

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

CVE Protest of:

U.S. Department of Veterans Affairs,

Protester,

Re: RC Consolidated Services, Inc.

Contract No. 36C24418P0937

U.S. Department of Veterans Affairs

Network Contracting Office 4

SBA No. CVE-154-P

Decided: July 8, 2020

APPEARANCES

Renee L. Kale, Contracting Officer, U.S. Department of Veterans Affairs, Coatesville, Pennsylvania

Maria L. Panichelli, Esq., Obermayer Rebmann Maxwell & Hippel LLP, Philadelphia, Pennsylvania, for RC Consolidated Services, Inc.

DECISION

I. Introduction and Jurisdiction

On May 1, 2020, the U.S. Department of Veterans Affairs (Protestor), acting through the assigned Contracting Officer (CO), protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of RC Consolidated Services, Inc. (RCCS), the prime contractor under Contract No. 36C24418P0937. Protestor maintains that RCCS is unusually reliant upon its subcontractor, Rochester Midland Corporation (RMC), to perform the primary and vital contract requirements, in contravention of 13 C.F.R. § 134.1003(c). For the reasons discussed *infra*, the protest is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J. A protest brought by a contracting officer is timely if filed anytime during the life of the contract. 13 C.F.R. § 134.1004(a)(2)(ii). The instant contract was awarded to RCCS on December 4, 2017 and is currently in the second option year of performance. Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On September 27, 2017, VA issued Request for Quotations (RFQ) No. VA244-17-Q-1289, seeking “a contractor to provide full service maintenance of hospital grade deodorizing/fragrance of public restrooms, regulated medical waste rooms, soiled linen rooms and other rooms” at the VA Pittsburgh Healthcare System (VAPHS). (Case File (CF), Exh. 233, at 2.) The RFQ's Performance Work Statement (PWS) described the required work as “air freshener service,” and explained that the contractor must:

furnish all labor, supervision, materials, supplies, transportation, equipment and tools to provide air freshener service to VAPHS that is compliant with federal, state and local guidelines, standards, mandates for air fresheners and dispensing equipment.

(CF, Exh. 234, at 1.)

The RFQ was set aside entirely for SDVOSBs, and was assigned North American Industry Classification System (NAICS) code 561720, Janitorial Services. (CF, Exh. 233, at 2.) Quotations were due October 20, 2017. (CF, Exh. 228, at 2.)

B. The Contract

On December 4, 2017, VA awarded Contract No. 36C24418P0937 to RCCS. Pursuant to the terms of the contract, VA agreed to pay RCCS a monthly fixed price to supply and service air fresheners at the VAPHS. (Contract at 4-7.) The monthly fixed price for option year 2 is \$4,452.16. (*Id.* at 5-6.)

C. Protest

On May 1, 2020, Protestor filed the instant protest with OHA. Protestor does not dispute that RCCS itself is an SDVOSB. Rather, Protestor contends that RCCS is unusually reliant upon RMC to perform the contract. Specifically, a review of monthly invoices suggests that RCCS is subcontracting a majority of the contract value to RMC. Protestor alleges:

[I]t appears [that] the majority of the work required by the [PWS] is being performed by the subcontractor, [RMC] a large business for the contract NAICS. It is [Protestor's] contention that [RCCS] is overly reliant on [RMC] to perform the vital and primary requirements of the contract. Without the subcontractor, [RCCS] may not be able to provide the services in accordance with 13 CFR 134.1003(c).

(Protest at 1.) Accompanying its protest, Protestor attached a copy of the contract; copies of invoices submitted by RMC to RCCS; and a 2016 Teaming Agreement between RCCS and RMC.

D. RCCS's Response

On June 26, 2020, RCCS responded to the protest. RCCS maintains that the protest lacks merit and should be denied.

RCCS first explains that, of the \$4,452.16 monthly fixed price paid by VA under this contract, the large majority — \$2,913.73 — is for supplies. (Response at 7.) The monthly cost for services performed under the contract is only \$1,538.43. (*Id.* at 4-5.) Of the amount relating to services, RCCS pays RMC \$697.43 per month (a rate calculated at \$0.97 per dispenser unit) for its labor under the contract. (*Id.*)

As a result, RCCS argues, RCCS is fully compliant with the “Limitations on Subcontracting” requirements, as set forth at 13 C.F.R. § 125.6. The instant contract calls for both supplies and services and thus is considered a “mixed” contract under § 125.6(b). (*Id.* at 6.) In such situations, the NAICS code assigned to the contract is “determinative” in deciding whether the contract is primarily for services or primarily for supplies. (*Id.*, quoting 13 C.F.R. § 125.6(b).) Here, a services NAICS code, 561720, Janitorial Services, was assigned to the contract. Because the instant contract is deemed to be primarily for services, RCCS need only comply with the “Limitations on Subcontracting” provisions relating to services under § 125.6(a)(1). RCCS has done so here because “it does not pay RMC more than 50% of the amount paid by the VA to RCCS *for services*,” and the cost of supplies is not included in the calculations. (*Id.* at 6-7, emphasis RCCS's.) RCCS highlights that “because the VA classified this Contract as a *services* contract, RCCS has no obligation to perform any of the supply portion of this Contract under 13 CFR § 125.6(b).” (*Id.* at 10, emphasis RCCS's.)

RCCS next observes that OHA has identified “four key factors” that may be suggestive of unusual reliance under the ostensible subcontractor rule. None of the four factors is applicable here, because:

(1) The alleged ostensible subcontractor, RMC, was not the incumbent on the predecessor contract. Instead, TL Services, Inc. was the incumbent.

(2) RCCS did not, and will not, hire the majority of its workforce from RMC. In fact, “RCCS did not hire any workers from RMC.”

(3) The contract is managed by RCCS's president, Mr. Ronald Johnson, who has never been employed by RMC.

(4) RCCS is not an inexperienced or unproven business. On the contrary, RCCS's quotation provided several examples of prior janitorial contracts.

(*Id.* at 7-8.)

RCCS insists that RMC is not performing the “primary and vital” functions of the contract. (*Id.* at 9.) The fact that a services NAICS code was assigned to the contract denotes that

the primary purpose of the procurement is services. (*Id.*) While RCCS subcontracts certain services to RMC, RCCS remains responsible for the majority of the contract services. (*Id.*)

E. Supplemental Documentation

With its response to the protest, RCCS moved to admit certain documents into the Case File. Specifically, RCCS requested that the following documents be added to the Case File:

1. RCCS's Vendor Information Page profile;
2. A Teaming Agreement between RCCS and RMC;
3. RCCS's GSA Federal Supply Schedule Contract No. GS-07F-0331T;
4. Information about RCCS's past performance;
5. A breakdown of amounts RCCS paid to its subcontractor, RMC, under Contract No. 36C24418P0937; and
6. A Cure Notice issued to RCCS relating to Contract No. 36C24418P0937.

On June 30, 2020, VA's Center for Verification and Evaluation (CVE) objected to RCCS's request to supplement the Case File. CVE maintains that the documents in question were properly not included in the Case File, because they played no part in CVE's decision to verify RCCS as an SDVOSB.

I agree with CVE that the documents do not pertain to CVE's verification of RCCS, and therefore should not be considered part of the Case File. In reaching a decision on a CVE Protest, however, OHA is not limited to the Case File but may also consider "information provided by the protester, the protested concern, and any other parties." 13 C.F.R. § 134.1007(g). Accordingly, RCCS's request to supplement the Case File is DENIED, but OHA has considered the proffered documents for purposes of this decision.

III. Discussion

A. Burden of Proof

As the protested firm, RCCS has the burden of proving its eligibility as an SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Dates to Determine Eligibility

In a CVE Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of two dates: (1) the date of the bid or initial offer including price, and (2) the date the CVE Protest was filed. *See* 13 C.F.R. § 134.1003(d)(1). Here, RCCS submitted its quotation including price on October 20, 2017, and the instant protest was filed on May 1, 2020. Sections II.B and II.C, *supra*. Therefore, OHA must examine RCCS's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

As of October 20, 2017, RCCS's eligibility was governed by VA's ownership and control rules for SDVOSBs, set forth at 38 C.F.R. part 74. Those rules, however, did not contain any

prohibition against unusual reliance upon a non-SDVOSB subcontractor. As of May 1, 2020, RCCS's eligibility is determined under SBA's rules for ownership and control at 13 C.F.R. part 125, which now also apply to SDVOSB procurements conducted by VA. Effective December 30, 2019, SBA added new provisions to the regulations at 13 C.F.R. part 125, explaining that a firm is not eligible for award of an SDVOSB contract if it is unusually reliant upon a subcontractor that is not an SDVOSB:

(f) *Ostensible subcontractor*. Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside or sole-source service contract or order, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside or sole source service contract or order, the prime contractor is not eligible for award of an SDVO contract.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for an SDVO status protest, as described in subpart D of this part. When the subcontractor is other than small, or alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest subject to the ostensible subcontractor rule, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime SDVO contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

84 Fed. Reg. 65,647, 65,664 (Nov. 29, 2019) (now codified at 13 C.F.R. § 125.18(f)). Concurrently with this change, SBA also revised the procedural rules for CVE Protests, adding that undue reliance upon a subcontractor is valid grounds to challenge the status of an SDVOSB:

(c) *Unusual reliance*. SBA will consider a protest challenging whether the prime contractor is unusually reliant on a subcontractor that is not CVE verified, or a protest alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.

84 Fed. Reg. at 65,666 (now codified at 13 C.F.R. § 134.1003(c)).

C. Analysis

Protestor does not dispute that RCCS itself is an SDVOSB. Section II.C, *supra*. Rather, the sole issue presented in this case is whether RCCS is in violation of 13 C.F.R. §§ 125.18(f) and 134.1003(c) due to excessive subcontracting to RMC. Having reviewed the record and the arguments of the parties, I find that RCCS has persuasively shown that it is not in violation of §§ 125.18(f) and 134.1003(c). This protest therefore must be denied.

The provision at § 125.18(f)(2) is dispositive of this protest. According to that rule, a prime contractor cannot be found in violation of §§ 125.18(f) and 134.1003(c) “where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.” Section III.B, *supra*.

Here, RCCS has explained that the instant contract is a “mixed” procurement assigned a services NAICS code, so RCCS need only meet the limitations on subcontracting related to services at § 125.6(a)(1). That regulation, in turn, stipulates that a prime contractor may not subcontract more than 50 percent of services to entities that are not similarly situated. The prime contractor is not restricted, however, from subcontracting any or all of the supply components of the procurement. Because RCCS subcontracts only a minority of contract services to RMC, RCCS is compliant with § 125.6(a)(1). Section II.D, *supra*. As a result, RCCS has established its compliance with § 125.6, and there is no basis to find RCCS in violation of §§ 125.18(f) and 134.1003(c).¹

IV. Conclusion

RCCS has proven its eligibility as an SDVOSB by a preponderance of the evidence. The protest therefore is DENIED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

KENNETH M. HYDE
Administrative Judge

¹ It is worth noting that §§ 125.18(f) and 134.1003(c) arguably do not even apply to the instant case. As discussed above, §§ 125.18(f) and 134.1003(c) did not become effective until December 30, 2019, more than two years after RCCS submitted its quotation for this procurement, and RCCS presumably would have relied on the rules that contemporaneously existed in preparing its quotation. I find it unnecessary to resolve this question because, even assuming §§ 125.18(f) and 134.1003(c) do apply in this case, RCCS plainly is not in violation in any event.