

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

CTSI-FM, LLC,

Appellant,

Appealed From
Size Determination Nos. 2-2016-56, -57

SBA No. SIZ-5809

Decided: February 6, 2017

APPEARANCES

Isaias Alba, Esq., Patrick Rothwell, Esq., Kathryn V. Flood, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for CTSI-FM, LLC

Adam S. Zarren, Esq., Ari Y. Friedman, Esq., Zarren Law Group, LLC, Baltimore, Maryland, for CTSI-FM, LLC

Mark R. Hagedorn, Esq., Office of General Counsel, for the U.S. Small Business Administration

DECISION¹

I. Procedural History and Jurisdiction

On November 7, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2016-56, 57, finding CTSI-FM, LLC (Appellant), is not an eligible small business for the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find it an eligible

¹ I originally issued this Decision under a Protective Order. After receiving and considering one or more timely requests for redactions, I now issue this redacted Decision.

small business for the instant procurement. For the reasons discussed *infra*, I grant the appeal in part, and remand the case to the Area Office for a new size determination.

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, Protest, and Area Office Proceedings

On November 25, 2015, The Nuclear Regulatory Commission (NRC) issued Solicitation No. NRC-HQ-40-16-R-0002 for building operations and maintenance services for the NRC headquarters facility. The Contracting Officer (CO) set the procurement aside for service-disabled veteran-owned small business concerns (SDVO SBCs), and designated North American Industry Classification System (NAICS) code 238990, All Other Specialty Trade Contractors, with a corresponding \$15 million annual receipts size standard, as the appropriate code. Appellant submitted its offer on December 15, 2015.

On April 26, 2016, the CO notified unsuccessful offerors that CTSI Facility Management (Appellant) is the apparent successful offeror. On May 3, 2016, Trifecta Global, LLC (Trifecta), filed a size protest against Appellant. Trifecta alleged Appellant is ineligible for the procurement because it does not have the capacity to perform services under NAICS code 238990. Trifecta also alleged Appellant is affiliated with Chesapeake Tower Systems, Inc., dba CTSI (CTSI). Further, CTSI is allegedly affiliated with Raven Services Corporation (RSC) by common management. Sarai Services Group, Inc. (Sarai), also filed a size protest, alleging Appellant is affiliated with CTSI.

Included with Trifecta's protest are System for Award Management (SAM) database printouts on Appellant and on alleged affiliate CTSI. In the "NAICS Codes Selected" column of the SAM, both Appellant and CTSI indicate their primary NAICS code is 561210 (Facilities Support Services). Both also indicate NAICS codes 238210 (Electrical contractors and other wiring installation contractors), 238220 (Plumbing, heating, and air-conditioning contractors), and 561730 (Landscaping services). Appellant indicates two other NAICS codes, and CTSI-FM indicates four others.

On May 12, 2016, Appellant responded to the protests. Appellant is a Maryland Limited Liability Company formed on January 19, 2010. (Protest Response at 3.) Appellant is a diversified building services concern offering maintenance, engineering, operations, custodial services, landscaping services, and project management services. Appellant has three members: K. Weedon Gallagher (Weedon) has [xxx]% ownership interest. Sean P. Gallagher (Sean) is Weedon's brother, and has [xxx]% interest. The third Member, Richard Kohr, Jr., also has [xxx]% interest. Weedon is Appellant's Managing Member and CEO. Sean provides Appellant with consulting services in his individual capacity for \$[xxx] a month. (*Id.* at 4.)

CTSI is a Maryland corporation whose main business is construction. Sean owns [xxx]% of CTSI and is its President. RSC is a Virginia corporation. It is [xxx]% owned by Michael Marino and [xxx]% owned by Sean. Sean is RSC's President; Mr. Marino is its CEO. Raven Services JV, LLC (RSJV) is a joint venture owned [xxx]% by CTSI and [xxx]% by RSC; Mr. Marino is its Operations Manager. Appellant performs work for RSJV as a subcontractor. (*Id.*; Appellant's SBA Form 355.)

Appellant argued there is a clear fracture between Weedon and Sean because the concerns have different locations, and are in different lines of business. Weedon controls Appellant and Sean controls CTSI. Neither brother has the ability to control the concern of which the other brother is majority owner. There is minimal business contact between the concerns, only Sean's consulting contract. In support, Appellant cites to *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059 (1995) and *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011). (*Id.* at 6-8.)

B. The Size Determinations

On November 7, 2016, the Area Office issued two similar size determinations, finding Appellant other than small. First, the Area Office dismissed Trifecta's allegations on Appellant's capacity to perform as outside the scope of a size determination. (Size Determination No. 2-2016-56, at 3.)

The Area Office found Appellant's reliance on *Bob Jones Realty* misplaced. (*Id.* at 5; Size Determination No. 2-2016-57, at 4.) That case dealt with concerns in different lines of business, in different locations, and which conducted minimal business together. The Area Office concluded the case does not support the claim that Sean or CTSI cannot control Appellant based upon Sean's [xxx]% ownership interest. Further, the Area Office distinguished *GPA Technologies*. There, OHA held a \$24,000 per year consulting agreement between concerns owned and controlled by siblings does not represent a tie that would preclude a finding of clear fracture. The concerns had no common ownership, no common management, had different facilities and were in different lines of business. (Size Determinations at 5.) Here, however, Sean is a former majority owner and CEO of Appellant, and is currently a minority owner and member who provides consulting services. Appellant and CTSI have almost identical trade names, same primary NAICS code, and similar lines of business. They target similar customer bases and are headquartered less than 30 miles apart. The Area Office thus found no clear line of fracture between Weedon and Sean, and thus Appellant and CTSI are affiliated based upon familial identity of interest. (*Id.*)

The Area Office found Sean had the power to control Appellant, and as President and [xxx]% owner had the power to control RSC. Accordingly, the Area Office found Appellant and RSC affiliated through common management. (*Id.* at 5-6.)

The Area Office found Appellant affiliated with CTSI, RSC, and RSJV, aggregated the annual receipts of Appellant and its affiliated concerns and concluded Appellant is other than small. (*Id.* at 6.)

C. The Appeal Petition

On November 22, 2016, Appellant filed the instant appeal. Appellant states that it is a diversified building services concern, offering maintenance, engineering, operations, custodial, landscaping and project management services. (Appeal at 3.) Appellant argues the Area Office's finding that Sean has the power to control Appellant is not based on any evidence in the record. (*Id.* at 6.) Appellant argues that a concern may rebut the finding of identity of interest between family members by showing there is a clear line of fracture separating them. A minimal amount of business activity between the family members will not prevent a finding of clear fracture. An identity of interest is found only where common interests establish a relationship that bespeaks a concert of purpose and effort that causes the family members to act in union for their common benefit. (*Id.* at 7, citing *Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008) (quoting *Size Appeal of Bend Research, Inc.*, SBA No. SIZ-4369 (1999)); *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006) (citing *Size Appeal of Ridge Instrument Co., Inc.*, SBA No. SIZ-4207 (1996)).)

Appellant argues SBA cannot find affiliation between two concerns unless there is the ability for one to control the other, or a third party to control both. Without the ability to control both concerns among the family members, a finding of identity of interest does not create affiliation. (*Id.* at 7 (citing *Size Appeal of U.S. Builders Group*, SBA No. SIZ-5519 (2013); *Size Appeal of Manroy, USA, LLC*, SBA No. SIZ-5244 (2011)).)

Appellant argues the Area Office's analysis fails to explain how Sean, [xxx]% owner, controls Appellant. Further, the Area Office ignored evidence Appellant presented establishing a clear fracture. Instead of performing a thorough review, the Area Office focused on the *de minimis* consulting services Sean provides in his individual capacity and unspecified connections between the two concerns. (*Id.* at 7-8.) The Area Office presented no actual evidence Sean controls Appellant, no analysis of the Amended Operating Agreement. The Amended Operating Agreement vests Weedon as Managing Member with “conduct and control” of Appellant's “business and affairs”. Further, under the Amended Operating Agreement, Weedon conducts and manages Appellant's day-to-day business operations as its CEO. (*Id.* at 8, citing Amended Operating Agreement at §§ 4.1, 4.2(a) & (b).)

Sean has neither positive nor negative control over Appellant. Any vote of the majority interest of Members present and eligible to vote is considered an act of the Members. (*Id.* at 8-9, citing Amended Operating Agreement at § 4.4.) Weedon's [xxx]% interest gives him sole control over Appellant. The Minority Members cannot block any actions by Weedon either collectively or as individuals. Nor does Sean's Membership give him any right to take part in the management or control of Appellant, or any authority to act for Appellant. (*Id.* at 9.)

Appellant argues the facts in *Bob Jones Realty* are on point here, and thus it supports a finding of clear fracture. (*Id.*) Appellant further argues the Area Office misapplied *GPA Technologies* in finding Sean's consulting services are sufficient to find there is no clear fracture here. The consulting fees are minor and the consulting agreement is with Sean as an individual, not CTSI. The Area Office also failed to acknowledge Appellant and CTSI operate completely separately. Further, the Area Office's finding that the fact they are located thirty miles apart is in

support of shared business ties rather than clear fracture is unreasonable. (*Id.* at 10.) Finally, the Area Office failed to consider that Appellant and CTSI are in different lines of business. Appellant is in facilities management; CTSI is in construction. (*Id.*)

Appellant argues the Area Office also erred in finding Appellant and RSC affiliated through common management. Appellant reasserts Sean has no ability to control or manage Appellant. (*Id.* at 11.) Further, while Sean is RSC's President, he is not an officer, director, managing member or partner of Appellant and has no control over Appellant's management, and thus, under 13 C.F.R. § 121.103(e), there is no common management between RSC and Appellant. (*Id.*) Appellant relies on *Size Appeal of Cambridge International Systems, Inc.*, SBA No. SIZ-5516 (2013); *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5432 (2013) and *Size Appeal of David Boland, Inc.*, SBA No. SIZ-5189 (2011) in support of this argument. (*Id.*)

Appellant asserts the Area Office erred in finding Sean has the ability to exercise substantive control over Appellant. The finding is conclusory and not based upon the record. There is no substantive analysis as to how Sean's status as Appellant's former CEO and majority owner, and current minority owner and consultant to Appellant, gives him the ability to exercise substantive control over RSC. *Size Appeal of Optivision, Inc.*, SBA No. SIZ-5740 (2016). (*Id.* at 12.) The fact Sean provides consulting services, as an individual and for a nominal amount, does not support a finding he controls Appellant. (*Id.* at 12-13, citing *Size Appeal of Coastal Waste Co.*, SBA No. SIZ-2338 (1985)).

Appellant further argues the Area Office ignored the Amended Operating Agreement which establishes that Weedon has unfettered control of the company. (*Id.* at 13.) Further, as Managing Member, Weedon has the unequivocal power to terminate the membership of any existing member, including Sean, citing Amended Operating Agreement at §§ 4.1, 4.2. (*Id.* at 13.) The Area Office failed to note that no Member of Appellant, solely by virtue of being a Member, may take part in the company's management. (*Id.* at 14, citing Amended Operating Agreement at § 4.3.) Appellant maintains the record demonstrates there is no common management between Appellant and RSC, and therefore they are not affiliated because of common management. As relief, Appellant requests that OHA either reverse the Size Determinations or remand the matter back to the Area Office.

D. Comments of SBA's Office of General Counsel

On December 8, 2016, SBA's Office of General Counsel (OGC) responded to the appeal. OGC argues that under 13 C.F.R. § 121.103(f) affiliation due to an identity of interest may arise between individuals or concerns that have identical or substantially identical business or economic interests. Concerns owned and controlled by siblings are presumed to be affiliated by an identity of interest. A challenged concern may rebut the presumption by showing a clear line of fracture among the family members. In examining whether there is a clear line of fracture, SBA may consider, among other factors, whether the concerns share officers, directors, employees, facilities or equipment, whether they have different customers or lines of business, whether there is financial assistance, loans, or significant subcontracting between the concerns, and whether the family members participate in multiple businesses together. (OGC Response at 2, citing *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442 (2013)).

OGC asserts the fact that Weedon and Sean both have an ownership interest in Appellant and that Sean owns CTSI gives rise to the presumption that the two concerns are affiliated due to an identity of interest. (*Id.*) OGC argues Appellant's contention the Area Office failed to explain how Sean has the power to control Appellant establishes clear error in the size determination is in itself based on error. The test for rebutting affiliation based upon identity of interest is not whether the level of interaction between the concerns rises to such a level that one concern can control the other to the degree that they act in concert. It is not necessary to conclude that one concern exercises control over the other in order to find affiliation based upon family relationships. Rather, the family relationship itself gives rise to the presumption that the family members will act in concert. Concerns owned by close family members are presumed affiliated, and the burden then shifts to the challenged concern to rebut the presumption. (*Id.* at 3-4, citing *Size Appeal of Knight Networking and Web Design, Inc.* SBA No. SIZ-5561 (2014).)

OGC argues the underlying basis for any finding of affiliation is control. 13 C.F.R. § 121.104(a)(1). When SBA applies the presumption of affiliation to concerns owned and controlled by family members, it presumes control. SBA is not required to make an independent determination that one concern controls or has the power to control the other once the presumption of affiliation based upon identity of interest is applied. (*Id.* at 4.)

OGC denies the Area Office failed to consider the fact that Appellant and CTSI are in different lines of business, the minimal business activity between the concerns, Sean's small ownership interest in Appellant, and Weedon's role as Appellant's Managing Member. All of these facts were considered in the size determination. (*Id.*) OGC rejects Appellant's contention the Area Office should have reviewed the record considering each indicium of control in a vacuum, and asserts no authority supports this argument. The Area Office may consider a variety of factors together in determining whether a clear line of fracture exists. (*Id.* at 5.)

OGC also maintains the Area Office correctly found Appellant affiliated with RSC under common management. Sean's position as [xxx]% owner and President of RSC gives him power to control RSC. (*Id.* at 6, citing *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477 (2013).) He also controls or has power to control Appellant based upon identity of interest. Therefore, RSC and Appellant are affiliated due to common management. (*Id.*)

E. Appellant's Reply to SBA OGC's Comments

On December 16, 2016, Appellant filed a motion to Reply to OGC's Response, together with the proposed reply. Appellant denies it is arguing SBA must show that one concern totally controls the other in order to find affiliation between them under the identity of interest regulation. Rather, Appellant maintains the factors the Area Office discussed do not support finding an absence of a clear fracture between Weedon and Sean. (Reply at 1-2.) Sean's status as Appellant's former CEO and majority owner shows no power to control Appellant as of the date of self-certification. Appellant recapitulates its argument that Sean has, in fact, no power to control Appellant, and that Sean's consulting agreement is a *de minimis* piece of business between the concerns which should not preclude a finding of clear fracture. (*Id.* at 2-3.) Further, the two concerns are in different lines of business, Appellant in facilities management, CTSI in

construction. (*Id.* at 3.) In addition the fact the concerns are located thirty miles apart does not support a finding of affiliation but of clear fracture. Appellant maintains there is no authority requiring that concerns operate in different metropolitan areas or have different names in order to support a finding of clear fracture. (*Id.*)

Appellant further maintains the Area Office's finding of affiliation between Appellant and RSC is without basis in SBA regulations or case law. The regulation governing affiliation under common management requires that one or more officers, directors, managing members or partners who control one concern also control the management of another concern to find affiliation. Where, as here, the two concerns do not share any common officers, affiliation cannot be found under common management. (*Id.* at 4.) While SBA need not find total control by common managers to find affiliation if there is critical influence on the ability to substantively control the alleged affiliate's operations, that control must be exercised by an officer of the concern in question. (*Id.* citing *Size Appeal of G&C Fab-Con, LLC*, SBA No. SIZ-5649 (2015).) Sean is not an officer, director, managing member or partner of Appellant. Appellant maintains there was no basis for the Area Office to bootstrap its erroneous finding of affiliation between Appellant and CTSI into a finding of affiliation between Appellant and RSC. (*Id.* at 4-5.)

F. SBA OGC's Reply

On December 21, 2016, OGC filed a motion to reply to Appellant's Reply to OGC's Response, together with its proposed reply. OGC argues Appellant has misread the regulation, which provides "affiliation arises when one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns." 13 C.F.R. § 121.103(e). The regulation does not require the two concerns to share a common officer, director, managing member or partner; rather one concern's officer, director, managing member or partner must have power to control the management of the alleged affiliate. The Area Office properly considered Sean's position with RSC as well as his ability to control Appellant's management. (OGC Reply at 2.)

OGC also maintains Appellant mischaracterizes the holding in *Optivision*. There, affiliation was not found when a President, sole shareholder and director of one concern was a key employee of another. The individual exercising critical influence or substantive control must be in overall management of both concerns, not merely a key employee of one. However, Appellant quotes *Optivision* out of context, and it would require a strict and formulaic approach not supported by regulations or case law. The dispositive factor in common management affiliation analysis is whether an individual has the ability to exercise critical influence or substantive control over two or more concerns' managements, not whether that individual holds a specific title at multiple concerns. (*Id.* at 3.) The Area Office reviewed the record, and reasonably determined Sean had the ability to exercise critical influence or substantive control over the management of both Appellant and RSC. Accordingly, the Area Office properly found the two concerns affiliated through common management. (*Id.*)

Finally, OGC argues the common strand between Appellant, CTSI, and RSC is Sean. He is President of and owns [xxx]% of CTSI, and clearly has the power to control it. He is President

of and owns [xxx]% of RSC, and thus controls or has power to control it. Finally, he controls or has the power to control Appellant based upon identity of interest. Because Sean controls or has the power to control all three concerns, they are affiliated. (*Id.* at 4.)

III. Discussion

A. Standard of Review and Motions

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

I herewith GRANT both Appellant's and SBA OGC's motions to reply. The issues here are such that I conclude the case will benefit from a fuller discussion.

B. Analysis

The first issue here is whether the Area Office correctly found Appellant and CTSI affiliated under the identity of interest rule because Weedon and Sean are brothers. SBA 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 by showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f).²

OHA has extensive case precedent interpreting this regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See, e.g., Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). OHA has explained that “[t]he regulation creates a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions.” *Size Appeal of Tenax*

² SBA recently has revised the regulation to include more specific language defining the family relationships that give rise to an identity of interest. The revised regulation became effective June 30, 2016. 81 Fed. Reg. 34243 (May 31, 2016). The prior version of the regulation governs this case.

Aerospace, LLC, SBA No. SIZ-5701, at 12 (2015) (quoting *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984).) “The presumption arises, not from the degree of family members' involvement in each other's business affairs but, rather, from the family relationship itself.” *Id.* (quoting *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998).) Concerns owned and controlled by siblings are presumed to be affiliated by an identity of interest. *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5114 (2010).

A challenged concern may rebut the presumption of identity of interest if it is able to show “a clear line of fracture among the family members.” *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006).) “A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged.” *Size Appeal of Hal Hays Construction, Inc.*, SBA No. SIZ-5217, at 6 (2011). “Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together.” *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). A minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture. *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012)); *accord Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307, at 6 (2011).

Appellant errs in arguing that there must be an affirmative finding of control before SBA can find affiliation based upon identity of interest. It is not necessary to conclude that one concern exercises near-total control over another in order to find affiliation through family relationships. Rather, the fact of the family relationship creates a presumption that the family members have identical interests and so SBA must treat them as one person. The burden then shifts to the challenged concern to rebut that presumption. *Knight Networking, supra* at 5.³

Appellant relies upon *Size Appeal of Bob Jones Realty, Co.*, SBA No. SIZ-4059 (1995). There, OHA found clear fracture between a father and son, where the son owned 2.5% of the father's business, was an outside director of the business, and the father's and son's concerns did not do business with each other and were in different lines of business and housed at different locations. Appellant also points to *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307 (2011). There one sibling was sole owner of the challenged concern. The other sibling was majority owner of the alleged affiliate. The concerns were in different facilities, with different lines of business and different customers. The challenged concern had subcontracted a small amount of work (4-4.5% of its revenue) to the alleged affiliate. The two concerns did share some employees. OHA held that a minimal amount of business activity between two concerns does not

³ Appellant also errs in arguing that SBA must find a concert of purpose among the family members in order to find an identity of interest among them. That test is for finding an identity of interest based upon common investments. It is not applicable to finding identity of interest based upon family relationships. *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701 at 12 (2015).

prevent a finding of clear fracture, and that a small amount of subcontracting provides little incentive to act as one, and no basis on which to conclude that one concern controls the other. Further, the sharing of a few employees who did not hold managerial or supervisory positions does not preclude a finding of clear fracture.

Here, Weedon is Appellant's [xxx]% owner, Managing Member and CEO. Weedon's brother Sean is [xxx] owner of CTSI, owns [xxx]% interest in Appellant and has a \$[xxx] a month consulting contract with Appellant. Previously, Sean was Appellant's majority owner and CEO until he sold a significant portion of his interest to Weedon and stepped down as CEO. (CTSI-FM Services Agreement at 1, January 31, 2015.) Appellant performs subcontracting work for RSJV, CTSI's joint venture with RSC, at a rate of \$[xxx] an hour. (Subcontractor Services Agreement at 1, January 1, 2015.) While Appellant maintains the concerns are in different lines of business, this is belied by the companies' System for Award Management (SAM) profiles, which the Area Office obtained. Both concerns list their primary NAICS code as 561210, Facilities Support Services. Their lists of additional NAICS codes share three codes.

I find Appellant has failed to establish that a clear fracture exists between Weedon and Sean. Sean was very involved in Appellant's business, as majority owner and CEO prior to the transfer to Weedon. He did not achieve a clean break when he stepped down as CEO. Rather, he retained an interest in the company, and continued to consult for it. Further, Appellant does business with Sean's company, CTSI, by performing subcontracting work for RSJV, CTSI's joint venture. In contrast to the concerns in *Bob Jones* and *GPA Technologies*, the concerns are in the same line of business, as evidenced by their both listing the same primary NAICS code in SAM. Further, in those cases, the family members had not been involved in each other business from the beginning, in contrast to this case, where Sean was majority owner and CEO of Appellant, and so was clearly deeply involved in its business from the beginning. While he stepped down as CEO and sold most of his interest, he retained an ownership stake, and continued to have a business relationship with Appellant; as a consultant and by retaining it as subcontractor for RSJV. Thus, Sean achieved no clear fracture with Weedon, because he continued to be involved with Weedon's business, Appellant. The two brothers have not separated their business interests, and accordingly failed to rebut the presumption that there is an identity of interest between them. The Area Office did not err in finding an identity of interest between Sean and Weedon Gallagher, and thus finding Appellant and CTSI affiliated under 13 C.F.R. § 121.103(f).⁴ CTSI is, of course, affiliated with its joint venture with RSC, RSJV, of which it is [xxx]% owner. 13 C.F.R. § 121.103(c)(1). Accordingly, Appellant is also affiliated with RSJV.

The Area Office further found Appellant affiliated with RSC based upon common management. Concerns are affiliated based upon common management when:

⁴ While I am affirming the Area Office's finding of no clear fracture between Sean and Weedon, I find the Area Office erred in finding that the fact the two concerns are located thirty miles apart supports a finding of no clear fracture. While the sharing of facilities is a factor to consider in a clear fracture analysis, I find no authority to support a finding that the location of the concerns within thirty miles of each other is an indicia of affiliation.

[O]ne or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

13 C.F.R. § 121.103(e).

Common management affiliation does not require that individual manager(s) exercise total control of a concern, just that they possess critical influence or the ability to exercise substantive control over a concern's operations. *Size Appeal of Cambridge International Systems, Inc.*, SBA No. SIZ-5516 (2013). Control of both concerns by the same person(s) is necessary for a finding of affiliation through common management. *Id.*

Here, Weedon holds no management position with RSC, and Sean holds no management position with Appellant. The Area Office based its finding of common management upon Sean's ability to control Appellant because of the affiliation based upon identity of interest due to his family relationship with Sean. However, the regulation bases the finding of affiliation upon common management between concerns. In order to find concerns affiliated under this regulation, the two concerns must have common officers, directors, managers, managing members or partners. *Size Appeal of Shoreline Services, Inc.*, SB A No. SIZ-5432 (2013). The "critical influence" necessary for a finding of affiliation under the common management regulation must be exercised by an officer, director, managing member or partner. The Area Office has misread *Optivision*. That case held that influence exercised by the sole shareholder of the challenged concern upon an alleged affiliate of which he was also a key employee, but not an officer, director, managing member or partner, was not sufficient to support a finding of common management, but that such influence must be exercised by someone in the overall management of both concerns. *Size Appeal of Optivision, Inc.*, SBA No. SIZ-5740, at 13 (2016). *Optivision* explicitly rejected including "key employees" in the categories of position which, if held by the same in person in two or more concerns, can give rise to a finding of common management. Accordingly, *Optivision* supports the position that OHA has consistently held: that a finding of common management must be based on individuals who held positions as officers, directors, managing members or partners of both concerns. *Size Appeal of Erickson Helicopters, Inc.*, SBA No. SIZ-5672 (2015) (Same individual serving as managing director of each of four concerns); *Size Appeal of Radant Mems, Inc.*, SBA No. SIZ-5600 (2014) (Same individual serving as President of both concerns); *Size Appeal of DMI Educational Training, LLC*, SBA No. SIZ-5275 (2011) (Same individual serving as managing member of one concern, and officer of another). OGC's argument that this is excessive formalism is meritless, this holding is squarely based upon the text of the regulation.

In the absence of individuals holding positions in both the challenged concern and the alleged affiliate, OHA has found the concerns were not affiliated based upon common management. *Optivision, supra* (No affiliation under common management where principal of one concern was key employee of another); *Size Appeal of Phoenix Environmental Design, Inc.*, SBA No. SIZ-5595 (2014) (No affiliation where former owners of challenged concern, and principals of another, no longer hold positions in challenged concern); *Size Appeal of Shoreline Services, supra*, (No affiliation where challenged concern and alleged affiliate had no common officers, directors, or managers); *Size Appeal of David Boland, Inc.*, SBA No. SIZ-5189 (2011)

(No affiliation where principal of one concern was non-managerial employee of another). Further, Appellant correctly points out that OHA has held that a consulting contract similar to Sean's contract with Appellant does not support a finding of affiliation through common management. *Size Appeal of Coastal Waste Co.*, SBA No. SIZ-2338 (1985).

Therefore, I conclude the Area Office erred in finding Appellant affiliated with RSC under 13 C.F.R. § 121.103(e), which requires that concerns with common management be found affiliated with each other, because Sean Gallagher is not an officer, director, managing member, or partner of Appellant.

Accordingly, I conclude the Area Office properly found Appellant affiliated with CTSI and RSJV, but erred in finding Appellant affiliated with RSC. I therefore VACATE the size determination and REMAND this case to the Area Office, for a new size determination based upon the size of Appellant, CTSI, and RSJV, without any affiliation with RSC.

IV. Conclusion

Appellant has demonstrated that the size determination is, in part, clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is VACATED and REMANDED to the Area Office for a new size determination consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge