

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

SIZE APPEAL OF:

Cummings Construction, LLC

Appellant

Appealed from
Size Determination No. 01-SD-2008-41

SBA No. SIZ-5022

Decided: January 13, 2009

APPEARANCE

Charles Cummings, President, for Appellant.

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 Area Office erred in finding that a limited liability company is controlled equally by two members who made equal capital contributions, even when one member has majority membership interest.

III. Background

A. The Size Determination

On December 14, 2007, Cummings Construction, LLC (Appellant), applied to the Small Business Administration (SBA) for Small Disadvantaged Business (SDB) certification. Appellant's primary industry classification is North American Industry Classification System (NAICS) code 236210, Industrial Building Construction. At that time, the code had a corresponding annual receipts size standard of \$31 million. On August 18, 2008, this size standard was increased to \$33.5 million.

On August 22, 2008, the SBA Office of SDB Certification and Eligibility requested that SBA's Office of Government Contracting - Area 1 in Boston, Massachusetts (Area Office), perform a size determination on Appellant. On August 26, 2008, the Area Office informed Appellant its size status had been questioned and requested that it submit a completed SBA Form 355, together with certain other information. The Area Office made several additional requests for information.

On September 8, 2008, the Area Office issued its size determination concluding Appellant is other than small. The Area Office first found the regulation required that Appellant must qualify as a small business both as of the date of its application and as of the date of its prospective certification by SBA, citing 13 C.F.R. § 121.404(b).

The Area Office found that Appellant is a Limited Liability Company (LLC), established on November 12, 2007. Appellant is 51% owned by Charles Cummings, an individual who is the firm's Managing Member. Appellant is 49% owned by LeChase Construction Services, LLC (LeChase), a large firm. The Area Office examined Appellant's Operating Agreement, and found that Mr. Cummings would make a capital contribution of \$51,000, and have a membership interest of 51%; and LeChase would make a capital contribution of \$49,000, and have a membership interest of 49%.

Appellant's capitalization would proceed in three stages. Phase I was to be completed upon execution of the Operating Agreement, when Mr. Cummings and LeChase would each contribute \$10,000. At Phase II, Mr. Cummings and LeChase would each contribute \$10,000. At Phase III, Mr. Cummings would contribute \$31,000, and LeChase would contribute \$29,000. Phases II and III would each take place at a time determined by the Managing Member. The Area Office examined Appellant's balance sheet dated August 27, 2008, and determined that only Phase I has been completed. The Area Office contacted Appellant and requested it to clarify the ownership percentages, given that only Phase I had been completed. Appellant affirmed that Mr. Cummings has a 51% interest, and LeChase a 49% interest.

The Area Office concluded that, because their capital contributions are equal at this point, Mr. Cummings and LeChase each has an equal ownership interest in, and equal power to control, Appellant. Accordingly, the Area Office concluded Appellant is affiliated with LeChase, a large business, and thus is other than small.

B. The Appeal

On September 18, 2008, Appellant received the size determination. On October 17, 2008, Appellant filed the instant appeal. Appellant asserts its own receipts are well within the size standard. Appellant further asserts that, under the Operating Agreement, Mr. Cummings has a 51% ownership interest, and LeChase a 49% interest. The Phase I capital contributions the Area Office noted were the initial cash needed to start up the business. These contributions do not represent the ownership interests in Appellant.

Appellant further asserts Mr. Cummings is Appellant's Managing Member. There are no restrictions on the power of the Managing Member, who is responsible for all aspects of running

the business, and he has full authority to run the concern's day-to-day business. Therefore, LeChase cannot control Appellant, because Mr. Cummings has the power of the Managing Member.

Appellant attempts to introduce new evidence on appeal. Appellant asserts Mr. Cummings made financial contributions not noted on the financial statements, and has made additional financial contributions since then.

Appellant further attaches a document it characterizes as an affidavit, attesting that Mr. Cummings owns 51% of Appellant, and LeChase 49%. However, the document is not notarized, nor is there any recitation that it is signed under the pains and penalties of perjury.

C. The Operating Agreement

A review of the Operating Agreement establishes that Mr. Cummings will have a 51% Membership Interest, and LeChase a 49% Membership Interest. The capital contributions are structured as the Area Office described them. At the concern's annual meetings, Members are entitled to vote in proportion to their Membership Interest. Articles 3.5, 5.1. Profits and losses and other distributions will be allocated according to the members' Membership Interest. Articles 7.2, 8.2(a).

Appellant's management is vested in a Managing Member, to conduct the concern's day-to-day operations. Article 4.1. The Managing Member has full power and authority to make all of the concern's decisions except those where the members' approval is expressly required by law or by the Operating Agreement. *Id.* The Operating Agreement provides that the Managing Member shall be Mr. Cummings and that any successor will be elected by the "Consent of the Members." Article 4.2. "Consent of the Members" requires the consent of Members representing a majority of the Membership Interests, Article 5.2.

IV. Discussion

A. Timeliness, Standard of Review, and New Evidence

Appellant filed the instant appeal within 30 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(2).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). 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).

Appellant attempts to submit new evidence on appeal, and has not filed a motion to do so. New evidence may not be submitted on appeal unless the Administrative Judge orders it *sua*

sponte or a motion is filed and served establishing good cause for the submission of the new evidence. 13 C.F.R. § 134.308(a). However, Appellant cannot submit evidence on appeal it neglected to submit at the protest stage. *Size Appeal of Management Support Technology, Inc.*, SBA No. SIZ-4976, at 3 (2008). Appellant was responsible for presenting all evidence to the Area Office. 13 C.F.R. 121.1009(b); *Management Support Technology*, at 3.

Here, Appellant offers evidence it could have presented to the Area Office, but did not. This evidence is an unsworn statement; and information about a financial transaction which occurred after the Area Office issued its size determination, which is thus not relevant to the issue of whether the Area Office erred based upon the record before it. Therefore, I EXCLUDE Appellant's proffered new evidence from the appeal record.

B. The Merits

While the Area Office did not directly address the issue, it is clear from a review of the record that Appellant is, by itself, a small business under the size standard. The question presented is whether Appellant is affiliated with its minority member, LeChase, a large business.

Business concerns are affiliates when one concern controls or has the power to control the other. 13 C.F.R. § 121.103(a)(1). The Area Office found LeChase has equal power to control Appellant, based on the fact that the capital contributions of LeChase and Mr. Cummings were equal. The Area Office cited neither the Operating Agreement nor New York state law for this proposition.

However, capital contributions are not a factor in determining control of a Limited Liability Company. It is the Membership Interest that is a member's aggregate rights in the company, including the right to vote and the right to share in the profits and losses. N.Y. Ltd. Liab. Co. Law (McKinney 2008) § 102(r). The Operating Agreement is the governing instrument for a limited liability company. *Id.* § 417, commentary 5A, at 197. Appellant's Operating Agreement provides that Mr. Cummings has a majority Membership Interest. The Operating Agreement further provides that the members will vote and will receive distributions of profits and losses in proportion to their Membership Interest. In other words, under the Operating Agreement, Mr. Cummings has a majority vote, and majority share in the concern's profits and losses. Further, the Operating Agreement provides that Mr. Cummings is the firm's Managing Member, with full power to run the company. Conversely, nothing in the Operating Agreement or New York state law gives any rights to control based upon the members' respective capital contributions.

Here, it is clear that Mr. Cummings has a majority voting interest in Appellant, is entitled to 51% of the firm's profits and, as Managing Member, controls the company's operations. The fact that at this stage his capital contribution is equal to that of LeChase is irrelevant to the issue of control. The Operating Agreement apportions voting and the right to profits based on the Membership Interests, and does not provide that the Membership Interests will be affected in any way by the capital contributions.

Accordingly, I find that the Area Office committed clear error in finding that LeChase

has equal power with Mr. Cummings to control Appellant. Mr. Cummings has control, as majority member and Managing Member. Appellant is not affiliated with LeChase, and is thus a small business.

V. Conclusion

For the above reasons, I GRANT the instant appeal and REVERSE the Area Office's size determination. Cummings Construction, LLC, is a small business.

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

CHRISTOPHER HOLLEMAN
Administrative Judge