United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Reality Technologies, Inc.,	SBA No. BDPT-488
Petitioner	Decided: May 3, 2013

ORDER DENYING MOTION FOR RECONSIDERATION

On November 21, 2012 the Court dismissed Petitioner's petition appealing the decision of the Small Business Administration ("SBA") to terminate Petitioner from the 8(a) Business Development Program ("8(a) BD Program"). In the *Ruling and Order on Respondent's Motion to Dismiss* ("Ruling and Order"), the Court found that Petitioner had failed to allege facts that, if proven to be true, would warrant reversal of the SBA's decision. On December 10, 2012, Petitioner filed a timely *Motion for Reconsideration* alleging that the Court made "errors of law and fact."

Standard of Review

SBA's regulations provide that the Court may grant a petition for reconsideration upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.409(c). This is a rigorous standard. *Hazzard's Excavating and Trucking Co*., SBA No. BDP-364 (2010). The party seeking reconsideration must make an argument that leaves the Court with the "definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). Further, a petition for reconsideration must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the Court. 13 C.F.R. § 134.409(c); *Bishop v. United States*, 26 CI. Ct. 281, 286 (1992); *Hazzard's Excavating and Trucking Co.*, SBA No. BDP-364 (2010); *see also Fru-Con Constr. Corp. v. United States*, 44 Fed. CI. 298, 301 (1999) (A movant may not merely recapitulate the cases and arguments the court considered before rendering its original decision, or attempt a rehearing based upon the evidence previously presented.). A petition for reconsideration is appropriate only in limited circumstances, such as situations where the Court has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties. *Quaker Alloy Casting Co. v. Gulfco Industries. Inc.*, 123 F.R.D. 282, 288 (N.D. III. 1988) (quoting *Above the Belt. Inc. v. Mel Bohannan Roofing. Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

Discussion

The SBA terminated Petitioner for willfully violating SBA regulations, and failing to disclose the extent CounterTrade. a non-disadvantaged firm, participated in the management of Reality Technologies, Inc. The specific regulations the SBA claims Petitioner willfully violated

are 13 C.F.R. §§ 125.6(a)(1)-(2) and 124.106(g) and (g)(4).

On appeal, the Court dismissed Petitioner's *Appeal Petition* for lack of jurisdiction. Specifically, the Court cited 13 C.F.R. § 134.405(a)(1), which states that the Court must decline jurisdiction if an appeal petition fails to allege facts that, if true, would warrant reversal of the determination. With regard to the SBA's determination that Petitioner committed a willful violation of 13 C.F.R. § 125.6(a)(1) and (2), the Court found the *Appeal Petition* demonstrated that Petitioner failed to perform 50 percent of the work on its 8(a) contracts, which were subcontracted to CounterTrade, a non-disadvantaged firm, and that Petitioner's actions were willful.

In its *Motion for Reconsideration* ("Motion"), Petitioner claims, in pertinent part, that the Court's dismissal of the *Appeal Petition* was a clear error of law and fact because (1) the Court erred in finding that the 50 percent work requirement applied to the contracts at issue; and (2) the Court used an incorrect definition of "willful."

I. The Court did not err in finding Petitioner failed to perform 50% of the contracts.

Petitioner claims the Court's finding that Petitioner failed to meet its 50 percent work requirement for services "is based upon errors of law and fact and must be reversed." However, Petitioner does not claim the error exists because Petitioner actually performed 50 percent of the 8(a) contracts. Rather, Petitioner asserts it established in the *Appeal Petition* that "the requirement to perform 50% of the cost of labor is applicable to services contracts." Petitioner then explains "the contracts at issue were supply or products contracts, and could not be considered services contracts or procurements." Last, Petitioner claims the Court committed reversible error by misreading 76 FR 8222-01.

Pursuant to 13 C.F.R. 125.6(a)(1)-(2), a participant firm must perform 50 percent of an 8(a) contract if the contract is for services, supplies or products. However, if the 8(a) contract is for supplies or products, the non-manufacturer exception may apply for procurements from a non-manufacturer in such supplies or products. 13 C.F.R. 125.6(a)(2). Per 76 FR 8222-01, "The nonmanufacturer rule only applies where the procuring agency has classified a procurement as a manufacturing procurement by assigning the procurement a NAICS code under Sectors 31-33." 76 FR 8222-01. The NAICS code assigned "best describes the principal purpose of the acquisition. . . . The classification dictates what an offeror must perform in order to qualify as a small business concern for a small set aside procurement." *Id*. "If a procuring agency determines that the principal nature of the procurement is services . . . the nonmanufacturer rule, which applies only to manufacturing/supply contracts, would not apply." 76FR8222-01, at 8225.

In its *Appeal Petition*, Petitioner states, "[t]he 8(a) contracts at issue in the SBA's termination decision were not contracts for services, as confirmed by CounterTrade." Petitioner then cited an e-mail from CounterTrade that states, in its entirety, "[t]here is no labor included on any order that is to be performed by CounterTrade or Reality." There is no mention as to whether the contracts are for services, or supplies and products. Petitioner then argues in its *Motion* that the Court erred in failing to accept the alleged fact that the 8(a) contracts were not for services as true for the purposes of the SBA's *Motion to Dismiss*.

However, a review of the *Appeal Petition* not only yielded the CounterTrade e-mail, but also included several letters sent by the SBA to contracting agencies. Many of these letters reference 8(a) awards given NAICS code 541519, which is assigned to "Other Computer Related Services" under Sector 54 ""Professional, Scientific and Technical Services." Petitioner confirmed receipt of these letters in its own attached correspondence. These letters, which Petitioner produced, contradicts Petitioner's own assertions that the contracts were for products and supplies only. Considering the only evidence in support of Petitioner's claim that the contracts were for supplies and products was an e-mail from CounterTrade, the very company Petitioner accuses of "intimidation" and "deceitful acts," the Court does not find it erred in concluding that some of the 8(a) contracts were for services.

Even assuming that the 8(a) contracts were for products and supplies, the Court cannot conclude that Petitioner performed the requisite work on the contracts. Petitioner states that under the correct reading of 76 FR 8222-01, "Reality was not required to perform as much as 1% of the associated services work if the contracts at issue were classified under their NAICS codes as supply contracts." Indeed, if a procurement that is classified as a manufacturing procurement also includes a requirement of services, a firm need only supply the product of a small business manufacturer and need not perform any *services*. 76 FR 8222-01, at 8225. However, Petitioner does not claim it actually provided the product of small business manufacturers. Rather, Petitioner states that "[t]o the best of Reality's knowledge (based upon the limited information and data provided by CounterTrade), we supplied the end items of small business manufactures or processors made in the United States." Petitioner cannot attest to complying with this requirement of the non-manufacturer exception because any 8(a) contract for supplies or products were performed by CounterTrade as a subcontractor and not Reality.

The Ruling and Order noted that even when the non-manufacturer rule applies, "any work done by the subcontractor on the services portion of the contract cannot rise to the level of being primary and vital requirements, and therefore cannot be the basis or affiliation as an ostensible subcontractor." This interpretation is in line with 76 FR 8222-01, which reads "a multi-million dollar supply contract in which a large business manufacturer provides the supply items directly to the Government procuring agency and the small business non-manufacturer provides nothing more than its status as a small business does not foster small business development." 76 FR 8222-01, at 8226. Accordingly, Petitioner has failed to demonstrate the Court's finding that Petitioner did not perform at least 50 percent of the 8(a) contracts requires reconsideration.

II. The Court did not err in finding Petitioner acted willfully.

Petitioner claims the Court "failed to apply the legal standard for either a motion to dismiss or for summary judgment," because the Court applied the incorrect legal standard for "willful," and failed to accept Petitioner's assertions as true for the purposes of the SBA's Motion to Dismiss.

First, Petitioner claims that the Court incorrectly used the Black's Law Dictionary definition of the term "willful." In support of its argument, Petitioner claims "this common

definition has been rejected by the United States Supreme Court in the context of penalizing a party for committing a violation of the law," and quotes *McLaughlin v. Richland Shoe Co*., 486 U.S. 128 (1988). However, Petitioner misreads the Supreme Court's holding. In *McLaughlin*, the Supreme Court held:

> [t]he standard of willfulness adopted in *Thurston-that* the employer either knew or showed reckless disregard as to whether its conduct was prohibited by the FLSA-must be satisfied in order for the 3-year statute of limitations to apply. This standard represents a fair reading of the Act's plain language, since it comports with the general understanding that the word "willful" refers to conduct that is "voluntary," "deliberate," or "intentional," and not merely negligent.

McLaughlin v. Richland Shoe Co., 486 U.S. 128, 108 S. Ct. 1677, 1679, 100 L. Ed. 2d 115 (1988). The Supreme Court, therefore, did not reject the general usage definition of "willful," but rather accepted the standard used in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) as it fell within the general definition.

Petitioner also argues the "knowing or reckless" standard adopted in *McLaughlin* should be the proper definition of willfulness in this case as well, apparently on the assumption that the Supreme Court intended this standard to apply to all statutes requiring a willful violation. In support, Petitioner claims "other administrative agencies" adopted a definition of "willful violation" that requires "knowing or reckless." However, the only example Petitioner cites concerns regulations issued pursuant to the Federal Labor Standards Act (FLSA). On the other hand, later courts have limited the *McLaughlin* holding to only apply to the FLSA. *A.J. McNultv & Co. Inc. v. Secretary of Labor*, 283 F.3d 328, 338 (D.C. Cir. 2002) (declining to apply the *McLaughlin* standard for willfulness in a case brought under the Occupational Safety and Health Act); *Recommendation for Debarment—Phoenix Paint Co.*, B-242728 (Comp.Gen.), 1992 WL 5591, fn. 2 (1992) (Comptroller General finding the *McLaughlin* decision to be "inapplicable" because the decision dealt specifically with "willful" under the FLSA). Accordingly, the Court finds that Petitioner has not made a clear showing of error regarding the Court's use of the Black's Law Dictionary definition of "willful" in the Ruling and Order. *See Vineland Fireworks Co., Inc. v. Bureau of Alcohol. Tobacco, Firearms, & Explosives*, 544 F.3d 509, 517 (3rd Cir. 2008) (finding the Bureau of Alcohol, Tobacco, Firearms & Explosives director's interpretation a willful violation to be reasonable as it "is in accord with the legal definition" from Black's Law Dictionary).

Second, Petitioner argues it "alleged in its petition that the actions for which the SBA terminated it were not willingly taken," and that the Court was required to accept such allegations as true for the purposes of the SBA's Motion to Dismiss. Petitioner also claims the Court acted outside of its "charge" when it "weighed what it considered to be conflicting evidence and then made a fact-finder's decision as to which evidence to believe."

An assertion of "willfulness," or lack thereof, is a legal conclusion and not a fact that the Court must accept as true. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("Although for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual

allegation."); *Gant v. United States*, 131 Fed. Appx. 292 (Fed. Cir. 2005) (disregarding the petitioner's "conclusory allegations" that he was under duress and noting that courts are not bound to accept such conclusions as true).

Although Petitioner claims that it acted under duress, the *Appeal Petition* contained evidence that did not support that assertion. Petitioner stated it "reasonably believed it had to take extreme action to avoid default termination" and that Petitioner "reasonably concluded that the only alternative for avoiding contract default was to enter into multiple [purchase order] subcontracts with CounterTrade." Such assertions demonstrate, as found in the Ruling and Order, that Petitioner's actions were voluntary and the result of careful consideration. Therefore, although Petitioner alleges it acted under duress, the Court erred neither in disregarding Petitioner's legal conclusion, nor by accepting Petitioner's own statements demonstrating willfulness.

III. Other grounds for termination need not be addressed.

On *Motion for Reconsideration*, Petitioner raises numerous arguments as to why the Court's Ruling and Order warrants reconsideration. Many of these arguments were previously raised and considered, and therefore need not be revisited because the purpose of a petition for reconsideration is not to rehash old arguments. *Fru-Con Constr. Corp. v. United States*, 44 Fed. CI. 298, 301 (1999).

Further, the Court recognizes that where the SBA terminates a Petitioner on more than one ground, and the Court affirms at least one ground of the SBA's determination, the determination cannot be found to be arbitrary, capricious, and contrary to law. *See Dienitas Technologies. LLC*, SBA No. BDPE-471, at 9 (2013). Therefore, even if Petitioner's Appeal Petition alleged facts that would warrant a reversal of every ground for termination save one, the SBA's decision could still not be found to be arbitrary, capricious, and contrary to law.

Conclusion

With regards to Petitioner's claims that the Court committed reversible error as to its finding of willfulness and that Petitioner failed to perform the requisite 50 percent of each 8(a) contract, the Court is not left with a "definite and firm conviction that a mistake has been committed." Accordingly, the Court's finding that the *Appeal Petition* failed to allege facts that, if true, would warrant reversal of the SBA's decision shall stand as to these issues.

Here, the SBA terminated Petitioner for a willful violation of 13 C.F.R. 125.6(a)(1) and (2), which requires participant firms to perform 50 percent of any 8(a) contract. The Court has found that Petitioner has failed to allege facts that, if true, would warrant reversal of the SBA's decision to terminate on this ground. Therefore, even if the Court found any (or all other) grounds for termination were arbitrary, capricious, and contrary to law, the SBA's determination would stand. Accordingly, Petitioner's *Motion for Reconsideration* is DENIED.[1]

[1] Petitioner's *Motion to Amend the Appeal Petition* is **DENIED** as moot.

So ORDERED,
J. JEREMIAH MAHONEY
Administrative Law Judge