

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

VSBC Protest of:

Spartan Medical, Inc.,

Protestor,

Re: Junius J. Dion d/b/a Risen Video
Production

Solicitation No. 36C25924R0066

U.S. Department of Veterans Affairs

SBA No. VSBC-366-P

Decided: June 24, 2024

APPEARANCES

Jeffrey S. Vail, Esq., Executive Vice President, Spartan Medical, Inc., Rockville,
Maryland

Theodore P. Watson, Esq., Watson & Associates, LLC, Denver, Colorado, for Junius J.
Dion d/b/a Risen Video Production

DECISION¹

I. Introduction and Jurisdiction

On April 15, 2024, Spartan Medical, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Junius J. Dion d/b/a Risen Video Production (Risen), in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C25924R0066. Protestor contends that Risen will be unusually reliant upon a non-SDVOSB subcontractor to perform the contract, in contravention of 13 C.F.R. §§ 128.401(g) and 134.1003(c). 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

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

Risen 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 RFP

On March 12, 2024, VA issued RFP No. 36C25924R0066 for “On-site Intraoperative Neuromonitoring and Instrumentation Services” at the Rocky Mountain Regional VA Medical Center in Aurora, Colorado. (RFP, SF 1449.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$10 million in average annual receipts. (*Id.*)

The RFP explained that the contractor will provide Intraoperative Neuromonitoring (IONM) technicians and associated instrumentation to support and monitor complex surgical procedures. (RFP at 8-10.) The technicians will utilize “electrophysiological methods such as electroencephalography (EEG), electromyography (EMG), and evoked potentials to monitor the functional integrity of certain neural structures (e.g., nerves, spinal cord and parts of the brain) during surgery.” (*Id.* at 7.) The goal of such work is to “reduce the risk to the patient of iatrogenic damage to the nervous system, and/or to provide functional guidance to the surgeon and anesthesiologist.” (*Id.*) The RFP estimated that IONM technicians will perform approximately 72 “neuro monitoring services” cases each year. (RFP, Amend. 0002.)

The RFP stipulated that IONM technicians must be board-certified or board-eligible through the American Board of Registration of Electroencephalographic and Evoked Potential Technologists. (RFP at 7.) In addition, “[e]ach surgical case must be supported with real-time data interpretation from a licensed MD.” (*Id.*) Contractor personnel “will report directly to the Chief, Surgical Services” at the Medical Center. (*Id.* at 8.)

The RFP stated that VA would evaluate proposals based on three evaluation factors: (1) Technical Capability; (2) Past Performance; and (3) Price. (*Id.* at 64.) For the Technical Capability factor, VA would examine whether proposed IONM technicians possess relevant experience within the preceding three years, and whether the technicians are properly licensed; board-certified or board-eligible; proficient in spoken and written English; and have completed life-support training. (*Id.* at 65.)

Proposals were due March 29, 2024. (RFP, SF 1449.) Risen and Protestor submitted timely offers.

B. Risen's Proposal

Risen's proposal, dated March 20, 2024, explained that Risen is an SDVOSB established in 2009. (Proposal at 13.) Risen will serve as the prime contractor, responsible for “all project management services.” (*Id.*) The proposal stated that Risen will engage SpecialtyCare Inc. (SpecialtyCare) as its sole subcontractor. (*Id.* at 14.) SpecialtyCare is not an SDVOSB. (*Id.* at 9.)

According to the proposal, SpecialtyCare “performs over [XXXX] *cases annually*, employs [XXXXXXXX], [XXXX] Surgeons supported with IONM, [XXXXXXXX] of IONM experience, and the [XXXXXXXXXX] staff in the industry.” (*Id.* at 14 (emphasis in original).)

Risen's proposal identified Risen's owner, Mr. Junius J. Dion, Jr., as the proposed “Project Manager.” (*Id.* at 105.) No other Risen employees are discussed in the proposal. Of the [proposed] IONM technicians, all are employees of SpecialtyCare. (*Id.* at 25-38.) All of the proposed remote monitoring physicians also are SpecialtyCare employees. (*Id.* at 25, 40-98.)

C. Protest

On April 10, 2024, the CO notified unsuccessful offerors, including Protestor, that Risen was the apparent awardee. On April 15, 2024, Protestor filed the instant protest with the CO, challenging both Risen's size and SDVOSB status. The CO forwarded the status portion of the protest to OHA for review.²

In the protest, Protestor does not dispute that Risen is an SDVOSB. However, Protestor contends, Risen will be unduly reliant upon a non-SDVOSB subcontractor, SpecialtyCare, to perform the instant contract. (Protest at 1-2.) Protestor alleges that Risen will pay “far more than 50%” of contract dollar value to SpecialtyCare. (*Id.*) Furthermore, according to Protestor, Risen already performs at least [XXXX] contracts nationwide for similar IONM services, partnering with SpecialtyCare in each instance. (*Id.* at 2.)

D. Risen's Response

On May 16, 2024, Risen responded to the protest. Risen urges that the protest should be denied because Risen is wholly-owned and controlled by Mr. Dion, a service-disabled veteran. (Response at 2-3.)

Risen maintains that, insofar as the protest questions whether Risen will comply with limitations on subcontracting restrictions, such matters are beyond OHA's jurisdiction. (*Id.* at 3-4, citing *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 10 (2013) and *Size Appeal of Assessment & Training Sols. Consulting Corp.*, SBA No. SIZ-5421, at 3 (2012).) Excluding this allegation, the remainder of the protest lacks specificity. (*Id.* at 4, citing 13 C.F.R. § 134.1005(a)(2).)

Risen asserts that it is neither unusually reliant upon SpecialtyCare nor is it controlled by SpecialtyCare. (*Id.* at 5-6.) Risen likewise denies that its proposal violates the ostensible subcontractor rule. (*Id.* at 6.) Under OHA precedent, a concern may be found to violate the rule if a large subcontractor, rather than the prime contractor, will perform the contract's primary and vital requirements. (*Id.* at 7, citing *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018).) Here, although Risen plans to “purchase[] services from SpecialtyCare on an as-needed basis,” such “staff works [] under the management and

² Pursuant to 13 C.F.R. §§ 121.1003 and 134.1001(c), the CO directed the size portion of Protestor's allegations to SBA's Office of Government Contracting — Area VI.

supervision of Risen.” (*Id.*) Furthermore, Risen alone will perform “all of the day-to-day management services” including: “[XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 9.)

Lastly, Risen asserts that, of the \$[XXXX] per case unit price that Risen proposed on the instant contract, Risen expects to pay SpecialtyCare only [XX]% of that amount. (*Id.* at 10.)

In a declaration accompanying Risen's Response, Mr. Dion acknowledges that SpecialtyCare's employees will “perform the clinical services” on this contract. (Dion Decl. at 2.) SpecialtyCare, though, “does not manage the contract” but rather “reports to Risen.” (*Id.*)

E. OHA's Request for Information

On May 17, 2024, OHA issued an Order, pursuant to its authority at 13 C.F.R. § 134.1007(g), requesting that Risen further address its compliance with the ostensible subcontractor rule, particularly “how Risen will self-perform the primary and vital aspects of this procurement.” (Order at 2.) Although Risen's Response referenced certain size appeal decisions pertaining to limitations on subcontracting restrictions, those decisions “do not address the requirements for the SDVOSB program found in 13 C.F.R. § 128.401(g).” (*Id.*) Furthermore, contrary to Risen's assertion that “there is no evidence that [SpecialtyCare] is performing or managing the contract in lieu of Risen,” Risen's proposal apparently indicates that all of the personnel performing IONM services will be SpecialtyCare employees. (*Id.*)

F. Risen's Response to OHA's Order

On May 27, 2024, Risen responded to OHA's Order. Risen renews its contention that it will pay only [XX]% of the unit cost per case to SpecialtyCare. Risen thus will comply with limitations on subcontracting restrictions and with the ostensible subcontractor rule. (Response to Order at 4, citing *CVE Protest of Veterans Care Med. Equip., LLC*, SBA No. CVE-241-P (2022) and *CVE Protest of Welch Constr., Inc.*, SBA No. CVE-210-P (2021).)

Risen offers a further breakdown of its anticipated pricing for this procurement. (*Id.*) SpecialtyCare will be paid [XXXXX]. (*Id.*) With an expected 72 cases annually, and a contract duration of five years, approximately 360 cases will be supported. (*Id.* at 5.) SpecialtyCare thus will be paid roughly \$[XXXXX], or in other words, [XX]% of the anticipated contract value. (*Id.*) Risen allows that it also will spend \$[XXX] per case on “materials,” which will be \$[XXXXX] for the life of the contract. (*Id.*) Risen will also rent IONM equipment for an additional \$[XXXXX]. (*Id.* at 5-6.) Risen states that the total expected value of the contract is \$[XXXXX]. (*Id.* at 5.)

Risen asserts that SpecialtyCare's employees will be “under the direct supervision” of Mr. Dion or his “designee.” (*Id.* at 6.) While Risen is “purchasing” IONM services from SpecialtyCare, Risen nonetheless “has to be available 24/7/365 to make changes to any staffing or scheduling requirements.” (*Id.* at 6-7.) Risen argues that the “management and professional support services” Risen will perform are key to the procurement. (*Id.* at 8.) Risen “[XXXX XX].” (*Id.* at 8-9.) Because Risen may be

called upon to manage the contract at all hours, up to “[XXXX] hours per year,” but SpecialtyCare's technologists only work approximately [XXXX] per surgical procedure, Risen reasons that SpecialtyCare's true contribution is only [XX]% of total hours. (*Id.* at 9-10.)

Risen lastly argues that its subcontracting with SpecialtyCare can be excused because SpecialtyCare is a Professional Employer Organization (PEO). (*Id.* at 11.) Under 13 C.F.R. § 121.104(b)(4), “[b]usiness concerns which lease employees from concerns primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a [PEO] are not affiliated with the leasing company or PEO solely on the basis of a leasing agreement.” (*Id.*) Risen argues that SpecialtyCare meets the definition of a PEO since it “offers staffing support.” (*Id.* at 12.) Because Risen merely “hires” staff via a PEO, SpecialtyCare, the exception at § 121.104(b)(4) should apply. (*Id.* at 13.)

G. Protestor's Reply

On May 29, 2024, after reviewing a redacted version of Risen's Response to OHA's Order, Protestor submitted a Reply. Protestor reiterates that it does not dispute that Risen is an SDVOSB. Risen's arguments that Mr. Dion owns and controls Risen are thus irrelevant to the issue in this case — whether Risen is in violation of the ostensible subcontractor rule. (Reply at 1.)

Protestor highlights that the RFP calls for more than IONM technologists. (*Id.* at 2.) Rather, the RFP also seeks neuromonitoring hardware and software, disposables, and “[r]emote monitoring of the specific patient's case in real time by [] MD Neurologists with specialty certification in a neuro-electrical physiology certification.” (*Id.*) In Protestor's view, the \$[XXXX] Risen claims that it will pay SpecialtyCare may be realistic for the technologists only, but likely does not also include the neurologists. (*Id.*) Protestor estimates that the payment for such neurologists would range from \$400-\$1000 per case, and that Risen's Response disregards these expenditures. (*Id.* at 2-3.) Protestor offers a sworn declaration from Mr. Paul Schulman, owner of an IONM service provider with over 20 years of experience, expressing his view that “it is not economically possible to provide required IONM services for a single case for less than \$1,000 per case.” (Schulman Decl. ¶ 4.) Protestor concludes that “[e]ven if these services — including the residency-trained Neurologist not mentioned by Risen — could be subcontracted for \$1,000 per case, that amount would still be far more than the maximum-permissible 49% of the amount Risen is paid by [VA].” (Reply at 3-4.) Risen's proposal thus clearly contravenes the ostensible subcontractor rule. (*Id.* at 4.)

Protestor disputes Risen's contention that SpecialtyCare is a PEO. (*Id.* at 2-3.) Moreover, even if SpecialtyCare did qualify as such, Risen's argument overlooks that SpecialtyCare, not Risen, will be performing all the required IONM services. (*Id.* at 3.) Protestor asserts that “[c]ertainly Risen does not [self-perform] these [IONM services] — Risen has no employees [other than Mr. Dion] and Mr. Dion is not an MD, nor can he function simultaneously at all of the locations where Risen currently provides IONM services (all through SpecialtyCare).” (*Id.*) Protestor posits that SpecialtyCare may have sought out Risen, an SDVOSB, merely to “use as a pass-through to improperly obtain SDVOSB set-aside contracts with the VA.” (*Id.* at 4.)

H. Case File

The Case File (CF) indicates that Risen is a sole proprietorship based in the state of California. (CF, Exh. 53.) Mr. Dion, a service-disabled veteran, owns 100% of Risen. (CF, Exh. 23.) Risen last was verified as an SDVOSB on July 23, 2020. (CF, Exh. 1.)

III. Discussion

A. Burden of Proof

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

B. Date to Determine Eligibility

In a SDVOSB status protest pertaining to a procurement, OHA assesses the protested concern's compliance with the ostensible subcontractor rule as of the date of final proposal revisions. 13 C.F.R. § 134.1003(e)(1). Here, Risen submitted its proposal on March 20, 2024, and there were no subsequent proposal revisions. Sections II.A and II.B, *supra*. Therefore, OHA must examine Risen's eligibility as of this date.

C. Analysis

SBA regulations governing the SDVOSB program instruct that:

Ostensible subcontractor. Where a subcontractor that is not a certified VOSB or SDVOSB will perform the primary and vital requirements of a VOSB or SDVOSB contract, or where a VOSB or SDVOSB prime contractor is unduly reliant on one or more small businesses that are not certified VOSBs or SDVOSBs to perform the VOSB or SDVOSB contract, the prime contractor is not eligible for award of that VOSB or SDVOSB contract.

13 C.F.R. § 128.401(g).

In the instant case, Protestor alleges that Risen's non-SDVOSB subcontractor, SpecialtyCare, will perform the “primary and vital” aspects of the contract, and that Risen will be heavily dependent upon SpecialtyCare to perform the contract. Section II.C and II.G, *supra*. Protestor highlights that Risen does not propose to self-perform any portion of the required IONM services. *Id.* Furthermore, Risen, a sole proprietorship, has no workforce that conceivably might perform such work. *Id.* In addition, Protestor contends, Risen must, necessarily, pay “far more than 50%” of contract dollar value to SpecialtyCare. *Id.* Protestor's allegations find support in Risen's own proposal, which confirms that all of the proposed IONM technicians, as well as all of the proposed remote monitoring physicians, will be SpecialtyCare employees. Section II.B, *supra*. The only Risen employee mentioned in the proposal is its sole proprietor, Mr. Dion, who resides in [another state] whereas the contract calls for “on-site” IONM services in Colorado. Sections II.A, II.B, and II.H, *supra*.

In response to the protest, Risen suggests that it is not in violation of the ostensible subcontractor rule, based on the language of 13 C.F.R. § 128.401(g)(2). Sections II.D and II.F, *supra*. The regulation permits that a prime contractor may be found compliant with the ostensible subcontractor rule by demonstrating that the prime contractor will adhere to applicable limitations on subcontracting restrictions:

In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

13 C.F.R. § 128.401(g)(2); *see generally CVE Protest of U.S. Dep't of Vet. Affairs*, SBA No. CVE-154-P (2020).

Risen, though, fails to offer any persuasive explanation as to how it will comply with the limitations on subcontracting restrictions set forth in 13 C.F.R. § 125.6. Risen asserts that it will pay SpecialtyCare [XXXXXX], for a total of \$[XXXXX] over five years using the RFP's estimate of 72 cases annually. Section II.F, *supra*. Protestor counters, however, that [XXXXX] is almost certainly for the IONM technologists only, and not for the other medical professionals that Risen also plans to subcontract to SpecialtyCare. Section II.G, *supra*. In any event, though, assuming, for purposes of argument, that the claimed \$[XXXXX] to SpecialtyCare is accurate, this amount still represents more than 50% of the services aspects of the procurement. This is true because Risen reports that, of a total contract dollar value of \$[XXXXX], Risen will devote some \$[XXXXX] to equipment and/or materials. Section II.F, *supra*. Pursuant to 13 C.F.R. § 125.6(b), when a procurement calls for a combination of supplies and services, but is assigned a services NAICS code, the prime contractor may not subcontract more than 50% of the services aspects of the procurement to entities that are not similarly situated. The instant procurement was assigned a services NAICS code, 621399, Offices of All Other Miscellaneous Health Practitioners. Section II.A, *supra*. Of the \$[XXXXX] that will reportedly be spent for services, then, Risen itself concedes it will subcontract [a majority] to SpecialtyCare. Section II.F, *supra*. Thus, Risen has not demonstrated that it will comply with 13 C.F.R. § 125.6.

Risen also maintains that it will self-perform the primary and vital aspects of the contract, because Risen alone will be responsible for all “management and professional support services.” Sections II.D and II.F, *supra*. This argument is meritless since the RFP calls for “On-site Intraoperative Neuromonitoring and Instrumentation Services,” not managerial services. Section II.A, *supra*. Indeed, the RFP did not require offerors to propose any managerial personnel, nor are any specific managerial tasks discussed in the RFP. *Id.* The fact that the CO assigned the RFP NAICS code 621399, Offices of All Other Miscellaneous Health Practitioners, further connotes that the principal purpose of this procurement is medical support services. *See* 13 C.F.R. § 121.402(b) (each procurement must be assigned “the single NAICS code which best describes the principal purpose of the product or service being acquired”). OHA has

“consistently held that a prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work.” *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 12 (2018). Accordingly, Risen is not eligible for this award due to violation of the ostensible subcontractor rule.

Risen's contention that its reliance upon SpecialtyCare may be excused because SpecialtyCare is a Professional Employer Organization (PEO) is likewise unavailing. As Protestor correctly observes, Risen has not established that SpecialtyCare is, in fact, a PEO.³ Nor has Risen shown that its relationship with SpecialtyCare here is anything other than a prime contractor/subcontractor relationship. Notably, Risen's proposal for this procurement defined SpecialtyCare as Risen's “subcontractor.” Section II.B, *supra*.

IV. Conclusion

Risen bears the burden of proof in this proceeding, and has failed to demonstrate that it will comply with 13 C.F.R. § 128.401(g). 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

³ Pursuant to the *NAICS Manual*, a PEO is an establishment “primarily engaged in providing human resources and human resource management services to client businesses and households.” *NAICS Manual* at 489.