

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

IN THE MATTER OF:

Bancroft GS, Inc.

Appellant

Solicitation No. VA-244-09-RA-0271

SBA No. VET-171

Issued: December 4, 2009

APPEARANCES

Catherine E. Walters, Esq.; Saul Ewing LLP; for Appellant Bancroft GS, Inc.

Kevin R. Harber, Esq.; Office of General Counsel, Small Business Administration, 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 121 and 134.

II. Issue

Did the Acting Director for Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) make a clear error of fact or law in determining that the SDVO SBC protest filed against Bancroft GS, Inc. by Wescott Electric Co. was timely?

III. Background

On July 7, 2009, the Department of Veterans Affairs (VA) published the synopsis for Solicitation No. VA-244-09-RA-0271 for correction of electrical deficiencies at the VA Medical Center in Coatesville, Pennsylvania. On July 23, 2009, the VA issued the solicitation totally set aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC). The solicitation was an Invitation for Bids (IFB) or sealed bid acquisition, with August 24, 2009, set as the date of bid opening.

On September 17, 2009, the VA made award to Bancroft GS, Inc. (Appellant). On

September 22, 2009, the VA posted notice of this award on the FedBizOpps website. On September 24, 2009, the VA sent notice of award to all bidders via U.S. Mail.

On September 25, 2009, Wescott Electric Co. (Wescott) filed a protest asserting Appellant was not an eligible SDVO SBC. On October 5, 2009, the Small Business Administration's (SBA) Director, Office of Contract Assistance (DCA) notified Appellant of the protest, and requested a response. In her letter, the DCA stated:

The subject solicitation was issued as a sealed bid procurement SDVO SBC set aside on August 24, 2009. Notice to Wescott of the apparent successful offeror occurred on September 24, 2009. Since Wescott submitted an offer under the solicitation, it qualifies as an interested party under 13 C.F.R. § 125.8(b). In addition, since it submitted its protest within the required five business day period, Wescott's protest is timely under 13 C.F.R. § 125.25(d).

On October 7, 2009, Appellant requested that the protest be dismissed as untimely. On October 12, 2009, Appellant filed a response on the merits with the DCA. Appellant also renewed its request that the protest be dismissed as untimely. Appellant asserted that bid opening took place on August 24th and that the results of bid opening were available to the public. Accordingly, Appellant argued that Wescott's September 25th protest was untimely.

On October 22, 2009, the Acting Director of the Office of Government Contracting (D/GC) issued his determination that Appellant was not an eligible SDVO SBC. On the issue of the timeliness of the protest, the D/GC stated that the VA Contracting Officer (CO) indicated in the protest referral that the results of bid opening were not announced in FedBizOpps until September 22nd. As a result, under *Matter of Advant-Edge Solutions, Inc.*, SBA No. VET-144 (2008) (*Advant-Edge*), the time to protest did not begin until September 22nd, and Appellant's protest was thus timely. The D/GC also referred Appellant's case to the appropriate Area Office for a size determination.

On November 5, 2009, Appellant filed the instant appeal. On November 18, 2009, SBA filed its response. Neither Appellant nor SBA addressed the issue of the timeliness of Wescott's protest.

On November 20, 2009, I issued an Order directing SBA to clarify the issue of whether there was a public bid opening. I did this because SBA exhibited some confusion about the facts here. The DCA's October 5th letter refers to August 24th as the date of issuance of the solicitation, when it was in fact bid opening date. The VA's referral does state that notice was posted on FedBizOpps on September 22nd, but it does not say that there was no announcement of the results of bid opening prior to that. The VA's referral does state that "Sealed bid procedures were utilized," which would indicate that results were known publicly on the date of bid opening, as Appellant asserted in its October 12th letter. Under *Advant-Edge*, the five-day time limit for protests in sealed bid procurements may only be waived if sealed bid procedures are not followed. *Advant-Edge*, at 4.

On November 27, 2009, SBA filed an Agency Report. SBA stated that it had learned

from the VA CO that: (1) there was a public bid opening on August 24th; (2) the results were publicly available at that time; (3) Wescott was present at the public bid opening; and (4) Wescott had actual notice of the identity of the apparent successful offeror as of August 24th. SBA concedes Wescott's protest should have been dismissed as untimely.

On December 2, 2009, Appellant filed a Response to the Agency Report, together with a Motion to Dismiss. Appellant asserts that it raised the issue of the timeliness of Wescott's protest a number of times during the process, and yet the D/GC found the protest timely. The D/GC's determination has been widely circulated, causing damage to Appellant's reputation and business opportunities, and requiring Appellant to retain counsel.

Appellant requests that this Office: (1) dismiss Wescott's untimely bid protest; (2) "terminate" the formal size determination initiated by the D/GC's October 22nd determination; (3) reinstate the award to Appellant of the instant procurement; and (4) award Appellant attorney's fees and costs.

#### 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 protest determination was based on clear error of fact or law. 13 C.F.R. § 134.508; *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 8 (2005). 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 his decision upon a 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 (2006) (discussing the clear error standard which 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 SDVO SBC protest process has certain specific and short timelines in order to accommodate the Federal procurement process. *Matter of Meadowgate Technologies, LLC*, SBA No. VET-115, at 3 (2007). If, as is the case here, the subject procurement is a sealed bid acquisition, a protest must be filed within five business days of bid opening. 13 C.F.R. § 125.25(d)(2). Here, the date of that bid opening was August 24th. Wescott had actual notice of the results, and yet filed no protest until September 25th. The fact that Wescott filed within five days of contract award is irrelevant. The regulation requires that protests in sealed bid procurements be filed within five business days of bid opening. This Wescott failed to do, and thus the D/GC should have dismissed the protest. Any protest submitted beyond the time limit is untimely, unless it is made by SBA or the CO. 13 C.F.R. § 125.25(d)(3); *Advant-Edge*, at 4.

Accordingly, I find that the D/GC's failure to dismiss Wescott's protest as untimely was clear error. I must, therefore, grant the instant appeal and order that the D/GC's October 22nd determination be reversed and vacated and be of no further force or effect.

I am unable to grant the further relief Appellant requests. I cannot dismiss Wescott's protest; because the D/GC has already acted on it. The remedy is to reverse and vacate the D/GC's determination. This Office has no power either to order a contract award or to award attorney fees in an SDVO SBC appeal. As to the pending size determination, the D/GC has the authority to request a formal size determination in an SDVO SBC procurement, and is not bound by the time limits for filing size protests. 13 C.F.R. §§ 121.1001(a)(8)(iv), 121.1004(b). Accordingly, the requested size determination must proceed as requested by the D/GC.

#### V. Conclusion

The Appeal of Bancroft GS, Inc. is herewith GRANTED. The October 22, 2009 D/GC Determination is REVERSED and VACATED.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge