

TERMINATING AN AWARD IF A SIZE DETERMINATION FINDS AN AWARDEE “NOT SMALL”

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Suppose a size determination ultimately finds a contractor is “not small” but the award has already been made? (This is a distinct possibility given the timing of size protests). What can the agency do at that time? *Amaze Tech. LLC*, B-419141, Dec. 22, 2020, and the small business regulations explain the options. Termination of the contract is only one avenue. The protester in *Amaze* alleged in a supplemental protest of a task order award that the awardee, Apogee, was no longer small, and ineligible to receive the task order it had been awarded. However, the Government Accountability Office (“GAO”) in its decision dismissed this protest ground (and denied other grounds) because of the following section of the small business regulations.

(g) *Results of an SBA Size Determination.*

(1) A contracting officer may award a [contract](#) to a protested concern after the SBA Area Office has determined either that the protested concern is an eligible small business or has dismissed all protests against it. If OHA subsequently overturns the Area Office's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award a [contract](#) to a protested concern that the Area Office has determined is not an eligible small business for the procurement in question.

(i) If a contracting officer receives such a determination after [contract](#) award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after [contract](#) award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the size determination finding the protested concern ineligible, the contracting officer shall either terminate the [contract](#) or not exercise the next option.

13 CFR § 121.1009(g).

The regulation states that when an agency receives *after award* a size determination that the awardee is not an eligible small business, and no appeal is made to the Small Business Administration (“SBA”) Office of Hearings & Appeals (“OHA”), then the agency must terminate the award. However, if a timely OHA appeal is filed and OHA affirms the size determination finding the awardee ineligible, the agency must either “terminate the contract or not exercise the next option.”

After the agency had issued the task order to Apogee, the SBA area office found it not small. But Apogee timely appealed to OHA, which affirmed the area office size determination. By doing this, the regulations permitted the agency to do one of two things:

- Terminate the task order issued to Apogee or
- Continue with Apogee’s performance, but not issue the next option on the task order.

In this case, the agency chose not to terminate the contract, which was an action explicitly allowed under the regulations (though the agency couldn't issue the next option).

Takeaway: If a contractor receives an award, but is found to be "not small" the contractor may appeal to OHA (assuming it has grounds for such an appeal). Even if OHA affirms the size determination finding the contractor "not small," the agency may elect not to terminate the contract but would be prohibited from exercising the next option.

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