Cite as: *Size Appeal of Cummings Construction, LLC*, SBA No. SIZ-5153 (2010)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Cummings Construction, LLC	SBA No. SIZ-5153
Appellant	Decided: August 31, 2010
Appealed from Size Determination No. 1-SD-2010-038	

APPEARANCES

Steven L. Reed, Esq., Doug P. Hibshman, Esq., Smith Currie & Hancock LLP, Washington, D.C., for Appellant.

Stephen B. Shapiro, Esq., Cheryl A. Feeley, Esq., Livya L. Heithaus, Esq., Holland & Knight LLP, Washington, D.C., for BCI Construction, Inc.

DECISION[1]

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 made clear error of fact or law in concluding that Appellant is affiliated with its 49% owner under the identity of interest rule.

[1] This Decision was issued under a Protective Order to prevent the disclosure of confidential or proprietary information. On August 31, 2010, I issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

III. Background

A. The Solicitation and Protest

On April 5, 2010, the Contracting Officer (CO) for the U.S. Department of Labor, Division of Job Corps A/E and Construction Services, in Washington, D.C., issued Solicitation No. DOL110RB20919 seeking bids for construction work at the Glenmont Job Corps Center (Glenmont Project). The CO set the procurement aside for small businesses and designated it under North American Industry Classification Code (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding $33.5 million annual receipts size standard.

On May 20, 2010 (Bid Day), bids were opened and Cummings Construction, LLC (Appellant), was identified as the lowest bidder. On May 27, 2010, BCI Construction, Inc. (BCI), an unsuccessful bidder, timely protested Appellant's small business size status to the CO. BCI alleged Appellant is not an eligible small business for this contract because Appellant is affiliated under the ostensible subcontractor rule with LeChase Construction Services, LLC (LeChase), a large firm and Appellant's 49% owner.

In its protest, BCI asserted that LeChase will perform "a large percentage" of subcontracted work, such as contract management and technical responsibilities. Further, LeChase "holds out Cummings as a related company," pointing to a notice on LeChase's website announcing that Mr. Cummings had earned Leadership in Energy and Environmental Design (LEED) certification. BCI also noted that the Dun & Bradstreet (D&B) Report on Appellant shows it has only one employee, and that the Dynamic Small Business Search (DSBS) Listing for Appellant shows its bonding levels are $0. Further, BCI asserted, some of its suppliers who had submitted quotes on the Glenmont Project to both BCI and Appellant informed BCI that they had been told to fax their quotes to LeChase, not Appellant, indicating LeChase, not Appellant, had prepared Appellant's bid. BCI also asserted its suppliers had informed BCI that LeChase, not Appellant, was responsible for obtaining the required bonding. Thus, BCI alleged, Appellant is unduly reliant on LeChase under the ostensible subcontractor rule.

On June 2, 2010, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting-Area I Office (Area Office), for a size determination.

B. The Area Office Investigation and File

On June 9, 2010, the Area Office requested from Appellant various documents and its response to the protest allegations. After receiving this information, the Area Office sent follow-up questions, and Appellant provided timely responses.

In its June 15, 2010, response, Appellant asserted that all of the protest allegations were either based on outdated information or were the unsubstantiated statements of unidentified "suppliers." Appellant also asserted that SBA had previously considered and resolved the issue of Appellant's size in January 2009, when SBA's Office of Hearings and Appeals (OHA) found Appellant a small business and not affiliated with LeChase, its 49% owner.

As for the ostensible subcontractor allegation, Appellant argued there can be no ostensible subcontractor violation because there are no subcontracts or teaming agreements in place with anyone on the Glenmont Project. Further, Appellant's 51% owner, Charles Cummings, has over 30 years of construction-related experience and will take executive lead on the Glenmont Project. Appellant also will provide a project manager and superintendent for the day-to-day management, and will obtain and manage all subcontractors. Thus, Appellant, not LeChase, will manage the contract.

Turning to the LEED notice, Appellant stated it says nothing indicating Cummings and LeChase are related companies, although Appellant did admit LeChase helped prepare it. The notice, which Appellant provided to the Area Office, was published in the *Rochester Business Journal* and on Appellant's own website as well as on LeChase's website.

Appellant also stated it does not have just one employee, as the outdated D&B Report notes; it had "upwards of 17 union masons" working on a current project over the past six months. Elaborating on its strategy for the Glenmont Project, Appellant stated Mr. Cummings himself is signatory with the masons and bricklayers union, and will sign agreements with the carpenter and laborer unions. Thus, Appellant will self-perform selective demolition, carpentry, concrete, masonry, and other portions of the work on the Glenmont Project. Appellant will perform at least the required 15% of the work.

In response to the allegation that LeChase prepared the bid, Appellant stated that allegation was untrue, and that Mr. Cummings sent out bid invitations to over 2000 potential suppliers and subcontractors, instructing them to direct their questions to him. Appellant admitted some of the quotations were sent to LeChase, but that Mr. Cummings himself selected the subcontractors to be used, and performed the final assembly and review of the bid.

As for bonding, Appellant stated BCI's unnamed suppliers are "simply incorrect." No performance and payment bonds have been obtained yet, but Appellant will obtain them for the Glenmont Project once the contract is awarded. Appellant attached a letter from its surety showing its bonding levels, and stated it will update the DSBS Listing to show these levels.

Along with other documents, Appellant submitted a list of its prior and ongoing construction jobs (including work performed by itself and any by LeChase), Master Subcontract Agreements between itself and LeChase), and copies of quotations from subcontractors and the "price build-up" spreadsheet underlying Appellant's bid on the Glenmont Project.

One Master Subcontract Agreement, executed July 22, 2008, governs work done by Appellant as a subcontractor to LeChase as prime contractor. The other, executed April 12, 2010, governs work done by LeChase as a subcontractor to Appellant as prime contractor. Both agreements cover boilerplate-type matters. Neither contains exclusive dealings clauses or prices or limitations on the type or amount of work that can be subcontracted.

The Area Office file also contains Appellant's bid for the Glenmont Project, including its Bid Bond on Standard Form (SF) 24. The Bid Bond was executed on May 17, 2010, by Charles

Cummings for Appellant as principal. The only surety on the Bid Bond is Safeco Insurance Company of America.

On June 20, 2010, the Area Office sent Appellant its first set of follow-up questions, including a copy of the newly organized concern rule. Appellant responded the following day. In its response, Appellant stated:

- Since its inception it has had 19 employees; Mr. Cummings has never been an employee, officer, director, member or owner of LeChase or its affiliates, and has no family relationship with any of them; and four of Appellant's union employees have previously worked for LeChase. (Union employees typically follow the work.)

- Its receipts, receipts from LeChase, and percentages of receipts from LeChase are:

Year	Total Receipts	Amount from LeChase	Percent from LeChase
2007	$ [xxxxx]	$ [xxxxx]	[xxxxx] %
2008	[xxxxx]	[xxxxx]	[xxxxx] %
2009	[xxxxx]	[xxxxx]	[xxxxx] %

- LeChase has significant presence in Rochester, and most suppliers and subcontractors, including Appellant, have worked for LeChase. Appellant listed its 16 past and current projects. Of these, 6 appeared not to involve LeChase; 6 involved LeChase as a subcontractor; 3 were subcontracted by LeChase to Appellant; and one was a LeChase project that both companies worked on.

- Appellant leases its own office space which it does not share; it has its own equipment; it shares no officers with LeChase; and Mr. Cummings prepares Appellant's billings.

- LeChase now prepares Appellant's payroll, though it has not always done so.

- Mr. Cummings used a LeChase conference room to perform the final assembly of the bid on the Glenmont Project. Mr. Cummings used LeChase's FedEx service twice.

- Appellant obtains its own bonding; LeChase does not indemnify or provide bid or performance bonds for Appellant, and provides no financial assistance. Even though the Glenmont Project is Appellant's largest to date, it will not need LeChase's financial guarantees or support.

- Appellant also argued it operates in a different market segment than does LeChase, which does not pursue small business set-aside contracts.

On June 21, 2010, the Area Office sent Appellant additional questions, noting Appellant has a contractual relationship with LeChase and including a copy of the identity of interest rule. The Area Office asked Appellant if there were family relationships or common investments between Mr. Cummings and people involved in LeChase. Appellant responded "no." The Area

Office then asked Appellant if it would rebut the presumption of identity of interest affiliation based on the percentage of annual receipts derived from LeChase.

Appellant's response recapped points previously made, and stressed Appellant is not economically dependent on LeChase because Appellant has received work from 15 other clients or contractors and has subcontracted work to 5-10 subcontractors other than LeChase. Further, while there is "occasional" subcontracting work between itself and LeChase, no contract dictates this subcontracting.

C. The Size Determination

On June 22, 2010, the Area Office issued Size Determination No. 1-SD-2010-38 (Size Determination). The Area Office noted Appellant's tax returns for the years 2007, 2008, and 2009 show that Appellant, by itself, is small under the applicable $33.5 million size standard. The Area Office determined, based on information in the ORCA and CCR databases, that LeChase exceeds this size standard.

After discussing the ostensible subcontractor rule and finding no violation there, the Area Office turned to general affiliation based on identity of interest between Appellant and LeChase. The Area Office first noted that the instant case presents a more developed record than did the case in *Size Appeal of Cummings Construction, LLC*, SBA No. SIZ-5022 (2009) (OHA's 2009 Decision). There, OHA determined Appellant is not affiliated with LeChase after examining Appellant's Operating Agreement in light of the governing New York State law. The Area Office noted that OHA's 2009 Decision did not address the issue of identity of interest, and was based on a record that was not as fully developed as the record in the instant case.

Here, the Area Office found there is no cross-ownership or cross-management or family relationships or common investments between Appellant and LeChase, but noted that Mr. Cummings had used LeChase's conference room to assemble Appellant's bid and that he also sent Appellant's response to the protest to the Area Office by FedEx from LeChase's office. Noting it had offered Mr. Cummings a chance to rebut the identity of interests ground for affiliation, the Area Office next quoted at length from Appellant's response. The Area Office then discussed Appellant's "different market segments" argument, and determined that Appellant and LeChase are in "the same/similar line of business" based on the fact that six of the seven NAICS codes listed on Appellant's CCR profile are the same as those listed on LeChase's CCR profile.

Next, the Area Office considered the subcontracting between Appellant and LeChase and the percentages of Appellant's receipts that it derives from subcontracts with LeChase. Then the Area Office considered Appellant's statement that it had no contracts with LeChase against the fact that the Master Subcontracting Agreements exist, the continuing contractual relationships between the two firms and large percentages of Appellant's receipts that are derived from LeChase through subcontracts over three years. As for Appellant's rebuttal, the Area Office found it was not sufficient to overcome the presumption of affiliation under the identity of interest rule because it has not shown clear fracture between the two firms.

Finally, the Area Office stated, "[b]ased on the totality of the circumstances, Cummings is determined to be affiliated with LeChase, a large concern, due to economic interests through contractual relationships." Among the Area Office's listed factual findings were: Both firms are in the same/similar line of business; LeChase owns 49% of Appellant; large percentages of Appellant's receipts derive from LeChase; contractual relationships exist between the firms, each firm subcontracts much work to the other; Mr. Cummings used LeChase's conference room and LeChase's help calling potential subcontractors; Appellant sent its response to the protest from LeChase's address; and there was a lack of clear fracture.

C. The Appeal

Appellant received the Size Determination on June 28, 2010, and filed its size appeal with OHA on July 13, 2010. Appellant does not dispute the Area Office's determination that LeChase is other than small, but contends that the Area Office's conclusion that Appellant is affiliated with LeChase is clear error. Appellant expands upon the arguments it originally presented to the Area Office: that it is not in the same or similar line of business as LeChase, that there is no common management or control, that it is not economically dependent on LeChase, and that its non-contractual business relationships with LeChase are minimal.

Regarding lines of business, Appellant asserts it is a general contractor while LeChase is a construction management firm. Thus, Appellant performs construction work, holds the trade contracts of subcontractors, has agreements in place to obtain union labor, and is responsible to the owner for project completion and delivery, while LeChase provides advisory and consulting services on bidding, scheduling, and value analysis but does not deal with the unions, employ the tradespeople or assume the risks that a general contractor assumes. Further, the two firms are in different markets, as 90% of Appellant's receipts derive from performance of projects set aside for minority contractors, while LeChase targets other markets.

Appellant again asserts that there is no affiliation with LeChase based on common management, common control, or common ownership, and that Mr. Cummings has full authority to run Appellant. Also, Appellant's Operating Agreement has not changed since OHA approved LeChase's 49% ownership of Appellant in its 2009 Decision.

As for economic dependence, Appellant asserts its subcontracting arrangements with LeChase are minimal and consistent with standard methods of performing construction contracts. Describing its contracting history (16 total projects) in more detail, Appellant stated that in 2007, it had one project with LeChase that accounted for [xxxxxxxxxx]. In 2008, it had six projects, including one with LeChase that accounted for [xxxxx] percent of its receipts that year. In 2009, Appellant had five projects, including one derived from its relationship with LeChase that accounted for [xxxxx] % of its receipts that year. For comparison, Appellant pointed to *Size Appeal of Gateway Van & Storage Co.,* SBA No. SIZ-1365 (1980) where the percentage of business between a franchisor and its franchisee amounting to 60% did not constitute affiliation.

Appellant stressed that each year the percentage of its receipts derived from LeChase has decreased, and that since 2008 the dollar amount of receipts has continued to decrease. Further, out of all 16 projects, 11 or 60% have been for customers other than LeChase. Referring to the

Master Subcontracting Agreements, Appellant also noted these do not guarantee any work. Appellant also projected its receipts in 2010, and also projected that no more than [xxxxxxxxxx] will have derived from its contracts with LeChase.

Finally, Appellant asserts that its non-contractual relationship with LeChase (including its use of the conference room, LeChase's efforts to introduce Appellant to potential subcontractors, and Appellant's use of LeChase's FedEx service) is minimal. Appellant notes it used LeChase's conference room on Bid Day only because construction noise in the building next to Appellant's own office was disruptive. Also, the number of potential subcontractors LeChase contacted was about ten (0.5%) out of the over 2,000 who were sent bid invitations. Further, Appellant's use of LeChase's FedEx box on two occasions was of nominal value and does not cause affiliation.

Appellant moves to supplement the record on appeal with the three-page affidavit of Mr. Cummings. This affidavit provides few facts not already in the record. These New Facts are: (1) that approximately 90% of Appellant's work derives from contracts set aside for minority contractors, (2) that LeChase had contacted ten potential subcontractors, (3) the number of projects Appellant did for LeChase and others in 2008 and 2009, (4) the reason Appellant used LeChase's conference room on Bid Day, and (5) Appellant's projections of its 2010 receipts and the percentage of those receipts that would come from LeChase.

As relief, Appellant requests OHA to conclude that Appellant is an eligible small business and to reverse the Size Determination.

D. BCI's Response to the Appeal and Appellant's Reply

On July 29, 2010, BCI filed its Response to the Appeal. BCI asserts the Area Office correctly found Appellant affiliated with LeChase under the identity of interests rule. BCI also opposes Appellant's new evidence.

On July 29, 2010, Appellant filed a Reply to BCI's Response. Appellant reiterates its arguments in favor of admitting its proffered new evidence into the record.

IV. Discussion

A. Preliminary Matters

1. Timeliness

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).

2. New Evidence

The regulations governing size appeals provide that evidence not previously presented to the Area Office will not be considered unless either the Judge orders the submission of such evidence or a motion filed and served with it establishes good cause for submission. 13 C.F.R.

§ 134.308(a). The Appeal Petition includes Appellant's motion asserting the new evidence included in the attached affidavit of Charles Cummings is necessary to rebut the erroneous findings in the Size Determination. I have summarized this new evidence *supra,* as New Facts (1)-(5). New Facts (1)-(4) do help me understand Appellant's arguments and do not unduly enlarge the issues.

Accordingly, New Facts (1)-(4) are ADMITTED into the appeal record.

The new evidence summarized in New Fact (5) is Appellant's projected receipts for 2010 and the percentage from LeChase. These projections do not speak to Appellant's size status as of Bid Day, May 20, 2010, and thus are completely irrelevant to this appeal. *See* 13 C.F.R. §§ 121.104(c)(1) (size based on receipts of prior three fiscal years), 121.404(a) (size determined as of bid day).

Accordingly, New Fact (5) is EXCLUDED from the appeal record.

3. Appellant's Reply

The size appeal regulations provide that no reply to a response will be permitted unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Appellant's Reply adds nothing to the discussion. Accordingly Appellant's Reply is EXCLUDED from the appeal record.

4. 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 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).

B. Merits of the Appeal

There is no dispute that Appellant, by itself, is small, and no dispute that LeChase is large. Therefore, the only issue in this appeal is whether Appellant is affiliated with LeChase. If Appellant is affiliated with LeChase, then Appellant is other than small under the $33.5 million size standard.

The Area Office found Appellant affiliated with LeChase under the identity of interest rule, which provides:

> Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, *or firms that are economically dependent through contractual or*

> *other relationships*) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f) (emphasis added).

Specifically, the Area Office found Appellant was economically dependent on LeChase through contractual relationships. In *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 10 (2007), OHA held that where a large firm provides 70% of the challenged firm's receipts, the firms share an identity of interest because the challenged firm is economically dependent on the large firm. Thus, in absence of proof of clear fracture, the firms are affiliated for size determination purposes. In *Faison*, OHA declined to establish a threshold percentage of receipts at which identity of interest would be presumed; instead, OHA held that the percentage also would depend on other factors in a given case, but could be as low as 30-40%. *Faison,* at 10; *see Size Appeal of David Boland, Inc.*, SBA No. SIZ-4965, at 9 fn. 2 (2008). Factors that strengthen a determination of economic dependence could include the same line of business, ownership interest, exclusive dealings contracts, strategic relationship, subcontractor relationships, supply of raw materials, financial and other assistance, and others. *Faison,* at 10.

Appellant's reliance on *Size Appeal of Gateway Van & Storage Co.*, SBA No. SIZ-1365 (1980) for the proposition that no affiliation results where 60% of the challenged firm's receipts are attributable to the alleged affiliate is misplaced. That case dealt with issues arising out of a franchise relationship, and is inapposite here.

Here, key to the Area Office's finding of economic dependence was the fact that LeChase was the source of a substantial percentage of Appellant's receipts over the past three fiscal years: [xxxxx] % in 2007, [xxxxx] % in 2008, and [xxxxx] % in 2009. That is [xxxxxxxxxx] of Appellant's total receipts over the three-year period applicable to the Size Determination. Also, despite Appellant's protestations to the contrary, Appellant and LeChase are in the same/similar line of business.[2] Further, LeChase assisted Appellant by contacting some subcontractors on its behalf for the instant procurement, which bespeaks a certain degree of cooperation between the firms.[3] In light of all these facts, which put this case clearly within the ambit contemplated by *Faison,* I must conclude that the Area Office did not err in concluding that an identity of interest exists between Appellant and LeChase.

Identity of interest affiliation may be rebutted by facts that show the firms' interests are in fact separate. 13 C.F.R. § 121.103(f). Here, however, LeChase's 49% interest in Appellant is

[2] Firms need not perform exactly the same services to be found in the same/similar line of business. Here, both firms are in the construction industry, and thus are in the same/similar line of business. *Size Appeal of DooleyMack Government Contracting, LLC,* SBA No. SIZ-5085, at 7 (2009). Also, a firm's line of business is not changed by the fact that it seeks small business and other set-aside contracts. *See* 13 C.F.R. § 121.107

[3] Appellant's use of LeChase's conference room and FedEx service demonstrate only a *de minimis* connection between the two firms, and cannot be the basis for a finding of affiliation.

so substantial as to preclude a finding that the two firms' interests are in fact separate. *See Size Appeal of Pointe Precision, LLC,* SBA No. SIZ-4466, at 14 (2001) (26% ownership interest precluded clear fracture in newly organized concern rule analysis). Therefore, I conclude that the Area Office committed no clear error in finding Appellant affiliated with LeChase on the ground of identity of interest.

The conclusion that Appellant and LeChase are affiliated is not in conflict with OHA's 2009 decision. The issue there was whether Appellant and LeChase were affiliated based upon Appellant's operating agreement and capitalization. Here, the issue is whether there is affiliation based on a record showing three years of business dealings between the two firms. This record supports a finding of affiliation where the record in the OHA's 2009 decision did not.

Accordingly, I must DENY the instant appeal.[4]

III. Conclusion

The Area Office's determination was not based upon clear error. Accordingly, the Size Determination is AFFIRMED, and this appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

[4] The Area Office needed not, and did not, analyze affiliation under the separate ground of totality of the circumstances. SBA may find affiliation between firms even when no single factor is sufficient to constitute affiliation, if the totality of the circumstances supports a finding of affiliation. 13 C.F.R. § 121.103(a)(5). Thus, SBA could aggregate LeChase's 49% interest in Appellant, an interest which, by itself, is just shy of control, with other factors (source of receipts, subcontracting, financial and other assistance, and so on), to determine whether Appellant and LeChase are affiliated. *See Faison* at 11. Even if Appellant were to reduce its economic dependence on LeChase by seeking a larger percentage of its receipts from other sources, the fact of LeChase's large (though non-controlling) interest in Appellant still greatly enhances the likelihood of a finding of totality of the circumstances affiliation when other factors are also present.