United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Rio Vista Management, LLC, Appellant, Appealed From Size Determination No. 6-2011-144	SBA No. SIZ-5316 Decided: January 11, 2012

APPEARANCES

Jonathan T. Williams, Esq., and Kathryn V. Flood, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On October 28, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2011-144 finding Rio Vista Management, LLC (Appellant) other than small for the procurement at issue due to affiliation with Cadence Contract Services, LLC (Cadence). Appellant contends that the Area Office made several errors. For the reasons discussed below, the appeal is granted, and the size determination is reversed.

SBA's Office of Hearings and Appeals (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 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 May 10, 2011, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA8201-11-R-0024 (RFP) seeking a contractor to perform minor construction, maintenance, and repair projects at Hill Air Force Base, Utah. The Contracting Officer (CO) set aside the procurement for participants in SBA's 8(a) Business Development (BD) program and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in

average annual receipts. On June 13, 2011, Appellant submitted its proposal, self-certifying as an eligible 8(a) BD program participant.

On September 22, 2011, the CO notified disappointed offerors, including Advanced Solutions Group, LLC (ASG), that Appellant was the apparent successful offeror. On September 23, 2011, ASG protested Appellant's size, claiming that Appellant is affiliated with Cadence.

B. Size Determination

On October 28, 2011, the Area Office issued its size determination. The Area Office first explained that Appellant and Cadence were parties to an SBA-approved mentor-protégé agreement, which was terminated at the parties' mutual request in May 2011. The two firms formed an SBA-approved joint venture on August 11, 2009, to perform a Federal contract in Texas, which is nearing the end of performance. The Area Office noted that the SBA approved a total of eleven joint ventures between the two firms between 2008 and 2010, but the Texas contract is the only contract awarded to any of the ventures. The Area Office determined that Appellant's receipts, including its proportionate share of the receipts of the joint venture, calculated on the basis of Appellant's 2008, 2009, and 2010 tax returns, fall below the applicable size standard. (Size Determination 5-6.)

The Area Office next determined that Appellant's sole owner, Mrs. JoAnn Jex, shares an identity of interest with her husband, Mr. Russell Jex, who is a former officer and employee of Cadence and currently is employed by Appellant. 13 C.F.R. § 121.103(f); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984). In an attempt to rebut the presumption of a familial identity of interest, Appellant argued that its interests are separate from those of Cadence. However, the Area Office rejected that argument, reasoning that, to successfully rebut the presumption, Appellant must show that the interests of the individuals themselves, rather than the interests of the firms, are separate. The Area Office concluded that Appellant was unable to show any fracture in the relationship between the Jexes.

In support of its conclusion, the Area Office explained that Mrs. Jex does not have a contracting license, and Appellant relied upon Mr. Jex's license to qualify for the instant contract. Mrs. Jex has no experience in the construction business and previously worked as an accountant before establishing Appellant. Moreover, since its founding in 2004, Appellant has had numerous contractual ties with Cadence: Cadence awarded twenty-one subcontracts to Appellant, Appellant awarded six subcontracts to Cadence, and Cadence provided bond indemnification for Appellant on thirteen contracts. (Size Determination 7.) Additionally, as previously noted, Cadence and Appellant are performing the Texas contract through a joint venture. Appellant and Cadence share office space in Texas related to that joint venture.

The Area Office then examined the revenues Appellant derived from Cadence. Appellant derived approximately 99% of its revenues from Cadence in 2004, 90% in 2005, 53% in 2006, 90% in 2007, 8% in 2008, 10% in 2009, and 27% in 2010. *Id.* The Area Office noted that after Appellant became an 8(a) BD program participant in late 2007, the assistance it received from Cadence shifted from subcontracts to bonding assistance. Additionally, Appellant began to subcontract work to Cadence. The Area Office also noted that the two firms do business in the

same or similar NAICS codes.

The Area Office went on to describe the newly organized concern rule, which the Area Office found to support a finding of affiliation between Appellant and Cadence. 13 C.F.R. § 121.103(g). The Area Office explained that Appellant was established in May 2004. Mr. Jex was Vice President of Operations at Cadence until 2007, and thereafter became Vice President of Appellant. During the time he was employed by Cadence, Mr. Jex was involved with several subcontracts awarded to Appellant. The Area Office questioned the veracity of Appellant's claim that Mr. Jex was not hired by Appellant until after December 18, 2007, the date that Appellant was admitted to the 8(a) BD program. The Area Office asserted that Appellant did not disclose its intent to hire Mr. Jex to 8(a) BD program officials. The Area Office further noted that Appellant initially failed to disclose Mr. Jex's prior relationship with Cadence in response to the size protest.

Based upon all these considerations, the Area Office concluded that Appellant is affiliated with Cadence based upon the identity of interest rule and the newly organized concern rule. The Area Office also determined that Appellant is not eligible for the mentor-protégé joint venture exemption to affiliation because Appellant received only one contract under an SBA-approved joint venture, and all the other ties between the firms fall outside the mentor-protégé joint venture exception. (Size Determination 9.) The Area Office noted that, in any event, it may find affiliation between a mentor and a protégé for other reasons. 13 C.F.R. § 121.103(b). The Area Office finally indicated that, even in the absence of specific facts supporting affiliation based upon the identity of interest rule and the newly organized concern rule, the totality of the circumstances are indicative of affiliation between Appellant and Cadence. 13 C.F.R. § 121.103(a)(5). Appellant acknowledged that Cadence is not a small business. (Size Determination 10.) Accordingly, because Cadence is other than a small firm, Appellant is also other than small under the applicable size standard.

C. Appeal Petition

On November 14, 2011, Appellant filed its appeal petition, claiming the size determination contains several clear errors. First, Appellant contends the Area Office failed to determine Appellant's size as of June 13, 2011, when Appellant submitted its initial offer. Instead, according to Appellant, the Area Office erroneously reviewed information and circumstances prior to the relevant period to determine size (2008-2010), such as Appellant's revenues between 2004 and 2007 and Appellant's 8(a) BD program application. Appellant argues that it is critical for the Area Office to review a firm's size as of the correct date because a firm's size and its affiliations may change over time. *See Size Appeal of Innovative Constr. & Mgmt. Servs.*, SBA No. SIZ-5202 (2011).

Appellant next asserts that the Area Office erred in examining Appellant's 8(a) BD program application and eligibility, which Appellant argues are matters beyond the scope of a size determination. *See* 13 C.F.R. § 124.517(a); *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254 (2011); *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950 (2008), *recons. denied*, SBA No. SIZ-4968 (2008) (PFR). Specifically, Appellant alleges that the Area Office improperly second-guessed Appellant's 8(a) BD program eligibility when it noted

that Mrs. Jex does not possess a contractor's license and questioned the information in Appellant's application. Appellant argues that whether Mrs. Jex has a contractor's license is merely a red herring because a disadvantaged owner of an 8(a) BD participant firm need not possess technical licenses, so long as she retains control over the company. 13 C.F.R. § 124.517(a). Additionally, Appellant asserts that it did notify SBA that it hired Mr. Jex when it submitted its initial business plan in 2008. Appellant emphasizes that it has received positive annual reviews from the 8(a) BD program office, and it has demonstrated its ability to operate independently. Appellant contends it was clearly erroneous for the Area Office to base its size determination on Appellant's 8(a) BD program eligibility.

Appellant also argues that the Area Office failed to give proper effect to the SBA-approved mentor-protégé agreement between Appellant and Cadence. The Area Office concluded that, aside from the Texas contract awarded to the joint venture between Appellant and Cadence, all the other ties between the firms (subcontracts, bonding assistance, joint office space) fall outside the mentor-protégé joint venture exemption from affiliation. Appellant claims the Area Office interpreted the affiliation exception too narrowly because a protégé cannot be affiliated with its mentor based upon assistance received under an SBA-approved mentor-protégé agreement. 13 C.F.R. §§ 121.103(b)(6), 124.520(d)(4). Thus, a finding of affiliation between a mentor and a protégé is not proper unless the mentor provides assistance "above and beyond" that contemplated by the mentor-protégé agreement. *See Size Appeal of Safety & Ecology Corp.*, SBA No. SIZ-5199 (2010).

Appellant contends that none of the ties between Appellant and Cadence go beyond the types of assistance usually provided under a mentor-protégé program, and the firms complied with the requirements of the mentor-protégé regulations. In support of this assertion, Appellant points to the letter approving the mentor-protégé agreement between Appellant and Cadence, which provides that a mentor firm may provide assistance such as "technical, administrative, managerial, financial (in the form of equity investments, bonding and/or loans), subcontracting, and ... joint venture arrangements." Letter from Joseph P. Loddo, Associate Administrator for the Office of Business Development, U.S. Small Business Administration to Stanley Nakano, Utah District Director, U.S. Small Business Administration (May 19, 2008); *see also* 13 C.F.R. § 124.520(a). Appellant highlights that it and Cadence voluntarily terminated their mentor-protégé agreement in May 2011, "[a]fter achieving the aims of the [mentor-protégé] program." (Appeal Petition 8.) Cadence has not provided bonding assistance to Appellant since 2010, and there have been no subcontracts between the firms since 2009. Thus, Appellant concludes that the Area Office clearly erred in basing its finding of affiliation on assistance that was within the scope of the mentor-protégé program and had ceased well before June 13, 2011.

Finally, Appellant emphasizes that Appellant is not affiliated with Cadence under the identity of interest rule, the newly organized concern rule, or the totality of the circumstances because Cadence cannot control Appellant. With regard to the identity of interest rule, Appellant argues Mr. and Mrs. Jex "must have interests in two or more firms through which affiliation between the firms could arise based on their familial relationship." (Appeal Petition 9.) Appellant explains that a finding of affiliation hinges on an individual's ability to exert control over an entity. 13 C.F.R. §§ 121.103(a)(1), 121.103(f). Here, as of the date to determine size, Mr. Jex had no involvement with Cadence, so there can be no identity of interest between Appellant

and Cadence. Furthermore, Appellant contends Mr. Jex never held a position of control at Cadence even when he was employed there because he held no ownership interest in the firm. Additionally, Mr. Jex's employment with Cadence ended in 2007, before the relevant period to determine size. Appellant asserts that Mr. Jex cannot now (and could not ever) control Cadence, so there can be no affiliation based on the familial relationship between Mr. and Mrs. Jex. *See Size Appeal of STA Techs., Inc.*, SBA No. SIZ-4790 (2006).

Appellant also asserts that there is no basis on which to conclude that Appellant is economically dependent upon Cadence because during the relevant years to determine size (2008-2010), the level of revenue Appellant derived from Cadence was well below the percentages generally determined to constitute evidence of economic dependence. *See, e.g., Size Appeal of Argus & Black, Inc.*, SBA No. SIZ-5204 (2011) (noting that economic dependence is found when a firm receives 70% or more of its revenues from another firm). Appellant again stresses that it is an economically viable firm and asserts that there is no evidence in the record to support the conclusion that Appellant was economically dependent upon Cadence as of the date to determine size.

Appellant claims the Area Office improperly conflated concepts related to the identity of interest rule with the newly organized concern rule:

> According to the Area Office, the fact that Mr. Jex was employed by Cadence while Mrs. Jex formed [Appellant] in 2004, combined with the fact that Mr. Jex later joined [Appellant] and is Mrs. Jex's husband, leads to the conclusion that Mr. Jex's association with Cadence is attributed to the founding of [Appellant]; therefore, [Appellant] is a newly organized concern of Cadence.

(Appeal Petition 11.) Appellant challenges this "novel combination" of the regulations by pointing out that the circumstances presented here do not satisfy the four elements of the newly organized concern rule. 13 C.F.R. § 121.103(g). Specifically, Appellant explains, Mrs. Jex was never employed by Cadence. Thus, she could never have controlled Cadence, which is an essential element of the newly organized concern rule. Appellant asserts the Area Office erred in using the alleged identity of interest between Mr. and Mrs. Jex to determine that Mr. Jex could control both entities (and to find a violation of the newly organized concern rule) because the familial identity of interest presumption applies only to the identity of interest rule itself and cannot be imputed to the context of the newly organized concern rule. *See Size Appeal of The McCarty Corp.*, SBA No. SIZ-3351 (1991). Appellant concludes that because Mrs. Jex was never employed by Cadence, Appellant cannot be affiliated with Cadence based on the newly organized concern rule. Appellant further maintains that it was founded in 2004 and cannot reasonably be considered "newly organized" as of the date to determine size.

Lastly, Appellant challenges the Area Office's determination that Appellant is affiliated with Cadence based upon the totality of the circumstances. Appellant argues it has demonstrated that the Area Office's conclusion that the firms are affiliated was based upon circumstances that occurred before the period to determine size, that were protected by the mentor-protégé agreement between the firms, and that are beyond the scope of a size determination. Appellant concludes that there is insufficient evidence in the record to support the determination that

Appellant is affiliated with Cadence. Accordingly, Appellant requests that OHA reverse the size determination.

III. 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. 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

Under SBA's regulations, concerns are affiliated when one could control another or when a third party could control both. 13 C.F.R. § 121.103(a)(1). The ultimate consideration in determining whether concerns are affiliated is whether one of the concerns controls or has the power to control the other. *See, e.g., Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244, at 5 (2011); *Size Appeal of LGS Mgmt., Inc.*, SBA No. SIZ-5160, at 3 (2010).

1. Date to Determine Size

Appellant first argues that the Area Office improperly considered information outside the period to determine size. Because Appellant submitted its initial offer for the subject solicitation on June 13, 2011, Appellant's size is determined as of that date. 13 C.F.R. § 121.404(a). The regulation governing the period of measurement used to determine a firm's size is clear: "Annual receipts of a concern that has been in business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three." 13 C.F.R. § 121.104(c)(1). Pursuant to this regulation, the Area Office calculated Appellant's receipts for the years 2008, 2009, and 2010.

Nonetheless, the size determination makes clear that the Area Office also considered circumstances long before the relevant period of measurement, such as Appellant's revenues from 2004-2007, the prior work experience of the Jexes, Appellant's application for admission to the 8(a) program, and various contractual arrangements between Appellant and Cadence. I agree with Appellant that these prior circumstances have limited, if any, relevance in determining whether Cadence had the power to control Appellant as of June 13, 2011. It is well-established that potential past affiliation is not sufficient to demonstrate current affiliation. *See, e.g., Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291, at 5 (2011) (finding that "prior investments which are no longer in effect cannot logically support a conclusion that two investors [still] share 'identical or substantially identical business interests"'); *Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254, at 9 (2011) (explaining that employment several years earlier was "too far in the past to be relevant to the question of affiliation today"). Likewise, past ties between Cadence and Appellant do not, by themselves, establish that the two firms are presently affiliated. At a

minimum, it appears that the Area Office focused too much attention on circumstances that occurred prior to 2008, without explaining or demonstrating how those prior circumstances are indicative of current affiliation. Accordingly, I find that the Area Office erred in finding affiliation based largely on circumstances preceding the applicable period of measurement.

2. Mentor-Protégé Agreement

Appellant next contends that it cannot be affiliated with Cadence based upon assistance rendered under the SBA-approved mentor-protégé agreement between the parties.[1] The regulations governing the 8(a) BD program specifically provide: "No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement." 13 C.F.R. § 124.520(d)(4). The regulations also explain:

> The mentor/protégé program is designed to encourage approved mentors to provide various forms of business development assistance to protégé firms. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of non-8(a) contracts so that protégé firms may more fully develop their capabilities. The purpose of the mentor/protégé relationship is to enhance the capabilities of the protégé, assist the protégé with meeting the goals established in its SBA-approved business plan, and to improve its ability to successfully compete for contracts.

In the size determination, the Area Office relied upon a different regulation: "An 8(a) BD Participant that has an SBA-approved mentor/protégé agreement is not affiliated with a mentor firm solely because the protégé firm receives assistance from the mentor under the agreement. . .

[1] Appellant argues at length that the Area Office improperly based its size determination on Appellant's 8(a) BD program eligibility. I agree with Appellant [cont.] that its 8(a) BD program application, eligibility, and mentor-protégé agreement are matters beyond the Area Office's purview. *See, e.g., Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254, at 7 (2011) ("SBA had already examined the relationship between [a mentor and protégé] when it approved Appellant's 8(a) application and mentor/protégé agreement. The Area Office should not have reached behind these approvals to examine a relationship which had already been examined and approved by SBA."); *Size Appeal of White Hawk/Todd, A Joint Venture*, SBA No. SIZ-4950, at 2 (2008), *recons. denied*, SBA No. SIZ-4968 (2008) (PFR) (holding that an area office does not have subject matter jurisdiction over a firm's compliance with 8(a) BD program regulations, specifically mentor-protégé program regulations). However, a fair reading of the size determination does not support Appellant's contention that the Area Office based its finding of affiliation upon whether or not Appellant was eligible for the 8(a) BD program. Rather, the Area Office concluded that Appellant is affiliated with Cadence based on an identity of interest and the newly organized concern rule, which are discussed further *infra*.

. Affiliation may be found . . . for other reasons." 13 C.F.R. § 121.103(b)(6). Thus, the Area Office recognized that the mentor-protégé agreement could not serve as a basis for finding affiliation, but still found affiliation "for other reasons."

I agree with Appellant that the Area Office failed to afford the proper weight to the mentor-protégé agreement between Appellant and Cadence, which was in effect for the entire measurement period for determining Appellant's size. The 8(a) BD program regulations specifically authorize mentor firms to provide "technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government through joint venture arrangements." 13 C.F.R. § 124.520(a). Furthermore, OHA has explained that to find affiliation between a mentor and a protégé under § 121.103(b)(6), the Area Office must find "assistance above and beyond such direct business assistance, such as a mentor sharing with its protégé a location and employees or a protégé selling to its mentor the majority of its stock." *Size Appeal of Safety and Ecology Corp.*, SBA No. SIZ-5177, at 24 (2010). In *Safety and Ecology*, a mentor firm and a protégé firm had formed eleven joint ventures. Two of those joint ventures had obtained five contracts. *Id.* at 4-5. OHA determined that "the broad protection of § 124.520(d)(4)" immunized the firms from affiliation. *Id.* at 24.

In finding affiliation in this case, the Area Office relied upon joint ventures formed by Appellant and Cadence, subcontracts between the firms, and bonding assistance provided by Cadence to Appellant. Appellant and Cadence formed eleven joint ventures during the relevant measurement period, but only one of those ventures obtained a contract—the Texas contract currently in performance. In *Safety and Ecology*, OHA determined that "[f]orming a joint venture with a protégé firm to compete for contracts undoubtedly constitutes assistance from the mentor firm under an 8(a) BD mentor-protégé agreement." *Id.* Appellant and Cadence have formed the same number of joint ventures as the firms in *Safety and Ecology*, and those joint ventures have earned fewer contracts than in *Safety and Ecology*.

Of the thirty-nine total contracts between Appellant and Cadence, thirteen were subcontracts issued to Appellant from Cadence in between 2008 and 2010; six were subcontracts issued to Cadence from Appellant between 2008 and 2010; thirteen are contracts for which a bond indemnification fee was paid to Cadence by Appellant (two of these also involve subcontracts issued to Cadence by Appellant) between 2008 and 2010; and one is the Texas contract awarded to the joint venture formed by Appellant and Cadence.[2] The subcontracts and bonding assistance between 2008 and 2010 are covered by the mentor-protégé agreement between the firms, and the regulations identify those types of assistance as proper under such an agreement. Thus, the Area Office erred in basing its finding of affiliation on assistance that was within the scope of the mentor-protégé program.

The Area Office cannot penalize a protégé firm because its mentor firm has provided assistance under an SBA-approved mentor-protégé agreement. Under the facts of this case, I find

[2] The remaining eight contracts were issued to Appellant from Cadence before 2008 (*i.e.*, before the period of measurement).

the joint ventures, subcontracts, and bonding assistance between Appellant and Cadence do not rise "above and beyond" the types of assistance authorized by regulation. Accordingly, pursuant to 13 C.F.R. §§ 121.103(b)(6) and 124.520(d)(4), the Area Office should not have considered these ties as evidence of affiliation in its size determination analysis.

3. Identity of Interest

Appellant next asserts that it cannot be affiliated with Cadence based on an identity of interest between the Jexes. The applicable regulation 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). Here, the Area Office determined that Mr. and Mrs. Jex share an identity of interest because they are husband and wife. The Area Office further noted that, based upon the identity of interest between the Jexes, Mr. Jex "is also considered to have been involved in the establishment of [Appellant]" during the time when Mr. Jex worked for Cadence. (Size Determination 7.)

Because Mr. and Mrs. Jex are a married couple, the Area Office reasonably determined that they share an identity of interest. However, the regulatory consequence of such a finding is that Mr. and Mrs. Jex "may be treated as one party with [their business or economic] interests aggregated." *Id.* The principal flaw with the Area Office's analysis is that neither of the Jexes holds any interest—let alone a controlling interest—in Cadence. Further, the Area Office did not determine, and the record does not support the conclusion, that the Jexes have any power to control Cadence. Thus, while it is proper to aggregate the interests of Mr. and Mrs. Jex, this does not establish any connection between Appellant and Cadence.

The identity of interest rule is applied to determine who controls an entity. An identity of interest can establish affiliation between firms where those firms or the people who control them have such similar interests that it can be assumed they will act in concert. *E.g.*, *Size Appeal of McLendon Acres, Inc.*, SBA No SIZ-5222, at 6-7 (2011) (finding affiliation between the appellant and a number of other firms after aggregating the interests of a married couple); *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011) (affirming a finding of identity of interest where "the Area Office presumed an identity of interest between [the challenged firm] and [its alleged affiliate] because the owners of the firms are related"). Here, the Area Office determined that Mr. and Mrs. Jex share an identity of interest, but this has no bearing on the connection between the Appellant and Cadence. The identity of interest between Mr. and Mrs. Jex does not establish any connection between Appellant and Cadence because neither Mr. nor Mrs. Jex has any interest in, or control over, Cadence.

The Area Office also apparently concluded that Appellant and Cadence share an identity of interest based upon economic dependence and repeatedly noted that Appellant derived a large portion of its revenues from Cadence from 2004 through 2007. It is true that OHA has generally found economic dependence when one firm relies upon another for 70% or more of its receipts. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007); *see also Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 5 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Furthermore, "affiliation through contractual relationships may be based on findings from a single fiscal year." *Size Appeal of TPG Consulting, LLC*, SBA No. SIZ-5306, at 14 (2011) (quoting *Size Appeal of Supreme-Tech., Inc.*, SBA No. SIZ-4092, at 5 (1995)). However, as discussed above, Appellant derived more than 70% of its revenues from Cadence only during years before the relevant period to determine size. During the relevant period of measurement, Appellant derived 8% of revenues from Cadence in 2008, 10% in 2009, and 27% in 2010. Accordingly, the Area Office erred in finding economic dependence, given that Cadence accounts for only a limited portion of Appellant's revenues during the relevant period of measurement. For these reasons, I find there is no identity of interest between Appellant and Cadence on the basis of the family relationship between the Jexes or economic dependence.

4. Newly Organized Concern Rule

The Area Office also found affiliation between Appellant and Cadence based on the newly organized concern rule. The rule provides that:

> Affiliation may arise where former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

13 C.F.R. § 121.103(g). Although Appellant was founded by Mrs. Jex in 2004, and Mr. Jex continued to be employed at Cadence for several years thereafter, the Area Office considered that Mr. Jex was involved in Appellant's establishment due to the identity of interest between the Jexes. The Area Office also explained that Mr. Jex is now employed by Appellant and provides the necessary contractor's license for Appellant's business. Further, Appellant has repeatedly leased office space from Cadence. Accordingly, the Area Office concluded that Appellant is a newly organized concern of Cadence.

OHA has distilled the "newly organized concern" rule into four required elements: (1) the former officers, directors, principal stockholders, managing members, or key employees of one

concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010).

Here, it is clear that the first element of the test is not met, because Appellant was established by Mrs. Jex, and Mrs. Jex was never an officer (or even an employee) of Cadence. The Area Office reasoned that Mr. Jex's employment with Cadence satisfies the first element of the rule because the Jexes share an identity of interest, so their actions are imputed to one another. I find that this attribution stretches too far the presumption that family members will act as one. As discussed *supra*, a finding that individuals or firms share an identity of interest results in their interests being aggregated; it does not mean that such individuals or firms are treated as a single person or entity for purposes of other, unrelated rules. Thus, I cannot conclude that the Jexes, collectively, meet the first element of the newly organized concern rule. Because Mrs. Jex alone established Appellant, and Mrs. Jex was never employed by Cadence, Appellant was not established by a former officer or employee of Cadence. Therefore, Appellant is not a newly organized concern of Cadence.[3]

5. Totality of the Circumstances

Finally, Appellant challenges the Area Office's finding that it is affiliated with Cadence based upon the totality of the circumstances. 13 C.F.R. § 121.103(a)(5). OHA has explained that SBA may find firms affiliated under the totality of the circumstances if "the interactions between the businesses are so suggestive of reliance as to render the firms affiliates. Although the evidence in the record may not establish affiliation under one of the specific factors enumerated in the regulation, a review of all the factors may lead to the conclusion one business has the power to control the other and, thus, both are affiliated." *Size Appeal of Diverse Constr. Group, LLC*, SBA SIZ-5112, at 7 (2010) (citations omitted). Here, I have determined that Appellant is not affiliated with Cadence based on an identity of interest or the newly organized concern rule,

[3] It is also questionable whether Appellant can even be considered "newly organized." OHA has recognized that "[o]nce a firm has been an active concern for an extended period, it is not appropriate to apply the 'newly organized concern' rule without considering whether the challenged firm can still reasonably be considered a new business." *Size Appeal of Coastal Mgmt. Solutions, Inc.*, SBA No. SIZ-5281, at 6 (2011). In *Coastal Management*, the challenged firm had been in existence for six years when the area office determined it had violated the newly organized concern rule. *Id.* at 6. OHA expressed skepticism that the rule should apply to a firm that had been active for six years, but remanded the matter for further review because the area office had not specifically considered the issue or notified the challenged firm that the area office may apply the rule. *Id.* Here, Appellant has been an active concern since 2004. As in *Coastal Management*, it does not appear that the Area Office considered whether Appellant can still be considered a newly organized concern. At a minimum, the Area Office should have explored why the newly organized concern rule applies to a seven-year old firm before finding affiliation on the basis of the rule.

so the totality of the circumstances is the only remaining basis to find affiliation.

As discussed above, the Area Office erred in considering information prior to 2008 in its affiliation analysis. I have also determined that the Area Office erred in considering the assistance provided by Cadence to Appellant under the mentor-protégé agreement between the firms as evidence of affiliation, because such assistance did not rise "above and beyond" the types of assistance authorized by regulation. This leaves scant evidence of affiliation between the firms to consider. The Area Office emphasized that Mr. Jex, not Mrs. Jex, provides the contractor's license for Appellant. Considering that Mr. Jex has been employed by Appellant throughout the measurement period to determine size, it is unclear how this could be indicative of affiliation between Appellant and Cadence.

The Area Office also emphasized that Appellant has leased office space from Cadence sixteen times when they have performed contracts over the course of their mentor-protégé arrangement. These transactions may also be protected by the mentor-protégé agreement between the firms, but even if not, they are alone insufficient to establish affiliation between Appellant and Cadence. Affiliation exists when "one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a). The fact that one firm leases office space from another provides no basis to find power to control. Accordingly, based upon the record, I conclude the Area Office clearly erred in finding affiliation between Appellant and Cadence.

IV. Conclusion

Appellant successfully demonstrated that the size determination was based upon clear and material errors. I therefore GRANT this appeal and REVERSE the Area Office's size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge