

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

SIZE APPEAL OF:

Emerald BioStructures, Inc.,

Appellant,

Appealed From
Size Determination No. 6-2011-042

SBA No. SIZ-5221

Decided: March 29, 2011

APPEARANCES

Lance Stewart, Chief Executive Officer, Emerald BioStructures, Inc., Bainbridge Island, Washington

DECISION

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

Did the Small Business Administration Office of Government Contracting commit a clear error of fact or law in determining that a business concern with multiple levels of corporate ownership is ineligible for the Small Business Innovation Research (SBIR) program? 13 C.F.R. § 134.314.

III. Background

A. The Size Determination

On February 1, 2011, the Department of Health and Human Services, National Institutes of Health, National Institute of Mental Health (NIMH) requested that the Small Business Administration (SBA) Office of Government Contracting - Area VI (Area Office) perform a size determination on Emerald Bio Structures, Inc. (Appellant). Appellant had a pending grant application with NIMH under the Small Business Innovation Research (SBIR) program.

On February 22, 2011, the Area Office issued Size Determination No. 6-2011-042 finding Appellant ineligible for award of an SBIR program grant. The Area Office observed that, by regulation, an SBIR participant must be at least 51% owned and controlled by one or more individuals who are United States citizens or permanent residents, or at least 51% owned and

controlled by a concern which is itself at least 51% owned and controlled by individuals who are United States citizens or permanent residents. 13 C.F.R. § 121.702. Because Appellant is owned by a corporation which itself is owned by another corporation, the Area Office concluded that Appellant “does not meet the regulatory requirements for [SBIR] eligibility.” Size Determination at 2.

B. The Appeal

On March 3, 2011, Appellant submitted the instant appeal. The appeal was filed within 15 days of Appellant's receipt of the size determination, and therefore is timely. 13 C.F.R. § 134.304(a).

In its appeal, Appellant acknowledges that it is 100% owned by Emerald Bio Structures Holdings, Inc., which in turn is 100% owned by Berylium, LLC. Appeal at Exhibit 2. Berylium, LLC is owned by several other entities and individuals. Appellant maintains, however, that United States citizens and permanent residents collectively own 79.02% of Berylium LLC. Appeal at Exhibit 3.

Appellant alleges that the Area Office construed the SBIR eligibility requirements in 13 C.F.R. § 121.702 too narrowly. In Appellant's view, the purpose of the regulation is not to prohibit multiple layers of corporate ownership, but ensure that ultimate ownership of an SBIR concern rests with United States citizens or permanent residents. Because Berylium, LLC ultimately owns Appellant, and United States citizens purportedly own a large majority of Berylium, LLC, Appellant reasons that it should be deemed to meet the SBIR eligibility requirements.

IV. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. Consequently, OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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. Analysis

I find no error with the Area Office's conclusion that Appellant is ineligible for the SBIR program.

The applicable regulation provides that, in order to be eligible for an SBIR award, a business concern must have no more than 500 employees and be: (1) a concern which is at least 51% owned and controlled by individuals who are United States citizens or permanent resident aliens; or (2) a concern which is at least 51% owned and controlled by another business concern

which in turn is at least 51% owned and controlled by individuals who are United States citizens or permanent resident aliens; or (3) a joint venture in which each entity meets the requirement of either (1) or (2). 13 C.F.R. § 121.702(a)(1). In this case, Appellant, by its own admission, does not qualify under the plain language of the SBIR regulation. Specifically, Appellant is 100% owned by Emerald BioStructures Holdings, Inc., which is itself 100% owned by Beryllium, LLC. The regulation does not allow an SBIR concern to have multiple layers of corporate ownership.

OHA previously considered this exact issue in *Size Appeal of Genex Technologies, Inc.*, SBA No. SIZ-4789 (2006), and concluded that “Appellant is a corporation, owned by another corporation, which corporation is in turn [predominantly] owned by another corporation. The regulation does not permit a concern to have two levels of corporate ownership and remain an eligible SBIR concern.” *Genex* at 3. OHA went on to state that: “Appellant has chosen a different form of corporate organization than that permitted by the regulation.” *Id.* at 4. In light of *Genex* and the plain language of 13 C.F.R. § 121.702, the Area Office did not err in concluding that Appellant is ineligible for the SBIR program.

Appellant also postulates that, in drafting 13 C.F.R. § 121.702, SBA intended to permit flexibility in the corporate structure of SBIR concerns, so long as final ownership rests primarily with United States citizens. A review of the regulatory history reveals the fallacy of this argument. Prior to 2004, SBA's regulations required that at least 51 percent of an SBIR concern be directly owned and controlled by natural persons who were either citizens or permanent residents of the United States. *E.g.*, *Size Appeal of Aspect Medical Systems, Inc.*, SBA No. SIZ-4567 (2003). Under this approach, corporate ownership of an SBIR concern was not allowable at all. SBA recognized, however, that an “anomalous situation” was arising whereby “if [an] eligible concern has a wholly owned subsidiary, the rule precludes the subsidiary from being eligible for SBIR funding.” 68 Fed. Reg. 33,412, 33,412-13 (June 4, 2003). SBA therefore relaxed the rule to permit some degree of corporate ownership of SBIR concerns. In so doing, SBA indicated that that it intended to limit SBIR eligibility to the specific situations described in regulation. 69 Fed. Reg. 70,180, 70,181 (Dec. 3, 2004). In addition, SBA expressed concern that allowing more elaborate corporate ownership structures would pose a reporting hardship for SBIR applicants, and potentially make it more difficult for SBIR officials to verify that an awardee was an eligible small business. 68 Fed. Reg. 33,412, 33,416 (June 4, 2003). Thus, contrary to Appellant's arguments, it appears that SBA actually intended to limit corporate ownership of SBIR concerns to the specific circumstances described in regulation.

V. Conclusion

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

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

KENNETH M. HYDE
Administrative Judge