

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

CVE Protest of:

Welch Construction, Inc.,

Protestor,

Re: Laubacker Enterprises, Inc.

Solicitation No. 36C78621B0020

U.S. Department of Veterans Affairs

SBA No. CVE-210-P

Decided: November 24, 2021

APPEARANCES

Mark Welch, President, Welch Construction, Inc., Marcellus, New York

Robert E. Laubacker, President, Laubacker Enterprises, Inc., Niagara Falls, New York

DECISION¹

I. Introduction and Jurisdiction

On September 13, 2021, Welch Construction, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Laubacker Enterprises, Inc. (LEI), in connection with U.S. Department of Veterans Affairs (VA) Invitation for Bids (IFB) No. 36C78621B0020. Protestor argues that Mr. Robert E. Laubacker, the service-disabled veteran owner of LEI, does not fully control LEI due to other outside employment, and that LEI will be unusually reliant upon one or more non-SDVOSB subcontractors to perform the instant contract. 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.² Protestor filed its protest within five business days after bid opening, so the

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, LEI informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

² The regulations at 13 C.F.R. part 134 subpart J became effective on October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

protest is timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On July 27, 2021, VA issued IFB No. 36C78621B0020 for a gravesite expansion project at Bath National Cemetery, New York. (Case File (CF), Exh. 66). The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$39.5 million average annual receipts. (*Id.* at 1.) Bids were due September 10, 2021. (*Id.*) LEI and Protestor submitted timely bids.

B. Protest

On September 10, 2021, bids were opened and the CO announced that LEI was the low bidder and apparent awardee. On September 13, 2021, Protestor filed a protest with the CO, challenging LEI's SDVOSB status. The CO forwarded the protest to OHA for review.

In the protest, Protestor alleges that Mr. Laubacker, the service-disabled veteran owner of LEI, is a full-time employee of another firm, Scott Lawn Yard Company. (Protest at 4.) Protestor bases this claim on Mr. Laubacker's Linked-In profile, which indicates that Mr. Laubacker has been an employee at Scott Lawn Yard Company since 2018 and remains employed there. (*Id.*)

Protestor further argues that LEI will not self-perform at least 15% of the contract work, as is required for construction contracts pursuant to limitations on subcontracting restrictions. (*Id.* at 3-4.) LEI's Vendor Information Pages profile states that LEI has only one employee. (*Id.* at 3.) Further, LEI's address appears to be a residential home, so LEI likely does not have the necessary equipment and vehicles to perform this contract. (*Id.* at 4.) As a result, Protestor contends, LEI must rely upon one or more non-SDVOSB subcontractors to perform all, or nearly all, of this contract.

C. LEI's Response

On October 4, 2021, LEI responded to the protest. LEI insists that Mr. Laubacker “is solely responsible for hiring and termination of employees, signing payroll, estimating and procurement, financial decisions, acquisition of equipment, bonding and insurance negotiations, and is the only authorized signatory for LEI.” (Response at 2.) Contrary to Protestor's suggestions, then, Mr. Laubacker does fully control LEI. (*Id.*)

With regard to the instant procurement, LEI contends that it will self-perform a large majority of the contract work, and will subcontract only approximately 11% of the total contract value. (*Id.*) LEI offers a list of four subcontractors that it will utilize for this contract. (*Id.*) Further, LEI already has signed leases in place at two locations that will be used for storage, equipment maintenance, and office space for purposes of performing this contract. (*Id.*)

D. OHA's Request for Additional Information and LEI's Response

On November 3, 2021, OHA issued an order, pursuant to 13 C.F.R. § 134.1007(g), requesting that LEI provide additional information about Mr. Laubacker's outside employment and other commitments. Specifically, OHA requested that LEI address in further detail Protestor's allegation that Mr. Laubacker is unable to work full-time at LEI because he is a full-time employee of Scott Lawn Yard Company.

On November 15, 2021, LEI responded to OHA's order. LEI asserts that Mr. Laubacker no longer has any outside employment or other commitments that prevent him from working full-time at LEI. (Response to Order at 1.) Mr. Laubacker resigned from Scott Lawn Yard Company in May of 2020, and has had no further involvement with Scott Lawn Yard Company since that time. (*Id.*) In addition, although Mr. Laubacker previously was enrolled in a graduate studies program, he withdrew from that program in 2018. (*Id.*) LEI argues that Mr. Laubacker's Linked-In profile, relied upon by Protestor, is out-of-date because Mr. Laubacker has not updated it since 2018. (*Id.*) LEI highlights that Mr. Laubacker currently devotes “a minimum of 60 hours per week” to operating and managing LEI. (*Id.*) In support, LEI offers a list of five projects recently completed by LEI, in which Mr. Laubacker was personally and extensively involved. (*Id.* and Attach. C.)

E. Case File

The Case File reflects that LEI is a corporation based in the state of New York. (CF, Exh. 22.) Mr. Laubacker is 100% owner of LEI, and serves as LEI's President, its highest officer position. (CF, Exhs. 24, 26, and 50.) Mr. Laubacker is a service-disabled veteran. (CF, Exh. 29.)

LEI's Bylaws state that “[t]he business and affairs of [LEI] shall be managed by the Board of Directors.” (CF, Exh. 26, at 29.) Among other powers, the Board appoints LEI's officers and “may remove any officer at any time with or without cause.” (*Id.* at 31-32.) Mr. Laubacker is LEI's sole director. (CF, Exh. 48.)

The Case File contains multiple versions of Mr. Laubacker's resume. (CF, Exhs. 10, 21, 30, and 41.) According to his most recent resume, Mr. Laubacker currently is employed only at LEI. (CF, Exh. 41.) In a letter to VA's Center for Verification and Evaluation (CVE) dated December 17, 2019, LEI stated that it does not have any business relationship with Scott Lawn Yard Company. (CF, Exh. 54.) LEI's only connection with Scott Lawn Yard Company is that Mr. Laubacker was employed there “temporar[il]y while attending university.” (*Id.*)

On January 2, 2020, CVE verified LEI as an SDVOSB and added LEI to the database of eligible concerns. (CF, Exh. 58.)

III. Discussion

A. Burden of Proof

As the protested firm, LEI has the burden of proving its eligibility 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, LEI submitted its bid on September 10, 2021, and the instant protest was filed on September 13, 2021. Sections II.A and II.B, *supra*. Therefore, OHA must examine LEI's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

C. Analysis

I find no merit to this protest. The record reflects that Mr. Laubacker, a service-disabled veteran, fully owns and controls LEI, a New York corporation. Section II.E, *supra*. Mr. Laubacker owns 100% of LEI, and there are no conditions on his ownership. *Id.* Further, LEI's Bylaws provide that “[t]he business and affairs of [LEI] shall be managed by the Board of Directors,” and Mr. Laubacker is the sole director of LEI. *Id.* Mr. Laubacker also holds LEI's highest officer position (that of President), and there is no dispute that Mr. Laubacker has managerial experience of the extent and complexity needed to run the concern. *Id.* Mr. Laubacker thus unconditionally and directly owns LEI, and he controls both the day-to-day and long-term decision-making of the corporation. 13 C.F.R. §§ 125.12 and 125.13(a)-(b), (e)(1)(i). CVE therefore properly verified LEI as an SDVOSB.

In challenging LEI's status, Protestor raises two principal allegations. First, Protestor contends that Mr. Laubacker cannot work full-time for LEI due to outside employment or other commitments. Section II.B, *supra*. The applicable regulations state that:

Normal business hours. There is a rebuttable presumption that a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work. This may include, but is not limited to, other full-time or part-time employment, being a full-time or part-time student, or any other activity or obligation that prevents the service-disabled veteran from actively working for the firm during normal business operating hours.

13 C.F.R. § 125.13(k). In the instant case, LEI has persuasively shown, and the Case File confirms, that Mr. Laubacker currently works full-time only for LEI. Sections II.D and II.E, *supra*. Although Mr. Laubacker previously was employed by Scott Lawn Yard Company, he resigned from that position in May 2020, well before the relevant dates to determine eligibility. *Id.* Similarly, Mr. Laubacker withdrew from a graduate studies program in

2018. *Id.* LEI further represents that Mr. Laubacker now works at least 60 hours a week for LEI, during its normal business hours. *Id.* As such, the presumption at 13 C.F.R. § 125.13(k) does not apply here.

Protestor's remaining allegation is that, even if LEI itself is an SDVOSB, LEI will improperly subcontract more than 85% of this contract to non-SDVOSBs. Section II.B, *supra*. OHA's rules of procedure provide that a protestor may bring an SDVOSB status protest contending that a “prime contractor is unusually reliant on a subcontractor that is not CVE verified, or . . . alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.” 13 C.F.R. § 134.1003(c). The prime contractor may overcome such a challenge, however, “where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting” restrictions. 13 C.F.R. § 125.18(f)(2).

In the instant case, LEI indicates in its response to the protest that LEI will subcontract only approximately 11% of the total contract value, and offers a list of its four intended subcontractors. Section II.C, *supra*. There is nothing in LEI's bid, or elsewhere in the record, that undermines or contradicts these claims. Further, although Protestor alleges that LEI would be unable to perform this contract from its primary business address, which appears to be a private residence, LEI has demonstrated that it has already entered into two separate leases for facilities that will be used to perform this contract. *Id.* Given this record, I see no basis to conclude that LEI will not comply with limitations on subcontracting, or that LEI will be unusually reliant upon one or more non-SDVOSB subcontractors.

IV. Conclusion

LEI has shown that it is an eligible SDVOSB. Accordingly, the protest 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