

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

SIZE APPEAL OF:

TelaForce, LLC,

Appellant,

Appealed From
Size Determination No. 3-2018-054

SBA No. SIZ-5970

Decided: November 2, 2018

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Jeffery M. Chiow, Esq., Stephen L. Bacon, Esq., Deborah N. Rodin, Esq., Rogers Joseph O'Donnell, P.C., Washington, D.C., for Avar Consulting, Inc.

DECISION¹

I. Introduction and Jurisdiction

On, July 30, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-054, concluding that TelaForce, LLC (Appellant) is not a small business under size standard associated with the instant procurement. The Area Office determined that Appellant is affiliated with a large business, CACI International, Inc. (CACI), under the newly-organized concern rule, 13 C.F.R. § 121.103(g), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). CACI is currently Appellant's SBA-approved mentor under SBA's All Small Mentor-Protégé Program (ASMPP). Appellant contends that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is granted, and the size determination is remanded for further review.

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.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

Appellant timely filed the appeal within fifteen days of receiving the size determination. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On September 27, 2017, the U.S. Department of Labor, Bureau of Labor Statistics (BLS), issued Request For Proposals (RFP) No. 1625DC-17-R-00003 for data collection and processing services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industrial Classification System (NAICS) code 541910, Marketing Research and Public Opinion Polling, with a corresponding size standard of \$15 million in average annual receipts. Proposals were due November 21, 2017. On May 30, 2018, the BLS announced that Appellant was the apparent awardee.

B. Protest

On June 1, 2018, Avar Consulting, Inc. (Avar), an unsuccessful offeror, submitted a size protest to the CO challenging Appellant's size. Avar alleged that Appellant is not a small business, and thus, “should be deemed ineligible for award.” (Protest at 1.)

Avar contended that Appellant “was formed less than two years ago by three former top executives” of L3 National Security Solutions, Inc. (L3-NSS). In February 2016, CACI purchased L3-NSS for \$550 million. (*Id.*) Shortly thereafter, Appellant was formed and “acquired a massive portfolio of former CACI/NSS IT support services contracts with various state and local entities.” (*Id.*) Avar asserted that Appellant's CEO, Mr. Leslie (Les) A. Rose, was formerly “the President of NSS where he ran the company and managed over 4,000 employees.” (*Id.* at 3.) Ms. Judith M. Giles, who is now Appellant's Chief Financial Officer (CFO), “was also the CFO at NSS for nine years.” (*Id.*) In addition, Mr. David A. Ramirez formerly “held various management positions at NSS” and is now Appellant's Chief Operating Officer (COO). (*Id.*)

Avar alleged four protest grounds: (1) Appellant's own revenues exceed the applicable size standard; (2) Appellant is affiliated with other companies, including SODAK Systems, LLC (SODAK) and NNData Corporation (NNData), based on common ownership and/or common management; (3) Appellant is affiliated with CACI under the newly-organized concern rule; and (4) Appellant is affiliated with CACI through economic dependence, 13 C.F.R. § 121.103(f). (*Id.* at 5-8.) With regard to the issue of economic dependence, Avar maintained that “the contracts [Appellant] acquired from CACI are almost certain to provide the vast majority, if not all, of the revenue earned by [Appellant].” (*Id.* at 8.) In addition, “it is virtually certain many of those contracts have not been formally novated by the relevant state and local governments,” such that the contracts “are still in CACI's name.” (*Id.*)

The CO forwarded Avar's protest to the Area Office for review.

C. Protest Response

On June 12, 2018, Appellant responded to the protest and provided various documents to the Area Office. Appellant acknowledged affiliation with SODAK and Titan Facilities, Inc. (Titan). However, Appellant contended, the combined receipts of Appellant and these affiliates do not exceed the size standard. (Protest Response at 1.)

With regard to CACI, Appellant highlighted that CACI is Appellant's SBA-approved mentor under the ASMPP. (*Id.* at 2.) As a result, “CACI is required to provide a variety of business development assistance to [Appellant].” (*Id.*)

Appellant denied affiliation with CACI under the newly-organized concern rule, for two reasons. First, although Mr. Rose worked at CACI for approximately 12 months after CACI acquired L3-NSS, he was never an officer or key employee of CACI. (*Id.* at 3, 7-9.) Second, any assistance Appellant received from CACI is pursuant to the mentor-protégé agreement, and cannot be used to find affiliation. (*Id.* at 9-10.)

Appellant contended that it is not economically dependent on CACI, because Appellant is “too recently-formed to be affiliated with CACI under the economic dependence rule.” (*Id.* at 3.) In particular, Appellant had been in business for less than 17 months as of the date it submitted its proposal. (*Id.* at 11.) Appellant again emphasized that assistance from CACI is part of the mentor-protégé agreement. (*Id.*)

D. Size Determination

On July 30, 2018, the Area Office issued Size Determination No. 3-2018-054, concluding that Appellant is not a small business due to its affiliation with CACI.

The Area Office first determined that Appellant is wholly-owned by SODAK, which in turn is [XX]% owned by Mr. Rose. Mr. Rose also holds [XXXX] in Titan. Appellant is affiliated with SODAK and Titan based on stock ownership. (Size Determination at 4.) The Area Office found that Appellant is not affiliated with NNData, as Avar's protest had alleged. (*Id.*)

Next, the Area Office explained that CACI acquired L3-NSS on February 1, 2016 “through a Stock Purchase transaction.” (*Id.* at 5.) L3-NSS thereafter became known as CACI-NSS. (*Id.* at 6.) After acquiring L3-NSS, CACI decided to divest its State and Local (S&L) contracts. Appellant was formed on June 21, 2016, after Mr. Rose expressed interest in acquiring the S&L contracts. (*Id.* at 4, 6.) At the time Appellant was founded, Mr. Rose was the sole owner of SODAK, Appellant's parent company. (*Id.* at 5.) Appellant “went through a due diligence process and made an offer for the S&L contracts”, which CACI accepted. (*Id.* at 6.) Appellant and CACI then entered into an Asset Purchase Agreement in November of 2016, and finalized the transaction on February 22, 2017. (*Id.*) The parties signed a Master Subcontracting Agreement with respect to certain contracts that could not be transferred, and agreed that CACI would retain these contracts but subcontract 100% of the work to Appellant. (*Id.*) Under the Asset Purchase Agreement, Appellant also was to sublease office space from CACI at ten locations. (*Id.*) In March 2017, Appellant and CACI applied for admission to the ASMPP and

submitted their proposed mentor-protégé agreement, which SBA approved on April 11, 2017. (*Id.* at 7.)

The Area Office determined that Appellant is affiliated with CACI under the newly-organized concern rule, which consists of four elements. For the first element, the Area Office found that Mr. Rose, while not “a former officer, director, principal stockholder, managing member or key employee of CACI or CACI-NSS”, was President of L3-NSS for 26 years before it was sold to CACI on February 1, 2016, and thereafter served as a part-time employee and consultant to CACI's COO until January 2017. (*Id.*) During his tenure at CACI, “Mr. Rose did not have control over any of CACI-NSS's operations or the operations of CACI”, and his role as a consultant to the COO “d[id] not constitute a key position”. (*Id.*) However, CACI-NSS is “essentially the same company” as L3-NSS, and “Mr. Rose was a high-ranking officer who had control over L3-NSS (renamed, CACI-NSS) for almost three decades.” (*Id.*) Therefore, “Mr. Rose is in fact, a former officer of what is now called CACI-NSS.” (*Id.* at 8.) The Area Office stated that Mr. Ramirez and Ms. Giles, who are currently officers of Appellant, also are both former officers of L3-NSS. (*Id.* at 7-8.)

The Area Office found that the second element of the newly-organized concern rule is met because Appellant is in a similar line of business as CACI/CACI-NSS, as demonstrated by the fact that Appellant purchased contracts from CACI. (*Id.* at 8.) The third element is met because Mr. Rose, Mr. Ramirez, and Ms. Giles are officers of Appellant. (*Id.*)

The Area Office determined the fourth element of the test is also met. The Area Office found that Appellant “is performing on all of CACI's S&L contracts either as the sole subcontractor performing 100% of those contracts, or as the prime contractor, having purchased S&L contracts from CACI.” (*Id.*) These contracts and subcontracts comprise nearly 100% of Appellant's revenues. (*Id.*) The Area Office highlighted that the revenues Appellant generated from the contracts in ten months were 16 times the purchase price Appellant paid for the contracts, which, in the Area Office's view, “constitutes extraordinary assistance from CACI.” (*Id.*) The Area Office noted that Appellant also subleases space from CACI. (*Id.*) Further, although CACI and Appellant are now mentor and protégé, this arrangement did not become effective until April 2017, two months after purchase of the contracts was finalized. “[A] concern can rebut a finding of affiliation under the newly organized concern rule if it demonstrates a clear line of fracture between the two concerns”, but the Area Office found that “[i]t is quite obvious that there is no such line of fracture here.” (*Id.* at 9.)

The Area Office also found Appellant and CACI affiliated under the totality of the circumstances. According to the Area Office, “[a]lthough [Appellant] received 100% of its revenues through CACI, this may not be sufficient to find that [Appellant] is economically dependent upon CACI and affiliated under the identity of interest rule due to the short time [Appellant] has been operating”. (*Id.*) However, “an economic dependence analysis was not performed”. (*Id.* at n.1) Aside from the revenues Appellant derives from CACI, the Area Office considered it unusual that Appellant was able to purchase S&L contracts from CACI, a “large, publicly traded, multi-national company with more than 120 locations around the world, with more than 18,000 employees worldwide, and with revenues of more than \$4 billion in 2017,” when Appellant was newly established. (*Id.* at 10.) Appellant has “recovered the purchase price

of the contracts and earned 16 times the cost of the contracts in the first 10 months of 2017.” (*Id.*) In addition, Appellant subleases space from CACI in six locations and is co-located with CACI. (*Id.*) Further, “[t]he mentor-protégé relationship between the companies is an additional bond linking them to an ongoing business relationship.” (*Id.*) The Area Office attributed this assistance to the connection between Mr. Rose and CACI, which began when L3-NSS was acquired by CACI, and continued after the sale, when Mr. Rose was retained as an advisor to the COO of CACI. (*Id.*)

E. Appeal

On August 14, 2018, Appellant filed the instant appeal. Appellant maintains that the size determination is clearly erroneous and should be reversed. According to Appellant, the Area Office improperly applied the newly-organized concern rule to individuals who never held a key position at the alleged affiliate, CACI/CACI-NSS. (Appeal at 1-2.) Further, the Area Office did not conduct a proper totality of the circumstances analysis, failed to find that the various connections between Appellant and CACI resulted in common control, and ignored the regulatory exception to affiliation enjoyed by ASMPP participants. (*Id.* at 2.)

Appellant argues, first, that the Area Office “erred by finding affiliation under the newly organized concern rule because, as the Area Office concedes, none of [Appellant's] principals ever held a key position at CACI.” (*Id.* at 6.) As a result, the first element of the test for the newly-organized concern rule is not met. Appellant highlights that Mr. Rose was never an officer, director, principal stockholder, managing member or key employee of CACI-NSS or of CACI itself. (*Id.* at 6-7.) Further, as the Area Office recognized, Mr. Ramirez was never employed by CACI at all, and Ms. Giles left CACI-NSS in February 2016, just 12 days after L3-NSS was acquired. (*Id.*)

Appellant insists that the record does not support the Area Office's conclusion that CACI-NSS and L3-NSS are “essentially the same company”. On the contrary, CACI-NSS and L3-NSS “are separate legal entities that never operated simultaneously, and never shared officers, directors, principal stockholders, managing members, or key employees.” (*Id.*) While the name of L3-NSS was changed to CACI-NSS after it was acquired by CACI, the resemblance between the companies ends there, because L3-NSS's personnel, assets, and business operations were divided among five different CACI business groups, and the remaining CACI-NSS entity “exists only for legal, administrative, and government accounting purposes.” (*Id.*) Appellant asserts that “there is no basis in law for treating L3-NSS and CACI-NSS as one and the same under the newly organized concern rule.” (*Id.* at 8.) Further, there is nothing in § 121.103(g) which “allows the Area Office to treat a third entity, in this case L3-NSS, as though it is identical to the alleged affiliate.” (*Id.*, emphasis Appellant's.)

Citing *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5440 (2013) and *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012), Appellant argues that the Area Office erred in imputing Mr. Rose's position at L3-NSS to his position at CACI-NSS. (*Id.* at 8-10.) “While Mr. Rose was the President of the NSS group prior to its acquisition by CACI, he retained no leadership or management following the sale to CACI.” (*Id.* at 9.) Appellant

emphasizes that none of its executives, including Mr. Rose, ever held an officer or key employee position at CACI-NSS. (*Id.*)

Appellant further argues that “[e]ven assuming that employment at L3-NSS could be imputed to CACI/CACI-NSS, the Area Office erred by finding [Appellant's] principals to be former key employees and/or officers.” (*Id.* at 10.) L3-NSS was a wholly-owned subsidiary of a much larger company prior to the acquisition, so the Area Office should have considered whether Appellant's principals were former officers of the parent company, L-3 Communications, Inc. (L-3). Appellant asserts that L3-NSS was responsible for only 8.5% of L-3's overall business, and thus none of Appellant's principals had critical influence or substantive control over L-3 as a whole. (*Id.* at 11.)

Next, Appellant argues that the Area Office improperly used “assistance [Appellant] received under its mentor-protégé agreement to find [Appellant] affiliated with its SBA-approved mentor, CACI.” (*Id.*) The Area Office should have applied the “the broad regulatory exception from affiliation” for ASMPP participants, instead of citing the mentor-protégé agreement as evidence of affiliation, and should have followed OHA decisions which hold that an area office cannot use assistance received under the mentor-protégé agreement to find affiliation. (*Id.* at 11-12 citing 13 C.F.R. §§ 125.9(d)(4) and 121.103(b)(6) and *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888 (2018).) Further, Appellant continues, the exception applies to assistance that began prior to the approval of the mentor-protégé agreement. (*Id.* at 12, citing *Size Appeal of The Orasa Group, Inc.*, SBA No. SIZ-4966 (2008).) Here, the Area Office used subcontracts as the “linchpin of its newly organized concern determination.” (*Id.* at 13.) Appellant insists that the vast majority of the revenues Appellant received from CACI occurred after SBA approved the mentor-protégé agreement. In addition, the mentor-protégé agreement was in place well before Appellant submitted its proposal for the instant procurement. (*Id.*) Appellant maintains that the subcontracts between the two entities should be viewed as “simply an intermediate step in CACI's ultimate goal of exiting this work entirely”, rather than assistance from mentor to protégé. (*Id.* at 15.)

Appellant also objects to the Area Office finding that Appellant's purchase of contracts and lease of space constitute assistance under the newly organized concern rule. (*Id.*) Appellant contends that the lease of office space from CACI after the purchase of contracts was “an essential part of [Appellant]'s performance of S&L contracts, in lieu of a novation agreement for the transfer of those contracts.” (*Id.* at 16.) Appellant goes on to describe the purchase of contracts as a “one-time purchase of assets” and an “arm's length transaction.” (*Id.*) Appellant posits that the Area Office's conclusion was improper because the purchase of S&L contracts from CACI were not ongoing assistance as contemplated by 13 C.F.R. § 121.103(g). (*Id.*) Appellant makes a further distinction, stating that “once the contract is purchased, the revenues come from the customer—not the company that sold the contract. It was arbitrary and unreasonable for the Area Office to lump the purchased contracts and subcontracts together under the heading ‘revenues from CACI.’” (*Id.* at 17.) Appellant also argues that it did not receive a below-market deal on the purchased contracts due to Mr. Rose's relationship with CACI. (*Id.*) CACI had an independent valuation of the S&L portfolio performed, and was faced with significant costs to wind down the contracts had it been unable to transfer them. (*Id.*)

Further, “[a]n arm's-length lease under which [Appellant] pays market-rate rent to CACI is not ‘assistance’ under any reasonable definition of the word.” (*Id.* at 18.)

Appellant argues that the Area Office also erred in finding affiliation under the totality of the circumstances. (*Id.*) Under OHA precedent, “one or more connection between two firms cannot produce a finding of affiliation unless an element of control is present.” (*Id.*, citing *Size Appeal of INV Technologies, Inc.*, SBA No. SIZ-5818 (2017).) Appellant continues:

[T]he Area Office's analysis of the totality of the circumstances is flawed in three primary respects. First, the Area Office fixates on the revenues [Appellant] received through subcontracts from CACI, and again conflates subcontract revenues with revenues from purchased contracts. Second, instead of exempting the SBA-approved assistance, the Area Office relies on the mentor-protégé agreement between [Appellant] and CACI as evidence of affiliation. Third, the Area Office's analysis is rife with factual errors that affected its conclusion.

(*Id.*)

Appellant complains that the Area Office failed to explain “how an arm's length negotiation for contract assets is indicative of control.” (*Id.* at 19.) In addition, the Area Office did not give proper weight to mentor-protégé agreement and rather penalized Appellant for having entered into the agreement. (*Id.*) Appellant takes issue with the Area Office's “unsupported assumption” that Appellant could not have negotiated agreements with CACI without Mr. Rose's connection with CACI. (*Id.*) This was sheer speculation by the Area Office because Mr. Rose in fact had “no relationship whatsoever with CACI before CACI acquired L3-NSS, and his brief tenure as an employee consulting on federal procurement matters did not give him, or Appellant, the sort of ‘close connection’ that could reasonably be considered in an affiliation analysis.” (*Id.*)

Finally, Appellant argues the Area Office's analysis contains factual inaccuracies. (*Id.*) Contrary to the size determination, Mr. Ramirez and Ms. Giles are not former officers of L3-NSS. (*Id.*) Appellant disputes the Area Office's statement that Appellant received 100% of its revenues from CACI. (*Id.* at 20.) According to Appellant, Appellant received [XX]% of its revenues from CACI from its formation through the date to determine size, but [XX]% of this revenue was received after SBA's approval of the mentor-protégé agreement. (*Id.*) Appellant denies it is co-located with CACI in six places. (*Id.*) Rather, CACI employees are present at only one of the locations. (*Id.*) Lastly, Mr. Rose had no relationship with CACI until it acquired L3-NSS. (*Id.*)

Accompanying its appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit a supplemental declaration from Mr. Rose. There is good cause to consider the declaration, Appellant argues, because the declaration “corrects factual inaccuracies in the Area Office's Size Determination and responds to issues first raised in the Size Determination.” (Motion at 1.)

F. Avar's Response

On September 7, 2018, Avar responded to the appeal. Avar asserts that the Area Office properly determined that Appellant is affiliated with CACI under the newly-organized concern rule and the totality of the circumstances. (Avar Response at 1.) Therefore, the appeal should be denied. If, however, OHA perceives the appeal to be meritorious, OHA “should remand the matter to the Area Office for full consideration of the economic dependence ground raised in Avar's protest”, which the Area Office did not address in the size determination. (*Id.* at 18 n.15.)

Avar highlights that Appellant was established by former L3-NSS executives a few months after L-3 sold NSS to CACI. (*Id.* at 2.) Mr. Rose, Appellant's CEO, was formerly President of L3-NSS, and then served as a consultant to the COO of CACI for a year before leaving to manage Appellant. (*Id.*) Mr. Ramirez, Appellant's COO, was previously President and General Manager of a business unit at L3-NSS. Ms. Giles, who is now Appellant's CFO, was the CFO at L3-NSS for nine years, and served in management positions for 35 years at NSS and legacy companies. (*Id.*)

Avar argues that Appellant “was established by purchasing from CACI the very contracts that NSS held prior to its acquisition by CACI.” (*Id.* at 3.) These contracts with state and local governments are the same contracts Mr. Rose, Mr. Ramirez, and Ms. Giles once managed as executives of NSS. (*Id.*) Avar states: “[Appellant] continues to perform the same contracts, using the same employees, on behalf of the same customers that it once served when its executives ran NSS, a 4,000+ employee company with \$1.2 billion in revenue.” (*Id.*) Avar observes that Appellant was formed while Mr. Rose was a consultant at CACI, and that Appellant purchased the contracts in question from CACI only months later, paying \$[XX] for contracts that Appellant acknowledges were worth \$[XX]. (*Id.*) Avar emphasizes Appellant's reliance on CACI as Appellant's primary source of revenue. (*Id.*) CACI entered a subcontracting agreement with Appellant to perform contracts that were not novated, and Appellant employs the CACI personnel previously performing the contracts. (*Id.* at 4.) CACI subleases office space to Appellant. (*Id.*) Avar also notes that in order for CACI to subcontract the S&L contracts to Appellant, it sought consent from customers based on the representation that Mr. Rose would accomplish a seamless transition, making it clear that Mr. Rose's involvement was important. (*Id.*) Only a few months after CACI and Appellant entered into an Asset Purchase Agreement for S&L contracts, the two companies submitted a proposed mentor-protégé agreement under the ASMPP. (*Id.*)

Avar addresses Appellant's arguments regarding the newly-organized concern rule. (*Id.* at 7.) Avar first argues that the Area Office correctly found there was no relevant factual or legal distinction between CACI-NSS and L3-NSS for purposes of the newly-organized concern rule. (*Id.*) Avar asserts that Appellant itself does not recognize a real distinction between CACI and L-3 NSS, based on language in Appellant's proposal describing its transition from L-3 NSS/CACI. (*Id.*) Avar also argues that CACI and L3-NSS must be treated as the same concern based on SBA's “successor-in-interest” rule at 13 C.F.R. § 121.105(c). (*Id.*) Avar contends that Appellant's reliance on *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5440 (2013) is misplaced because OHA there found the record incomplete and remanded the matter to the Area Office to determine whether an individual was a key employee of the predecessor company. (*Id.* at 8.)

Moreover, in a subsequent case, OHA reviewed the Area Office's decision following remand and upheld a finding of affiliation under the newly-organized concern rule. (*Id.*, citing *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5474 (2013).) Avar also posits that *Roundhouse PBN*, which Appellant cites in its appeal to support the contention that positions held by Appellant's executives at L3-NSS cannot be imputed to CACI-NSS, is inapplicable because that case involved a federally-recognized Indian tribe, which have separate exceptions under SBA's affiliation rules. (*Id.* at 9.)

Avar next discusses Appellant's argument that the newly-organized concern rule does not apply because its executives did not have control over L-3, the parent company of L3-NSS. (*Id.*) Mr. Rose's supplemental declaration on this question is new evidence which cannot be considered on appeal. (*Id.*) Moreover, even if OHA were to admit the new evidence, Appellant's argument should be rejected because L3-NSS “was a separately incorporated legal entity that had its own executive and key employees who eventually formed [Appellant].” (*Id.* at 10.) Avar highlights that L3-NSS was an independent business concern under 13 C.F.R. § 121.105, and as such, the Area Office correctly analyzed whether Mr. Rose, Ms. Giles, and Mr. Ramirez were former officers, directors, or key employees of L3-NSS, and properly imputed their roles to the successor-in-interest, CACI. (*Id.*) Avar further asserts that Mr. Rose, while at L3-NSS, controlled one of L-3's major business units, and thus did exert significant influence over L-3 as a whole. (*Id.* at 11.)

Avar next focuses on Appellant's assertion the Area Office improperly considered mentor-protégé assistance in its finding. (*Id.* at 12.) OHA has recognized that “SBA's mentor/protégé regulations do not provide a ‘magic wand’ that eliminates affiliation issues.” (*Id.*, quoting *Size Appeal of Technical Support Services*, SBA No. SIZ-4751, at 10 (2006).) Appellant's position “would allow spin off firms to unilaterally evade the consequences of the newly organized concern rule simply by entering into an agreement with the protégé firm to shield itself from the assistance element of the rule.” (*Id.*) Avar acknowledges that, under 13 C.F.R. §§ 121.103(b)(6) and 125.9(d)(4), a mentor and protégé are not affiliated solely because the protégé receives assistance from its mentor, but notes that the regulations also state that affiliation may be found for other reasons, such as the newly-organized concern rule. (*Id.*) In Avar's view, “[t]he limited mentor-protégé exception cannot swallow whole the independent newly-organized concern basis for a finding of affiliation under the rules.” (*Id.* at 13.) Avar points to *Technical Support Services*, where OHA upheld a finding that a mentor and protégé were affiliated through identity of interest because they were run by close family members, and determined that although the mentor-protégé arrangement did not itself create affiliation, the two firms had a relationship “too plain to ignore”. (*Id.*, quoting *Technical Support Services*, SBA No. SIZ-4751, at 11.) Avar characterizes the assistance Appellant received from CACI before the mentor-protégé agreement was approved as “a sweetheart deal that allowed CACI to divest certain contracts by spinning off a new corporate entity, to whom it would guarantee subcontracts, leases, the incumbent workforce performing the contracts, etc.” (*Id.* at 14.)

Avar next addresses Appellant's claim that the Area Office wrongly considered its purchase of contracts and office space leases from CACI. (*Id.*) According to Avar, whether these transactions were at arm's length is “a red herring that misses the point.” (*Id.* at 15.) The relevant issue is that CACI is providing ongoing assistance to Appellant, in satisfaction of the fourth

element of the newly-organized concern rule. (*Id.*) Avar argues that, absent novation of the purchased contracts, Appellant is subcontractor to CACI, which OHA has found to be a form of assistance. (*Id.*, citing *Size Appeal of eTouch Federal Systems, LLC*, SBA No. SIZ-5271 (2011).) Avar adds that insofar as CACI remains the contractor of record, and is as such a guarantor of Appellant's work on the contracts, there is a relationship between the companies that “contradicts any attempt to show a clear fracture between the concerns as a way of rebutting their affiliation.” (*Id.*)

Avar also questions whether the transactions were, in fact, at arm's length. Avar highlights that Appellant paid only \$[XXXX] for contracts estimated to be worth \$[XXXX]. (*Id.* at 17.) Appellant's explanation for the reduced price, that CACI wished to avoid wind-down costs, does not justify the below-market price paid for the contracts. (*Id.*) Avar asserts that Appellant generated almost \$[XXXX] in revenues during 2017 from CACI subcontracts, and assuming “a modest profit margin of [XX]%, [Appellant] would have completely recouped its investment in less than one year.” (*Id.*)

G. 2M's Filing

On September 9, 2018, the date of the close of record, 2M Research Services (2M) submitted four documents to OHA via e-mail. The documents were: (1) a screenshot of Mr. Rose's LinkedIn profile; (2) a printout from Appellant's web site; (3) a letter identifying Appellant as the apparent successful offeror for the subject procurement; and (4) a printout showing that staff in Okaloosa County, Florida recommended approving the assignment of a contract from CACI-NSS to Appellant. 2M did not include with its filing a motion to introduce new evidence. OHA directed 2M to serve its copies of its filing to other parties, and 2M did so on September 14, 2018.

On September 18, 2018, Appellant objected to 2M's filing. 2M was not a protester, and its “attempted intervention” should be denied, as there is no indication that 2M is an interested party under 13 C.F.R. § 134.210(b). (Opp. at 1-2.) Even if OHA permits 2M to intervene, the new evidence must be excluded. 2M did not file a motion to introduce new evidence as required by 13 C.F.R. § 134.308(a), and in any event, there is no good cause to admit the evidence because 2M could have, but did not, submit the information to the Area Office during the size review. (*Id.* at 3, citing *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330 (2012) and *Size Appeal of Melton Sales & Service, Inc.*, SBA No. SIZ-5893 (2012).)

I agree with Appellant that 2M's filing is not properly before OHA. 2M has not demonstrated that it is an interested party with standing to intervene under 13 C.F.R. § 134.210(b). Further, 2M's filing consists of new evidence, and 2M did not provide a motion establishing good cause to admit new evidence as required by 13 C.F.R. § 134.308(a). Accordingly, 2M's filing is EXCLUDED from the record and has not been considered for purposes of this decision.

H. Motion to Reply and Opposition

On September 14, 2018, Appellant moved to reply to Avar's response, and submitted its proposed reply. According to Appellant, Avar's response is based largely on the successor-in-interest rule, 13 C.F.R. § 121.105(c), which is not discussed anywhere in the size determination, nor did the Area Office afford Appellant fair opportunity to address this issue. (Motion at 2.) In addition, Appellant maintains, Avar's response "inaccurately portrays a number of facts". (*Id.*)

Avar opposes Appellant's motion. In Avar's view, Appellant's motion "is nothing more than a desperate attempt to 'get the last word.'" (Opp. at 1.) Avar discussed the successor-in-interest rule in order to refute "[Appellant's] dubious claim that L3-NSS and CACI-NSS had nothing in common except their names." (*Id.*) Avar also contends that the proposed reply does not identify significant factual errors, but rather consists of "a combination of needless flyspecking of statements made in Avar's Response and reiteration of arguments already made in the Appeal petition." (*Id.* at 2.)

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to file a reply, the proposed reply was filed after the close of record, and Appellant does not persuasively explained why a reply is warranted. Accordingly, Appellant's motion to reply is DENIED. *E.g.*, *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 7 (2015); *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 14 (2015).

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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).

B. Analysis

Having reviewed the record and the arguments of the parties, I agree with Appellant that the Area Office lacked proper basis to find that Appellant is affiliated with CACI under the newly-organized concern rule. In addition, the existing record does not support the conclusion that Appellant is affiliated with CACI under the totality of the circumstances. As Avar observes, the Area Office did not explore whether Appellant is affiliated with CACI through economic dependence, an allegation specifically raised in Avar's protest, so that question must be remanded to the Area Office for investigation. *E.g.*, *Size Appeal of Veterans Constr. Coalition, LLC*, SBA No. SIZ-5824, at 10 (2017). Accordingly, the appeal is granted, and the size determination is remanded to the Area Office for further review.

A. Newly-Organized Concern Rule

OHA has explained that the newly-organized concern rule consists of 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 Metis Tech. Solutions, Inc.*, SBA No. SIZ-5538, at 4 (2014); *Size Appeal of Alterity Mgmt. & Tech. Solutions, Inc.*, SBA No. SIZ-5514, at 5 (2013); *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 10 (2012). In the instant case, there is no dispute that the second and third elements of the test are met. The second element is satisfied because Appellant and CACI operate in the same or related lines of business. The third element is met because Appellant's founder, Mr. Rose, is Appellant's CEO and the largest shareholder of SODAK, Appellant's parent company. The parties debate whether the fourth element of the test is met, but I agree with the Area Office and Avar that the fourth element likely is met, because CACI provided Appellant with subcontracts, office space, and assistance, at least some of which transpired before CACI and Appellant became mentor and protégé.

The first element of the test, however, appears highly questionable based on the record. The Area Office determined that Appellant was founded by Mr. Rose, who also was the sole owner of SODAK at the time Appellant was founded. Section II.D, *supra*. According to the Area Office, Mr. Rose is not “a former officer, director, principal stockholder, managing member or key employee of CACI or CACI-NSS.” *Id.* Further, although Mr. Rose was employed as a consultant at CACI for one year following the acquisition of L3-NSS, his role “d[id] not constitute a key position,” and “Mr. Rose did not have control over any of CACI-NSS's operations or the operations of CACI.” *Id.* Based on the Area Office's findings, then, it would appear that the first element of the newly-organized concern rule is not met, because Mr. Rose is not a former officer, director, principal stockholder, managing member, or key employee of CACI or CACI-NSS. OHA has repeatedly held that, if the first element of the newly-organized concern rule fails, “there can be no violation of the newly organized concern rule, irrespective of whether the remaining conditions of the rule are met.” *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 10 (2016); *see also Size Appeal of Native Energy & Tech., Inc.*, SBA No. SIZ-5858, at 10 (2017); *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803, at 12 (2017); *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 6-7 (2013), *recons. denied*, SBA No. SIZ-5493 (2013) (PFR); *Size Appeal of Willow Envtl., Inc.*, SBA No. SIZ-5403, at 6-7 (2012).

The size determination suggests that CACI-NSS is “essentially the same company” as L3-NSS, so Mr. Rose's former role as President of L3-NSS may be imputed to CACI-NSS. Section II.D, *supra*. This reasoning, though, is problematic both factually and legally. The Area Office offered no factual support for the notion that CACI-NSS and L3-NSS are “essentially the same company,” except that the companies share similar names. Thus, the Area Office did not,

for example, examine the assets, liabilities, personnel, or operations of the two companies to determine whether they are, in fact, substantially identical. *Id.* It is worth noting in this regard that, according to Appellant, CACI-NSS is fundamentally different in its composition than L3-NSS, because CACI reorganized L3-NSS after the acquisition, and the remaining CACI-NSS entity is a corporate shell that “exists only for legal, administrative, and government accounting purposes.” Section II.E, *supra*. Further, mere similarity of names is largely meaningless and does not establish that there is any connection at all between two concerns. *E.g.*, *Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 6 (2011) (similarity between names “is no indicia of affiliation, as many firms may have similar names.”). Thus, the Area Office's findings do not support the notion that CACI-NSS and L3-NSS are, in fact, “essentially the same company.”

Moreover, even supposing that CACI-NSS and L3-NSS are essentially identical, the Area Office also did not identify any legal mechanism for imputing an individual's prior position at one company to a different company for purposes of the newly-organized concern rule. As Appellant emphasizes, there is nothing in the text of the newly-organized concern rule itself to authorize such an approach. 13 C.F.R. § 121.103(g). In its response to the appeal, Avar argues that, although not discussed in the size determination, the Area Office could have relied upon the “successor-in-interest” rule, 13 C.F.R. § 121.105(c), and OHA's decisions in *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5440 (2013) (“*Saint George I*”) and *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5474 (2013) (“*Saint George II*”) to achieve this result.

A principal problem with Avar's arguments is that it is not clear that the successor-in-interest rule applies in the instant case. The successor-in-interest rule states that “[a] firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity.” 13 C.F.R. § 121.105(c). As discussed above, though, the Area Office did not reference the successor-in-interest rule, and conducted no analysis of the assets and/or liabilities of the firms in question. Section II.D, *supra*. Further, OHA has explained that the successor-in-interest rule applies to an acquisition of assets or liabilities, whereas a different rule — the “newly-acquired affiliate” rule, found at 13 C.F.R. §§ 121.104(d)(2) and 121.106(b)(4)(i) — applies when the transaction “involves the purchase of an entire company, such as ‘a separate corporation, LLC, or division.’” *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462, at 14 (2013) (quoting *Size Appeal of AIS Eng'g, Inc.*, SBA No. SIZ-5348, at 6 (2012)). Here, the size determination suggests that CACI purchased L3-NSS in its entirety, and that, at the time of the transaction, L3-NSS was a separate corporation, wholly-owned by L-3. Section II.D, *supra*. Accordingly, the instant transaction may be governed by the newly-acquired affiliate rule, not the successor-in-interest rule.

The distinction between the two rules may have implications for whether Mr. Rose's role at L3-NSS could properly be imputed to CACI-NSS. By indicating that a successor entity “will not be treated as a separate business concern” than its predecessor, the phrasing of the successor-in-interest rule provides a possible legal basis for imputing an individual's role at the predecessor entity to the successor entity. The newly-acquired affiliate rule, on the other hand, contains no such language, but instead requires that the receipts or employees of an acquired concern be added to those of the challenged concern for size purposes. 13 C.F.R. §§ 121.104(d)(2) and 121.106(b)(4)(i). Thus, insofar as CACI's acquisition of L3-NSS is governed by the newly-acquired affiliate rule rather than by the successor-in-interest rule, the instant case may lack a

regulatory foundation for imputing Mr. Rose's position at L3-NSS to CACI-NSS. OHA's decisions in *Saint George I* and *II* likewise pertained to the successor-in-interest rule, not the newly-acquired affiliate rule, and thus may be inapposite here.

In sum, the Area Office determined that Mr. Rose is not a former officer, director, principal stockholder, managing member, or key employee of CACI or CACI-NSS. Based on this finding, the first element of the newly-organized concern rule would not be met, and there could be no affiliation between Appellant and CACI/CACI-NSS under the newly-organized concern rule, regardless of whether the other three elements of the test are satisfied. Although the Area Office asserted that CACI-NSS is essentially the same company as L3-NSS, the Area Office offered no factual basis for this conclusion. Moreover, even supposing that the two companies are essentially identical, no legal mechanism was identified for imputing Mr. Rose's role at L3-NSS to CACI-NSS for purposes of the newly-organized concern rule. Avar advances the successor-in-interest rule as a potential basis, but it is not clear that this rule would apply to the situation presented here, and in any event, the successor-in-interest rule is not mentioned in the size determination, nor did the Area Office conduct any substantive analysis of the rule. Accordingly, I find it appropriate to remand this matter for further investigation.

B. Totality of the Circumstances

The Area Office also found Appellant affiliated with CACI under the totality of the circumstances. OHA has repeatedly held, however, that “in order to find affiliation through the totality of the circumstances, ‘an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.’” *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 15 (2015) (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007)); *see also Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017). It follows, therefore, that “merely listing connections between concerns does not suffice to show that they are affiliated under the totality of the circumstances.” *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 10 (2018). Here, although the Area Office identified certain connections between Appellant and CACI, the Area Office did not explain how these connections would enable CACI to control Appellant, or *vice versa*. As a result, additional review is warranted.

As Appellant observes, several of the specific connections referenced by the Area Office appear to be flawed or incomplete. The Area Office cited the mentor-protégé agreement between Appellant and CACI as “an additional bond linking them to an ongoing business relationship”. Section II.D, *supra*. SBA regulations, though, prohibit any finding of affiliation or control based on an SBA-approved mentor-protégé agreement or any assistance provided pursuant to the agreement. 13 C.F.R. §§ 125.9(d)(4) and 121.103(b)(6). Similarly, the Area Office found that Appellant derives much of its revenues from CACI, but failed to address Appellant's arguments that the subcontracting and other assistance Appellant receives from CACI falls within the scope of the mentor-protégé agreement, and thus cannot be used to find affiliation. In addition, although the Area Office determined that CACI provided “extraordinary assistance” to Appellant by allowing Appellant to purchase the S&L contracts at a below-market price, the Area Office apparently reached this conclusion by comparing the initial purchase price for the contracts with

the revenues subsequently generated by those contracts. Section II.D, *supra*. As Appellant notes, such reasoning is questionable without also considering the corresponding expenses associated with the contracts. If, for example, the bulk of contract revenues were consumed by contract labor or other expenses, it is not clear how the ratio of revenues to purchase price would shed light on whether the purchase price was reasonable. Accordingly, additional review is necessary to determine whether Appellant may be affiliated with CACI through economic dependence² or the totality of the circumstances.

IV. Conclusion

For the above reasons, the appeal is **GRANTED**, the size determination is **VACATED**, and the matter is **REMANDED** to the Area Office for further investigation and review. In light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *E.g.*, *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge

² Under OHA precedent, the Area Office should have addressed economic dependence, an allegation specifically raised in Avar's protest, before turning to the totality of the circumstances. OHA has explained that "the totality of the circumstances should only be the basis for a finding of affiliation if no other specific ground is sufficient. In other words, the Area Office should find affiliation based upon the totality of the circumstances only when it is unable establish affiliation under any of the other specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation." *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 9 (2010).