

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

IN THE MATTER OF:

Brandt Group, Inc.,

Appellant,

RE: TFAM Solutions, LLC

Solicitation No. SPMYM3-15-M-6071

SBA No. VET-249

Decided: November 4, 2015

APPEARANCE

Christopher R. Clarke, Esq., Office of General Counsel, U.S. 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. Background

A. Solicitation and Protest

On April 22, 2015, the Department of Defense, Defense Logistics Agency Land and Maritime (DoD) issued Solicitation No. SPMYM3-15-M-6071 for keel blocks. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). Brandt Group, Inc. (Appellant) and TFAM Solutions, LLC (TFAM) submitted timely proposals, self-certifying as eligible SDVO SBCs.

On August 13, 2015, the CO announced, via posting on fedbizopps.gov, that TFAM was apparent awardee of the Solicitation. On August 14, 2015, the Contracting Specialist informed each interested party, via email, that TFAM was the apparent successful offeror. On September 3, 2015, the CO received Appellant's protest challenging TFAM's eligibility as an SDVO SBC.

### B. D/GC Determination

On September 25, 2015, the SBA's Director for Government Contracting (D/GC) issued his determination dismissing the protest. The D/GC concluded Appellant's protest was untimely because it was received 15 business days after notification that TFAM was the apparent awardee. According to 13 C.F.R. § 125.25(d)(2), a written protest specifying the grounds for the protest must be submitted by close of business on the fifth business day after notification. Hence, Appellant's protest was dismissed as untimely.

### C. Appeal

On September 28, 2015, Appellant filed an appeal of the D/GC's decision with SBA's Office of Hearings and Appeals (OHA).<sup>1</sup> Appellant requests OHA reverse the D/GC's denial of its protest.

Appellant states TFAM is listed on SAM as an SDVO and Woman-Owned SBC, which cannot be possible because the majority owner is not a woman. Appellant also states the D/GC did not address issues relating the Solicitation's requirement that a vender is certified by the Precast/Pre-stressed Concrete Institute (PCI). Instead, the determination only addresses one issue, Appellant's protest timeliness. Appeal, at 1.

Appellant maintains that its only failure was to use the word 'protest' within the allowable time limit for filing a status protest. Appellant argues that it maintained daily communications with the CO where Appellant brought up the issues it argued made TFAM unable to receive the award. Appellant states the CO promised to hold a debriefing and the CO further admitted he was unaware that any awardee must be PCI certified. Lastly, Appellant maintains the email communications with the CO show that after continued communication the CO informed Appellant that it needed to file a 'bid protest.' Appellant concludes by stating that it "believes that it is the lowest price technically acceptable submitter and should be awarded the project forthwith." *Id.* at 2.

### D. SBA's Response

On October 30, 2015, the SBA submitted its response to the appeal. The SBA argues the D/GC's determination should be upheld and the appeal denied.

SBA notes that Appellant's first two points of argument involve issues that do not challenge the dismissal based on Appellant's failure to submit a timely appeal. SBA argues these two points are moot and should not be taken up by OHA. Appellant's final two points of contention argue that its communications with the CO should be treated as filing a timely status

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<sup>1</sup> OHA received the appeal and the supplement to the appeal after 5 p.m. eastern time on September 25, 2015. "Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day." 13 C.F.R. § 134.204(b)(2). Nevertheless, Appellant filed the appeal within 10 business days of receiving the determination, so the appeal is timely. *Id.* § 134.503.

protest. However, SBA maintains that these communications do not meet the requirements for filing a protest under 13 C.F.R. § 125.25(b). SBA Response, at 5.

Here, SBA argues Appellant took issue with a certification Appellant believed all offerors were required to make in order to be considered for award. This issue is unconnected to TFAM's status as an SDVO.

However, SBA points out that it was only on August 31, 2015, 11 days after Appellant was notified of the apparent awardee, Appellant first raised with the CO its concern that TFAM does not qualify as an SDVO SBC. *Id.* at 6. Appellant's argument that it relied on the CO's granting of a debriefing is also meritless. SBA argues that while requesting a debriefing, and granting a formal debrief, may toll the period for filing a bid protest, it does not alter the time limit for filing an SDVO status protest.

SBA notes there was no formal debriefing granted and Appellant failed to raise any issue regarding TFAM's SDVO status within five days of being notified TFAM was the apparent awardee. At no point before September 3, 2015, does it appear Appellant's communications were meant to be a formal protest of TFAM's status as an SDVO SBC the CO was required to forward to SBA. *Id.* at 6-7. The emails Appellant relies upon clearly show Appellant was attempting to remind the CO it needed to check TFAM's certifications as an SDVO SBC and some mistakes may have been made in the solicitation and award process. *Id.* at 7. Therefore, Appellant's appeal should be dismissed as it fails to show the D/GC erred in dismissing the protest as untimely.

#### IV. Discussion

##### A. Jurisdiction and Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. OHA reviews the D/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 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a clear error based on the record before him.

##### B. Analysis

For the reasons discussed *infra*, I find Appellant's protest was untimely and the D/GC properly dismissed it.

Appellant filed its appeal petition within ten business days of receiving the D/GC's determination, and thus the appeal is timely.

However, a timely appeal petition may not cure an untimely protest. *Matter of Major Contracting Services*, SBA No. SDV-226 (2012). The regulation explicitly requires protests of a firm's SDVO SBC status be filed by the close of business on the fifth business day after

notification by the contracting officer of the identity 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). In this case, Appellant filed its SDVO SBC status protest with the CO on September 3, 2015. Conversely, Appellant had received notice that TFAM was the apparent successful offeror on August 13, 2015, via a post on fedbizopps.gov and on August 14, 2015, via email. The protest was filed later than five business days after Appellant's notification, and thus the D/GC properly dismissed it as untimely. *Matter of Major Contracting Services*, SBA No. SDV-226 (2012).

Appellant argues it relied on frequent email communications with the CO where it raised all of its concerns with the award to TFAM. Appellant maintains the CO had a duty to advise it to file a protest. Appellant reasserts its arguments that TFAM is not an eligible SDVO SBC, does not meet certain requirements established by the Solicitation, and that Appellant is the lowest price technically capable offeror.

First, Appellant's attempt to raise its substantive arguments is out of place here. If its protest was untimely, I cannot consider them. If it was timely, I must remand this matter to the D/GC for a full determination.

Second, even if the protest were timely, many of Appellant's arguments could not be considered by the D/GC. It appears Appellant is confused as to the nature of a bid protest and an SDVO status protest. The SBA “does not review issues concerning the administration of an SDVO contract.” 13 C.F.R. § 125.25(a). Therefore, Appellant's claims that the CO did not properly evaluate TFAM or that Appellant should be awarded the contract are not issues that can be considered in an SDVO status protest.

Third, I conclude Appellant's argument that its earlier communications should be considered timely protests, even though they did not use the word “protest”, is meritless. The regulation requires that a protest be in writing and must specify all the grounds upon which the protest is based, merely asserting the protested concern is not an eligible SDVO SBC is not enough. 13 C.F.R. § 125.5. That is, the protest, in addition to being in writing, must make a specific allegation related to one of the grounds for an SDVO SBC protest in SBA's regulations. Other complaints about the procurement process, such as Appellant made in its emails, are not the basis for a protest, just as a conclusory assertion that a protested concern is not eligible cannot be the basis for a protest. None of Appellant's emails raised the question of TFAM's certification as an SDVO SBC until August 31, 2015, 11 days after Appellant received notice of the award. Even this communication is no more than a reminder to the CO that an awardee has to be a certified SDVO SBC, and he should check TFAM's certifications.

The email does not use the word “protest” or request the allegation be forwarded to SBA for adjudication. Therefore, the CO could not know he had the duty to submit the matter to SBA as an SDVO SBC protest. I thus conclude that because, prior to the September 3, 2015 email, nothing Appellant submitted to the CO was in writing, raised an issue of SDVO SBC eligibility based upon the regulations, and neither described itself as a protest or requested the matter be referred to SBA for adjudication, none of these communications can be considered an SDVO SBC protest. Appellant first protested TFAM's status on September 3rd, and that was too late.

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