

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

SIZE APPEAL OF:

Radant MEMS, Inc.,

Appellant,

Appealed From
Size Determination No. 01-SD-2014-29

SBA No. SIZ-5600

Decided: September 22, 2014

APPEARANCES

L. Alexandra Hogan, Esq., M. David K. Webber, Esq., Shatz, Schwartz and Fentin, P.C.,
Springfield, Massachusetts, for Appellant.

Paul E. Smith, Contracting Officer, Wright-Patterson Air Force Base, Ohio, for the U.S.
Department of the Air Force.

DECISION¹

I. Introduction and Jurisdiction

On June 17, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 01-SD-2014-29 concluding that Radant MEMS, Inc. (Appellant) is not a small business for purposes of a Small Business Innovation Research (SBIR) grant. The Area Office specifically found that Appellant is affiliated with CPI Radant Technologies Division (RTD) through common management and the totality of the circumstances. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied.

OHA decides size determination appeals under the Small Business Act of 1958, 15

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded the parties an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant timely filed the instant appeal on July 7, 2014.² Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On November 20, 2013, the U.S. Department of Defense issued Solicitation No. FY 14.1 inviting proposals for various research topics under the SBIR program. On January 22, 2014, Appellant submitted a proposal for Air Force Topic AF141-004, “Radio-frequency Micro-electromechanical Systems with Integrated Intelligent Control.” The proposal represented that Appellant is a small business with 10 employees and no affiliates. On May 22, 2014, the Contracting Officer (CO) filed a size protest questioning Appellant's eligibility to participate in the SBIR program. The CO alleged that Appellant is affiliated with RTD through common management because several of Appellant's senior personnel, including Appellant's President/CEO, Dr. Jean-Claude Sureau, are also high-ranking employees of RTD. (Protest at 2-3.) The CO further contended that Appellant and RTD have a common address and use the same telephone and fax numbers. (*Id.* at 3.) The CO attached documentation indicating that RTD is a subsidiary of Communications & Power Industries, LLC (CPI). (*Id.*, Attachment 1.) According to the System for Award Management, CPI is not a small business under any size standard. (*Id.*, Attachment 3.) In addition, CPI's website proclaims that “[i]n fiscal [year] 2013, CPI employed approximately 1,670 people and generated approximately \$420 million in sales.” (*Id.*, Attachment 15.)

In response to the protest, Appellant submitted a completed SBA Form 355, corporate documents, and other information. In subsequent correspondence with the Area Office, Dr. Sureau stated that he is currently President of RTD and that he has “control in the day to day management of [RTD],” although “certain matters,” such as hiring of senior personnel, require higher-level corporate authorization. (Letter from J. Sureau to S. Liu (June 12, 2014), at 1.) Appellant also submitted a letter from legal counsel asserting that “Dr. Sureau has no responsibility for the operations of [Appellant] as [Appellant] has its own staff to conduct its business.” (Letter from S. Schwartz (June 11, 2014), at 1.)

B. Size Determination

On June 17, 2014, the Area Office issued Size Determination No. 01-SD-2014-29 concluding that Appellant is affiliated with RTD through common management and the totality of the circumstances. The Area Office assessed Appellant's size as of May 22, 2014, the date of the CO's protest. 13 C.F.R. § 121.704(a).

² Ordinarily, an appeal petition must be filed within fifteen calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). In this case, Appellant received the size determination on June 19, 2014. (Appeal at 6.) Fifteen calendar days after June 19, 2014 was Friday, July 4, 2014. Because July 4, 2014 was a Federal holiday and the next two days were a weekend, the appeal petition was due on the following business day: Monday, July 7, 2014. 13 C.F.R. § 134.202(d)(1).

The Area Office found that Dr. Sureau is Appellant's President/CEO and a member of Appellant's board of directors. In addition, Dr. Sureau owns a majority of Appellant's voting stock, and close relatives of Dr. Sureau also hold significant ownership interests. (Size Determination at 3.) As a result, the Area Office determined, Dr. Sureau has the power to control Appellant. (*Id.* at 3, 5.)

Next, the Area Office addressed Appellant's relationship with RTD. The Area Office explained that RTD formerly was known as Radant Technologies, Inc. (RTI), and was an affiliate of Appellant. (*Id.* at 4.) In October 2013, RTI was acquired by CPI and was renamed RTD. (*Id.*)

The Area Office found that each of Appellant's three officers holds managerial positions at RTD. Dr. John Maciel, Appellant's COO and Vice President and the proposed principal investigator for the subject research project, is Manager, Electromagnetics at RTD. (*Id.* at 4-5.) Ms. Gayle Jennings-Poitras, Appellant's Secretary, is Director of Contracts at RTD. (*Id.* at 4.) Most significantly, Dr. Sureau himself is President of RTD and a full-time employee of RTD. The Area Office determined that, although Dr. Sureau alone cannot control RTD, he “manage[s] the day to day operation of RTD” in his capacity as RTD's President. (*Id.* at 5.) The Area Office also rejected the notion that Dr. Sureau is not involved with the management of Appellant, finding that, as Appellant's President/CEO, “he has the power to manage the company.” (*Id.* at 6.) The Area Office concluded that Appellant is affiliated with RTD through common management because “Dr. Sureau has the power to manage both companies being that he holds senior leadership positions in both [Appellant] and RTD.” (*Id.*)

The Area Office discussed several other connections between Appellant and RTD. The Area Office found that Appellant shares equipment and facilities with RTD, and that RTD leases those facilities from a company owned by Dr. Sureau. (*Id.* at 4.) Appellant relies upon RTD for support services, such as accounting, information technology, human resources, contracting, and mail delivery. (*Id.* at 4-5.) Appellant and RTD operate in similar lines of business. (*Id.* at 5.) Further, Appellant's proposal for the SBIR grant described RTD's facilities and equipment as if they were those of Appellant itself. (*Id.*) The Area Office determined:

[C]onsidering all of these indicia of affiliation, including [Appellant's] officers and directors are employees of RTD, [Appellant's] sharing RTD's facility and equipment, [Appellant's] total dependency on employees of RTD to perform essential operating functions, [Appellant's] principal investigator for the subject SBIR project is an employee of RTD, [Appellant's] proposal referenced the use [] of RTD facilities and equipment, and RTD leases its facility from a firm which is owned and controlled by Dr. Sureau, the Area Office concludes that [Appellant] and RTD are affiliated through the totality of the circumstances.

(*Id.* at 6.)

The Area Office found that RTD is wholly-owned by, and affiliated with, CPI, a large

business. (*Id.* at 7.) Combined, Appellant and its affiliates, including RTD and CPI, exceed the 500-employee size standard for participation in the SBIR program. (*Id.*)

C. Appeal

On July 7, 2014, Appellant filed the instant appeal. Appellant “vehemently denies” any affiliation with RTD through common management or otherwise. (Appeal at 6.)

With regard to the findings of common management, Appellant acknowledges that Dr. Sureau is Appellant's founder and majority stockholder, as well as Appellant's President, CEO, and Treasurer. (*Id.* at 2.) Accordingly, the Area Office properly determined that Dr. Sureau exercises “critical influence and substantial control” over Appellant. (*Id.* at 6.) In addition, Appellant does not dispute that Dr. Sureau is both President and a full-time employee of RTD. Nevertheless, Appellant maintains, the size determination is flawed because the Area Office incorrectly found that Dr. Sureau controls the management of RTD. (*Id.* at 7.)

Appellant asserts that the Area Office's decision conflicts with the findings elsewhere in the size determination that RTD is controlled by CPI, and that Dr. Sureau alone cannot control RTD. (*Id.*) Moreover, the Area Office did not consider that Dr. Sureau's role at RTD is “strictly constrained and limited” by CPI; instead, the Area Office “conducted a superficial analysis” based merely on the fact that Dr. Sureau holds the job title of President of RTD. (*Id.*) According to Appellant, while Dr. Sureau is “authorized to approve small transactions and contracts” on behalf of RTD, many other types of transactions require the approval of CPI's board or other CPI officials. (*Id.* at 8-10.) Thus, “[w]ith so many limitations on his authority, Dr. Sureau has no critical influence or substantial decision-making authority for CPI or [RTD].” (*Id.* at 10.) Appellant further contends that CPI, as RTD's 100% shareholder, could choose to remove Dr. Sureau from his position at RTD at any time and without cause, rendering any appearance of managerial control by Dr. Sureau illusory. (*Id.* at 10-11.)

Appellant argues that the Area Office also erred in finding affiliation under the totality of the circumstances. In particular, while the Area Office identified various ties between the companies, none of these factors demonstrates that Appellant has the power to control RTD or *vice versa*. On the contrary, the Area Office expressly stated that Dr. Sureau controls Appellant and that Dr. Sureau cannot control RTD. (*Id.* at 11-12.)

Appellant attacks each of the factors cited by the Area Office as evidence of affiliation under the totality of the circumstances. Appellant argues that, although Appellant and RTD do have three common employees, the Area Office did not explain how this would give rise to any interdependence or power to control. (*Id.* at 14.) Appellant acknowledges that RTD performs certain support services for Appellant, but emphasizes that Appellant pays for these services, and that the arrangement has been in place for less than one year. (*Id.* at 14-15.) Further, the support services are administrative in nature and “have nothing to do with” Appellant's core research and technology operations. (*Id.* at 15.) Thus, Appellant reasons, the support services provided by RTD do not suggest affiliation. Appellant denies that it operates in the same industry as RTD, and denies that it shares facilities and equipment with RTD. (*Id.* at 16-19.) Appellant observes that the Area Office “fails to cite even a single piece of shared equipment,” and made no finding

that Appellant's sublease from RTD is not on ordinary commercial terms. (*Id.* at 17, 19.)

Lastly, even if Appellant is affiliated with RTD and CPI, Appellant maintains that there is no evidence that the three firms together have more than 500 employees. (*Id.* at 19.) As a result, the size determination is “arithmetically incorrect on that basis.” (*Id.*)

Accompanying its appeal petition, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit affidavits from Dr. Sureau, Dr. Maciel, and Ms. Jennings-Poitras describing their responsibilities and levels of authority at RTD. Appellant also seeks to admit an affidavit from Mr. J. Michael Stacy, a member of Appellant's board, indicating that he personally has no involvement with RTD, and an affidavit from Mr. Joel A. Littman, an officer of RTD, discussing the relationship between Appellant and RTD. Appellant argues that there is good cause to admit this evidence because “(i) the New Evidence addresses arguments that [Appellant] could not have anticipated the Area Office would pursue in the size determination, and (ii) the evidence now set forth [in Mr. Littman's affidavit] was not received by [Appellant] until after the determination date had passed.” (Motion at 1.)

D. CO's Response

On July 22, 2014, the CO responded to the appeal. The CO states that he filed a size protest against Appellant in order to ensure a fair competition for the other small businesses that submitted SBIR proposals. (CO's Response at 1.) With his response, the CO provides copies of his correspondence with Appellant and the Area Office, and a portion of Appellant's proposal, because these materials were not included with the initial protest. (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a)(2). The proponent must

demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 6 (2009).

In this case, Appellant has not established good cause to admit the new affidavits, because each affidavit pertains to matters that Appellant knew, or should have known, were under review by the Area Office. The CO's protest alleged that Appellant is affiliated with RTD through common management, identifying four of the five affiants — Dr. Sureau, Dr. Maciel, Ms. Jennings-Poitras, and Mr. Stacy — specifically by name. *See* Protest at 2-3. Based on the CO's protest, then, Appellant was well-aware that the Area Office would be examining the roles of these individuals in the management of Appellant and RTD, as well as the broader relationship between the companies. Thus, if Appellant wished to address these issues with affidavits, Appellant could have submitted such affidavits to the Area Office during the course of the size review. OHA has long held that it will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review. *See, e.g., Size Appeal of ISC8, Inc.*, SBA No. SIZ-5414, at 4 (2012) (rejecting new evidence because it pertained to a matter that the proponent “knew was at issue before the Area Office”); *Size Appeal of BR Constr., LLC*, SBA No. SIZ-5303, at 7 (2011) (denying motion to admit new exhibit, which “sets forth factual information that could have been communicated to the Area Office”). For these reasons, Appellant's motion to supplement the record is DENIED.

With regard to the documents provided with the CO's response, much of this material (such as the pages from Appellant's SBIR proposal, and correspondence with the Area Office) is already contained in the record and therefore is not new evidence. Insofar as the CO's response offers new documents that were not previously made available to the Area Office, those documents cannot be utilized on appeal. Therefore, the attachments to the CO's response are EXCLUDED from the record and have not been considered for purposes of this decision.

C. Analysis

As discussed below, the record in this case amply supports the Area Office's determination that Appellant is affiliated with RTD through common management. Accordingly, the appeal must be denied, and it is unnecessary to consider whether Appellant also is affiliated with RTD through the totality of the circumstances.

As a preliminary matter, this case involves a relatively new regulation governing affiliation for the SBIR program, 13 C.F.R. § 121.702, rather than the long-standing affiliation regulation found at 13 C.F.R. § 121.103. Both regulations, however, recognize affiliation through common management -- 13 C.F.R. § 121.103(e) and 13 C.F.R. § 121.702(c)(3) -- and I find that SBA did not intend to create a material difference between the two regulations with regard to affiliation through common management. In proposing the new SBIR regulation, SBA remarked that “SBA believes that, in general, the principles of affiliation set forth in § 121.103 apply to the SBIR and [Small Business Technology Transfer] program.” 77 Fed. Reg. 28,520, 28,523 (May 15, 2012). Further, when the final version of § 121.702 was promulgated, SBA rejected a commenter's proposal which would have departed from § 121.103(e), stating that “[i]f a person is the President of one company and also the President of another company, SBA

will continue to find that the two companies are affiliated.” 77 Fed. Reg. 76,215, 76,220 (Dec. 27, 2012). Because there is not a significant difference between the two regulations with respect to affiliation through common management, I find it appropriate to apply OHA's case law interpreting common management under § 121.103(e), notwithstanding that this case actually involves § 121.702(c)(3).

Turning to the instant appeal, Appellant argues that Appellant is not affiliated with RTD through common management because Dr. Sureau, although President of both companies, does not fully control RTD due to limitations on his authority imposed by CPI. OHA has long held, however, that affiliation through common management “does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations.” *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488, at 6-7 (2013); *Size Appeal of Env'tl. Quality Mgmt., Inc.*, SBA No. SIZ-5429, at 6 (2012); *Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5275, at 6 (2011). Here, Appellant's own submissions to the Area Office acknowledged that Dr. Sureau has “control in the day to day management of [RTD].” *See* Section II.A, *supra*. Nor is it plausible to believe that the President of a concern does not, at a minimum, wield “critical influence” or “substantive control” over the concern's operations. The applicable regulation, 13 C.F.R. § 121.702(c)(3), specifically recognizes the importance of a company's President in management of the company, stating that “[a]ffiliation arises where the CEO or President of a concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns.” Likewise, OHA has held that senior leadership positions, such as CEO and COO, may be presumed to exercise substantive control over the firm's operations, absent significant evidence to the contrary. *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9 (2013), *recons. denied*, SBA No. SIZ-5493 (2013) (PFR). I therefore find no error in the Area Office's determination that Appellant is affiliated with RTD through common management.

Appellant also maintains that Dr. Sureau's managerial control over RTD is illusory, because CPI can choose to replace Dr. Sureau at any time and without cause. This contention fails for two reasons. First, Appellant did not raise this argument to the Area Office, so the record lacks the necessary factual foundation to conclude that CPI could unilaterally terminate Dr. Sureau any time. Second, OHA has applied the concept of illusory control in situations “where a majority shareholder has the power to call a shareholders meeting and, at that meeting, to remove any and all directors with or without cause.” *Size Appeal of US Builders Group*, SBA No. SIZ-5519, at 6 (2013). The instant case presents no such circumstances, and Appellant offers no legal authority to extend the concept of illusory control to cases of common management generally. Indeed, to find common management “illusory” merely because the officer could be removed from his or her position would potentially eviscerate common management as a basis for affiliation, because many officers and managers can be removed by some person or entity.

Appellant also argues that the record does not demonstrate that Appellant and its affiliates together exceed the 500-employee size standard. This argument too is meritless. Contrary to Appellant's contention, the CO presented evidence with his protest that CPI is not a small business, and Appellant did not attempt to refute it. *See* Section II.A, *supra*. Thus, having found that Appellant is affiliated with RTD and CPI, the Area Office correctly determined that Appellant is not a small business.

IV. Conclusion

For the above reasons, the appeal is DENIED. The record fully supports the Area Office's conclusion that Appellant is affiliated with RTD through common management, 13 C.F.R. § 121.702(c)(3), and that Appellant is not a small business. In light of this outcome, it is unnecessary to decide whether Appellant also is affiliated with RTD under the totality of the circumstances. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge