

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

SIZE APPEALS OF:

SETA Support Services Alliance, LLC

SBA No. SIZ-5111

and

Decided: January 22, 2010

Sigmatech, Inc.

Appellants

Re: Electronic Consulting Services, Inc.

Petition for Reconsideration of

SBA No. SIZ-5101

Appealed from

Size Determination Nos. 2-2009-94 & 95

APPEARANCES

Gary L. Rigney, Esq., for SETA Support Services Alliance, LLC.

Thomas L. McGovern III, Esq., Stephen A. Smyers, Esq., Hogan & Hartson, LLP, for  
Electronic Consulting Services, Inc.

ORDER DISMISSING PETITION FOR RECONSIDERATION

HOLLEMAN, Administrative Judge:

I. Background

A. Prior Proceedings

On September 29, 2009, the Small Business Administration (SBA) Area II Office for Government Contracting in Philadelphia, Pennsylvania (Area Office) issued a Size Determination finding Electronic Consulting Services, Inc. (ECS) to be an eligible small business for a solicitation issued by the U.S. Department of the Army, Program Executive Office for Simulation, Training and Instrumentation. Two unsuccessful offerors, SETA Support Services Alliance, LLC (SETA) and Sigmatech, Inc. (Sigmatech), filed appeals of the Size

Determination with SBA's Office of Hearings and Appeals (OHA).

On December 15, 2009, OHA issued a decision in *Size Appeals of SETA Support Servs. Alliance, LLC, et al.*, SBA No. SIZ-5101 (2009) denying the Appeal Petitions of both SETA and Sigmatech. Upon review of the Record, OHA determined that (1) the Area Office correctly relied on ECS's tax returns to calculate its average annual receipts, and (2) there was no evidence to support a finding that ECS violated the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)). Accordingly, OHA affirmed the Size Determination.

B. Petition for Reconsideration

On January 4, 2010, SETA filed the instant Petition for Reconsideration (PFR) alleging OHA made errors of fact and law in deciding that ECS did not violate the ostensible subcontractor rule. SETA first argues OHA's finding that ECS would perform project management and administrative functions is inconsistent with OHA's finding that one of ECC's subcontractors will serve as primary lead on tasks such as Agency Coordination, Financial Management, and Program Execution and Oversight. SETA also contends OHA's finding that subcontractors will serve as the primary lead on eight of twenty essential contract functions (some without any contribution from ECS) clearly demonstrates ECS's undue reliance on its subcontractors.

SETA next claims OHA's conclusion that ECS will perform the majority of the contract work is unsupported by the facts because the procurement is an indefinite delivery/indefinite quantity contract, so the precise requirements of the contract (to be requested through future task orders) are not yet known. SETA also alleges that but for the capabilities and experience of ECS's subcontractors, ECS would not be able to perform the contract requirements. Finally, SETA asserts ECS has hired subcontractors to perform the essential contract elements while reserving only administrative functions for itself, thereby creating a "canonical joint venture." SETA emphasizes that subcontractors will be performing 40% of the primary contract requirements and argues this relationship clearly violates the ostensible subcontractor rule.

C. ECS Response

On January 13, 2010, ECS filed its Motion to Dismiss or Deny Petition for Reconsideration. ECS argues OHA should dismiss SETA's PFR because the only issue SETA raises is OHA's application of the ostensible subcontractor rule, and the contract has been awarded to ECS. Pursuant to 13 C.F.R. § 121.1101(b), OHA may not review a size determination where the contract has been awarded and the issues are contract-specific.

Furthermore, ECS asserts SETA has failed to meet the high burden of proof applicable to a PFR. ECS emphasizes that a PFR is appropriate only in limited circumstances, such as where OHA has misunderstood the facts of the case. ECS purports that SETA merely attempts to reargue its position and is unable to meet this heavy burden.

## 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. SETA filed the instant PFR within twenty days of the service of the decision in *Size Appeals of SETA Support Servs. Alliance, LLC, et al.*, SBA No. SIZ-5101 (2009), so it is 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 Envntl. 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)).

### B. Analysis

The contract at issue was awarded to ECS on August 10, 2009. The Contracting Officer issued a stop work order on August 17, 2009, because both SETA and Sigmatech had filed protests with the Government Accountability Office (GAO). The GAO denied both protests on November 23, 2009, and the CO lifted the stop work order on November 24, 2009.

SBA's regulations preclude OHA from reviewing contract-specific issues, such as the ostensible subcontractor rule, after the contract at issue has been awarded. 13 C.F.R. § 121.1101(b). SETA's PFR challenges only OHA's finding that ECS did not violate the ostensible subcontractor rule. Because the contract has been awarded, the applicable regulations prohibit OHA from considering the ostensible subcontractor issue,<sup>1</sup> and OHA must dismiss it.

Furthermore, even if OHA were to consider the merits of the PFR, SETA does not allege any clear error or mistake in OHA's decision. Rather, SETA expresses disagreement with OHA's findings and asserts that they are "inconsistent" with one another and with the Record. SETA has merely used its PFR to reargue its position on the ostensible contractor issue. This does not meet the high burden applied to a PFR. SETA has failed to identify any clear error of fact or law that requires reconsideration of OHA's decision.

Thus, SETA's PFR fails on two separate grounds. OHA no longer has jurisdiction over the ostensible subcontractor issue, and SETA failed to meet the rigorous standard applicable to a PFR.

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<sup>1</sup> ECS is correct that the stop work order does not change the analysis under 13 C.F.R. § 121.1101(b). The contract has been awarded, and the PFR is based upon contract-specific issues. *See Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5068 (2009).

III. Conclusion

For the foregoing reasons, ECS's Motion to Dismiss is GRANTED, and SETA's Petition for Reconsideration is DISMISSED.

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CHRISTOPHER HOLLEMAN  
Administrative Judge