United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:

Eagle Consulting Corporation

Appellant,

Petition for Reconsideration of
SBA No. SIZ-5267
Appealed From
Size Determination No. 2-2011-77

SBA No. SIZ-5288 (PFR)
SBA No. SIZ-5267

Decided Oct. 6, 2011

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On June 16, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-77. The Area Office determined that Eagle Consulting Corporation (Petitioner), an applicant to SBA's 8(a) Business Development (BD) program, does not qualify as a small business under its primary North American Industry Classification System (NAICS) code. Specifically, the Area Office determined that Petitioner is economically dependent upon a large concern, BAE Systems, Inc. (BAE) and, therefore, shares an identity of interest with that firm. 13 C.F.R. § 121.103(f). On June 30, 2011, Petitioner appealed the size determination to the SBA Office of Hearings and Appeals (OHA).

On August 19, 2011, OHA issued its decision in *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267 (2011). OHA determined that, during the relevant period of review, Petitioner was heavily dependent upon BAE for its revenues. Therefore, OHA found no clear error in the size determination and denied the appeal.

B. Petition for Reconsideration

On September 19, 2011, Petitioner requested reconsideration of OHA's decision. Petitioner asserts OHA failed to examine its claim that it did not receive due process because the Area Office failed to file certain regulatory requirements in processing the size determination. Petitioner also contends OHA erred in excluding from the record evidence Petitioner submitted for the first time on appeal.

Petitioner reasserts that it is not controlled by BAE because BAE plays only a minor role

in the performance of a Department of State contract under which Petitioner provides consulting services to the government (as a subcontractor to BAE). Petitioner also argues that OHA's finding that Petitioner is economically dependent upon BAE is contrary to SBA regulations because the ostensible subcontractor rule provides the standards by which to determine when a subcontractor controls a prime contractor. Petitioner claims none of the factors to be considered under the ostensible subcontractor rule are present in its relationship with BAE. Petitioner also contends the Area Office should have considered Petitioner's current revenue stream in determining economic dependence, especially because Petitioner is no longer receiving any revenue from BAE. Petitioner requests that I overrule OHA's decision to uphold the size determination and seeks immediate admission to the 8(a) BD program.

II. Discussion

A. Jurisdiction and Standard of Review

A party seeking reconsideration of an OHA decision must serve the petition for reconsideration within twenty days after service of the written decision. 13 C.F.R § 134.227(c). Petitioner filed the instant petition for reconsideration within twenty days of service[1] of the decision in *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267 (2011). Accordingly, this matter is properly before OHA for decision.

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. *Size Appeal of Envtl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935, at 2 (2008). 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." *Size Appeal of KVA Electric, Inc.*, SBA No. SIZ-5057, at 2 (2009) (citations omitted). A petitioner will not prevail on a motion for reconsideration if it merely repeats arguments OHA already considered in the original decision or seeks rehearing based upon evidence previously presented. *Size Appeal of Luke & Assocs., Inc.*, SBA No. SIZ-4993, at 3 (2008).

B. Analysis

Petitioner first contends that OHA failed to consider the due process arguments presented on appeal. In its original appeal petition, Petitioner alleged the Area Office failed to provide to Petitioner a copy of the letter—sent to the Area Office from the Division of Program Certification and Eligibility (DCPE) in connection with Petitioner's (8)a BD program application—requesting the size determination. Petitioner cites 13 C.F.R. § 121.1008(a), which indicates the Area Office will provide a copy of a size protest to the challenged firm at the outset of the size determination process.

Contrary to Petitioner's contentions, the Area Office was not required to provide a copy

[1] The record reflects that although the decision was issued on August 19, 2011, Petitioner was not served with the decision until August 31, 2011.

of the letter from DCPE. What Petitioner fails to recognize is that a formal request for a size determination from DCPE is not the same as a size protest, which generally relates to a particular procurement. *Compare* 13 C.F.R. § 121.1001(a) *with* 13 C.F.R. § 121.1001(b). The regulation that applies here is 13 C.F.R. § 121.1008(b), which provides: "When SBA receives a request for a formal size determination in accord with § 121.1001(b), SBA will provide a blank copy of SBA Form 355 to the concern whose size is at issue." The Area Office properly complied with the applicable regulation, and Petitioner's complaint is meritless.

Petitioner also argued in its appeal that the Area Office did not timely process its size determination. Petitioner cites13 C.F.R. § 121.1009(a)(1), which provides: "After receipt of a protest or a request for a formal size determination, the SBA Area Office will issue a formal size determination within 15 business days, if possible." Here, contrary to this regulation, the Area Office issued its size determination over four months after it received the DCPE letter. I understand Petitioner's frustration with the tardiness of the size determination. However, I cannot conclude that this delay constituted a violation of due process. Petitioner has not pointed to any prejudice or concrete harm that it suffered as a result of the delay. Petitioner was not an 8(a) BD program participant before the delay, and it is not an 8(a) BD program participant after the delay. Accordingly I find there was no denial of due process here, and I will not reverse OHA's decision on this basis.

Petitioner next contends OHA erred in failing to consider three letters submitted with its appeal petition that related to the Area Office's finding that Petitioner was affiliated with BAE based on the newly organized concern rule, 13 C.F.R. § 121.103(g). Petitioner argues OHA should have considered these letters because it did not previously have an opportunity to respond to the Area Office's concerns regarding the newly organized concern rule. However, the OHA decision twice explains that the administrative judge did not consider the newly organized concern rule. *Eagle Consulting*, SIZ-5267, at 4, 7. The administrative judge determined that "the record amply supports the Area Office's determination that Petitioner is affiliated with BAE through economic dependence." *Id.* at 7. Therefore, the administrative judge did not address the Area Office's findings with regard to the newly organized concern rule because doing so would have had no effect on the outcome of the appeal. *Id.* (citing *Size Appeal of Keystone Ocean Servs., Inc.*, SBA No. SIZ-4712, at 7 (2005)). In other words, regardless of whether the Area Office made an error in its findings related to the newly organized concern rule, Petitioner would still be affiliated with BAE based on economic dependence. Consequently, it was not necessary to review the newly organized concern issue. Because the administrative judge did not consider the issue, there was no need to admit or consider additional evidence related to it.

Petitioner also argues that none of the factors to be considered under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), are present in its relationship with BAE. The ostensible subcontractor rule is not at issue here and has no relation to the issues presented in the size determination or in OHA's decision. The Area Office determined, and OHA affirmed, that Petitioner is economically dependent upon BAE. Thus, Petitioner was found affiliated with BAE based upon a shared identity of interest, 13 C.F.R. § 121.103(f), not based upon the ostensible subcontractor rule. Moreover, the ostensible subcontractor rule could not apply to the facts of this case. That rule can apply only to a specific procurement where the challenged firm is the prime contractor but the subcontractor is actually controlling the procurement. Here, no

particular procurement is at issue; it is Petitioner's eligibility to the 8(a) BD program that is at issue. Additionally, with regard to the Department of State procurement that Petitioner references, Petitioner, the challenged firm, is the subcontractor, not the prime contractor. Thus, Petitioner could not be found affiliated with BAE based on the ostensible subcontractor rule under the facts and circumstances of this case.

With regard to OHA's conclusion that Petitioner is economically dependent upon BAE, Petitioner reasserts that it is not controlled by BAE and submits the same arguments it offered to the Area Office and in its appeal petition. Petitioner does not challenge the fact that it derived the vast majority of its revenue from its subcontracts with BAE over the relevant period of measurement. Instead, Petitioner argues this fact does not render it economically dependent upon BAE. Unfortunately, Appellant is incorrect. As explained in OHA's decision, "OHA has held, as a matter of law, that when one concern depends upon another for 70% or more of its revenue, that concern is economically dependent on the other." *Eagle Consulting*, SIZ-5267, at 5 (citing *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007)). Under the applicable regulation, this finding of economic dependence compels the conclusion that Petitioner and BAE share an identity of interest- *i.e.*, that the firms "have identical or substantially identical business or economic interests." 13 C.F.R. § 121.103(f). Because Petitioner relies upon BAE for revenue, its interests are closely aligned with those of BAE, and BAE can, in effect, control Petitioner.

Finally, Petitioner contends the Area Office should have considered its current 2011 revenue stream in determining economic dependence. Petitioner cites *Size Appeal of C2G Ltd Co.*, SBA No. SIZ-5186 (2011) for support. Petitioner's reliance on *C2G* is misplaced. In *C2G*, the challenged firm had previously been found economically dependent upon another firm. Subsequently, the challenged firm applied for recertification on the basis that its relationship with its affiliate had ended. The Area Office denied the application for reconsideration, but OHA reversed, finding the challenged firm had shown a change in its circumstances, as required by 13 C.F.R. § 121.1010(a). Specifically, OHA recognized that the challenged firm had severed all ties with its affiliate before applying for recertification.

Here, Petitioner is not applying for reconsideration, but is applying for admission to the 8(a) BD program. The regulations governing an application for recertification are very different from those governing an 8(a) BD program application. Whereas 13 C.F.R. § 121.1010(a) requires a firm to show a significant change in the circumstances bearing on its status as a small business to be recertified, a business applying to the 8(a) BD program must prove that it is small *as of the date of its application*. 13 C.F.R. § 121.404(b). Accordingly, the Area Office was required to determine Petitioner's size based upon Petitioner's financial information for the years preceding its 8(a) BD application. Petitioner's revenue stream after that time is irrelevant because it could not change Petitioner's size as of the date of Petitioner's 8(a) BD application.[2] Petitioner

[2] Petitioner's 8(a) BD application in the record is dated May 20, 2010. DPCE requested the size determination on February 1, 2011. It appears from the record that the Area Office considered Petitioner's application to be complete in early 2011 because the Area Office included Petitioner's 2010 revenues in its size determination analysis.

is therefore incorrect that its current 2011 revenue stream should be considered in determining its size.

As I outlined above, the standard for reconsideration is high, and a petition for reconsideration should not be used as an additional chance to argue one's case to OHA. *See, e.g., Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 6 (2010) (PFR); *Size Appeals of SETA Support Servs. Alliance, LLC, et al.*, SBA No. SIZ-5111, at 3 (2010) (PFR). Petitioner does not argue here that OHA misunderstood the facts at issue. Rather, Petitioner merely restates its position that the Area Office and OHA decided the matter incorrectly. Petitioner has not made a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). Accordingly, I will not reconsider OHA's decision.

III. Conclusion

Petitioner's arguments were fully considered and rejected in the prior decision, and Petitioner has identified no compelling grounds for reversal. For these reasons, the petition for reconsideration is DENIED.

CHRISTOPHER HOLLEMAN
Administrative Judge