

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

SIZE APPEAL OF:

El Poco Enterprises, Inc.

Appellant

Petition for Reconsideration of
SBA No. SIZ-4986

Appealed from
Size Determination No. 2-2008-81

SBA No. SIZ-5001 (PFR)

SBA No. SIZ-4986

Decided: September 15, 2008

ORDER DENYING PETITION FOR RECONSIDERATION¹

I. Background

On July 2, 2008, the Small Business Administration's (SBA) Office of Government Contracting, Area II, in Philadelphia, Pennsylvania (Area Office) issued Size Determination No. 2-2008-81 (size determination) finding El Poco Enterprises, Inc. (Appellant) other than small for Solicitation No. W91CRB-08-R-0001. On July 18, 2008, Appellant appealed the size determination to the Office of Hearings and Appeals (OHA).

On August 20, 2008, in accordance with 13 C.F.R. § 121.1101(b), I dismissed Appellant's appeal. *Size Appeal of El Poco Enterprises, Inc.*, SBA No. SIZ-4986 (2008). The regulation clearly states that OHA will not review a formal size determination where the contract has been awarded and the issue raised on appeal is contract specific. *Id.* In this case, the contract was awarded and Appellant challenged the Area Office's determination that Appellant violated the ostensible subcontractor rule, a contract-specific issue. In the decision, I noted that had the Contracting Officer (CO) cancelled or terminated the award of the contract I would have considered the appeal.

On September 9, 2008, Appellant filed a petition for reconsideration (PFR) of the dismissal.

II. Timeliness and Standard of Review

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

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.

SBA's regulations provide that OHA may grant a PFR 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.

Thus, a PFR must be based upon manifest error of law or mistake of fact and is not intended to give an additional opportunity for an unsuccessful party to appeal to OHA. 13 C.F.R. § 134.227(c). A PFR 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 Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

III. Merits of the PFR

Appellant's PFR does not allege clear errors of fact or law in OHA's dismissal of Appellant's appeal as required by 13 C.F.R. § 134.227(c), but requests OHA reconsider its decision based on the CO's subsequent decision to terminate the contract. Because the CO has decided to terminate the contract, Appellant asserts 13 C.F.R. § 121.1101(b) no longer applies and requests OHA issue a decision on the merits. The crux of Appellant's PFR is a sentence in the decision in which I indicated "had the CO cancelled or terminated the award," I would have considered the appeal. *Size Appeal of El Poco Enterprises, Inc.*, SBA No. SIZ-4986, at 5 (2008).

Appellant's PFR is unsupported. The regulation specifically allows PFRs for the limited purpose of allowing OHA to correct factual or legal errors. The regulation does not allow an unsuccessful party to challenge a decision based on changed circumstances. Appellant's introduction of evidence that the contract has subsequently been terminated does not furnish a basis to sustain Appellant's PFR. A PFR is an opportunity to correct a manifest error of law or a mistake of fact; a PFR is not an opportunity to request a new decision based on events occurring after the decision was issued.

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