Cite as: *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5105 (2010) (PFR)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:

Social Impact, Inc.

Appellant

RE: QED Group, LLC

Petition for Reconsideration of
SBA No. SIZ-5090
Appealed from
Size Determination No. 2-2009-56

SBA No. SIZ-5105 (PFR)
SBA No. SIZ-5090

Decided: January 4, 2010

APPEARANCES

Patricia H. Wittie, Esq., and Kathryn E. Swisher, Esq., Oldaker Belair & Wittie, LLP, Washington, D.C., for Appellant Social Impact, Inc.

Antonio R. Franco, Esq., Kelly E. Buroker, Esq., and Ryan C. Bradel, Esq., Piliero Mazza, PLLC, Washington, D.C., for The QED Group, LLC.

ORDER DENYING PETITION FOR RECONSIDERATION

HOLLEMAN, Administrative Judge:

I. Background

A. Prior Proceedings

On July 20, 2009, after two remands in this matter, the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2009-56 (Third Size Determination) finding that The QED Group, LLC (QED) is a small business for Solicitation No. M/OAA/DCHA/OTI-07-907 (RFP) issued by the United States Agency for International Development (USAID). Specifically, the Area Office determined that QED properly excluded from its revenues amounts collected as an agent for another, and, as a result, its average annual receipts fell within the applicable size standard.

On July 30, 2009, Social Impact, Inc. (Social Impact) filed an appeal of the Third Size Determination with the SBA Office of Hearings and Appeals (OHA). Social Impact argued that the amounts QED excluded from its revenues were not amounts collected for another and should

not be excluded. Without the exclusions, QED exceeds the applicable size standard.

On November 18, 2009, OHA issued a decision in *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090 (2009), granting Social Impact's appeal, reversing the size determination, and finding QED is other than small for the USAID RFP. Upon review of the Record, OHA determined the evidence presented by QED to the Area Office failed to establish that QED acted as an agent with regard to the transactions it sought to exclude from its revenues. Because QED failed to meet its burden, the amounts it sought to exclude had to be included in its revenues. Consequently, OHA found QED to be other than small for the instant procurement.

B. Petition for Reconsideration

On December 4, 2009, QED filed the instant Petition for Reconsideration (PFR) of the decision in *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090 (2009). QED asserts that OHA should not have determined that QED is other than small for this procurement. Instead, QED argues, OHA should have remanded the case to the Area Office for a third time to allow the Area Office to gather all the information necessary to determine whether the amounts QED sought to exclude were excludable and whether QED is small for purposes of the RFP.

QED claims "OHA's Decision is replete with statements indicating the insufficiency of the information upon which the Area Office based the Third Size Determination." (PFR, at 9.) Because OHA itself found that there was not enough information to determine whether the amounts QED sought to exclude were in fact excludable, QED claims it was clear error for OHA to have determined that the amounts must be included in QED's revenues. Thus, QED contends the proper course of action was to remand the case with specific guidance as to how to authoritatively determine whether the amounts are excludable.

Furthermore, QED claims a remand is appropriate here because "(1) the application of the conference management exclusion is an issue of first impression; and (2) the information OHA identified as being relevant to the exclusion determination is of a type and scope not commonly requested by or provided to the Area Office in size determinations." (PFR, at 9.) Finally, QED asserts OHA's prior decisions in this matter indicate that a remand is appropriate when the record is not clear enough to determine whether amounts are excludable. (PFR, at 10 (citing *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028 (2009)).)

C. Social Impact's Response

On December 22, 2009, Social Impact filed its response requesting that OHA deny QED's PFR. Social Impact emphasizes that a PFR is only appropriate in limited circumstances and must be based upon clear error of law or mistake of fact. Social Impact alleges QED has failed to identify any error in OHA's decision and is merely trying to reargue its position, which is not the intended purpose of a PFR. Thus, Social Impact claims QED has not met the rigorous standard applied to a PFR and contends the PFR should be denied.

Social Impact notes that QED's PFR is based on the argument that OHA should have remanded the case rather than issuing a decision on the merits. Social Impact argues that this is

not an assertion of error on OHA's part, but rather a request that QED be given another chance to present relevant evidence. Social Impact contends that it is within OHA's discretion to remand a case, but OHA is not required to do so.

Social Impact next addresses QED's assertion that OHA did not have enough information on which to base its decision. Social Impact points out that this is contrary to QED's earlier claim that it provided the necessary documentation to the Area Office. Social Impact also disputes QED's characterization of OHA's decision, which QED claims clearly indicated that the Area Office's determination was based upon insufficient information. Instead, Social Impact argues, OHA found that QED failed to meet its burden of proving that it acted as an agent of the government because the information provided to the Area Office was merely conclusory. Social Impact concludes QED has failed to demonstrate any error in OHA's decision, QED is not entitled to a third remand, and the instant PFR should be denied.

II. Discussion

A. Jurisdiction & Standard of Review

This PFR 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. Appellant filed the instant PFR within twenty days of the service of the decision in *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5090 (2009), so it was filed timely. 13 C.F.R. § 134.227(c). Accordingly, this matter is properly before OHA for decision.

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." *Id.* This is a rigorous standard. 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 argue its case before OHA. *Size Appeal of Envtl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935 (2008) (citing 13 C.F.R. § 134.227(c); *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992)). "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." *Id.* (citing *Quaker Alloy Casting Co. v. Gulfco Indus., 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))). Thus, "[t]he 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." *Size Appeal of TKTM Corp.*, SBA No. SIZ-4905 (2008) (citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006)); *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5057 (2009).

B. Analysis

As Social Impact argues, QED has failed to meet the rigorous standard applicable to a PFR. QED's primary contention is that OHA should have remanded the case rather than deciding the case. However, as Social Impact points out, it is within OHA's discretion to determine whether to remand a case. *See* 13 C.F.R. 134.229 ("Except when the Judge reconsiders a decision or remands the case, the jurisdiction of OHA will terminate upon the issuance of a decision resolving all material issues of fact and law. . . . If the Judge remands the

case, the Judge may retain jurisdiction at his or her own discretion, and the remand order may include the terms and duration of the remand."); *Size Appeal of Lance Bailey & Assocs., Inc.*, SBA No. SIZ-4799, at 11 (2009) (PFR).

In *Lance Bailey*, OHA determined it properly decided a case rather than remanding it because further factfinding would not have cured the deficiency. Here, QED argues it would be able to cure the deficiency in its evidence if given the chance to do so. QED cites the first decision in this matter, *Size Appeal of Social Impact, Inc.*, SBA No. SIZ-5028 (2009), for the proposition that a remand is appropriate when the Record is insufficient to decide whether expenses are excludable under 13 C.F.R. § 121.104(a). Although it is true that OHA found a remand to be appropriate under the circumstances of the first (and second) appeal in this matter, the circumstances surrounding this third appeal were different. QED had already been given three chances (the original protest plus two remands) to provide the relevant evidence, and OHA had specifically explained in each of the prior decisions what QED needed to prove to succeed. It is hardly an abuse of discretion to decide a matter upon the third appeal after giving QED three separate chances to prove its case. A remand is not necessary every time a party fails to meet its burden of proof, particularly after three opportunities to do so.

QED apparently contends that it did not know what documentation to submit to the Area Office. But the regulation is clear, and OHA repeatedly explained in the prior decisions in this matter that only expenses "collected for another" are excludable. This is not a complex legal question. It is simply a matter of proving that an agency relationship existed and the amounts were collected for another. Surely QED understood after OHA explicitly explained in two remands that this was the crux of its case and that this was what it must prove to the Area Office. Nevertheless, QED failed three separate times to prove this and now seeks an additional opportunity to do so. As explained above, this is not the intended purpose of a PFR.

QED also claims it was clear error for OHA to have determined that the amounts it sought to exclude must be included in QED's revenues. This argument implies that OHA committed error in determining the amounts are not excludable or committed error in calculating QED's revenues. However, OHA did not determine that the amounts were not excludable and did not calculate QED's revenues. Instead, OHA merely found that QED failed to meet its burden of proving the revenues are excludable. It was QED's burden to prove that the amounts were excludable. Because QED failed to meet that burden, the case was decided against QED. In other words, OHA did not specifically determine that the amounts QED sought to exclude were includable. Rather, the amounts had to be included by default because QED failed to prove they were excludable.

Finally, QED attempts to expand the import of this case by arguing that it is a case of first impression, and the information OHA identified as relevant is not of the type usually provided to the Area Office in size determination cases. Admittedly, OHA has not decided a wealth of cases regarding the 13 C.F.R. § 121.104(a) exclusion and has not decided any dealing specifically with the application of the exclusion to conference management service providers. Nevertheless, OHA has decided a number of cases dealing with the exclusion in other contexts, and those cases apply with equal force to cases, such as this, involving conference management service providers. *See Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828, at 10 (2006)

(analyzing the applicability of the exclusion to payroll service providers and determining that "[t]his Office's precedent limits the exclusion of pass-through receipts only to those industries enumerated in the regulation"); *Size Appeal of Manassas Travel, Inc., et al.*, SBA No. SIZ-4737, at 4-5 (2005) (finding the exclusion did not apply when a travel agency arranged for expenses due to it from a customer to be paid directly to the travel agency's consultant because the receipts were for services rendered and were not amounts collected for another).

Thus, the fact that this case deals specifically with conference management service providers does not render it one of first impression because the exclusion applies in the same manner to each industry listed in the regulation. With regard to the relevant information to be provided to the Area Office, QED was well aware that it needed to prove an agency relationship existed between it and the government. It was not OHA's responsibility to provide QED with specific direction regarding what documentation would or would not prove that fact. Instead, it was QED's burden to provide its own documentation sufficient to prove that fact. QED failed to do so at its own peril.

QED failed to meet its burden of proof on appeal. QED's PFR takes issue with OHA's discretionary decision to decide this matter instead of remanding it for a third time based upon QED's failure. This is insufficient to meet the rigorous standard applied to a PFR. QED has failed to identify any clear error of fact or law in OHA's decision, and, accordingly, this PFR must be denied.

III. Conclusion

For the foregoing reasons, QED's Petition for Reconsideration is DENIED.

CHRISTOPHER HOLLEMAN
Administrative Judge