United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Evolver, Inc. Appellant Appealed from Size Determination No. 2-2007-03 & 07	SBA No. SIZ-4854 (PFR) No. SIZ-4844 Decided: June 14, 2007

APPEARANCES

Andrew B. Golkow, Esq., Rees, Broome & Diaz, P.C., Vienna, Virginia, for Appellant.

Kenneth Dodds, Esq., Office of General Counsel, Washington, D.C., for Small Business Administration.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the decision of the Office of Hearings and Appeals in *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007) was based on a clear error of fact or law. 13 C.F.R. § 134.227(c).

III. Background

A. The First Decision

The background for this case may be found in *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007) (*Evolver I*). Briefly, on July 26, 2006, the Contracting Officer (CO) for the U.S. Army Contracting Agency, Contracting Center of Excellence in Washington, D.C. (Army) issued a Request for Proposals for educational support services at several locations in the United States and in foreign countries. On September 22, 2006, the CO issued a notice that Evolver, Inc. (Appellant) was one of three firms selected for award of the contract.

On September 28, 2006, IPLUS-MES Joint Venture (IPLUS-MES), an unsuccessful offeror, filed a size protest with the CO alleging Appellant is affiliated with its ostensible subcontractor Serco, the contract incumbent. On February 16, 2007, the Small Business Administration (SBA) Office of Government Contracting–Area II in Philadelphia, Pennsylvania (Area Office) issued Size Determination No. 2-2007-03 & 07, finding that Appellant is not a small business for the procurement. The Area Office determined that Appellant is engaged in a joint venture and is affiliated with Serco, a large concern under the applicable NAICS code, in violation of the ostensible subcontractor rule. *See* 13 C.F.R. § 121.103(h)(4).

On March 5, 2007, Appellant filed an appeal of the size determination with the Office of Hearings and Appeals (OHA). On March 28, 2007, the CO filed a statement that she had awarded the contract to Appellant on September 22, 2006, and it was her determination to allow Appellant to continue in performance through the Base Period, which ends on September 30, 2007.

On April 5, 2007, I issued my decision in *Evolver I*, and dismissed the appeal. *Evolver I* held that, under SBA's regulations, OHA will not review a formal size determination where the contract has been awarded and the issue raised in the appeal is contract-specific, specifically including cases where the issue is the ostensible subcontractor rule, citing 13 C.F.R. § 121.1101(b) (hereafter, § 1101(b)).

In addition to the case before OHA involving this solicitation, the U.S. Court of Federal Claims reviewed this solicitation as part of an offeror's motion for judgment on the administrative record. The U.S. Court of Federal Claims granted the offeror's motion for judgment on the administrative record on May 16, 2007, and ordered the Army not to exercise its options to continue the contract of Evolver, Inc., and to resolicit the contract for the provision of support services beginning after September 30, 2007. *Heritage of America, LLC v. U.S.***,** No. 07-150 C, 2007 WL 1672761 (Fed.Cl. June 8, 2007).

B. The Petition for Reconsideration

On April 25, 2007, Appellant filed the instant Petition for Reconsideration (PFR). Appellant asserts the size determination contains errors of fact and law, and that it will suffer real financial harm if the size determination is not overturned because the CO has asserted that she will recompete the contract.

On May 16, 2007, SBA requested an opportunity to respond to the appeal. I granted the request, and set May 25th as the due date for the Agency Response, with replies to the Agency Response due on June 1st, at which point the record would close.

Also on May 16th, Appellant, through counsel, filed a supplement to its PFR. Appellant asserts that it has been informed that the CO has stated she is preparing to immediately terminate the contract. Appellant further reasserts that the size determination contains serious errors of law and fact.

Appellant also asserts that § 1101(b) does not mandate dismissal. Rather, § 1101(b) incorporates the concept of mootness into the regulation. Appellant argues it does not state that OHA may never consider an ostensible subcontractor case. Appellant asserts that OHA did so in *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4765 (2006). Appellant argues that a decision will not be moot, but have real effect, as without a favorable result, Appellant's contract will be terminated.

Finally, Appellant argues reading § 1101(b) to mean that a decision based on the ostensible subcontractor rule could never be reviewed would violate Appellant's due process rights. These rights require notice and opportunity to respond. If Appellant cannot challenge a size determination which it asserts has errors of law and fact, Appellant will be denied due process rights.

C. The Agency Response

SBA argues the purpose of SBA's size regulations is to determine whether an entity is small, and thus eligible for programs and preferences reserved for small business concerns. SBA asserts a timely size protest applies to a procurement in question even though a contracting officer awarded the contract prior to receipt of the protest. SBA maintains that, when a formal size determination finds a concern other than small, an award to the concern is never valid. SBA states the CO must apply the Area Office's size determination to the procurement in question by terminating the contract, not awarding task orders beyond the guaranteed minimum or not exercising the first option.

SBA argues that § 1101(b) presumes a contracting officer receives the size determination prior to award. SBA asserts that when a contracting officer receives a negative size determination before award, he or she must either award to another firm or withhold award until the appeal is decided. Conversely, SBA states, where a contracting officer receives a determination that an awardee is other than small after award, it would be a waste of time to consider an unsuccessful offeror's appeal involving a contract-specific size determination, as the contracting officer would be under no legal obligation to take any action based on a negative decision by OHA. SBA asserts that § 1101(b) does not apply to cases where a contracting officer makes an award before a protest is filed and the awardee is found other than small in a size determination.

In support of this argument, SBA relies on the Federal Register preamble to the proposed rule, which states SBA's intention to codify OHA's mootness precedent. SBA asserts that OHA decisions received after contract award will only have future effect, and not apply to the particular procurement or sale, unless the contracting officer agrees to apply the OHA decision to that procurement. 13 C.F.R. § 121.1009(g)(3). SBA maintains the CO must take some action in this case, absent Appellant prevailing here, and because she has indicated her intent to apply the OHA decision to the procurement, OHA can accept the case under 13 C.F.R. § 121.1009(g)(3), despite § 1101(b).

D. The Reply

On June 1, 2007, IPLUS-MES replied to SBA's Response. IPLUS-MES argues that OHA's jurisdiction does not extend to reviewing the fairness of SBA's regulations, and that the clear mandate of § 1101(b) requires dismissal. IPLUS-MES also asserts SBA has reversed its position from that taken on *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007) where the Agency took a strict stand in favor of maintaining mootness precedent. IPLUS-MES insists that OHA did not err in applying the plain meaning of § 1101(b) in *Evolver I*.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant PFR within 20 days of the service of *Evolver I*, and thus filed timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a motion for reconsideration upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). This is a rigorous standard. The moving party's argument must leave the Administrative Judge with the definite and firm conviction that key findings of fact or conclusions of law of the earlier decision were mistaken.[*]

In addition to the regulatory standard, there is a relevant body of decisional law applicable to motions for reconsideration. Such motions 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)). The decision of whether to grant reconsideration lies largely within OHA's discretion. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (citations omitted).

A motion 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 OHA. 13 C.F.R. § 134.227(c); *see Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992) (citations omitted). A motion for reconsideration is appropriate only in limited circumstances, such as situations 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 movant must support the motion "'by a showing of extraordinary circumstances which justify relief.'" *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)). The movant should not be permitted to attempt a rehearing based upon evidence available at the time of the hearing. *Seldovia Native Ass'n Inc. v. United States*, 36 Fed. Cl. at 594. A movant may not merely recapitulate the cases and arguments OHA considered before rendering its original decision, or attempt a rehearing based

[*] For a discussion of the "clear error" standard, see *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006).

upon the evidence previously presented. *Fru-Con Constr. Corp.*, 44 Fed. Cl. at 301. The purpose of a motion for reconsideration is not to revisit previously considered issues or to rehash original arguments. *Id.* OHA's decision are not first drafts, subject to revision at a litigant's pleasure. *Id.* (citing *Quaker Alloy Casting Co.*, 123 F.R.D. at 288).

> The reargument of cases cannot be permitted upon the sole ground that one side or the other is dissatisfied with the conclusions reached by the court, otherwise the losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged, with no more satisfactory results, as there would still be a losing party in the end.

White Mountain Apache Tribe v. United States, 9 Cl. Ct. 32, 35 (1985) (quoting *Roche v. District of Columbia*, 18 Ct. Cl. 289, 290 (1883)).

B. The Merits of the Motion

The fact that Appellant will suffer financial harm if *Evolver I* is not reversed is irrelevant. All parties to an action will suffer harm if they fail to prevail, otherwise they would have no standing to appear. This fact cannot be the basis for a decision. The question here is whether SBA's regulations permit Appellant to appeal this particular size determination, under these particular circumstances. Assignments of error in the size determination are immaterial. The issue is whether *Evolver I* properly dismissed the appeal under § 1101(b). *Size Appeal of Greenleaf Construction Company, Inc.*, SBA No. SIZ-4765 (2006) is inapposite, as award had not been made in that case. Appellant's allegations as to new statements by the CO are undocumented hearsay, and cannot be considered. Moreover, in accordance with the ruling in the U.S. Court of Federal Claims, *Heritage of America, LLC v. U.S.***,** No. 07-150 C, 2007 WL 1672761 (Fed.Cl. June 8, 2007), Appellant is no longer eligible for this procurement. *Id.*; *cf.* 13 C.F.R. § 121.1001.

The argument by Appellant and SBA that § 1101(b) simply codifies OHA's mootness precedent is unpersuasive. The regulation does not mention mootness. Rather, the regulation specifically prohibits OHA from reviewing certain cases. As noted in *Evolver I*, OHA has recently reconsidered its mootness precedent and will no longer routinely dismiss as moot an unsuccessful offeror's appeal after contract award. *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007). However, *Size Appeal of Ross Aviation, Inc.* has no effect, and can have no effect, on § 1101(b), which is a specific regulation, identifying specific categories of cases which OHA may not consider:

> 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 non-manufacturer rule (*see* § 121.406(b)), or joint venture or ostensible subcontractor rule (*see* § 121.103(h)).

13 C.F.R. § 121.1101(b).

The regulation is direct and specific. There is no support in the text of the regulation for SBA's argument that it presumes the contracting officer receives the size determination before award is made. The regulation does not state this, and it is not always true, as must have been well known to the drafters of the regulation. Further, there is no support in the text of the regulation for SBA's argument that it does not apply to cases where a contracting officer makes award before the protest is filed and the awardee is found other than small. SBA's argument discusses several situations that are dependent upon when a contracting officer receives a size determination, but this discussion is without support in the text of the regulation. Where SBA's brief makes a distinction between the various types of situations where contract award has been made, the regulation simply does not make any such distinction. Indeed, SBA's argument is not supported by much more than mere assertion. The preamble SBA relies upon cannot be used to vary the plain text of the regulation.

While SBA argues the regulation does no more than codify OHA's mootness precedent, the text of the regulation does not use the words "moot" or "mootness." Rather, the regulation describes specific cases in which the size determination may not be appealed to OHA. This case fits the criteria of the regulation.

SBA's argument based upon 13 C.F.R. § 121.1009(g)(3) is also meritless. That section merely provides that OHA decisions made after award will not apply to the procurement unless the contracting officer agrees to apply them. This general regulation cannot be held to override the more specific requirements of § 1101(b). *See Helvering v. Winmill*, 305 U.S. 79, 83-84 (1938). Further, 13 C.F.R. § 121.1009(g)(3) is not a jurisdictional or standing regulation, but one dealing with the effect of OHA's decisions. However, if SBA believes there is error in the size determination, the agency has the discretion to reconsider the determination on its own initiative. 13 C.F.R. § 121.1009(h).

Finally, this OHA cannot consider Appellant's arguments that § 1101(b) violates Appellant's due process rights. This OHA has no jurisdiction to consider any challenge to SBA's regulations. *Size Appeal of Terra Excavating, Inc*., SBA No. SIZ-4785, at 3-4 (2006).

Thus, a review of Appellant's and SBA's arguments fails to leave me with the definite and firm conviction that my decision in *Evolver I* was based on any error of fact or law. Accordingly, I must deny Appellant's Petition for Reconsideration.

V. Conclusion

Accordingly, for the above reasons, I DENY Appellant's Petition for Reconsideration.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

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CHRISTOPHER HOLLEMAN
Administrative Judge