

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

IN THE MATTER OF:

Advant-Edge Solutions, Inc.

Appellant

Solicitation No.

VA-244-08-IB-0335

U.S. Department of Veterans Affairs

SBA No. VET-144

Decided: December 17, 2008

APPEARANCES

Walter B. Dennen, Esq., Aimino & Dennen, Woodbury, New Jersey, for Appellant.

James A. Coleson, President and Owner, NEIE, Portsmouth, Virginia.

Christopher R. Clarke, Esq., Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

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 Director for Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining the Service-Disabled Veteran-Owned Business Concern status of Advant-Edge Solutions, Inc. *See* 13 C.F.R. § 125.10(d) and 13 C.F.R. § 134.508.

### III. Background

#### A. Protest

On July 21, 2008, the U.S. Department of Veterans Affairs, Veterans Affairs Medical Center, issued Solicitation Number VA-224-08-IB-0335 as a sealed-bid solicitation as a set-aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC). The purpose of the solicitation is infectious waste removal. Bid opening was scheduled for August 25, 2008. On September 19, 2008, NEIE Medical Waste Services, LLC (NEIE) protested the eligibility of Advant-Edge Solutions (Appellant).

#### B. October 3, 2008 D/GC Determination

The D/GC dismissed NEIE's protest as untimely because the protest was submitted eighteen business days after the bid opening and 13 C.F.R. § 125.25(d)(2) requires an interested party to submit a protest within five business days after bid opening in sealed-bid acquisitions.

#### C. NEIE Appeal

On October 3, 2008, NEIE appealed the D/GC's decision to the Office of Hearings and Appeals (OHA). NEIE asserted, although the solicitation was presented as a sealed-bid acquisition, the Contracting Officer (CO) did not follow sealed-bidding procedures. NEIE stated the award was not publicized until it was listed on FedBizOpps.gov on September 13, 2008, two weeks after bid opening. NEIE asserted the CO never notified NEIE of award to Appellant and NEIE only became aware of award to Appellant because NEIE saw the award on FedBizOpps.gov on September 18, 2008. To support its appeal, NEIE included an August 25, 2008 email to Appellant from the CO; the CO indicated that it may take a couple days to determine the low bidder.

#### D. SBA Response to NEIE Appeal

On October 9, 2008, the SBA responded to NEIE's appeal. SBA argued 13 C.F.R. § 125.25(d)(2) explicitly states in sealed-bid procurements protests of a firm's SDVO SBC status must be filed by the close of business on the fifth business day after bid opening. SBA stated the subject solicitation was a sealed-bid acquisition, bid opening occurred on August 25, 2008, and NEIE submitted its bid eighteen business days after the bid opening. Accordingly, SBA asserted NEIE's protest was untimely.

#### E. OHA Remand

On October 16, 2008, I remanded the appeal to the D/GC. I acknowledged that the text of 13 C.F.R. § 125.25(d)(2) is clear; an interested party must submit its protest within five business days after bid opening in sealed-bid procurements. However, based on NEIE's allegations that sealed-bid procedures were not followed, there was a factual question of whether the CO followed the procedures required by sealed-bid acquisitions and if NEIE had timely filed within five business days after bid opening or notification. 13 C.F.R. § 125.25(d)(2). These

factual questions could not be answered based on the Record before me. Accordingly, I vacated the D/GC's dismissal and remanded the case to the D/GC to determine if sealed-bid procedures were followed.

#### F. November 12, 2008 D/GC Determination

On November 12, 2008, the D/GC issued a new determination sustaining NEIE's protest. The D/GC cited the statute and pertinent regulations, recited protest allegations, and identified information submitted by Appellant. Based on the evidence, the D/GC determined that a service-disabled veteran owns Appellant, but that a service-disabled veteran does not control Appellant because the qualifying service-disabled veteran lives in Florida, 800 miles away from the contract site in Maryland, and does not control day-to-day management of Appellant.

#### G. Appeal

On November 26, 2008, Appellant filed the instant appeal of the D/GC's determination with OHA. Appellant contends the D/GC was overbroad and failed to consider that Appellant also performs contracts in Florida, the qualifying service-disabled veteran's home state, which do not suffer from the control issues cited in the D/GC determination. Appellant does not concede that the D/GC's determination regarding control is correct, but states, even if accepted, it should not be applicable to Florida projects where the qualifying service-disabled veteran is in control of day-to-day management and operations. Moreover, Appellant alleges the D/GC erroneously relied on a formulaic application of construction industry cases to determine the qualifying service-disabled veteran lacked control. Appellant asserts, although construction contracts may require on-site supervision, the same is not true for medical waste transportation and disposal where a driver performs the actual work by emptying customers' designated containers generally on a weekly basis.

#### H. Response

On December 1, 2008, NEIE, responded to the Appeal. NEIE asserts the D/GC's determination that a service-disabled veteran does not control the day-to-day operations of Appellant is correct. NEIE also alleged an owner of Medtrace created this company and then added a veteran and that the Medtrace owner is using the same business structure to create a woman-owned business.

#### I. SBA Response

On December 8, 2008, SBA filed its response to the appeal. SBA notes on September 11, 2008, the CO awarded two contracts from the subject solicitation; one to Appellant and one to NEIE. SBA asserts the D/GC properly found Appellant was not controlled by a service-disabled veteran based on the information before her. SBA states the Appellant admitted non-service-disabled veterans handle the "nuts and bolts" of the operation and the service-disabled veteran is geographically distant from Appellant's headquarters and work site. Additionally, SBA states the new facts Appellant included in the Appeal were not before the D/GC at the time she made a determination and are inadmissible.

#### IV. Discussion

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

Nevertheless, a timely Appeal Petition may not cure an untimely protest. *Size Appeal of Symtech Corporation, Inc.*, SBA No. SIZ-4406 (2000). The instant solicitation is a sealed-bid solicitation. The regulation explicitly states that, in the case of a sealed-bid solicitation, 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). Based on NEIE's allegations that sealed-bid procedures were not followed, this matter was remanded specifically to consider that issue. *Matter of NEIE Medical Waste Services, LLC*, SBA No. VET-141 (2008). Unfortunately, the D/GC's determination on remand does not acknowledge: the prior proceedings, my Remand Order, the issue of sealed-bid procedures, or consider the timeliness.

Fortunately, the Record here is more complete than the Record in *NEIE Medical Waste Services*. The Record in this matter includes an email from the CO which candidly admits notification was delayed. Agency Response, Ex. 8. Accordingly, because sealed-bid procedures were not followed, timeliness will be calculated from actual notification. 13 C.F.R. § 125.25(d). NEIE had five business days after notification by the CO to submit its protest. *Id.*

The CO states NEIE was made aware of partial award to Appellant on September 11, 2008 via email. *Id.* This assertion is in direct contradiction to NEIE's assertion in *Matter of NEIE Medical Waste Services* that it was "not notified of an award to [Appellant] by the contracting officer at any time. Thursday, September 18, 2008 is the date that [NEIE was] notified that [Appellant] was the apparent winner of VA-243-08-IB-0335." NEIE Appeal, at 1. This discrepancy in notice is easily clarified by the email string in Exhibit 7 of the SBA's Response. In addition to the September 10, 2008, 9:59am, email from the CO to NEIE notifying NEIE of its award, there is a September 10, 2008, 1:09pm reply from NEIE to the CO inquiring which other SDVO businesses share the award. The CO promptly responded on September 11, 2008, at 6:56am, that NEIE shared the award with Appellant. NEIE acknowledged receipt of this email on September 11, 2008, at 9:05am, by expressing congratulations to Appellant, noting the SDVO community works closely together, and requesting Appellant's owner's name and contact information.

Thus, it is clear from the Record NEIE had five business days from September 11, 2008, or until September 18, 2008, to submit a protest against Appellant. NEIE's protest was received by the CO via Fed-Ex September 19, 2008, and is a day late. SBA Response, Exhibit 11. NEIE's claims of not being notified are disingenuous and misrepresent the facts presented in emails between NEIE and the CO included in the Record.

Any protest submitted beyond the time limits is untimely, unless it is made by SBA or the CO. 13 C.F.R. § 125.25(d)(3). The Record clearly demonstrates NEIE submitted the protest and the protest was untimely and should have been dismissed.

Accordingly, I find the D/GC erred in issuing a determination on the merits.

V. Conclusion

The November 12, 2008 D/GC Determination is REVERSED and VACATED. The Appeal of Advant-Edge Solutions, Inc., is GRANTED.

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

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THOMAS B. PENDER  
Administrative Judge