

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

SIZE APPEAL OF:

Irvine Sensors Corporation,

Appellant,

Appealed From
Size Determination No. 6-2014-033

SBA No. SIZ-5545

Decided: April 3, 2014

ORDER DISMISSING APPEAL¹

I. Background

On February 20, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2014-033 concluding that Irvine Sensors Corporation (Appellant) is not an eligible small business under the size standard associated with SBA's Small Business Innovation Research (SBIR) program.

On March 6, 2014, Appellant requested that the Area Office reopen and reconsider the size determination under 13 C.F.R. § 121.1009(h). The Area Office denied that request on March 12, 2014.

On March 18, 2014, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Because the appeal appeared to have been filed more than fifteen days after Appellant's receipt of the size determination, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. In the order, OHA directed Appellant's attention to *Size Appeal of Columbus Technologies and Services, Inc.*, SBA No. SIZ-4831 (2007), a case in which OHA found that a request to reopen did not toll the deadline for filing an appeal of a size determination.

On March 27, 2014, Appellant responded to OHA's order. Appellant contends that the appeal challenges two distinct actions: the size determination itself, and the denial of the request to reopen the size determination. Appellant asserts that the "appeal is timely with respect to the [Area Office's] decision not to reopen the Size Determination." (Response at 1.) On this point,

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.

Appellant claims that the Area Office abused its discretion “by summarily denying a good-faith request [to reopen] with a single-sentence e-mail.” (*Id.*)

Appellant contends that the appeal of the Area Office's decision not to reopen the size determination is timely because it was filed within 15 days after the denial of Appellant's request. (*Id.* at 1-2.) Appellant asserts that OHA's decision in *Columbus Technologies* is inapposite because the size determination in that case was not manifestly erroneous, whereas the determination here contains “facially present errors of both law and regulation.” (*Id.* at 1.) Appellant insists that “[t]he governing question should be whether the [Area Office] has authority to flout both the law and SBA regulations without OHA oversight.” (*Id.* at 2.)

II. Discussion

The instant appeal is untimely and must be dismissed. Pursuant to 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within fifteen days of receipt of the size determination. 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 Autonomic Resources, LLC*, SBA No. SIZ-5453 (2013). Here, the Area Office issued the size determination on February 20, 2014, and Appellant filed the instant appeal with OHA 26 days later. In its response to the show cause order, Appellant does not attempt to argue that Appellant filed its appeal within 15 days of receipt of the size determination. Accordingly, the appeal is untimely.

Appellant contends that OHA should review the Area Office's denial of the request to reopen the size determination because the appeal was filed within 15 days after the Area Office reached that decision. This argument fails for several reasons. SBA regulations do not authorize an appeal to be filed within 15 days of a denial of a request to reopen, and Appellant offers no legal authority to support this proposition. Nor does Appellant persuasively distinguish OHA's decision in *Columbus Technologies*. In that case, OHA dismissed an appeal as untimely, notwithstanding that the challenged firm had previously filed a “Request to Reopen its Size Determination for the same reasons set forth in its appeal.” *Columbus Techs.*, SBA No. SIZ-4831, at 3. Contrary to Appellant's suggestions, *Columbus Technologies* does not indicate that the result might have been different if the size determination had been facially defective.

Appellant's assertion that it is appealing the Area Office's refusal to reopen the size determination is also flawed because OHA has recognized that an area office has essentially unfettered discretion in deciding whether or not to reopen a size determination. *Size Appeal of EASTCO Building Servs., Inc.*, SBA No. SIZ-5437, at 6 (2013). As OHA explained, the purpose of 13 C.F.R. § 121.1009(h), the regulation governing reopening, “is to ‘permit SBA to correct [an] error or mistake without requiring the filing of an appeal at OHA’ . . . [, but] not to mandate reopening of a size review if such a course of action is shown to be reasonable.” *Id.* (discussing regulatory history). Accordingly, Appellant's complaint that the Area Office unjustly refused to reopen the size determination does not constitute a valid basis for appeal.

For the above reasons, the appeal is DISMISSED 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