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Focus

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FEATURE COMMENT: *22nd Century Technologies, Inc. v. U.S.*: The Federal Circuit Limits COFC Jurisdiction Over Size Protests In Connection With Task And Delivery Order Procurements

A central goal of the federal procurement system is to provide opportunities for small businesses. The Government accomplishes this in many ways, including by establishing small business subcontracting goals for federal agencies and reserving procurements for small businesses and certain socioeconomic categories of small businesses, e.g., veteran-owned small businesses, service-disabled veteran-owned small businesses, woman-owned small businesses, 8(a) Business Development Program small businesses, and Historically Underutilized Business Zone (HUBZone) small businesses. According to the Small Business Administration, which administers these programs, small businesses in Fiscal Year 2021 [received \\$154.2 billion from federal contracts](#) (27.2 percent of total federal contract expenditures).

A consistent challenge these programs face is ensuring that only qualified small businesses receive contracts set aside for small businesses. One method of enforcement is allowing contracting officers and competitors to challenge the size and socioeconomic statuses of companies that receive such contracts. SBA routes the challenges (also referred to as size and status protests) to the applicable SBA Area Office, which SBA charges with making size and status determinations. Parties to a protest dissatisfied with

the SBA Area Office determination can appeal to the SBA Office of Hearings and Appeals (OHA). Parties that are unsuccessful at OHA generally can challenge OHA decisions at the U.S. Court of Federal Claims.

However, on Jan. 10, 2023, in *22nd Century Techs., Inc. v. U.S.*, 57 F.4th 993 (Fed. Cir. 2023); [65 GC ¶ 24](#), the U.S. Court of Appeals for the Federal Circuit held that the jurisdictional restrictions in the Federal Acquisition Streamlining Act (FASA) on protests in connection with task and delivery order procurements (which have some exceptions discussed below) apply to size protests. The court's holding, which presumably also will apply to status protests, likely will have several significant implications.

The Small Business Act, Size Status Challenges, and Appeals—The size protest process is distinct from the traditional bid protest process. In traditional bid protests, interested parties may file protests at the Government Accountability Office or the COFC. Size protests follow a different process. The Small Business Act and SBA's regulations implementing that statute provide SBA with authority to issue size determinations in response to challenges to an awardee's (or an apparent successful offeror's) size status and, through that determination, declare whether the concern qualifies as small for a particular federal procurement. 13 CFR § 121.1002 ("The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination."). SBA's regulations and the Federal Acquisition Regulation refer to those challenges as "size protests." Id. §§ 121.1001–121.1010; FAR subpt. 19.3.

Size protests can begin in several ways. An offeror competing in a small business set-aside procurement that itself qualifies as small and has

not been eliminated from the competition “for any procurement-related reason” can challenge the size status of the apparent successful offeror or awardee. Id. § 121.1001(a)(1)(i). COs for set-aside procurements can also file size protests if they are concerned that an apparent successful offeror or awardee might not qualify as small under the applicable size standard. Although COs can file size protests, disappointed offerors should not rely upon COs to do so. In *Harmonia Holdings Grp., LLC v. U.S.*, 999 F.3d 1397 (Fed. Cir. 2021); [63 GC ¶ 191](#), the protester tried to challenge the awardee’s size status indirectly through a bid protest. The protester argued that the CO should have initiated a size protest challenging the awardee’s size status and that the CO’s failure to do so was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Federal Circuit rejected the protester’s arguments. Although the Federal Circuit did not expressly foreclose the possibility that COs could, under a specific set of facts, abuse their discretion by failing to bring a size protest, it expressed skepticism that such an argument could succeed. The SBA Government contracting area director responsible for the area in which the protested offeror is located can file a size protest. 13 CFR § 121.1001(a)(1)(iii). In certain instances, large businesses and offerors determined to be other than small can also file size protests. Id. § 121.1001(a)(1)(iv).

After receiving a size protest, the relevant SBA Area Office is responsible for issuing a size determination. The SBA Area Office forwards the size protest to the protested concern. The protested concern must then respond to the allegations, including refuting the protest allegations and providing documents that the Area Office requests (e.g., SBA Form 355 and corporate and financial documents for itself and its affiliates) along with other materials the protested concern believes are relevant. The deadlines for providing initial and supplemental materials are typically quite short (e.g., three working days from when the protested concern receives the initial request for information from SBA). If the protested concern fails to respond, request and receive an extension, or does not provide all of the requested information, SBA may apply an adverse inference finding that the missing information would show that the protested concern does not qualify as small. Id. § 121.1008(d). It is typically difficult, though not impossible depending on the

circumstances, to overcome an adverse inference through the appeal process.

An unsuccessful, non-Government party may appeal the Area Office’s size determination to OHA. Id. § 121.1101(a). The appellant must prove that the Area Office based its size determination on a clear error of fact or law. See, e.g., *Taylor Consultants, Inc.*, SBA No. SIZ-4775 at 9 (2006). This deferential standard of review requires a “definite and firm conviction that a mistake has been committed. OHA generally only considers issues raised with the Area Office, creating further challenges for appellants. The upshot is that it is critical for parties to a size protest (both the protester and the protested concern) to avoid pitfalls at the Area Office (e.g., avoid adverse inferences) and preserve issues for appeal.

If a party to a size protest disagrees with OHA’s decision, the disappointed party typically can bring its case to the COFC. Both the Federal Circuit and the COFC have held that the COFC has jurisdiction to review OHA decisions under 29 USCA § 1491, known as the Tucker Act, when SBA makes its determination “in connection with a procurement.” *Palladian Partners, Inc. v. U.S.*, 783 F.3d 1243, 1254 (Fed. Cir. 2015) (jurisdiction over North American Industry Classification System code determination “in connection with a proposed procurement”); [57 GC ¶ 135](#); *Paradigm Eng’rs & Constructors, PLLC v. U.S.*, 147 Fed. Cl. 487, 494 (2020) (“Because the OHA’s decision denying Paradigm’s appeal was made ‘in connection with a procurement,’ the Court has jurisdiction over this claim.”); *Team Waste Gulf Coast, LLC v. U.S.*, 135 Fed. Cl. 683, 687 (2018) (“This court may review a decision of the SBA when that decision constitutes an action ‘in connection with a procurement.’”).

FASA Limitation on Protests in Connection with Task Order Procurements—FASA states that “[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order” with two exceptions. 10 USCA § 3406(f)(1). The first exception is that the COFC and GAO may adjudicate “a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.” Id. § 3406(f)(1)(A); 41 USCA § 4106(f)(1)(A). For procurements conducted by the Department of Defense, the Department of the Army, the Department of the Air Force, the Coast Guard, and NASA, the value of the order must ex-

ceed \$25 million. 10 USCA § 3063. For procurement conducted by so-called “civilian” agencies, the value of the order must exceed \$10 million. 41 USCA § 4106(f)(a)(1)(B).

The second is where the order exceeds certain dollar value thresholds. 10 USCA § 3406(f)(1)(B); 41 USCA § 4106(f)(1)(B). GAO has exclusive jurisdiction over protests falling within this latter exception. 10 USCA § 3406(f)(2) (“Notwithstanding section 3556 of title 31, the Comptroller General of the United States shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).”).

22nd Century Technologies—Overview of the Case—In the *22nd Century Technologies*, issued on Jan. 10, 2022, the Federal Circuit interpreted FASA’s limitations on protests in connection with task and delivery procurements as extending to size protests. In that case, 22nd Century Technologies held one of the Responsive Strategic Sourcing for Services indefinite-delivery, indefinite-quantity (IDIQ) multiple award contracts (MACs). *22nd Century Techs., Inc.*, SBA No. SIZ-6122 at 1 (2021). The agency did not set the IDIQ procurement aside for small businesses, but the agency could set task orders aside for small businesses and require contractors to represent their size status in task order proposals. The procurement at issue involved a task order set aside for small businesses. The agency selected 22nd Century Technologies for award.

In response to a size protest, the SBA Area Office determined that 22nd Century Technologies did not qualify as small for the task order. 22nd Century Technologies appealed to OHA and raised several issues, including that it qualified as small at the time it submitted its initial proposal for the IDIQ contract and the task order request for proposals did not require offerors to recertify their size status in connection with task order procurements. *Id.* at 15–17. OHA affirmed the Area Office’s determination that 22nd Century Technologies did not qualify as small.

22nd Century Technologies filed a complaint with the COFC challenging OHA’s decision. *22nd Century Techs., Inc. v. U.S.*, 157 Fed. Cl. 152 (2021); [64 GC ¶ 9](#). The Government and Fibertek, the defendant intervenor and a protester at SBA, moved to dismiss. They argued, among other things, that the COFC lacked jurisdiction under FASA because the size protest was in connection with the issuance of a task order. The COFC concluded that

FASA deprived the court of jurisdiction because “22nd Century’s challenge [was] clearly made in connection with the issuance of a task order.” 22nd Century Technologies argued that FASA did not apply “because OHA’s size determination is a ‘discrete and separate’ decision temporally distanced from the Army’s task order award to 22nd Century.” The COFC disagreed, explaining that “[e]ven though the size determination here was made by OHA, an entity different from the procuring agency, there is nothing in FASA that limits its application to the actions of the procuring agency.”

22nd Century Technologies appealed to the Federal Circuit, which affirmed the COFC’s decision. The Federal Circuit observed that “22nd Century’s complaint explicitly assert[ed] jurisdiction under [28 USCA] § 1491(b)(1) as a bid protest” and that “[t]he caption of the complaint even identifie[d] the complaint as a ‘bid protest.’” 22nd Century Technologies also argued that the COFC had jurisdiction under the Contract Disputes Act to review the contracting agency’s termination of the awarded order. The Federal Circuit rejected that argument for multiple reasons, including skepticism about whether the complaint could be fairly characterized as a contract claim rather than a protest, 22nd Century Technologies’ noncompliance with the CDA claim process, and questions about the COFC’s authority to issue injunctive relief in connection with CDA claims.

The court acknowledged that it has “describe[d] differences between size protests brought at the SBA and bid protests brought at” the COFC, but discounted those differences because size protests and bid protests rely upon the same authority under the Tucker Act (i.e., “an action by an interested party objecting to ... a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement”). The court held that “FASA’s unambiguous language categorically bars jurisdiction over bid protests, even those involving a challenge to an SBA size determination where the size determination is challenged ‘in connection with the issuance of a task or delivery order.’”

Perspectives and Implications—

- **If the regulations assess size status at the time an offeror submits its proposal at the MAC level, why does recertification at the order level matter?** Deter-

mining size status for orders under MACs is more complicated than determining size status for a standalone contract. SBA's regulations state that "SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer or response which includes price." 13 CFR § 121.404(a). In the context of MACs and orders issued under those contracts, a concern that qualifies as small at the time it submits its initial offer for the MAC generally qualifies as small for orders placed under the MAC.

- There are exceptions, however. One exception, as was the case in *22nd Century Technologies*, is where the agency does not set the MAC aside for small businesses but does set aside an order under that MAC for small businesses. Id. § 121.404(a)(1)(i)(A) («Except for orders and Blanket Purchase Agreements issued under any Federal Supply Schedule contract, if an order or a Blanket Purchase Agreement under an unrestricted Multiple Award Contract is set-aside exclusively for small business (i.e., small business set-aside, 8(a) small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business), a concern must recertify its size status and qualify as a small business at the time it submits its initial offer, which includes price, for the particular order or Blanket Purchase Agreement.»); Id. § 121.404(a)(1)(ii)(A) (similar); 85 Fed. Reg. 66146, 66150–51 (Oct. 16, 2020) ("In SBA's view, where a CO sets aside an order for small business under an unrestricted MAC, the order is the first time size status is important. That is the first time that some firms will be eligible to compete for the order while others will be excluded from competition because of their size status. To allow a firm's self-certification for the underlying MAC to control whether a firm is small at the time of an order years after the MAC was awarded does not make sense to SBA.").
- Another exception is "[w]here the contracting officer explicitly requires concerns to recertify their size status in response to a solicitation from an order." Under those circumstances, "SBA will determine size as of the date the concern submits its self-representation as part of its response to the solicitation for the order." In those and other circumstances, size protests remain a viable path to challenging awards at the order level.
- ***22nd Century Technologies* provides an important lesson about how to plead size protest issues in complaints.** Plaintiffs challenging OHA decisions issued in connection with task or delivery order procurements must recognize the FASA issue or face a similar dismissal. The complaint in *22nd Century Technologies* focused narrowly on a specific task order procurement. Although size protests at SBA necessarily relate to specific procurements, size determinations are not procurement specific. They apply to *all* certifications under equal or lower size standards.
- SBA size determinations state that where SBA has determined a concern to be other than small, that concern (1) is prohibited from self-certifying as small for the subject or lesser size standard in the System for Award Management (SAM.gov) or any of the successor system registrations unless this determination is overturned by the OHA or it is recertified as small by SBA; and (2) if the concern "has already certified itself as small on a pending procurement or on an application for SBA assistance, it must immediately inform the officials responsible for the pending procurement or request assistance of the adverse size determination." 13 CFR § 121.1009(g)(5).
- If the plaintiff was the apparent successful offeror but was found by SBA to be other than small under the applicable size standard, the plaintiff should plead that SBA's size determination precludes it from competing in those other procurements. Even with this pleading strategy, a plaintiff would face challenges obtaining injunctive relief in connection with the task or delivery order procurement.
- The foregoing approach will not work for a plaintiff that challenges an SBA determination that the apparent successful offeror does

qualify as small because, in that scenario, the plaintiff's interest is procurement specific. In this circumstance, the plaintiff should consider arguing that allowing companies that do not qualify as small under the applicable size standard to compete increases the scope of the underlying MAC. The likelihood of success on such an argument is necessarily fact dependent.

- **Does the Federal Circuit's decision impact SBA jurisdiction?** The Federal Circuit's decision is arguably unclear regarding the breadth of FASA's prohibition on protests in connection with task order procurements. FASA's prohibition on protests in connection with task order procurements is not limited to COFC and GAO jurisdiction. It also applies, for instance, to agency-level protests, though it requires agencies to appoint a task and delivery order ombudsman who has authority to review complaints relating to task and delivery order procurements even where FASA would bar a protest. 10 USCA § 3406(g); 41 USCA § 4106(g). If a size protest qualifies as a "protest" for purposes of FASA, then the decision potentially could be interpreted as limiting SBA's authority to adjudicate size protests in connection with

task or delivery order procurements unless one of the FASA exceptions applies. We are skeptical that the Federal Circuit intended its decision to apply to SBA jurisdiction over size protests and do not think that is a correct reading of the decision.

- **Even if *22nd Century Technologies* does not impact SBA's jurisdiction over size protests, SBA proceedings have become even more important.** As noted, the size protest process is rife with potential pitfalls. Even if *22nd Century Technologies* does not foreclose SBA's jurisdiction over size protests in connection with task order procurements, the decision has limited, if not foreclosed, opportunities to challenge OHA decisions involving task order procurement. It, therefore, is critical for protesters to fully litigate all *size protests filed in connection with task order procurements at SBA*.



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