United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
RX Technology Corporation	SBA No. SIZ-4998
Appellant	Decided: September 12, 2008
Appealed from Size Determination No. 4-2008-45	

APPEARANCES

Timothy Davis, Esq., General Counsel, RX Technology Corporation.

Randy A. Wise, President, Century Label, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

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.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On March 21, 2008, the U.S. Department of Veterans Affairs issued the subject solicitation (RFP No. VA-707-08-RP-0041) for pharmacy laser labels. The Contracting Officer (CO) set the procurement totally aside for small business and designated North American Industry Classification System (NAICS) code 322222, Coated and Laminated Paper Manufacturing, with a corresponding 500 employee size standard, as the appropriate NAICS

code. Offers were due on April 14, 2008.

On May 28, 2008, the CO issued a notice that RX Technology Corporation (Appellant) was the apparent successful offeror. On June 1, 2008, Century Label, Inc. (Century) filed a protest alleging that Appellant was not a small business concern. On June 11, 2008 the Small Business Administration (SBA) Office of Government Contracting - Area IV in Chicago, Illinois (Area Office) notified Appellant of the protest and requested Appellant respond to the protest and submit a completed SBA Form 355, together with certain other information.

On June 23, 2008, Cenveo, Inc. (Cenveo), Appellant's self-described "ultimate parent," filed a response on Appellant's behalf. Appellant asserted Century lacked standing to file a size protest because Century did not have the capacity or expertise to perform the contract.

Appellant's Form 355 lists Cenveo as its 100 percent shareholder. Appellant's Form 355 also lists some 60 affiliates for Cenveo, including Appellant, with a total number of employees far in excess of 500.

B. The Size Determination

On July 14, 2008, the Area Office issued a size determination finding Appellant other than small. The Area Office noted that Appellant is owned and controlled by Cenveo. The Area Office quoted from Cenveo's 2007 Annual Report, which stated that Cenveo was one of the largest diversified printing companies in North America. The Area Office noted that Cenveo's 2007 Form 10-K, filed with the Securities and Exchange Commission, listed 59 subsidiaries, including Appellant, and 10,700 employees. While the number of employees reported on Appellant's Form 355 was different, the Area Office found both figures exceeded 500 employees.

After reviewing the record the Area Office found Appellant was other than small. On July 16, 2008, Appellant received the size determination. On July 30, 2008, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA).

C. The Appeal

Appellant first argues that Century lacked standing to protest Appellant's size. Appellant asserts there is nothing in the record demonstrating that Century is small under the 500 employee size standard. Appellant also incorporates by reference the assertion made in its response to the protest that Century cannot perform the contract.

Second, Appellant asserts that this procurement is technically difficult to perform and the requirement has grown dramatically in recent years. Appellant contends only it has the unique capability to perform the contract. Appellant proffers new evidence to support its assertions.

Third, Appellant asserts that any other awardee would face patent infringement litigation from ABP Patent Holdings, Inc., while Appellant has successfully defended against this firm.

Fourth, Appellant asserts the size determination failed to note that it has less than 200 employees. Appellant also maintains that it files its own tax returns and its managers make all day-to-day decisions. Appellant further asserts all submissions in response to the solicitation and all negotiations were conducted by its own employees.

Appellant argues that SBA regulations do not mandate SBA to determine size based on the number of employees of Appellant's "indirect affiliates" (Appellant's phrasing). Appellant further asserts that its affiliation with Cenveo can and should be waived under 13 C.F.R. §§ 121.406, 121.1203, 121.1204, and that it would be a triumph of form over substance to find Appellant other than small when a waiver is available.

D. Response

On August 14, 2008, Century filed a response to the appeal. Century asserts it is a small business with standing to protest. Century discusses Appellant's allegations concerning potential patent litigation, and questions the uniqueness of Appellant's technology.

On August 25, 2008, Appellant requested leave to reply to Century's response. It did not attach the proposed reply.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

B. Threshold Matters

Appellant proffers evidence not presented to the Area Office without moving for its admission, which is not permitted by the regulation. 13 C.F.R. § 134.308(a). Further, the evidence addresses issues not relevant to the issues in this appeal. Therefore, I EXCLUDE Appellant's Exhibits 8 and 9.

A reply to a response is not permitted unless the Judge otherwise directs. 13 C.F.R. § 134.309(d). Appellant's motion to reply to Century's response came after the close of record. In addition, Century's response merely reasserts its claim of standing, and discusses the irrelevant issues of Appellant's technology and possible patent litigation over this contract. There is simply not much substance in Century's response to reply to. Accordingly, I conclude

that I need hear nothing further on the issues raised in Century's response, and I DENY Appellant's motion to reply to Century's response.

I also hold that Century has standing to file a size protest in this case, and thus deny Appellant's implied motion to dismiss on that basis. Any offeror whom the CO has not eliminated for reasons unrelated to size may file a size protest. 13 C.F.R. § 121.1001(a)(1)(i). The regulation confers standing even upon offerors who have been eliminated from consideration for reasons related to size. *See Size Appeal of Global McKissack Partners, LLC*, SBA No. SIZ-4807 (2006).

Accordingly, Appellant's assertions that Century might be other than small are irrelevant to the issue of standing. Appellant's assertions that Century could not perform the contract are also irrelevant to the issue of Century's standing in the absence of a determination by the CO eliminating Century from consideration for that reason. Century clearly had standing to protest Appellant's size status.

C. The Merits

In determining a concern's size, SBA aggregates the employees (or receipts) of the challenged firm and all of its domestic and foreign affiliates. 13 C.F.R. § 121.103(a)(6). Affiliation exists when one concern controls or has the power to control another, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). SBA considers factors such as ownership and management in determining whether affiliation exists. 13 C.F.R. § 121.103(a)(2). Concerns are affiliated when one owns or has the power to control 50 percent or more of the other concern's voting stock. 13 C.F.R. § 121.103(c)(1).

There is no more well established or unquestioned point of law in OHA's case law than that which states that when one corporation owns 100 percent of another's stock, the two firms are affiliated. *See, e.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4867 (2007). Further, the concept of "indirect affiliation" is unknown in SBA's size regulations or OHA case law. Concerns are either affiliated, and must be aggregated to determine size, or they are not. *See Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008).

There is thus no question that Appellant and Cenveo are affiliates, and Cenveo's employees must be added to Appellant's to determine whether Appellant is a small business. Further, all of Cenveo's affiliates are Appellant's affiliates as well. Appellant's contentions to the contrary are without merit, bordering on the frivolous. Similarly, Appellant's contention that the regulations do not require a finding of affiliation in this case, but leave a measure of discretion, when in fact they clearly mandate such a finding, is a misreading so great as to raise questions of competence or bad faith.

The fact Appellant itself meets the size standard is irrelevant. The regulations are designed to deal with a concern which, while it may itself be small, is affiliated with other concerns such that it is part of an overall enterprise which is other than small. OHA case law is replete with firms which were themselves within the applicable size standard, but were found to be other than small when aggregated with their affiliates. *See, e.g., Size Appeal of McLane*

Advanced Technologies, Inc., SBA No. SIZ-4746 (2005).

Appellant's contentions concerning contract performance and possible patent litigation over the contract are irrelevant here. These are questions for the CO or the contract protest process. The only issue here is whether the Area Office erred in finding Appellant affiliated with Cenveo, and thus other than small. The Area Office clearly did not err.

Appellant's argument that it is entitled to a waiver of the size regulations reveals a complete misunderstanding of the waiver process, which is inapplicable in this situation. Without going into a detailed discussion, I will merely note that waivers are granted by SBA's Director of the Office of Government Contracting, not by the Area Office or OHA, and are thus not obtainable through the size determination or size appeal process. 13 C.F.R. §§ 121.1203, 121.1204.

In conclusion, there is no question that Appellant is a wholly owned affiliate of Cenveo, a large business, and is thus other than small. The Area Office made no error of law or fact in its size determination, and I must affirm it.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

_____

CHRISTOPHER HOLLEMAN
Administrative Judge