On April 23, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-87, finding that Trailboss Enterprises, Inc. (Appellant) is not an eligible small business under the size standard associated with the instant procurement due to its affiliation with numerous concerns.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be a small business for the instant procurement. For the reasons discussed infra, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 et seq., and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.
I. Background

A. Solicitation and Procedural History

On February 6, 2012, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) issued solicitation HSCEDM-12-R-00007, seeking a contractor to perform transportation services to support its Enforcement and Removal Operations San Antonio Field Office. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, with a corresponding $18.5 million average annual receipts size standard.

On May 16, 2012, the CO notified all unsuccessful offerors that Appellant had been selected for award. AMTEX Security, Inc. (AMTEX) an unsuccessful offeror, filed a timely protest with the CO, claiming that Appellant was not an eligible small business under the applicable size standard. On December 21, 2012, SBA issued size determination 06-2012-90, finding Appellant not to be an eligible small business under the applicable size standard due to Appellant's affiliation with three other entities. The size determination was appealed to OHA, which issued Size Appeal of Trailboss Enterprises, Inc., SBA No. SIZ-5442 (2013) (Trailboss I). In its decision, OHA remanded, in part, the size determination back to the Area Office in order to afford Appellant the opportunity to respond to the Area Office's finding of affiliation between Appellant and Dossman-Tolliver Group (DTG) based on familial identity of interest.

B. Size Determination

On April 23, 2014, the Area Office issued its size determination, finding Appellant other than a small business under the $18.5 million size standard due to its affiliation with three other entities.

The Area Office found that Joseph Tolliver owns 80.5% of Appellant, while Mr. Tolliver's son, Marvin Tolliver, owns 10%, and Ken Oato owns the remaining interest. Based on the familial identity of interest between Mr. Tolliver and Marvin Tolliver, the Area Office found their interests must be combined under 13 C.F.R. § 121.103(f). Size Determination, at 2. The Area Office also found that Gail Dossman-Tolliver, Mr. Tolliver's wife, is a director of Appellant, along with the three owners.

Next, the Area Office explained that Mr. Tolliver and Mr. Oato each have a 50% voting interest in T&O Company, LLC (T&O). Mr. Tolliver serves as President and CEO, while Mr. Oato serves as CFO. Because Mr. Tolliver and Mr. Oato have the power to control T&O, the Area Office found Appellant and T&O are affiliated based on 13 C.F.R. § 121.103(c).Id. at 3.

The Area Office proceeded to explain the relationship between Appellant and Dossman-Tolliver Group, LLC (DTG), Trailboss Solutions, LLC (TSL), and The Joseph and Gail Tolliver

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Foundation (The Foundation). The Area Office stated that DTG is a real estate brokerage firm and art dealer owned and controlled by Ms. Dossman-Tolliver. DTG is located and the same address as Appellant, TSL and T&O. Id. The Foundation owns the property in which all companies are located. The Foundation is registered as a nonprofit entity, with its Board of Directors comprised of Ms. Dossman-Tolliver, Mr. Tolliver, and Marvin Tolliver. Id. Based on their control over The Foundation, the Area Office determined that Appellant and The Foundation are affiliates based on common management.

Appellant, according to the Area Office, is the largest ownership interest holder of TSL, with T&O, DTG, and Mr. Scott Allen owning the remaining ownership interest. Based on Appellant, T&O and DTG's combined shares of TSL, the Area Office concluded they can control TSL based on ownership, and thus TSL is considered an affiliate of Appellant, T&O, The Foundation and DTG. Id. at 4.

Next, the Area Office states that, per the remand instructions in Trailboss Enterprises, Inc., SBA No. SIZ-5442, Ms. Dossman-Tolliver and Mr. Tolliver were afforded the opportunity to rebut the presumption that their familial identity of interest creates affiliation between the companies under their control and ownership. Id. Ms. Dossman-Tolliver and Mr. Tolliver submitted written declarations indicating Appellant has no ownership or management control over DTG, and that the concerns are separate and distinct entities. Further, Ms. Dossman-Tolliver stated she is a non-voting member of Appellant, and has no control over the day-to-day business and management operations. Mr. Tolliver stated he has no ownership or management control over DTG. Their declarations also state Appellant and DTG have no business dealings and do not share personnel, equipment or resources. After reviewing this information, the Area Office determined that Ms. Dossman-Tolliver and Mr. Tolliver cannot rebut the presumption of having a familial identity of interest. Id.

The Area Office explained that firms owned by persons with a familial identity of interest are not required to be in the same line of business in order to be affiliated or that ownership interest is required to find affiliation. The Area Office states Ms. Dossman-Tolliver and Mr. Tolliver control concerns that operate out of the same building, pay rent to the same owner, which is an affiliated of Appellant and DTG, and controlled by Ms. Dossman-Tolliver, Mr. Tolliver and their son, Marvin Tolliver. The Area Office adds that Ms. Dossman-Tolliver's assertion that she is a non-voting member of Appellant's Board of Directors is unsupported by any documentation. The Area Office concluded that “both Mr. and Mrs. Tolliver receive an economic benefit from direct and indirect intercompany transactions and from the other two affiliates which are also co-located on the premises.” Id. at 5.


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2 I note with some concern Appellant's failure to disclose The Foundation in its SBA Form 355 at the time of the first size determination. This raises a question as to Appellant's willingness to be forthcoming with accurate information.
C. Appeal Petition

On May 8, 2014, Appellant filed its appeal of the size determination with OHA. Appellant argues the Area Office erred in finding affiliation between the concerns owned by Mr. Tolliver and Ms. Dossman-Tolliver.

Appellant argues the Area Office erroneously concluded Appellant is affiliated with DTG and The Foundation. Appellant acknowledges that T&O is its affiliate and together they control TSL. Appeal, at 4-5.

Appellant states Ms. Dossman-Tolliver is a non-voting member of Appellant without any control over the concern's management. Appellant notes this information was provided to the Area Office in Ms. Dossman-Tolliver's declaration, as well as in Appellant's answer to SBA Form 355. Based on Ms. Dossman-Tolliver's role within Appellant, the appeal argues there is no common management between Appellant and The Foundation. Id. at 6. Consequently, Appellant suggests that Ms. Dossman-Tolliver and DTG's lack of control over The Foundation refutes the Area Office's finding of affiliation between DTG and The Foundation. Appellant adds the Area Office offered no basis for concluding that DTG's 20% share of TSL should be aggregated with the 60% ownership share of Appellant and T&O in order to establish affiliation. Id. at 7.

Appellant notes the commercial space agreements that Appellant and DTG have with The Foundation are arm's-length transactions that do not establish common management between the concerns. Thus, based on the market rate rents paid by Appellant and DTG, and Ms. Dossman-Tolliver's lack of control over The Foundation, Appellant argues no affiliation exists between DTG and The Foundation. Id. Appellant adds that the only “links” between Mr. Tolliver and Ms. Tolliver “are that [Appellant] and [DTG] operate out of the same building, pay rent to the same owner — [T]he Foundation, and, with [Mr.] Tolliver's son, comprise the Board of Directors of [T]he Foundation.” Id.

Next, Appellant argues Mr. Tolliver, and by extension Appellant, do not have any business contacts with DTG and neither party exercises any control over DTG. Appellant contends this lack of control is sufficient to rebut the presumption of an identity of interest based on familial relationship. Appellant asserts that sharing of office space with DTG is not enough to establish affiliation because each concern pays market price rate, have separate offices within the building, and do not share personnel, equipment, or resources. Appellant concludes by stating that “the fact that these entities are not related, have no business relationship, and neither has control or ownership over the other, it necessarily follows that [Appellant] and [DTG] are not affiliated under OHA precedent.” Id. at 9.

D. SBA Comments

On June 3, 2014, SBA filed its comments. SBA argues the ties between Mr. Tolliver and Ms. Dossman-Tolliver are significant enough that OHA should affirm the Area Office's size determination and deny the appeal.
SBA contends that the ties between Mr. Tolliver and Ms. Dossman-Tolliver rise above the minimal amount found in OHA cases where no affiliation was found. SBA asserts that similar to Size Appeal of RGB Group, Inc., SBA No. SIZ-5351 (2012), the spouses found here are business partners in another concern, TSL, and jointly control The Foundation. In addition, Appellant and TSL are located in the same building, which is owned by The Foundation. SBA Comments, at 2.

SBA notes past OHA decisions not finding affiliation between concerns owned by spouses significantly differ from the facts found here. SBA states those decisions include situations where the spouses do not have an ownership interest in each other's concerns, or serve as officers or directors. Additionally, no affiliation was found in situations where the concerns did not share any office space and were engaged in different categories of work. Id. at 4. Conversely, SBA argues the facts here show that Ms. Dossman-Tolliver is in Appellant's Board of Directors and DTG shares office space with Appellant, which is owned by The Foundation, a concern controlled by Mr. Tolliver, Ms. Dossman-Tolliver, and Marvin Tolliver. SBA concludes that unlike other OHA decisions where no affiliation was found, “there is not an event in this case that establishes a clear fracture.” Id. at 5.

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 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

Here, Appellant contends it is not affiliated with DTG, and as a result, its receipts should not be aggregated. The Area Office reasoned that because Mr. Tolliver controls Appellant and Ms. Dossman-Tolliver controls DTG, the spousal relationship gives rise to an identity of interest under 13 C.F.R. § 121.103(f). As stated previously in Trailboss I, that particular regulation states:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination by showing that the interests deemed to be one are in fact separate.
13 C.F.R. § 121.103(f). OHA has extensive case precedent interpreting this regulation as creating a rebuttable presumption that family members have identical interests and must be treated as one person. See, e.g., Trailboss I; Size Appeal of McLendon Acres, Inc., SBA No. SIZ-5222, at 6 (2011); Size Appeal of US Builders Group, SBA No. SIZ-5519 (2013). In these situations, the common interests are viewed as causing the parties to act in unison, and thus should be treated as one person. Size Appeal of DooleyMack Govt. Contracting, LLC, SBA No. SIZ-5085, at 6 (2009).

However, the challenged firm can rebut the presumption of identity of interest by showing there is “a clear line of fracture among the family members.” Size Appeal of Carwell Products, Inc., SBA No. SIZ-5507, at 8 (2013) (citing Size Appeal of Tech. Support Servs., SBA No. SIZ-4794, at 17 (2006)). The facture exists when the family members have no business relationship or involvement with each other's business concerns, or if the family members are estranged. Id.; Size Appeal of Hal Hays Constr., Inc., SBA No. SIZ-5217, at 6 (2011).

Nevertheless, OHA has stated in the past “that a minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture.” Id.; citing RBG Group, Inc., SBA No. SIZ-5351, at 7 (2012). Some of the factors to consider in examining whether a clear line of fracture exists includes: whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together. Size Appeal of GPA Techs., SBA No. SIZ-5307, at 8-10 (2011); Hal Hays, SBA No. SIZ-5217, at 6-7; Size Appeal of Jenn-Kans, Inc, SBA No. SIZ-5114, at 8 (2010); McLendon Acres, SBA No. SIZ-5222, at 6; Size Appeal of Pacific, Inc., SBA No. SIZ-5205, at 5 (2011).

In this case, Ms. Dossman-Tolliver has no ownership shares of Appellant but does serve on its Board of Directors. Ms. Dossman-Tolliver and Mr. Tolliver control The Foundation because together they serve on its Board of Directors, with Mr. Tolliver as its President and Ms. Dossman-Tolliver as the Vice-President. Furthermore, Appellant owns the largest share of TSL, with DTG, a concern owned and controlled by Ms. Dossman-Tolliver, owning a 20% minority interest. Lastly, all the above listed concerns operate out of the same building owned by The Foundation. It is clear from the record that Mr. Tolliver and Ms. Dossman-Tolliver have mutual business interests with no clear fracture between these interests.

Appellant attempts to dispute the Area Office's findings by stating Ms. Dossman-Tolliver's role in Appellant is as a non-voting Director. The Area Office dismissed this argument stating a lack of evidence. However, the SBA Form 355 and the declaration made by Ms. Dossman-Tolliver to the Area Office present sufficient evidence to establish Ms. Dossman-Tolliver as non-voting member of Appellant. Nevertheless, while Ms. Dossman-Tolliver's participation on the Board may be non-voting, it is still participation in Appellant's management. Therefore, Appellant cannot establish that there is a clear fracture between Mr. Tolliver and Ms. Dossman-Tolliver, and cannot rebut the presumption in 13 C.F.R. § 121.103(f).

Appellant argues that the lack of common management between Appellant and DTG rebuts the Area Office's affiliation finding. But, common ownership or management is not
required in order to find affiliation under a familial identity of interest. RBG Group, Inc., SBA No. SIZ-5351 (2012).

In order to rebut the presumption of identity of interest, a party must establish that the family members have no business relationship, something Appellant has failed to show. The record shows the extensive and substantial involvement by Mr. Tolliver and Ms. Dossman-Tolliver in one another's business undertakings. Appellant arguments attempting to upend the size determination by highlighting the lack of common ownership and management with DTG indicates a misinterpretation of 13 C.F.R. § 121.103(f). The regulation creates the presumption of an identity of interest between spouses which arises “not from the degree of family members' involvement in each other's business affairs, but from the family relationship itself.” Size Appeal of SP Tech., LLC, SBA No. SIZ-5319, at 5 (2012). Thus, the issue is whether Mr. Tolliver and Ms. Dossman-Tolliver can show a “clear line of fracture” between their business interests. Jenn-Kans, Inc., SBA No. SIZ-5114 (2010). I find they have not done so.

It is therefore clear that, treating Mr. Tolliver and Ms. Dossman-Tolliver as one party with their interests aggregated, DTG, The Foundation, T&O, and TSL are thus affiliated with Appellant.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge