

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

VSBC Protest of:

McKenna Brytan Industries LLC.,

Protestor,

Re: BTNG Enterprises. LLC

Solicitation No. SPE8E8-24-T-0657

Defense Logistics Agency

SBA No. VSBC-334-P

Decided: February 8, 2024

APPEARANCES

Dave Larson, Vice President, McKenna Brytan Industries LLC, Clermont, Florida

Gary Wise, Owner, BTNG Enterprises, LLC, Toms River, New Jersey,

DECISION

I. Introduction and Jurisdiction

On December 7, 2023, McKenna Brytan Industries LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of BTNG Enterprises, LLC (BTNG) in conjunction with Defense Logistics Agency (DLA) Request for Quotations (RFQ) No. SPE8E8-24-T-0657. Protestor maintains that BTNG falsely represented itself as an SDVOSB for the subject procurement. For the reasons discussed *infra*, the protest is sustained.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J. Protestor filed its protest within five business days after receiving notification that BTNG was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(3). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFQ

On November 8, 2023, DLA issued RFQ No. SPE8E8-24-T-0657 for portable dehumidifiers. (RFQ at 6.) The Contracting Officer (CO) set aside the procurement for

SDVOSBs, and assigned North American Industry Classification System (NAICS) code 333415, Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing, with a corresponding size standard of 1,250 employees. (*Id.* at 2.) The RFQ indicated that “[i]f no qualified SDVOSB offers are received, it is possible other small businesses can be considered.” (*Id.*) On December 6, 2023, the CO announced that BTNG had been selected for award.

#### B. BTNG's Quotation

According to BTNG's quotation, dated November 13, 2023, BTNG will supply the dehumidifiers at a fixed unit price of \$330 per unit. (Quotation at 1.) BTNG represented itself as both an SDVOSB and a Women-Owned Small Business (WOSB). (*Id.* at 2.)

#### C. Protest

On December 7, 2023, Protestor, an unsuccessful offeror, filed the instant protest with the CO, challenging BTNG's SDVOSB status. Protestor alleges that its own quotation was superior to BTNG's and might have been selected for award, if not for BTNG falsely claiming to be an SDVOSB. (Protest at 1.)

The CO forwarded the protest to OHA for review, requesting that “a formal SDVOSB status determination be accomplished for BTNG.” (Letter from J. Wallis (Dec. 19, 2023), at 1.) In a memorandum accompanying the referral letter, the CO noted that, although BTNG did submit the lowest-priced quote from an offeror identifying itself as an SDVOSB, BTNG's “was not the lowest quote in relation to the quotes submitted by [non-SDVOSBs].” (Memorandum for Record, at 1.)

#### D. Case File

On January 9, 2024, OHA issued a Notice and Order, instructing the Director of SBA's Office of Government Contracting (D/GC) to submit the Case File to OHA. On January 19, 2024, the D/GC informed OHA that, after a comprehensive search, his office could locate no record that BTNG applied for, or obtained, certification as an SDVOSB. (E-mail from VetCertOHA@sba.gov (Jan. 19, 2024).) As a result, the D/GC was unable to produce a Case File or other associated documents. (*Id.*) That same day, OHA issued an Order, pursuant to 13 C.F.R. § 134.1007(g), directing BTNG to produce evidence that it qualifies as an SDVOSB. (Order at 1.) OHA cautioned that, under OHA's rules of procedure, “[i]n the case of refusal or failure to furnish requested information within a required time period, the Judge may assume that disclosure would be contrary to the interests of the party failing to make disclosure.” (*Id.* at 2, quoting 13 C.F.R. § 134.1011.)

#### E. BTNG's Response

On January 31, 2024, BTNG responded to the protest and to OHA's Order. BTNG does not argue that it is at least 51% owned, and fully controlled, by one or more service-disabled veterans. Rather, BTNG maintains that it was selected for the instant award because it is a small

business. (Response at 1.) BTNG asserts that it expects to “partner” with an SDVOSB through a post-award “teaming agreement.” (*Id.*) BTNG concludes that “the [CO] awarded this contract with full authority and the protest is without merit.” (*Id.*)

### III. Discussion

#### A. Burden of Proof

As the protested firm, BTNG has the burden of proving its eligibility as an SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010.

#### B. Date to Determine Eligibility

In an SDVOSB status protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of the date of its initial offer or response which includes price. 13 C.F.R. § 134.1003(e)(1). Here, BTNG submitted its quotation on November 13, 2023. Section II.B, *supra*. Therefore, OHA must examine BTNG's SDVOSB eligibility as of this date, using the substantive ownership and control regulations in effect on that date.<sup>1</sup>

#### C. Analysis

SBA regulations generally permit that a concern may self-certify as an SDVOSB, so long as the concern submitted “a complete SDVOSB certification application to SBA on or before December 31, 2023,” until such time as “SBA declines or approves the concern's application.” 13 C.F.R. § 128.401(a). Here, in its quotation dated November 13, 2023, BTNG represented itself as an SDVOSB. Section II.B, *supra*. There is no record, however, that BTNG applied for SDVOSB certification prior to December 31, 2023. Section II.D, *supra*. BTNG's self-certification as an SDVOSB thus was improper under 13 C.F.R. § 128.401(a). Furthermore, in the instant proceeding, BTNG has produced no evidence to substantiate its claimed SDVOSB status. Section II.E, *supra*. Nor does BTNG even argue that it is at least 51% owned, and fully controlled, by one or more service-disabled veterans. *Id.* Accordingly, BTNG has not carried its burden of proving that it is an SDVOSB. This protest must therefore be sustained.

In response to the protest, BTNG observes that an offeror need not necessarily have been an SDVOSB in order to have submitted a quotation for the instant procurement. Section II.E, *supra*. It is true that the RFQ indicated that “[i]f no qualified SDVOSB offers are received, it is possible other small businesses can be considered.” Section II.A, *supra*. BTNG, though, did represent itself as an SDVOSB in its quotation, and DLA evaluated BTNG's quotation as if it had been submitted by an SDVOSB. Sections II.B and II.C, *supra*. Contrary to BTNG's suggestions, then, BTNG's status as an SDVOSB (or lack thereof) was directly relevant to the underlying procurement.

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<sup>1</sup> Effective January 1, 2023, the relevant SDVOSB ownership and control regulations are found at 13 C.F.R. Part 128. 87 Fed. Reg. 73,400 (Nov. 29, 2022).

IV. Conclusion

BTNG has not proven that it is an eligible SDVOSB. The protest therefore is SUSTAINED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(B); 13 C.F.R. § 134.1007(i).

KENNETH M. HYDE  
Administrative Judge