, GAI replied to the SBA OGC comments. GAI agrees with SBA OGC that 13 C.F.R. Part 121 is applicable to size protests, and 13 C.F.R. Part 126 is applicable to HUBZone protests. However, GAI argues Part 121 should govern here because Appellant's status protest "relates" to whether a certified HUBZone small business concern is other than small.

On February 4, 2025, I denied GAI's Motion to Dismiss. GAI's motion is based upon a misreading of the regulation. GAI relied upon 13 C.F.R. § 121.1001(a)(6)(i). However, this regulation sets forth the rules for standing for filing size protests in connection with HUBZone

procurements. In this case, Appellant's size protest was dismissed by the Area Office, and that dismissal affirmed by OHA. *See supra*. This case is adjudicating the disposition of Appellant's HUBZone protest, not a size protest. The HUBZone regulations governing HUBZone status protests provide that:

The protest procedures described in this part are separate from those governing size protests and appeals. All protests relating to whether a certified HUBZone small business concern is other than small for purposes of any Federal program are subject to part 121 of this chapter and must be filed in accordance with that part. If a protester protests both the size of the HUBZone small business concern and whether the concern meets the HUBZone eligibility requirements set forth in § 126.200, SBA will process the protests concurrently, under the procedures set forth in part 121 of this chapter and this part.

13 C.F.R. § 126.801(a)(2) (2024).²

The regulation addresses which parties have standing to file a HUBZone protest:

Who may protest the status of a certified HUBZone small business concern?

(a) *For sole source procurements*. SBA or the contracting officer may protest the proposed awardee's status as a certified HUBZone small business concern.

(b) *For all other procurements, including Multiple Award Contracts (see § 125.1 of this chapter)*. SBA, the contracting officer, or any other interested party may protest the apparent successful offeror's status as a certified HUBZone small business concern.

13 C.F.R. § 126.800 (2024).

The HUBZone regulations further defined "interested party":

Interested party means any concern that submits an offer for a specific HUBZone set-aside contract (including Multiple Award Contracts) or order, any concern that submitted an offer in full and open competition and its opportunity for award will be affected by a price evaluation preference given a qualified HUBZone small business concern, any concern that submitted an offer in a full and open competition and its opportunity for award will be affected by a reserve of an award given to a

² SBA has recently revised the HUBZone regulations. 89 Fed. Reg. 102,504 (Dec. 17, 2024). These revisions were not in effect at the time of the issuance of the Solicitation and Appellant's protest. Accordingly, the regulations in effect at the time the Solicitation was issued will apply.

qualified HUBZone small business concern, the contracting activity's contracting officer, or SBA.

13 C.F.R. § 126.103 (2024).³

SBA thus clearly provided that any interested party may file a HUBZone protest and defined interested party as any concern which submits an offer for a specific HUBZone set-aside contract or a contract which, while a full and open competition, had a HUBZone price evaluation preference or reserve. In contrast to the regulations governing size protests, the regulation does not deny standing to file a HUBZone protest to concerns eliminated from competition for procurement-related reasons such as non-responsiveness or being outside the competitive range. SBA then quite clearly did not deny standing to file a HUBZone protest to offerors eliminated from consideration for a procurement-related reason.

Here, Appellant was clearly an offeror, therefore SBA properly found it had standing to file a HUBZone protest. I therefore need not consider whether Appellant was eliminated from consideration to determine whether it had standing. The question of whether Appellant was eliminated from competition is irrelevant to the issue of whether it had standing to file a HUBZone protest, and I need not consider it here.

GAI's argument that because the appeal raises (according to it) issues of its size, the procedural regulations for size protests must apply. GAI's reliance upon one phrase in the regulation is misplaced. SBA has established two distinct procedures, one for size protests and appeals, and one for HUBZone protests and appeals. They have different procedural rules. Appellant's size protest was dismissed. OHA is now considering Appellant's HUBZone protest. The procedural rules for that protest are at 13 C.F.R. §§ 134.1301-1316. Under these rules the fact Appellant was an offeror for this procurement is enough to clothe it with standing here. I therefore DENIED GAI's Motion to Dismiss.

H. SBA OGC Comments

On March 13, 2025, SBA's Office of General Counsel (OGC) filed comments on this appeal. SBA notes that only certified HUBZone small business concerns are eligible to submit offers for a HUBZone contract. (SBA OGC Comment at 2, citing 13 C.F.R. § 126.601(a).) The regulation at 13 C.F.R. § 126.601(e) specifically addresses two-step HUBZone procurements, providing that a certified HUBZone concern must be eligible as of the date it submits its initial offer for the first phase, which may or may not include price. The parenthetical mentioning of architect-engineering and design-build procurements is not meant to limit this procedure to these types of procurements exclusively. Over the years, the Agency has become aware of other types of two-step procurements and has amended its regulations to address them. (*Id.*, at 3.) "SBA believes that it makes sense to establish size as of the date of the step one proposal in order to give certainty early on in the process who is and who is not eligible for such an award." (*Id.*,

³ SBA recently revised this definition to limit it to HUBZone concerns which had submitted offers on HUBZone contracts. 89 Fed. Reg. 96,089 (Dec. 4, 2024). This revision was not in effect at the time of Appellant's protest.

citing 67 Fed. Reg. 70,339, 70,343 (Nov. 22, 2002).) SBA OGC argues the same principle applies to HUBZone procurements.

SBA OGC refers to the Solicitation at ¶¶ L.4.2 and L.5, which it asserts make clear that offerors' certifications were to be submitted as part of the Phase I proposals. The Solicitation also required offerors to identify for which socioeconomic track they were submitting proposals. (*Id.* at, 4-5. Solicitation, ¶ L.6.1.) The regulation governing size for two-step procurements (13 C.F.R. § 121.404(h)) enumerates three types of two-step procurements but does not explicitly exclude others. In any event, SBA OGC asserts 13 C.F.R. § 121.601(e) clearly applies to all two-step procurements. (*Id.*, at 6.)

SBA OGC further argues that the D/HUB's decision would have been the same had it determined GAI's eligibility as of the date of its Phase II proposal. GAI submitted its Phase II proposal January 25, 2023. GAI's certification anniversary date preceding this was November 19, 2022. SBA OGC asserts the D/HUB performed a program examination of GAI in connection with its certification anniversary date and found GAI eligible as of November 19, 2022. This included a determination GAI met the HUBZone programs' principal office and residency requirements as of November 19, 2022. GAI was thus eligible for all HUBZone contracts for which it qualified as small for a period of one year from November 19, 2022. (*Id.* at 7, citing 13 C.F.R. § 126.501(c).) The D/HUB would thus have denied Appellant's protest if it was determining GAI's eligibility as of its submission of its Phase II proposal.

Finally, SBA OGC asserts there is no indication the D/HUB made any error of fact or law when determining there was a clear line of fracture between GAI and the 17 entities. Nothing in GAI's response showed that GAI shared employees, facilities, or equipment with the other entities; had the same customers or operated in the same lines of business as the other entities; or received significant contracts or financial assistance from the other entities. Furthermore, the application file shows that GAI reported that these entities had zero employees, aside from SSI Capital LLC, which had four employees. Even had these been aggregated with GAI's 99 employees, it would still be within the size standard and would still have met the 35% HUBZone residency requirement. Further it would have met the principal office requirement because about half of GAI's employees work from the principal office and the other half from their homes. (*Id.*, at 8.)

III. Discussion

A. Standard of Review

“The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence.” 13 C.F.R. § 134.1308. Under this standard, OHA will disturb the D/HUB's determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the D/HUB erred in making their key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006). The administrative judge's decision must be based upon “a review of the evidence in the written

protest file, arguments made in the appeal petition, and response(s) filed thereto.” 13 C.F.R. § 134.1312.

B. Analysis

Only certified HUBZone small business concerns are eligible to submit offers for a HUBZone contract. 13 C.F.R. § 126.601(a) (2024). Here, the D/HUB determined that GAI was an eligible HUBZone small business concern. The issue here is whether the D/HUB used the correct date to determine GAI's status. SBA established that, in determining a concern's size for a procurement, the general rule is that size is determined as of the date of concern's self-certification that it is small as part of its initial offer, including price. 13 C.F.R. § 121.404(a). SBA later modified this rule for two-step procurements. The rule for setting the date for establishing size in two step procurements is now:

For purposes of architect-engineering, design/build or two-step sealed bidding procurements, a concern must qualify as small as of the date that it certifies that it is small as part of its initial bid or proposal (which may or may not include price).

13 C.F.R. § 121.404(h).

When SBA initially made the change, it explained its reasoning: “SBA believes that it makes sense to establish size as of the date of the step one proposal in order to give certainty early on in the process who is and who is not eligible for such an award.” 67 Fed. Reg. 70,339, 70,343 (Nov. 22, 2002). At that time the proposed rule limited this exception to procurements conducted using sealed bidding under FAR subpart 14.5. 67 Fed. Reg. at 70,349. SBA thus established early on the rationale for determining size in a two-step procurement as of the submission of the subject concern's offer for the first step. It helps to establish with certainty at an early stage in the procurement process which parties are and are not eligible for award.

The same principle applies for a concern's HUBZone status as well as its size, as this too determines whether a concern is eligible for award. The general rule is that a certified HUBZone concern must certify to the contracting officer that it is a certified HUBZone concern at the time it submits its initial offer, including price. 13 C.F.R. § 126.601(b) (2024). However, for two-step procurements, the regulation requires that:

For two-step procurements (including architect-engineering and design-build procurements) to be awarded as HUBZone contracts, a concern must be a certified HUBZone small business concern as of the date that it submits its initial bid or proposal (which may or may not include price) during phase one.

13 C.F.R. § 126.601(e) (2024).

The regulation thus makes clear that in the case of two-step procurements, a concern's HUBZone status is determined as of the date of its submission of its offer for the first step of the procurement, whether or not that includes price. The question here is, does the instant procurement count as a two-step procurement under the regulation.

Appellant argues that this regulation applies only to architect-engineering and design-build contracts, and thus not to the instant solicitation. Appellant maintains that these two-step procurements may only be conducted under FAR subpart 14.5 and FAR part 36, and this procurement is being conducted under FAR part 12. However, the regulation does not explicitly limit its scope to those two categories of contract. Rather, it includes those types of procurements in the two-step procurements it covers. Further, this is in contrast to the proposed rule of 2002, which explicitly limited its scope to procurements conducted under FAR subpart 14.5. The current HUBZone regulation, however, does not limit its scope to procurements conducted under any particular provision of the FAR. Rather, it covers two-step procurements, without limitation to any particular type, but explicitly including architect-engineering and design-build. It does not exclude any type of procurement as long as that procurement is a two-step procurement. This language leads to a conclusion that the scope of the regulation is not limited to architect-engineering and design-build procurements. Identifying them as included means that other types of two-step procurements must also be covered. This conclusion is consistent with the policy SBA expressed in 2002, that of giving certainty of which offerors are eligible to the process. The question is, is the instant procurement a two-step procurement.

Here, the procurement was clearly being conducted in two steps. The Solicitation makes clear, at ¶¶ L.4.2 and L.5, that offers were to be submitted for both Phase I and Phase II. The offers for Phase I did not include price, but did require that offerors certify themselves as HUBZone concerns. Offerors were required to provide all relevant certifications and representations, including status certifications, in their Phase I submissions. It is at that point that they certified their eligibility for the procurement. The Phase II submission was to include price. The fact that price is to be included in offerors' Phase II proposals is irrelevant here. The instant procurement is a two-step procurement.

Appellant's reliance on *Size Appeal of Point Blank Enterprises*, SBA No. SIZ-5982 (2019) and *Size Appeal of Pyramid Servs., Inc.*, SBA No. SIZ-4879 (2008) is misplaced. *Point Blank* restated the general rule that size and status eligibility is determined as of the date that an offeror submits its initial offer which includes price. It mentioned that 13 C.F.R. § 121.404(f) provided that size is determined as of the date of a concern's initial bid or proposal in the case of architect-engineering or design-build contracts. It did not, however, state that the regulation was limited to those two categories of procurement vehicles. Further, that regulation was not under consideration in that case, so the statement is dicta. Finally, it is not the regulation under consideration here. *Pyramid Servs.*, is limited to the facts in that case, because the issue was whether that procurement was conducted under sealed bidding. It is inapposite here.

Accordingly, I conclude that the D/HUB made no error of fact or law when she determined GAO's HUBZone status as of its submission of its Phase I proposal on June 9, 2021. That is thus the date for determining GAI's eligibility. SBA had certified GAI as a HUBZone concern on November 19, 2020. The certification included determinations that at least 35% of GAI's employees resided in HUBZones (13 C.F.R. § 126.200(d)(1) (2024)) and that its principal office was located at 720 E. Pete Rose Way, Cincinnati, Ohio, in a HUBZone district (13 C.F.R. § 126.200(c) (2024)). So here, the date for determining GAI's eligibility was within one year of its first certification.

Once SBA certifies a concern as eligible to participate in the HUBZone program, it will be treated as a certified HUBZone concern eligible for all HUBZone contracts for which it qualifies as small for one year from the date of its initial certification or recertification. 13 C.F.R. § 126.501(a) (2024). In deciding a HUBZone protest, SBA will determine a concern's eligibility as of the date of its certification, or, if applicable, its most recent recertification. 13 C.F.R. § 126.803(a) (2024). GAI's offer for Phase I was submitted June 9, 2021, within one year of its certification on November 19, 2020. Accordingly, the D/HUB properly found GAI was an eligible HUBZone concern and denied Appellant's protest.

Appellant's protest raised a number of challenges to GAI's status that were not raised in its Appeal here. Accordingly, they have been dropped, and I will not consider them here. *Size Appeal of SC&A, Inc.*, SBA No. SIZ-6059 at (2020). Appellant attempts to raise the issue of GAI's size in its Supplemental Appeal, but the issue of Appellant's size for this procurement was already decided in *Size Appeal of BahFed Corp.*, SBA No. SIZ-6327 (2024) and may not be raised again.

Further, as SBA OGC points out in its Comment, the record application GAI submitted showed that GAI complied with the regulations. While there are 17 concerns which can be considered affiliated, the file shows that only one of these concerns, SSI Capital LLC, has any employees, and that concern only four. In any event, employees of a concern's affiliate may not be counted as the concern's employees where there is a clear line of fracture between the concern and its affiliate. 13 C.F.R. § 126.204(c) (2024). A clear line of fracture exists where a concern demonstrates it does not share employees, facilities, or equipment with the affiliate, has different customers or line of business, (or is distinctly segregated geographically) and does not receive significant contracts or financial assistance from the affiliate). 13 C.F.R. § 126.204(c)(1) (2024). Nothing in GAI's application show that it shared employees, facilities or equipment, had the same customers or line of business, or received financial assistance from its affiliates. Nor has Appellant made any showing that there is not a clear line of fracture between GAI and its affiliates. The record reflects that GAI has 99 employees, at least 37 of whom are residents of the HUBZone. Thus, even including the four employees of SSI Capital, GAI meet the 35% residency requirement.

I conclude that Appellant has failed to establish that the D/HUB's determination was based upon clear error of fact or law, and I must thus deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has failed to establish that the HUBZone determination is based upon a clear error of fact and law. Accordingly, I DENY the instant appeal, and I AFFIRM the D/HUB's determination. Appellant is an eligible HUBZone small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.1315.

CHRISTOPHER HOLLEMAN
Administrative Judge