United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: W.I.N.N. Group, Inc., Appellant, RE: Strategic Solutions Unlimited, Inc. Appealed From Size Determination Nos. 3-2012-044 and 3-2012-045	SBA No. SIZ-5360 Decided: June 6, 2012

APPEARANCES

Rebecca E. Pearson, Esq., J. Scott Hommer, III, Esq., Christina K. Kube, Esq., Venable LLP, Washington, DC, for The W.I.N.N. Group, Inc.

DECISION[1]

I. Introduction and Jurisdiction

This is a protestor's appeal from a February 21, 2012, size determination finding the protested concern, Strategic Solutions Unlimited, 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.

II. Background

A. The Solicitation and Protests

On October 1, 2010, the Department of Homeland Security, DHS/OPO Federal Protective Service, East Consolidated Contracts Group, in Philadelphia, Pennsylvania, issued Request for Quotations No. HSHQEC-10-Q-00009 (RFQ) for on-site maintenance of electronic

[1] I originally issued this Decision under a Protective Order and ordered the parties to file any requests for redactions. OHA received one or more timely requests and I considered them in redacting the Decision. I now issue the redacted version of the Decision for public release.

security systems. The Contracting Officer (CO) set the procurement aside for small businesses and assigned to it North American Industry Classification System (NAICS) code 561621, Security Systems Services (except Locksmiths), with a $12.5 million annual receipts size standard. Strategic Solutions Unlimited, Inc. (SSU), submitted its initial quote on January 26, 2011. The CO amended the solicitation twice after January 26th. Amendments 9 and 10 were both issued on July 29, 2011. Following two rounds of discussions, SSU submitted its final quote revision on October 13, 2011.

On January 25, 2012, the CO filed her own protest of SSU's small business size status, based on the purchase, by CENTRA Technology, Inc. (CTI), of all of SSU's stock on March 15, 2011. The CO noted CTI offered to purchase the stock on February 2, 2011, just seven days after SSU had self-certified as small with its initial quote on the instant procurement. The CO also summarized the solicitation's amendments, querying whether they had triggered the size status recertification requirement then at 13 C.F.R. § 121.404(a), so that SSU's self-certification as a small business effectively would have occurred after it became affiliated with CTI.

On January 31, 2012, the CO notified The W.I.N.N. Group, Inc. (Appellant), an unsuccessful offeror, that SSU was the intended awardee. On February 3, 2012, Appellant filed a size protest with the CO. Appellant noted SSU's Central Contractor Registration (CCR) listing indicated it is not small under the size standard for NAICS code 561621. Appellant also questioned SSU's ability to perform the contract, suggesting an ostensible subcontractor was involved, but did not name any particular subcontractor. The CO forwarded the protests to the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office), for a size determination.

B. Purchase by CTI

In its February 16, 2012, response to the protests, SSU provided its completed SBA Form 355, tax returns for the applicable three years 2010, 2009, and 2008, and documentation of its negotiations with CTI. SSU also submitted documentation of its discussions with other potential purchasers.

On August 12, 2010, SSU retained ERG Partners (ERG), a financial advisor, to explore a possible sale of its stock. Starting in November 2010, SSU began to receive inquiries from various potential acquirers. These included [xxxxxx], [[xxx], [xxxx], and CTI.

On January 10, 2011, CTI submitted to SSU an Initial Non-Binding Indicative Offer to acquire all of SSU's stock, and on January 11, 2011, CTI submitted a Revised Non-Binding Indicative Offer. The latter included:

- Price range between $[xxx] and $[xxx], of which $[xxx] to $[xxx] would be paid at closing, and the remainder [xxxxxx] as earnout based on SSU's [xxxxxx] and [xxxxxx], [xxxxxxxxxx] yet to be negotiated;
- SSU's delivery of a net working capital balance of $[xxx] at closing, with CTI assuming an [xxxxxxxxxxxxxxxxxx] and SSU having [xxxxxxxxxxxxxxxxx];

- CTI's retention of all [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxx];
- Additional terms to be determined upon CTI's completion of due diligence, which required additional documents, including all contractual instruments, any third party or Government audits, employee rosters, balance sheets and income statements, and documentation of all assets, real property, and leases; and
- A projected schedule to lead to a confirmatory offer by January 28, 2011.

On January 11, 2011, ERG e-mailed SSU to discuss the CTI's Non-Binding Indicative Offer, identifying a number of items that required further discussion, including price and timing of payout. The e-mails also discussed the need to respond to [xxx], which seeks to commence their due diligence.

On January 24, 2011, ERG forwarded to SSU an e-mail from CTI, setting a time and place for a meeting for January 25 and 26, 2011, to discuss a potential sale, and deal with "outstanding questions". These topics included review of contracts, validation of payables and receivables, indirect and fringe rates, explanation of payroll practices, explanation of outstanding debt and specific plans for resolution, and the inclusion of real and intellectual property in the sale.

On January 25, ERG e-mailed Tony Martin, SSU's President and [xxx] shareholder, to confirm an upcoming meeting with [xxx], one of the other potential acquirers. On February 1, 2011, ERG e-mailed SSU to inquire whether any materials should be prepared for the upcoming meeting with [xxx], one of the other potential offerors.

On February 1, 2011, CTI submitted its Initial Confirmatory Offer to SSU. Among other terms, this offer included:

- Price of $[xxx] to be paid at closing, and $[xxx] over [xxx] years as earnout based on SSU's achievement of specific [xxxxxxxxxxxxxxxxxx] at the end of each calendar year;
- SSU's delivery of a net working capital balance of $[xxx];
- SSU to ensure that one piece of real property is properly conveyed to SSU and that another piece of real property remains its property; and
- SSU to ensure the validity of existing employment agreements of four named employees, with signed statements of their intent to honor them, and the establishment of employment agreement with [xxxxxxxxxxxxxxxxxxxxxxxxx] and non-compete restrictions.

On February 1, 2011, ERG e-mailed Mr. Martin, referencing previous discussions and the "draft confirmatory letter" from CTI. The e-mail discussed the issue of right of first refusal, and whether there will be a "dual threshold of meeting your revenue forecast AND the net income target". SSU maintained that it does not want to be held to both. Further, there is an issue as to whether a certain piece of real property was included in the transaction. The e-mail went on to state "Based on our discussion, Jack is making certain changes to the offer letter:" and specified these changes, the schedule for CTI acquiring all the shares, the price, and real property and

patents that would be included in the sale.

On February 3, 2011, at 3:49 a.m., Mr. Martin responded, seeking clarification of CTI's terms, and stated there would be a discussion of "[xxxxxxxxxxxxxxxxxxxxxxxx]."

On February 2, 2011, CTI submitted its Revised Confirmatory Offer. This offer included:

- Price of $[xxx] to be paid at closing, and $[xxx] over three years as earnout based on SSU's achievement of specific (but some different) [xxxxxxxxxxxxxxxx] for each calendar year;
- CTI to purchase a certain piece of real property for $[xxx] with payment and conveyance of the deed due at or before closing; and
- Net working capital and employment terms as on February 1st.

The February 2, 2011, Revised Confirmatory Offer also noted CTI's completion of due diligence and concluded, "We look forward to proceeding toward execution of a Purchase Agreement at your earliest convenience." Under a proposed schedule, CTI would provide a Stock Purchase Agreement (SPA) for SSU's review by February 9th, with SSU's comments due by Feb 16th, discussions completed by February 23rd, a final SPA with all supporting schedules by March 2nd, and closing by March 5th.

On February 3, 2011, Mr. Martin e-mailed a copy of CTI's Revised Confirmatory Offer to SSU's [xxx] shareholders, informing them "This is the offer I have accepted. They conducted their due diligence last week (spent 3 days with lawyers and accountants then the owner flew in for the last day). Everything came back with a clean bill of health."

On February 9, 2011, CTI presented the first draft of the Stock Purchase Agreement. CTI presented subsequent drafts on February 18, 2011, March 1, 2011, and March 12, 2011. Finally, on March 15, 2011, SSU and CTI executed the Stock Purchase Agreement, transferring all of SSU's stock to CTI.

C. The Size Determination

The documents in the Area Office file show that on January 26, 2011, the day SSU submitted its initial quote in response to the instant RFQ, SSU was [[xxxxxxxxx] by its President, Tony Martin, whose only other business interest was in SSU's admitted affiliate ODA 746 LLC (ODA). The income tax returns for the applicable years show SSU's annual receipts, combined with those of ODA, do not exceed the size standard. CTI, which purchased 100% of SSU's stock on March 15, 2011, is undisputedly a large concern.

On February 21, 2012, the Area Office issued Size Determination Nos. 3-2012-044 and 3-2012-045 (Size Determination) concluding that SSU is a small business. The Area Office determined the date as of which size is to be determined as January 26, 2011, the date SSU submitted its initial offer, including price.

The Area Office found that on March 15, 2011, CTI purchased 100% of SSU's stock. The

Area Office also found that CTI had a 100% ownership interest in Courage Services, Inc. and SCIA, LLC, and was affiliated with these two concerns as well as SSU as of its March 15, 2011, purchase of SSU's stock.

The Area Office also noted that on November 22, 2011, it had issued Size Determination No. 3-2012-021, finding SSU other than small. The Area Office had determined SSU's size as of February 22, 2011, and gave present effect to the February 2, 2011, Revised Confirmatory Offer from CTI to acquire SSU.

The Area Office reviewed the submitted e-mails, and other documents pertaining to the acquisition of SSU by CTI and concluded that an agreement in principle had not yet been reached by January 26, 2011. Instead, the Area Office gave present effect to the February 2, 2011, Revised Confirmatory Offer. Because SSU was affiliated with CTI as of the date for determining size, the Area Office concluded SSU was a small business for the instant RFQ.

Appellant received the Size Determination on February 21, 2012, and filed its appeal on March 5, 2012. On March 30, 2012, the Department of Homeland Security awarded the contract to SSU.

III. The Appeal

A. Appellant's Arguments

Appellant asserts that the Area Office made clear errors of fact and law in its determination that SSU is a small business. Specifically, Appellant asserts the Area Office erred in determining SSU's size as of January 28, 2011, rather than with its submission of its final proposal revision on or about August 3, 2011, as a result of its acquisition by CTI.[2]

Appellant further argues the Area Office erred when it found that CTI's letter of January 11, 2011, did not constitute an agreement in principle, because it contained all the elements necessary to form a contract. Appellant argues that because the January 11, 2011, letter is an agreement in principle, SSU and CTI were affiliated as of January 26, 2011. Appellant argues the fact that an offer is non-binding is not determinative as to whether an agreement in principle is formed. Rather, there are such factors as specificity in price and the nature of the intent to purchase the target company, citing *Size Appeal of WRS Infrastructure and Environment, Inc.*, SBA No. SIZ-5007 (2008).

Further, CTI's February 2, 2011, Revised Confirmatory Offer was executed only three business days after SSU's self-certification. Appellant argues that the speedy confirmation of CTI's offer following self-certification indicates that the parties intended that the terms and conditions in the January 11th offer were non-speculative.

---

[2] Appellant refers to the Area Office determining Appellant's size as of January 28, 2011. This may be because of some confusion in the text of the Size Determination, discussed *infra*. However, Appellant's offer is in the record, and it is clearly dated January 26, 2011.

Appellant asserts that while a self-certification must be submitted as part of an initial offer, the regulations contemplate that subsequent certification may also be made and require that such certifications be given effect. Appellant relies upon *Size Appeal of LB&B Associates, Inc.*, SBA No. SIZ-4732 (2005), recognizing that agencies have the authority to require recertification not required by the regulations. Here, Appellant argues that the inclusion of a specific stock purchase price and closing capital balance reflect the parties' serious intent to merge.

Appellant further argues that there are occasions when there are mandatory requirements for a concern to recertify its size. One such occasion is when the original solicitation is so modified that offerors' initial proposals are non-responsive. Further, Appellant argues that a concern must recertify within 30 days of a merger or acquisition, citing 13 C.F.R. § 121.404(g)(2). Appellant argues that if such a recertification occurs, size is to be determined as of the date of recertification, citing *Size Appeal of TPMC-Energy Solutions Environmental Services 2009, LLC,* SBA No. SIZ-5109 (2010). Appellant argues that where an agency should have required recertification but failed to do so, SBA must impute the recertification to the contractor and determine size as of the date the contractor should have recertified as small.

Appellant also argues the RFQ required that an offeror's representations and certifications be complete (RFQ, at 38,FAR 52.212-3(b)). Appellant argues that had SSU complied with this requirement, there would have been notice that SSU was other than small as of the date it submitted its final quote revision. As relief, Appellant requests that OHA reverse the Size Determination and find SSU other than small.

B. Appellant's Supplement to the Appeal

On March 30, 2012, after reviewing the Area Office file under the terms of a protective order, Appellant moved for leave to file, and filed, a supplement to its appeal. There Appellant asserts that in determining a concern's size, SBA will look beyond the four corners of an offer and examine additional factors such as the intent of the parties to merge, specificity in the terms, and the length of time from self-certification and finalization of the merger, citing *WRS Infrastructure, supra*. Appellant points to the January 24, 2011, e-mail between CTI and ERG setting up a meeting with CTI for January 25-26 and detailing terms to be discussed. This meeting occurred just prior to SSU's self-certification. The items for discussion included validation of specific financial facts, such as SSU's cash, assets, balance sheets, and income statements. The Presidents of SSU and CTI were to attend. Appellant argues the agenda and attendees for this two-day, joint-company meeting bolsters its position that the parties established a serious intent to merge prior to SSU's certification, establishing CTI's control under the present effect rule.

Appellant points to the February 1, 2011, e-mail from ERG to Mr. Martin, referencing previous discussions between the two, and Mr. Martin's agreement following those discussions. Appellant also points to a February 2, 2011, e-mail from Mr. Martin referencing a previous telephone conversation in which certain terms of CTI's offer were clarified. Appellant asserts these e-mails strengthen the argument that the parties had a serious intent to merge prior to SSU's certification.

Appellant further argues that the e-mail correspondence following the January 25-26 meeting indicates an oral finalization between the parties to merge prior to February 2, 2011.

Further, SSU received CTI's Confirmatory Offer on February 1, 2011, just days after SSU's certification and the business meeting. Appellant argues that this swift consummation of the acquisition is indicative of a previously established agreement in principle giving rise to present effect of CTI's power to control SSU.

IV. Discussion

A. Timeliness 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).

Motions for leave to supplement an appeal normally are not granted. *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).

C. Analysis

1. Date for Determining Size

First, I must decide whether the Area Office used the correct date to determine size. A concern's size is determined as of the date of its submission of its initial offer, including price. 13 C.F.R. § 121.404(a). The Size Determination contains some confusion as to the date as of which size is to be determined. On pages 2, 5, and 7 it identifies the date as January 28, 2011. On page 3 it identifies the date as January 26, 2011. Reviewing the record, I find that SSU actually submitted its initial quote, including price, on January 26, 2011, even though quotes were due on January 28, 2011. Therefore, SSU's size is to be determined as of January 26, 2011. The Area Office's use of the January 28th date is harmless error, because it does not affect the outcome of the case.

Appellant argues that SSU's size should be determined at a later date. The size regulation provides that if an agency modifies a solicitation so that initial offers are no longer responsive to

the solicitation, then a concern must recertify as small business when it submits its responsive offer, including price, to the new solicitation. 13 C.F.R. § 121.404(a)(rescinded effective March 4, 2011, 76 Fed. Reg. 5680, 5683 (February 2, 2011)). The instant RFQ was issued prior to March 4, 2011, and so the older regulation applies.)

The CO issued two amendments after January 26, 2011.[3] Amendment No. 9, issued July 29, 2011, informed all vendors in the competitive range of the conclusion of discussions and the due date for receipt of final quote revisions. The amendment contained no changes to the Statement of Work. Amendment No. 10, also issued July 29, 2011, incorporated Department of Labor Wage Determination No. 2005-2103. Again, this did not contain changes to the Statement of Work which would have rendered initial quotes nonresponsive. Therefore, I conclude that nothing in the amendments issued after SSU's initial quote rendered its initial quote nonresponsive, and the requirement for recertification in 13 C.F.R. § 121.404(a) is not applicable here.

Appellant's reliance upon 13 C.F.R. § 121.404(g)(2) and *Size Appeal of TPMC-Energy Solutions Environmental Services 2009, LLC*, SBA No. SIZ-5109 (2010) is misplaced. It is true that § 121.404(g)(2) requires recertification of size in the event of a merger or acquisition, but this provision is part of § 121.404(g), which provides that a concern that qualifies as small at the time it receives a contract is small for the life of the contract. The provision at (g)(2) dealing with mergers provides that if the concern is other than small as a result of a merger, the agency can no longer count the options or orders issued towards its small business goals. This provision does not deal with the date for determining size for contract award, and thus is not applicable here. The *TPMC-Energy Solutions* case dealt solely with the provision of § 121.404(a) requiring recertification when solicitations were modified so that initial proposals were nonresponsive, and thus was not applicable to § 121.404(g)(2).

Further, Appellant's reliance upon *Size Appeal of LB&B Associates, Inc.*, SBA No. SIZ-4732 (2005) is inapposite, because at no time did the CO require recertification. Appellant's reference to FAR 52.212-3(b) is also inapposite, because the requirements for self-certification for size are clearly laid out in 13 C.F.R. § 121.404(a), and SBA's regulations do not require other certifications from offerors on Federal procurements. To hold otherwise would contradict the policy SBA expressed in its amendment to 13 C.F.R. § 121.404(a), that it is unfair to disqualify a firm from consideration after a firm has spent considerable time and resources pursuing a contract for which it was eligible at the time of its initial offer. 76 Fed. Reg. at 5680.

Therefore, I conclude that SSU's size must be determined as of the date of its submission of its initial offer, including price, on January 26, 2011.

2. The Present Effect Rule

There is no question that, prior to its merger with CTI, SSU was a small business, nor that

[3] Amendment No. 8 did make some changes to the Statement of Work, but this amendment was issued January 24, 2011, prior to SSU's self-certification, and thus could not trigger the regulatory requirement to recertify.

after the merger SSU was large. Further, the merger was not completed by the date of SSU's self-certification. The issue is whether the present effect rule in SBA's size regulations applies, requiring the Area Office to give present effect to an agreement to merge between SSU and CTI, and find the concerns affiliated.

The present effect rule provides that agreements for a merger or acquisition, including agreements in principle, have "present effect" on the power to control a concern. 13 C.F.R. § 121.103(d)(1). Stated differently, for size purposes, a merger or acquisition is effective as of the date an "agreement in principle" is reached, even though the merger or acquisition itself is not yet consummated. The regulation cautions, however, that "[a]greements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered 'agreements in principle' and are thus not given present effect." 13 C.F.R. § 121.103(d)(2). Agreements which are subject to conditions precedent which are speculative in nature are not given present effect. 13 C.F.R. § 121.103(d)(3).

In interpreting this regulation, OHA has held that it is improper to assume that, merely because a deal is complex or time-consuming, an agreement in principle must have been reached at an earlier point in the process. OHA has explained:

> The mere fact that an agreement is lengthy and complicated does not necessarily mean that there was any agreement reached prior to its execution. Many business transactions are finalized only after long negotiation over many points. While the parties may both seek an agreement, one is not final until the final contract is signed. Often, major business deals fall apart at the last minute, despite long negotiation and extensive drafting of lengthy documents ... [T]o find that an agreement in principle must have existed simply because the final document is lengthy and complex is without foundation, and a clear error.

Size Appeal of Nuclear Fuel Services, Inc., SBA No. SIZ-5324, at 8-9 (2012) (quoting *Size Appeal of Kadix Systems, LLC*, SBA No. SIZ-5016, at 6 (2008)).

Accordingly, OHA has affirmed the use of the present effect rule in situations where there is tangible evidence that an agreement in principle had been reached. *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324, at 9 (2012).

Regarding SSU, the Area Office had previously issued a size determination. Size Determination No. 3-2012-021. That size determination gave present effect to the February 2, 2011, Revised Confirmatory Offer and held SSU and CTI were affiliated as of that date. That size determination was not appealed, and is not binding upon OHA. *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 7 (2009). Here, size must be determined as of January 26, 2011. The issue here is, is there tangible evidence of an agreement in principle to merge between CCU and CTI as of the January 26th date?

On January 11, 2011, CTI submitted a signed Revised Non-Binding Indicative Offer to SSU. The offer describes itself as non-binding. The letter does not include a set price, but a rather a range between $[xxx] and $[xxx]. The letter carefully conditions the non-binding offer

on further due diligence by CTI. CTI requires extensive additional information from SSU as part of its due diligence, including all contractual instruments, third party and Government audit reports (including those from the Defense Contract Management Agency), rosters of employees and contractors, balance sheets and a documentation of all assets, including real property and leases. The letter anticipates that a ““confirmatory offer” would be made once the due diligence is completed.

I conclude that the January 11, 2011, Revised Non-Binding Indicative Offer is not tangible evidence of an agreement in principle. First, it describes itself as non-binding. Second, an actual agreement would have, as a minimum, a set price. A $[xxx] price range is simply too great to say that the parties have reached an agreement in principle. Third, CTI carefully conditions its offer on its due diligence examination of a great deal of important financial information. CTI preserves its right to withdraw from the transaction until it examined SSU's financial reports, assets, contracts, and any audits conducted of the concern. If any of the information CTI found had not been satisfactory, CTI was free to withdraw from the transaction. CTI has left itself too large an out here for me to conclude that it has actually agreed to anything. Finally, there is no evidence of an acceptance by SSU of the terms of the January 11th letter. Accordingly, I conclude that CTI's letter of January 11, 2011, does not constitute an agreement in principle which would trigger application of the present effect rule. Rather, it is, if any kind of agreement, an agreement to continue negotiations, and is not to be given present effect.

Appellant points to certain e-mail messages which it argues establish an agreement in principle. On January 24, 2011, CTI and SSU's representative exchanged e-mails. These e-mails schedule the time and place of a meeting to discuss the potential merger, and list the topics for discussion. These topics included validation of payables and receivables, indirect and fringe rates, explanation of payroll practices, explanation of outstanding debt and specific plans for resolution, and the inclusion of real and intellectual property in the sale. This e-mail makes it clear that CTI and SSU had not yet reached an agreement. CTI needed to know about a number of important matters, including SSU's debts and how they would be resolved, and just what property would be included in the sale. These e-mails, read with the January 11th letter, make clear that there was not yet any agreement, because there simply too many important unresolved matters for CTI to make a firm offer that SSU could accept.

On February 1, 2011, there is ERG's e-mail to SSU. This e-mail refers to a ““draft confirmatory letter” from CTI. The e-mail discusses the issue of right of first refusal, and whether there will be a “dual threshold of meeting your revenue forecast AND the net income target”. SSU maintains that it does not want to be held to both. Further, there is an issue as to whether a certain piece of real property was included in the transaction. The e-mail goes on to state “Based on our discussion, Jack is making certain changes to the offer letter:” and specifies these changes, the schedule for CTI acquiring all the shares, the price, and real property and patents that would be included in the sale.

On February 2, 2011, there was another e-mail referencing clarification of CTI's terms, and this would be followed by the February 2, 2011, letter that the Area Office concluded represented an agreement in principle in Size Determination No. 3-2012-021.

Further, on January 11th, January 25th, even as late as February 1st, SSU is still discussing the terms of purchase with another suitor, [xxx]. It is only on February 3rd that Mr. Martin can state he has accepted an offer and made a deal.

Reviewing these documents, I reach the opposite conclusion from Appellant. The record presents not tangible evidence of an agreement by January 26th, but the absence of an agreement. CTI and SSU went into the January 25-26 meeting with many unresolved issues. The record documents that as of January 26, 2011, CTI and SSU were still engaged in discussion about a potential merger. While there was strong interest in both sides in a merger, there were many important issues outstanding, and there was as yet no agreement that the merger would take place. Even after the meeting, there remained important issues unresolved. On February 1, 2011, after SSU's certification, the parties were still discussing important issues such as whether SSU would have to meet a revenue threshold as well as a net income target and exactly what property was included in the sale. These are not incidental items. It is clear that on February 1st, negotiations were continuing and SSU and CTI had not yet reached an agreement in principle. Mr. Martin does not report to his [xxx] shareholders his acceptance of an offer until February 3rd.

Further, SSU clearly had not abandoned the possibility of a deal with [[xxx], because the two firms still had scheduled meetings. The fact that SSU was still in discussions with [xxx] weighs very strongly against, indeed almost precludes, a finding that there was an agreement in principle between SSU and CTI.

I conclude that SSU and CTI had not yet reached an agreement in principle to merge as of January 26, 2011, and therefore were not affiliated as of that date.

Appellant's reliance on *Size Appeal of WRS Infrastructure and Environment, Inc.*, SBA No. SIZ-5007 (2008) for the principle that an eventual consummation of the agreement supports a finding that there was an agreement in principle is misplaced. While this may be one of the factors which may be used to determine whether an agreement in principle had been reached, it cannot be used to contradict a clear record that, at a particular point in time, the parties had not yet reached agreement. Otherwise, every agreement reached would be found to have existed as an agreement in principle at the earliest point in negotiations where any document was produced.

Appellant has failed to meet its burden of establishing clear error, and I must affirm the Area Office's Size Determination.

V. Conclusion

The record on appeal supports the Area Office's conclusion that SSU did not exceed the $12.5 million size standard as of January 26, 2011, when it submitted its initial quote. Therefore, SSU 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