United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: TelaForce, LLC, Appellant, Petition for Reconsideration by Avar Consulting, Inc., of SBA No. SIZE-5970	SBA No. SIZ-5991 Decided: March 25, 2019

APPEARANCES

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ORDER DENYING PETITION FOR RECONSIDERATION[1]

I. Background

A. Prior Proceedings

On November 21, 2018, Avar Consulting, Inc. (Petitioner) filed the instant Petition for Reconsideration (PFR) of the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *Size Appeal of TelaForce, LLC*, SBA No. SIZ-5970 (2018) ("*TelaForce I*"). In that decision, OHA granted an appeal filed by TelaForce, LLC (TelaForce) and remanded the underlying size determination, No. 3-2018-054, to SBA's Office of Government Contracting — Area III (Area Office). OHA found that the Area Office did not articulate a valid basis to find TelaForce affiliated with its SBA-approved mentor, CACI International, Inc. (CACI), under the newly-organized concern rule; that the Area Office failed to explore whether TelaForce is affiliated with CACI through economic dependence, as Petitioner had alleged in its protest; and that the record did not support the conclusion that TelaForce is

[1] OHA issued a protective order in this case on August 20, 2018, which remains in effect for the PFR. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the protective order and is intended for public release.

affiliated with CACI under the totality of the circumstances. *TelaForce I*, SBA No. SIZ-5970, at 12-16.

With regard to the newly-organized concern rule, OHA explained that the rule consists of four required elements. *TelaForce I*, SBA No. SIZ-5970, at 13. OHA considered that the second and third elements of the test are met, and the fourth element likely is met. *Id.* However, the first element of the test — which requires that the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern — "appears highly questionable based on the record." *Id.*

OHA reviewed the facts as found by the Area Office. The Area Office determined that TelaForce's founder, Mr. Leslie Rose, previously was President of L3 National Security Solutions, Inc. (L3-NSS). *Id.* at 3. Several months before TelaForce was established, CACI acquired L3-NSS, and L3-NSS thereafter became known as CACI-NSS. *Id.* 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 temporarily served as a consultant to CACI's COO after the acquisition of L3-NSS, Mr. Rose "did not have control over any of CACI-NSS's operations or the operations of CACI." *Id.* The Area Office determined, however, that because L3-NSS is "essentially the same company" as CACI-NSS, Mr. Rose could be deemed a former officer of CACI-NSS. *Id.*

On appeal, OHA found that, based on the facts recited in the size determination, the Area Office lacked a proper basis to find TelaForce affiliated with CACI under the newly-organized concern rule. *Id.* at 13. More specifically, the Area Office did not offer a valid factual or legal rationale for concluding that the first element of the newly-organized concern rule was met, particularly in light of the Area Office's determination that Mr. Rose is not a former officer of CACI or CACI-NSS. *Id.* at 13-14.

Petitioner argued on appeal that Mr. Rose's role as President of L3-NSS could be attributed to CACI-NSS through the successor-in-interest rule, 13 C.F.R. § 121.105(c). *Id.*at 9. OHA found this argument unpersuasive because the successor-in-interest rule was not mentioned in the size determination, nor did the Area Office conduct any analysis of the rule. *Id.* at 14. Further, under OHA precedent, the successor-in-interest rule applies only to certain types of corporate acquisitions, and would not necessarily have governed the acquisition of L3-NSS. *Id.* at 14-15.

B. PFR

In its PFR, Petitioner challenges only the portion of *TelaForce I* pertaining to the newly-organized concern rule. Petitioner argues that OHA was correct in finding that the second, third, and fourth elements of the newly-organized concern rule are met; however, OHA "incorrectly suggested that the first element was not." (PFR at 1.)

Petitioner maintains that:

> OHA focused exclusively on the ***legal*** basis advanced by [Petitioner] (the successor-in-interest rule), but overlooked that CACI-NSS and L3-NSS are literally the same 'concern' as a matter of ***fact***. As a result, there was no need for the Area Office to find a 'legal mechanism' for imputing Mr. Rose's role for L3-NSS to CACI-NSS because they are one and the same.

(*Id.* at 4 (emphasis Petitioner's).)

Petitioner highlights that CACI acquired L3-NSS through a stock purchase, and that L3-NSS continued to exist after the transaction under a new name, CACI-NSS. (*Id.*) Accordingly, Petitioner reasons, L3-NSS and CACI-NSS should be treated as one entity for purposes of the newly-organized concern rule. (*Id.*) In Petitioner's view, "Mr. Rose is necessarily a 'former officer' of CACI-NSS because that corporate entity and L3-NSS are factually indistinguishable." (*Id.*)

Petitioner argues that the Area Office need not have conducted any analysis under the successor-in-interest rule to determine if the assets, liabilities, personnel and operations of L3-NSS and CACI-NSS are substantially identical, because the only relevant issue is whether L3-NSS and CACI-NSS are the same corporate entity. (*Id.* at 5.) Likewise, as CACI-NSS is merely L3-NSS renamed, it was unnecessary for the Area Office to find a legal mechanism to impute Mr. Rose's role at L3-NSS to CACI-NSS. (*Id.*) "[T]he need for a legal imputation mechanism arises if — but only if — L3-NSS and CACI-NSS are distinct legal entities." (*Id.*)

Petitioner also contends that *TelaForce I* constitutes poor policy, because it could enable firms to circumvent the newly-organized concern rule through name changes. Petitioner imagines a scenario in which "the CEO of Lockheed Martin Corporation could leave that company, start a new firm, obtain contracts from her former firm, and remain an eligible small business in contravention of the newly-organized concern rule so long as Lockheed Martin changes its name to Lockheed Inc., for example." (*Id.* at 6.)

C. TelaForce's Response

On December 11, 2018, TelaForce responded to the PFR. TelaForce maintains that the PFR merely restates arguments that OHA considered and rejected in *TelaForce I*, and that the PFR fails to show any error in *TelaForce I*. (Response at 1.) Therefore, OHA should dismiss or deny the PFR.

TelaForce contends that Petitioner seeks reconsideration solely on the grounds that OHA should have treated L3-NSS and CACI-NSS as a single corporate entity for purposes of the newly-organized concern rule. Petitioner, though, argued this point at length in *TelaForce I*. Because Petitioner repeats the same arguments in hopes of a different result, the PFR should be dismissed. (*Id.* at 2-3, citing *Size Appeal of Megen-AWA 2, LLC*, SBA No. SIZ-5852 (2017) (PFR).)

Alternatively, TelaForce asserts, Petitioner falls well short of the rigorous standard necessary to prevail on a PFR. On the contrary, "OHA's decision was factually and legally correct," and Petitioner has shown no error in *TelaForce I*. (*Id.* at 3.) Although Petitioner focuses narrowly on the fact that L3-NSS, as a legal entity, ultimately became CACI-NSS, Petitioner ignores other relevant circumstances, including "the change of corporate ownership (from L-3 to CACI)," "the removal of Mr. Rose and TelaForce's other principals from their positions at L3-NSS," "CACI's reassignment of CACI-NSS's contracts to other CACI entities," and "CACI-NSS's effective cessation of operations as an ongoing operating concern." (*Id.*) Due to this fundamental reorganization, L3-NSS is not essentially the same company as CACI-NSS, notwithstanding their similar names. (*Id.*at 4, citing *Size Appeal of I.T.E. Contractors & Rental, Inc.*, SBA No. 1922 (1984).)

TelaForce I also is consistent with the underlying purpose of the newly-organized concern rule — *i.e.*, to prevent large businesses from creating spin-off firms that are in fact affiliates or extensions of large firms. (*Id.*) Here, although TelaForce's principals may have held key positions at L3-NSS prior to its acquisition by CACI, they never held such positions at CACI. As a result, no public policy is advanced by finding TelaForce affiliated with CACI, "an entirely separate large firm where — indisputably — none of TelaForce's principals ever held controlling roles." (*Id.*) Petitioner's position, if adopted, would extend the newly-organized concern rule to situations it was not intended to address. (*Id.* at 4-5.) Further, under Petitioner's reasoning, any individual who held a key role at one company could have that role imputed to another company following an acquisition, regardless of the role the individual played at the acquiring entity, an "unjust and inequitable" result. (*Id.* at 5.) TelaForce insists that fundamental changes in relationships can render a mechanical application of affiliation rules unjust or inequitable. (*Id.* at 6, citing *Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012).)

Lastly, TelaForce argues that, even assuming OHA erred in analyzing the first element of the newly-organized concern rule, any such error was harmless because affiliation under the newly-organized concern rule is rebuttable. (*Id.*, citing 13 C.F.R. § 121.103(g).) Accordingly, it still was appropriate for OHA to remand the matter for the Area Office to further examine whether TelaForce had demonstrated a clear line of fracture. (*Id.* at 7, citing *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128 (2010) (PFR).)

II. Discussion

A. Jurisdiction and Standard of Review

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. Petitioner filed its PFR within twenty days of service of *TelaForce I*, so the PFR is timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." *Id.* This is a rigorous standard. *Size Appeal of Straughan Envtl., Inc.*, SBA No. SIZ-5776, at 3 (2016) (PFR). A PFR must be based upon manifest error of law or mistake of fact and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of BryMak & Assocs., Inc.*, SBA

No. SIZ-5789, at 3 (2016) (PFR); *Size Appeal of Brown & Pipkins, LLC*, SBA No. SIZ-5642, at 2 (2015) (PFR).

B. Analysis

Petitioner has not shown clear error in *TelaForce I*. Therefore, this PFR must be denied.

A principal problem with the size determination in *TelaForce I* was that the Area Office did not explain its rationale for concluding that the first element of the newly-organized concern rule was met. The size determination suggested that the first element was met because Mr. Rose is the former President of L3-NSS, which, the Area Office asserted, is "essentially the same company" as CACI-NSS. Section I.A, *supra*. TelaForce, though, vigorously disputed whether the two companies are "essentially the same," highlighting numerous factual distinctions which the Area Office did not address and apparently did not consider. Moreover, the size determination contained no substantive analysis to support the conclusion that L3-NSS and CACI-NSS are essentially the same entity, and further confused the issue by stating that Mr. Rose is not a former officer of CACI-NSS. *Id.* As Petitioner recognizes in its PFR, if L3-NSS and CACI-NSS were actually one and the same, Mr. Rose logically must be a former officer of CACI-NSS. Section I.B, *supra*. By finding that Mr. Rose is not a former officer of CACI-NSS, then, the size determination undermined the notion that L3-NSS and CACI-NSS are "essentially the same company."

Petitioner does not dispute that, insofar as L3-NSS and CACI-NSS are not in fact the same entity, the first element of the newly-organized concern rule would be met only if there were a legal mechanism to impute Mr. Rose's role at L3-NSS to CACI-NSS. Discussion of any such legal mechanism again was entirely absent from the size determination. Section I.A, *supra*. Thus, the Area Office lacked a proper factual or legal foundation to support the conclusion that the first element of the newly-organized concern rule was met, and remand was appropriate.

III. Conclusion

OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). Here, Petitioner has not established any clear error in OHA's decision. I therefore DENY the PFR and AFFIRM the decision in *Size Appeal of TelaForce, LLC*, SBA No. SIZ-5970 (2018).

KENNETH M. HYDE
Administrative Judge