

REDACTED DECISION FOR PUBLIC RELEASE

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

SIZE APPEALS OF:

SETA Support Services Alliance, LLC

SBA No. SIZ-5101

and

Decided: December 15, 2009

Sigmatech, Inc.

Appellants

Re: Electronic Consulting Services, Inc.

Appealed from

Size Determination Nos. 2-2009-94 & 95

APPEARANCES

Gary L. Rigney, Esq., for SETA Support Services Alliance, LLC.

Ira E. Hoffman, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, P.A. for Sigmatech, Inc.

Thomas L. McGovern III, Esq., Stephen A. Smyers, Esq., Allison D. Pugsley, Esq.,
Hogan & Hartson, LLP, for Electronic Consulting Services, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office properly relied upon the challenged firm's tax returns, as opposed to Dun & Bradstreet reports, to determine size, and whether the challenged firm was

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unusually reliant upon, and thus affiliated with, its subcontractors. *See* 13 C.F.R. § 134.314.

III. Background**A. Solicitation and Protest**

On August 28, 2008, the Department of the Army Program Executive Office for Simulation, Training and Instrumentation (Army) issued a request for proposals for Systems Engineering and Technical Assistance support services. The designated North American Industry Classification System (NAICS) code for this procurement is 541330, Engineering Services, Military and Aerospace Equipment and Military Weapons, with a corresponding \$27 million annual receipts size standard.¹ Proposals were due on September 30, 2008, later extended to October 14, 2008 by Amendment No. 1.

On August 10, 2009, the Army notified unsuccessful offerors that it has selected Electronic Consulting Services, Inc. (ECS) as the apparent successful offeror. On August 12, 2009, SETA Support Services Alliance, LLC (SETA) filed a protest asserting ECS was other than small. SETA asserted ECS's annual receipts exceeded the applicable size standard, based upon Dun & Bradstreet reports, and that it was affiliated with its team members. Also on August 12th, Sigmatech, Inc. (Sigmatech) filed a protest asserting ECS was other than small. Sigmatech also asserted ECS's annual receipts exceeded the applicable size standard based upon Dun & Bradstreet reports.

B. The Size Determination

On September 29, 2009, the Small Business Administration (SBA) Area II Office for Government Contracting in Philadelphia, Pennsylvania (Area Office) issued a size determination finding ECS an eligible small business.

The Area Office reviewed ECS's Federal tax returns for the years 2005, 2006, and 2007. The Area Office concluded that ECS's annual receipts were within the applicable size standard.

The Area Office further found that ECS's use of the phrase "team" to describe its relationship with its subcontractors was not an indicia of affiliation. The Area Office also found that ECS's documentation reflected that it was assigning discrete tasks to its subcontractors and that ECS was performing the majority of work for the procurement. The Area Office concluded there was no evidence ECS was unusually reliant on its subcontractors and thus was not affiliated with them. Accordingly, the Area Office determined that ECS was an eligible small business.

¹ The solicitation misstates the size standard as \$25 million. This was corrected in Amendment No. 1, dated September 12, 2008. The SBA Area Office used the correct \$27 million size standard in the size determination. 13 C.F.R. § 121.201.

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C. SETA's Appeal

1. SETA's Appeal Petition

On October 13, 2009, SETA filed an appeal of the size determination, Docket No. 2009-10-13-67. SETA argues that because this procurement has not yet been awarded and no task orders have been issued, ECS is unable to assign discrete tasks to its subcontractors, and the Area Office erred in finding that ECS had done so. SETA asserts ECS does not have the capability to perform this contract without relying on its subcontractors. SETA asserts that ECS must have assigned areas of responsibility, rather than tasks, to its subcontractors and that ECS is therefore unusually reliant upon, and thus affiliated with, its subcontractors. As a result of this affiliation, SETA argues ECS is other than small.

2. ECS's Response

On October 29, 2009, ECS responded to SETA's appeal. ECS noted that SETA did not challenge the Area Office's finding that ECS was, by itself, small under the applicable NAICS code. ECS asserts that SETA's appeal is based upon unsupported allegations that ECS is unusually reliant upon its subcontractors, none of which SETA identified.

ECS asserts it will be performing the majority of the work on this contract. The "ECS Team" consists of ECS, plus two other contractors, MCR Federal, LLC (MCR) and Washington Consulting Government Services (WCGS) and four other companies. While these companies were strategic partners for this procurement, ECS has no longstanding relationship with them. ECS is committed to performing [XXX] of the contract work. ECS's subcontracts with MCR and WCGS establish a target of approximately [XXX] of the work for each subcontractor. ECS will perform the project management function, and the [XXXXXXXXXXXXXXXXXXXXXXXXXX] will be ECS employees. ECS will be the primary lead or principal contributor on [XXXX] major tasks. ECS further asserts SETA is unusually reliant on its subcontractor.

D. Sigmatech's Appeal

1. Sigmatech's Appeal Petition

On September 30, 2009, counsel for Sigmatech received the size determination. On October 15, 2009, Sigmatech filed its appeal of the size determination. Sigmatech asserts that, according to Dun & Bradstreet, ECS's sales for the applicable years exceed the size standard.

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FY 2005	\$17,028,610
FY 2006	\$28,138,764
FY 2007	<u>\$36,269,693</u>
Total	\$81,437,067
3-year average	\$27,145,689

Sigmattech asserts the size determination is flawed because it contains no specific evidence such as calculations of ECS's annual receipts, nor provides any explanation for the inconsistency with the Dun & Bradstreet report.

2. ECS's Response to Sigmattech

On November 2, 2009, ECS responded to Sigmattech's appeal. ECS asserts that size determinations must be based upon the information from a firm's income tax returns, not from Dun & Bradstreet. ECS reports its receipts as follows:

FY 2005	[XXXXXXX]
FY 2006	[XXXXXXX]
FY 2007	<u>[XXXXXXX]</u>
Total	[XXXXXXX]
3-year average	[XXXXXXX]

ECS thus asserts its annual receipts are within the size standard.

E. Further Pleadings

On November 9, 2009, Sigmattech filed a motion for leave to reply to ECS's response, together with the reply. On November 12, 2009, ECS moved for leave to file a surreply to Sigmattech's reply.

On November 23, 2009, I consolidated the two appeals, and issued a Protective Order, *sua sponte*. On December 1, 2009, I admitted counsel for SETA and Sigmattech under the Protective Order.

IV. Discussion

A. Timeliness

Appellants filed their appeals within 15 days of receiving the size determination. Thus, both appeals are timely. 13 C.F.R. § 134.304(a)(1).

REDACTED DECISION FOR PUBLIC RELEASE**B. Standard of Review**

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

C. The Reply and Surreply

A reply to a response is not permitted unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Here, Sigmatech's reply merely extends arguments from its appeal. Accordingly, I DENY Sigmatech's and ECS's motions to file a reply and surreply, and EXCLUDE those pleadings from the record.

D. The Merits**1. ECS's Annual Receipts**

SBA calculates a concern's annual receipts by adding total income to cost of goods sold as these terms are defined and reported on the concern's IRS tax return forms, such as Form 1120S for S corporations. 13 C.F.R. § 121.104(a); *Size Appeal of Alpha Protective Services, Inc.*, SBA No. SIZ-5035, at 4 (2009). In determining size, SBA relies upon the signed and certified statements made by a challenged firm in its SBA Form 355 and its Federal tax returns. *Size Appeals of CorTrans Logistics, LLC, et al.*, SBA No. SIZ-4691, at 12 (2005).

SBA must use a challenged firm's Federal tax returns to determine its annual receipts, unless other information gives SBA reason to regard the returns as false. 13 C.F.R. § 121.104(a)(1); *Size Appeal of Community Research Associates, Inc.*, SBA No. SIZ-4554 (2003). Here, where there is no reason whatever to believe ECS's returns were in any way false, the Area Office was correct in relying upon them to determine ECS's size.

Dun & Bradstreet reports are sufficient to enable a size protest to reach the specificity threshold. *Size Appeal of Allan Baker, d/b/a Korrekt Optical*, SBA No. SIZ-4486 (2002). Nevertheless, OHA has consistently held that Dun & Bradstreet reports represent information that is second hand at best and cannot be used to determine size or to question the results reached by the Area Office's examination of the Federal tax returns. *Size Appeals of CorTrans Logistics, LLC, et al*, SBA No. SIZ-4691, at 12 (2005). Accordingly, Sigmatech's reliance upon them is misplaced.

Sigmatech points to the lack of detailed analysis of the tax returns in the size determination. The reason for this is that the size determination is provided to the protestors, and to include the figures from a challenged firm's tax return would disclose confidential financial

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information to competitors. Similarly, this Office's decisions, which are available to the public, generally do not contain specific figures from a challenged firm's tax returns, in order to preserve the confidentiality of the firm's financial information. Frequently, counsel for the parties in an appeal request a Protective Order, so that the specific financial information may be discussed without disclosure to the parties and the public. Because there was no such request in this case, I issued a Protective Order *sua sponte*.

A review of ECS's Form 1120S Corporate Federal tax returns reveals the following:

FY 2005	total income:	[XXXXXX]
	cost of goods sold:	[XXXXXX]
	annual receipts:	[XXXXXX]
FY 2006	total income:	[XXXXXX]
	cost of goods sold:	[XXXXXX]
	annual receipts:	[XXXXXX]
FY 2007	total income:	[XXXXXX]
	cost of goods sold:	[XXXXXX]
	annual receipts:	[XXXXXX]
	Total annual receipts:	[XXXXXX]
	3-year average of annual receipts:	[XXXXXX]

It is thus clear that ECS's annual receipts are within the \$27 million annual receipts size standard for NAICS code 541330. Sigmatech's contention that there must be some explanation for the variance with the Dun & Bradstreet figures for sales is meritless. First, the regulation requires reliance on the tax returns alone, and the Dun & Bradstreet figures may not be used to challenge the figures from the returns, absent some reason to regard the returns as false. Second, there is no reason to believe the figures reported to Dun & Bradstreet as "sales" represent precisely the same figures as "total income" plus "cost of goods sold." There is thus no reason to be concerned that the two sets of figures may be different when they may not be measuring the same things.

2. The Ostensible Subcontractor Issue

The ostensible subcontractor rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are found to be affiliated. 13 C.F.R. § 121.103(h)(4).

Here, ECS does describe itself and its subcontractors as the "ECS Team", but this Office has held that proposal language describing the challenged firm and its subcontractors as a team is not *per se* evidence of an ostensible subcontractor affiliation. *Size Appeal of Greenleaf Construction Co., Inc.*, SBA No. SIZ-4663 (2004).

