United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: White Hawk/Todd, A Joint Venture Appellant Re: DMS-All Star Joint Venture Petition for Reconsideration of SBA No. SIZ-4950 Appealed from Size Determination No. 6-2008-033	SBA No. SIZ-4968 (PFR) No. SIZ-4950 Decided: June 17, 2008

ORDER DENYING PETITION FOR RECONSIDERATION[1]

I. Background

On March 9, 2007, the U.S. Department of the Army, Ft. Sam Houston, Texas issued RFP No. W9124J-06-R-0031 (RFP) as a total competitive 8(a) small business set-aside.

On November 30, 2007, the Contracting Officer (CO) notified unsuccessful offerors of award to DMS-All Star Joint Venture (DMS JV), a joint venture comprised of Diversified Maintenance Systems, Inc. (DMS) and All Star Services Corporation (All Star). The SBA approved a mentor-protégé agreement between All Star (mentor) and DMS (protégé) on January 12, 2006. Their last annual review was completed June 22, 2007, when their Mentor-Protégé Agreement was approved for another year.

On December 7, 2007, White Hawk/Todd, A Joint Venture (Appellant) filed a size protest. Appellant alleged DMS and All Star were not operating as joint venturers under an approved mentor-protégé agreement at the time of proposal submission, April 27, 2007. Appellant asserted All Star violated 13 C.F.R. § 124.520(b)(2) by attempting to simultaneously act as a mentor of two protégés in direct competition with each other. Moreover, Appellant contended that DMS did not qualify as a protégé under 13 C.F.R. § 124.520(c) because (1) DMS is not in the developmental stage of 8(a) program participation; (2) DMS has received an 8(a) contract; and (3) DMS's size is more than half the size standard corresponding to its primary SIC Code. Accordingly, Appellant alleged that without a legitimate mentor-protégé relationship,

[1] This appeal 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.

DMS and All Star are affiliates and DMS JV is other than small for the instant procurement. Finally, Appellant argued that DMS JV failed to maintain a bona fide place of business in Oklahoma as required by the solicitation.

On December 28, 2007, the Small Business Administration's (SBA) Office of Government Contracting, Area VI Office (Area Office) dismissed Appellant's protest for lack of standing and specificity. After finding a lack of standing and specificity, the Area Office concluded Appellant's allegation that DMS JV did not have a legitimate mentor-protégé relationship was beyond the scope of a size protest.

On January 14, 2008, Appellant appealed the Area Office's dismissal of its size protest with the SBA Office of Hearings and Appeals (OHA) and SBA filed a response. On February 7, 2008, I issued *Size Appeal of White Hawk/Todd, A Joint Venture,* SBA No. SIZ-4888 (2008) (Remand Order), vacating the Area Office's dismissal and remanding the case to the Area Office. I found Appellant had standing to file a protest and its protest was sufficiently specific. I remanded the case to the Area Office to review Appellant's allegations that All Star did not meet the requirements of 13 C.F.R. § 124.520(b) and DMS did not qualify as a protégé because it failed to satisfy the requirements of 13 C.F.R. § 124.520(c).

On March 25, 2008, the Area Office issued a size determination upon remand finding DMS JV meets the mentor-protégé requirements of 13 C.F.R. §§ 124.520(b)(2), (c)(1) and is a small business for the instant procurement. On April 9, 2008, Appellant appealed the size determination upon remand to OHA. On May 1, 2008, I issued an order vacating the Remand Order and dismissing the appeal. *See Size Appeal of White Hawk/Todd, A Joint Venture,* SBA No. SIZ-4950 (2008) (*White Hawk II*). I held that "I should not have found the Area Office had subject matter jurisdiction over Appellant's protest allegation regarding DMS JV's compliance with SBA's mentor-protégé regulations." *Id.* at 2. Because of the lack of subject matter jurisdiction, I also held that the issue of Appellant's standing to file the protest and the protest's specificity was irrelevant.

II. Petition for Reconsideration

On May 21, 2008, Appellant filed a petition for reconsideration (PFR) of *White Hawk II*. Appellant argues that previous OHA cases (*Size Appeal of Lance Bailey and Associates, Inc.,* SBA Nos. SIZ-4788 and SIZ-4799 (2006)) have found that OHA has jurisdiction to evaluate whether the joint venture agreement between the mentor and protégé violated 13 C.F.R. § 124.513(c). Appellant argues in a factually analogous case, *Size Appeal of NSR Solutions, Inc.*, SBA No. SIZ-4859 (2007), OHA found the appellant failed to establish any error in SBA approving the mentor-protégé agreement and did not hold that OHA lacked jurisdiction over the issue. Appellant also cites other OHA decisions addressing aspects of the mentor-protégé program. Appellant also argues that evaluating compliance with the mentor-protégé regulations is entwined with evaluating whether the concerns are affiliated, an issue clearly within OHA's jurisdiction.

After arguing that OHA and the Area Office have jurisdiction to review DMS JV's compliance with the mentor-protégé regulation, Appellant then argues that the Area Office

committed clear error in its size determination on remand by finding Appellant complied with the regulations. Appellant also argues that OHA summarily dismissed its argument that the Area Office improperly evaluated the size of DMS by considering the receipts of RestoRacing, an issue outside the mentor-protégé regulation.

Finally, Appellant argues that DMS JV waived any right to challenge OHA's initial Remand Order and SBA does not have a right to challenge the Remand Order after the Area Office already issued its size determination upon remand.

III. Timeliness and Standard of Review

Appellant filed the instant PFR within 20 days of the service of *White Hawk II*, and thus filed timely. 13 C.F.R. § 134.227(c).

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. The 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.[2]

In addition to the regulatory standard, there is a relevant body of decisional law applicable to motions for reconsideration. Such motions must be considered with exceptional care. *Seldovia Native Ass'n, Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996) (quoting *Carter v. United States*, 207 Ct. Cl. 316, 318 (1975)), *aff'd*, 144 F.3d 769 (Fed. Cir. 1998). The decision of whether to grant reconsideration lies largely within the adjudicatory body's discretion. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

A petition for reconsideration must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway OHA. *See* 13 C.F.R. § 134.227(c); *see Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992). 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. *See Quaker Alloy Casting Co. v. Gulfco Industries, 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)).

A movant may not merely recapitulate the cases and arguments OHA considered before rendering its original decision, or attempt a rehearing based upon the evidence previously presented. *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 301 (1999). The purpose of a petition for reconsideration is not to revisit previously considered issues or to rehash original arguments. *Id*.

[2] For a discussion of the "clear error" standard, see *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006).

IV. Merits of the PFR

Appellant's PFR does not present any clear errors of fact or law in *White Hawk II*. The caselaw cited by Appellant in support of its position that OHA has previously found subject matter jurisdiction over compliance with the mentor-protégé regulation is distinguishable or inapposite.

In *Size Appeal of Lance Bailey and Associates, Inc.*, SBA No. SIZ-4788 (2006), OHA addressed the joint venture agreement's compliance with 13 C.F.R. § 124.513(c)(2) and not the authority to approve the joint venture's underlying mentor-protégé agreement under 13 C.F.R. § 124.520. Next, *Size Appeal of Lance Bailey and Associates, Inc.*, SBA No. SIZ-4799 (2006), was merely a denial of a petition for reconsideration of *Lance Bailey*, SBA No. SIZ-4788. In *Size Appeal of American Security Programs*, SBA No. SIZ-4797 (2006), OHA merely held that the assistance a mentor extends to its protégé under a mentor-protégé agreement cannot be used to find affiliation; the case did not address whether the mentor-protégé agreement should have been approved. Likewise *Size Appeal of Technical Support Services and Vanguard Resources Corp.*, SBA No. SIZ-4794 (2006) held that an area office is not allowed to use business relationships between a mentor and protégé occurring after SBA approves a mentor-protégé agreement to find the mentor and protégé affiliated; it did not address the appropriateness of approving the mentor-protégé agreement in the first place. In addition, *Size Appeal of TKTM Corp.*, SBA No. SIZ-4885 (2008) is inapposite as the case dealt with a Department of Defense mentor-protégé agreement, and not an SBA-approved mentor-protégé agreement.

I agree with Appellant that OHA's discussion of 13 C.F.R. § 124.520(c)(1) in *Size Appeal of NSR Solutions, Inc.*, SBA No. SIZ-4859 (2007) (*NSR Solutions*) is not in accord with my decision in *White Hawk II*. I note, however, that OHA, in *NSR Solutions*, applied 13 C.F.R. § 124.520(c)(1)[3] without squarely addressing whether OHA had jurisdiction over compliance with the regulation. This treatment of 13 C.F.R. § 124.520 is similar to my treatment of 13 C.F.R. § 124.520 in the Remand Order. However, upon having the matter squarely presented and briefed to me in the second White Hawk appeal, I issued my decision in *White Hawk II* finding OHA lacked jurisdiction to rule on issues raised by 13 C.F.R. § 124.520. Accordingly, any suggestion found in *NSR Solutions* that OHA, and thus area offices, have jurisdiction to decide a firm's compliance with 13 C.F.R. § 124.520 is expressly overruled.

I find Appellant's argument that SBA and DMS JV waived any right to challenge my Remand Order unpersuasive because OHA's lack of subject matter jurisdiction may be raised by a party, or OHA on its own initiative, at any stage of the litigation. *See* Fed. Rules Civ. Proc. 12(b)(1), (h)(3); *see also Size Appeal of McDougal Timber and Consulting*, SBA No. SIZ-3259 (1990) (holding that while OHA has not adopted the Federal Rules of Civil Procedure, "we have relied upon those rules in the past, and there is precedent for their use as a guide in our own proceedings.").

Therefore, because I have not found that Appellant has presented any clear errors of fact

[3] OHA found the requirements of 13 C.F.R. § 124.520(c)(1) to be in the disjunctive.

or law in my decision to vacate my Remand Order for lack of subject matter jurisdiction in *White Hawk II*, it is not necessary to address Appellant's arguments as to the merits of the Area Office's size determination upon remand.[4]

V. Conclusion

Accordingly, I DENY Appellant's Petition for Reconsideration.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

THOMAS B. PENDER
Administrative Judge

[4] *White Hawk II* vacated the entire size determination upon remand, including the issues independent of the mentor-protégé regulation, *i.e.*, the RestoRacing issue, an issue that was not addressed in the initial size determination and would not have been addressed upon remand but for my Remand Order.