

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

IN THE MATTER OF:

Redhorse Corporation,

Appellant,

Solicitation No. QTA0016ACB3007

SBA No. VET-261

Decided: March 21, 2017

APPEARANCES

Richard B. Oliver, Esq., Pillsbury Winthrop Shaw Pittman, LLP, Los Angeles, California, for Appellant

Jody J. Venkatesan, President and CEO, Platinum Business Services, LLC, Laurel, Maryland

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

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) concluding that Redhorse Corporation (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). Appellant maintains that the D/GC should have dismissed the underlying protest as untimely. For the reasons discussed *infra*, the appeal is granted and the D/GC's determination is vacated.

OHA decides appeals of SDVO SBC status determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. Appellant filed the instant appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

¹ OHA issued a protective order in this case on January 24, 2017. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the protective order and is intended for public release.

II. Background

A. Solicitation and Protests

On June 13, 2016, the U.S. General Services Administration (GSA) issued Request for Quotations (RFQ) No. QTA0016ACB3007 for transition ordering assistance in support of the Network Services Program. The RFQ contemplated the award of a task order under the GSA Professional Services Schedule. The Contracting Officer (CO) set aside the order entirely for SDVO SBCs, and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of \$15 million average annual receipts. The CO did not request that offerors recertify their size or SDVO SBC status for this task order. On September 29, 2016, the CO announced that Appellant was the apparent awardee.

On October 5, 2016, Platinum Business Services (Platinum), an unsuccessful offeror, filed protests with the CO challenging Appellant's size and its status as an SDVO SBC. The CO forwarded the size protest to SBA's Office of Government Contracting, Area VI (Area Office) and the status protest to the D/GC.

On October 25, 2016, the Area Office issued Size Determination No. 06-2017-006 dismissing Platinum's size protest as untimely. The Area Office explained that the instant procurement involved the award of a task order under a GSA Schedule contract. Because the CO did not request recertification for this task order, Platinum's most recent opportunity to protest Appellant's size was when Appellant recertified for Option 1 of its Professional Services Schedule Contract No. GS-00F-0013Y in October 2014. (Size Determination No. 06-2017-006, at 2.) Platinum's size protest was filed almost two years later, and therefore was untimely. (*Id.*) On appeal, OHA affirmed the Area Office's dismissal, holding that “the Area Office properly dismissed [Platinum's] protest as untimely.” *Size Appeal of Platinum Business Services, LLC*, SBA No. SIZ-5800, at 6 (2016).

On November 8, 2016, the D/GC wrote Appellant to request a response to Platinum's status protest. The D/GC commented that “the protest is considered timely under 13 C.F.R. § 125.25(d).” (Letter from S. Crean to D. Inmon (Nov. 8, 2016), at 1.) In a footnote, the D/GC elaborated:

There may be some confusion about the timeliness of an SDVO SBC status protest of a contract awarded as a task order[] under a General Service Administration (GSA) Federal Supply Schedule contract. The reason is because size protests of task order contracts have a different timeliness rule. 13 C.F.R. § 121.1004(a)(3). Pursuant to that regulation, on a long term contract such as a GSA schedule contract, the “size” of a firm may be challenged at three stages: (1) when the long-term contract is initially awarded; (2) when an option is exercised; or (3) if a CO requests recertification in conjunction with an individual order. That regulation only applies to challenges to a firm's size. The timeliness of protests challenging the SDVO SBC status of [a] firm [is] governed by 13 C.F.R. § 125.25(d). See *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013).

Under the SDVO SBC timeliness requirement, Platinum's SDVO SBC status protest is timely filed.

(*Id.* at 1 n.1.) The D/GC did not adopt Platinum's status protest as his own, nor initiate his own status protest against Appellant.

B. D/GC Determination

On January 5, 2017, the D/GC issued his determination sustaining Platinum's status protest and concluding that Appellant is not an eligible SDVO SBC. The D/GC did not address the timeliness of the protest in his determination.

C. OHA Proceedings

On February 28, 2017, OHA requested comments from the parties as to whether the D/GC properly considered Platinum's status protest. In particular, OHA directed the parties to address whether Platinum's status protest was timely in light of OHA's decision in *Size Appeal of Platinum Business Services, LLC*, SBA No. SIZ-5800 (2016). (Order at 1.)

1. Platinum's Comments

On March 6, 2017, Platinum responded to OHA's Order. Platinum maintains that its status protest was timely, for the reasons stated in the D/GC's letter of November 8, 2016. (Platinum's Comments, at 2.)

2. SBA's Comments

On March 7, 2017, SBA responded to OHA's Order. SBA argues that size protests and status protests are subject to “separate and distinct” timeliness requirements. (SBA's Comments at 3.) According to SBA, on a long-term contract such as a GSA Schedule, size may be protested at three stages: (1) when the long-term contract is initially awarded; (2) when an option is exercised; or (3) if a CO requests recertification in conjunction with an individual order. (*Id.* at 2, citing 13 C.F.R. § 121.1004(a)(3).) Platinum's size protest was correctly dismissed because the instant RFQ did not call for recertification and Platinum filed its size protest “more than one year after the last recertification on [Appellant's] GSA schedule contracts.” (*Id.*)

Conversely, a status protest of an SDVO SBC award is governed by 13 C.F.R. § 125.28(d), which provides that “[f]or negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the [CO] of the apparent successful offeror.” (*Id.* at 3, emphasis added by SBA.) Thus, SBA contends, a status protest is timely if (1) the contract was set aside for SDVO SBCs; and (2) the protest was filed within five business days after notification pursuant to 13 C.F.R. § 125.28(d). (*Id.* at 4.) Platinum's status protest met both of these criteria and therefore was timely. SBA asserts that, although Platinum's protest pertained to a task order under a GSA Schedule contract, “[u]nder SBA regulations, any order set-aside against a Multiple Award Contract is an SDVO

SBC [contract] and certification is required and determined at the time of offer for the SDVO SBC contract.” (*Id.*)

3. Appellant's Comments

On March 7, 2017, Appellant responded to OHA's Order. Appellant argues that SBA's regulations for the SDVO SBC program mirror the size regulations with regard to task orders under GSA Schedule contracts. (Appellant's Comments at 3.) Specifically, the regulations state that a concern which qualified as an SDVO SBC at the time a GSA Schedule contract is awarded “will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order.” (*Id.*, quoting 13 C.F.R. § 125.18(e) (emphasis added by Appellant).) In the instant case, Appellant most recently recertified its SDVO SBC status for its GSA Professional Services Schedule contract in October 2014, and the CO here did not request recertification for the instant task order. (*Id.* at 5-6.) As a result, Appellant remained an eligible SDVO SBC for this task order.

Appellant acknowledges that the regulation pertaining to status protests at 13 C.F.R. § 125.28(d) does not address task orders under GSA Schedule contracts. Nevertheless, Appellant contends, 13 C.F.R. § 125.28(d) should be read in concert with 13 C.F.R. § 125.18(e). (*Id.* at 5.) Therefore, “OHA should interpret the timeliness requirements such that a protestor must file a protest within five days of the initial award or option exercise, unless the contracting officer requires recertification as part of the order.” (*Id.*) In Appellant's view, Platinum could have filed a timely protest within five days of GSA's notification that Appellant was awarded its Professional Services Schedule Contract No. GS-00F-0013Y or within five days of GSA exercising Appellant's option under that contract. (*Id.* at 6.) However, Appellant argues, because the CO did not request recertification for the instant task order, Appellant's recertification as an SDVO SBC for Option 1 of its Professional Services Schedule contract still governs and Appellant is considered an SDVO SBC through December 2019. (*Id.*)

Appellant attacks the D/GC's reliance on *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013). *Golden Key* is not controlling here because the recertification provisions at 13 C.F.R. § 125.18(e) did not become effective until December 2013, several months after *Golden Key* was decided, and OHA has yet to address 13 C.F.R. § 125.18(e) in any decision. (*Id.* at 5.)

Attached to its comments, Appellant offers documentation demonstrating that Appellant most recently recertified its SDVO SBC status for its Professional Services Schedule contract in late 2014, when Appellant requested renewal under the first of three five-year options under Contract No. GS-00F-0013Y.

III. Discussion

I agree with Appellant that Platinum's status protest, like its size protest, was untimely. Pursuant to 13 C.F.R. § 125.30(b), the D/GC must dismiss an untimely status protest. Accordingly, because the D/GC erred in not dismissing Platinum's status protest, the appeal is granted and the D/GC's determination is vacated.

Similar to the size regulations at 13 C.F.R. § 121.404(g), SBA's status regulations make clear that a concern will retain its SDVO SBC eligibility for all orders under a GSA Schedule or other "Multiple Award Contract", unless the CO requests recertification for a particular order.² Specifically, the status regulations state, in pertinent part:

Recertification. (1) A concern that represents itself and qualifies as an SDVO SBC at the time of initial offer (or other formal response to a solicitation), which includes price, including a Multiple Award Contract, is considered an SDVO SBC throughout the life of that contract. This means that if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order.

...

(5) Where the contracting officer explicitly requires concerns to recertify their status in response to a solicitation for an order, SBA will determine eligibility as of the date the concern submits its self-representation as part of its response to the solicitation for the order.

13 C.F.R. § 125.18(e). In promulgating these regulations, SBA stated that it intended to "appl[y] the 'recertification rule' (the recertification requirements used to determine size) to its status programs." 78 Fed. Reg. 61,114, 61,127 (Oct. 2, 2013).

In the instant case, Appellant self-certified as an SDVO SBC when it was initially awarded its Professional Services Schedule contract, and most recently recertified its status in 2014 when GSA exercised an option to extend the contract. *See* Section II.A, *supra*. As a result, according to the plain language of 13 C.F.R. § 125.18(e), Appellant is "considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order." It is undisputed that the CO here did not request recertification of size or status for this task order. *Id.* Accordingly, the award of the instant task order was not an event that Platinum could challenge through a status protest. While Platinum could, in theory, have protested the award of Appellant's initial Professional Services Schedule contract or the exercise of the option, any such protest was untimely as of October 5, 2016. In addition, although there is no time limit on a status protest brought by the D/GC, 13 C.F.R. § 125.28(d)(3), the D/GC here did not adopt Platinum's protest or initiate his own status protest against Appellant. *Id.* I therefore conclude that Platinum's status protest was untimely and should have been dismissed.

SBA argues that Platinum's status protest was timely under 13 C.F.R. § 125.28(d)(1) because the instant task order was set aside for SDVO SBCs, and because Platinum filed its

² The regulations define the term "Multiple Award Contract" as encompassing GSA Schedule contracts. 13 C.F.R. § 125.1.

status protest within five business days after learning that Appellant had been awarded the task order. According to SBA, “any order set-aside against a Multiple Awar[d] Contract is an SDVO SBC [contract] and certification is required and determined at the time of offer for the SDVO SBC contract.” *See* Section II.C.2, *supra*. This argument, though, is flawed for two reasons. First, contrary to SBA's suggestions, Appellant was not required to — and did not — certify itself as an SDVO SBC for this task order. Rather, Appellant's most recent recertification occurred in 2014, and no timely status protest was filed at that juncture. Because Appellant did not self-certify as an SDVO SBC for the task order, Appellant was entitled to rely on its 2014 certification at the GSA Schedule contract level, and no mechanism exists for Platinum to protest Appellant's SDVO SBC status for this order. Second, SBA makes no attempt to reconcile the status protest regulation at 13 C.F.R. § 125.28(d)(1) with the recertification regulation at 13 C.F.R. § 125.18(e). Permitting a protester to bring a status protest in conjunction with any GSA Schedule task order, even if recertification was not requested, would render 13 C.F.R. § 125.18(e) essentially meaningless, and is therefore untenable.

Lastly, OHA's decision in *Matter of Golden Key Group, LLC*, SBA No. VET-236 (2013) does not require a contrary result. As Appellant correctly observes, at the time *Golden Key* was decided, SBA's status regulations did not address task orders under GSA Schedule contracts. Rather, these rules, and particularly the recertification provision at 13 C.F.R. § 125.18(e), became effective December 31, 2013, several months after OHA issued its decision in *Golden Key*. 78 Fed. Reg. 61,114 (Oct. 2, 2013). Accordingly, *Golden Key* is not controlling here as it did not address the status regulations as currently drafted.

IV. Conclusion

For the above reasons, the appeal is GRANTED and the D/GC's determination is VACATED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge