

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

IN THE MATTER OF:

In and Out Valet

Appellant

RE: Everything Parking, Inc.

Solicitation No. VA-245-07-RP-0057

SBA No. VET-147

Decided: January 7, 2009

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 dismissing a Service-Disabled Veteran Owned Small Business Concern (SDVO SBC) protest filed more than five business days after notification by the contracting officer of the apparent successful offeror. *See* 13 C.F.R. §§ 125.25(d)(1), 134.508.

III. Background

On September 10, 2007, the U.S. Department of Veterans Affairs (VA), VA Maryland Health Care System issued Solicitation No. VA-245-07-RP-0057 as a total SDVO SBC set-aside. The solicitation was a negotiated bid acquisition. In accordance with Amendment No. 2, offers were due on August 12, 2008.

On September 24, 2008, the Contracting Officer (CO) notified In and Out Valet (Appellant) that Everything Parking, Inc. (Everything Parking) was the apparent successful offeror. On October 30, 2008, the CO notified Appellant the contract was awarded to Everything Parking.

On November 6, 2008, Appellant protested Everything Parking's SDVO SBC status with the CO. On November 13, 2008, the CO referred Appellant's protest to the SBA Office of Government Contracting.

On December 5, 2008, the D/GC dismissed Appellant's protest as untimely under 13 C.F.R. § 125.25(d)(1) because Appellant did not file its protest within five business days after notification by the CO of the apparent successful offeror.

On December 11, 2008, Appellant appealed the D/GC's dismissal to SBA's Office of Hearings and Appeals (OHA). Appellant questions why the D/GC's dismissal asserts Appellant should have filed its protest before actual award of the contract. Appellant also states it has previously successfully challenged Everything Parking and Appellant argues Everything Parking should be ineligible for VA contracts issued before Everything Parking regained SDVO SBC eligibility on July 17, 2008.

On December 22, 2008, SBA filed a Response. SBA states, in negotiated acquisitions, timeliness is determined based on notification of the apparent successful offeror and SBA asserts Appellant was notified that Everything Parking was the apparent successful offeror in a September 24, 2008 letter from the CO. SBA asserts Appellant's argument that timeliness should be based on the notification of the contract award is in error and the D/GC's dismissal should be affirmed.

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 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 D/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 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 the Appeal

The instant solicitation is a negotiated acquisition. The regulation explicitly states that, in the case of a negotiated acquisition, protests of a firm's SDVO SBC status must be filed "by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror." 13 C.F.R. § 125.25(d)(1). 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).

Appellant submitted its protest on November 6, 2008, thirty (30) business days after the CO issued notification that Everything Parking was the apparent successful offeror. Appellant's argument that its protest was submitted within five business days of notification of contract award is irrelevant when the CO notified Appellant of the apparent successful offeror a month earlier. Accordingly, the D/GC properly dismissed Appellant's untimely protest. 13 C.F.R. § 125.25(d)(1).

In addition to timeliness, the D/GC also dismissed Appellant's protest because it was based on non-protestable issues. Because the protest was untimely, it is unnecessary for me to rule on whether Appellant raised non-protestable allegations.

V. Conclusion

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

The D/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