

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

IN THE MATTER OF:

Veterans Construction of South Carolina,
LLC

Appellant

Solicitation No. AG-4741-S-09-0001

SBA No. VET-164

Decided: October 9, 2009

APPEARANCES

Leonard W. Childs, Jr., Childs & Associates, Savannah, GA, for Appellant.

DECISION

I. Background

On July 1, 2009, the Contracting Officer (CO) for the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) issued Solicitation No. AB1330-09-RB-0026 (solicitation) seeking sealed bids for tornado debris removal and disposal services in Williamson County, Tennessee. The solicitation was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside, and the CO designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$33.5 million in average annual receipts.

On July 30, 2009, bids were opened, and Blackmon Companies, Inc. (Blackmon) was the apparent low bidder. On August 6, 2009, counsel for Veterans Construction of South Carolina, LLC (Appellant), the second low bidder, telephoned the NRCS to give it preliminary notice that Appellant would challenge Blackmon's SDVO SBC status. On August 6, 2009, at approximately 10:24 p.m., Appellant faxed its written protest (dated August 7, 2009) to the CO.

On September 14, 2009, the U.S. Small Business Administration's (SBA) Acting Director of the Office of Government Contracting (AD/GC) dismissed Appellant's protest as untimely. On September 28, 2009, Appellant filed the instant appeal of the AD/GC's dismissal with SBA's Office of Hearings and Appeals (OHA). Appellant asserts that its protest was timely and that Blackmon failed to certify its status as an eligible SDVO SBC.

II. Discussion

Appellant filed the instant appeal within ten business days of receiving the AD/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. OHA reviews AD/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, the Administrative Judge may only overturn the AD/GC's determination if Appellant proves that he made a patent error based on the record before him.

As noted above, the AD/GC dismissed Appellant's protest as untimely. The AD/GC relied on 13 C.F.R. § 125.25(d)(2), the regulation governing SDVO SBC status protests: "For sealed bid acquisitions, an interested party must submit its protest by close of business on the fifth business day after bid opening." Here, August 6, 2009, was the fifth business day after bid opening. Because Appellant did not submit its written protest until after business hours on August 6, 2009, the AD/GC concluded it was untimely.

Appellant now argues that the AD/GC's decision was in error based on 13 C.F.R. § 121.1005, which provides:

A protest must be delivered to the contracting officer by hand, telegram, mail, facsimile, Federal Express or other overnight delivery service, e-mail, or telephone. If a protest is made by telephone, the contracting officer must later receive a confirming letter either within the 5-day period in §121.1004(a)(1) or postmarked no later than one day after the date of the telephone protest.

Pursuant to this section, Appellant claims, it properly filed its protest by telephone on August 6, 2009, and properly submitted its protest by fax later that evening to be received the next business day, August 7, 2009.

Unfortunately, Appellant is incorrect. The provision it cites governs the filing of *size* protests, not SDVO SBC *status* protests. In fact, 13 C.F.R. § 125.25(a) explicitly warns that "[t]he protest procedures described in this part are separate from those governing size protests and appeals." Because Appellant challenged Blackmon's status as an eligible SDVO SBC, it was required to conform to the filing procedures set forth in 13 C.F.R. Part 125, not Part 121.

As the SBA points out in its response to the appeal petition, 13 C.F.R. § 125.25(c) provides: "An interested party, other than the contracting officer or SBA, must deliver their protests in person, by facsimile, by express delivery service, or by U.S. mail (postmarked within the applicable time period) to the contracting officer." Pursuant to 13 C.F.R. § 125.25(d)(2), quoted above, the time period within which a protest must be filed for sealed bid acquisitions is close of business on the fifth business day after bid opening. Furthermore, protests filed under Part 125 must be in writing. 13 C.F.R. § 125.25(b). Part 125 simply does not allow protests by telephone, as does Part 121. Therefore, under 13 C.F.R. § 125.25(d)(2), Appellant's protest, faxed after business hours on the fifth business day after bid opening, was untimely.

III. Conclusion

The AD/GC's determination was not based upon clear error. Thus, the AD/GC's status decision is AFFIRMED, and the instant 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