UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

SIZE APPEAL OF:	)	
Ross Aviation, Inc.	)	Docket No. SIZ-2006-10-10-58
Appellant	)	Decided: March 7, 2007
RE: USA Jet Airlines, Inc.	)	
Solicitation No. DE-RP52-06NA25694 U.S. Department of Energy NNSA Service Center Albuquerque, NM	)	

ORDER DENYING MOTION TO DISMISS AS MOOT

I. Introduction

There is no doubt that OHA must dismiss appeals that are moot. This must be distinctly understood, or no positive result can come from this order. However, regardless of whether a contract has been awarded during appeal, the preliminary question remains whether the appeal is moot. That question is for OHA to decide.

Apart from contract-specific issues (*e.g.*, ostensible subcontractor and non-manufacturer rule), OHA will no longer dismiss automatically an unsuccessful offeror's appeal as moot after contract award. Instead, OHA will promote the integrity of the procurement process (reflected in the Small Business Act and SBA's size, size protest, size determination, and size appeal regulations) by not dismissing an appeal as moot simply because of a contracting officer's representation that he/she intends not to disturb award of the contract (including their intent to award options).

II. Procedural History

On September 28, 2006, the U.S. Small Business Administration (SBA), Office of Government Contracting, Area Office IV (Area Office) issued Size Determination No. 4-2006-114 (size determination) finding USA Jet Airlines, Inc. (USA Jet) to be a small business for the applicable size standard of 1500 employees. The size determination stems from a September 1,

2006 size protest by Ross Aviation, Inc. (Appellant). On October 12, 2006, Appellant filed an appeal at the Office of Hearings and Appeals (OHA).

On December 13, 2006, USA Jet filed a Motion to Dismiss the appeal as moot because the Contracting Officer (CO) represented that she intended to continue performance of the awarded contract with USA Jet regardless of any decision by OHA. The CO also represented she would award all options to USA Jet regardless of any decision by OHA.

Pursuant to the discretion afforded me by 13 C.F.R. § 134.229, I issued an Order (Remand Order) on December 21, 2006: (1) Vacating and remanding the size determination; (2) Discussing why I did not immediately grant USA Jet's motion to dismiss for mootness; (3) Ordering the parties to address the mootness issue raised by USA Jet and to file a response consistent with the Order; and (4) Explaining to the Area Office that it was not immediately obligated to reevaluate USA Jet's size. I remanded the size determination to the Area Office because of the clear error in its analysis. However, I retained jurisdiction and instructed the Area Office not to proceed with a new size determination until I could resolve the threshold issue of mootness. That is, I did not and could not require the Area Office to commence a new size determination because OHA's jurisdiction to remand and vacate the size determination depended upon me determining the appeal was not moot.

III. Facts Relevant to the Motion[1]

1. The Contracting Officer (CO) for the U.S. Department of Energy (DOE/NNSA) set-aside RFP No. DE-RP52-06NA25694 (the RFP) for small businesses, and classified it under North American Industry Classification System (NAICS) code 481211, with a 1500 employee size standard.

2. The CO awarded Contract No. DE-AC52-06NA25694 (the contract) to USA Jet. The contract contains a base year and four one-year options.

3. On December 11, 2006, the CO represented:

> [T]he National Nuclear Security Administration Service Center will retain its prerogative to continue performance with USA Jet Airlines for all option periods of contract number DE-AC52-06NA25694, as this contract fulfills a vital national security mission.

4. Appellant did not base its Appeal Petition upon contract-specific issues. Instead, Appellant based its Appeal Petition upon clear mistakes of fact and law committed by the Area Office in determining the size of USA Jet, *i.e.*, the Area Office failed to properly examine the relationship between USA Jet and Greenbriar Equity Group LLC (Greenbriar) and Berkshire Partners LLC (Berkshire).

[1] For a more detailed discussion of the facts, see my December 21, 2006 Remand Order.

IV. The Parties' Contentions

USA Jet originally moved to dismiss the instant appeal as moot in a one-page motion. USA Jet noted the CO's December 11, 2006 letter (Fact 3) and averred that because of this letter any decision by OHA would become advisory. In addition, USA Jet referenced previous OHA decisions addressing the issue of advisory opinions, *e.g.*, *Size Appeal of E.D. Etnyre & Co.*, SBA No. SIZ-4625 (2004).

On January 4, 2007, Appellant and the SBA filed Responses to USA Jet's Motion to Dismiss. On January 5, 2007, USA Jet requested leave to reply to the Responses. On January 8, 2007, I granted USA Jet leave and it timely filed its Reply on January 22, 2007. In addition, I allowed Appellant to file a Surreply to USA Jet's Response.

A. Appellant's Response to Motion to Dismiss as Moot

On January 4, 2007, Appellant filed its Response to the Motion to Dismiss as Moot. Appellant asserts that:

> A formal determination of USA Jet's size would not be moot because it would enhance the integrity of the small business program by increasing the accuracy of reported small business awards, by assisting the agency in determining whether to continue performance if USA Jet is determined to be other than small, and by clarifying the rules for multi-investment companies affiliations. In addition, the precedential case in this matter was decided based on a faulty analogy comparing the Office of Hearings and Appeals to an Article III court and should be overruled.

Response, at 2. Appellant begins by examining the regulatory background of 13 C.F.R. § 121.1101(b), which states that OHA will not review a size determination when the contract has been awarded and the issues raised in the petition for review are contract-specific. Appellant notes that the rule did not adopt the line of OHA cases holding that appeals would be considered moot where an award had already been made even though the issues are not contract-specific, *i.e.*, *Size Appeal of Spectrum Landscape Services, Inc.*, SBA No. SIZ-4313 (1998) (*Spectrum).*

Appellant urges OHA to reverse its *Spectrum* precedent concerning mootness. Appellant contends that *Spectrum* was wrongly decided "because its interpretation of mootness is inappropriate to the role of the SBA, which was not established for the same purposes as an Article III Federal court, but rather to assure the health and well-being of the small business community of the United States." Response, at 5. Appellant asserts that *Spectrum's* reasoning (that a case was moot when OHA could no longer redress Appellant's injury after contract award) is flawed because it analogized standing for size appeals at OHA to the standing requirements for Federal courts established by Article III of the Constitution.

Appellant asserts that SBA's size determination authority stands in marked contrast to the powers of the Government Accountability Office (GAO) and Court of Federal Claims to disturb

awards. Therefore, Appellant contends that *Spectrum* should be overruled because it misinterpreted the role and powers of the SBA. Appellant asserts that unlike the GAO or Article III courts, the Small Business Act does not grant SBA the authority to adjudicate disputes between parties, or the authority to provide specific relief to a protestor ("[r]elief for the protestor is neither an element of the size protest nor something that SBA can grant"). Response, at 8. Instead, Congress established the SBA to "aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns…to insure that a fair proportion of the total purchase and contracts or subcontracts for property and services for the Government…be placed with small-business enterprises…." Response, at 7 (citing 15 U.S.C. § 631(a)). Therefore, SBA is charged with determining the size of a concern whether this question is raised by a competitor or a government official. *See* 13 C.F.R. § 121.1001(a).

Furthermore, Appellant maintains that the standing requirements at SBA are less restrictive than Article III courts, as a size protestor does not have to prove it would be prejudiced by the award or that it would have had a substantial chance to receive the award. Appellant argues that this standing distinction "demonstrates that the purpose of the size protest is not merely to 'redress Appellant's injury' but has some other or larger purpose as well." Response, at 11. Appellant contends that the protest process enhances the integrity of the small business program by policing self-certification abuses, which prevents contracting officers and the SBA from having to verify an awardee's size for each small business procurement. Given the fact that SBA does not have the authority to redress an appellant's injury by disturbing a contract award nor the authority to adjudicate disputes, Appellant argues that comparing SBA to Article III courts is inappropriate and *Spectrum* should be overruled.

Appellant further argues that a decision in the present case would not be advisory because the decision would have a future effect on the integrity of the small business program. Specifically, DOE/NNSA may report the award as a small business award if the Area Office does not conduct a new size determination, despite the fact that the "size determination has been vacated for substantial cause and should raise numerous question…[about] the appropriateness of the award to USA Jet." Response, at 15. This reporting, in turn, would adversely affect the integrity of the small business program. Response, at 13. In sum, Appellant asserts that the SBA obtains reports from agencies and makes studies to insure that a fair proportion of the total purchases are made from small businesses and that "[i]t is critical that the information obtained and used to determine the activities and accomplishments of the small business program be accurate." Response, at 17.

Appellant also asserts that a decision would not be advisory because the contract has four one-year options, which DOE/NNSA may decide not to award if the awardee is determined to be other than small. Despite the CO's assurances that she intends to continue performance by USA Jet and to exercise all options under the USA Jet contract, Appellant urges that DOE is under pressure to meet the government-wide goal of 23% of procurement dollars going to small businesses and "[i]t would be cynical to assume that DOE/NNSA will simply disregard this mandate if USA Jet is found to be other than small." Response, at 20. Appellant argues that the contracting officer does not have "unfettered discretion to continue performance and exercise options with a company which did not qualify under the terms of the solicitation because of its

size." Response, at 19 (citing *ALATEC, Inc.*, B-298730, December 4, 2006, 2006 CPD ¶ 191 (*ALATEC*)).

Finally, Appellant argues that the integrity of the small business program would be enhanced by considering appeals which raise issues which are not contract-specific. Appellant asserts that dismissing this appeal as moot would encourage businesses and contracting officers to game the system "because they know it is unlikely to affect the outcome of the instant procurement and to have no future effect on either the size certification of the questioned company, the reporting of the small business awards, or the exercise of options." Response, at 21. These abuses would prevent the SBA from relying on information critical to the evaluation of the small business program and damage the integrity of the program. Appellant also argues that deciding this case would clarify for all parties "under what circumstances a company with affiliations to an investment company and its other holdings would be considered large or small." Response, at 22. Otherwise, none of the cases addressing the size of affiliates of multi-fund investment companies may survive the appeal process without being dismissed as moot, "leaving the issue open indefinitely and leading to possible abuses of awards of set-aside contracts." Response, at 23. In sum, the integrity of the program would be enhanced by a decision on the merits, which would assure "that awards and reports correctly reflect the size of the prime contractor." *Id.*

B. SBA's Arguments

On January 4, 2007, the SBA filed its Response, concluding that "OHA cannot and should not overturn its existing precedent concerning whether size appeals are moot." Agency Response, at 1.

The SBA first argues that OHA does not have jurisdiction to decide the mootness issue because OHA has already vacated the size determination and remanded the matter to the Area Office. Now, only the Area Office has jurisdiction over this matter.

The SBA then argues that in 2004 SBA codified existing OHA precedent concerning when size appeals are moot, and any change to this practice must be done through public rulemaking consistent with the Administrative Procedure Act. The SBA points out that the size protest and appeal process is designed to allow a procuring agency to proceed with award following a size determination, while giving that agency the discretion to wait for a size appeal decision.

The SBA further argues, "if OHA were to hold that a size appeal is not moot because the appeal decision would affect the procuring agency's ability to count the award towards its small business government goals, it would render 13 C.F.R. § 134.316(a) meaningless, since the same can be said of every size appeal." Response, at 5.

Finally, the SBA asserts that the Area Office should render a formal size determination, which will affect the procuring agency's ability to count the award toward its small business government contracting goals.

C. USA Jet's Reply

On January 22, 2007, USA Jet submitted its Reply Brief arguing that the Motion to Dismiss as Moot should be granted. USA Jet argues that the Motion is clearly supported by post-1998 OHA caselaw, which was "*intended* to be codified by the 2002 amendments" to OHA's rules. Reply, at 2 (emphasis added). USA Jet's fundamental assertion throughout the Reply is that OHA's mootness doctrine should only be changed through the notice and comment process of proposed rulemaking, not by the adjudicatory process.

USA Jet first argues that OHA has jurisdiction to consider the Motion to Dismiss pursuant to 13 C.F.R. § 134.229. Furthermore, OHA retained jurisdiction to consider the Motion by advising that "the Area Office may choose to await any ruling on the mootness issue before proceeding with further action." Remand Order, at 13.

USA Jet then argues the rulemaking history supports *Spectrum's* regulatory codification. The legislative history to 13 C.F.R. § 134.303 explained that this provision "would clarify that OHA does not issue advisory opinions…This proposed rule would codify long-standing OHA case law, including *Size Appeal of Loghtcom* [sic] *International, Inc.*, SBA No. SIZ-4118 (1995). 67 Fed. Reg. 11061 (2002)." Reply, at 3-4. The legislative history to 13 C.F.R. § 134.316(a) also provided that "[t]his would codify OHA precedent. *See e.g., Size Appeal of Lightcom International, Inc.*, SBA No. SIZ-4118 (1995); *Size Appeal of Infotec Development, Inc.*, SBA No. SIZ-4197 (1996)." Reply, at 4 (citing 67 Fed. Reg. 70339, 70346 (2002)). USA Jet argues the OHA caselaw referenced in the legislative history includes *Spectrum* despite the fact that it does not specifically reference *Spectrum*. USA Jet rejects Appellant's assertion that OHA only codified the caselaw it specifically listed, *i.e.*, *Lightcom* and *Infotec*; USA Jet argues that SBA merely gave examples of some of the caselaw, "making clear that the rule codified case law 'including' such cases." Reply, at 4.

USA Jet then counters Appellant's assertion that OHA is not an adjudicative body and therefore is not bound by the same mootness principles as Article III courts. USA Jet argues that the instant appeal proceeding is an actively litigated dispute between parties and when SBA promulgated the rule shifting responsibility for size appeals to OHA, it recognized "the essentially adjudicative nature of size…determinations…." Reply, at 5 (citing 48 Fed. Reg. 55832 (1983)). USA Jet argues that if *Spectrum* "is to be overruled because it improperly relied upon the need for there to be an existing case or controversy, there would be no principled basis not to overrule the entire line of OHA's mootness jurisprudence, including the cases [contract-specific mootness cases] that [Appellant] concedes has been codified by the regulations and cannot be overruled by OHA." Reply, at 6-7.

USA Jet further argues that an opinion on the merits would be advisory, and thus moot, because it would have no present or future effect. The size determination concluding that USA Jet was small was effective immediately and remains in effect unless reversed by OHA. *See* 13 C.F.R. § 121.1009(g)(1). Furthermore, USA Jet asserts that any OHA decision after contract award will not apply to that procurement pursuant to 13 C.F.R. § 121.1009(g)(3) and 48 C.F.R.

§ 19.302(i). USA Jet asserts that Appellant's arguments about the future effect of the decision (on DOE's reporting of small business awards and on the CO's decision to continue or terminate performance with USA Jet) are pure speculation. USA Jet contends that "[s]peculation over what others might do in response to a decision, however, has been held not to be sufficient to make a decision non-advisory." Reply, at 8. USA Jet also distinguished *ALATEC* because in that case although the contract had been awarded, performance had been suspended due to a GAO protest.

USA Jet argues that the integrity of the small business program requires that *Spectrum* and its progeny be retained. USA Jet asserts that the regulatory scheme balances the need to ensure that a small business receives a set-aside against the need for finality to allow agencies to proceed without continued adjudication of disputes over small business status. USA Jet urges that OHA should not upset this balance. USA Jet asserts that both SBA regulations and the FAR allow an agency to proceed based on an Area Office decision and state that an OHA decision that is received after award does not apply to that acquisition. *See* 13 C.F.R. § 121.1009(g)(2), (3); 48 C.F.R. § 19.302(g)(2), (i). USA Jet reiterates that any revisions to the regulatory scheme regarding mootness should be accomplished through the regulatory, not adjudicatory, process.

Finally, USA Jet argues that the Remand Order should be vacated because the appeal is moot, and thus OHA lacks jurisdiction to order a remand.

D. Appellant's Surreply

On January 24, 2007, Appellant filed its Surreply to USA Jet's Reply. Appellant asserts that it does not dispute that OHA will not decide matters that are moot, but the central question is whether this matter is moot. Appellant contends that USA Jet's argument that the rule changes in 2002 encompass the *Spectrum* series of cases ignores the plain language of 13 C.F.R. § 121.1101(b). Appellant asserts that "the rule-makers chose to explicitly identify as moot one kind of size appeal—that which is contract specific—and did not choose to make moot another kind of size appeal—those which are not contract specific even when the contract has been awarded." Surreply, at 2. Therefore, Appellant argues that "any determination of mootness depends on OHA's case law which can be overruled by OHA." *Id.*

Appellant then submits that it does not dispute that OHA has adjudicative powers, but these powers are different from the powers given to a federal court or the GAO. Specifically, OHA determines the size of a questioned concern and does not resolve disputes between parties. While Appellant agrees that the process is adversarial, it asserts that OHA is not granting relief to either party but merely determining the question of size.

Appellant then challenges USA Jet's alleged assertion that "a determination that a company awarded a small business set-aside is in fact not a small business would have a negative effect on the program's integrity." Surreply, at 3. Appellant characterizes this as a "baffling assertion" given the program's concern with awarding small business set-asides to large businesses.

V. Discussion

A. Applicable Law and Regulations

1. The Small Business Act

In enacting the Small Business Act (the Act), Congress established its underlying policy as follows:

> (a) Foster small business
> For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all Federal department, agency, and instrumentality policies, programs, and activities *in order to: foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses;* establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.

15 U.S.C. § 631(a) (as amended) (emphasis added).

2. Regulations Relating to the Process

Pursuant to its authority under the Act, SBA's size standards:

> [D]efine whether a business entity is small and, thus, eligible for Government programs and preferences reserved for "small business" concerns. Size standards have been established for types of economic activity, or industry, generally under the North American Industry Classification System (NAICS).

13 C.F.R. § 121.101(a).

The procurement programs subject to size determinations are set forth in 13 C.F.R. § 121.401, which provides:

> The rules set forth in § 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program….

Furthermore, when a contracting officer designates a procurement (solicitation) as set-aside for small businesses, SBA's size determination regulations are in effect. *See* 13 C.F.R. § 121.402(b).

SBA permits a wide array of individuals and entities to initiate a size protest or to request a formal size determination when a contracting officer establishes a procurement as a set-aside. Specifically, as related to the facts of this appeal, 13 C.F.R. § 121.1001(a) provides:

> (1) For SBA's Small Business Set-Aside Program, including the Property Sales Program, or any instance in which a procurement or order has been restricted to or reserved for small business or a particular group of small business, the following entities may file a size protest in connection with a particular procurement, sale or order:
>
> (i) *Any offeror* whom the contracting officer has not eliminated for reasons unrelated to size;
>
> (ii) *The contracting officer*;
>
> (iii) *The SBA Government Contracting Area Director* having responsibility for the area in which the headquarters of the protested offeror is located, regardless of the location of a parent company or affiliates, or the Associate Administrator for Government Contracting; and
>
> (iv) *Other interested parties*. Other interested parties include large businesses where only one concern submitted an offer for the specific procurement in question. A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small.

(emphasis added).

As provided in 13 C.F.R. § 121.1101(a), 13 C.F.R. Part 134 contains procedures for size and NAICS appeals before OHA. For example, 13 C.F.R. § 134.302 identifies who may appeal a size determination, to include:

> (a) *Any person* adversely affected by a size determination;
>
> . . .
>
> (c) The Associate or Assistant Administrator for the SBA program involved, through SBA's Office of General Counsel; or
>
> (d) The procuring agency *contracting officer* responsible for the procurement affected by a size determination.

(emphasis added).

The net effect of SBA's size, size protest, and size appeal regulations is that in furtherance of its congressionally-mandated responsibility to administer small business programs for the Federal Government and thus foster the economic interests of small businesses and insure a competitive economic climate conducive to the development, growth and expansion of small businesses, SBA:

a. Defines whether an entity is small under the various NAICS codes;

b. Administers a set-aside program that is inherently self-enforcing and based upon the economic and programmatic interests of participants, SBA, and contracting officers;

c. Makes size determinations binding upon the parties when status as a small business is required or advantageous;

d. Permits a wide variety of individuals and entities to have standing to protest a concern's size as long as the protest relates to a particular procurement; and

e. Permits appeals of size determinations under specified circumstances.[2]

3. Mootness

a. Mootness - Generally

The Constitution's case or controversy limitation on a federal court's judicial authority, Art. III, § 2, is the basis for the mootness doctrine. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 703-704 (2000); *International Union, UAW v. Dana Corp.*, 697 F.2d 718, 720-721 (6th Cir. 1983) (holding that mootness is a jurisdictional question that arises from the case or controversy requirement of Article III). Mootness divests a court of jurisdiction and must be considered as a threshold issue. *Rogin v. Bensalem Township*, 616 F.2d 680, 684 (3rd Cir. 1980). Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The court may not render an advisory opinion; it is confined to "real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character…." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

The requirement that the issues be "live" requires that "[a] case presented for adjudication must be an actual, concrete dispute over legal rights; the controversy may not be a hypothetical one." *Geraghty v. U.S. Parole Commission*, 579 F.2d 238, 246 (3rd Cir. 1978). The second aspect of mootness, the parties' interest in the litigation, is often referred to as the "personal stake" requirement. *U.S. Parole Commission v. Garaghty*, 445 U.S. 388, 396 (1980). This means that, throughout the litigation, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). If an event occurs while a case is pending that heals the injury and only prospective relief has been sought, the case must be dismissed. *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2nd Cir. 1996). A federal court has no power to give opinions about moot questions which cannot affect the matter in issue in

[2] These circumstances include timeliness (13 C.F.R. § 134.304(a)(1)) and a full and specific statement of error (13 C.F.R. § 134.305(a)(3)). These requirements are in addition to the requirements of 13 C.F.R. §§ 121.1101(b), 134.303, 134.316(a).

the case before it. *Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992).

Regardless, "[a]n administrative agency is not bound by Article III limits, and may be empowered to maintain proceedings that would be moot in a court. If the agency decision has a present impact, judicial review may be proper even though a trial court could not have decided an action in similar circumstances." 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3533.1 (2d ed. 1984) (citing *RT Communications, Inc. v. F.C.C.*, 201 F.3d 1264, 1267 (10th Cir. 2000) (holding that the FCC's decision to rule on preemption issue, despite state agency's claim that decision was moot due to its decision to grant challenger authority to provide local telephone services, was not an abuse of discretion)); *see also Sheng Bing He v. Gonzales*, No. 03-73213, 2006 WL 1582669, *3 (9th Cir. June 5, 2006) (stating that it is an elementary principle of administrative and constitutional law that an administrative agency is not subject to Article III's case or controversy requirement). An agency has "substantial discretion" to decide whether to hear issues which might be precluded by mootness. *RT Communications, Inc.*, 201 F.3d at 1267 (citing *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 451 (10th Cir. 1983)). The agency, in exercising its discretion, should consider: (1) whether resolution of the issue is the proper role of the agency as an adjudicatory body; and (2) whether concerns for judicial economy weigh in favor of present resolution. *Id.*

b. SBA Appeal Rules Applicable to Mootness

Rules pertaining to appeals of size determinations and mootness are first found in 13 C.F.R. § 121.1101, which provides:

> (a) Appeals from formal size determinations may be made to OHA. Unless an appeal is made to OHA, the size determination made by a SBA Government Contracting Area Office or Disaster Area Office is the final decision of the agency. The procedures for appealing a formal size determination to OHA are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a formal size determination may be sought in a court.
> (b) *OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific,* such as compliance with the nonmanufacturer rule (see § 121.406(b)), or joint venture or ostensible subcontractor rule (see § 121.103(h)).

(emphasis added).

Also relevant to this discussion is 13 C.F.R. § 134.303, which provides, "The Office of Hearings and Appeals does not issue advisory opinions." The only other limitation on OHA's authority in this part is contained in 13 C.F.R. § 134.316(a), which states, "The Judge will not decide substantive issues raised for the first time on appeal, or which have been abandoned or become moot."

c. *Spectrum*

Spectrum is the most frequently cited OHA decision on mootness when the issues on appeal are not contract-specific. It is also at the core of USA Jet's argument. In *Spectrum*, OHA framed the issues (pertinent to this case) as follows:

> Whether this Office will dismiss as moot an *unsuccessful offeror's appeal* of a size determination concluding the challenged firm was small, where the procuring agency has awarded the contract at issue, and the issues on appeal are not specific to that procurement.
>
> Whether a size appeal becomes moot as to the instant procurement where contract award occurs during the pendency of the appeal.

(emphasis added).

OHA answered both issues in the affirmative. As Appellant correctly asserts, the Judge based *Spectrum* on the portion of FAR 19.302(i) that provides:

> The SBA decision, if received before award, will apply to the pending acquisition. SBA rulings received after award shall not apply to that acquisition.

The Judge concluded that since the contracting officer was not obligated to change the award based upon an OHA decision, there was no case or controversy. In addition, the Judge applied an inapposite decision (*Columbian Rope Co. v. West*, 142 F.3d 1313, 1316 (D.C. Cir. 1998)) (*Columbian Rope*) where the contract had been fully performed and the options had expired. The facts in *Columbian Rope* were unlike the facts in *Spectrum* and are unlike the facts in this appeal. *Spectrum* at 5-6. The Judge held: "Because this Office's decision does not apply to a procurement after award, under *Columbian Rope*, OHA no longer could redress Appellant's injury after the May 15th contract award."

The *Spectrum* decision does not discuss or analyze:

a. The purpose of the size protest and determination process;

b. Standing or who really is the injured party;

c. Why it should treat offerors differently than SBA or contracting officers in pursuing appeals; or

d. The integrity of SBA's size determination process or any effect the decision would have on the integrity of set-aside programs.

In addition, I note that OHA has already modified its holding in *Spectrum.* OHA does not dismiss cases as moot when the contracting officer has stopped performance on an awarded contract. *Size Appeal of The Analysis Group, LLC*, SBA No. SIZ-4814, at 5 (2006); *Size Appeal*

of B.L. Harbert International, LLC, SBA No. SIZ-4525, at 8-9 (2002). While pragmatic, this departs from *Spectrum's* reasoning. Whether or not the contracting officer has suspended performance is irrelevant to the contracting officer's authority to ignore SBA under FAR 19.302(i) (the basis of *Spectrum*) or 13 C.F.R. § 121.1009(g)(3)[3] and for an unsuccessful offeror to receive any remedy as a result. Rather than carve exceptions out of *Spectrum* that belie its reasoning, it would be better for OHA to recognize that *Spectrum* was improvidently decided because it ignored the integrity of the process SBA is tasked with preserving.

4. Integrity

There is more than one issue of integrity relevant to this appeal. The first is the integrity of SBA's size, size determination, size protest, and size appeal process. The second is the integrity of the procurement system. SBA is responsible for the integrity of the size protest, size determination, and size appeal process. The GAO traditionally addresses issues of integrity within the procurement system.

SBA addresses the integrity of the processes it is responsible for with the full realization of the purpose of the Small Business Act. That is, it has written its regulations in such a way as to "*foster the economic interests of small businesses* [and] *insure a competitive economic climate conducive to the development, growth and expansion of small businesses*…." 15 U.S.C. § 631(a) (as amended) (emphasis added). Examples of how SBA fosters the economic interests of small businesses in the procurement setting include:

a. Establishing uniform rules for determining whether concerns are small by the application of size standards, such as average annual receipts and employee count, to applicable industry or NAICS codes (13 C.F.R. §§ 121.101, 121.103, and 121.201);

b. Undertaking to determine the size of concerns when their size is protested and their size is a requirement for participation in a set-aside program (13 C.F.R. §§ 121.401, 121.1008, and 121.1009);

c. Requiring firms to self-certify their size by submitting a written self-certification that the concern is small to the procuring activity (13 C.F.R. § 121.404(a); *see* FAR 4.1202, 52.204-8, and 52.219-8);

d. Encouraging integrity in the enforcement of its size regulations by permitting a wide array of individuals and entities, with diverse interests, to both *protest* and *appeal* the size of a concern within a procurement setting (13 C.F.R. § 121.1001(a) and 13 C.F.R. § 134.302);

e. Instituting formal size protest requirements designed to protect the protested concern by requiring the protester to provide reasonable notice of alleged grounds upon which the concern's size is protested (13 C.F.R. § 121.1007(b));

[3] Unlike FAR 19.302(i), 13 C.F.R. § 121.1009(g)(3) grants the contracting officer authority to voluntarily agree to apply an OHA decision if received after award.

f. Emphasizing integrity by making the protested concern: (1) responsible for providing evidence and information or risk an adverse inference (13 C.F.R. § 121.1008(d)); and *prove* its size (13 C.F.R. § 121.1009(c));

g. Enhancing integrity by forbidding concerns from reducing their size after the issuance of a determination in order to be eligible for the procurement (13 C.F.R. § 121.1009(g)(4)) and providing formal recertification procedures (13 C.F.R. § 121.1010); and

h. Establishing a detailed and complete appeal process with inherent due process, that includes the appointment of judges empowered to issue final decisions for SBA. SBA's appeal procedures specify a burden of proof, require service of all pleadings on interested parties, include reply rights, rights to submit new evidence, a right to request an oral hearing, a requirement for a written decision, and a right to request reconsideration (13 C.F.R. § 134.201 *et seq*., and 13 C.F.R. § 134.301 *et seq*.).

Recently, the GAO addressed the issue of integrity of the procurement system as it relates to procurements set-aside for small businesses. In *ALATEC,* the GAO sustained a protest after award had been made to a concern later found to be other than small by the area office and OHA. The agency suspended performance of the contract pursuant to 31 U.S.C. § 3553(c)(3) (2000) and OHA found the case was not moot because performance had been suspended. The GAO explained that it generally did not question "the propriety of an award made by an agency before a decision by the SBA on a size protest had been issued, where the 10 business day period for issuing such decisions had expired, even where the awardee was determined by SBA to be other than a small business concern." *ALATEC* at 4. However, the GAO noted when preserving the award to the other than small business was not supported by countervailing reasons, it would be inconsistent with the integrity of the procurement system and the intent of the Small Business Act for an agency to permit a business that is ineligible under the terms of the solicitation to continue contract performance. *Id.* at 5.

The GAO found no countervailing circumstances in favor of allowing an other than small concern to begin performance under the suspended contract and "certainly none for allowing that firm to perform for what could be *5 years, which could occur if all options are exercised under the small business set-aside*." *ALATEC* at 5 (emphasis added). The GAO noted:

> To the extent that any of our prior decisions suggest than an agency is not required to consider terminating a contract awarded to a large business in circumstances such as those present in the case before us here, they will no longer be followed.

ALATEC at 5, n.3. The GAO then recommended the contract be terminated and award be made to the small business offeror whose proposal represents the best value under the RFP's evaluation scheme. What is more, the GAO also recommended the protestor be granted its costs of filing and pursuing the protest, including reasonable attorneys fees.

The facts of *ALATEC* are different from the present appeal, for the CO here deliberately decided not to suspend performance of the contract by USA Jet. However, the GAO's analysis of why the integrity of the procurement system would be further tainted by performance of a contract by an other than small contractor during the option years is persuasive.

5. Award of Options

The CO represented she intended to award all options under the contract to USA Jet, regardless of any action taken by SBA. Despite this assertion, the authority of contracting officers to award options is not absolute. FAR 17.207 states:

> (c) The contracting officer may exercise options only after determining that --
>
> (1) Funds are available;
>
> (2) The requirement covered by the option fulfills an existing Government need;
>
> (3) The exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors (see paragraphs (d) and (e) of this section) considered; and
>
> (4) The option was synopsized in accordance with Part 5 unless exempted by 5.202(a)(11) or other appropriate exemptions in 5.202.
>
> (d) The contracting officer, after considering price and other factors, shall make the determination on the basis of one of the following:
>
> (1) A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. If it is anticipated that the best price available is the option price or that this is the more advantageous offer, the contracting officer should not use this method of testing the market.
>
> (2) An informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer.
>
> (3) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer. The contracting officer shall take into consideration such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services.

Similarly, contractors do not have a right to be awarded options. That is, the Government does not have a legal obligation to exercise the option or require the work. *Government System Advisors, Inc. v. United States*, 847 F.2d 811, 813 (Fed.Cir. 1988). Accordingly, the CO is not obligated to award any of the options in the contract to USA Jet.

B. Analysis

1. Introduction

In accordance with the Small Business Act (15 U.S.C. § 631(a)), the purpose of the SBA's size, size protest, size determination, and size appeal process regulations must be to "*foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses."* SBA crafted its size, size determination, size protest, and size appeal regulations in a manner that conforms to the Act and ensures the integrity of the process. Given the emphasis these regulations place on the integrity of the entire process, any remedy granted to individual concerns is only a collateral effect and not a goal of the size protest and appeal process.

Appellant's arguments are consistent with the purpose of SBA's size, size protest, size determination, and size appeal regulations. Specifically, Appellant argues that:

> SBA was established for purposes quite different from the judiciary and was given different powers in order to accomplish those purposes. The Small Business Act does not grant SBA any authority to adjudicate a dispute between parties such as Ross Aviation and USA Jet, nor does it give SBA the power to provide specific relief to a small business size protestor. Therefore, the reasoning in *Spectrum Landscape* is flawed.

(Appellant's Response, at 6). Appellant is arguing that *Spectrum* was written in a vacuum by ignoring that OHA's purpose is not to grant relief to individual concerns but to ensure that other than small concerns do not benefit from small business set-aside contracts to the detriment of small concerns. Patently, if other than small concerns do benefit from set-asides, this would not "*foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses."*

Appellant's arguments are well-reasoned and logical. Appellant raises many of the problems inherent in *Spectrum*. In addition to the arguments advanced by Appellant, it is objectionable that *Spectrum* bases mootness on the fact OHA's decision will not apply to the immediate procurement if the contracting officer awards the contract prior to the decision.[4] However, this ignores that OHA's decision will affect a concern's ability to self-certify its size, that a contracting officer has the discretion under 13 C.F.R. § 121.1009(g)(3) to apply OHA's decision if received after award, and the fact that the authority of a contracting officer to award options is neither absolute (FAR 17.207) nor obligatory. Furthermore, I find *Spectrum* ignores: (1) the purpose of SBA's size, size protest, size determination, and size appeal regulations; (2) the issue of standing; (3) issues of integrity; and (4) small business goals.

[4] *See* Footnote 3.

I also give little credit to the CO's unsworn representation of what she will do in the option years in view of:

1. FAR 17.207;

2. 13 C.F.R. § 121.1009(g)(3), which provides that OHA decisions received after contract award, while not applicable to the instant procurement, will have future effect, unless the contracting officer decides to apply the decision to the procurement;

3. The GAO's discussion in *ALATEC* of an other than small firm potentially performing under a set-aside procurement for five option years and its view of how this would impact the integrity of the procurement system;

4. The problems the Department of Energy has historically had in meeting small business contracting goals and what would happen if the CO could not count the contract as a small business award; and

5. The presumption that Government employees act in good faith. That is, I believe this presumption means it is unlikely that a professional contracting officer will passively award options under a small business set-aside procurement to a concern that SBA has determined to be other than small when such an award will mean the agency will receive no credit toward its small business goals and will likely receive negative attention from the small business community and Congress.

USA Jet insists OHA does not have the authority to overrule *Spectrum* because it was "intended to be codified" by the 2002 CFR amendments. USA Jet is mistaken. As discussed in my analysis of SBA's regulations below, the only "codification" of OHA decisions occurred in 13 C.F.R. § 121.1101(b) and that is limited to cases involving contract-specific issues.

USA Jet also argues that any opinion on the merits in this case would be advisory and could not apply to the instant procurement under 13 C.F.R. § 121.1009(g)(3). It asserts any argument on what the Department of Energy may do in reaction to a negative decision on USA Jet's size is speculative. Finally, USA Jet argues the best way to ensure integrity of the small business program is to uphold *Spectrum*. As explained below, I reject USA Jet's arguments.

SBA Office of General Counsel asserts that if OHA does find this appeal not to be moot because it would affect the procuring agency's ability to count the award toward its small business goals, this would render 13 C.F.R. § 134.316(a) meaningless, since it can be said of every size appeal. However, this is not the sole basis of my decision and it is not what Appellant argues. For example, I note: (1) the Department of Energy has had difficulty in meeting small business goals; (2) this appeal involves substantive issues with the potential to affect Appellant and many other similarly situated concerns; and (3) the question of other than small concerns

being awarded set-aside contracts is a matter of immediate concern to the Congress,[5] which accentuates the need to preserve the integrity of the process. These factors directly affect the integrity of the process, which SBA does not address.[6] Accordingly, since there will be appeals: (1) where the integrity of the process is not at issue[7]; (2) that involve contract-specific issues; or (3) that involve procedural issues, I cannot agree that finding this appeal not moot would render 13 C.F.R. § 134.316(a) meaningless.

2. Jurisdiction to Decide this Motion

I issued the Remand Order and retained jurisdiction to decide the mootness issue as permitted by 13 C.F.R. § 134.229 because: (1) the Remand Order was ready to issue at the time I received the Motion to Dismiss and the Area Office's error was plain; (2) I did not deem the Remand Order to be advisory (the stated basis of USA Jet's motion); and (3) Although USA Jet argued OHA decisions addressing advisory opinions, the title of its pleading was *Motion to Dismiss As Moot*, which necessarily raised *Spectrum*, an issue I realized would be time-consuming.

3. OHA Determines When an Appeal is Moot

Once a contract has been awarded, OHA is not permitted to review a size determination (consider an appeal) when the contract has been awarded and the underlying issues are contract-specific. 13 C.F.R. § 121.1101(b). With that exception, the regulations do not specifically describe cases OHA will not hear other than to specify OHA may not: (1) Issue advisory opinions (13 C.F.R. § 134.303); (2) Decide substantive issues raised for the first time on appeal or which have been abandoned or become moot (13 C.F.R. § 134.316(a)). The determination of what is an advisory opinion and when an issue has become moot is not specified.

The regulations do not reference any OHA decisions concerning mootness. Nor has any party argued that the regulations concerning mootness are ambiguous or require clarification. Therefore, I note the well-known axiom that when the language is clear on its face, it is unnecessary to review its regulatory history to discern its meaning and scope. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978). Consequently, legislative or regulatory history is relevant only if the legislation or regulations are unclear. *See Lamie v. U.S. Trustee*, 540 U.S.

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[5] Small Business Reauthorization and Improvements Act of 2006, S. 3778, 109th Cong., 2d Session, §§ 1401-04; and *see* § 1402 requiring an annual re-certification of size. This proposed, on a bipartisan basis, an elaborate size protest process with language nearly identical to the statute addressing the GAO's protest procedures. The Senate proposed this measure because, among other matters, it was concerned that set-aside contracts were being incorrectly awarded to other than small concerns.

[6] SBA agrees the Area Office should issue a size determination concerning USA Jet.

[7] *E.g.*, OHA will always consider timeliness and specificity (notice to the protested concern) before assessing whether an appeal is moot.

526 (2004); *Meredith v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987). Under these principles, OHA's *Spectrum* decision was not codified into the regulations.

Even if I were to look at the regulatory history, the OHA cases referenced therein (*Lightcom* and *Infotec*) pertain to contract-specific issues. Therefore, the holding in *Spectrum* is neither referenced in the regulatory history nor discernible in the text of the regulations. Since *Spectrum* was never codified (made the subject of a rule), OHA can overrule it. Accordingly, since the determination of what is an advisory opinion and when an issue is moot (outside of contract-specific cases) is not specified, OHA must determine when an appeal is moot.

4. Is this Appeal Moot or the Remand Order Advisory?

The requirement for a case or controversy that underlies Article III mootness typically involves a request for specific relief between two parties. Further, a plaintiff must have a personal stake in the litigation, *i.e.*, suffer or be threatened with actual injury traceable to the defendant that can be addressed by an adjudicatory decision. This doctrine anticipates that: (1) standing to sue and be sued is personal between the injured party and the party doing the injury; (2) a court adjudicates a dispute between a plaintiff and a defendant; and (3) the court will order relief to be provided by a party.

The differences between traditional litigation and appeals to OHA are manifest. The greatest difference involves standing. As noted above, a wide array of individuals and entities may protest a concern's size and, in turn, appeal a size determination by an Area Office. Included in that group is the SBA, the contracting officer, and various offerors that may or may not have a chance to benefit from the size determination or a decision upon appeal, *i.e.*, they do not have to be next in line to receive the award.

SBA is also allowed to ask itself to conduct a size determination and then appeal its own size determination to OHA. *See* 13 C.F.R. § 121.1001(a)(1) and 13 C.F.R. § 134.302. This is especially interesting, for the area offices and the program offices all report to the same Associate Administrator. Thus, conceivably, an Area Director can file a protest, be supported by an offeror, issue a decision and have that decision appealed to OHA by SBA itself. Or alternatively, a contracting officer may file a protest or appeal and be opposed by SBA or some other party. Identifying the parties and who is actually seeking relief from whom for the purposes of evaluating mootness is nearly impossible, unless we recall that the real interest in SBA's regulations is in fostering the economic interests of small businesses by maintaining the integrity of the size, size protest, size determination, and size appeal process.

This expansive list of those with standing to *protest* and *appeal* shows that even though SBA grants unsuccessful offerors the right to *protest* and *appeal*, their interests are not necessarily paramount, *i.e.*, redressing offeror's rights is not the goal of the process. Instead, SBA's expansive list of those with standing to *protest* and *appeal* is designed to foster enforcement of a concern's size in the set-aside process. The intent of SBA's regulations is to provide a form of "group policing" to preserve the small business programs, for usually the only

entity that actually knows whether a concern is small is the protested concern.[8] Hence, SBA grants a large group the right to protest and appeal size determinations because knowledge of factors relevant to size is not certain or public and because it presumes the members of the group named in 13 C.F.R. § 121.1001(a)(1) and 13 C.F.R. § 134.302 have a real interest in the integrity of the size process. Hence, correctly determining the size of challenged concerns, not providing relief to the protestor, is the paramount interest because it preserves the integrity of SBA's programs and processes.

Therefore, the law that traditionally determines when a case is moot has only a limited application to appeals before OHA. This conclusion is consistent with and strengthened by the rule that administrative agencies are not bound by traditional Article III limits for case and controversy. Thus, I hold that pursuant to 13 C.F.R. § 134.316, OHA judges have substantial discretion, outside of 13 C.F.R. § 121.1101(b), to determine when issues in an appeal are moot. In this case, the appeal is not moot given the fact that the integrity of the process trumps unsworn representations addressing the future award of options the government is not required to award.

5. The Integrity of the Process

As discussed above, SBA's regulations permit diverse parties to submit protests when they believe a concern that has represented itself as a small concern is really an other than small concern and should not benefit from a procurement set-aside for small concerns. Despite SBA's rules, there is a perception that contracting officers award set-aside contracts to other than small concerns. In reaction to this, the U.S. Senate Committee on Small Business & Entrepreneurship proposed legislation that limits the ability of contracting officers to award contracts during size protests.[9] Also, SBA recently published changes to 13 C.F.R. § 121.404 requiring concerns to re-certify their size after a five-year term and under subsequent option periods for multiple award schedule contracts. There have also been various articles discussing the award of contracts to other than small concerns, including GAO reports.[10]

As stated by SBA, FAR 19.202-5(b) provides that procuring agencies cannot count an award toward their small business goals when OHA (or SBA) has decided a concern is other than small. This is a significant issue for agencies that have difficulty in meeting their small business

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[8] The protested concern has the burden to prove its size after a protest. 13 C.F.R. § 121.1009(c).

[9] Small Business Reauthorization and Improvements Act of 2006, S. 3778, 109th Cong., 2d Session, §§ 1401-04; and *see* § 1402 requiring an annual re-certification of size.

[10] SBA Office of Inspector General, *FY 2007 Report on the Most Serious Management Challenges Facing the Small Business Administration*, Report No. 7-01 (Oct. 16, 2006) (Challenge 1: Procurement flaws allow large firms to obtain small business awards and agencies to count contracts performed by large firms towards their small business goals) at page 1.

goals as does the Department of Energy.[11] Furthermore, when an appeal is ended for mootness pursuant to *Spectrum*, OHA may be justly accused of contributing to erroneous reporting and a lack of integrity. This gives an appearance that neither OHA, nor SBA, generally care that dismissal of a case as moot denies contracting officers an opportunity to act to enhance the integrity of the procurement system, by ensuring they have a final agency size decision upon which to decide to award options. *See ALATEC* at 5.

Spectrum: (1) Permits a concern that might be other than small to continue to represent itself as small; (2) Lessens confidence in SBA's size determination process; and (3) Adds to the anecdotal reports of other than small firms receiving contracts. It also creates an appearance that contracting officers rush to award contracts to avoid reading what OHA may say. These results can either be perceived as a flaw within the system or more properly, as a flaw created by *Spectrum*. Therefore, it is proper to overrule *Spectrum* to correct these flaws.

As mentioned, the purpose of the Act is to "*foster the economic interests of small businesses; insure a competitive economic climate conducive to the development, growth and expansion of small businesses."* As I have discussed, SBA's regulations are specifically written to be compatible with the Act. Unfortunately, *Spectrum* is not compatible with the purpose of the Act.

There are several points of incompatibility between *Spectrum*, the Act, and SBA's implementing regulations. As discussed throughout, SBA wrote its regulations to enhance the integrity of the process. *Spectrum* does the opposite, for it: (1) Ends the size determination process before resolution; (2) Truncates the appeal rights of a protesting concern before resolution of the size of the protested concern; (3) Potentially permits other than small concerns from continuing to represent themselves as small; (3) Lowers the confidence of those involved in the process; (4) Ignores the intent of standing rules designed to exclude other than small firms from set-aside programs; and (5) Imposes Article III (case or controversy) mootness rules in a situation where OHA does not have the authority to grant specific relief to an appellant.

C. Conclusion

The purpose of SBA's regulations and thus OHA is to protect the integrity of the small business set-aside program. Furthermore, *Spectrum* is problematic because its mootness holding:

1. Ignores the purpose of the size, size protest, size determination, and size appeal regulations, which emphasize the integrity of the process;

2. Fails to recognize the importance of the size protest and size appeal standing regulations, *i.e.*, OHA does not adjudicate the protestor's rights, but rather whether the area office made a clear error in determining size;

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[11] S*ee generally*, GAO, *DOE Contracting: Improved Program Management Could Help Achieve Small Business Goal,* GAO-06-501, April 7, 2006 at 14-15; GAO, *Department of Energy: Achieving Small Business Prime Contracting Goals Involves Both Potential Benefits and Risks,* GAO-04-738T, May 18, 2004 at 3.

3. Treats potential offerors differently than SBA or the Contracting Officer for mootness purposes without any cogent logic;

4. Applies Article III rules of mootness to administrative adjudications that do not grant relief to a specific party;

5. Places too great of a weight on a contracting officer's stated intent to award all options;

6. Fails to give contracting officers, especially in option contracts like the present contract, an opportunity to act to enhance the integrity of the procurement system, by ensuring they have a final agency size decision upon which to decide to award options;

7. Encourages the reporting of inaccurate set-aside data or alternatively does nothing to encourage the reporting of accurate data; and

8. Pre-dates the major emphasis on awarding set-aside contracts to small businesses born out of a perception of abuse, which places an even greater emphasis on the integrity of SBA's size determination process.

Therefore, I hold this appeal is not moot, for determining the true size of USA Jet is an inherent part of SBA's and thus OHA's adjudicatory mission. Accordingly, the integrity of process and SBA's standing scheme justifies a decision by OHA.

Based upon the foregoing, *Spectrum* is OVERRULED and USA Jet's Motion to Dismiss as Moot is DENIED. Therefore, OHA did have jurisdiction to issue the Remand Order and the Area Office is ORDERED to determine the size of USA Jet pursuant to 13 C.F.R. § 121.404.

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THOMAS B. PENDER
Administrative Judge