United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Luke & Associates, Inc. Appellant RE: Innovative Health Applications, LLC Petition for Reconsideration of SBA No. SIZ-4981 Appealed from Size Determination Nos. 03-2008-52 & 03-2008-54	SBA No. SIZ-4993 (PFR) SBA No. SIZ-4981 Decided: September 3, 2008

ORDER DENYING PETITION FOR RECONSIDERATION[1]

I. Background

On June 23, 2008, the Small Business Administration's (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 03-2008-52 & 03-2008-54 finding Innovative Health Applications, LLC (IHA) to be a small business for a $9 million annual receipts size standard. IHA is a mentor-protégé joint venture between InoMedic, Inc. (IMI), an 8(a) firm, and Comprehensive Health Services, Inc. (CHS), an acknowledged large firm.

The Area Office found that because the procurement at issue was not an 8(a) procurement, it did not have to evaluate whether IHA met the joint venture requirements of 13 C.F.R. § 124.513(c). Instead, because IMI is a small business under the $9 million size standard, IHA qualified as small for the RFP. 13 C.F.R. § 121.103(h)(3)(iii); *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008) (*SES-Tech*).

Luke & Associates, Inc. (Appellant) appealed the size determination on July 8, 2008. Appellant argued that OHA should overturn *SES-Tech* wherein OHA held that the Area Office had no authority to review a joint venture agreement under 13 C.F.R. § 124.513 because the

[1] 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.

procurement at issue was not an 8(a) procurement. Appellant asserted that "[w]hile OHA probably feels that its interpretation [in *SES-Tech*] is correct because of the plain language of the applicable regulations, it must consider whether such interpretation is consistent with the spirit and letter of all of the related federal regulations regarding 8(a) firms." Appeal, at 7.

On August 7, 2008, I issued *Size Appeal of Luke & Associates, Inc.*, SBA No. SIZ-4981 (2008) (*Luke & Associates)*, affirming the size determination and denying Appellant's appeal. I held:

> The regulation clearly permits a mentor and 8(a) protégé firm to joint venture for any government procurement, with the only conditions being that the protégé firm qualifies as small under the applicable NAICS code for the procurement, and for 8(a) sole source procurements, the protégé has not reached the dollar limit in 13 C.F.R. § 124.519. 13 C.F.R. § 121.103(h)(3)(iii). Here, the only question properly before the Area Office was whether IMI, the protégé, was small, which it answered in the affirmative. Accordingly, the Area Office did not commit clear error in finding IHA, the joint venture, qualified as small for the RFP.

Luke & Associates, SBA No. SIZ-4981, at 5.

On August 12, 2008, Appellant filed a petition for reconsideration (PFR) of the decision. Appellant argues that IMI and CHS formed a joint venture, and thus were affiliated, before the mentor-protégé agreement was approved by the SBA. Appellant also asserts that the SBA never approved IHA's joint venture agreement and thus IHA was an ineligible offeror for the procurement.

On August 13, 2008, IHA filed its response to the PFR. IHA asserts that Appellant's "blanket assertion that executing the joint venture agreement before SBA approved the mentor-protégé agreement automatically gave rise to an affiliation between [IMI] and CHS unreasonably ignores the realities of the procurement process." Response, at 3, n.1. IHA asserts that it submitted its mentor-protégé agreement to the SBA many months before the proposal deadline and had no control over how long it would take the SBA to approve the agreement. It is thus unreasonable, IHA maintains, to argue that IMI and CHS could not take any actions towards preparing a complex proposal in the interim.

Moreover, IHA asserts the joint venture agreement does not create affiliation because size is determined as of the date the concern submits a written self-certification that it is small as part of its initial offer, 13 C.F.R. § 121.404(a), and as of IHA's offer date, November 16, 2008, SBA had approved its mentor-protégé agreement and the non-affiliation treatment rule at 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(4) applied.

Finally, IHA asserts OHA correctly determined that the joint venture agreement did not have to be approved by SBA pursuant to 13 C.F.R. § 124.513 because the procurement was a non-8(a) procurement.

II. Timeliness and Standard of Review

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

SBA's regulations provide that OHA may grant a petition for reconsideration upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(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.[2]

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).

A petition for reconsideration must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway OHA. *See* 13 C.F.R. § 134.227(c); *see Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992). A petition 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)).

A movant may not merely recapitulate the cases and arguments OHA considered before rendering its original decision, or attempt a rehearing based upon the evidence previously presented. *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 301 (1999). The purpose of a petition for reconsideration is not to revisit previously considered issues or to rehash original arguments. *Id*.

III. Merits of the PFR

Appellant's PFR does not present any clear errors of fact or law in *Luke & Associates*. Contrary to Appellant's contention, it is irrelevant whether SBA had approved the joint venture agreement between IMI and CHS. The holding of the *SES-Tech* decision is that joint ventures for non-8(a) procurements need not comply with 13 C.F.R. § 124.513. Hence, whether the SBA ever approved the joint venture agreement is immaterial.

Moreover, the date IMI and CHS executed their joint venture agreement is also

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

irrelevant[3] because SBA determines size as of the date a protested concern submits its initial offer, including price. 13 C.F.R. § 121.404(a). At the time IHA submitted its offer, SBA had approved IHA's mentor-protégé agreement and IMI and CHS were thus exempt from a finding of affiliation for their joint venture. 13 C.F.R. §§ 121.103(h)(3)(iii) and 124.520(d)(4); s*ee Size Appeal of Medical and Occupational Services Alliance*, SBA No. SIZ-4989 (2008). Thus, I do not find Appellant has presented any clear errors of law or fact in *Luke & Associates.*

IV. Conclusion

Accordingly, 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

[3] I noted and considered the execution date of the joint venture agreement and the approval date of the mentor-protégé agreement in *Luke & Associates* (Facts 2 and 3).