

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

SIZE APPEAL OF:

Cambridge International Systems, Inc.,

Appellant,

RE: Rome Research Corporation

Appealed From

Size Determination No. 1-SD-2013-42

SBA No. SIZ-5516

Decided: November 21, 2013

APPEARANCES

William A. Shook, Esq., Washington, D.C., for Cambridge International Systems, Inc.

Shlomo D. Katz, Esq., Brown Rudnick LLP, Washington, D.C., for Rome Research Corporation

DECISION¹

I. Introduction and Jurisdiction

On July 12, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2013-42, concluding that Rome Research Corporation is an eligible small business.

Cambridge International Systems, Inc., contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is not a small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within

¹ This Decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the Decision, counsel for Rome Research Corporation informed OHA it had no requested redactions. Therefore, I now issue the entire Decision for public release.

fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On March 13, 2013, the Department of the Navy, NAVSUP Fleet Logistics Center, Philadelphia Contracting Department, issued Solicitation No. N00189-13-R-Z033 for Operations and Maintenance of the Naval Communications Facility at Aguada, Puerto Rico. The Contracting Officer (CO) set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 517110, Wired Telecommunications Carriers, which has a size standard of 1,500 employees. Rome Research Corporation (RRC) submitted its offer on April 15, 2013.

On May 22, 2013, the CO informed offerors that RRC would be awarded the contract. On May 27, 2013, Cambridge International Systems, Inc. (Appellant), an unsuccessful offeror, filed a size protest with the CO. Appellant alleged that RRC is not a small business because it is owned by PAR Technology Corporation (PAR Technology) and, when combined with its sister companies and other affiliates, exceeds the size standard. Based on Dun & Bradstreet (D&B) Reports and public SEC filings, Appellant also alleged RRC is affiliated with publicly-traded Furmanite Corporation (Furmanite), Veramark Technology, Inc. (Veramark), and Vicor Corporation (Vicor) through common members of their boards of directors. The CO referred the protest to the Area Office for a size determination.

B. Size Determination

On July 12, 2013, the Area Office issued Size Determination No. 1-SD-2013-42, concluding that RRC is an eligible small business.

RRC's completed SBA Form 355 and accompanying documents state it is wholly-owned by PAR Government Systems Corp., which in turn is wholly-owned by PAR Technology, a publicly-traded company. RRC's other "PAR" affiliates are: Ausable Solutions, Inc.; PAR Canada, ULC (formerly PixelPoint, LLC); PAR Logistics Management Systems; ParTech, Inc.; PAR Microsystems, S.A.; PAR Springer-Miller Systems, LLC; Springer-Miller International, LLC; Springer-Miller Canada, ULC; PAR Tech (Shanghai) Company, Ltd.; PAR Technology Australia Pty Ltd; PAR Springer-Miller Systems Private Ltd.; and Par-Siva Corporation. Three other admitted affiliates of RRC are: J.W. Sammon Corp., Sammon Family LP, and Sammon and Sammon, LLC (the Sammon affiliates). The combined employee counts for RRC, its 14 PAR affiliates, and its three Sammon affiliates do not exceed the 1,500 employee size standard.

PAR Technology's By-Laws provide that a simple majority of its directors constitutes a quorum to transact business, and that a simple majority of directors present is required for action. (By-Laws, Art. III § 8.) As of April 15, 2013, when RRC submitted its offer, PAR Technology has five directors, who are: Sangwoo Ahn, Kevin R. Jost, and James A. Simms, Ronald J. Casciano, and John W. Sammon, Jr. (SBA Form 355, Addenda at 9.)

The By-Laws provides for Committees of the Board, including an Executive Committee, an Audit Committee, and others as the Board may determine. (By-Laws, Art. IV.) Between Board meetings, the Executive Committee “may exercise all the power of the Board” in all cases where “specific directions shall not have been given by the Board.” (By-Laws, Art. IV § 1.) The Audit Committee has duties relating to the independent accountants and auditing. (By-Laws, Art. IV § 2.) At any time, by majority vote, the Board “shall have power ... to change the members of, to fill vacancies in, and to discharge any committee of the Board.” (By-Laws, Art. IV § 5.) Further, by majority vote of the Board, any committee member “may be removed at any time, either with or without cause.” (*Id.*)

On March 25, 2013, PAR Technology's Board amended the By-Laws to separate the Chairman of the Board from the office of Chief Executive Officer (CEO), and elected Director Ahn as non-executive Chairman of the Board. (PAR Technology Proxy Statement at 6.) This action enables the CEO to focus more closely on the day to day operations, while the task of providing leadership of the Board will be the focus of the Chairman. (*Id.*) Particularly, the Board believes the election of a non-executive Chairman enables the leader of the Company's Board to better represent shareholder interests and provide independent evaluation of and oversight over management. (*Id.*)

On PAR Technology's Board, Messrs. Ahn, Jost, and Simms are independent non-management directors under New York Stock Exchange (NYSE) listing standards (independent directors). (SBA Form 355, Addenda at 18 (Qn. 14b).) Messrs. Ahn and Jost also serve on Furmanite's Board as independent directors. (*Id.*) Mr. Simms also serves on Vicor's Board as an independent director. (*Id.*) Mr. Casciano serves on Veramark's six-member Board as an independent director. (*Id.*; RRC Response to Protest at 5.) There are no contractual or other relationships between RRC/PAR Technology and the alleged affiliates Furmanite, Veramark, and Vicor. (*Id.*, Addenda at 20-23 (Qns. 16, 19, 21, 25, 28).)

The Area Office rejected Appellant's allegation that RRC is affiliated with Furmanite, Veramark, and Vicor through common management affiliation. The Area Office found that even though these three concerns share some directors with RRC's ultimate parent, PAR Technology, these individuals do not control PAR Technology's Board. Specifically, Messrs. Ahn and Jost, who also serve on Furmanite's Board, do not have the power to control PAR Technology's five-person Board; Mr. Casciano, who also serves on Veramark's Board, does not have the power to control PAR Technology's Board; and Mr. Simms, who also serves on Vicor's Board, does not have the power to control PAR Technology's Board. (Size Determination at 5.)

C. The Appeal

On August 2, 2013, Appellant filed the instant appeal. Appellant does not contest the Area Office's conclusion that the combined employees of RRC, the PAR affiliates, and the Sammon affiliates are below the 1,500 employee size standard. Appellant does contend, however, that the Area Office erred in concluding that PAR Technology, and thus RRC, is not affiliated with Furmanite, Veramark, and Vicor through common management in the form of shared members of their boards of directors. Relying on *Size Appeal of DMI Educational*

Training LLC, SBA No. SIZ-5275 (2011)(*DMIET*), Appellant asserts that common management affiliation does not require “total control” over a concern, but only “critical influence or the ability to exercise substantive control” over operations. (Appeal at 2.)

Appellant asserts that Messrs. Ahn and Jost have “critical influence or the ability to exercise substantive control” over PAR Technology's operations because Mr. Ahn chairs and Mr. Jost serves on PAR Technology's three-member Executive Committee. (Appeal at 3 (citing PAR Technology Proxy Statement at 6).) The Executive Committee may exercise “all powers of the Board” in cases where “specific direction has not been provided by the Board.” (*Id.*) Further, Mr. Ahn is the non-executive Chairman of the Board, who provides “independent evaluation of and oversight over management.” (*Id.*) These duties, argues Appellant, give Messrs. Ahn and Jost critical influence and the ability to exercise substantive control over PAR Technology's operations. (Appeal at 3.) Appellant also asserts that Messrs. Ahn and Jost control Furmanite's Board through their “Presiding Non-Executive Director” and Audit Committee roles. (Appeal at 3-4.) Thus, because Messrs. Ahn and Jost control the Boards of both PAR Technology and Furmanite, there is common management affiliation between the two concerns. (*Id.*) Further, because Furmanite by itself exceeds the size standard, its affiliation with PAR Technology would cause RRC to be other than small. (*Id.*)

Appellant also asserts that Mr. Casciano, President and CEO of PAR Technology, is also one of five directors of Veramark, and the chair of Veramark's Audit Committee. (Appeal at 4-5.) Mr. Casciano, thus, has critical influence and the ability to exercise substantive control over both PAR Technology and Veramark. (*Id.*) Veramark, therefore, is affiliated with PAR Technology and RRC. (*Id.*)

Finally, Appellant asserts Mr. Simms, who serves as an independent director on both PAR Technology's and Vicor's Boards, is also on PAR Technology's Nominating and Corporate Governance and Audit Committees and is also Vice President and Chief Financial Officer of Vicor. (Appeal at 5.) Mr. Simms, thus, has critical influence and the ability to exercise substantive control over both PAR Technology and Vicor. (*Id.*) Vicor, therefore, is affiliated with PAR Technology and RRC. (*Id.*)

In support of its statement that Mr. Casciano serves on and chairs Veramark's Audit Committee, Appellant submits Veramark's Proxy Statement as new evidence on appeal.

D. RRC's Response to the Appeal

On August 7, 2013, RRC opposed Appellant's additional evidence and, on August 19, 2013, RRC submitted its response in opposition to the appeal. RRC contends the Area Office correctly found no affiliation between RRC and Furmanite, Veramark, or Vicor.

RRC contends that Messrs. Ahn and Jost do not control PAR Technology's Board either by their votes or by their committee assignments. Thus, they cause no common management affiliation with Furmanite. RRC distinguishes PAR Technology from the concern at issue in *DMIET*, asserting that the PAR Technology independent directors have no management role, unlike the LLC's managing member in *DMIET*. (Response at 7-8.) Also, Appellant only

speculates that there is any critical or substantive area in which “specific direction has not been provided by the Board” to the Executive Committee. (Response at 8.)

Regarding Veramark, RRC asserts that Mr. Casciano, as one of five directors,² does not control Veramark's Board. RRC cites *Size Appeal of Automated Systems Design, Inc.*, SBA No. 3927A (1994) for the proposition that Mr. Casciano's role as outside director and chair of Veramark's Audit Committee does not cause common management affiliation. (Response at 10.) RRC also notes that Mr. Casciano resigned from Veramark's Board on July 22, 2013.

As for the alleged affiliation with Vicor, RRC asserts that Mr. Simms is one of five directors on PAR Technology's Board. Thus, Mr. Simms does not control PAR Technology's Board, and does not cause common management affiliation with Vicor. (Response at 10-11.)

III. Discussion

A. New Evidence and Standard of Review

New evidence not presented to the Area Office is generally not considered on appeal. *See* 13 C.F.R. § 134.308(a). Appellant's Attachment 15, Veramark's Proxy Statement, although not part of the record before the Area Office, resolves a factual discrepancy among submissions, and so I ADMIT it into the record on appeal and will consider it here.

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an 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

The small business size regulations provide that concerns are affiliates of each other “when one controls or has the power to control the other.” 13 C.F.R. § 121.103(a)(1). Here, it is undisputed that RRC's ultimate corporate parent, PAR Technology, controls RRC. Therefore, the only issue on appeal is whether PAR Technology (and thus RRC) is affiliated with Furmanite, Veramark, or Vicor because of common management.

The size regulation provides that affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns. 13 C.F.R. § 121.103(e). OHA has long held that common management affiliation does not require “total control” of a concern, just critical influence or the ability to exercise substantive control

² RRC echoes Appellant's assertion on appeal that Veramark has five directors. In its Area Office submission, RRC stated Veramark has six directors. (Response to Protest at 5.) Veramark's Proxy Statement, at 6, states Veramark has six directors.

over a concern's operations. *See Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5275, at 6 (2011) (*DMIET*); *Size Appeal of Active Deployment Systems*, SBA No. 5216, at 6 (2011); *Size Appeal of ETI Professionals, Inc.*, SBA No. SIZ-5403 (2004).

Nevertheless, control of *both* concerns by the same person(s) is necessary for common management affiliation. *See Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059, at 5 (1995). It follows that if the person does not control one or the other of two concerns in question, then there cannot be common management affiliation between them.

1. Common Management - Furmanite

For there to be common management affiliation between PAR Technology (and thus RRC), and Furmanite, the common persons, who are Messrs. Ahn and Jost, must control both PAR Technology and Furmanite. *See Bob Jones Realty, supra*. At issue here is whether they control or have the power to control PAR Technology.

Appellant asserts Messrs. Ahn and Jost control PAR Technology through the three-member Executive Committee on which both serve and Mr. Ahn is chair, because the Executive Committee may exercise Board powers in cases where the Board has not provided “specific direction.” Further, Mr. Ahn is the non-executive Chairman of the Board, who provides “independent evaluation of and oversight over management.”

RRC contends that Messrs. Ahn and Jost do not control PAR Technology's five-person Board by vote or by committee assignments. Further, it is speculative whether a critical or substantive area exists in which the Board has not provided “specific direction”. RRC distinguishes PAR Technology from the concern at issue in *DMIET*, asserting that the PAR Technology independent directors have no management role, unlike the LLC's managing member in *DMIET*.

PAR Technology's By-Laws require a simple majority of its directors for quorum and a simple majority for action. (By-Laws, Art. III § 8.) Messrs. Ahn and Jost are only two of five directors on PAR Technology's Board and so cannot control the Board by their votes. As for their roles on Board committees, Appellant neglects to note that PAR Technology's ByLaws also permit the Board, at any time and by majority vote, to change the members of, to fill vacancies in, and to discharge any committee of the Board. (By-Laws, Art. IV § 5.) Further, by majority vote of the Board, any committee member may be removed at any time, with or without cause. (*Id.*) Thus, even though Messrs. Ahn and Jost appear able to control the three-person Executive Committee, the fact that the other three members of the full Board may remove them at any time, with or without cause, serves as such a significant check on the Executive Committee's power as to render that Committee completely subservient to the full Board which, as noted *supra*, Messrs. Ahn and Jost cannot control by their two votes.³ Based on PAR Technology's By-Laws, I

³ This concept is analogous to that in *Size Appeal of Environmental Quality Management, Inc.*, SBA No. SIZ-5429, at 6-7 (2012). There, OHA held that where a majority shareholder may remove any director at any time, with or without cause, control of a Board by a majority of its members is “illusory”.

conclude that Messrs. Ahn and Jost do not have control over PAR Technology by their votes on the Board and their participation on Committees of the Board.

Further, OHA has in the past determined that a Director's service on a Board's Audit Committee and Compensation Committee does not confer control over the company to a Director who does not otherwise control that company. *Size Appeal of Automated Systems Design, Inc.*, SBA No. SIZ-3927A, at 6-7 (1994).

Appellant lastly points to Mr. Ahn's role as non-executive Chairman of the Board in support of its argument that, under *DMIET*, Mr. Ahn controls PAR Technology because he provides “independent evaluation of and oversight over management.” (Appeal at 3 (quoting PAR Technology Proxy Statement at 6).) I reject this argument. RRC's Area Office submission specifically states Mr. Ahn is an “independent non-management director” under the NYSE listing standards. (SBA Form 355, Addenda at 18 (Qn. 14b).)⁴ Further, on Mr. Ahn's election as non-executive Chairman of the Board, the Board stated his task is to provide “leadership of the Board” and to “better represent shareholder interests” while the CEO is to “focus more closely on the day to day operations”. (PAR Technology Proxy Statement at 6.) Mr. Ahn's role is to be an independent director, a check on management, who provides “independent evaluation of and oversight over management” rather than to be a part of management. Appellant has presented no evidence that Mr. Ahn is any part of PAR Technology's management.

Appellant has failed to show that Messrs. Ahn and Jost control PAR Technology. Thus, I must uphold the Area Office's determination that there is no common management affiliation between RRC and Furmanite.

2. Common Management - Veramark

For there to be common management affiliation between PAR Technology (and thus RRC), and Veramark, the common person, who is Mr. Casciano, must control both PAR Technology and Veramark. *See Bob Jones Realty, supra*. At issue here is whether he controls Veramark.

Appellant asserts that Mr. Casciano controls Veramark because he is a director and the chair of Veramark's Audit Committee. RRC asserts that Mr. Casciano is only one director, and an outside director⁵ at that, so he does not control Veramark.

I agree with RRC that Mr. Casciano does not control Veramark's Board. He is only one of six directors, and with no special quorum or voting requirements in evidence, he does not control Veramark's Board by his vote. He does not control Veramark or its Board through his work on the Audit Committee, as shown in the discussion *supra*. Finally, Appellant has not

⁴ Among many other requirements, an “independent director” under the NYSE listing standards cannot be or have been within the last three years, an employee of the listed company. *See* NYSE Listed Company Manual, § 303A.02(b)(i).

⁵ Members of the Audit Committee and the Compensation Committee of any publicly-traded company must be “independent directors”. *See* 17 C.F.R. §§ 240.10A-3, 240.10C-1.

shown any evidence that Mr. Simms, who is an “independent director” of Veramark, controls that company by actually managing it, as was the case in *DMIET*.

Appellant has failed to show how Mr. Casciano controls Veramark. Thus, I must uphold the Area Office's determination that there is no common management affiliation between RRC and Veramark.⁶

3. Common Management - Vicor

For there to be common management affiliation between PAR Technology (and thus RRC), and Vicor, the common person, who is Mr. Simms, must control both PAR Technology and Vicor. *See Bob Jones Realty, supra*. At issue here is whether he controls PAR Technology.

Appellant asserts Mr. Simms controls PAR Technology's Board because he is on the Nominating and Corporate Governance and Audit Committees. RRC asserts Mr. Simms, as one of five directors, does not control PAR Technology's Board.

I agree with RRC. PAR Technology's Board requires a majority for quorum and a majority for action. (By-Laws, Art. III § 8.) Mr. Simms is only one of five directors and so cannot control the Board by his vote. As noted *supra*, PAR Technology's By-Laws specifically provide that the members of Board Committees may be removed at any time and by majority vote of the Board with or without cause. (By-Laws, Art. IV § 5.) Thus, Mr. Simms' committee assignments do not grant him control over PAR Technology or its Board. Finally, Appellant has not shown any evidence that Mr. Simms, who is an “independent director” of PAR Technology, controls that company by actually managing it.

Appellant has failed to show how Mr. Simms controls PAR Technology. Thus, I must uphold the Area Office's determination that there is no common management affiliation between RRC and Vicor.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

⁶ Mr. Casciano's July 22, 2013 resignation from Veramark's Board is irrelevant to this appeal because RRC's size status is determined as of April 15, 2013, the date of its offer.