

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

IN THE MATTER OF:

Zap Electrical Services, Inc.

Appellant

RE: Meridian Construction Group, Inc.

Solicitation No. VA-263-09-RP-0049

SBA No. VET-152

Decided: June 30, 2009

APPEARANCES

John Egbers, President, Zap Electrical Services, Inc., St. Joseph, Minnesota, for the Appellant.

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

DECISION

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 January 29, 2009, the U.S. Department of Veterans Affairs (VA), Minneapolis Contracting and Purchasing Office, issued Solicitation No. VA-263-09-RP-0049 as a total SDVO SBC set-aside. The solicitation was a negotiated bid acquisition. Offers were due on February 18, 2009. The VA entered into discussions with all of the offerors and issued

Amendment 6 to clarify the scope of the of the project. Amended submissions were due on March 18, 2009.

On May 4, 2009, the Contracting Officer (CO) notified unsuccessful offerors, including Zap Electrical Services, Inc. (Appellant) that the contract was awarded to Meridian Construction Group, Inc. (Meridian).

On May 18, 2009, Appellant protested Meridian's SDVO SBC status with the CO. On May 25, 2009, Appellant supplemented the information provided in its protest. On May 29, 2009, the CO referred Appellant's protest to the SBA Office of Government Contracting.

On June 4, 2009, the D/GC dismissed Appellant's protest as untimely under 13 C.F.R. § 125.25(d)(1) because Appellant did not submit its protest within five business days after notification by the CO of the apparent successful offeror.

On June 17, 2009, Appellant appealed the D/GC's dismissal to SBA's Office of Hearings and Appeals (OHA). Appellant states it requested a formal debriefing which was held on May 12, 2009. Appellant asserts its protest was timely because its protest was submitted within five days after the formal debriefing. Appellant cites Federal Acquisition Regulation (FAR) 33.103(f)(3) to support its argument that its protest was timely.

On June 25, 2009, SBA filed a response. SBA states, in negotiated acquisitions, timeliness is determined based on notification of the apparent successful offeror. SBA asserts 13 C.F.R. § 125.25(d)(1) requires a protest to be submitted within five business days after notification by the CO of the apparent successful offeror. SBA states the CO notified Appellant that Meridian was the apparent successful offeror on May 4, 2009 and Appellant did not file its protest until May 18, 2009. SBA asserts Appellant's reliance on FAR 33.103(f)(3) is in error. SBA states FAR 33.103(f)(3) establishes policy on agency procurement protests, but is inapplicable to SBA protest procedures. SBA notes FAR 33 indicates guidance on SDVO SBC protests can be found at FAR 19.307, which cites 13 C.F.R. § 125.4 through 13 C.F.R. § 125.28. SBA argues the rule is clear 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, 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 May 18, 2009, ten business days after the CO notified Appellant that Meridian was the apparent successful offeror. Appellant's argument that its protest was submitted within five business days of its formal debriefing on May 12, 2009 is irrelevant. Appellant was aware of the apparent successful offeror a week before the formal debriefing and, in accordance with 13 C.F.R. § 125.25(d)(1), timeliness is calculated from the date of notification. Accordingly, the D/GC properly dismissed Appellant's untimely protest. 13 C.F.R. § 125.25(d)(1).

Appellant's reliance on FAR 33.103(f)(3) is misplaced. FAR establishes policy on agency procurement protests, but FAR citations are inapposite to the SDVO SBC protests and appeals process. *Matter of Alliance Medical Services of Arizona*, SBA No. VET-143 (2008). The SDVO SBC protests and appeals are governed by 13 C.F.R. Parts 125 and 134.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge