

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

SIZE APPEAL OF:

Sage Acquisitions, LLC

Appellant,

Petition for Reconsideration by  
Q Integrated Companies, LLC,  
of SBA No. SIZ-5726

SBA No. SIZ-5738 (PFR)

Decided: May 13, 2016

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

On July 25, 2014, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals (RFP) No. DU204SA-13-R-0005 for the management and marketing of HUD-owned properties. On November 4, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination Nos. 3-2016-010, -011, -012, -013 finding that Sage Acquisitions, LLC (Sage) is a small business for that RFP. On March 8, 2016, the Area Office issued a second size determination, No. 3-2016-036, finding that Sage is not a small business for the RFP.

On March 22, 2016, Sage appealed Size Determination No. 3-2016-036 to the SBA Office of Hearings and Appeals (OHA). On March 28, 2016, the SBA moved to dismiss the appeal based on its rescission, earlier that day, of Size Determination No. 3-2016-036. In the rescission letter, SBA dismissed the underlying size protest that led to Size Determination No. 3-2016-036, and granted appeal rights to the protester. On April 4, 2016, Sage withdrew its appeal because SBA had granted the relief Sage sought in its appeal. On April 5, 2016, OHA dismissed the appeal as moot. *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726 (2016).

On April 8, 2016, Q Integrated Companies, LLC (Petitioner) timely filed a Petition for Reconsideration (PFR) of the dismissal order in *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726 (2016). Petitioner asserts that the dismissal order “constitutes a clear error of fact or law as it did not adequately account for the interests of [Petitioner], the protester[,] [HUD,] and judicial efficiency of both OHA and the U.S. Court of Federal Claims” (Court). (PFR at 1.) Petitioner further asserts that the rescission of Size Determination No. 3-2016-036 “was a clear violation of [13 C.F.R. §] 121.1009(h) as it occurred after the deadline for appeal to OHA **and** Sage had already filed the Size Appeal.” (*Id.* at 2, emphasis in original.)

Further, in granting Sage's withdrawal without providing Petitioner or the protester an opportunity to object, Petitioner asserts, OHA committed "clear error of law" and adversely impacted Petitioner's and the protester's interests. (*Id.* at 3.) In support, Petitioner cites to OHA's decisions in *Size Appeal of Reliable Building Maintenance*, SBA No. SIZ-2616 (1987) and *NAICS Appeal of Circle Solutions, Inc.*, SBA No. NAICS-5181 (2011). (*Id.* at 2-3.) As for its interests being adversely impacted, Petitioner points to the HUD contract now being performed by Sage which, Petitioner contends, "is clearly affiliated with a large business, as the Area Office correctly concluded in the March 8 Size Determination." (*Id.* at 4.) Petitioner also complains that its bid protest at the Court "is currently stayed pending the outcome of OHA's resolution of Sage's size status" and that if OHA does not grant the PFR, further delay will "adversely impact" Petitioner's "ability to obtain complete relief" there. (*Id.*)

On April 8, 2016, Sage responded to the PFR, asserting that it "is devoid of merit and should be denied." (Response at 1.) Sage argues that after SBA granted the relief requested in the Sage's appeal, there remained no live case or controversy, and thus Sage's withdrawal of its appeal, and OHA's granting of that request, were proper. (*Id.* at 2.) There was no useful reason for Sage to continue its appeal after its requested relief had been granted. (*Id.*) Sage asserts that there is no stay at the Court and provides various papers to that effect. (*Id.* at 1.) Sage also suggests that Petitioner lacks standing here because Petitioner did not protest the award which led to Size Determination No. 3-2016-036, nor did Petitioner appeal Size Determination Nos. 3-2016-010, -011, -012, -013, which concluded that Sage was an eligible small business. (*Id.* at 4.)

On April 26, 2016, Sage supplemented its response to the PFR. Sage amplifies its earlier arguments, asserting that under OHA case law, a PFR may be granted "only in limited circumstances" and that Petitioner must show that "extraordinary circumstances justify relief." (Supp. Response at 1.)

## II. Discussion

I find no merit to this PFR.

SBA regulations prohibit OHA from adjudicating disputes that have "become moot." 13 C.F.R. § 134.316(c). As a result, OHA has routinely dismissed size appeals when the appellant chooses to withdraw its appeal. *E.g.*, *Size Appeal of Veterans Construction Services, Inc.*, SBA No. SIZ-5684 (2015); *Size Appeal of Professional Analysis, Inc.*, SBA No. SIZ-5630 (2014); *Size Appeal of INTERA Nevada, Inc.*, SBA No. SIZ-5620 (2014). Here, Sage withdrew its appeal after obtaining the relief it requested, so OHA dismissed the matter as moot. *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726 (2016). Petitioner has not demonstrated any error in this approach, let alone a "clear showing of an error of fact or law material to the decision" as is required to prevail on a PFR. 13 C.F.R. § 134.227(c).

Petitioner argues that SBA could not rescind Size Determination No. 3-2016-036 because 13 C.F.R. § 121.1009(h) precludes SBA from reopening a size determination once an appeal to OHA has been filed. As noted above, though, the rescission letter itself dismissed the protest which led to Size Determination No. 3-2016-036 and granted appeal rights to the protester. *See* Section I, *supra*. Accordingly, the appropriate mechanism for challenging the rescission was

to file a new appeal of the rescission letter, not a PFR of the mootness dismissal. The only issue presented in *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726 (2016) was whether to dismiss the appeal as moot after Sage withdrew. Petitioner has not shown any error in this decision, regardless of whether or not 13 C.F.R. § 121.1009(h) prevented SBA from rescinding Size Determination No. 3-2016-036.

The two OHA decisions relied upon by Petitioner, *Reliable* and *Circle*, are inapposite here. *Reliable* concerned a regulation — which has since been repealed — that authorized an area office to complete a size determination once begun, even if the original reason for the size determination no longer existed. *Circle* was an appeal of the North American Industry Classification System (NAICS) code assigned to a procurement. While the appeal was pending, the contracting officer changed the NAICS code initially assigned, thereby prompting argument about the new code. Neither *Reliable* nor *Circle* sheds light on whether OHA erred in dismissing the instant appeal as moot after Sage withdrew.

### III. Conclusion

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 DENY the PFR and AFFIRM the decision in *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5726 (2016).

KENNETH M. HYDE  
Administrative Judge