

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

IN THE MATTER OF:

Fairwater Associates,

Appellant,

RE: L.E. Peabody and Associates

Solicitation No. 89243218RNE000003
Department of Energy

SBA No. VET-280

Decided: June 11, 2019

DECISION

I. Background

A. Solicitation and Protests

On April 1, 2019, the Department of Energy (DOE) notified unsuccessful offerors of the award of Solicitation No. 89243218RNE000003, a solicitation for rail cost modeling analysis, to L.E. Peabody and Associates (Peabody). (Protest File, (PF), Ex. 2, at 1.) The Contracting Officer (CO) set aside the procurement entirely for small business concerns and designated the highest order of set-aside precedence to Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). (PF, Ex. 4, at 25.) The CO assigned North American Industrial Classification System (NAICS) Code 541990, Professional, Scientific and Technical Services, with a corresponding \$15 million annual receipts size standard. (PF, Ex. 4, at 25.)

Fairwater Associates (Appellant) requested a debrief on April 4, 2019, and DOE provided a formal written debrief to Appellant on April 9, 2019. (PF, Ex. 2, at 1.) On April 11, 2019, Appellant filed a protest with the CO, protesting the award to Peabody, arguing Peabody was not an eligible service-disabled veteran-owned small business. (Appellant Protest to CO, at 1.)

On April 25, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting received DOE's referral of Appellant's protest. (PF, Ex. 1, at 2.) On May 16, 2019, the Acting Director of SBA's Office of Government Contracting (AD/GC) dismissed Appellant's protest as untimely. (*Id.*, at 3.) The AD/GC concluded Appellant's protest was not filed within five business days of the CO's notice to unsuccessful offerors and was therefore not filed in a timely manner and must be dismissed. (*Id.*)

B. Appeal

On May 28, 2019, Appellant filed the above-captioned appeal with the SBA Office of Hearings and Appeals (OHA), appealing the dismissal of its protest.

Appellant argues that because it submitted its Agency Protest to DOE's Senior Procurement Executive with the request that DOE promptly rule on the grounds of its protest, DOE's referral of the protest to SBA was improper. (Appeal at 1.) Appellant asserts its Protest was not untimely because Agency Protests may be filed no later than 10 days after the basis of the protest is known. (*Id.*, citing FAR 33.103(e).) Appellant asserts the basis of its protest was not Peabody's eligibility as an SDVO SBC, but DOE's incomplete validation of bidder eligibility. Appellant maintains DOE should have obtained documentation of the service-disabled veteran status of the personnel listed on Peabody's profile, and determined whether these individuals owned and controlled Peabody. (*Id.*, at 1-2.) Appellant does not challenge the dates in the AD/GC's letter, which found that Appellant received notice of the awardee's identity on April 1, 2019, and filed its protest on April 11, 2019.

II. 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 (2009) (discussing the clear error standard that is applicable both in size appeals and SDVO SBC appeals). Thus, OHA may overturn the D/GC's decision only if Appellant proves the D/GC made a patent error based on the record before him.

B. Analysis

Appellant timely filed the instant appeal within ten (10) days of receiving the D/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. However, OHA has consistently held a timely appeal cannot cure an untimely protest. *In the Matter of Brandt Group, Inc.*, SBA No. VET-249 (2015); *In the Matter of Major Contracting Services*, SBA No. SDV-226 (2012).

I find Appellant fails to show the AD/GC erred in dismissing Appellant's status protest as untimely. SBA regulations dictate “an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror” for negotiated acquisitions. 13 C.F.R. § 125.28(d)(1). SBA regulations mandate that “[a]ny protest submitted after the time limits is untimely, unless it is from SBA or the CO.” *Id.*, at § 125.28(d)(3). An untimely protest must be dismissed. *Matter of Research Solution Group, Inc.*, SBA No. VET-266 (2017). Here, DOE gave notice to unsuccessful offerors of the award to Peabody on April 1, 2019. Appellant filed its protest with the CO on April 11, 2019, ten days later. *See* Section I.A, *supra*. The fact that Appellant received a debriefing on April 9, 2019 is irrelevant. It is the notification of the awardee's identity that is the event which

starts the time to protest running, not the protestor's learning of the grounds for the protest. *Size Appeal of Garco Construction, Inc.*, SBA No. SIZ-5308, at 3 (2011). A debriefing does not stay the time for filing a protest. (*Id.*)

Appellant appears to argue that DOE should have treated its protest as an Agency Protest, and not referred it to SBA. OHA has no jurisdiction over Agency Protests, and I cannot rule on Appellant's claim. However, because Appellant appears to be challenging Peabody's status as an SDVO SBC, it was reasonable for DOE to refer the matter to SBA.

I conclude the AD/GC properly dismissed Appellant's protest as untimely.

III. Conclusion

For the above reasons, I find Appellant has failed to show the AD/GC erred in dismissing its protest against Peabody as untimely filed. Accordingly, the instant appeal is DENIED, and the AD/GC's determination is AFFIRMED. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge