

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

SIZE APPEAL OF:

Avar Consulting, Inc.,

Appellant,

RE: TelaForce, LLC

Appealed From

Size Determination No. 3-2019-022

SBA No. SIZ-6017

Decided: July 25, 2019

APPEARANCES

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.

Matthew T. Schoonover, Esq., Ian P. Patterson, Esq., John M. Mattox II, Esq., Robert D. Kampen, Esq., Koprince Law LLC, Lawrence, Kansas, for TelaForce, LLC

DECISION¹

I. Introduction and Jurisdiction

On April 5, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2019-022, concluding that TelaForce, LLC (TelaForce) is an eligible small business under the size standard associated with the instant procurement. On appeal, Avar Consulting, Inc. (Appellant), the original protestor, maintains that the size determination is contrary to prior decisions of the Office of Hearings and Appeals (OHA) in *Size Appeal of TelaForce, LLC*, SBA No. SIZ-5970 (2018) (“*TelaForce I*”) and *Size Appeal of TelaForce, LLC*, SBA No. SIZ-5991 (2019) (PFR) (“*TelaForce II*”), and requests that the size determination be reversed or remanded. For the reasons discussed *infra*, the appeal is denied.

¹ OHA originally issued this decision under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

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 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. RFP and Prior Proceedings

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 TelaForce was the apparent awardee.

On June 1, 2018, Appellant, an unsuccessful offeror, filed a size protest with the CO challenging TelaForce's size. The protest alleged that TelaForce is affiliated with its SBA-approved mentor, CACI International, Inc. (CACI), through the newly-organized concern rule and through economic dependence. The CO forwarded the size protest to the Area Office for review.

On July 30, 2018, the Area Office issued Size Determination No. 3-2018-054, concluding that TelaForce is not a small business because it is affiliated with CACI on two grounds: the newly-organized concern rule and the totality of circumstances. The Area Office did not address Appellant's allegation of economic dependence.

With regard to the newly-organized concern rule, the Area Office found that TelaForce was formed by Mr. Leslie (Les) A. Rose on June 21, 2016. *TelaForce I*, SBA No. SIZ-5970, at 3 (summarizing Size Determination No. 3-2018-054). Mr. Rose formerly was President of L-3 National Security Solutions, Inc. (L3-NSS), one of four business segments of L-3 Technologies, Inc. (L-3), a large business. *Id.* at 4.

The Area Office determined that, on February 1, 2016, several months before TelaForce was established, CACI acquired L3-NSS, and L3-NSS thereafter became known as CACI-NSS. *Id.* at 3-4. Following the acquisition, Mr. Rose served as a part-time employee and consultant to CACI's COO until January 2017. *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," nor did he "have control over any of CACI-NSS's operations or the operations of CACI." *Id.* at 4 (quoting Size Determination No. 3-2018-054, at 7). However, the Area Office added, L3-NSS and CACI-NSS are "essentially the same company," so Mr. Rose's role at L3-NSS could be imputed to CACI-NSS. *Id.* (quoting Size Determination No. 3-2018-054, at 7).

TelaForce appealed Size Determination No. 3-2018-054 to OHA. With its appeal, TelaForce moved to introduce new evidence, including two exhibits and an August 14, 2018 Declaration of Mr. Rose.

On November 2, 2018, OHA issued its decision in *TelaForce I*. OHA held that the record did not support the conclusion that TelaForce is affiliated with CACI under the newly-organized concern rule or the totality of the circumstances. OHA therefore granted the appeal, vacated Size Determination No. 3-2018-054, and remanded the matter to the Area Office for further review. *TelaForce I*, SBA No. SIZ-5970, at 15. OHA did not rule on TelaForce's motion to admit new evidence. *Id.*

With regard to the newly-organized concern rule, OHA explained that the rule consists of four required elements, the first of which is that the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern. *Id.* at 12. In Size Determination No. 3-2018-054, 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 own finding that Mr. Rose is not a former officer of CACI or CACI-NSS. *Id.* at 12-14. Furthermore, TelaForce disputed the notion that CACI-NSS is “essentially the same company” as L3-NSS. *Id.* at 13.

On November 21, 2018, Appellant filed a Petition for Reconsideration (PFR) of *TelaForce I*. On March 25, 2019, OHA denied the PFR. Although OHA agreed with Appellant that “if L3-NSS and CACI-NSS were actually one and the same, Mr. Rose logically must be a former officer of CACI-NSS,” OHA reiterated that remand was appropriate because Size Determination No. 3-2018-054 “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.” *TelaForce II*, SBA No. SIZ-5991, at 5.

B. Area Office Investigation

Prior to the issuance of Size Determination No. 3-2018-054, TelaForce submitted to the Area Office its completed SBA Form 355, its initial response to the protest allegations, its Mentor-Protégé Agreement (MPA) with CACI, and various other materials including tax returns, accounting spreadsheets, contract documentation, and information on its two acknowledged affiliates, Sodak Systems, LLC (Sodak) and Titan Facilities, Inc. (TFI). In response to subsequent inquiries from the Area Office, TelaForce provided additional information and explanation to the Area Office through an extensive e-mail exchange.

On remand, TelaForce submitted to the Area Office a supplemental response to the protest, which in addition to further argument included Mr. Rose's March 26, 2019 Declaration and two more exhibits. TelaForce also asked the Area Office to consider the earlier Rose Declaration and two exhibits that had been its proposed new evidence in *TelaForce I*. (Suppl. Protest Resp. at 1, n.1.) These materials are all in the Area Office file.

1. TelaForce Principals and Officers

The record indicates that TelaForce has three principals who are also all of its officers: Mr. Rose, Chief Executive Officer (CEO); Ms. Judith Giles, Chief Financial Officer (CFO); and Mr. David Ramirez, Chief Operating Officer (COO). TelaForce was formed by Mr. Rose on June 21, 2016 as a subsidiary of Sodak. (Form 355.) Prior to forming TelaForce, Mr. Rose worked for L3-NSS and its legacy companies from 1990 to February 1, 2016. (Exh. K-3 (Rose Resume).) Although he was also a Vice President of L-3, Mr. Rose never had any authority to control L-3, and he did not exert critical influence over L-3 as a whole. (Rose Decl. ¶ 4 (Aug. 14, 2018).)

Mr. Rose explains that after CACI acquired L3-NSS on February 1, 2016, “CACI immediately removed me from my position as President.” (*Id.* ¶ 8.) Mr. Rose then “worked as a consultant to CACI’s Chief Operating Officer regarding strategic planning before leaving to manage TelaForce. In my consultant capacity, I did not have control over CACI’s operations. My role was confined to recommending business strategies for one segment of a much larger company, which CACI management could adopt or reject.” (Rose Decl. ¶ 3 (June 11, 2018).) In January 2017, Mr. Rose left CACI to manage TelaForce. (*Id.* ¶ 5.) He never served as any of CACI’s five Executive Level positions, never sat on CACI’s 10-person Board of Directors, and never held any of CACI’s other overall corporate leadership positions. (*Id.* ¶ 4; *see also* Exh. I at 1, 12 (CACI 2016 Annual Report).) During this time, Mr. Rose was a CACI employee. He “consulted with the COO of CACI, but had no independent decision-making authority. By way of example, Mr. Rose did not have the power to hire, fire, or discipline employees, did not have the authority to sign contracts, and did not have the authority to make financial commitments for CACI.” (E-mail from J. Giles to K. Silvia (July 17, 2018).)

In addition to Mr. Rose, TelaForce has two other officers: Ms. Giles and Mr. Ramirez. Besides TelaForce and its affiliates, neither Mr. Ramirez nor Ms. Giles has any other business interests. (E-mail from J. Giles to K. Silvia (July 25, 2018).) Mr. Ramirez worked at L3-NSS from 2001 to August 2015, and his last position there was President & General Manager - Global Sector, with 750 employees. (Exh. K-1 (Ramirez Resume); E-mail from J. Giles to K. Silvia (July 25, 2018).) Mr. Ramirez never worked for CACI; before joining TelaForce in August 2016, Mr. Ramirez worked at FireEye, Inc., a company unassociated with CACI. (*Id.*)

Ms. Giles also joined TelaForce in August 2016. Prior to that, Ms. Giles worked for L3-NSS and its legacy companies since 1979. Her last position at L3-NSS was as Senior Vice President and CFO. (Exh. K-2 (Giles Resume).) Ms. Giles “was notified by CACI on January 26, 2016, that her services were no longer required going forward. She was officially separated from CACI on February 12, 2016.” (Form 355, ¶ 15.) Apart from those 12 days, Ms. Giles never worked for CACI.

2. CACI’s Acquisition of L3-NSS

On June 21, 2018, Ms. Giles summarized the CACI acquisition as follows:

Due diligence phase began in late June 2015 and ran through early December of 2015, when an agreement was reached with CACI to acquire [L3-

NSS] through a Stock Purchase transaction. The transaction closed on February 1, 2016. I am adding to this email for additional clarification that the due diligence period was comprised of two phases: Phase I involved multiple companies doing due diligence on [L3-NSS], with offers provided to L-3 in the late October/early November timeframe. L-3 then selected CACI for a short but deeper dive, due diligence phase in order to reach a final offer. In the early December 2015 timeframe, L-3 and CACI reached agreement for CACI to acquire [L3-NSS] subject to meeting certain closing conditions, with the transaction closing on February 1, 2016, as indicated above.

(E-mail from J. Giles to K. Silvia, Item 3a (June 21, 2018).)

On July 9, 2018, Ms. Giles provided a more detailed account of the CACI acquisition:

This email summarizes our conversation of Friday afternoon regarding the involvement of [L3-NSS] executives, and more specifically Les Rose and myself, in the management of and decisions involving the acquisition of [L3-NSS] by CACI.

[L3-NSS] executives were notified in May 2015, that the corporate office of [L-3] had made the decision to sell [L3-NSS] and had engaged the services of Deutsche Bank to support them in the sale. Throughout the process, all decisions regarding this sale were made at the corporate level with no input from [L3-NSS] executives. A five-phase process then ensued, which [L3-NSS] executives supported, as follows:

Phase 1 — [L3-NSS] executive team members supported the preparation of a management presentation and meetings with potential buyers under the direction of Deutsche Bank and L-3 corporate management. This phase was conducted during the June and into mid-July.

Phase 2 — The due diligence process, involving several potential buyers, was conducted under the direction of Deutsche Bank and L-3 corporate management. [L3-NSS] supported populating the data room, responded to questions, and supported a small number of follow-on meetings with potential buyers, all of which was done through Deutsche Bank. This was a very tightly managed process as several companies were competing to buy [L3-NSS]. Throughout the process, Deutsche Bank was the POC with the potential buyers. At no time did [L3-NSS] engage directly with any potential buyers without Deutsche Bank in attendance to manage the interaction. This phase was conducted from mid-July through mid-October.

Phase 3 — Potential buyers put together their initial offers and submitted them to L-3 through Deutsche Bank. L-3 and Deutsche Bank then evaluated the offers and held discussions with the offerors. [L3-NSS] executives were not involved in the evaluation or decision process. A down select decision was made

by L-3 in the late October early November timeframe to pursue the CACI offer and work towards a definitized agreement.

Phase 4 — As a definitized agreement was being negotiated by the two parties, [[L3-NSS] supported a more in-depth due diligence process, which involved providing addition[al] data for the data room, answering questions, and supporting teleconference meetings as requested. This phase was also conducted under the direction of Deutsche Bank and L-3 corporate management. A definitized agreement was reached in early December 2015 and a public announcement was made.

Phase 5 — This final phase, managed by L-3 corporate management, was primarily in support of transition activities that need to be completed before the transaction could close. This involved a larger group of L-3 management members, but again, the scope of management interaction and data detail to be provided was totally managed by L-3 corporate. The transaction closed on February 1, 2016.

(E-mail from J. Giles to K. Silvia (July 9, 2018).)

Following the acquisition, CACI absorbed all of the L3-NSS assets, personnel, and business operations and moved them into five of CACI's existing business groups. (Rose Decl. ¶ 9 (Aug. 14, 2018).) L3-NSS, now known as CACI-NSS, “effectively ceased to exist as an operating business entity,” but continued to exist only for legal, administrative, and government accounting purposes. (*Id.*)

3. Asset Purchase Agreement

After CACI acquired L3-NSS, Mr. Rose learned that CACI was planning to divest all of its state and local government contracts that were not part of its core business. (E-mail from J. Giles to K. Silvia (July 13, 2018).) Some, but not all, of these contracts were originally L3-NSS contracts. (*Id.*) After due diligence, TelaForce made an offer to CACI, and CACI vetted that offer against its other options. (*Id.*) Mr. Rose states that the negotiations for these contracts “were conducted at arm's length.” (Rose Decl. ¶ 2 (March 26, 2019); Rose Decl. ¶ 10 (Aug. 14, 2018).) Further, in those negotiations, TelaForce was represented by independent legal counsel retained solely by TelaForce, and CACI was represented by independent legal counsel retained solely by CACI. (Rose Decl. ¶ 3 (March 26, 2019).)

On November 10, 2016, TelaForce and CACI entered into an Asset Purchase Agreement (APA) for the state and local contracts, and the APA closed on February 22, 2017. Contracts that CACI could assign were assigned to TelaForce as prime contractor, and contracts that could not be assigned were retained by CACI, with the work subcontracted to TelaForce through a Master Subcontracting Agreement (MSA). (APA ¶¶ 2.4, 5.18.) TelaForce paid CACI a purchase price of \$[xxx] at closing and, with respect to the retained contracts, an annual subcontracting fee of \$[xxx] for [xxx]. (APA ¶¶ 2.2-2.3, 5.18(d).) For each contract retained by CACI, CACI would transfer to TelaForce [xxx]. (MSA Item 3.) The parties also arranged for TelaForce to sublease

space currently being used by CACI, and to move incumbent workforces from CACI's to TelaForce's employ. (APA ¶¶ 3.6(a), 5.19.) Mr. Rose asserts that TelaForce was represented by independent legal counsel in the sublease negotiations with CACI, and that TelaForce pays the full cost of these subleases. (Rose Decl. ¶ 6 (March 26, 2019).)

All told, [xxx] contracts were assigned to TelaForce, and [xxx] were retained by CACI with the work to be subcontracted to TelaForce. (Rose Decl., Exh. 1 (Aug. 14, 2018).) As of August 14, 2018, work was completed on 3 of the retained contracts, and TelaForce works on those programs as the prime contractor. (*Id.*) Also, as of August 14, 2018, there were four new awards to TelaForce by CACI. (*Id.*) Mr. Rose states that CACI had an independent valuation done of the state and local contracts, which estimated their value as \$[xxx]. (Rose Decl. ¶ 20 (Aug. 14, 2018).) The APA, including avoidance of shutdown costs for contracts being completed, “achieved that value and satisfied the CACI Board of Directors that this was a reasonable value for CACI.” (*Id.*)

Between February 22, 2017 (when the APA closed) and April 11, 2017 (when SBA approved the MPA), TelaForce received \$[xxx] from CACI subcontracts, against total receipts of \$[xxx]. (Rose Decl. ¶ 14 (Aug. 14, 2018); Post-Remand Submission, Exh. 2.) Between April 11, 2017 and November 21, 2017 (when TelaForce self-certified), TelaForce received \$[xxx] from CACI subcontracts, and \$[xxx] in all other receipts. (Rose Decl. ¶ 16 (Aug. 14, 2018); Post-Remand Submission, Exh. 2.) In percentage terms, between the dates the APA closed and SBA approved the MPA, TelaForce earned [xxx]% of its receipts from CACI subcontracts. (Post-Remand Submission, Exh. 2.) During the entire time between the date the APA closed and self-certification, TelaForce earned [xxx]% of its receipts from CACI subcontracts before the MPA was approved, [xxx]% of its receipts from CACI subcontracts after the MPA was approved, and [xxx]% of its receipts from other customers. (*Id.*)

4. Mentor-Protégé Agreement

On April 11, 2017, SBA approved an MPA under the All Small Mentor-Protégé Program (ASMPP), with CACI as Mentor and TelaForce as Protégé. TelaForce sought four types of assistance under the MPA. First, under “Management & Technical Assistance,” TelaForce requested “Technical and Management Certifications,” specifically to allow [xxx]. (MPA at 2.) Second, under “Contracting Assistance,” TelaForce requested “Peer-to-Peer Contracting assistance,” specifically for a [xxx]. (*Id.*)

Third, under “Business Development Assistance,” TelaForce requested (1) [xxx], and (2) [xxx]. (*Id.* at 2-3.) Specific assistance requested included: (1) provide resources for [xxx]; (2) provide [xxx]; (3) assign TelaForce as a [[xxx]; (4) subcontract work to TelaForce to meet SDVOSB and other small business goals on existing contracts and new business opportunities; (5) prepare appropriate [xxx]; (6) allocate [xxx] on a case-by-case basis; and (7) access to [xxx] for customer meetings and demos. (*Id.*) Fourth, under “General and/or Administrative Assistance,” TelaForce requested “ISO 20000,” specifically, that [xxx]. (*Id.* at 3.)

C. The Instant Size Determination

On March 26, 2019, TelaForce submitted additional information and argument in response to Appellant's protest allegations. TelaForce stated that, at the Area Office's request, TelaForce was limiting its response only to the issues of economic dependence and the totality of the circumstances, and that “[i]f [the Area Office] is considering any other potential bases of affiliation in this remanded size determination, TelaForce requests the opportunity to provide a separate response addressing those issues.” (Post-Remand Submission at 1.)

TelaForce observed that the economic dependence rule specifically excludes situations where a company is a start-up and has had only limited opportunity to diversify its business, highlighting that TelaForce was formed just 17 months before the November 21, 2017 self-certification date. (*Id.* at 2.) In support, TelaForce pointed to OHA's decision in *Size Appeal of Argus & Black, Inc.*, SBA No. SIZ-5204 (2011) and its progeny. (*Id.*) TelaForce also argued that even if the Area Office were to apply a presumption of affiliation under 13 C.F.R. § 121.103(f)(2), the presumption would be rebutted here because the CACI subcontracts were provided to the TelaForce pursuant to an SBA-approved MPA, even though the MPA was not approved by SBA until several weeks after the APA closed. (*Id.*) TelaForce maintained that it is not affiliated with CACI under the totality of the circumstances because no power to control is present. (*Id.* at 4.) Further, citing *Size Appeal of The ORASA Group, Inc.*, SBA No. SIZ-4966 (2008), TelaForce argued that assistance provided under an MPA cannot be used to find affiliation under the totality of the circumstances. (*Id.*) The Area Office previously recognized that Mr. Rose's time at CACI was purely in an advisory role and that Ms. Giles worked at CACI only 12 days, so control cannot be established there. (*Id.* at 5.)

On April 5, 2019, the Area Office issued Size Determination No. 3-2019-022, concluding that TelaForce is not affiliated with CACI, and that TelaForce's own receipts, combined with those of its affiliates Sodak and TFI, do not exceed the \$15 million size standard. Regarding the newly-organized concern rule, the Area Office noted that this issue had been raised in Appellant's protest, and quoted from *TelaForce I* where OHA held that the initial size determination “lacked proper basis” to find newly-organized concern rule affiliation. (Size Determination No. 3-2019-022, at 1, 3-4.) The Area Office deleted all of its prior discussion of the newly-organized concern rule, including its prior finding that CACI-NSS is “essentially the same company” as L3-NSS. (Size Determination No. 3-2019-022, at 3-4; *cf.*, Size Determination No. 3-2018-054, at 5-8.) Regarding the totality of the circumstances, the Area Office again quoted *TelaForce I* where OHA had opined that “the existing record does not support the conclusion” of affiliation on this basis, and again removed all of its prior discussion on the issue. (Size Determination No. 3-2019-022, at 3-4, 9; *cf.*, Size Determination No. 3-2018-054, at 9-10.)

Turning to the question of economic dependence, the Area Office quoted at length from the arguments set forth in TelaForce's post-remand submission and concluded that TelaForce is not affiliated with CACI through economic dependence. (Size Determination No. 3-2019-022, at 7-9.) Having found no affiliation between TelaForce and CACI on any grounds, the Area Office determined that TelaForce, with its two acknowledged affiliates, is an eligible small business. (*Id.* at 9-10.)

D. Appeal

On April 19, 2019, Appellant filed the instant appeal. Appellant argues that, contrary to OHA's decisions in *TelaForce I* and *II*, the Area Office did not reexamine its earlier findings regarding the newly-organized concern rule and the totality of the circumstances. (Appeal at 2-4.) According to Appellant:

OHA clearly instructed the Area Office to revisit its prior finding of affiliation between TelaForce and CACI-NSS based on the newly-organized concern rule and the totality of the circumstances. The Area Office, however, curiously — and improperly — failed to address either of those issues on remand and ignored what has been the central issue in this protest: whether TelaForce's owner and Chief Executive Officer, Les Rose, is a “former officer” of CACI-NSS under the first element of the newly-organized concern rule.

(*Id.* at 2.)

With regard to the newly-organized concern rule, Appellant asserts that the Area Office on remand “effectively determined that L3-NSS and CACI-NSS were ““one and the same”D’, because Size Determination No. 3-2019-022 noted that CACI changed the name of L3-NSS to CACI-NSS after the acquisition by CACI. (*Id.* at 11.) The Area Office, though, did not apply this key fact to the first element of the newly-organized concern rule. (*Id.*) In Appellant's view, “[i]f the Area Office had conducted a proper remand analysis, it would have reached the inescapable conclusion that L3-NSS and CACI-NSS are the exact same entity and, thus, Mr. Rose is necessarily a former officer of CACI-NSS.” (*Id.* at 10-11.) Appellant also looks to one of the representations in the APA to argue that L3-NSS and CACI-NSS are the same entity: [xxx] (*Id.* at 11, quoting APA ¶ 3.11 (emphasis added by Appellant).) For these reasons, the first element of the newly-organized concern rule is satisfied and TelaForce is affiliated with CACI-NSS.

Turning to economic dependence, Appellant points to TelaForce's three-year receipts of \$[xxx], [xxx]% of which came from CACI subcontracts, and maintains that the Area Office clearly erred by not applying the presumption of affiliation under 13 C.F.R. § 121.103(f)(2) and by adopting TelaForce's arguments to the contrary. (*Id.* at 12-13.) First, Appellant maintains, the “start-up” exception to economic dependence in *Size Appeal of Argus & Black, Inc.*, SBA No. SIZ-5204 (2011) and similar cases is narrow and does not apply here because TelaForce has received much larger and more numerous subcontracts than did the challenged firm in *Argus & Black*. (*Id.* at 13-14.) TelaForce's situation is analogous to the situations seen in *Size Appeal of Ma-Chis Project Controls, Inc.*, SBA No. SIZ-5486 (2013) and *Size Appeal of LSINC Corp.*, SBA No. SIZ-5856 (2017), where OHA distinguished *Argus & Black* based on contract size and duration. (*Id.* at 13-15.) Further, Appellant contends, the MPA does not cover the assistance provided by CACI in the form of the purchased contracts, because those contracts were purchased before the MPA existed. (*Id.* at 15-16.) As a result, that assistance cannot have been “pursuant to” the MPA. In support, Appellant cites the preamble to the ASMPP rule which notes that the intent of the ASMPP is to encourage assistance that the protégé would not otherwise be

able to get. (*Id.* at 16.) There is no rational basis to apply the MPA “retroactively to shield revenue earned from subcontracts that pre-date the MPA.” (*Id.*)

With regard to the totality of the circumstances, Appellant contends the Area Office erred “in making a conclusory determination that TelaForce and CACI are not affiliated based upon the totality of the circumstances, even though it previously found affiliation on this ground.” (*Id.* at 9.) Had the Area Office performed a complete review, as instructed in *TelaForce I* and *II*, it would have found affiliation on this ground too. Appellant cites *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138 (2010) for the proposition that affiliation under the totality of the circumstances may arise where not all elements of the newly-organized concern rule are satisfied. (*Id.* at 18.) Appellant contends that in *TelaForce I*, OHA found Size Determination No. 3-2018-054 to be flawed because, although the Area Office recognized that TelaForce “derives much of its revenues from CACI,” the Area Office did not explore whether the MPA shielded that revenue or other forms of assistance CACI provided, such as the employees and leases that went with the subcontracts, from affiliation. (*Id.* at 18-19.) Appellant posits that this assistance is outside the scope of the MPA and should be considered another bond of affiliation between TelaForce and CACI. (*Id.* at 19.) Appellant also asserts that TelaForce purchased the state and local contracts from CACI “at an extraordinary discount from market value,” noting the disparity between the \$[xxx] purchase price and the independent valuation of those contracts at \$[xxx]. (*Id.*) Finally, the fact that Mr. Rose knew the value of those contracts, which no other buyer would have known, suggests that the purchase was not at arm's length. (*Id.* at 20.)

Appellant requests that OHA either reverse the size determination or remand the matter again to the Area Office to conduct a new and proper size determination. (*Id.*)

E. TelaForce's Response

On May 8, 2019, TelaForce responded to the appeal. TelaForce maintains that the Area Office correctly concluded that TelaForce is not affiliated with CACI under any of Appellant's theories of affiliation. (Response at 1.) Therefore, the appeal should be denied.

With regard to the newly-organized concern rule, TelaForce highlights that, in Size Determination No. 3-2018-054, the Area Office made contradictory findings that Mr. Rose is not a former officer of CACI or CACI-NSS, but that CACI-NSS is “essentially the same company” as L3-NSS. (*Id.* at 4.) On remand, the Area Office resolved this inconsistency by deleting its earlier, baseless finding that L3-NSS and CACI-NSS are “essentially the same company.” (*Id.* at 6-7.) Thus, the Area Office “implicitly abandoned” the key finding which had been the Area Office's only rationale, in Size Determination No. 3-2018-054, for imputing Mr. Rose's role at L3-NSS to CACI-NSS. (*Id.* at 7-8.) TelaForce further insists that the Area Office was correct to find no violation of the newly-organized concern rule. According to TelaForce, after acquiring L3-NSS, CACI “structurally dismantled” L3-NSS and integrated its personnel, assets, and operations into five existing CACI units. (*Id.* at 10-11.) The renamed CACI-NSS thus had “an entirely different character” than the concern Mr. Rose previously managed for L-3. (*Id.*) Without any continuity between L3-NSS and CACI-NSS, there was no possible basis for the Area Office to impute Mr. Rose's role at L3-NSS to CACI-NSS for purposes of the newly-organized concern rule. (*Id.* at 11.)

On the question of the economic dependence, TelaForce contends, first, that the regulatory presumption at 13 C.F.R. § 121.103(f)(2) arises only when one concern derives more than 70% of its receipts from another concern over a three-year lookback period. (*Id.* at 12-13.) TelaForce self-certified for the instant procurement on November 21, 2017, so in considering whether TelaForce is presumed economically dependent upon CACI, only receipts during fiscal years 2014, 2015, and 2016 should be considered, and TelaForce had no receipts from the CACI subcontracts until 2017. (*Id.* at 13.) Alternatively, TelaForce contends, the current iteration of the economic dependence rule can be understood as granting “a three-year grace period” for startups such as TelaForce, citing preamble commentary to the 2016 rule. (*Id.*) TelaForce argues that the cases cited by Appellant, *Ma-Chis* and *LSINC*, are inapposite here because they were decided under the older version of 13 C.F.R. § 121.103(f), which did not reference a three-year lookback period. (*Id.* at 14.) TelaForce also notes that its receipts derived from CACI over its first three fiscal years (from June 21, 2016 to December 31, 2018) are only [xxx]%, which is below the 70% threshold triggering the presumption of economic dependence, and only [xxx]% when considering that the MPA shields the bulk of those receipts. (*Id.* at 15.) TelaForce emphasizes that assistance under an SBA-approved MPA cannot be used to establish affiliation, citing *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888 (2018) and others. Further, citing *Size Appeal of The ORASA Group, Inc.*, SBA No. SIZ-4966 (2008), TelaForce argues that an MPA may extend to assistance that begins before the MPA is approved. (*Id.* at 17.) Thus, OHA should find no merit to Appellant's arguments.

Third, regarding totality of the circumstances, TelaForce maintains the Area Office was not obligated to investigate this issue in the first instance, because Appellant did not raise it in its initial protest. (*Id.* at 18.) Even so, a finding of affiliation under totality of the circumstances must include facts showing how one concern has the power to control the other, and no such facts exist here. (*Id.* at 19.) TelaForce and CACI share no common ownership, officers, directors, employees, facilities, or equipment, and TelaForce has never received loans or other similar financial assistance from CACI. (*Id.*) Thus, OHA should reject this portion of Appellant's appeal.

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

Appellant has not shown clear error in the new size determination. As a result, this appeal must be denied.

1. Newly-Organized Concern Rule

Beginning with the newly-organized concern rule, Appellant first maintains that the instant size determination should be remanded because the Area Office ignored Appellant's protest allegation concerning the newly-organized concern rule, or in the alternative, that the size determination should be reversed because the Area Office effectively determined that CACI-NSS and L3-NSS are the same entity, such that Mr. Rose's role as a former officer of L3-NSS may be imputed to CACI-NSS. The record, though, does not support either of Appellant's contentions.

In *TelaForce I*, OHA explained that the newly-organized concern rule, 13 C.F.R. § 121.103(g), consists of four required elements, all of which must be present in order to find affiliation under the rule. *TelaForce I*, SBA No. SIZ-5970, at 12. The first element of the rule requires that the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern. *Id.* Although the Area Office, in the prior size determination, found that the first element was met, OHA agreed with *TelaForce* that this determination was “highly questionable” because the Area Office concluded that *TelaForce*'s founder, Mr. Rose, was never an officer or key employee of CACI or CACI-NSS. *Id.* The Area Office also found, in the prior size determination, that CACI-NSS is “essentially the same company” as L3-NSS, but the Area Office did not offer any factual or legal basis for this assertion beyond the superficial similarity of names, and *TelaForce* highlighted various factual distinctions between L3-NSS and CACI-NSS. *Id.* at 14-15. OHA concluded that remand was appropriate because the Area Office did not reconcile its contradictory findings that, on the one hand, Mr. Rose is not a former officer of CACI or CACI-NSS, but on the other hand, Mr. Rose is a former officer of L3-NSS, which is “essentially the same company” as CACI-NSS. *Id.*

On remand, the Area Office apparently reconsidered its position on the newly-organized concern rule, and resolved the inconsistency in the prior size determination by deleting nearly all of the earlier discussion of the newly-organized concern rule, including the prior finding that CACI-NSS and L3-NSS are “essentially the same company.” Section II.C, *supra*. Contrary to Appellant's suggestions on appeal, the instant size determination acknowledges that Appellant's protest alleged affiliation under the newly-organized concern rule and quotes from OHA's discussion of the newly-organized concern rule in *TelaForce I*, so I cannot conclude that the Area Office disregarded that issue on remand. *Id.*

Appellant's argument for reversal is premised on its view that L3-NSS and CACI-NSS are the same concern, and thus that Mr. Rose's executive position at L3-NSS can be imputed to CACI-NSS in order to satisfy the first element of the newly-organized concern rule. The problem for Appellant, though, is that, unlike the earlier size determination, the instant size determination contains no findings to suggest that Mr. Rose is a former officer of CACI or CACI-NSS. Section

II.C, *supra*. While the instant size determination does mention in passing that CACI changed the name of L3-NSS after acquiring that company, the instant size determination does not indicate that CACI-NSS is merely L3-NSS operating under a different name, nor would the record support such a conclusion. Rather, according to Mr. Rose's sworn declarations, CACI's subsequent actions of breaking up L3-NSS, and redistributing its assets and workforce among several CACI business units, changed the very character of CACI-NSS such that CACI-NSS no longer was the same entity as L3-NSS. Section II.B.2, *supra*. Further, the record amply supports the notion that Mr. Rose was never actually an officer or a key employee of CACI or CACI-NSS, as he had no critical influence or substantive control over those companies. Section II.B.1, *supra*.

It is well-settled law 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). Here, in the instant size determination, the Area Office made no findings from which it could properly have concluded that Mr. Rose is a former officer of CACI or CACI-NSS. The only rationale that might previously have supported this conclusion — that CACI-NSS and L3-NSS are “essentially the same company” — was deleted from the instant size determination on remand. Without this factual predicate, there was no valid basis for the Area Office to find TelaForce affiliated with CACI under the newly-organized concern rule. Accordingly, Appellant has not carried its burden of proving clear error in the instant size determination.

2. Economic Dependence

Appellant also argues that the Area Office incorrectly found that TelaForce is not affiliated with CACI through economic dependence. Appellant observes that, under 13 C.F.R. § 121.103(f)(2) and OHA case precedent, concerns are presumed affiliated if one derives 70% or more of its receipts from the other. Here, by TelaForce's own admission, CACI accounted for more than 70% of TelaForce's revenues from the date of TelaForce's founding through the date of its self-certification.

I find Appellant's argument unpersuasive because, while it is true that TelaForce derived more than 70% of its receipts from CACI through the date of self-certification, the large majority of these receipts were generated after SBA had approved the MPA between TelaForce and CACI (*i.e.*, during the time period when TelaForce and CACI were operating as an SBA-approved mentor and protégé). Specifically, according to the data TelaForce provided to the Area Office, TelaForce begin receiving revenues through CACI on February 22, 2017, when the APA closed. Section II.B.3, *supra*. Less than two months later, on April 11, 2017, SBA formally approved the MPA. Section II.B.4, *supra*. Although TelaForce derived some revenues from CACI during the interval before SBA approved the MPA, these represented a modest [xxx]% of TelaForce's total revenues through the date of self-certification, far below the 70% threshold that would trigger a presumption of economic dependence. Section II.B.3, *supra*. Further, during the course of the remand, TelaForce argued, and the Area Office agreed, that revenues TelaForce received from CACI after the MPA was approved should not be considered in assessing economic dependence, because SBA regulations provide that an SBA-approved mentor and protégé are broadly exempt

from affiliation based on their mentor-protégé relationship or assistance within the scope of their MPA. 13 C.F.R. §§ 125.9(d)(4) and 121.103(b)(6). On these facts, then, the Area Office reasonably concluded that there was no valid basis to find TelaForce affiliated with CACI through economic dependence.

On appeal, Appellant also highlights that SBA did not approve the MPA until several weeks after the APA closed. Therefore, Appellant urges, the MPA does not apply to the assistance CACI provided to TelaForce via the APA. While Appellant is correct that the MPA chronologically was not in effect at the time the APA closed, Appellant has not established that APA itself should be considered “assistance” from CACI to TelaForce. The APA was an asset purchase transaction, whereby TelaForce purchased certain contracts between CACI and state and local governments, and assumed liabilities associated with those contracts. Section II.B.3, *supra*. An asset purchase agreement conceivably could constitute “assistance” if the terms of such an agreement were disproportionately favorable to one party, but the record here does not support the conclusion that the APA was unduly favorable to TelaForce. Through sworn statements, TelaForce informed the Area Office that the APA was conducted as an arm's-length transaction, with TelaForce and CACI each represented by independent legal counsel. Section II.B.3, *supra*. Although Appellant emphasizes that the APA called for TelaForce to pay a \$[xxx] purchase price for contracts reportedly valued between \$[xxx], this argument overlooks that TelaForce also was obliged to make additional payments to CACI beyond the initial purchase price, and furthermore that TelaForce assumed liabilities associated with the purchased contracts, such as payroll and lease expenditures, thereby enabling CACI to avoid these costs. *Id.* Thus, Mr. Rose avers that CACI's board considered the transaction, as a whole, a fair value to CACI. *Id.* Appellant also posits that Mr. Rose may have benefited from insider knowledge of the purchased contracts, gleaned from his prior role as president of L3-NSS. This allegation, though, is purely speculative, and is undermined by the fact that not all of the purchased contracts were previously held by L3-NSS. *Id.* Further, CACI would have been well aware of Mr. Rose's former connection with L3-NSS, which also was disclosed in the APA. Thus, the record does not support Appellant's contention that the Area Office erred by failing to construe the APA as pre-MPA “assistance” from CACI to TelaForce.

3. Totality of the Circumstances

Lastly, I find no merit to Appellant's assertion that the Area Office should have found TelaForce affiliated with CACI under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). As OHA explained in *TelaForce I*, “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.’” *TelaForce I*, SBA No. SIZ-5970, at 14 (quoting *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 15 (2015)). Here, as discussed above, the Area Office reasonably determined that TelaForce is not affiliated with CACI through the newly-organized concern rule or economic dependence — the two issues raised in Appellant's protest — and no other facts or circumstances have been identified which might enable CACI to control TelaForce, or *vice versa*. It follows, then, that TelaForce and CACI are not affiliated under the totality of the circumstances.

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge