

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

IN THE MATTER OF:

Ferrotherm Corporation

Appellant

Re: Union Machine Company of Lynn, Inc.

Solicitation Nos. SPM4A7-07-R-0648
and SPM4A7-07-Q-6641

Defense Logistics Agency
Defense Supply Center Richmond
Richmond, Virginia

SBA No. VET-118

Decided: July 13, 2007

APPEARANCES

Michael A. Hordell, Esq., Sean P. Bamford, Esq., and Heather Kilgore Weiner, Esq.,
Pepper Hamilton LLP, Washington, D.C., for Appellant.

Adam Timothy, VP of Marketing & Sales, for Union Machine Company of Lynn, Inc.

Kevin R. Harber, Esq., Office of General Counsel, Small Business Administration, for
the Agency.

DECISION AND REMAND ORDER

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 125 and 134.

II. Issues

Whether the D/GC should have found untimely an SDVO SBC protest filed more than
five business days after award, but within one day of the actual notification to the protestor of the
identity of the awardee, when no pre-award notification was required because the SDVO SBC
solicitation was issued under Simplified Acquisition Procedures.

Whether the D/GC should have found premature an SDVO SBC protest made prior to the award or identification of the apparent successful offeror for the procurement in question.

III. Background

A. Protests and the D/GC Dismissal

On February 12, 2007, the Defense Supply Center Richmond (DSCR) issued RFP No. SPM4A7-07-R-0648 (the R solicitation). On April 7, 2007, DSCR issued RFQ No. SPM4A7-07-Q-6641 (the Q solicitation). Both solicitations were issued under Simplified Acquisition Procedures, seeking proposals for a Shroud Segment used on a J85 Turbojet engine. The Contracting Officer (CO) set the solicitations aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC). Ferrotherm Corporation (Appellant), a small but not an SDVO concern, submitted proposals for both solicitations.

On April 19, 2007, the CO determined that Union Machine Company of Lynn, Inc. (Union) was the potential awardee for the Q solicitation. Protest File, Tab G, at 25. Since the CO issued the solicitations pursuant to FAR 13, Simplified Acquisition Procedures, the CO was not required to give notice of award to unsuccessful offerors. FAR 13.106-3(c). On April 26, 2007, Appellant sent emails to DSCR requesting immediate notification of award and stating its *intent* to protest Union's SDVO SBC status with regard to both solicitations. Protest File, Tab I, at 35; Protest File, Tab J, at 37-38. On April 27, 2007, DSCR responded (with the "RE" line referencing the Q solicitation) that "under simplified acquisition procedures, we do not issue Letters of Intent to Award...I need to know what the basis of your allegation is that Union Machine is not a SDVOSB. Please forward immediately." Protest File, Tab I, at 33. On April 27, 2007, Appellant filed two separate protests (with regard to the Q and R solicitations), asserting that Union was not 51% owned by a service-disabled veteran because "there are potentially four (4) other owners of stock in addition to Mr. Harper, including his mother and sister...." Protest File, Tab I, at 33; Appeal Petition, Ex. 6.

On May 2, 2007, DSCR forwarded the protests to the Director for Government Contracting (D/GC) at the Small Business Administration (SBA). Protest File, Tab J, at 36; Protest File, Tab K, at 55.

On May 3, 2007, the CO determined that Union was the potential awardee for the R solicitation. Protest File, Tab G, at 25.

On May 21, 2007, the D/GC dismissed both protests. The D/GC dismissed the April 27, 2007 Q solicitation protest as untimely under 13 C.F.R. § 125.25(d)(2) because it was filed six business days after the date Union was identified as the apparent successful offeror, i.e., April 19, 2007. With regard to the R solicitation protest, the D/GC erroneously attributed Appellant's protest to DSCR. However, DSCR merely forwarded Appellant's protest on May 2, 2007.¹ The

¹ The SBA asserts that it treated the DSCR letter of May 2, 2007, as a protest by the CO because Appellant only expressed its intent to file a protest with regard to the R solicitation.

D/GC dismissed the R solicitation protest as premature under 13 C.F.R. § 125.25(d)(4) because DSCR's "request for a determination of Union's SDVO SBC eligibility...was dated May 2, 2007", and DSCR did not identify Union as the apparent successful offeror until May 3, 2007.

B. Appeal Petition

On June 4, 2007, Appellant filed the instant appeal of the D/GC's dismissal of both protests with the Office of Hearings and Appeals (OHA). Appellant urges OHA to remand the case to the D/GC for a determination as to whether Union is an SDVO SBC. Appellant asserts that 13 C.F.R. § 125.25(d) does not address the issue of timeliness when no pre-award notification is provided to offerors under Simplified Acquisition Procedures. Accordingly, Appellant argues that the D/GC should have applied the timeliness procedures set forth in 13 C.F.R. § 121.1004(a)(5), which provide that the five-day protest period will commence upon oral notification by the contracting officer of the identity of the apparent successful offeror. Since DSCR informed Appellant on April 27, 2007, that it intended to award Union a contract pursuant to both solicitations, Appellant asserts that its April 27, 2007 protests as to both solicitations were timely filed.

C. Union's Response

On June 6, 2007, Union filed its Response with documentation allegedly substantiating its SDVO SBC status.

D. SBA Response

On June 13, 2007, SBA responded to the Petition. SBA asserts that the D/GC's dismissal of both protests should be sustained.

In responding to Appellant's Petition, SBA concedes that the SDVO SBC regulations do not address what constitutes an untimely or premature protest of awards made under Simplified Acquisition Procedures. However, SBA asserts that it has an "inherent authority to fill interstices in the law" and that OHA should give deference to the Agency's interpretation. Accordingly, SBA's interpretation of "timeliness" as meaning "within five business days of the date of award (the date the apparent successful offeror was identified)" and premature as "at any point prior to the date of award (the date the apparent successful offeror was identified)" is entitled to deference. Therefore, SBA asserts that the D/GC's determination that Appellant's Q solicitation protest was untimely and Appellant's R solicitation protest was premature and therefore subject to dismissal was not based on a clear error of fact or law and should be affirmed.

Response, at 8, n.2 (citing an April 26, 2007 email). However, the Appeal Petition (Exhibit 6) contains an April 27, 2007 email wherein Appellant clearly protests Union's SDVO SBC status with regard to the R solicitation. Regardless, the error is harmless because even if the D/GC correctly attributed the protest to Appellant, the protest predates the DSCR letter and likewise would have been found premature.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 business days of receiving the D/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

The standard of review for SDVO SBC appeals is whether the D/GC's protest determination was based on clear error of fact or law. 13 C.F.R. § 134.508; *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 8 (2005). In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the D/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard which is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

B. Merits of Appeal

The Record indicates that DSCR issued the solicitations pursuant to FAR 13, Simplified Acquisition Procedures. FAR 13.106-3(c) does not require notice to be given to unsuccessful offerors and 13 C.F.R. § 125.25(d) does not address the issue of protest timeliness when no pre-award notification is provided to offerors under Simplified Acquisition Procedures. The issue on appeal, thus, is whether the D/GC should have applied the timeliness procedures set forth in 13 C.F.R. § 121.1004(a)(5), which provide that the five business day protest period will commence upon oral notification by the contracting officer of the identity of the apparent successful offeror, when no pre-award notification is required because the solicitation is issued under Simplified Acquisition Procedures.

The Agency argues that because the question of awards made under Simplified Acquisition Procedures is not specifically addressed in 13 C.F.R. § 125.25, it is "an interstitial matter" and the Agency has discretion to make rules to fill these interstices in the law, relying on *Long Island Care at Home, Ltd. v. Coke*, 127 S.Ct. 2339 (2007), and *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990). However, the Agency's argument misses the important point that these cases involved "interstices" in statutes which the agencies in question had filled with actual written regulations promulgated under notice and comment rulemaking pursuant to power specifically delegated to them by Congress. Here, the "interstice" is in the regulations themselves, and the D/GC is not issuing a rule, but making a determination in the course of handling an SDVO SBC protest.

SBA argues for deference, I must reject that argument. The type of deference SBA seeks for this decision is reserved for notice and comment rulemaking or other final agency action on review in a Federal court. *See United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). Agency interpretations contained in policy statements or positions taken in litigation are not entitled to the deference granted to those interpretations made under notice and comment

rulemaking. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 882-884 (7th Cir. 2002) (Easterbrook, J., concurring). Accordingly, the D/GC's determination to count the five business day time limit for filing an SDVO SBC protest as running from the date of an award which was made without notice to Appellant is not entitled to *Chevron* deference. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather it is OHA's final agency decision which is entitled to *Chevron* deference when it is reviewed by a Federal court. See 13 C.F.R. § 134.515(a).

Moreover, there is an analogous SBA regulation and OHA caselaw dealing with the timeliness of protests of procurements conducted under Simplified Acquisition Procedures. OHA has held that when there is no requirement for notice of award, 13 C.F.R. § 121.1004(a)(5) states a protestor has five business days to file a size protest once being informed of the identity of the successful offeror. *Size Appeal of Mid-Continent Testing Laboratories, Inc.*, SBA No. SIZ-4773 (2006). I am also informed by an analogous case, issued prior to the codification of 13 C.F.R. § 121.1004(a)(5), which held that a size protest was timely when the protesting concern filed it within five days of learning from the Contracting Officer that she had awarded the contract to the challenged concern. *Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447 (2001) (noting that, under Simplified Acquisition Procedures, protester necessarily filed its size protest after award).

I also find persuasive that the Government Accountability Office has held the time to protest an action taken under these procedures runs from the date a protester is notified of the action that is the basis of its protest. *Tiger Enterprises, Inc.*, B-292815.3; B-293439, 2004 CPD ¶ 19, 2004 WL 94388 at *3 (January 20, 2004); *Payne Construction*, B-291629, 2003 CPD ¶ 46, 2003 WL 253713 at *3 (February 4, 2003). This holding is appropriate, as a protester cannot be held to knowledge of an action of which he has received no notice. Holding a protester to a deadline measured from an action he was not notified of would render the protest process meaningless, and would likely be a violation of due process.

Therefore, I hold that OHA will follow our precedent in size cases and 13 C.F.R. § 121.1004(a)(5), and, when a procurement is conducted under Simplified Acquisition Procedures which do not require notice of award to the unsuccessful offerors, that the five business day time limit in 13 C.F.R. § 125.25(d) to file a protest of an apparent successful offeror's SDVO SBC status runs from the date of the protester's notification of the identity of the apparent successful offeror or awardee.

However, I note that the Record is devoid of evidence as to the date that Appellant received notification that Union was the apparent successful offeror with regard to both solicitations. Appellant alleges that it received notification of DSCR's intent to award to Union under both solicitations on April 27, 2007. Appeal Petition, at 3. However, the Protest File merely contains an April 27, 2007 email (with the "RE" line referencing the Q solicitation) wherein DSCR responded to Appellant's email of its *intent* to protest that "under simplified acquisition procedures, we do not issue Letters of Intent to Award...I need to know what the basis of your allegation is that Union Machine is not a SDVOSB. Please forward immediately." Protest File, Tab I, at 33.

Accordingly, I will treat the April 27, 2007 email as the date that Appellant was notified that Union was the apparent awardee with regard to the Q solicitation. Therefore, Appellant's protest of Union's SDVO SBC status under the Q solicitation must be held to be timely, as it was made within one day of learning that Union was the apparent awardee.

Although Appellant asserts that DSCR notified it on April 27, 2007, that Union was the apparent awardee under the R solicitation, the Record shows that DSCR did not identify Union as the apparent awardee under the R solicitation until May 3, 2007. Therefore, Appellant's April 27, 2007 protest of Union's SDVO SBC status under the R solicitation was made prior to the identification of Union as an apparent successful offeror. The protest was made before any action had been taken, and when there was, as yet, nothing to protest. SBA's jurisdiction to entertain SDVO SBC protests extends only to those concerning apparent successful offerors or awardees, and on April 27th, Union was neither for the R solicitation. The regulation is clear that protests received prior to notification of the identity of the awardee are premature, and must be dismissed. 13 C.F.R. § 125.25(d)(4). The D/GC acted properly in dismissing the protest regarding the R solicitation, and Appellant can show no error of law here.

Accordingly, the instant appeal is GRANTED in part, and REMANDED to the D/GC for an SDVO SBC determination of Union's status as to the Q solicitation, and DENIED in part as to the R solicitation, where the D/GC's dismissal of the Appellant's protest as premature is AFFIRMED.

V. Conclusion

Appellant has established clear error of law in the D/GC's decision to dismiss its protest of Union's SDVO SBC status under Solicitation No. SPM4A7-07-Q-6641. However, Appellant has failed to establish clear error as to the D/GC's dismissal of its protest of Union's SDVO SBC status under Solicitation No. SPM4A7-07-R-0648.

Accordingly, I GRANT the instant Appeal Petition as to the dismissal of Appellant's April 27th protest of Union's SDVO SBC status as to Solicitation No. SPM4A7-07-Q-6641, and REMAND the case to the D/GC for a full SDVO SBC determination of Union's status. I AFFIRM the D/GC's dismissal of Appellant's April 27th protest of Union's SDVO SBC status under Solicitation No. SPM4A7-07-R-0648.

This is the final decision of the Small Business Administration with regard to Solicitation No. SPM4A7-07-R-0648. *See* 13 C.F.R. § 134.515(a).

CHRISTOPHER HOLLEMAN
Administrative Judge