

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

IN THE MATTER OF:

Major Contracting Services

Appellant,

RE: RonJon Rentals/Vantax Service
Joint Venture

Solicitation No. W912Q-11-R-0121

SBA No. VET-226

Decided: January 3, 2012

APPEARANCES

Durwood E. Timmons, Sherman & Howard LLC, Colorado Springs, Colorado, Counsel
for Appellant

Kevin R. Harber, Small Business Administration, Office of General Counsel,
Washington, D.C.

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 determination of the Small Business Administration's Director for Government Contracting (D/GC), dismissing the protest of Major Contracting Services (Appellant) as untimely, was based on clear error of fact or law. *See* 13 C.F.R. § 134.508.

III. Background

On October 20, 2011, the Department of the Army, Mission and Installation Contracting Command (MICC), Contracting Officer (CO) notified unsuccessful offerors for Solicitation No. W9124Q-11-R-0121, a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside for portable chemical latrines and hand-wash station, that RonJon Rentals/Vantex Service Joint Venture was the successful offeror. On October 28, 2011, Appellant filed a protest with the CO.

On November 1, 2011, the CO referred the protest to the Small Business Administration (SBA) Director for Government Contracting (D/GC) for an SDVO SBC status determination. On December 5, 2011, the D/GC dismissed Appellant's protest as untimely.

On December 15, 2011, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). Appellant argues the D/GC erred in dismissing Appellant's protest as untimely. Appellant states it received the CO's notice of award by email at 4:43 p.m. on Thursday, October 20, 2011. Appellant asserts because the CO's notice was received after 4:30 p.m., after "close of business," Appellant considered the notice received on the next business day, Friday, October 21, 2011 and filed its protest five business days later on October 28, 2011. Appellant asserts there is no definition of "close of business" in the definition section of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 2.101, or in 13 C.F.R. §§ 125.24 to 125.28. Appellant states the protest section of FAR, 48 C.F.R. § 33.101(2)(ii), does indicate "Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m. local time." Appellant argues if 4:30 p.m. is presumed to be the close of business for protestors when filing a protest, 4:30 p.m. should also be the presumed close of business for the government to trigger the five business day deadline. Appellant states there is nothing in the record to indicate MICC has a close of business different than 4:30 p.m.

On December 27, 2011, the SBA filed its response to the appeal and the protest file on which the D/GC based his dismissal. SBA argues the D/GC properly dismissed the protest as untimely. SBA asserts Appellant acknowledges in its appeal that OHA stated in *Eagle Home Medical Corp.*, SBA No. SIZ-4701 at 2 n. 3 (2005), the close of business is generally accepted as 5:00 p.m.

IV. Discussion

Appellant filed its appeal petition within ten 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. *Matter of KMK Construction, Inc.*, SBA No. SDV-104 (2005). The regulation explicitly states that protests of a firm's SDVO SBC status must be filed by the 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 that is untimely, unless it is made by SBA or the contracting officer. 13 C.F.R. § 125.25(d)(3). Here, the CO's notification was made on October 20, 2011, and Appellant's protest was filed with the CO on October 28, 2011, six business days later. Appellant's protest was untimely, and thus was properly dismissed by the D/GC. *Matter of KMK Construction, Inc.*, SBA No. SDV-104 (2005).

Appellant argues the five business day deadline should not be triggered until the day after Appellant received email notice of contract award from the CO because the CO's email was sent at 4:43 p.m. OHA's regulations and case law maintains that 5:00 p.m. is generally considered the close of business. 13 C.F.R. § 134.204(b)(2); *Eagle Home Medical Corp.*, SBA No. SIZ-4701 at 2 n. 3; *see also Macaluso v. Keyspan Energy*, No. CV 05-0823(ADS)(WDW), 2007 WL

1041662 at *3 (E.D.N.Y. Apr. 3, 2011) (Given that “close of business” is commonly understood to mean 5:00 p.m.). I also note the Performance Work Statement MICC issued with this procurement identifies the work day as ending at 5:00 p.m., unless otherwise specified by the CO representative. PWS, ¶ 1.9 Work Hours & ¶ 5.4 Hours of Operation. Conversely, the FAR provision Appellant relies upon (FAR 33.101(2)(ii)) applies generally to bid protests, not SDVO SBC protests, and is thus inapposite here.

V. Conclusion

Appellant has failed to establish any clear error of fact or law in the D/GC's dismissal of Appellant's protest. 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