

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

SIZE APPEAL OF:

TKTM Corporation

Appellant

Petition for Reconsideration of

SBA No. SIZ-4885

Appealed from

Size Determination No. 6-2008-022

SBA No. SIZ-4905 (PFR)

No. SIZ-4885

Decided: March 3, 2008

APPEARANCE

Manuel Arce, President, TKTM Corporation, Spokane, Washington, for Appellant.

DECISION

PENDER, Administrative Judge:

I. Jurisdiction

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.

II. Issue

Whether the decision of the Office of Hearings and Appeals in *Size Appeal of TKTM Corporation*, SBA No. SIZ-4885 (2008) was based on a clear error of fact or law. 13 C.F.R. § 134.227(c).

III. Background

On December 18, 2007, the Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2008-022 (size determination), finding TKTM Corporation (Appellant) other than small for the instant procurement due to Appellant's affiliation with its ostensible subcontractor, Garco Construction, Inc. (Garco). On December 28, 2007, Appellant filed an appeal at the SBA Office of Hearings and Appeals (OHA) seeking reversal of the size determination.

On January 31, 2008, OHA issued *Size Appeal of TKTM Corporation*, SBA No. SIZ-4885 (2008) (*TKTM*), affirming the Area Office's size determination.

On February 13, 2008, Appellant filed a letter at OHA. Appellant's letter states that it received the *TKTM* decision and "cannot accept the final decision" because (1) Appellant is a small business; (2) the Area Office's size determination was wrong because it was hastily prepared; (3) the Area Office failed to contact the "Mentor/Protégé manager"; and (4) the Area Office improperly denied Appellant's request for "transcripts of [the Contracting Officer's] conversations with Mr. Kevin Michael and Mr. John Bagaason." Appellant concludes by stating:

The contracting officer and the SBA did not make the proper efforts to obtain information. In addition they denied [Appellant's] requests for needed facts for our appeal. [Appellant] deserve[s] that the appeal be reviewed by different persons who should investigate the size determination using proper details and information and not based on appearances that are in error and damaging to our company. *Please inform us of the procedures to continue the appeal.*

February 13, 2008 Letter, at 2 (emphasis added).

On February 25, 2008, I ordered Appellant to notify OHA, no later than February 27, 2008, if its letter was a petition for reconsideration (PFR) and to correct deficiencies to comply with 13 C.F.R. § 134.227(c).

On February 25, 2008, Appellant submitted a filing stating:

As per your request and order we reiterate the statements of our letter dated February 13, 2008. The letter is a petition for reconsideration and request for the SBA to correct the deficiencies and to analyze our appeals by contacting the people that can provide true facts and information that will prove Mr. Bagaason's size determination wrong.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant PFR¹ within 20 days of the service of *TKTM*, and thus filed timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a motion 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

¹ Appellant filed a letter on February 13, 2008, which Appellant later asserted was a PFR, within the 20 day timeframe for filing a PFR. *See* Appellant's February 25, 2008 letter.

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

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) (citations omitted).

A motion 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) (citations omitted). A motion 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)).

B. The Merits of the PFR

Appellant's February 13, 2008 letter, which Appellant later confirmed was a PFR, does not set forth any errors, let alone clear errors, of fact or law in the *TKTM* decision. Instead, Appellant argues that the Area Office prepared the size determination in haste and without contacting the proper parties. However, a petition for reconsideration is not an opportunity for an appellant to re-argue the errors of the underlying size determination; instead, an appellant must set forth a clear error of fact or law in OHA's final decision.

Further, in my February 25, 2008 Order, I ordered Petitioner to not only confirm whether the letter was a PFR but to also correct deficiencies to comply with 13 C.F.R. § 134.227(c). However, in Appellant's February 25, 2008 letter, Appellant merely stated that it was "reiterat[ing] the statements of [its] letter dated February 13, 2008" and did not set forth any clear errors in the *TKTM* decision.

Thus, a review of Appellant's arguments cannot leave me with the definite and firm conviction that my decision in *TKTM* was based on any error of fact or law. Accordingly, I must deny Appellant's Petition for Reconsideration.

V. Conclusion

Accordingly, for the above reasons, 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