

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

SIZE APPEAL OF:

AIS Engineering, Inc.,

Appellant,

RE: UltiSat, Inc.

Appealed From  
Size Determination No. 2-2012-35

SBA No. SIZ-5348

Decided: May 3, 2012

**APPEARANCES**

Jonathan T. Williams, Esq., Isaias “Cy” Alba, IV, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, Washington, DC, for AIS Engineering, Inc.

Daniel S. Herzfeld, Esq., John E. Jensen, Esq., Clare M. Cavaliero, Esq., Pillsbury Winthrop Shaw Pittman LLP, McLean, Virginia, for UltiSat, Inc.

**DECISION**<sup>1</sup>

**I. Introduction and Jurisdiction**

This is a protestor's appeal from a January 30, 2012, size determination finding the protested concern, UltiSat, Inc., an eligible small business. On appeal, I affirm the size determination and deny the appeal.

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.

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<sup>1</sup> This Decision was originally issued under a Protective Order. On May 3, 2012, I issued an Order for Redactions. OHA received one request for redactions. I now issue a redacted version of the Decision for public release.

## II. Background

### A. The Solicitation and Protest

On June 7, 2010, the Defense Information Systems Agency, Defense Information Technology Contracting Organization, at Scott Air Force Base, in Illinois, issued Solicitation No. HC1013-10-R-2005 for telecommunications and network services. The Contracting Officer (CO) set the procurement aside for small businesses and assigned to it North American Industry Classification System (NAICS) code 517919, All Other Telecommunications, with a corresponding annual receipts size standard of \$25 million. Initial offers were due December 9, 2010, and final proposal revisions were due on August 30, 2011.

On November 18, 2011, the CO notified AIS Engineering, Inc. (Appellant), an unsuccessful offeror, that UltiSat, Inc. (UltiSat) was the intended awardee. On November 28, 2011, Appellant filed a size protest with the CO asserting UltiSat is not an eligible small business. The CO forwarded the protest to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) for a size determination.<sup>2</sup>

In its protest, Appellant asserted the CO should have required offerors to recertify their size status when they submitted their second final proposal revisions on August 30, 2011, and urged SBA to determine UltiSat's size status as of that date. Appellant asserted UltiSat's receipts, combined with those of its wholly-owned subsidiary, UltiSat Europe, exceed the size standard. Also, UltiSat Europe could not be small because it has been accepted into a Danish public sector "Framework Agreement," an opportunity open only to companies with "significant revenues." Further, in 2009, UltiSat acquired a division of TDC A/S (TDC), a large concern with which it has an ongoing relationship, and UltiSat is planning another acquisition.

### B. The Area Office File and Size Determination

In response to the protest, UltiSat acknowledged affiliation with its wholly-owned Danish subsidiary UltiSat Europe A/S (UltiSat Europe) and with UltiSat Europe's wholly-owned subsidiary AVC Logistics EMEA A/S (AVC), but denied it is affiliated with TDC. UltiSat asserted its size should be determined as of its initial offer in 2010, rather than as of its second final proposal revisions in 2011, although it provided to the Area Office its complete receipts information for 2010 as well as for 2009, 2008, and 2007.

UltiSat discussed the March 17, 2009, Business Transfer Agreement (BTA) under which it purchased from TDC certain satellite and teleport equipment located in Denmark. UltiSat's purpose was to acquire those tangible assets; however, in order to purchase them, it was required under the BTA to take on existing customer and supplier contracts involving those assets. If the assignment of a contract to UltiSat required a third party's consent, and that party refused, § 3.2 of the BTA required UltiSat and TDC to establish a "back-to-back arrangement" to put both

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<sup>2</sup> AIS also filed Bid Protest No. B-406186 at the Government Accountability Office (GAO) on November 28, 2011. On March 7, 2012, the GAO denied the protest.

UltiSat and TDC in the same financial position as if the third-party consent had been given and UltiSat had formally assumed the contract. [xx].

Also, as set out in considerable detail in the BTA, § 3.3 and Schedule 4, under Danish law UltiSat was required [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx  
xx]. Under the BTA, [xxx]% of the purchase price was allocated to [xxxxxxxxxx], with [xxx]% to [[xxx  
xxxxxxxxxx]. UltiSat did not purchase goodwill or the use of TDC's name. On April 6, 2009,  
UltiSat Europe was established to hold and operate the assets and, later, AVC was established as  
UltiSat Europe's subsidiary.

UltiSat's own receipts are reported on its IRS Forms 1120. The receipts of UltiSat Europe (and AVC) for nine months of 2009 and all of 2010 are reported on UltiSat's IRS Forms 5471 (Information Return of U.S. Persons With Respect To Certain Foreign Corporations), Schedule C (Income Statement), lines 2 (Cost of goods sold) and 9 (Total income). Interaffiliate transactions are reported on UltiSat's IRS Forms 5471, Schedule M (Transactions Between Controlled Foreign Corporations and Shareholders or Other Related Persons), lines 1 (Sales of stock in trade (inventory)) and 13 (Purchases of stock in trade (inventory)).

For the period January 1, 2008 to April 5, 2009, which was prior to UltiSat Europe's formation, UltiSat provided the Area Office with receipts based on the pro forma financial statement TDC had prepared before the asset sale. UltiSat stated TDC had no separate division for operating those assets, and kept no separate accounts for the receipts those assets generated.<sup>3</sup>

UltiSat's and its subsidiaries' receipts for the years 2008-2010 are:

	2008	2009	2010
UltiSat	[xxx]	[xxx]	[xxx]
UltiSat	—	[xxx]	[xxx]
Europe (and AVC)			
Subtotal	[xxx]	[xxx]	[xxx]
Less	—	[xxx]	[xxx]
Interaffiliate Transactions			
Total	[xxx]	[xxx]	[xxx]
receipts for size purposes			

<sup>3</sup> In Attachment 1 to its response to the protest, UltiSat explained the derivation of the “pro forma” receipts. The figures for 2007 and the first three quarters of 2008 were TDC’s “best estimate” of actual receipts generated by the assets it was selling. The figures for the last quarter of 2008 were TDC’s estimates. TDC provided no figures for the first three months of 2009, so UltiSat used TDC’s “best estimate” of actual receipts for the third quarter of 2008.

UltiSat asserted it is not affiliated with TDC, and it is not a “successor in interest” to TDC because the purchased assets are not a substantial portion of TDC assets, and these assets were never operated as a separate division of TDC. UltiSat also argued it has no identity of interest with TDC because their ongoing contractual relationships (office leases, internet service, and the one “back-to-back” contract), are minimal. UltiSat also stated there is no agreement in principle to merge with any other company although, it admitted, it had received some indications of interest beginning in October 2011, after its self-certification for the instant procurement. Finally, UltiSat noted the “Framework Agreement” is similar to a GSA Schedule contract with no guaranteed orders.

On January 30, 2012, the Area Office issued Size Determination No. 2-2012-35 (Size Determination) concluding that UltiSat is a small business. The Area Office determined UltiSat is not a “successor in interest” to TDC or any division of TDC under 13 C.F.R. § 121.104(d)(2) and *Size Appeal of The Associated Construction Co.*, SBA No. SIZ-5314, at 6 (2011), because UltiSat purchased only assets from TDC, not a separate legal entity. The Area Office also concluded UltiSat is not economically dependent on TDC based on contractual relationships. Next, regarding Appellant's allegation that UltiSat was planning another acquisition, the Area Office credited UltiSat's sworn denial rather than Appellant's nonspecific allegation, and determined there is no agreement to merge to which the present effect rule could be applied.

The Area Office determined UltiSat's size status as of August 30, 2011, the date UltiSat submitted its second proposal revisions. The Area Office did not include in its size calculations the receipts generated by the purchased assets for 2008 and the first three months of 2009, while these assets were in TDC's hands. Combining UltiSat's 2008, 2009, and 2010 receipts with UltiSat Europe's 2009 and 2010 receipts, the Area Office determined, regardless of whether the interaffiliate sales are excluded from receipts, UltiSat is an eligible small business under the \$25 million size standard.

Appellant received the Size Determination on January 31, 2012, and filed its appeal on February 15, 2012.

### III. The Appeal

#### A. Appellant's Arguments

Appellant asserts that the Area Office made clear errors of fact and law in its determination that UltiSat is a small business. Specifically, Appellant asserts the Area Office erred in characterizing what UltiSat purchased from TDC as merely “assets.” Here, UltiSat purchased not only assets, but also leases, customer lists, customer and other contracts, and employees — a “distinct business” that is easily segregable from the rest of TDC.

Further, Appellant asserts the Area Office erred in interpreting the successor in interest rule to apply only where assets are purchased from a separate legal entity. Under the correct reading of the regulation and OHA decisions such as *Size Appeal of Ace-Federal Reporters, Inc.*,

SBA No. SIZ-2814 (1988), UltiSat is a successor-in-interest to “the satellite division” of TDC and, thus, is affiliated with that division for size determination purposes. Therefore, Appellant asserts, the Area Office also erred in counting only those receipts generated by the purchased assets that arose after UltiSat purchased them.

Finally, Appellant asserts the Area Office erred by limiting the Size Determination only to the issues raised in Appellant's protest, and by not fully investigating the identity of interest issue Appellant's protest did raise.

Appellant moves for admission of new evidence in the form of a 4-page “Linked In” profile of [former employee], a former TDC employee transferred to UltiSat under the BTA.

As relief, Appellant seeks reversal of the Size Determination or remand for further investigation of the identity of interest issue and other possible issues.

#### B. UltiSat's Response to the Appeal

On March 5, 2012, UltiSat responded to the appeal asserting the Size Determination is correct. UltiSat maintains it did not purchase a separate division of TDC. TDC never held or operated the purchased assets as a separate entity, division, or segment and, in fact, continues to sell satellite service in competition with UltiSat. UltiSat received no goodwill, nor permission to use TDC's name. Thus, UltiSat did not purchase the “substantial portion” of assets necessary to trigger SBA's successor-in-interest rule, and the Area Office was correct not to count the receipts generated by the assets in TDC's hands when calculating UltiSat's size status.

Further, even if the satellite assets were a “division” of TDC, the only accounting for the receipts generated from these assets were the estimates from the pro forma financial spreadsheets TDC prepared for the 2009 sale. [xxx] percent of the purchase price was for [xx], and [xxx]% for [xx].

Moreover, UltiSat asserts that even if it must include the receipts generated by these assets while in TDC's hands, UltiSat is still below the \$25 million size standard.<sup>4</sup>

Finally, UltiSat asserts that the Area Office correctly found UltiSat has no identity of interest with TDC, a competitor, and that the Area Office was not required to examine additional issues not raised in the protest.

UltiSat opposes the admission of the [former employee] “Linked In” profile because it was not in the record that was before the Area Office.

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<sup>4</sup> In a footnote, UltiSat renews its contention that the correct measuring period for determining its size status is 2007-2009, not 2008-2010 as used by the Area Office. Because UltiSat is small using either 2007-2009 or 2008-2010, I need not decide which measuring period is correct.

### C. Appellant's Supplement to the Appeal and UltiSat's Response

On March 8, 2012, after reviewing the Area Office file, Appellant moved for leave to file, and filed, a supplement to its appeal. There Appellant asserts the Area Office incorrectly analyzed economic dependence in view of the proportion of UltiSat Europe's receipts to UltiSat's receipts, rather than focus on the issue of whether UltiSat Europe is economically dependent on TDC, a question which, if answered affirmatively, would mean UltiSat, as UltiSat Europe's affiliate, also would be affiliated with TDC.

Appellant also asserts that it is unclear how, other than by UltiSat's own statement, the Area Office independently verified that the office leases between UltiSat and TDC are "at arm's length for market prices" given that the leases are in Danish. Further, the leases, the transferred employees, the additional "seconded" employees, the employee-related services and internet service TDC provides under a "Master Services Agreement," and other issues all suggest an identity of interest issue not investigated by the Area Office.

On March 20, 2012, UltiSat filed its opposition to Appellant's motion for leave. UltiSat did not respond substantively to the arguments raised in Appellant's supplement.

## IV. Discussion

### A. Timeliness, New Evidence, and Appellant's Supplement

Appellant filed its appeal on the fifteenth day after its receipt of the Size Determination. Therefore, the appeal is timely. 13 C.F.R. § 134.304(a).

Evidence not previously presented to the Area Office will not be considered unless the Administrative Judge orders its submission or a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a). Here, Appellant has filed a motion, but has not established good cause for submitting for the first time on appeal a document that was available to Appellant at the time of its protest but was not submitted then. Accordingly, good cause not having been shown, Appellant's motion for admission of new evidence is DENIED.

Motions for leave to supplement an appeal normally are not granted, as UltiSat points out in its opposition. *See* 13 C.F.R. § 134.207(b). Here, however, what Appellant styles as a supplement is really additional argument following Appellant's review of the Area Office file for the first time, under a protective order. OHA normally grants leave for this type of pleading. Therefore, Appellant's motion for leave to supplement is GRANTED.

### B. Burden of Proof and Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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).

Because Appellant here has the burden of proof to show clear error in the size determination, I must reject Appellant's request for remand on the basis of additional, uninvestigated issues. The Area Office is not required to investigate every possible size issue, just those indicated by the protestor's specific allegations. Otherwise, size determination would be an endless process.

### C. Analysis

#### 1. The Successor in Interest Rule

The size determination regulations require that if a challenged concern has acquired an affiliate during the period of measurement for determining size, the receipts of the acquired concern must be added to those of the challenged concern in determining its size. 13 C.F.R. § 121.104(d)(2). Further, the aggregation of receipts applies for the entire period of measurement, not just the period after the affiliation arose. *Id.* Thus, the newly acquired affiliate is treated as if it had been affiliated with the challenged concern for the entire three-year period of measurement.

A challenged concern is not 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). In such a case, the annual receipts of the predecessor will be taken into account in determining size. *Id.* Thus, a concern deemed by SBA to be the successor in interest to a predecessor entity is treated as if it is affiliated with the predecessor entity.

Here, however, UltiSat did not acquire a separate corporation, LLC, or division of TDC. Rather, UltiSat purchased a number of TDC's assets. The Area Office concluded that, therefore, § 121.104(d)(2) is not applicable here, because UltiSat had not acquired an affiliate. The Area Office relied upon *Size Appeal of The Associated Construction Co.*, SBA No. SIZ-5314 (2011), which defines affiliate as a “concern” and a concern as an individual proprietorship, partnership, limited liability company, corporation, joint venture, trust or cooperative. 13 C.F.R. § 121.105(b). The Area Office therefore found that, in order to include the receipts of an acquired affiliate in a challenged concern's receipts under § 121.104(d)(2), that affiliate must be a separate legal entity in the form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, trust or cooperative.

This approach is contrary to that of *Size Appeal of Ace-Federal Reporters, Inc.*, SBA No. SIZ-2814 (1988). There, the challenged concern, Heritage, did not purchase a corporation or other entity, or the stock of a corporation; it purchased only certain assets of ACME, a large concern. OHA reversed, concluding that despite not having purchased all of ACME's assets and interests, Heritage was ACME's successor in interest, and thus affiliated. However, *Ace-Federal* is not based upon the text of the regulation. The regulation at § 121.104(d)(2) clearly applies only when a concern “acquires an affiliate”. The purchase of a portion of another concern's assets, without the purchase of a cognizable unit, does not meet the test of the

regulation, which requires the aggregation of the receipts only of an acquired affiliate, not whatever receipts might be attributable to assets purchased by the challenged concern. The aggregation of receipts required by § 121.104(d)(2) can be made only when the challenged concern acquires a cognizable unit such as those enumerated in § 121.105(b).

Similarly, 13 C.F.R. § 121.105(c), applies only when “a substantial portion” of a challenged concern's assets and/or liabilities are those of “a predecessor entity”. The purchase by UltiSat of a number of TDC's assets, and not of a division of TDC or of any other cognizable unit, such as those enumerated in § 121.105(b), does not meet the test of purchasing the assets of an entity.

Accordingly, I find that the Area Office correctly determined that none of TDC's receipts prior to UltiSat's purchase of some of TDC's assets should be included in its determination of UltiSat's size, because UltiSat did not purchase an affiliate, or the assets of a predecessor entity. To the extent that this result is contrary to *Ace-Federal*, that case is contrary to the text of the current regulation, and that case is no longer applicable.

## 2. Calculation of Receipts

### a. Acceptable Evidence of Receipts

The size regulations define “receipts” as “total income” plus “cost of goods sold” as these terms are defined and reported on Federal income tax forms. 13 C.F.R. § 121.104(a). If a concern has not filed a Federal tax return for a fiscal year included in the period of measurement, SBA calculates the concern's receipts for that year “using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.” 13 C.F.R. § 121.104(a)(2).

### b. Exclusion of Interaffiliate Transactions

The definition of “receipts” excludes “proceeds from transactions between a concern and its domestic or foreign affiliates.” 13 C.F.R. § 121.104(a). Here, UltiSat, as the parent of a foreign affiliate (UltiSat Europe), was required to file IRS Forms 5471 for the years 2009 and 2010, and to report its purchases of inventory from, and its sales of inventory to, that foreign affiliate on Schedule M. These are clearly interaffiliate transactions, and reported to the IRS. The Area Office erred by not excluding these receipts from its calculation of UltiSat's annual receipts.

UltiSat's and its affiliates' combined receipts for the three years 2008, 2009, and 2010 must include UltiSat's and UltiSat Europe's own receipts less the amount of the interaffiliate transactions. Under the regulatory formula, total receipts are \$[xxx], and receipts averaged over the three years measuring period are \$[xxx]. UltiSat therefore, does not exceed the applicable \$25 million size standard for NAICS code 517919.<sup>5</sup>

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<sup>5</sup> Appellant also argues the Area Office erred in determining there is no economic dependence on TDC based on UltiSat Europe's low percentage of total receipts. I reject Appellant's argument. UltiSat Europe has well less than half the UltiSat affiliate group's total



V. Conclusion

The record on appeal supports the Area Office's conclusion that UltiSat does not exceed the \$25 million size standard. Therefore, UltiSat is an eligible small business for the instant procurement. The Size Determination is AFFIRMED and the Appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge

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receipts. Thus, even if all of UltiSat Europe's receipts came from TDC, those receipts would be too small a percentage of the affiliate group's total receipts to justify a finding of economic dependence. *See Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 9-10 (1997).