United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Telecommunication Support Services, Inc. Appellant, Appealed From Size Determination No. 03-2018-044	SBA No. SIZ-5953 Decided: August 17, 2018

APPEARANCES

Damien C. Specht, Esq., Steven W. Cave, Esq., R. Locke Bell, Esq., Morrison & Foerster, LLP, McLean, VA, for Appellant

Tracy A. Marion, Esq., Jonathan F. Mayhall, Esq., J. Clark Pendergrass, Esq., Lanier Ford Shaver & Payne, P.C., Huntsville, AL, for Baron Services, Inc.

DECISION[1]

I. Procedural History and Jurisdiction

On May 30, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office), issued Size Determination No. 03-2018-044, finding Telecommunication Support Services, Inc. (Appellant) is not an eligible small business for the procurement at issue.

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 that Appellant is an eligible small business for the instant procurement. For the reasons discussed *infra*, I grant the appeal, vacate the size determination, and remand the matter to the Area Office.

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

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions if desired. After reviewing the decision, the parties informed OHA that they had no requested redactions. Therefore, OHA now issues the entire decision for public release.

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.

II. Background

A. The Solicitation, Award, and Protest

On June 23, 2017, the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOOA) issued Request for Proposals (RFP) No. RA133W-17-RP-0075, seeking a contractor to refurbish the Next-Generation Weather Radar (NEXRAD) network Weather Search Radar — 88 Doppler (WSR-88D) antenna pedestal. The Contracting Officer (CO) set the procurement aside for small businesses and designated North American Industry Classification System (NAICS) code 334519, Other Measuring and Controlling Device Manufacturing, with a corresponding 500 employee size standard as the appropriate code. Initial offers were due on August 23, 2017. On March 22, 2018, the CO notified the unsuccessful offerors that Appellant was the apparent awardee.

On March 29, 2018, Baron Services, Inc. (Baron) filed a size protest with the CO. Baron alleged that Appellant was owned by Acorn Growth Companies, LLC (AGC), which is a private equity firm that owns and is affiliated with 16 other business concerns. Based on this affiliation, Baron argued that Appellant exceeds the size standard associated with the instant solicitation.

In response to the size protest, Appellant submitted a declaration by Jeff Morton, CFO of AGC, one of Appellant's affiliates. Mr. Morton discusses a Letter of Intent (LOI) which AGC entered into on May 12, 2017, with CIS Secure Computing, Inc. (CIS). Mr. Morton declares that after the LOI was executed and during the course of due diligence, problems with the deal emerged, as concerns grew about CIS meeting its financial targets. "The deal was essentially 'on hold' and 'pencils were down' in June and July (AGC and its attorneys and consultants refrained from undertaking normal deal tasks to move the deal toward the anticipated July 31, 2017 closing)." (Declaration of Jeff Morton, ¶8, at 1.) In early August the parties agreed to extend the deadline through August 18th, and later through August 31st. AGC discovered additional issues in August, and the deal was not closed until September 14, 2017. CIS refused to extend the LOI's exclusivity past August 31st because the parties questioned whether a deal could be completed. The deal was not finalized until the day before closing. (*Id.*, ¶9-18, at 2.)

Appellant also submitted a declaration by William Strang, Managing Partner of Bluestone Capital, the investment bank representing CIS in this transaction. He stated the LOI created an exclusive period for negotiations, not a binding contract. There were disagreements about material terms of the deal into September. (Declaration of William Strang, ¶3-7, at 1.)

Appellant further submitted an extensive file of e-mails between persons involved in negotiating the deal between AGC and CIS. (Ex. Q — EE to Protest Response.) The emails discuss the many unresolved issues between AGC and CIS, up until the closing on September 14th.

B. The Letter of Intent

The LOI is dated May 12, 2017. It sets forth its intent in the first numbered paragraph:

> (1.) Intent. This letter is intended to set forth the general terms and conditions under which the Buyer (AGC) would be willing to purchase the stock of the Company (CIS) as stipulated above. This letter is not intended to create a binding contract, but is intended to evidence the parties' mutual willingness to work together in good faith to consummate the transaction contemplated hereby on the terms set forth herein, pursuant to the results of confirmatory due diligence, additional detailed discussion with management, and definitive financing exercises to follow.

(LOI, at 1.) The LOI set a price for CIS, but only on the condition that the company meet certain financial targets. The LOI set forth certain assumptions upon which AGC based its price. (*Id.* at 2-4.) AGC reserved the right to conduct additional due diligence. (*Id.* at 5.) The parties expected to close by July 31, 2017. (*Id.* at 6.) CIS agrees that it will entertain no other offers until July 31, 2017. However, the exclusivity provisions will not apply if AGC withdraws its offer, and CIS may withdraw if AGC proposes terms materially adverse to CIS compared to those in the LOI or if AGC fails to achieve milestones set in the agreement. (*Id.* at 7.) The parties agree to keep the terms confidential and to bear their own expenses. The LOI further provided: "The foregoing is intended to evidence the terms on which Buyer would like to work with the Company to consummate a transaction, but is not intended to create any binding commitments, except [as to exclusivity, confidentiality and expenses]. (*Id.*) AGC states at the conclusion of the LOI "[W]e appreciate the opportunity you have provided us with respect to evaluating this opportunity." (*Id.* at 8)

C. The Size Determination

On May 4, 2018, the Area Office issued Size Determination No. 03-2018-044, finding Appellant is not an eligible small business for this procurement.

The Area Office noted that Appellant acknowledged affiliation with the following concerns: Aerospace Products S. E., Inc.; SinglePoint Financial; AGC Integrated Defense Holdings; Aerospheres UK, Ltd; Raisback Holdings, LLC; Raisback Engineering, Inc.; Aircraft Logistics Group, LLC; Special Missions Support Group, LLC; AGC Back Office Support Services; and TESG Holding, LLC. (Size Determination, at 3.) Further, Appellant is 100% owned by TSS Acquisitions, LLC (TSSA), and thus Appellant and TSSA are affiliates. In turn, TSSA is 69% owned by Acorn Growth Capital Fund IV, L.P. (Acorn), while the remaining 31% is owned by TSS Co-Invest, LLC (TSSCI). Based on its 69% interest, the Area Office found that Acorn has the power to control TSSA. (*Id.* at 4.)

The Area Office next noted that AGC is owned by Mr. Rick Nagel and Mr. Jess Davis, and is an affiliate of Appellant. AGC is the Manager of the following private equity funds: Acorn Growth Capital, LLC (Fund I); Acorn Growth Equity Capital, LLC (Fund II); Acorn Growth Capital Fund III, LLC (Fund III); and Acorn. While AGC holds no ownership interest in these

funds, they receive a management fee for the fund's investment oversight. (*Id.*) AGC also acknowledged that Mr. Nagel and Mr. Davis hold controlling interests in the following companies: 3050 Beachfront, LLC; Passion, LLC; Amerihomes, LLC; Nagel Properties, LLC; and Ranex Enterprises, Inc. The Area Office found Appellant is affiliated with all of these concerns.

According to the Area Office, Fund III owns an 18% interest in Unitech Holdco (UH), while Edgewater Funds (EF) holds a 73.4% interest, while the remaining 8.6% interest is owned by Caltius. Given EF's 73.4% ownership in UH, the Area Office found that EF has the power to control UH. (*Id.* at 4-5.) In turn, UH holds 100% ownership interest in Unitech Holdings, which owns 100% of Unitech AeroSpace; North Coast Composites, Unitech Composites; Integrated Composites; TODS Aerospace; TODS Defense; and Paul Fabrications. (*Id.* at 5.) The Area Office concluded there is no affiliation between Appellant and UH and UH's affiliates.

The Area Office further found that AGC acquired CIS on September 14, 2017. The date of acquisition was thus after Appellant had submitted its initial offer, including price, on August 23, 2017. Appellant acknowledged that negotiations between AGC and CIS were ongoing under the LOI. The LOI, according to Appellant, expired on July 31, 2017, with no agreement in principle. (*Id.* at 5.)

While reviewing the LOI, the Area Office found that July 31, 2017, was not the date of expiration, but rather the anticipated closing date. Further, email communications provided to the Area Office show that the closing date on the LOI had been extended until August 18, 2017. This means the LOI was in effect at the time of Appellant's proposal submission, as "the parties were moving towards a closing of the transaction." (*Id.* at 6.) The closing date was moved yet again to August 31, 2017, and while some issues were still being worked over, the final agreement was executed September 14, 2017. The Area Office noted Appellant argued the LOI was not a binding agreement and should not be giving 'present effect' under SBA regulations. (*Id.*)

The Area Office stated that under OHA precedent, "for the present effect rule to apply, an agreement in principle does not need to be binding." (*Id.*; citing *Size Appeal of WRS Infrastructure and Environment, Inc.*, SBA No. SIZ-5007 (2008).) Further, unless two exceptions exist, "the action that is the goal of the agreement in principle has happened for determining the size of the protested concern." (*Id.* at 7.) Here, the Area Office found that the LOI in question discusses terms of the eventual purchase in detail, including price, shares to be purchased, valuation of shares, assumption of current contracts, employment of current management and employee base, purchase financing, an equity purchase agreement, and an exclusivity clause. (*Id.* at 7-8.) The Area Office added that the LOI was executed by AGC's Managing Partner and CIS' sole director. The Area Office concluded that the LOI constituted an agreement in principle that is given present effect, and as such, found Appellant affiliated with CIS.

In adding the employee count of Appellant, and its affiliates, with CIS, the Area Office determined that Appellant exceeded the applicable size standard, and thus is not a small business concern for the instant procurement.

D. The Appeal

On June 14, 2018, Appellant filed the instant appeal. The appeal contends the Area Office clearly erred in finding Appellant is not a small business concern.

Appellant asserts the Area Office erred in determining the LOI established an agreement in principle. Appellant contends that under SBA regulations, an agreement in principle is not one where negotiations are ongoing 'towards the possibility of a merger or a sale of stock at some later date'. (Appeal, at 12; citing 13 C.F.R. § 121.103(a)(1).) Appellant further adds that in the past, OHA has differentiated between a letter of intent and an agreement in principle. Appellant explains that "[w]here an agreement describes itself as nonbinding and conditions an offer on due diligence and examination of financial information", the agreement allows for continued negotiations and is not given present effect. (*Id.* at 13; citing *Size Appeal of The W.I.N.N. Group, Inc.*, SBA No. SIZ-5360 (2012).) In analyzing the LOI, Appellant argues the Area Office disregarded certain conditions included in the LOI, and erroneously excluded certain communications from the record because they took place after the date to determine size. The removal of these communications was made without legal basis, as the continued negotiations between two parties are material as to whether or not an agreement in principle has been reached. Further, dismissing the communications that took place after the date to determine size goes against OHA precedent. (*Id.* at 14; citing *The W.I.N.N. Group, Inc.*, SBA No. SIZ-5360 (2012); *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012).)

In finding that the LOI was an agreement in principle, the Area Office failed to follow SBA regulations that state open or continued negotiations towards a merger or sale of stock are not agreements in principle. (*Id.* at 15; citing 13 C.F.R. § 121.103(d)(2).) According to Appellant, under the Area Office's reasoning, any active letter of intent will thus be considered an agreement in principle. The fact that negotiations with CIS were ongoing at the date to determine size, and that communications between the parties continued after Appellant submitted its proposal, establishes that the LOI is nonbinding. Additionally, that "CIS could terminate its exclusivity obligations (and effectively the LOI) if AGC proposed materially adverse terms or failed to achieve certain diligence milestones" further shows that the LOI was not an agreement in principle. (*Id.* at 15-16.)

Appellant contends that because the exclusivity period stated by the LOI expired, and the parties continued to negotiate material aspects of the acquisition, an agreement in principle did not exist before the date to determine size. Where the purported agreement in principle was nonbinding, subject to several conditions, and negotiations extended beyond the letter of intent's expiration, OHA has found no agreement in principle exists. (*Id.* at 16; citing *Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012).)

Appellant maintains the facts here are similar to those in *The W.I.N.N. Group*, because additional information from CIS was required at the date to determine size, and the parties here could walk away from the negotiation at any point because the LOI was nonbinding. In fact AGC actually went "pencils down" on the transaction and CIS rejected an extension of exclusivity in order to court other offers. This is not how parties to an agreement in principle act. (*Id.* at 17.)

The Area Office, however, mistakenly relied on *WRS Infrastructure and Environment, Inc.*, SBA No. SIZ-5007 (2008), where the parties in question entered into a letter of intent after negotiations had taken place and established an "intent to purchase" at the time to determine size. (*Id.*) In contrast, here the LOI showed the parties were willing to work together in order to achieve the contemplated purchase. (*Id.*) Appellant adds that the LOI was terminated in May 2017 when CIS failed to meet valuation assumptions on which the LOI was conditioned. Only later was the deal revived. (*Id.* at 18.) Therefore, Appellant argues, the LOI should not be given present effect, and CIS should not be found to be affiliated with Appellant.

Appellant further challenges Area Office's finding that the LOI did not terminate on July 31, 2017, arguing that after July 31, 2017, CIS could court offers from other business concerns without being restricted by the exclusivity requirement in the LOI. Appellant purports that "without the provision obligating CIS to negotiate exclusively with AGC, the LOI was rendered devoid of ***any*** obligations between the parties, except that of confidentiality (which often extends past the termination of an agreement)." (*Id.* at 19.) (emphasis original) Thus, the LOI was not an agreement in principle at the date to determine size. Appellant adds that during the size investigation, it repeatedly expressed to the Area Office that during discussions, CIS's continued failure to meet milestones effectively terminated the LOI when an agreement was not reached by July 31, 2017, thus allowing CIS to field other offers. (*Id.* at 19-20.)

Lastly, Appellant argues the Area Office failed to recognize AGC's divestiture of AGC Integrated Defense Holdings. Appellant explains that it told the Area Office that AGC was involved in negotiations to divest AGC Integrated Defense Holdings, which included a letter of intent. Appellant noted that its discussions to divest AGC of AGC Integrated Defense Holdings did not reach the level of an agreement in principle, similar to its negotiations with CIS. (*Id.* at 20.) If this letter of intent is given present effect, then AGC Integrated Defense Holdings' employee count should be removed from any analysis. Appellant states that Area Office exercised a double standard when it failed to analyze the letter of intent regarding the divestiture of AGC Integrated Defense Holdings.

E. Baron's Response

On June 29, 2018, Baron responded to the appeal, arguing the Area Office correctly found Appellant is not a small business concern.

Baron contends the Area Office accurately concluded the LOI between AGC and CIS was an agreement in principle. Baron states that "SBA rules do not require that an agreement in principle be complete as to every term nor do they require that an agreement be legally binding in order to constitute an agreement in principle." (Response, at 6.) In *WRS Infrastructure*, the appellant also argued that the letter of intent in question did not equal an agreement in principle because it was an agreement to continue negotiations, an argument Appellant makes here. Baron explains that OHA rejected such an argument and instead found that appellant, similarly to the situation here, did not take issue with all the facts found in the letter of intent in which the Area Office relied on. Baron reasons the facts in *WRS Infrastructure* mirror those in the instant case, and support the Area Office's finding the LOI constituted an agreement in principle. (*Id.* at 7-8.)

Baron further contends that under § 121.103(d)(1), OHA has found that the agreement in principle does not need to be legally binding, because the substance of the agreement is what dictates whether the present effect rule applies. (*Id.* at 8; citing *Size Appeal of Kadix Systems, LLC*, SBA No. SIZ-5016 (2008).)

Further, Baron challenges Appellant's reliance on *The W.I.N.N. Group*, because the concerns in that case had not proceeded as far as AGC and CIS had here. In *The W.I.N.N. Group*, the parties had not agreed upon a price; the purchaser had received no information regarding ongoing contracts; audit reports, employee lists, and other financial information had not been shared; and the seller was still in contact with a potential third party purchaser. (*Id.* at 9; citing *The W.I.N.N. Group, Inc.*, SBA No. SIZ-5360 (2012).) Here, Baron argues, "AGC and CIS had not only negotiated the critical terms of the contemplated transaction, but also they had agreed on those terms, thereby reaching an agreement in principle." (*Id.* at 10.)

Similarly, Baron argues that Appellant's reliance on *Nuclear Fuel Services* was misplaced. Baron contends that in *Nuclear Fuel Services*, the document at issue was not an agreement, but "a mere letter, a unilateral proposal from the potential acquirer outlining general terms under which a transaction might occur." (*Id.*) Here, Baron notes that the LOI shows AGC and CIS agreed on major details of the consummated transaction. Baron further disputes Appellant's reliance on *Kadix Systems* when arguing that a letter of intent is not an agreement in principle. Baron reasons that the holding in *Kadix Systems* establishes that a letter of intent is an important part of any analysis that purports to determine whether an agreement in principle existed. (*Id.* at 12.)

Barron further asserts the LOI, despite Appellant's contentions, was in effect at the time to determine size. Baron argues Appellant admits the LOI was in effect as of August 31, 2017, thus it was in place when Appellant submitted its initial offer. Despite Appellant's reliance on *The W.I.N.N. Group*, that case held that the absence of an exclusivity provision, along with the fact that the company to be acquired was in discussion with another potential buyer, lead OHA to conclude that the letter of intent in that case was not an agreement in principle. (*Id.* at 13.) Conversely, here the LOI, and its exclusivity provision, were in effect as of the date to determine size, and AGC and CIS remained in negotiations after the date to determine size up until finalizing the agreement on September 14, 2017.

In responding to Appellant's allegations the Area Office failed to give present effect to the LOI that divested AGC's ownership on AGC Integrated Defense Holdings, Baron argues the Area Office correctly acted under § 121.103(d)(4). (*Id.* at 13-14.) Baron notes that AGC Integrated Defense Holdings was sold in November 2017, well after the date to determine size. SBA rules provide that a concern may not utilize its divestiture of an ownership interest in order to make itself small under the present effect rule. (*Id.* at 14-15; citing 13 C.F.R. § 121.103(d)(4); *WRS Infrastructure*, SBA No. SIZ-5007 (2008).) Thus, in finding that the sale of AGC Integrated Defense Holdings was irrelevant to Appellant's size analysis, the Area Office did not commit an error of fact or law.

F. Appellant's Reply

On July 2, 2018, two days after the close of record, Appellant filed a motion to reply to Baron's response. Appellant argues its motion should be admitted because Baron's response misstated facts, raised new arguments on appeal, and mischaracterized Appellant's arguments on appeal.

Appellant contends that, despite Baron's incorrect assumptions, it never admitted the LOI was in place on August 23, 2017. Appellant notes that it has always argued that "even if the LOI were an agreement in principle when signed in May 2017, that agreement terminated when CIS failed to meet valuation assumptions on which the agreement was conditioned." (Reply, at 1; citing Appeal at 18.) Appellant further disputes Baron's allegations that CIS was not in discussion with another potential buyer as was the challenged concern in *The W.I.N.N. Group*. Appellant restates that CIS notified AGC that it sought offers from other parties after August 31, 2017. This fact is crucial because OHA has previously found that the seller seeking offers from other buyers could demonstrate that the parties were not acting as parties do when an agreement in principle is in place. (*Id.* at 1-2.) Appellant argues the weight of evidence in showing there was no agreement in principle does not vary depending upon whether there were discussions with other potential buyers before or after the date for determining size. The important point is that AGC and CIS allowed any exclusivity between them to expire, and CIS actively sought other buyers. This demonstrates they had not reached an agreement in principle by August 23, 2017. (*Id.*)

Finally, Appellant argues that Baron raised a new argument not previously considered by the Area Office. Appellant alleges that Baron incorrectly argued that under 13 C.F.R. § 121.103(d)(4) the Area Office was precluded from considering the letter of intent that governed AGC Integrated Defense Holdings' divestiture by AGC. In response, Appellant contends that under *WRS Infrastructure*, § 121.103(d)(4) prevents concerns from "maintaining agreements that could divest an entity of control, for the sole purpose of appearing to divest control for the present effect rule, with no evidenced intent of actually divesting that control." (*Id.* at 2; citing 69 Fed. Reg. 29192, 29194.) Appellant maintains this provision is not apposite here. Rather the question is whether the AGC Integrated Defense LOI was an agreement in principle to which the Area Office should have given present intent.

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. Preliminary Matters

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). A reply may be accepted, however, to address factual errors or new issues raised in an opposing party's pleading. *E.g., Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 9-10 (2012). In this case, the reply is brief and addresses purported errors and inconsistencies in the response. Further, Baron did not object to Appellant's reply. Accordingly, the motion to reply is GRANTED, and the reply is ADMITTED into the record. *Size Appeal of Systems Resource Mgmt., Inc.*, SBA No. SIZ-4640, at 5 (2004) (admitting unopposed reply) .

C. Analysis

This case turns upon the present effect rule. The rule provides:

> *Affiliation arising under stock options, convertible securities, and agreements to merge*. (1) In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.
>
> (2) Agreements 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.
>
> (3) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.
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> (4) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

13 C.F.R. § 121.103(d).

In interpreting the rule, OHA has recently 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).)

In the past, OHA has affirmed the use of the present effect rule where there is tangible evidence that an agreement in principle had been reached. *Size Appeal of WRS Infrastructure and Environment, Inc.*, SBA No. SIZ-5007 (2008); *Size Appeal of Syro Steel Co.*, SBA No. SIZ-3800, at 10 (1993). The issue in these cases is whether the agreement in question is an agreement in principle, or merely an agreement to open or continue negotiations. Further, "whether a document is a letter of intent, or is actually an agreement in principle, is to be determined not by the caption on the document, or a partial quotation from the document, or a self-serving characterization of the document, but by the substance of the entire document itself." *Kadix Systems, LLC*, SBA No. SIZ-5016 (2008).

Here, the Area Office relied upon *WRS Infrastructure* in finding that the LOI in question was an agreement in principle. In *WRS Infrastructure*, an agreement which was not speculative, was intended to succeed, included important terms, e.g., a specific price, and resulted in the expeditious purchase of one concern by another, was an agreement in principle, and OHA gave it present effect. Appellant looks to *The W.I.N.N. Group* in arguing that the LOI in question does not rise to an agreement in principle under SBA regulations. In that case, an agreement which described itself as non-binding, which had a range of prices, rather than a set price, and which conditioned the offer on an extensive due diligence examination of a great deal of financial information, was not an agreement in principle. There, the purchasing firm had left itself too large an out to permit the conclusion that it had really agreed to anything. Accordingly, that agreement was not an agreement in principle, but an agreement to continue negotiating, and OHA declined to give it present effect.

Here, Appellant's affiliate, AGC, and CIS had entered into the LOI, with the intention of AGC purchasing CIS. The LOI set forth general terms and conditions under which AGC would be willing to purchase CIS; it was an opportunity to evaluate an opportunity. While the LOI specified a price, it was only upon the condition that CIS had to meet certain financial conditions. Furthermore, the LOI provided for extensive due diligence by AGC prior to any deal being closed and was non-binding, except for a few provisions dealing with the negotiations themselves. The LOI also allowed for either party to withdraw from the agreement, therefore giving AGC a way to avoid the obligation of purchasing CIS. The declarations of Mr. Morton and Mr. Strang establish that the deal was put on hold when certain problems arose, and matters did not move forward until CIS improved its financial condition. Messrs. Morton and Strang also viewed the LOI as creating an exclusive period for negotiations, not a contract. Additionally, the deal was not closed within the time frame originally contemplated by the LOI, as the original date for closing was July 31, 2017. While the LOI was extended until August 31st, CIS could have entertained offers from third parties between August 31st and the closing on September 14th. Far from being expeditiously concluded, the sale was closed almost two months after the date originally contemplated. Thus, it would confound logic to hold that an agreement in

principle existed at the time to determine size, yet that same agreement could fall apart after the date to determine size based on the unilateral actions of one of the parties.

I find the facts here to be analogous to the situation in *Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012). Similarly to here, in *Nuclear Fuel Services*, OHA found that the agreement in question was non-binding, subject to review of the business operation of the selling company, and was not accepted until after the date to determine size. OHA added that the "inclusion of a proposed price does not establish that the parties had reached any agreement in principle, but rather marks the onset of more serious negotiations." *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324, at 9 (2012). Just as it is the case here, actively negotiating an acquisition, based on multiple exchanges and draft proposals by the parties, does not equal an agreement in principle.

I therefore conclude that the LOI in this case did not constitute an agreement in principle, but was an agreement to negotiate under certain parameters. Hence, I find that the Area Office erred in finding the LOI an agreement in principle, and giving it present effect, thus erroneously finding Appellant affiliated with CIS as of the date to determine size.

However, I find that the Area Office did not err in not applying the present effect rule to AGC's divestiture of AGC Integrated Defense Holdings. The present effect rule "may not be used to *disaffiliate* concerns." *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 8, (2009); 13 C.F.R. § 121.103(d)(4). (emphasis original)

IV. Conclusion

Appellant has demonstrated that the size determination is, in part, clearly erroneous. Accordingly, the appeal is GRANTED, and the size determination is VACATED and REMANDED to the Area Office for a new size determination consistent with this decision. The Area Office is to determine whether Appellant, and its affiliates, exceed the applicable size standard, without aggregating CIS's employee count.

CHRISTOPHER HOLLEMAN
Administrative Judge