

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

SIZE APPEAL OF:

Goel Services, Inc., and Grunley/Goel
JVD, LLC

Appellant,

Appealed From
Size Determination No. No. 2-2011-152

SBA No. SIZ-5356

Decided: May 23, 2012

ORDER DISMISSING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On October 25, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-152. The Area Office determined that Goel Services, Inc. (Goel), is not a small business under North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$33.5 million annual receipts size standard, the size standard associated with Department of the Army Solicitation No. W912DR-11-R-0017 (RFP). The Area Office further determined that joint ventures to which Goel is a party, including Grunley/Goel Joint Venture D LLC (Grunley/Goel JV), likewise do not qualify as small businesses for procurements at the same or lower size standard.

On November 10, 2011, Goel and Grunley/Goel JV (Appellants), appealed the size determination to the SBA Office of Hearings and Appeals (OHA). SBA did not respond to the appeal or participate in any way in the proceedings, other than to submit the Area Office's case file. On March 22, 2012, OHA issued its decision in *Size Appeal of Goel Services, Inc. and Grunley/Goel Joint Venture D LLC*, SBA No. SIZ-5320 (2012) (*Goel Services I*). OHA held that once SBA's Office of Business Development has approved an 8(a) mentor-protégé joint venture, an area office lacks the authority to reexamine the size of the protégé firm. The Area Office erred in conducting a review of Goel's size at the time of contract award. Therefore, OHA granted the appeal and reversed the size determination.

B. Petition for Reconsideration

On March 29, 2012, SBA filed a Petition for Reconsideration (PFR) of *Goel Services I*. SBA argues that *Goel Services I* rested on three errors of law: it failed to properly apply the

exception to affiliation that requires that the protégé in a mentor-protégé joint venture be a small business; did not give full effect to 13 C.F.R. § 124.517(b); and confused the SBA District Office approval of a joint venture for a formal size determination. Accordingly, SBA argues that *Goel Services I* should be reconsidered and overturned.

On April 17, 2012, Appellants responded to SBA's PFR. Appellants argue OHA correctly held that the Area Office erred in examining Goel's size in a protest challenging Grunley/Goel JV's eligibility, and that SBA failed to establish any manifest error of law in *Goel Services I*.

C. The Order to Show Cause

On April 20, 2012, I issued an Order to Show Cause to SBA to show why it is eligible to request reconsideration when it had not appeared or participated in the proceedings in *Goel Services I*. I extended the close of record to May 4, 2012 to receive SBA's Response to the Order to Show Cause.

On April 30, 2012, SBA responded to the Order to Show Cause. SBA argues the definition of a party to an OHA proceeding includes the respondent. 13 C.F.R. § 134.101. A respondent includes any person or governmental agency against which a case has been brought before OHA. *Id.* SBA argues it was the respondent in *Goel Services I* and therefore is a party able to request reconsideration. The size determination was issued by the Area Office and signed by the Area Director. SBA's Office of General Counsel represents the Area Director in his official capacity. SBA filed the Area Office's case file, as required by 13 C.F.R. § 134.306(a). SBA asserts that filing a response to the appeal is not required. SBA argues that every OHA case has an appellant and respondent, and that SBA is the respondent agency in this case, and responded by filing the case file.

SBA argues that 13 C.F.R. § 134.316(e)(2) which refers to situations where SBA is not a party applies to NAICS code appeals, where SBA is not necessarily a party. SBA argues that it is always a party in size appeals. SBA further argues it has filed PFRs in the past without having previously submitted a legal response in the initial size proceeding, citing *Size Appeal of Hui O Aina, LLC*, SBA No. SIZ-5262 (2011).

SBA further argues that apart from the question of whether OHA misunderstood arguments before it or made a decision outside the issues presented by SBA, *Goel Services I* nevertheless contained significant errors of law.

On May 2, 2012, Appellants filed a Motion to Reply to SBA's Response, together with their Reply. Appellants argue a PFR is appropriate only in limited circumstances, where OHA has misunderstood a party, or has made a decision outside the adversarial issues presented. OHA could not have misunderstood SBA's arguments or made a decision outside the issues presented, because SBA did not participate in the earlier proceedings. Appellants further assert SBA is not a respondent under 13 C.F.R. § 134.101 because SBA did not participate in the initial appeal. Further, SBA's argument that it is always a respondent renders its ability to intervene under 13 C.F.R. § 134.210(a) meaningless. In addition, Appellant argues SBA errs in asserting that 13

C.F.R. § 134.316(e)(2) only applies to NAICS code appeals and has failed to establish that it is eligible to request reconsideration of OHA's decision.

II. Discussion

A. Jurisdiction, Standard of Review and Appellants' Reply

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). SBA filed the instant petition for reconsideration within twenty days of service of the decision in *Size Appeal of Goel Services, Inc. and Grunely/Goel Joint Venture D LLC*, SBA No. SIZ-5320 (2012). Accordingly, this PFR is timely. The issue here is whether SBA is a party eligible to file it.

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).

Appellants' Reply responds to arguments SBA raised in response to the Order to Show Cause. These arguments are relevant here, and I GRANT this Motion and REOPEN the Record to ADMIT Appellants' Reply into the Record.

B. Analysis

Any party to an OHA proceeding may request reconsideration of an OHA decision by filing a petition within twenty days after service of the written decision. 13 C.F.R. § 134.227(c). Here, the issue is whether SBA is a party to a size appeal once OHA's decision is issued when it has not participated in any way in the proceeding except to submit the Area Office file, as required by 13 C.F.R. § 121.306(a).

A party in an OHA proceeding is defined as either a petitioner, appellant, respondent, or intervenor. 13 C.F.R. § 121.101. Here, Grunley/Goel JV and Goel are the Appellants, there is no petitioner, and SBA failed to intervene, so it is not an intervenor. SBA argues it is a party because it is a respondent, the agency against which a case has been brought before OHA. 13 C.F.R. § 134.101. SBA's argument is that it is, in effect, a party in every size appeal.

However, the regulations do not contemplate that SBA will always be a party. The regulation provides that SBA may be an intervenor in any case until fifteen days from the close of record, or the issuance of a decision, whichever comes first. 13 C.F.R. § 134.210(a). There

would be no need to have a specific provision providing for SBA's intervention if SBA were automatically a party. To find SBA a party to every size appeal would render this regulation meaningless. This provision gives SBA the right to intervene in any case, but only within a specified time, up to fifteen days from the close of record. If SBA does not act within the fifteen days, it loses the right of intervention. The record in *Goel Services I* closed on November 30, 2011, and fifteen days after that was December 15, 2011. SBA did not take advantage of the intervention provision in the regulation, and therefore cannot claim any right of intervention under it now.

Further, the regulations contemplate that there will be size cases where SBA is not a party. The regulations, in Part 134, Subpart C, covering Rules of Practice for Size and NAICS code appeals, provide that OHA will serve a copy of all written decisions on each party or its counsel and on: SBA's General Counsel, or his or her designee, if SBA is not a party. (emphasis added). 13 C.F.R. § 134.316(c).

Contrary to SBA's assertion in its reply to the Order to Show Cause, this provision does not apply only to NAICS code appeals, but clearly applies to all Size and NAICS code appeals. The one part of that section which applies only to NAICS code appeals is 13 C.F.R. § 134.316(d), which prohibits petitions for reconsideration in NAICS code cases. The rest of the section explicitly applies to both Size and NAICS code appeals.

Even if SBA were considered a respondent, SBA failed to meet the requirement that a respondent timely file and serve its answer or response. 13 C.F.R. § 134.206(d). The result of this failure is a default, which bars the respondent from further participation in the case. *Id.* If SBA is the defaulting respondent, SBA must still submit the administrative record, as it did here in *Goel Services I. Id.* That is the limit of SBA's participation in cases where, as here, it is the respondent, and fails to timely file its response. (This has also been SBA's practice in the great majority of size appeals.) SBA's argument that its status as a respondent gives it leave to petition for reconsideration even when it did not participate in the initial size appeal is not supported by the regulation, which limits the participation of a defaulting respondent.

Thus, it is clear that, under the regulations, SBA is not necessarily a party in every size case. Rather, SBA must take the active step of intervening, no more than fifteen days after the close of record, in order to be a party in a size case.¹

Further, as I outlined above, the standard for reconsideration is high. *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5288 (2011). Here, SBA cannot assert that OHA misunderstood an SBA argument, because SBA made no argument. There is also no question of OHA having gone outside the issues presented here. The issue of whether the Area Office had the authority to examine Goel's eligibility was squarely on the table because Appellants appealed the size

¹ While it may be true that there have been SBA PFRs in the past without having previously submitted a legal response, the issue of whether the Agency had the standing to file a PFR was not raised in those cases, and they are not an excuse for contravening the regulatory mandate.

determination. SBA does not argue here that OHA misunderstood the facts at issue. Rather, SBA merely restates its position that OHA decided the matter incorrectly. Therefore, SBA's PFR cannot meet the standards for granting a PFR, because it did not participate in *Goel Services I*, and thus presented no argument which could be misunderstood.²

Accordingly, I conclude that, because SBA did not appear or participate in any way in *Goel Services I*, it is not a party eligible to seek reconsideration of the decision. Therefore, I must dismiss SBA's PFR.

III. Conclusion

SBA is not eligible to file a Petition for Reconsideration in this matter, because it was not a party to the initial proceedings. Accordingly, I must DISMISS SBA's Petition for Reconsideration. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge

² SBA argues that the importance of the issue here mandates reconsideration and reversal of *Goel Services I*. However, if SBA is not a party eligible to file a PFR, then the importance of the issue at hand cannot confer that eligibility upon it.