Cite as: *Size Appeal of FRM Socks, LLC*, SBA No. SIZ-6281 (2024)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: FRM Socks, LLC, Appellant, Appealed From Size Determination No. 04-2024-007	SBA No. SIZ-6281 Decided: May 1, 2024

APPEARANCE

Frank S. Murray, Esq., Foley & Lardner LLP, Washington, D.C., for FRM Socks, LLC

DECISION[1]

I. Introduction and Jurisdiction

On January 11, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2024-007, concluding that FRM Socks, LLC (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant and its affiliates collectively exceed the applicable size standard. On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 15 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 RFP

On April 6, 2023, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SPE1C1-23-R-0067 for cold weather socks. (RFP at 7.) The Contracting Officer (CO)

[1] This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release

set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 315120, Apparel Knitting Mills, with a corresponding size standard of 850 employees. (RFP, SF 1449.) Offers were due May 23, 2023. (*Id.*) On October 17, 2023, the CO announced that Appellant had been selected for award.

B. Protests

On November 3, 2023, Nester Hosiery, Inc. (NHI), an offeror that had "indicated in its proposal that it was not a small business concern," filed a protest with the CO challenging Appellant's size. (NHI Protest at 1.) The protest alleged that Appellant is not small due to affiliation with other concerns.

More specifically, NHI contended that Appellant is owned by Standard Merchandising Company which in turn is owned by LongWater Opportunities (LWO). (*Id.*) NHI claimed that LWO owns or controls at least 13 additional concerns. (*Id.*) Based upon publicly-available information, NHI identified the following employee counts for Appellant and the alleged affiliates:

Company Name	Employee Count
LWO	29
LongWater Investment Overview	3
Midland Garage Doors	250
Jetta Corp.	31
XCaliber Container	15-29
Kalisher	60
Studio E/L	11
Appellant	200
M3 Glass Technologies	48
Thermotech Glass	unknown
Standard Merchandising Company	25
Pistil Designs	13
Interia Art	unknown
Soho Myriad	unknown
Tara Materials, Inc.	59
LongWater Investment Co-Investors	unknown

(*Id.* at 3-5.) NHI estimated the combined number of employees for Appellant and the alleged affiliates to be at least 758. (*Id.* at 2.) Some of the alleged affiliates, though, have unknown numbers of employees, so NHI contended that the total headcount for Appellant and its affiliates likely exceeds 850. (*Id.*)

In Size Determination No. 04-2024-005, the Area Office dismissed NHI's protest as untimely and for lack of standing. On November 15, 2023, however, the Area Director initiated

her own size protest against Appellant, based on the information and allegations presented by NHI. (Area Director's Protest at 1.)

C. Protest Response

In response to the protest, Appellant offered spreadsheets detailing the connections between Appellant and the alleged affiliates. (*See* Fund and Related Entities Diagram Spreadsheet.) Appellant acknowledged affiliation with the following concerns: LWO; Jetta Corp.; XC Container, LLC; XC Financial, LLC; XC Real Estate, LLC; Art is Love, LLC; Tara Art, LLC; Glass Fab, LLC; Glass Fab Austin, LLC; Great Socks, LLC; Pistil, LLC; Tara Art, LLC; and Soho, LLC. (*Id.* at Fund II Diagram & Fund III Diagram.) Appellant further acknowledged that, effective June 6, 2023, Appellant became affiliated with Midland Garage Door Manufacturing Co., LLC (Midland). (*Id.* at Fund III Diagram.) Appellant maintained, however, that its affiliation with Midland did not begin until after Appellant had submitted its offer for the instant procurement. (*Id.*) Appellant denied affiliation with LongWater Investment Overview, LongWater Investment Co-Investors, Standard Merchandising Company, and Tara Materials, Inc.

Appellant provided the average employee headcounts of its various acknowledged affiliates for the two years preceding Appellant's offer date. (*See* Revised Employee Calculation Worksheet.) Great Socks Holding Co., LLC, which owns Appellant, Great Socks, LLC, and Pistil, LLC, had an average of 169 employees over this time period. (*Id.*) Art is Love Holdings, LLC, which owns Art is Love, LLC, Soho, LLC, and Tara Art, LLC, had on average 312 employees. (*Id.*) Glass Fab Holdings, LLC, which owns Glass Fab, LLC and Glass Fab Austin, LLC, had an average of 109 employees. (*Id.*) XC Containers Holding, LLC, which owns XC Container, LLC, XC Financial, LLC, and XC Real Estate, LLC, had an average of 78 employees. (*Id.*) Jetta Holdings, LLC, which owns Jetta Corp., had 71 employees. (*Id.*) LWO had 9 employees. (*Id.*) In total, Appellant, with its acknowledged affiliates, had an average of 748 employees.

With regard to Midland, Appellant acknowledged that LWO, through a holding company, formally acquired Midland on June 6, 2023. After Appellant submitted the final purchase agreement to the Area Office for review, the Area Office asked if there had been any earlier "initial agreement." (E-mail from P. MacLean to G. Peavey (Dec. 18, 2023).) The Area Office quoted SBA's "present effect" rule, 13 C.F.R. § 121.103(d), and explained that an earlier agreement might affect the date that a merger or acquisition is deemed to have occurred. (*Id.*) LWO responded, "Are you guys referring to something like a term sheet? Those are unofficial, but we have one." (E-mail from G. Peavey to P. MacLean (Dec. 18, 2023).) The Area Office confirmed, "Yes, a negotiated/signed term sheet." (E-mail from P. MacLean to G. Peavey (Dec. 18, 2023).) LWO subsequently produced a copy of a Term Sheet for the Midland acquisition, dated February 10, 2023 and signed by representatives of LWO and Midland (hereafter, the "Term Sheet"). The following are pertinent provisions found in the Term Sheet:

> We [LWO] are thrilled by this opportunity, and believe that we will make great stewards of the business that ownership and management has built over the preceding decades.

Below is a summarization of the terms discussed for the purchase of Midland Garage.

· **Structure**: [XXXXX]

· **Fundraising**: LWO will execute quiet raise over 90 days

· **Purchase Price**: $[XXXXX]

· [XXXXX]
· [XXXXX]

· **Expected Close**: 6/1/2023

· **[XXXXX]**:
· [XXXXX]
· [XXXXX]
· [XXXXX]
· **[XXXXX]**:
· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]
· **[XXXXX]**:
· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]
· **[XXXXX]**:
· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]:
· [XXXXX]
· [XXXXX]
· [XXXXX]
. . .
· **[XXXXX]**
· [XXXXX]

· **Other Structuring Items**:

· Transaction structure: asset transaction

· [XXXXX]

· Real estate lease agreements: TBD

· [XXXXX]

· Net Working capital target: TBD — [XXXXX]

Below is a summarization of the terms for the purchase of Midland Door Solutions.

· **Purchase Price**: $[XXXXX]

· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]
· [XXXXX]:
· [XXXXX]

· **Other Structuring Items**:

· [XXXXX]
· [XXXXX]
· [XXXXX]

· **Third Party Diligence**:

· Accounting / tax

· Legal

· Insurance

· Environmental

· **[XXX]'s role**:

· Title, Primary Duties, Compensation: To be determined through discussion and defined in future stages of the process.

· [XXXXX]
· [XXXXX]
· **[XXXXX]**:

· TBD — we'd like to explore purchasing [XXXXX], but we can discuss this at a later date

· **[XXXXX]**

· Title, Primary Duties, Compensation: To be determined through discussion and defined in future stages of the process

· [XXXXX]
· [XXXXX]

· **Exclusivity**:

Until June 1, 2023, neither you nor Midland Garage will directly or indirectly initiate, encourage, solicit, negotiate, enter into any agreement with respect to, or provide any information to any party other than LWO with respect to the sale of Midland Garage or other similar transaction.

(Term Sheet, at 1-4.)

After reviewing the Term Sheet, the Area Office informed LWO that "based on the SBA regulations, this agreement is given present effect for size and affiliation purposes (*i.e*. as of 2/10/23)," and asked for Midland's employee count. (E-mail from P. MacLean to G. Peavey (Dec. 18, 2023).) Appellant produced a revised worksheet showing that Midland had an average of 299 employees. (Revised Employee Calculation Worksheet, at Midland Holding Co., LLC.)

D. Size Determination

On January 11, 2024, the Area Office issued Size Determination No. 04-2024-007, concluding that Appellant is not a small business under an 850-employee size standard. The Area Office came to this conclusion due to Appellant's affiliation with Midland and 13 other concerns. (Size Determination at 4, 6.)

The Area Office explained, first, that Appellant acknowledged affiliation with 13 other concerns. (*Id.* at 3-4.) The Area Office accepted Appellant's claim that it is not affiliated with LongWater Investment Overview, LongWater Investment Co-Investors, Standard Merchandising Company, and Tara Materials, Inc. (*Id.* at 4.)

The Area Office then addressed whether Appellant's acknowledged affiliate, LWO, had reached an agreement in principle to acquire Midland prior to May 23, 2023, when Appellant submitted its offer for the subject procurement. (*Id.*) The Area Office observed that "SBA considers the date 'an agreement in principle' is reached as the acquisition date for the purpose of size under the 'present effect' rule." (*Id.* at 4-5, citing 13 C.F.R. § 121.103(d).) The Area Office reviewed the Term Sheet in light of OHA precedent. (*Id.* at 5, citing *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324 (2012) and *Size Appeal of The W.I.N.N. Grp., Inc.*, SBA No. SIZ-5360 (2012).) OHA has held that:

> [W]hat is required for a finding of an agreement in principle is sufficient evidence that the parties have agreed that a transaction to merge is to take place at some time in the future.

(*Id.*, quoting *Size Appeal of Enhanced Vision Sys., Inc.*, SBA No. SIZ-5978, at 25 (2018).) In the instant case, the Term Sheet reflects that an agreement in principle existed because "the negotiating parties ha[d] agreed on all material terms and intend[ed] to proceed with the transaction." (*Id.*) Since the acquisition of Midland is deemed to have occurred on February 10, 2023, the date of the Term Sheet, Appellant was affiliated with Midland prior to the submission of its offer on May 23, 2023. (*Id.*)

The Area Office computed the average employees of Appellant and its affiliates, including Midland, for the 24 months prior to offer submission. (*Id.* at 7.) The combined employee count exceeds the applicable size standard, so Appellant is not small for the subject procurement. (*Id.*)

E. Appeal

On January 26, 2024, Appellant appealed Size Determination No. 04-2024-007 to OHA. Appellant asserts that the Area Office erred in concluding that the Term Sheet was an agreement in principle under 13 C.F.R. § 121.103(d). (Appeal at 10.) Absent this finding, Appellant would not have been affiliated with Midland as of May 23, 2023. (*Id.* at 10-11.) Since Appellant and its affiliates would then have had fewer than 850 employees, Appellant calls upon OHA to reverse the size determination. (*Id.* at 11.)

The Area Office determined that "[t]he provided [T]erm [S]heet is clear that the negotiating parties *have agreed on all material terms* and intend to proceed with the transaction." (*Id.* at 12, quoting Size Determination at 5 (emphasis added by Appellant).) Appellant contends, however, that this assertion is clearly refuted by the text of the Term Sheet as well as by comparing the Term Sheet to the final purchase agreement. (*Id.*) Instead, the Area Office should have viewed the Term Sheet as a starting point for further negotiations. (*Id.* at 14, citing 13 C.F.R. § 121.103(d)(2).) In Appellant's view, this conclusion is supported by the fact the Term Sheet was subject to "speculative conditions precedent." (*Id.* at 13, citing 13 C.F.R. § 121.103(d)(3).) Appellant highlights that the mere fact that a business transaction is complex does not necessarily mean that there was a prior agreement in principle. (*Id.* at 14, citing *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324, at 8 (2012).)

Appellant maintains that the Term Sheet was not an agreement in principle, for several reasons. First, the Term Sheet was executed before LWO had performed any due diligence into Midland's business. (*Id.*) Indeed, the Term Sheet indicated that the agreement was subject to accounting, legal, insurance, and environmental due diligence reviews, which LWO performed only after signing the Term Sheet. (*Id.* at 15.) Second, "[c]ritical elements such as the roles, duties, and governance rights of the Midland principals in any go-forward entity and how (or even whether) LWO might purchase Midland's [XXXXX] were listed as 'TBD' in the Term Sheet." (*Id.*) LWO and Midland continued discussions, exchanging multiple drafts of an LLC operating agreement over the ensuing months. (*Id.*) The Term Sheet also was conditioned on

LWO's ability to raise [XXXXX] in outside capital to fund the transaction. (*Id.*) LWO did not begin to raise this capital until after the Term Sheet was signed. (*Id.* at 15-16.)

Appellant next contends that provisions of the Term Sheet materially differ, and sometimes contradict, the final agreement. (*Id.*) The Term Sheet contemplated a sale of Midland assets whereas the final agreement was structured as the sale of equity interests in Midland with a corporate reorganization. (*Id.*) In the final agreement, the cash paid by LWO and financed by Midland differs from the Term Sheet by millions of dollars. (*Id.* at 16-17.)

Appellant argues that *Size Appeal of Telecomm. Support Servs., Inc.*, SBA No. SIZ-5953 (2018) is analogous here. In *Telecomm. Support*, OHA found that an area office erred in treating a Letter of Intent (LOI) as an agreement in principle. (*Id.* at 17.) According to OHA, the parties did not view the LOI as a contract but rather as creating an exclusive period of negotiations. (*Id.*, citing *Telecomm. Support*, SBA No. SIZ-5953, at 11.) A final agreement was not reached until after the exclusivity period identified in the LOI expired. (*Id.*, citing *Telecomm. Support*, SBA No. SIZ-5953, at 11.) OHA opined that "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." (*Id.*, quoting *Telecomm. Support*, SBA No. SIZ-5953, at 11.) Similarly, in the instant case, an agreement was not finalized until four days after the exclusive negotiating period specified in the Term Sheet expired. (*Id.*) Likewise, the need for LWO to raise the requisite capital can be viewed as a "unilateral action of one of the parties" that could have disrupted the agreement after the Term Sheet was executed. (*Id.*)

Even though the LOI in *Telecomm. Support* included a specified price, it also was subject to due diligence. (*Id.* at 18, citing *Telecomm. Support*, SBA No. SIZ-5953, at 11.) The LOI also was non-binding, allowing either party to end negotiations, which led OHA to find that the LOI "did not constitute an agreement in principle, but was an agreement to negotiate under certain parameters." (*Id.*, quoting *Telecomm. Support*, SBA No. SIZ-5953, at 11.) Since the Term Sheet here also was subject to due diligence and enabled either party to withdraw, Appellant contends that it too should not have been considered an agreement in principle. (*Id.*)

Lastly, in *Size Appeal of The W.I.N.N. Grp., Inc.*, SBA No. SIZ-5360 (2012), OHA found an offer letter was not an agreement in principle. (*Id.*) Just as here, the parties in *W.I.N.N. Grp.* were free to withdraw from the agreement subject to due diligence and further negotiations of unresolved terms. (*Id.*, citing *W.I.N.N. Grp.*, SBA No. SIZ-5360, at 10.) OHA concluded that the need to address material issues prevented a finding of an agreement in principle. (*Id.* at 18-19, citing *W.I.N.N. Grp.*, SBA No. SIZ-5360, at 10.) Thus, Appellant argues, the Term Sheet, like the initial offer letter in *W.I.N.N. Grp.*, should not be considered an agreement in principle. (*Id.* at 19.) Furthermore, the offer letter in *W.I.N.N. Grp.* mirrored the final agreement. (*Id.*) Here, because the transaction structure fundamentally differs between the Term Sheet and the final agreement, Appellant argues that the Term Sheet is even less likely an agreement in principle. (*Id.*)

F. New Evidence

On January 31, 2024, Appellant moved to introduce new evidence. Specifically, Appellant seeks to introduce a declaration from Mr. Griffin Peavey, Vice President of LWO, dated January 26, 2024. (Motion at 1.) Appellant reports that Mr. Peavey has first-hand knowledge of the Term Sheet and the final purchase agreement. (*Id.*)

Appellant contends that there is good cause to admit Mr. Peavey's declaration because it is "relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on appeal." (*Id.* at 2, quoting *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).) The declaration directly relates to the primary issue on appeal — whether the Term Sheet constituted an agreement in principle. (*Id.* at 3.) The declaration does not expand the issues on appeal as it focuses on the Term Sheet. (*Id.*) The declaration clarifies the facts on appeal, particularly certain provisions of the Term Sheet and the behind-the-scenes negotiations. (*Id.* at 3-4.)

Appellant claims that it did not unreasonably fail to provide Mr. Peavey's declaration to the Area Office. (*Id.* at 4.) Mr. Peavey was in communication with the Area Office during its review and was not asked for a declaration or to provide more specific details about the Term Sheet. (*Id.*) After the Area Office inquired whether there had been any "initial agreement" about the Midland acquisition prior to May 23, 2023, Mr. Peavey explained that the Term Sheet was unofficial but nonetheless submitted it to the Area Office. (*Id.* at 5.) Shortly after receiving the Term Sheet, the Area Office "stated unequivocally to Mr. Peavey that [the] Term Sheet must be given present effect under SBA regulations." (*Id.*) To Mr. Peavey, a non-attorney, the Area Office appeared unwilling to engage in further discussion of the Term Sheet or the present effect rule. (*Id.*) Until the instant appeal, then, Appellant "did not have a prior opportunity to explain why the Term Sheet should not be given 'present effect'." (*Id.*)

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on

appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

Here, Appellant has not shown good cause to introduce Mr. Peavey's declaration. During the course of its investigation, the Area Office specifically alerted Appellant and Mr. Peavey that it was examining whether there had been any earlier "initial agreement" pertaining to the Midland acquisition prior to May 23, 2023. Section II.C, *supra*. The Area Office pointed Appellant and Mr. Peavey to SBA's "present effect" rule, 13 C.F.R. § 121.103(d), and explained the significance and relevance of this rule. *Id.* Additionally, upon reviewing the Term Sheet, the Area Office made clear that it intended to treat the Term Sheet as an agreement in principle about the Midland acquisition. *Id.* Accordingly, insofar as Appellant and/or Mr. Peavey disagreed with the Area Office and believed that the Term Sheet was not, in fact, an "initial agreement" or an agreement in principle, Appellant had ample opportunities to submit evidence and argument on this point to the Area Office. Indeed, given that Appellant had the burden of proving its small business status pursuant to 13 C.F.R. § 121.1009(c), it was "incumbent upon Appellant to present its arguments and evidence to the Area Office in a clear and compelling manner," and Appellant's failure to do so "cannot be cured on appeal." *Size Appeal of Tech. Assocs., Inc.*, SBA No. SIZ-5814, at 10 (2017). For these reasons, Appellant's motion to introduce new evidence is DENIED, and Mr. Peavey's declaration is EXCLUDED from the record.

C. Analysis

The central issue in this case is whether the Area Office correctly applied the "present effect" rule, 13 C.F.R. § 121.103(d). The rule states, in pertinent part:

> ***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.

13 C.F.R. § 121.103(d). OHA has explained that, under the present effect rule, "a merger or acquisition is effective as of the date [] that an 'agreement in principle' is reached, even though the merger or acquisition itself is not yet consummated." *Size Appeal of Crop Jet Aviation, LLC*, SBA No. SIZ-5933, at 7 (2018) (quoting *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324, at 7 (2012)). An agreement in principle need not be a legally binding arrangement in order for the present effect rule to apply. *Size Appeal of WRS Infrastructure and Env't, Inc.*, SBA No. SIZ-5007, at 7 (2008) ("no part of 13 C.F.R. § 121.103(d) requires an agreement in principle to be legally binding.").

In the instant case, the Area Office cited OHA's decision in *Size Appeal of Enhanced Vision Sys., Inc.*, SBA No. SIZ-5978 (2018) in finding that the Term Sheet made clear that "the negotiating parties ha[d] agreed on all material terms and intend[ed] to proceed with the transaction." Section II.D, *supra*. OHA explained in *Enhanced Vision* that "what is required for a finding of an agreement in principle is sufficient evidence that the parties have agreed that a transaction to merge is to take place at some time in the future." *Enhanced Vision*, SBA No. SIZ-5978, at 25. I agree with the Area Office that the Term Sheet does show that LWO and Midland fully intended and agreed that LWO would acquire Midland. Notably, Appellant produced the Term Sheet in response to the Area Office's request for any "initial agreement" pertaining to the Midland acquisition. Section II.C, *supra*. Furthermore, the language of the Term Sheet — which was signed by representatives of both LWO and Midland, included an approximate "purchase price" and date of "expected close," and commented that LWO "will make great stewards of the business" — indicates that the parties had progressed well beyond mere negotiations. *Id.*

On appeal, Appellant contends that the Term Sheet was not an agreement in principle for several reasons. Section II.E, *supra*. First, Appellant maintains that any agreement was conditioned upon accounting, legal, insurance, and environmental due diligence reviews. OHA has recognized, however, that an agreement may be given present effect, even if it is subject to due diligence, when the due diligence is "confirmatory . . . as opposed to a more extensive due diligence review." *Enhanced Vision*, SBA No. SIZ-5978, at 24. Here, the Term Sheet contained a section entitled "Third party diligence," which in turn listed four bullets — "Accounting / tax," "Legal," "Insurance," and "Environmental" — without any further specifics. Section II.C, *supra*. There is no indication in the Term Sheet, however, that such "Third party diligence" reviews would be extensive, or that any deal was conditioned on the results of these reviews. *Id.* Accordingly, the bulleted list of "Third party diligence" appears akin to the confirmatory due diligence discussed in *Enhanced Vision*.

Next, Appellant observes that the Term Sheet left certain details as "TBD," including a potential sale of Midland's [XXXXX] and the future roles of Midland's principals. Section II.E, *supra*. Nevertheless, while it is true that such matters were not yet finalized as of February 10, 2023, it does not appear that resolution of these issues was vital to the deal. The Term Sheet thus indicated that LWO "would like to explore purchasing" Midland's [XXXXX], but that the parties could "discuss this at a later date." Section II.C, *supra*. This casual regard suggests that [XXXXX] was a minor aspect of the overall transaction. Likewise, the parties mutually agreed

that the "[t]itle, [p]rimary [d]uties, [and] [c]ompensation" of Midland's principals could be "determined through discussion and defined in future stages of the process." *Id.* If anything, such language reflects that the parties fully expected and intended that LWO would indeed acquire Midland.

Appellant also argues that the Term Sheet should not be given present effect because LWO had not secured the necessary financing as of February 10, 2023. Section II.E, *supra*. Pursuant 13 C.F.R. § 121.103(d)(3), agreements that are "subject to conditions precedent" are not given present effect, if such conditions are "speculative" or "extremely remote." Again, though, the Term Sheet does not state that any deal was contingent upon LWO's ability to obtain outside financing. Section II.C, *supra*. Nor does the Term Sheet indicate that the parties harbored any serious doubt as to whether LWO could finance the transaction. *Id.* I therefore see no basis to conclude that the Term Sheet was subject to speculative conditions that were unlikely to actually transpire.

Appellant also notes that the Term Sheet differs in certain respects from the final agreement reached by Midland and LWO, but this issue has no bearing on whether the Term Sheet should be given present effect. Rather, as explained above, the fundamental question is whether the Term Sheet shows that the parties had reached an agreement that the transaction would occur at a later time. *Enhanced Vision*, SBA No. SIZ-5978, at 25. The details of how the deal ultimately was consummated are not significant to this analysis.

Lastly, the two OHA cases relied upon by Appellant are readily distinguishable. In *Size Appeal of The W.I.N.N. Grp., Inc.*, SBA No. SIZ-5360 (2012), OHA found that a "non-binding" offer which did not include "a set price" and which had not been accepted by both parties was not an agreement in principle. *W.I.N.N. Grp.*, SBA No. SIZ-5360, at 9. Conversely, in the instant case, all material provisions, including price, were detailed in the Term Sheet, signed by LWO and Midland. Section II.C, *supra*. In *Size Appeal of Telecomm. Support Servs., Inc.*, SBA No. SIZ-5953 (2018), the parties expressed a "mutual willingness to work together in good faith" to effectuate an acquisition, "but only on the condition that the [to-be-acquired] company meet certain financial targets." *Telecomm. Support*, SBA No. SIZ-5953, at 2, 11. By contrast, the instant Term Sheet was not contingent on any future conditions or events, and even the perfunctory reference to "Third party diligence" appears to have been addressing mere confirmatory due diligence. Section II.C, *supra*.

Accordingly, the Area Office reasonably determined that the Term Sheet between LWO and Midland was an agreement in principle, which must be given present effect at the time of its execution. Thus, the Term Sheet, an agreement for the purchase of Midland, must be treated as if the acquisition took place on February 10, 2023, the date the Term Sheet was executed. *See* 13 C.F.R. § 121.103(d)(1). Appellant and Midland therefore were affiliated as of May 23, 2023, the date Appellant submitted its offer for the instant procurement, and the date on which its size must be determined. The size standard applicable to the procurement is 850 employees, and Appellant concedes that it is not small if Midland's employees are included in the calculation. Therefore, the Area Office properly found Appellant other than small for the instant procurement.

IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the size determination. The appeal therefore 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).

KENNETH M. HYDE
Administrative Judge