

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

SIZE APPEAL OF:

ACCESS Systems, Inc.

Appellant

Solicitation No. USSS040042

U.S. Secret Service

Information Resources Mgmt. Division

Washington, D.C.

SBA No. SIZ-4853

Decided: June 11, 2007

ORDER DENYING PETITION FOR RECONSIDERATION

I. Introduction

On May 10, 2007, ACCESS Systems, Inc. (Appellant) filed a Petition for Reconsideration (PFR). On May 11, 2007, I issued an Order in the above-captioned case directing Appellant, no later than May 18, 2007, to show cause why its PFR should not be dismissed as untimely. On May 18, 2007, Appellant filed its Response to the Order to Show Cause. The May 11, 2007 Order provided that any response from EMW, Inc. (EMW) and any other interested party must be filed by May 25, 2007. On May 24, 2007, EMW filed a response to Appellant's Response to the Order to Show Cause.

II. Issue

Is the twenty-day regulatory deadline for filing a PFR measured from service of the decision or measured from publication of the decision by the Office of Hearings and Appeals (OHA) after being reviewed for redactions under an existing protective order?

III. Facts

1. On February 2, 2007, Appellant appealed a January 14, 2007 size determination issued by the U.S. Small Business Administration (SBA) Office of Government Contracting, Area Office II (Area Office). On February 7, 2007, Appellant's counsel moved OHA for issuance of a Protective Order covering: material Appellant had submitted to the Area Office; Appellant's Appeal Petition; Appellant's Amended Appeal Petition and accompanying exhibits; any future pleadings that refer to these materials; and the final decision in this matter, if it refers to these materials. Appellant's Motion for a Protective Order informed OHA that the release of Appellant's material would harm Appellant. On February 7, 2007, I granted Appellant's Motion for a Protective Order. On February 9, 2007, I admitted counsel for EMW under the Protective Order.

2. On April 4, 2007, OHA issued the final decision of the SBA in *Size Appeal of ACCESS Systems, Inc.*, SBA No. SIZ-4843 (2007) (*ACCESS Systems*) under the February 7, 2007 Protective Order. OHA served the decision on all parties on the same day. On the same day I issued a separate order which directed the parties to identify any recommended redactions by April 12, 2007.
3. On April 12, 2007, Appellant formally responded to the April 4, 2007 Order. Appellant indicated it had no recommended redactions. Appellant also stated its intention to file a PFR on or before April 24, 2007, pursuant to 13 C.F.R. § 134.227(c).
4. On April 20, 2007, OHA published *Size Appeal of ACCESS Systems, Inc.*, SBA No. SIZ-4843 (2007) in its entirety without any redactions.
5. On April 23, 2007, Appellant's counsel contacted OHA via email to inform OHA of its understanding of *Size Appeal of Anadarko Industries*, SBA No. SIZ-4753 (2005) (*Anadarko*) and to inquire if OHA would take a position contrary to *Anadarko*. (Appellant's email of April 23, 2007 and Appellant's Response to the Order to Show Cause, at 3.)
6. On April 23, 2007, the OHA Attorney Advisor who received Appellant's April 23, 2007 email replied at 11:18 that morning: "I apologize, but I'm not able to provide legal advice regarding the interpretation of our caselaw." (OHA email of April 23, 2007.)
7. On May 10, 2007, Appellant filed a PFR.
8. On May 11, 2007, in accordance with 13 C.F.R. § 134.227(c) which requires a PFR to be filed within 20 days after service of the written decision, I ordered Appellant to show cause, by May 18, 2007, why its PFR should not be dismissed as untimely. Appellant was instructed to address why *Anadarko* is applicable and how *Anadarko* can be reconciled with 13 C.F.R. § 134.227(c). Appellant was ordered to state when Appellant's counsel received the decision, when Appellant received the decision, and why Appellant could not have immediately received the decision since the information the Protective Order was issued to protect belonged to Appellant or was in Appellant's possession. Appellant was directed to attach copies of communications it made concerning its intent to file a PFR with OHA. The Order provided EMW until May 25, 2007 to respond to Appellant's Response to the Order to Show Cause.
9. On May 18, 2007, Appellant filed its Response to the Order to Show Cause. Appellant indicated that *ACCESS Systems* was served on April 4, 2007. Appellant's counsel also confirmed that he had inquired and had received confirmation from OHA on April 10, 2007, that he could share the unredacted decision with Appellant.
10. On May 24, 2007, EMW filed a Response to Appellant's Response to the Order to Show Cause.
11. On May 25, 2007, Appellant filed a Motion for Leave to file a reply to EMW's Response to Appellant's Response to the Order to Show Cause. On May 25, 2007, Appellant also filed its

Reply to EMW's Response to Appellant's Response to the Order to Show Cause. On May 29, 2007, I denied Appellant's request to include a Reply to EMW's Response to Appellant's Response to the Order to Show Cause in the record.

IV. Discussion

A. Arguments

1. Appellant

Appellant argues its PFR is timely filed based upon 13 C.F.R. § 134.227(c) and OHA's application of the regulation in *Anadarko*. Appellant states its PFR was "filed within 20 days after OHA's service of the redacted decision, but well after the issuance and service of the original, unredacted decision under the Protective Order." Appellant's Response to Order to Show Cause, at 4. Appellant cites to the Administrative Judge's conclusion in *Anadarko* that "the proper date from which to measure the time for filing a Reconsideration Petition 'is that of this Office's service of the redacted decision.'" Appellant's Response to the Order to Show Cause, at 4 (citing *Anadarko*, at 3).

Appellant argues that even though redactions were not recommended in this case, Appellant and Appellant's counsel still needed time to consider whether to propose redactions to the decision. Appellant states *Anadarko*'s interpretation of 13 C.F.R. § 134.227(c) allows time for this process which recognizes: "'counsel's consultations with their clients must of necessity be limited prior to the issuance of the redacted decision, and therefore any client decision to file a PFR would be based on incomplete information and less than full discussion with counsel in the absence of the published decision.'" Appellant's Response to the Order to Show Cause, at 5 (citing *Anadarko*, at 3).

Appellant argues *Anadarko*'s interpretation is reasonable, sound, and consistent with 13 C.F.R. § 134.227(c). Appellant states *Anadarko* can be reconciled with the regulation which, it alleges, does not specifically address the situation. Moreover, Appellant states the *Anadarko* ruling prejudices no one and preserves the integrity of the applicable regulation and the integrity of protective orders.

In the alternative, Appellant argues that if OHA chooses to depart from the *Anadarko* logic, such a departure should be done prospectively to protect Appellant's substantive and procedural due process rights due to Appellant's reliance on *Anadarko*. Appellant states that "the value of OHA procedural statements will be seriously diluted if litigants before it are forced to question the validity of OHA procedural precedent." Appellant's Response to the Order to Show Cause, at 6. Appellant also notes that on April 23, 2007, Appellant's counsel contacted OHA via email to inform OHA of its understanding of *Anadarko* and to guarantee "OHA would not take a position contrary to *Anadarko*." Appellant's Response to the Order to Show Cause, at 3. Appellant notes the regulation also provides OHA the authority to reconsider the decision at any time and requests OHA reconsider its decision under that authority.

2. EMW

EMW argues Appellant's PFR was untimely, Appellant failed to identify a basis for OHA to accept jurisdiction, and OHA does not have discretion to accept the late filing. EMW asserts the regulation requires a PFR to be filed within 20 days after the service of the decision and the deadline is not tolled for any reason. EMW cites numerous decisions dismissing PFRs for failing to be filed within the required 20 days established by the regulation. EMW concedes the *ACCESS Systems* decision was issued under a protective order, but notes OHA authorized Appellant's counsel to share the decision with Appellant since any potentially proprietary information belonged to Appellant. EMW asserts, based on 13 C.F.R. § 134.227(c), Appellant's PFR was due no later than April 24, 2007 and, consequently, Appellant's May 10, 2007 PFR is late.

EMW argues the facts present in this case are distinguishable from the facts in *Anadarko*: whereas *Anadarko*'s counsel was unable to discuss the unredacted decision with his client, Appellant's counsel was authorized to discuss the entire decision with Appellant and was not hindered by the protective order. EMW argues Appellant is asking OHA to ignore the regulation and to extend the deadline for a PFR from 20 days to 36 days. EMW states Appellant acknowledges it originally intended to file the PFR within 20 days as required by the regulation before Appellant read *Anadarko*.

EMW argues it has been prejudiced by Appellant's delay. EMW states all other offerors have been eliminated and Appellant and EMW are the only offerors in the competitive range. EMW asserts the government has stated the contract will not be granted until all OHA proceedings are complete, including a ruling on the PFR. Thus, EMW concludes Appellant's delayed filing is prejudicial to EMW.

B. Applicable Regulation

PFRs are controlled by 13 C.F.R. § 134.227(c). The regulation states:

(c) *Reconsideration*. Except as otherwise provided by statute, the applicable program regulations in this chapter, or this part 134, an initial or final decision of the Judge may be reconsidered. Any party may request reconsideration by filing with the Judge and serving a petition for reconsideration within 20 days after service of the written decision, upon a clear showing of an error of fact or law material to the decision. The Judge also may reconsider a decision on his or her own initiative.

13 C.F.R. § 134.204(c) defines services as follows:

Service. Service is the mailing, delivery, or facsimile to all other parties of a copy of each pleading or other submission filed with OHA.

13 C.F.R. § 134.204(c)(2) establishes the date of service as:

The date of service is as follows: for facsimile, the date the facsimile is sent; for personal delivery by the party, its employee, or its attorney, the date the document is given to the party served; for commercial delivery, the date the document is given to the delivery service; for mail, the date of mailing. The date of mailing is the date of a U.S. Postal Service postmark or any other proof of mailing. . . .

C. Analysis

1. Introduction

In its Response to the Order to Show Cause, Appellant asserts it filed its PFR “within 20 days after OHA’s service of the redacted decision, but well after the issuance and service of the original, unredacted decision under the Protective Order.” Appellant’s Response to the Order to Show Cause, at 4. Even though this statement is true, it is a distinction without difference. That is, the decision served upon Appellant’s counsel on April 4, 2007 and shared with Appellant on April 10, 2007, is the final decision in this matter. This means that Appellant took 36 days to file its PFR from the date OHA served its decision upon its counsel and 30 days to file its PFR from the date when Appellant’s counsel shared the decision with his client.

Sylogistically, Appellant’s argument is flawed.

Appellant recognizes 13 C.F.R. § 134.227(c) requires parties to request reconsideration within 20 days from service of a decision.

Appellant acknowledges OHA served Appellant’s counsel with the decision on April 4, counsel shared the decision with Appellant on April 10, and counsel requested reconsideration on May 10.

However, Appellant then ignores the major premise to make an illogical leap and assert that Appellant’s PFR is timely even though Appellant was served with the decision 36 days earlier.

In recognition of 13 C.F.R. § 134.227(c) and the facts, Appellant argues that OHA’s *Anadarko* decision permits it to file its PFR 36 days after service of the decision and 30 days after sharing the decision with its client. Appellant is mistaken.

2. The Plain Meaning of 13 C.F.R. § 134.227(c)

Parties have 20 days after service of the decision to request reconsideration. 13 C.F.R. § 134.227(c). If a party does not request reconsideration within 20 days of a decision, OHA has no authority to reconsider its opinion unless a judge decides, on his/her own initiative, to reconsider a decision. Regardless, the standard for reconsideration is that there must be a clear showing of an error of fact or law material to the decision. *Id.*

Pursuant to 13 C.F.R. § 134.227(c), the definition of service and the effective date of service becomes relevant. Based upon 13 C.F.R. § 134.204(c), service of the decision underlying the PFR occurred on April 4, 2007, when OHA telefaxed the decision to the parties.

The plain meaning of these regulations is a party has 20 days from the service of the decision to file an appeal. Strictly applied to the facts of this appeal and as Appellant originally understood, Appellant would have until April 24, 2007 to file its PFR (Fact 3).

3. The Effect of *Anadarko*

EMW asserts Appellant ignored its original interpretation of 13 C.F.R. § 134.227(c) and decided to submit its PFR based upon its interpretation of *Anadarko*. I agree and find this choice was contrary to the plain meaning of 13 C.F.R. § 134.227(c).

Appellant ignores a critical factual difference between *Anadarko* and the present case. Specifically, Appellant's counsel knew he could give, did give, and had an opportunity to discuss the *ACCESS Systems* decision with Appellant on April 10, 2007 (Fact 9).¹ Therefore, if the facts are interpreted most favorably to Appellant, the best argument Appellant can make is that it should have filed its PFR within 20 days of that date or by April 30, 2007.

I also note the record underlying the decision on the merits cited information included in a Source Selection Statement (SSS). *Size Appeal of Anadarko Industries*, SBA No. SIZ-4708, at 3 (2005); *see also Anadarko*, at 2 (noting the decision on the merits excluded proffered new evidence with the exception of the SSS). An SSS is a government document that may contain protected material applicable to all offerors and thus may be considered source selection sensitive. *See FAR* 3.104-4, 15.207, and 15.308. This means there was potential for more information in the *Anadarko* record to require protection than material sought to be protected by Anadarko Industries, LLC, in its motion for a protective order (*see* Fact 1).

While I could be sympathetic to Appellant's reliance upon *Anadarko*, I note that Appellant's original intent was to rely on the plain meaning of the applicable regulation and not to rely upon *Anadarko*. Appellant asserted 13 C.F.R. § 134.227(c) gave it 20 days from when OHA served the *ACCESS Systems* decision upon its counsel to file its motion for reconsideration (Fact 3). Accordingly, Appellant's original interpretation of 13 C.F.R. § 134.227(c) tracks the precise language of 13 C.F.R. § 134.227(c).

Parties seeking to request reconsideration under 13 C.F.R. § 134.227(c) must file their request for reconsideration within 20 days of OHA's service of that decision upon their counsel (or the party if there is no counsel). To the extent that counsel may want or need to consult with the client about the text of a decision containing material that is arguably protected from disclosure to the client, counsel must expeditiously ask OHA to: (1) Grant permission for the client to see any protected material; or (2) Issue a redacted decision. If necessary, a party may file a protective request for reconsideration and seek leave to supplement it.

¹ The Protective Order was issued to protect Appellant's own confidential and proprietary information (Fact 2).

4. Reconsideration Based Upon Judicial Initiative

I may reconsider a decision upon my own initiative. 13 C.F.R. § 134.227(c). However, PFRs, whether initiated by a party or a judge, must be considered with exceptional care. *Seldovia Native Ass'n Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996), *aff'd*, 144 F.3d 769 (Fed. Cir. 1998) (quoting *Carter v. United States*, 207 Ct. Cl. 316, 318 (1975)).

A PFR must be based upon clear error of law or mistake of fact in the underlying decision and is not intended as an opportunity to relitigate a matter. 13 C.F.R. § 134.227(c); *see Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992) (citations omitted). A PFR is only appropriate in limited circumstances, such as where OHA has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties. *See Quaker Alloy Casting Co. v. Gulfco Indust., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill. 1988) (quoting *Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A PFR “must be supported ‘by a showing of extraordinary circumstances which justify relief.’” *See Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 262 (Fed. Cir. 2000)). Reconsideration of a decision is not meant as an opportunity to recapitulate the cases and arguments previously considered in the original decision. *See Fru-Con Constr. Corp.*, 44 Fed. Cl. at 301 (quoting *Cataret Savings Bank, F.A. v. Shushan*, 721 F. Supp. 705, 706 (D.N.J. 1989)).

In consideration of the foregoing, *ACCESS Systems* is not an appropriate decision for me to reconsider on my own initiative. When confronted with the record in *ACCESS Systems*, I was charged with reviewing the appeal to evaluate if the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006) (articulating OHA’s standard of review). I concluded the record supported the Area Office’s size determination, based upon my thorough review of: (1) the facts; (2) the size determination issued by the Area Office; (3) the appeal petition; (4) the response of the protestor, EMW; (5) Appellant’s reply to the response of the protestor; and (6) the applicable law. Since the Record contained no indication that the Area Office erred in material findings of law or fact, I affirmed the Area Office’s size determination. Accordingly, I am unaware of any clear error of fact or law material to my affirmation of the size determination that supports the extraordinary measure of a judicially initiated reconsideration of the decision.

V. Conclusion

In consideration of Appellant’s failure to timely file a PFR pursuant to 13 C.F.R. § 134.227(c) and since I am convinced the Area Office’s size decision was justified under OHA’s case law and 13 C.F.R. § 121.103(h)(4), I hold that: (1) Appellant’s PFR is untimely;

(2) I cannot reconsider *ACCESS Systems* upon Appellant's untimely motion; and (3) the *ACCESS Systems* decision does not justify the exceptional action of reconsideration based upon judicial initiative.

THOMAS B. PENDER
Administrative Judge