

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

SIZE APPEAL OF:

Autonomic Resources, LLC,

Appellant,

Appealed From
Size Determination No. 3-2012-083

SBA No. SIZ-5453

Decided: February 28, 2013

ORDER DISMISSING APPEAL

I. Background

On May 3, 2012, the U.S. Small Business Administration (SBA) Associate Administrator for Business Development (AA/BD) requested a formal size review of Autonomic Resources, LLC (Appellant), an 8(a) participant, for purposes of assessing Appellant's continued eligibility for the 8(a) program. Pursuant to the AA/BD's request, SBA's Office of Government Contracting -- Area III (Area Office) commenced an investigation of Appellant's size, and instructed Appellant to produce various supporting documentation.

While the review was ongoing, Appellant announced that it wished to voluntarily withdraw from the 8(a) program. In a letter to the AA/BD dated September 26, 2012, Appellant stated that it "would appreciate your taking such actions as are necessary to remove [Appellant] from the rol[l]s of the SBA 8(a) program, effective immediately." Appellant also notified the Area Office that Appellant would no longer respond to the Area Office's document requests, which Appellant perceived to be overly burdensome. The AA/BD did not rescind his request for a size determination, however, and the Area Office continued its investigation.

On December 5, 2012, the Area Office issued Size Determination No. 3-2012- 083 finding that Appellant is not a small business under the size standard associated with Appellant's primary industry. The Area Office specifically found that Appellant had not produced all required information; as a result, the Area Office applied an adverse inference that the missing material would have shown that Appellant exceeded the size standard. Appellant received the size determination on December 6, 2012. (Appeal at 3.)

In the size determination, the Area Office noted that Appellant had previously expressed its intent to withdraw from the 8(a) program. However, despite communications with 8(a) program officials, the Area Office had "not received confirmation from the 8(a) BD program office that [Appellant] has withdrawn from the 8(a) BD program." (Size Determination at 7.)

On December 6, 2012, the day after the size determination was issued, the AA/BD formally approved Appellant's withdrawal.

On December 28, 2012, Appellant asked the Area Office to retract the size determination. Appellant insisted that it had withdrawn from the 8(a) program as of September 26, 2012, and that there was "no basis or reason for [the Area Office] to [thereafter] proceed further with [its] protest investigation as [Appellant] was no longer in the 8(a) program and was no longer representing itself as being part of the program." The Area Office refused to rescind the determination, explaining that, under SBA Standard Operating Procedure 80 05, withdrawal from the 8(a) program is effective only upon approval by the AA/BD. In this case, the AA/BD did not approve Appellant's withdrawal until after the size determination had already been issued.

On January 22, 2013, Appellant filed the instant appeal -- entitled "Appeal of Unauthorized SBA 8(a) Eligibility Determination Issued Following Voluntary Withdrawal From Program" -- with the SBA Office of Hearings and Appeals (OHA). On February 8, 2013, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. OHA stated that, by regulation, a size appeal must be filed within fifteen days after receipt of the size determination. 13 C.F.R. § 134.304(a).

On February 15, 2013, Appellant responded to OHA's order. Appellant asserts that the Area Office erroneously characterized its decision as a size determination, and that the decision instead should be considered an 8(a) eligibility determination. Appellant emphasizes that the review was conducted at the request of the AA/BD solely for the purpose of assessing Appellant's eligibility to remain in the 8(a) program. Further, a key issue on appeal is whether the Area Office had authority to proceed with the investigation after September 26, 2012, when Appellant announced its intent to withdraw from the 8(a) program. Thus, Appellant reasons, this appeal is governed by the 45-day deadline for appeals of 8(a) eligibility determinations, 13 C.F.R. § 134.404, and was timely filed under that standard.

II. Analysis

The instant appeal is untimely and must be dismissed. In accordance with 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within fifteen days receipt of the size determination. Here, Appellant received the size determination on December 6, 2012. Any appeal of the size determination was therefore due by December 21, 2012. Appellant's appeal was received at OHA approximately one month later, on January 22, 2013. Accordingly, the appeal is untimely. OHA has no discretion to extend, or waive, the deadline for filing an appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A), 134.304(c); *Size Appeal of A-Top Security Co.*, SBA No. SIZ-5227 (2011).

I also reject Appellant's contention that this appeal pertains to an 8(a) eligibility matter. The determination in question was issued by an area office, not an 8(a) program office, and is clearly labeled a size determination. Further, the AA/BD requested the Area Office to review Appellant's size, not its 8(a) eligibility. SBA regulations expressly authorize the AA/BD to request such a review. 13 C.F.R. § 121.1001(b)(2)(i)(B). While it may be true that the AA/BD

could have chosen to rescind his request upon learning that Appellant planned to withdraw from the 8(a) program, the AA/BD did not do so, and did not formally approve Appellant's withdrawal until after the size determination was issued. Thus, the AA/BD's request was still outstanding, and Appellant technically was still an 8(a) participant, at the time of the size determination. Under these circumstances, it was not improper for the Area Office to have proceeded with issuing a size determination.

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge