

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

IN THE MATTER OF:

Cambridge Federal Solutions, LLC

Appellant

Solicitation No. FA3047-07-R-0030
U.S. Department of the Air Force
Lackland Air Force Base, Texas

SBA No. VET-131

Decided: April 18, 2008

REMAND ORDER

PENDER, 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. Issue

Whether the Acting Director for Government Contracting for the U.S. Small Business Administration made a clear error of fact or law in determining that Cambridge Federal Solutions, LLC is an ineligible Service-Disabled Veteran-Owned Small Business Concern. *See* 13 C.F.R. § 134.508.

III. Background

A. Protests and AD/GC Determination

On June 15, 2007, the U.S. Department of the Air Force, Lackland Air Force Base issued Request for Proposals No. FA3047-07-R-0030 (RFP) as a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. On December 14, 2007, Cambridge Federal Solutions, LLC (Appellant) submitted its offer. Protest File (PF), at 345.

On March 5, 2008, the Contracting Officer (CO) notified unsuccessful offerors that the apparent successful offeror was Appellant. PF, at 244. On March 11, 2008, Catalyst Professional Services, Inc. protested both Appellant's size and SDVO status with the CO. PF, at 228. On March 11, 2008, Angel Staffing protested Appellant's size and SDVO status with the

CO. PF, at 347. On March 12, 2008, the CO forwarded the SDVO protests to the Small Business Administration's (SBA) Office of Government Contracting. PF, at 228, 345.

On March 17, 2008, the Acting Director for Government Contracting (AD/GC) notified Appellant of both protests. PF, at 207, 215. The AD/GC requested twenty-nine documents¹ to demonstrate that Appellant was 51% unconditionally and directly owned and controlled by one or more service-disabled veterans at the time of Appellant's offer. PF, at 208-209, 216-217. The AD/GC instructed Appellant to provide these documents within five business days from receipt of SBA's letter. PF, at 208, 216. The AD/GC also notified Appellant that any response to the protests must be received by the SBA no later than the close of business on March 21, 2008. PF, at 210, 218.

On March 21, 2008, Appellant submitted its response and attached many of the requested documents. The response and attached documents, Appellant asserted, had already been submitted in response to a size protest at the SBA Office of Government Contracting, Area II (Area Office), and accordingly Appellant simply attached a copy of its response and documents that were sent to the Area Office. PF, at 18-143. Appellant asked that SBA contact Malachi Jones, Appellant's Principal, if SBA required any additional information. PF, at 18.

On March 24, 2008, Edith Butler at SBA's Office of Government Contracting sent emails to Mr. Jones requesting the following documents: (1) a copy of Mr. Jones' resume, (2) a copy of Mr. Jones' Department of Veterans Affairs letter stating his service-connected disability, (3) a copy of Appellant's business tax registration to transact business in the state of Virginia, (4) a copy of Appellant's current lease, and (5) a copy of Appellant's Operating Agreement. PF, at 15. This email did not provide a deadline for submission of these documents. *Id.*

On the same day, March 24, 2008, Mr. Jones responded to Ms. Butler with an email stating:

Thanks for your email. I am currently out of the country and expected [sic] to be back on March 31st. I am not sure this requirement can be put on hold until April 1, 2008. I can try to get you items number 3 and 4 very soon and also a copy of the operating agreement. However, I do not have access to my resume and the documents of my disability which are at my house. Please let me know if it is ok for me to send items 1 and 2 on April 1, 2008. Meanwhile, I will keep trying my best to get then [sic] to you earlier, if possible.

PF, at 14. On March 25, 2008, Ms. Butler emailed Mr. Jones stating the five items must be received by March 31, 2008. PF, at 12.

On April 2, 2008, the AD/GC issued a determination finding Appellant failed to meet the SDVO SBC eligibility requirements at the time of offer for the instant solicitation. PF, at 1. The

¹ For example, copies of stock certificates, buy/sell agreements, shareholder agreements, trust agreements, articles of incorporation.

AD/GC found that Appellant did not submit the documentation that would establish its SDVO SBC eligibility within the ten business day period (by March 31, 2008) provided in 13 C.F.R. § 125.27(c)(1). PF, at 4. Accordingly, the AD/GC found Appellant an ineligible SDVO SBC. PF, at 7.

B. Appeal Petition

On April 4, 2008, Appellant filed the instant appeal of the AD/GC's determination with the SBA Office of Hearings and Appeals (OHA). Appellant asserts that the AD/GC's determination is based on a clear error of fact because Appellant submitted the five documents referenced in the determination on March 28, 2008, and again on April 1, 2008.

Appellant asserts that on March 28, 2008, Mr. Jones sent Ms. Butler an email attaching the additional documents requested. Appeal, at 3. Appellant attached this email to its appeal. Appeal, Exhibit 2. Appellant contends the email did not bounce back and Appellant assumed the transmission was completed.

Appellant then asserts on April 1, 2008, Mr. Jones telephoned Ms. Butler to confirm she received the documents. Appellant asserts Ms. Butler "stated she had not been able to access her emails because of a computer problem" and "requested that Mr. Jones resend his email dated March 28, 2008, with attached documents, to a colleague, Pamela McClam." Appeal, at 3. That same day, April 1, 2008, Appellant asserts Mr. Jones emailed the information to Ms. McClam.

Appellant also argues the SBA violated its own regulations by initially requiring information to be submitted by March 21, 2008, when Appellant was entitled to receive ten business days, until March 31, 2008, to supply the requested information under 13 C.F.R. § 125.27(c)(1).

C. OHA Notice and Order

On April 7, 2008, I issued a Notice and Order informing the parties of the appeal and setting April 15, 2008, as the date for the close of record. I also ordered the SBA to file and serve the Protest File with OHA no later than April 15, 2008. I further ordered all non-privileged material in the Protest File to be served on Appellant. See 13 C.F.R. §§ 134.204(c)(1), 134.506.

D. SBA's Motion

On April 14, 2008, SBA submitted a motion for reconsideration of my order requiring SBA to serve all non-privileged material in the Protest File on Appellant. SBA argues that 13 C.F.R. § 134.507 requires the AD/GC to send the Protest File to OHA and only OHA. SBA asserts this intent is found in the preamble to 13 C.F.R. § 134.507, which states "the protest file will not be sent to the parties to the appeal because it typically contains confidential information that cannot be disclosed to other parties." 70 Fed. Reg. 8923, 8925 (Feb. 24, 2005). SBA asserts that because OHA's Order conflicts with the SBA's stated interpretation of its own regulation, which was issued directly by the Agency's Administrator, SBA is compelled to adhere to the Agency's interpretation of 13 C.F.R. § 134.507.

SBA then asserts 13 C.F.R. § 134.507 specifically exempts the AD/GC's transmission of the Protest File from the general service rule of 13 C.F.R. § 134.204. Next, SBA argues this process is "similar to the process that SBA follows in size and NAICS appeals, where the SBA Area Office sends the case file only to OHA." Motion, at 3.

Finally, SBA asserts it will not cause substantial prejudice to Appellant by not serving Appellant with the Protest File because the information is either information SBA already sent to Appellant or information Appellant sent to the SBA. Moreover, if SBA followed OHA's order in a protestor's appeal, the SBA would be obligated to serve confidential information, contained in the protest file, about the protested concern to the protestor. SBA argues "[t]his would put SBA in the position of either having to violate OHA's Order or running the risk of incurring litigation related to its disclosure of confidential information." SBA Motion, at 5.

E. SBA Response

On April 15, 2008, SBA filed its Response and the Protest File.² SBA asserts the AD/GC did not commit clear error of fact or law in concluding that Appellant did not submit the documentation that would establish its SDVO SBC eligibility within the ten business day period provided in 13 C.F.R. § 125.27(c)(1), a conclusion that led the AD/GC to find Appellant an ineligible SDVO SBC.

SBA asserts the Protest File does not support Appellant's claim that it submitted additional documentation to SBA on March 28 and April 1, 2008. Further, "Appellant's inclusion in its Appeal Petition of a copy of the e-mail it alleges Mr. Jones sent on March 28, 2008 cannot overcome the absence of the necessary documents in the Protest File." Response, at 8.

SBA also argues Appellant should have called SBA to verify receipt of the documents before the deadline and not one day after the deadline. Alternatively, SBA argues Appellant should have used a verifiable method of delivery.

Finally, SBA asserts regardless of the time period given in the protest notification letter for the submission of documents, the AD/GC waited the full ten business days, as required by 13 C.F.R. § 125.27(c)(1), for the documents before issuing her determination.

IV. Discussion

A. Timeliness and Standard of Review

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

² SBA did not serve the Protest File on Appellant as it is awaiting my ruling on its Motion.

The standard of review for SDVO SBC appeals is whether the AD/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.508. 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 AD/GC based her 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 that is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

B. Subsequent Motions

On April 16, 2008, Appellant filed a motion for an expedited decision. On April 17, 2008, SBA filed a reply to Appellant's motion. Both filings were submitted after the close of the record and therefore I am not considering these filings.

C. Service of the Protest File

The general service provision in 13 C.F.R. § 134.204(c)(1) provides that "[c]omplete copies of all pleadings and other submissions filed with OHA must be served upon all other parties...." The service and filing requirements for SDVO SBC appeals state that the general service provisions of 13 C.F.R. § 134.204 "apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart." 13 C.F.R. § 134.506 (emphasis added).

Pursuant to 13 C.F.R. § 134.507:

Upon receipt of an appeal petition, the D/GC will send to OHA a copy of the protest file relating to that determination. The D/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

SBA argues 13 C.F.R. § 134.507 specifically exempts the AD/GC's transmission of the Protest File from the general service rule of 13 C.F.R. § 134.204. However, I do not find any specific exemption in 13 C.F.R. § 134.507 to the general service requirements. The regulation does not address, let alone specifically exempt, serving the appellant a copy of the protest file. Rather, 13 C.F.R. § 134.507 merely establishes the procedures for filing the protest file at OHA. Accordingly, it does not set forth any deviation from the general service rule at 13 C.F.R. § 134.204. *Compare* 13 C.F.R. § 134.507, *with* 13 C.F.R. § 134.511 (specifically disallowing discovery in SDVO SBC appeals, contrary to the general rule in 13 C.F.R. § 134.213).

Moreover, 13 C.F.R. § 134.507 is consistent with 13 C.F.R. § 134.204; accordingly, 13 C.F.R. § 134.204 applies.³ Thus, I find no conflict between OHA's standard Notice and

³ The SDVO SBC regulations state that "[e]xcept where inconsistent with this subpart, the provisions of Subpart A and B of this part [this includes the general service provision of

Order and 13 C.F.R. § 134.507 and no ambiguity in 13 C.F.R. § 134.507 that authorizes me to consult its regulatory history (the preamble). *See Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (“It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous.”).

I find SBA’s argument that failing to serve Appellant with the Protest File will not prejudice Appellant because Appellant already possesses the information particularly disingenuous in this appeal. This appeal is not about legal error but factual error, whether or not Appellant timely submitted information to the SBA. SBA cites to the Protest File repeatedly in its Response to assert that it never received Appellant’s documents. Appellant asserts otherwise, and attached an email to prove it did send the information to SBA. Appellant certainly has the due process right to review the Protest File to confirm that it does not contain this documentation (or object to the absence of a document which Appellant believes was erroneously omitted from the Protest File) or compare the information in the Protest File with its own records.

With regard to the SBA’s concern with revealing a protested concern’s confidential information to a protestor, the SBA under 13 C.F.R. § 134.204(e) has procedures in place for protecting confidential information. In an appeal such as this one, such procedures are unnecessary for there is no logical reason to think SBA needs to protect information Appellant provided in the first instance.

I also find SBA’s analogy to an Area Office protest file in a size case inapposite.⁴ In size appeals, Area Offices do not authenticate or certify the record. Moreover, unless OHA requests SBA to respond, it is rare that SBA provides any kind of an adversarial response to an appeal petition. However, in SDVO SBC appeals, SBA always responds. Therefore, the better analogy involves 8(a) and Small Disadvantaged Business (SDB) appeals, where SBA does supply the unprivileged portions of the record to the appellant. *See* 13 C.F.R. § 134.406(c).

In light of my Remand Order, it is not necessary for SBA to serve Appellant a copy of the unprivileged portions of the Protest File. However, in the future, SBA must serve the unprivileged portions of the protest file on the appellant.

D. Merits of the Appeal

The AD/GC made an adverse inference that Appellant was not an eligible SDVO SBC because the AD/GC did not receive the requested documents. Thus, the issue in this appeal is simply whether Appellant supplied the requested documents by the March 31, 2008 regulatory deadline. The only probative evidence on this point is Appellant’s Exhibit 2, a copy of a March 28, 2008 email from Mr. Jones to Ms. Butler that lists the requested documents as attachments.

13 C.F.R. § 134.204] apply to [SDVO SBC] appeals....” 13 C.F.R. § 134.501(b).

⁴ SBA also argues the Area Office sends the protest file only to OHA in NAICS code appeals. Area Offices, however, do not review NAICS code appeals. 13 C.F.R. §§ 121.1102, 121.1103.

The SBA does not contest the validity of this email but asserts the “Protest File does not include any e-mails from Mr. Jones or Appellant from either March 28 or April 1, 2008.” Response, at 8.

When SBA bases an SDVO SBC eligibility determination upon an adverse inference derived from a protested concern’s alleged failure to provide documentation, an appellant is not bound by the existing record to rebut a finding that it did not provide the evidence. Unlike a determination on the merits, Appellant is disputing SBA’s finding that it did not submit evidence, which, by definition, could not be part of the Protest File or SBA would not have said it was missing. Accordingly, in this appeal, when Appellant provided the copy of the email it sent on March 28, 2008 with its appeal petition, it was not seeking to introduce new evidence prohibited by 13 C.F.R. § 134.512.

The Protest File does contain Ms. Butler’s “Memo for the Record” (memo), which is not signed. PF, at 9. This memo, however, merely purports to confirm Appellant’s assertion that Mr. Jones phoned Ms. Butler on April 1, 2008, told Ms. Butler that he sent the documents on March 28, 2008, and that Ms. Butler instructed him to resubmit the data to Ms. McClam. The memo does not speak to the factual dispute at the heart of the appeal because it does not (1) address whether Ms. Butler received any of the documents from Mr. Jones on March 28, 2008, (2) address whether Ms. Butler received any delivery failure notifications on March 28, 2008 because, for example, the attachments exceeded SBA’s size limit, or (3) in any way respond to Appellant’s contention that it emailed the requested documents on March 28, 2008.

I am concerned that SBA provided no evidence that could prove it did not receive Appellant’s March 28, 2008 email, *e.g.*, Ms. Butler’s March 28, 2008 email records, and instead merely asserts the email is not in the Protest File. In contrast, Appellant, in furnishing a copy of its March 28, 2008 email, has proffered probative evidence that Appellant sent an email to Ms. Butler attaching the required documents on March 28, 2008. As Appellant persuasively stated in its appeal, when Appellant’s March 28, 2008 email “did not bounce back,” Appellant believed the transmission was complete. The SBA has not provided any evidence to rebut Appellant’s contention or argued Appellant’s email is forged. Therefore, I find Appellant submitted the documentation within ten business days from notice of the protest as required by 13 C.F.R. § 125.27(c)(1).

Finally, I note SBA instructed Appellant to send information to it by fax or email. PF, at 14. Hence, I find SBA explicitly authorized Appellant to utilize email to submit documents. Moreover, I find that Appellant was permitted to believe that SBA’s email server was capable of receiving large documents because SBA instructed it to use email to send documents. Consequently, Appellant was entitled to rely on an expectation that if the email did not bounce back, or Appellant was not notified otherwise of transmission failure, that the SBA received the email. Accordingly, Appellant had no duty to call and verify receipt.

V. Conclusion

I hold Appellant established clear error of fact in the AD/GC’s determination. Accordingly, pursuant to 13 C.F.R. § 134.515(c), the case is REMANDED to the AD/GC for a

new SDVO SBC determination on the merits. The AD/GC is ORDERED to allow Appellant to resubmit the missing documents.

THOMAS B. PENDER
Administrative Judge