United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Global Solutions Network, Inc. Appellant Re: Accurate Conceptions, LLC Petition for Reconsideration of SBA No. SIZ-4881 Appealed from Size Determination No. 2-2007-111	SBA No. SIZ-4892 (PFR) No. SIZ-4881 Decided: February 12, 2008

APPEARANCE

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, P.L.C., Alexandria, Virginia, for Appellant.

DECISION

PENDER, 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 (OHA) in *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4881 (2008) was based on a clear error of fact or law. 13 C.F.R. § 134.227(c).

III. Background

A. The First Decision

On November 27, 2007, the Small Business Administration (SBA) Office of Government Contracting, Area Office II (Area Office) issued Size Determination No. 2-2007-111 finding Accurate Conceptions, LLC (ACL) a small concern under RFP No. W91QV1-06-R-0003 (RFP). The size determination was predicated upon Global Solutions Network, Inc.'s (Appellant)

allegation that ACL violated the ostensible subcontractor rule. On December 12, 2007, Appellant filed an appeal at OHA. Subsequently, the Contracting Officer (CO) informed OHA that she had awarded the contract arising from the RFP before SBA determined whether ACL was a small concern. On January 16, 2008, I dismissed the appeal. *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4881 (2008) (*Global).*

In *Global*, 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, *e.g.*, cases where the issue is the ostensible subcontractor rule, citing 13 C.F.R. § 121.1101(b).

B. The Petition for Reconsideration

On February 5, 2008, Appellant filed the instant Petition for Reconsideration (PFR). Appellant argues OHA caselaw clearly recognizes an exception to the rule at 13 C.F.R. § 121.1101(b) limiting review of ostensible subcontractor appeals. Specifically, Appellant argues in *Size of Appeal of The Analysis Group*, SBA No. SIZ-4814 (2006) (*Analysis*), OHA held that a size appeal is not moot when a contracting officer has stopped performance on an awarded contract. Appellant contends that the CO has likewise not permitted performance of the contract awarded to ACL to proceed. Accordingly, Appellant asserts OHA should not have dismissed its appeal and urges OHA to reconsider Appellant's appeal.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant PFR within 20 days of the service of *Global*, 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.[1]

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) (quoting *Carter v. United States*, 207 Ct. Cl. 316, 318 (1975)), *aff'd*, 144 F.3d 769 (Fed. Cir. 1998). The decision of whether to grant reconsideration lies largely within the adjudicatory body's discretion. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990) (citations omitted).

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

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 Industries, 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)).

B. The Merits of the PFR

The regulation governing when a formal size determination is subject to appeal provides:

> 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 specifically prohibits OHA from reviewing certain cases. In *Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840 (2007) (*Ross*), OHA held that apart from contract-specific issues specifically delineated in 13 C.F.R. § 121.1101(b), *e.g.*, the ostensible subcontractor rule, OHA will no longer routinely dismiss as moot an unsuccessful offeror's appeal after contract award. Therefore, *Ross* recognizes that the regulation clearly mandates that OHA must dismiss an appeal when the contract has been awarded and the issue raised on appeal is contract-specific.

With regard to Appellant's reliance on *Analysis*, I note the premise stated in the case is correct; however, OHA's application of the mootness doctrine was in direct contravention to 13 C.F.R. § 121.1101(b). I agree with the premise of *Analysis*, *i.e.*, a size appeal is not moot when the contracting officer has stopped performance on an awarded contract. However, my holding in *Global* dismissed the case based on the regulatory mandate of 13 C.F.R. § 121.1101(b), not because the case was moot. Accordingly, I cannot follow the reasoning and holding of *Analysis*.

Thus, a review of Appellant's arguments fails to leave me with the definite and firm conviction that my decision in *Global* 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).

THOMAS B. PENDER
Administrative Judge