

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

IN THE MATTER OF:

LMC Governmental Services, Inc.

Appellant

RE: Diversified Veteran Services II, A JV

Solicitation No.
W9124D-08-B-0004
Department of the Army
Ft. Knox, Kentucky

SBA No. VET-134

Decided: May 14, 2008

DECISION

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 dismissing a Service-Disabled Veteran Owned Small Business Concern protest filed more than five business days after bid opening in a sealed bid acquisition. *See* 13 C.F.R. §§ 125.25(d)(2), 134.508.

III. Background

On February 19, 2008, the U.S. Department of the Army, Ft. Knox, Kentucky, issued the subject Invitation for Bid (IFB) as a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. The IFB was a sealed bid acquisition and bids were opened on March 21, 2008. On April 4, 2008, the contract was awarded to Diversified Veteran Services II, A JV (Diversified), and unsuccessful bidders were notified of the award on April 7, 2008.

On April 9, 2008, LMC Governmental Services, Inc. (Appellant) protested Diversified's SDVO SBC status with the Contracting Officer (CO). On April 16, 2008, the CO referred

Appellant's protest to the Small Business Administration's (SBA) Office of Government Contracting.

On April 30, 2008, the Acting Director for Government Contracting (AD/GC) dismissed Appellant's protest as untimely under 13 C.F.R. § 125.25(d)(2) because Appellant did not file its protest with the CO within the required five business day period after bid opening in a sealed bid acquisition.

On May 1, 2008, Appellant filed the instant appeal of the AD/GC's dismissal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts it was unreasonable to hold Appellant to the time requirements of 13 C.F.R. § 125.25(d)(2) because Diversified was the fifth lowest bidder and thus an unlikely awardee. To hold otherwise, Appellant maintains, would require a company to submit a protest of the SDVO status of every company that submits a bid for a sealed bid acquisition, regardless of the company's likelihood to be the successful awardee. Accordingly, Appellant argues it filed its protest at the earliest time possible after learning of award to Diversified, and urges OHA to reverse the AD/GC's dismissal.

On May 1, 2008, SBA filed a Motion to Dismiss. SBA argues that OHA has previously held that any protest in a sealed bid procurement submitted later than five business days after bid opening is untimely, even where the protester acts within five days of learning of the identity of the awardee. *Matter of KMK Construction, Inc.*, SBA No. VET-104 (2005). SBA argues this precedent, coupled with the requirements of 13 C.F.R. § 125.25(d)(2), requires OHA to dismiss the appeal under 13 C.F.R. § 134.509(a)(1).

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.

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. Merits of the Appeal

The instant solicitation is a sealed bid procurement, not a negotiated procurement. The regulation explicitly states that, in the case of a sealed bid procurement, protests of a firm's SDVO status must be filed by the close of business on the fifth business day after bid opening.

13 C.F.R. § 125.25(d)(2). Any protest submitted later than the fifth business day is untimely, unless it is made by the SBA or the CO. 13 C.F.R. § 125.25(d)(3). Contrary to Appellant's argument, there is no exception to this rule when award is made to an unlikely bidder. Appellant submitted its protest on April 9, 2008, thirteen (13) business days after bid opening. Accordingly, the AD/GC properly dismissed Appellant's untimely protest. 13 C.F.R. § 125.25(d)(2).

V. Conclusion

Appellant has failed to establish any clear error of fact or law in the AD/GC's dismissal. Accordingly, I must DENY the instant Appeal and AFFIRM the AD/GC's dismissal of Appellant's protest.

The AD/GC's determination is AFFIRMED and the Appeal is DENIED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.515(a).

THOMAS B. PENDER
Administrative Judge