

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

**DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

CopaSat, LLC,

Appellant,

Appealed From

Size Determination No. 03-2018-037

SBA No. SIZ-5918

Decided: May 31, 2018

APPEARANCE

Patricia Payne, Esq., Payne & Associates, Washington, D.C., for Appellant

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On March 14, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-037, finding CopaSat, LLC (Appellant) is not small for the subject procurement. In its determination, the Area Office concluded Appellant is affiliated with several entities based on common ownership, common management, and identities of interests.

On March 27, 2018, Appellant appealed the Area Office's determination to SBA's Office of Hearings and Appeals (OHA), asserting the Area Office erred in concluding Appellant is affiliated with Tampa Microwave, LLC (TM), a large business, under common management and identities of interest. For the reasons discussed *infra*, the instant appeal is denied.

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 this appeal within fifteen

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<sup>1</sup> This decision was initially issued with confidential treatment pursuant to 13 C.F.R. 134.205(f). OHA afforded Appellant an opportunity to file recommended redactions. OHA received no recommended redactions, and now issues the decision for public release.

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. Protest

On December 15, 2017, the SBA Office of the Inspector General (OIG) received an anonymous submission through the OIG's Complaint Hotline, alleging Appellant “has strong affiliation with [TM] including mutual ownership and control, and should therefore not be able to claim small business status on any [North American Industry Classification System (NAICS)] codes under which [TM] is considered a large business including 334220 and 517410.” (E-mail from P. Cullum to D. Loines (Jan. 16, 2018).) The anonymous protestor asserted Appellant is “owned and controlled by executives of [TM]” (*i.e.*, Obie Johnson and Eric Guerrazzi) and acts as “the de-facto small business arm of [TM], selling its products on small business set-aside procurements.” (*Id.*) The anonymous protestor suggested Appellant and TM also share the same address according to both entities' websites and System for Award Management (SAM) profiles. (*Id.*) Further, the anonymous protestor stated “[Appellant's] employees are known to be [TM] employees or do work on behalf of [TM], and the two entities are generally considered interchangeable in the industry.” (*Id.*)

On January 16, 2018, SBA OIG referred the anonymous protest to the Area Office. (E-mail from D. Loines to C. Thompson (Jan. 16, 2018).) On February 13, 2018, the Acting Area Director notified Appellant that it had protested Appellant's size status based on information from the OIG's referral. (Letter from J. Thurmond to E. Guerrazzi (Feb. 13, 2018), at 1.)

### B. Size Determination

The Area Office found Appellant was formed in 2014 for “engineering secure satellite and mobile communication systems for government and civilian organizations,” with Obie J. E. Johnson owning 61%, Scott J. Bohnsack owning 25% and John C. Sperandio owning 14%. (Size Determination, at 3.) The Area Office also determined Mr. Johnson is Appellant's President and Chief Executive Officer, while Mr. Bohnsack and Mr. Sperandio are Appellant's Chief Operating Officer (COO) and Chief Technical Officer (CTO), respectively. (*Id.*) The Area Office noted no other officers, directors, or executives were identified in Appellant's filings, but Appellant's Operating Agreement identifies Mr. Johnson, Mr. Bohnsack, and Mr. Sperandio as members of the Board of Managers. (*Id.*, at 3, 4.) The Area Office concluded Mr. Johnson, Mr. Bohnsack, and Mr. Sperandio each have management control over Appellant. In particular, the Area Office highlighted Appellant's statement that “[Mr. Bohnsack's] duties and authorities are to conduct the day to day overall operations of [Appellant] . . . [Mr. Bohnsack] makes daily decisions on the direction and focus of [Appellant].” (*Id.*, at 4.)

The Area Office determined Appellant is affiliated with Mohave Group, Inc. (MG) and G2 Properties, Inc. (G2) through common management because Mr. Bohnsack holds a 100% stock interest in each affiliate and has the power to control Appellant. (*Id.*, at 4-5.) The Area

Office also determined Appellant is affiliated with its wholly-owned subsidiary, Eclipse Composite Engineering, LLC (ECE), for which Mr. Bohnsack serves as President. (*Id.*, at 4.)

The Area Office concluded Appellant and TM are affiliated through common management. (*Id.*, at 5.) Based on Appellant's SBA Form 355, the Area Office found Mr. Johnson is responsible for TM's "future product development and engineering" as Vice President of Advanced Development, while Mr. Sperandio is TM's Vice President and CTO. (*Id.*) Both positions, the Area Office found, are at-will and are unbridled by special terms, contracts, or riders.<sup>2</sup> (*Id.*)

In addition, the Area Office concluded Appellant and TM are affiliated through an identity of interest shared by Mr. Johnson and Eric Guerrazzi, President of TM. The Area Office uncovered that Mr. Guerrazzi "was a member of the Board of Managers in [Appellant's] Operating Agreement until November 24, 2017, one month before the anonymous protest was received by SBA [OIG]." (*Id.*, a 5.) The Area Office found Mr. Guerrazzi holds a 51% interest in E2G Partners, LLC (E2G) and Mr. Johnson holds the remaining minority interest. Concurrently, the Area Office found, Mr. Guerrazzi holds a 25% interest in TM while Mr. Johnson holds a 24% interest. (*Id.*) Thales Defense & Security, Inc. (TDS) holds the remaining 51% interest in TM. (*Id.*) The Area Office reasoned Mr. Guerrazzi and Mr. Johnson "have identical or substantially identical business or economic [interests] . . . based on common investment in [Appellant] and TM, and based on [their] management control of both concerns." (*Id.*)

The Area Office examined Appellant's size at the time of the Area Director's protest (*i.e.*, February 8, 2018) because the size protest is not tied to a specific procurement and relates to "protecting the integrity of the Federal procurement process." *Id.*; *see* 13 C.F.R. § 121.1001(b)(9). The Area Office based its determination upon Appellant's self-certification as small under NAICS code 517410, Satellite Telecommunications, with a corresponding \$32.5 million annual receipts size standard. (*Id.*, at 1.) In sum, the Area Office determined Appellant is affiliated with MG, G2, ECE, TM, and E2G. (*Id.*, at 5-6.) However, the Area Office concluded Appellant is other than small for NAICS code 517410 based on its affiliation with TM, "a self-certified large business." (*Id.*, at 6.)

### C. Appeal

On appeal, Appellant maintains the Area Office erred in finding Appellant affiliated with TM based on common management and an identity of interest shared by Mr. Johnson and Mr. Guerrazzi. (Appeal, at 2.)

Appellant affirms Mr. Johnson, Mr. Bohnsack, and Mr. Sperandio own 61%, 25%, and 14% of Appellant, respectively. (Appeal, at 2.) But, Appellant stresses these individuals are the only members of Appellant's management team. (*Id.*) Appellant also stresses TM "designs,

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<sup>2</sup> The Area Office did not note that Mr. Johnson is on TM's Board of Managers, although this information was submitted to it in an email that described Mr. Johnson and Mr. Sperandio as among TM's "Senior Executives and direct reports" to Mr. Guerrazzi, TM's Vice President and General Manager. (E-mail from E. Guerrazzi to D. Gerard (Mar. 6, 2018)).

develops, and produces a narrow segment of specific communications and related equipment for resale” while Appellant “does not design, develop, or produce” any of the satellites, ground stations, or fiber communications involved in its contracts. (*Id.*, at 3.) Appellant concedes it has one active reseller agreement with TM and utilizes a communication component produced by TM, but maintains it has contracts with 8 to 10 other vendors and utilizes other equipment in its network integration services. (*Id.*) Appellant further suggests TM's products are sold and marketed through approximately 5 to 8 vendors in addition to Appellant. (*Id.*, at 4.)

Appellant also affirms that Mr. Johnson owns 24% of TM, and that TM is registered as other than small. (*Id.*, at 3, 4.) But, Appellant asserts the majority owner, TDS, has control over TM rather than Mr. Johnson and Mr. Sperandio. (*Id.*, at 4.)

Appellant submits as new evidence the “Amended and Restated Limited Liability Company Agreement of Tampa Microwave, LLC” (TM's Operating Agreement), which was not included in Appellant's submissions to the Area Office. (Appeal, at Exh. 1.) Appellant argues TDS controls TM through its “explicit contractual authority to appoint the majority of TM's 5-member Board of Managers.” (*Id.*, at 3.) Appellant acknowledges that Mr. Johnson holds one of the five Board positions, but emphasizes that TDS has authority to appoint the majority of Board positions and a majority is necessary for any legal action by TM. (*Id.*, at 5.) Appellant maintains Mr. Johnson is merely an at-will employee of TM, reports to TM's Board, and may be fired for any reason. (*Id.*) In addition, Appellant argues Mr. Sperandio has no managerial control over TM, as he is “not an officer, director or owner (in any capacity) of TM.” (*Id.*, at 5.) Appellant maintains Mr. Sperandio and Mr. Johnson do not have managerial control over or “legal authority to bind” TM. Appellant further specifies that Mr. Johnson, as one of the five Board members, does not have negative control over the actions of TM. (*Id.*, at 7.)

Appellant contends the Area Office's finding of an identity of interest shared by Mr. Johnson and Mr. Guerrazzi is erroneous. (*Id.*, at 7.) Appellant stresses Mr. Guerrazzi separated from Appellant on November 24, 2017, more than one month before the anonymous protest, and divested his holdings in Appellant at that time. (*Id.*, at 8.) In Appellant's view, the Area Office should not have relied on Mr. Guerrazzi's prior relationship with Appellant in finding affiliation between Appellant and TM. (*Id.*) Appellant further argues SBA regulations are devoid of any requirements regarding the timing of an owner's separation. (*Id.*)

Moreover, Appellant contends there is no identity of interest between Appellant and TM. Appellant notes TM is in a different line of work, directly competes with Appellant for government procurements, has separate facility security clearances, and does not share employees with Appellant. (*Id.*, at 8.) Appellant also asserts it does not share office space and equipment with TM, and is moving to another city on April 2, 2018. (*Id.*)

### III. Discussion

#### A. Standard of Review

When filing a size appeal, the Appellant has the burden of proving, beyond a preponderance of the evidence, all elements of his appeal. 13 C.F.R. § 134.314. The applicable

standard of review is whether the size determination was based on a clear error of fact or law. *Id.*, The Area Office's size determination will only be disturbed if it is the result of a clear error of fact or law, based upon the evidence in the record the Area Office had at the time it made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

### B. New Evidence

With its appeal, Appellant submitted TM's Operating Agreement. However, OHA's review is based upon the evidence in the record at the time of the Area Office's determination. OHA is precluded from considering new evidence for the first time on appeal, unless a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a); *see Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). Here, Appellant filed no such motion, and OHA has held that such an omission may be “fatal” to an attempt at introducing new evidence. *Size Appeal of Arrow Moving & Storage — Mayflower Transit*, SBA No. SIZ-5902 (2018). Further, OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014); *see Size Appeal of Nat'l Security Assocs., Inc.*, SBA No. SIZ-5907 (2018). Here, Appellant provides no justification for not providing TM's Operating Agreement to the Area Office, especially when the Area Office specifically requested information on TM. (*See* E-mail from E. Guerrazzi to D. Gerard (Mar. 6, 2018).) I therefore EXCLUDE TM's Operating Agreement from the record.

### C. Analysis

The Area Office found Appellant affiliated with TM on two grounds, common management and identity of interest. Under the common management rule, concerns are affiliated where:

[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 Operating Agreement or more other concerns.

13 C.F.R. § 121.103(e). A finding of affiliation through common management does not require that the person exercising the common management have “total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations.” *Size Appeal of DMI Educational Training LLC*, SBA No. SIZ-5275, at 6 (2011). The influence in question must be wielded by someone in the overall management of both concerns. *Size Appeal of Optivision, Inc.* SBA No. SIZ-5740, at 13-14 (2016). OHA has held that senior leadership positions, such as CEO and COO, may be presumed to exercise substantive control over the firm's operations, absent significant evidence to the contrary. *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600 (2014) (citing *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9 (2013)). OHA, however, has specified “this inference is rebuttable, and a concern could come forward with evidence to show that, despite, a position's title, the individual officer does not actually have critical influence or substantive control.” *Nat'l Security Assocs., Inc.*, SBA No. SIZ-5907, at 9 (2018) (holding the challenged firm's President and CEO did not have critical

influence or substantive control when serving as an alleged affiliate's COO, based on three sworn declarations submitted to the Area Office during the size review).

Here, Appellant does not dispute that Mr. Johnson has control of Appellant as its majority owner, President, and CEO. *See* Section II.B, II.C, *supra*. Appellant also confirms Mr. Johnson concurrently serves as TM's Vice President of Advanced Development and as a member of its Board of Managers. *See* section II.C, *supra*. Like a CEO or COO, a member of a concern's Board of Managers or Directors is presumed to exercise critical influence or substantive control over the firm's operations, absent significant evidence to the contrary. It is not plausible that Mr. Johnson, as a member of the Board, does not have critical influence over TM's operations. Appellant failed to provide any evidence to the contrary to the Area Office.<sup>3</sup> Further, Appellant states Mr. Johnson is responsible for “development of future product development and engineering” as one of TM's “Senior Executives”. (E-mail from E. Guerrazzi to D. Gerard (Mar. 6, 2018).) Appellant makes no attempt to dispel Mr. Johnson's critical influence over TM in this senior role. Moreover, Mr. Sperandio serves as Appellant's CTO, while also serving as TM's Vice President and CTO. *See* Section II.B, *supra*. It is similarly not plausible that Mr. Sperandio does not have critical influence or substantive control over Appellant and TM in these senior roles. Mr. Sperandio's service as CTO for both concerns, itself, particularly indicates the presence of common management. Therefore, I find Appellant is affiliated with TM based on common management by Mr. Johnson and Mr. Sperandio.

While finding Appellant affiliated with TM based on common management, I also find the Area Office's conclusion that Mr. Guerrazzi and Mr. Johnson share an identity of interest is harmless error. An area office's error is harmless when rectifying the error would not have changed the result. *See Size Appeal of Melton Sales & Service*, SBA No. SIZ-5893, at 14 (2018); *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017). Under SBA regulations, affiliation based on identity of interest:

[M]ay arise between two or more persons . . . [when i]ndividuals 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 interested aggregated.

13 C.F.R. § 121.103(f). “SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.” 13 C.F.R. § 121.103(a)(2). OHA has held SBA regulations create “a rebuttable presumption that family members, entities with common investments, and economically dependent firms are affiliated.” *Size Appeal of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 15 (2015). OHA has specified “the common investments of the persons must be substantial, either in number of individual investments, or in total value, in order to find that there is an identity of interest between the investors.” *Size Appeal of Tenax Aerospace, LLC*,

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<sup>3</sup> Notably, the sections of TM's Operating Agreement cited by Appellant on appeal, even if admitted, would be insufficient to demonstrate Mr. Johnson does not have critical influence or substantive control.

SBA No. SIZ-5701, at 11 (2015). OHA articulated two guideposts, recounting that “common investments in eight firms other than the challenged firm itself constituted significant ownership interests that clearly bespeaks a common purpose such that a finding of identity of interest is appropriate,” *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013), but “three common [minority] investments are insufficient to justify a finding of an identity of interest.” *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 8 (2011). OHA has held this presumption can be rebutted by demonstrating the investors do not have a common purpose, one that “causes the parties to act in unison for their common benefit.” *Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 11 (2015).

Here, Mr. Guerrazzi and Mr. Johnson only share common investments in one firm, E2G. The Area Office erroneously adopted Appellant's transitive relation and concluded Mr. Guerrazzi owns 25% of TM with Mr. Johnson owning 24%. *See* Section II.B, *supra*. In an email to the Area Office, Mr. Guerrazzi describes TM both as owned 51% by TDS and 49% by E2G, and also as 25% owned by himself and 24% owned by Mr. Johnson. *Id.*; *see* E-mail from E. Guerrazzi to D. Gerard (Mar. 6, 2018). While the Area Office should have clarified this confusion, it appears that Appellant and the Area Office both treated E2G's share in TM as belonging to Mr. Guerrazzi and Mr. Johnson in proportion to their interests in E2G.

Mr. Guerrazzi has control of E2G as its majority shareholder and Appellant admits Mr. Johnson “does not have a controlling interest” in E2G. (E-mail from J. West to D. Gerard (Feb. 27, 2018).) Consequently, Mr. Guerrazzi has control of E2G's 49% share in TM. Although Mr. Johnson's resume suggests he previously had ownership interests in TM, Appellant's response to the protest states Mr. Johnson presently has no express ownership interest in TM. (Letter from S. Bohnsack to D. Gerard (Feb. 16, 2018).) Thus, Mr. Guerrazzi and Mr. Johnson only share one common investment at the time for determining size. This alone is insufficient to find an identity of interest, failing far short of even the investments present in *Seacon Phoenix*.

The Area Office also relied on Mr. Guerrazzi's previous relationship with Appellant and current roles at TM. Prior to divesting in November 2017, Mr. Guerrazzi held an ownership interest in Appellant alongside Mr. Johnson and served as Appellant's COO as well as on its Board. *See* Section II.B, *supra*. However, even so, Mr. Guerrazzi's previous relationship with Appellant and current role in TM, coupled with one common investment in E2G, do not demonstrate that Mr. Guerrazzi and Mr. Johnson hold identical or substantially identical economic interests at the time for determining size. Therefore, I find Mr. Guerrazzi and Mr. Johnson are not affiliated based on identity of interest. Notably, even if Mr. Guerrazzi and Mr. Johnson were affiliated based on identity of interest, E2G's holding represents the minority share in TM and the Area Office made no finding, and there is no evidence in the record to show, that the minority shareholder has negative control of TM. *See Size Appeal of Team Waste Gulf Coast, LLC*, SBA No. SIZ-5864 (2017).

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge