

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

SIZE APPEAL OF:

Malouf Group, LLC.

Appellant

Appealed from
Size Determination No. 6-2010-004

SBA No. SIZ-5102

Decided: December 15, 2009

ORDER DISMISSING APPEAL

I. Introduction and Jurisdiction

On November 4, 2009, the Small Business Administration (SBA) Office of Government Contracting, Area Office VI (Area Office) issued Size Determination No. 6-2010-004 finding Malouf Group, LLC (Appellant) to be an other than a small concern under RFP No. VA-261-09-RP-0171 (RFP). The Area Office found Appellant is affiliated with Camco Construction under the ostensible subcontractor rule and that their combined annual receipts exceed the size standard. The Area Office concluded Appellant is other than small under the \$33.5 Million size standard “for this procurement only.”

On November 19, 2009, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). The Contracting Officer (CO) informed OHA that she had awarded the contract arising from the RFP before SBA determined whether Appellant was a small concern.

OHA decides size determination appeals 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 appeal, which challenges an ostensible subcontractor determination, must be dismissed pursuant to 13 C.F.R. § 121.1101(b) because the CO has awarded the contract.

III. Discussion

OHA’s authority to decide certain issues is limited by regulation. For example, while an area office may consider an ostensible subcontractor protest submitted after a contracting officer

awards a contract, 13 C.F.R. § 121.1101(b) provides:

OHA will not review a formal size determination where the contract has been awarded and the issue(s) raised in a petition for review are contract specific, such as compliance with the nonmanufacturer rule (*see* § 121.406(b)), or joint venture or ostensible subcontractor rule (*see* § 121.103(h)).

Therefore, as OHA has held, it lacks the authority to review an appeal where the contract has been awarded and the issue is an alleged violation of the ostensible subcontractor rule. *Size Appeal of Global Solutions Network, Inc.*, SBA No. SIZ-4881 (2008); *Size Appeal of Evolver, Inc.*, SBA No. SIZ-4844 (2007). Therefore, I have no alternative but to DISMISS this appeal.

IV. Conclusion

I have considered Appellant's Petition, the applicable law and the Record. It is clear the contract has been awarded and the size determination is predicated upon violation of the ostensible subcontractor rule. Consequently, this appeal is DISMISSED pursuant to 13 C.F.R. § 121.1101(b) and the November 4, 2009 size determination issued by the Area Office remains in effect. Hence, the VA may not count award of this contract to Appellant toward fulfilling its small business goal.

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

THOMAS B. PENDER
Administrative Judge