

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

² Those protests had been docketed under Docket Nos. 06-ODRA-00378 and 06-ODRA-00379.

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her decision to refrain from issuing further delivery orders under EIT's contract and recompile future requirements among the remaining offerors. For the reasons set forth herein, the ODRA recommends that the Protest be denied.

II. Findings of Fact

1. The Center issued the instant SIR on March 2, 2006, seeking technical documentation and engineering services in support of the Center's Airport and Aircraft Safety Research and Development Division, AAR-400. *See* Agency Response ("AR"), Tab 1, Section B. The SIR describes the contract type as a time and material, indefinite delivery/indefinite quantity ("IDIQ"), with a performance period of five years; a two year base period and three one-year option periods, if all options are awarded. AR, Tab 1, Sections B and C.1.
2. The acquisition was set aside for small businesses meeting the North American Industry Classification System, (NAICS) code 56110, "Office Administrative Services." That standard sets a maximum of company receipts at \$6.5 M per year, as determined by the company's average gross receipts over the past three years. AR, Tab 1, Section L.3 and Tab 10.
3. The SIR also incorporates by reference Acquisition Management System ("AMS") clause 3.2.2.3-3, Affiliated Offerors (July 2004), which states:
 - (a) Business concerns are affiliates of each other when, either directly or indirectly,
 - 1) One entity controls or has the power to control the other, or
 - 2) A third party controls or has the power to control both.
 - (b) Each offeror (you) must submit an affidavit stating that it has no affiliates, or containing the following information:
 - 1) The names and addresses of all affiliates.

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- 2) The names and addresses of all persons and concerns that exercise control or ownership over the offeror and all of your affiliates, regardless of how they exercise control or ownership.

AR, Tab 11.

4. The SIR provided for the award to be made to the responsible offeror whose proposal, conforming to the SIR, provides the best value to the Government. AR, Tab 1, Section M.2.
5. EIT submitted an offer and was awarded Contract DTFACT-06-D-00006 on June 29, 2006. Thereafter, two competitors filed post-award protests (“Prior Protests”) with the Contracting Officer and the ODRA claiming that EIT was other than small, citing to the SBA’s “identity of interest” affiliation regulation at 13 C.F.R. §121.103. Protest at 1.
6. Specifically, the Prior Protests alleged that EIT is affiliated with a large business, Hi-Tec Systems, Inc. (“Hi-Tec”), by virtue of the fact that the President/CEO of EIT and the President of Hi-Tec are married, and the companies are in the same line of business, share the same interests, and utilize common corporate resources, including office space and employees. The Prior Protests alleged that the revenues of EIT and Hi-Tec should be considered together for size determination purposes. AR, Tabs 5 and 7.
7. On September 5, 2006, the Contracting Officer issued her determination which concluded that EIT does not qualify under the size standard in NAIC 5610, and that corrective action was necessary. Protest, Exhibit 1. In the letter transmitting her determination, the Contracting Officer indicated that “after reviewing all of the submissions by the parties, and after consulting with technical, policy, and procurement personnel within the Agency, I have concluded that EIT should be considered affiliated with Hi-Tec Systems for purposes of this acquisition.” She

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further stated, “I believe that it is appropriate to consider the Small Business Administration’s traditional indicia of ‘affiliation’ in 13 CFR 121.103, and when I do so, the two companies’ income must be counted together.” Protest Exhibit 1, Letter dated September 5, 2006; Contracting Officer Determination of Size Status (“Size Determination”).

8. The Size Determination document sets forth the specific bases for the Contracting Officer’s conclusion. In the document, she explains that all the offerors had submitted signed “Business Declarations” certifying that they met the applicable NAIC code and that she had accepted those declarations at face value. It was only as a result of the Prior Protests against the award to EIT that any issues of size and affiliation were brought to her attention. As a consequence of the Prior Protests, the Contracting Officer determined that she had an independent duty to review the validity of the contract award and, in doing so, would look to SBA precedent as non-binding guidance. Protest, Exhibit 1, Size Determination, page 2-3.
9. The rationale for the Contracting Officer’s Size Determination is as follows:

There are several reasons why consideration of the SBA precedence is in the interest of the FAA in this case. First, while the Agency *could* have designed any size standard for a particular set-aside, we chose to use one of SBA’s established NAIC codes, specifically, 56110. Having opted to use an SBA classification, it provides continuity and fairness to the small business community to also use the long established and published SBA regulations and caselaw that enforce those NAIC codes. The regulations at 13 CFR 121.103 and the “affiliation” decisions from the SBA’s Office of Hearings and Appeals are at the heart of that enforcement, and the small businesses generally are aware of, and abide by, those standards.

Secondly, the FAA’s *Small Business Office* and the *Procurement Policy Office* have both indicated that that AMS “affiliation” clause, 3.2.2.3-3, (July 2004), was not designed nor intended to override all prior guidance. This protest presented a unique question to the FAA Technical

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Center, and since the result would likely have wide-ranging implications, I consulted the two offices charged with oversight of the applicable policy; the *Acquisition Policy and Procedures Division*, ASU-120, and the *Special Assistant for Small Business*, ARA-5. Their respective statements are attached as Exhibits (1) and (2).

In essence, both managers indicate that it was never the intention of their respective offices to completely overwrite and dismiss all SBA guidance on small business matters. Rather, clause 3.2.2.3-3 was part of an overall attempt to simplify and minimize the length of prescriptive clauses and standards in the AMS. Since Section 3.6.1.2 of the AMS directly charges the Special Assistant for Small Business with responsibility for establishing, monitoring, and evaluating FAA Small Business policy, that office's view on this matter must be considered.

Comparing the language of clause 3.2.2.3-3 to Section 121.103 itself also supports a finding that SBA experience was not to be discarded. The language in the AMS Clause is verbatim the *introductory* paragraph of SBA's "affiliation" standards, as well as the introductory language of FAR 19.101, which, like the SBA regulations, then goes on to discuss the traditional indicia of "affiliation." In both cases, the introductory language concerning companies "controlling" each other is just a general statement, followed by a more comprehensive set of guidelines. This suggests that the FAA intended to incorporate the same concept, without necessarily rewriting all the explanatory pages that followed. Rather than redefining "affiliation" to the very narrow case where one "controls" the other or both are jointly "controlled," it appears that the intent of Clause 3.2.2.3-3 was to continue prior policy.

Finally, the AMS always intended that the FAA might selectively adopt provisions of existing procurement law, where appropriate. The introductory page of the AMS contains a *Forward* by the then Administrator, David Hinson, dated April 1, 1996, the same day the AMS took effect. After pointing out that the 1996 Appropriations Act removed the FAA from many acquisition laws, he reminded the contracting community that the Agency retained " ... the discretion to adopt the substance of portions of acquisition law into its system as the FAA deems appropriate ..." See Exhibit (3). The FAA has done

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exactly that elsewhere in the Small Business context, such as in its “Small & Economically Disadvantaged Business”, (SEDB), program. There again, the FAA could have selected any standard it wanted, but decided to adopt SBA’s “*Section 8a*” guidelines and certification procedures for the program. Likewise, the FAA has also adopted SBA’s guidelines for Service-Disabled Veteran Owned Small Businesses. See AMS Appendix “E.” In each of those cases, it was logical and consistent to adopt the well known, publicized, existing SBA standards into the FAA program. I believe it is appropriate to do so here with respect to “affiliation.”

In conclusion, I believe it is appropriate in this case to consider the SBA’s guidance in determining EIT’s eligibility for award under NAIC 56110. There is nothing in the language of Clause 3.2.2.3-3 itself that precludes further definition; on the contrary, it appears that the AMS clause was structured with that guidance in mind. I believe that SBA’s expertise and experience will help maintain the integrity of the Small Business program.

Protest, Exhibit 1, Size Determination, pp. 3-4.

10. The Contracting Officer’s Size Determination references a statement that the Contracting Officer obtained from the *Acquisition Policy and Procedures Division*, ASU-120, indicating that the drafters of the AMS did not intend to diverge substantially from long standing Government contract clause use, interpretation, and case law. See AR, Tab A, *Declaration of David Lankford*. Additionally, a statement from the *Special Assistant for Small Business*, ARA-5, indicates that since the inception of the AMS in 1996, the FAA Small Business Development Office “at all times intended to follow general SBA policy and guidance” and “never intended to ignore or displace the SBA’s policy or decisions defining when two small businesses are ‘affiliated’ for size determination purposes.” AR, Tab B, *Declaration of Inez C. Williams*.
11. In the Size Determination, the Contracting Officer identified the following facts, as the basis for her conclusion that the two companies were “physically and functionally interwoven”:

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Ms. Nandita Singh is the CEO/President of EIT and owns 100% of the company stock. She is married to Mr. Tribhuvan Singh, who is CEO/President of Hi-Tec.

Both companies provide engineering and technical support services, primarily to the FAA Technical Center, in Atlantic City NJ, and to the FAA Headquarters, (HQ).

The offices of both EIT and Hi-Tec are located in the same office building, 500 Scarborough Drive, about 4 miles from the Technical Center. EIT leases its space from Hi-Tec; the offices are adjoining, with direct access between the two.

Ms. Singh worked as an employee of Hi-Tec prior to EIT's commencement of operations.

The CEO and other employees of Hi-Tec participated in initial teaming discussions with the predecessor contractor.

[DELETED]

Protest, Exhibit 1, Size Determination at 5.

12. The Contracting Officer relied on SBA decisional law to guide her analysis of the above facts, noting specifically that a husband-wife relationship creates a strong presumption of affiliation that must be overcome with clear evidence of "fracture," or complete noninvolvement in each other's affairs. The Contracting Officer explained "the 'totality' of these circumstances cannot lead to any conclusion but that the two companies are strongly interconnected and should be viewed as one for purposes of this procurement." To underscore her conclusion, she commented that "Hi-Tec's own website displays a picture on its 'Who We Are' page with husband and wife prominently seated in front of the company's employees." Protest, Exhibit 1, Size Determination at 6.

13. EIT's Protest contends that the Size Determination is wrong as a matter of law and based on erroneous factual findings. In particular, EIT asserts that the Contracting Officer's conclusion that EIT and Hi-Tec are "physically and

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functionally interwoven” is false and unreasonable in light of the facts contained in the record. Protest at 13.

14. In its Protest, EIT identifies what it asserts is the “*relevant information* necessary to find that EIT was a *bona fide* small business concern under the criteria *established by the FAA*.” EIT considers as relevant *only* those facts that are expressly enumerated as factors in the Toolbox Guidance to define a “controlling interest.” Toolbox Guidance, T3.6.1.³ According to EIT, the facts solely relevant to the question of whether EIT is a bona fide small business concern are as follows:

- Nandita Singh holds the position of Chief Executive Officer (“CEO”) of EIT;
- Nandita Singh owns and controls all the shares of EIT and is the only Member of the Board of Directors. There are no other officers or directors of EIT;
- Nandita Singh unconditionally owns 100% of the stock of EIT;
- Nandita Singh works full time as the President/CEO of EIT and has unconditional 100% ownership and control of the company;
- Nandita Singh has worked full-time since 2002 when EIT became operational, managing all aspects of the company’s operations, business development and growth. During this period, Nandita has managed all prime and subcontracts of the company and has routinely interfaced with clients, including the FAA, and employees of EIT;
- Nandita Singh has both a Masters and Bachelor’s degree in Economics. Additionally, Nandita has taught technical computer science courses at community college and brings experience working in banking, finance, accounting, bookkeeping, loan processing, etc. Nandita Singh is highly qualified and competent to manage EIT;

³ See Footnote 5 *infra*.

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- Nandita Singh as President/CEO has established all company policies and procedures of EIT;
- Nandita Singh is solely responsible for the final determination and selection of all business opportunities that are either produced by her, or those opportunities that have been identified based upon the recommendation of EIT's Technical Directors and Senior Staff;
- Nandita Singh holds regular program reviews for all programs, and meets frequently with customers. Nandita Singh interacts routinely, on a daily basis with her employees including Technical Director, Program Manager and Senior Engineers;
- Nandita Singh supervises tracks and controls all major and minor expenditures at EIT.
- Nandita Singh is the only person at EIT authorized to sign checks and approve expenditures;
- Nandita Singh is solely responsible for hiring all EIT employees, including but not limited to Key Personnel;
- Nandita Singh is the final authority in all the decisions made at EIT and approves all EIT business development and marketing decisions;
- Nandita Singh is the only person authorized to sign and approve documents on behalf of EIT;
- Neither Nandita Singh nor EIT have received any financial assistance in any form from Hi-Tec;
- [DELETED]

Protest at 11-13, *citing* Protest Exhibit 4, Declaration of Nandita Singh.

15. EIT challenges the Contracting Officer's factual conclusion that EIT and Hi-Tec are "physically and functionally interwoven," asserting that each company has its own independent resources and that EIT is not unduly reliant on Hi-Tec in any manner. Protest at 15.

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16. With respect to the Contracting Officer's finding that the companies share office space, EIT states that the Determination neglected to consider that Ms. Singh had requested, two months prior to filing of the size protests, that the office building's property manager negotiate a direct lease with EIT rather than continue the sublease from Hi-Tec. As for the door between the EIT and Hi-Tec suites, EIT asserts that it serves as a fire exit and is required by code. EIT also contends that it pays "market rates" and that the location of its headquarters is not material, since EIT employees are generally on-site at client facilities. Protest at 15, *citing* Exhibit 6 and 7.
17. With respect to the Contracting Officer's consideration of initial teaming discussions between EIT, Hi-Tec and the predecessor contractor, and her consideration of the inclusion of Hi-Tec as a reference for experience in EIT's proposal, EIT does not deny these facts but disputes their significance and argues that they are not indicia of affiliation. Protest at 16.
18. EIT's proposal identified Hi-Tec as one of three subcontractors, and, in the Corporate Experience/Past Performance Section of its proposal, featured Hi-Tec's corporate experience in a manner at least equal to, or in several instances greater than its own. Protest Exhibit 9.
19. As for the Contracting Officer's finding that Hi-Tec is "taking on large portions of the [EIT] work as a subcontractor," EIT asserts that "Hi-Tec has *never* performed *any* work under an EIT prime contract." Protest at 17, *citing* Exhibits 4 and 6.
20. With respect to the Contracting Officer's findings regarding EIT's website and telephones, EIT states:

The sole evidence underlying the Agency's finding that Hi-Tec "maintains" EIT's website is the registration record for the domain

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www.eitinc.net, which shows the registrant as Hi-Tec. Far from being proof that Hi-Tec maintains EIT's website, the registration record is merely proof that the WHOIS database is incorrect and out of date.

The registration was created over four years ago, on March 18, 2002, by a third-party at the request of EIT. *See* Declaration of N. Singh ... at [Protest] Exhibit 10. Unbeknownst to Ms. Singh, the EIT registration was done in the wrong name and the wrong contact information was provided. *Id.* Further, the information contained in the registration is incorrect: the email contact provided, trib@hitecsystems.com, is not a correct email address. Nevertheless, upon learning of this error through the Agency's Determination it was easily rectified as of September 7, 2006. *See* [Protest] Exhibit 11

Moreover, EIT employees have "maintained" the website in-house. *See* [Protest] Exhibit 10. All design content and updating is performed by EIT

Regarding the claim that EIT's phones are maintained by Hi-Tec, once again, the Agency jumped to a faulty conclusion based on an administrative error unknown to EIT, and outside of EIT's control. EIT was previously unaware that the caller identification on some of its phones apparently listed Hi-Tec as the originating source for the call. This was an error by the phone company, completely out of the control of EIT, that was rectified by the phone company as soon as it was brought to EIT's attention.

Protest at 17-18.

21. The Center filed its Agency Response on October 4, 2006 and EIT filed its Comments on October 11, 2006, after which the record was closed.

III. Discussion

A. Standard of Review

In reviewing Agency procurement actions, the ODRA will not recommend that the actions be overturned, so long as such actions do not constitute an abuse of discretion, are not arbitrary or capricious, are supported by a rational basis and are founded upon

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substantial evidence. *Protest of Computer Associates, Inc.*, 00-ODRA-00173, citing *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, affirmed 203 F.3d 52 (DC Cir. 1999). Moreover, the ODRA will not substitute its judgment for that of an FAA Product Team where the Team's decision is rationally based and consistent with the FAA's Acquisition Management System ("AMS"), as well as the specified Solicitation evaluation and award criteria. See *Protest of Information Systems and Networks Corporation*, 99-ODRA-00116. The protester bears the burden of demonstrating that a Product Team's actions fail to satisfy the above standards. *Id.* It further is well established that mere disagreement with the outcome of an evaluation will not in and of itself satisfy the protester's burden. *Protest of The Dayton Group, Inc.*, 06-ODRA-00385.

B. Merits of the Protest

EIT argues that the fundamental issue before the ODRA is "the proper interpretation and application of *FAA regulations* pertaining to small-business set-aside procurements." Comments at 1 (emphasis added). Basically, EIT contends that (1) the Contracting Officer's decision is contrary to Federal law and to AMS policy; and (2) the Contracting Officer's decision is factually unreasonable.

1. The Contracting Officer's consideration of SBA regulations and caselaw was not improper.

EIT argues that the Center failed to acknowledge the fact that Congress specifically exempted the FAA from the Small Business Act, 15 U.S.C. §631 *et seq.*, as well as the SBA regulations promulgated thereunder. For this reason, EIT argues that the Contracting Officer's consideration of anything that was not expressly adopted by, or contained in, the FAA's own AMS policy and guidance is improper. In essence, EIT argues:

The fact is that the FAA did consciously rewrite an entirely new acquisition management policy *pursuant to its Congressional mandate.*

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The drafters of the AMS began with a blank slate that *explicitly excluded all SBA regulations*. To the extent drafters copied only a small part of 13 C.F.R. 121.103, the choice to exclude other parts was a conscious decision. Of course, the FAA has the discretion to adopt the entirety of 13 C.F.R. 121.103 But the application of SBA regulations to FAA procurements has always been predicated upon a formal rule making process, or notice and disclosure of all applicable regulations in solicitations, so that potential bidders may knowingly determine whether to compete for FAA procurements.

Comments at 2.

The ODRA rejects EIT's assertions of legal error with respect to the Contracting Officer's consideration of SBA regulations and guidance on the issue of "affiliation" to determine EIT's eligibility under NAIC code 56110. Although these precise issues have not been adjudicated previously by the ODRA, this office has considered other protests that have challenged the use of SBA guidance in connection with FAA small business set-asides. In the *Protest of Four Winds Services, Inc.*, 02-ODRA-00219, the ODRA recognized that although the Congress in Public Law 104-50 made the Small Business Act inapplicable to the FAA's acquisition process, it also recognized that decisions of the SBA Office of Hearing and Appeals could be consulted as "persuasive authority" with respect to such matters as the interpretation of NAIC codes. Likewise, it follows that determinations of eligibility under a particular NAIC code, including those that raise questions of affiliation, could be assisted by consulting SBA regulations and cases. Moreover, such treatment is similar to the ODRA's treatment of GAO decisions, which also are viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS. See *Protest of International Services, Inc.*, 02-ODRA-00224. Thus, the FAA is not precluded from relying on guidance derived from regulations and decisions that are issued pursuant to statutory authorities which Congress made expressly inapplicable to the FAA, so long as such guidance is consistent with AMS policy.

The FAA's use of SBA regulations and caselaw also was addressed in the *Protest of Communication Technologies, Inc.* ("Comtek"), 03-ODRA-00257. In that case, the

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ODRA denied a protest challenging action taken by the FAA that was based in part on its review of SBA's ostensible subcontractor rule and legal precedent from the SBA's Office of Hearings and Appeals. The *Comtek* protest was filed after the FAA decided to settle a protest filed by Computer Data Source, Inc. ("CDC") against an award to Comtek. The CDC protest had alleged that Comtek was not eligible for award under the SIR's small business set-aside provisions. Although Comtek did not intervene in the CDC protest, the contracting officer requested that it provide additional information with regard to its subcontractor agreements. The FAA then decided to settle the CDC protest based "upon the product team's application of the seven factor test [set forth in 13 C.F.R. §121.103(f)(4)] for determining whether a *de facto* joint venture relationship exists, notwithstanding the 'ostensible subcontractor' relationship of two entities." *Id.* at 29. CDC and the FAA entered into a settlement agreement that provided for award to CDC, and that settlement was protested by Comtek. Subsequently, in the adjudication of the Comtek protest, the ODRA observed, that "just from ... two undisputed facts, the Product Team had a rational basis for perceiving a litigation risk" with respect to three of the seven factors identified in the SBA regulations. *Id.*⁴

The *Protest of Four Winds* and the *Protest of Comtek* indicate that consideration of non-FAA regulations and caselaw may be appropriate when used to analyze situations not specifically covered in AMS policy and Toolbox Guidance, as was the case in this Protest. Furthermore, this approach is consistent with the intent of the drafters of the AMS, as well as the practices of the FAA Small Business Development Office. FF 10.

The ODRA finds that the Contracting Officer's reliance on SBA regulations and caselaw to assist her evaluation of whether EIT meets the SIR's size standard under AMS clause 3.2.2.3 was consistent with AMS policy, and the ODRA concurs with the Center's legal analysis of AMS 3.2.2.3. FFs 9, 10 and 12. Use of AMS clause 3.2.2.3 is prescribed when "the FAA needs to know affiliated bidders to prevent practices prejudicial to

⁴ In the adjudication of Comtek on the merits, however, the ODRA declined to conduct a "trial within a trial" with respect to the question of affiliation under the SBA "ostensible subcontractor" regulations and case law, and determined that the issue presented in the Comtek protest was "whether, in deciding to settle, the Product Team was without rational basis in perceiving a litigation risk." *Id.* at 28.

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effective competition.” *See* AMS clause 3.2.2.3, *Prescription*. Specifically, AMS clause 3.2.2.3 states that business concerns “are affiliates of each other when, either directly or indirectly, (1) one entity controls or has the power to control the other, or (2) a third party controls or has the power to control both.” FF 3. As argued by the Center, this language is mirrored in the SBA Regulation at 13 C.F.R. §121.103(a) which describes the principle of affiliation as follows:

Concerns and entities are affiliates of each other when one *controls or has the power to control the other*, or a *third party* or parties *controls or has the power to control both*. It does not matter whether control is exercised, so long as the power to control exists.

(Emphasis added). The SBA regulation further explains that such power to control may arise among individuals with an “identity of interest” such as:

Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. §121.103(f).

The FAA’s Procurement Toolbox Guidance T3.6.1 sets forth four factors that must exist in order for an owner of a firm to be found to possess a “controlling” interest, namely: (1) The eligible owner holds the position of chairperson of the board, president or Chief Executive Officer; (2) The eligible owner has the right to vote his or her shares or other equity interest to elect the majority of voting members of the Board of Directors or other governing body; (3) The eligible owner holds at least 51% unconditionally ownership and control of the operation; and (4) The eligible owner has direct full-time responsibility for the day-to-day management of the business.⁵ However, the establishment or non-

⁵ This fourth factor is demonstrated by evidence of all of the following: (a) Directly related managerial or technical experience and competency; (b) Establishment of company policies; (c) Determination and selection of business opportunities; (d) Supervision and coordination of projects; (e) Control of major expenditures; (f) Hiring and dismissing key personnel; (g) Marketing and sales decisions; and (h) Signature on major business documents.

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existence of a “controlling interest” under the Toolbox Guidance does not, in and of itself, preclude the possibility that a company may be unacceptably “affiliated” with another entity. Moreover, the Toolbox Guidance does not preclude the consideration of additional evidence in the record that indicates that a company is affiliated with a large business in such a way that their business or economic interests are identical and/or dependent on one another. To do so would create, as the Center argues, “a completely new definition of affiliation that was deliberately narrowed from SBA’s regulatory and procedural guidance at 13 C.F.R. 121.103, developed over the past 35 years.” Agency Response at 3.

Additionally, the Center’s actions were consistent with Toolbox Guidance, which identifies as a goal the promotion of small business interests and protection of the integrity of the FAA’s small business utilization program. Towards this end, the FAA Toolbox Guidance, T3.6.1 – Small Business Development Program (Revision 18, July 2006) provides:

To preserve the integrity and foster the objectives of the small business program, the FAA must satisfy itself that the ownership, control, and day-to-day management requirements of the program are fulfilled. Each business claiming eligibility as a small business or small business owned and controlled by a socially and economically disadvantaged individual must be required to provide evidence of eligibility prior to award. The FAA reserves the right to review and verify each firm’s program eligibility.

Given the evidence presented, the ODRA finds that the Contracting Officer acted rationally in conducting further inquiry and seeking guidance from SBA regulations and caselaw to aid her interpretation of the meaning of affiliation and “the power to control.” The Contracting Officer did exactly what she should have done to ensure that only bona fide small businesses would be considered eligible for award, since after all, they are the intended recipients of the Agency’s procurement dollars earmarked for small business set-asides. *See* Toolbox Guidance T3.6.1.

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2. The Contracting Officer's Size Determination based on "totality of the circumstances" is rational and is based on substantial evidence.

The record contains undisputed facts that provide substantial evidence supporting the Contracting Officer's Size Determination. These undisputed facts include: (1) the CEO/President of EIT, who owns 100% of the company stock, was married to the CEO/President of Hi-Tec, a large business; (2) both companies provided engineering and technical support services primarily to the FAA Technical Center and Headquarters; (3) the companies shared office space, *i.e.*, with adjacent suites connected by a door, by virtue of a sublease between Hi-Tec and EIT; (4) the CEO/President of EIT previously was employed by Hi-Tec; (5) EIT participated in initial teaming discussions with the incumbent contractor which were premised on the belief that Hi-Tec also would be a team member and that "the three companies teamed together would make a formidable team that no other team could beat" [Protest, Exhibit 8, Declaration of Haim Gabrieli]; and (6) EIT's proposal identified Hi-Tec as a subcontractor and featured its corporate experience in a manner at least equal to, or in several instances greater than its own. FF 10 and 18.

Although EIT disagrees with the Contracting Officer as to the legal significance of the above facts and presents varied reasons why they should be discounted, the ODRA views these arguments as mere disagreement over an unfavorable result, and as such do not provide a basis for sustaining a protest. *See Protest of Universal Systems & Technology, Inc.*, 01-ODRA-00179.

To the extent that EIT argues it was unfairly prejudiced by its lack of opportunity to respond to the CO's findings with respect to Hi-Tec's registration of EIT's phone system and website, as well as the interconnectedness of the two offices, *see* Protest at 18, the ODRA agrees with the Center's position that:

The simple fact is that these were minor, peripheral, and common sense observations made from publicly available sources that were not critical to the determination. The familial relationship, combined with adjoining offices, prior employment, EIT renting from Hi-Tec, common business

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plans, Hi-Tec participating in EIT's employee interview process, and Hi-Tec being cited for major aspects of Corporate Experience, was more than enough to support the determination.

AR at 5. In sum, the ODRA finds that the Center's Size Determination is consistent with the AMS, has a rational basis, is not arbitrary or capricious, does not constitute an abuse of discretion and is supported by substantial evidence. *Protest of Information Systems and Networks Corporation, supra.*

IV. Recommendation

Based on the foregoing, the ODRA recommends that the protest be denied.

/S/

Marie A. Collins
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

/S/

Anthony N. Palladino
Associate Chief Counsel and Director,
Office of Dispute Resolution for Acquisition