

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

SIZE APPEAL OF:

Assurance Technology Group LLC

Appellant

Appealed from
Size Determination No. 2-2009-105

SBA No. SIZ-5104

Decided: December 23, 2009

ORDER DISMISSING APPEAL

I. Introduction and Jurisdiction

On November 19, 2009, the Small Business Administration (SBA) Office of Government Contracting, Area Office II (Area Office) issued Size Determination No. 2-2009-105 finding Assurance Technology Group LLC (Appellant) to be an other than a small concern under RFP No. FA8501-08-R-0030 (RFP). The Area Office found Appellant is affiliated with Kay and Associates, Inc., 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 \$7 Million size standard for the subject procurement.

On December 4, 2009, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). The Contracting Officer (CO) for the Air Force informed OHA that he had awarded the contract arising from the RFP to Appellant on September 15, 2009, and had issued a stop work order on September 21, 2009.

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 19, 2009 size determination issued by the Area Office remains in effect. Hence, the Air Force may not count award of this contract to Appellant toward fulfilling its small business goal unless it terminates the contract with Appellant and awards a contract to an eligible small business concern.

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

THOMAS B. PENDER
Administrative Judge