

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

IN THE MATTER OF:

Island Creek Associates, LLC,

Appellant,

RE: ReMilNet, LLC

Solicitation No. M67854-17-R-3018
U.S. Marine Corps Systems Command

SBA No. WOSB-110

Decided: February 26, 2018

APPEARANCES

Jeffery M. Chiow, Esq., Lucas T. Hanback, Esq., Stephen L. Bacon, Esq., Rogers Joseph O'Donnell, P.C., Washington, D.C., for Appellant

James E. Krause, Esq., James E. Krause, P.A., Jacksonville, Florida, for ReMilNet, LLC.

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

Lisa L. Baker, Esq., Office of Counsel, Marine Corps Systems Command, Quantico, Virginia

DECISION¹

I. Introduction and Jurisdiction

This dispute arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) that ReMilNet, LLC (ReMilNet) is an eligible Woman-Owned Small Business (WOSB) for the subject procurement. ReMilNet requests that SBA's Office of Hearings and Appeals (OHA) dismiss the appeal because the underlying protest filed by Island Creek Associates, LLC (Appellant) was untimely. For the reasons discussed *infra*, ReMilNet's request is granted, the D/GC's determination is vacated, and the appeal is dismissed.

¹ OHA issued a protective order in this case on December 27, 2017. This decision, though, does not contain any confidential or proprietary information. Accordingly, the decision is not issued under the protective order and is intended for public release.

II. Background

A. Solicitation and Protest

On May 16, 2017, the U.S. Marine Corps, Marine Corps Systems Command (Marine Corps) issued Solicitation No. M67854-17-R-3018 for services in support of the Global Combat Support System-Marine Corps/Logistics Chain Management Program. The solicitation contemplated the award of a task order under the SeaPort Enhanced (SeaPort-e) multiple-award indefinite-delivery/indefinite-quantity (ID/IQ) contracts. The Contracting Officer (CO) set aside the task order for WOSBs, but did not request that SeaPort-e contractors recertify their size or WOSB status for the task order. Appellant and ReMilNet submitted timely offers. On September 11, 2017, the CO announced that ReMilNet was the apparent awardee. On September 18, 2017, Appellant filed a protest challenging ReMilNet's status as a WOSB.

B. D/GC's Determination

On December 12, 2017, the D/GC determined that ReMilNet is an eligible WOSB. The D/GC did not adopt Appellant's protest, and did not address the timeliness of Appellant's protest in his determination. On December 27, 2017, Appellant appealed the D/GC's determination to OHA.

C. OHA Proceedings

While the appeal was pending, the CO informed OHA that SeaPort-e contractors were not required to recertify size or WOSB status for the instant task order. On February 6, 2018, OHA requested that the parties submit comments as to whether the D/GC should have dismissed Appellant's protest as untimely. OHA directed the parties' attention to 13 C.F.R. § 127.503(h)(1) and OHA's decision *Matter of Redhorse Corporation*, SBA No. VET-261 (2017), *recons. denied*, SBA No. VET-263 (2017) (PFR), where OHA vacated a D/GC determination after concluding that a status protest was not filed within 5 business days after award of the base contract or an order requiring recertification. Appellant, ReMilNet, and the Marine Corps submitted comments in response to OHA's request.

1. Appellant's Comments

Appellant contends that neither *Redhorse* nor 13 C.F.R. § 127.503(h)(1) applies here because SeaPort-e is “a unique [ID/IQ] contract vehicle that did not require the awardees to certify their small business status at the time of initial award.” (Appellant's Comments, at 1.) Appellant asserts that, under SeaPort-e, ReMilNet “could have relied on previous certifications submitted under its prior SeaPort-e IDIQ contract awarded in May 2007.” (*Id.* at 4.) “[B]ecause ReMilNet was *never required to certify* its small business status in the initial offer responding to the [current SeaPort-e] solicitation, the ‘recertification rule’ cannot operate here to bar [Appellant's] protest on timeliness grounds.” (*Id.*, at 5, emphasis Appellant's.)

Appellant adds that SBA previously accepted a status protest against Appellant in connection with a different SeaPort-e task order. In Appellant's view, “it would be both absurd

and inequitable to deny [Appellant] an equal right” to challenge ReMilNet's status as a WOSB. (*Id.* at 6.)

2. ReMilNet's Comments

ReMilNet argues that it self-certified as a WOSB when it submitted its proposal for its SeaPort-e contract in 2014. (ReMilNet's Comments, at 2.) The Marine Corps did not request recertification for the instant task order. (*Id.*) Therefore, Appellant's protest was plainly untimely, as it was filed three years after ReMilNet's most recent certification. (*Id.*, at 3, citing *Redhorse* and 13 C.F.R. § 127.503(h)(1).)

3. Marine Corps' Comments

The Marine Corps maintains that OHA's decision in *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR) is “directly on point”. (Marine Corps' Comments, at 1.) In *Quantum*, OHA determined that a protest involving a SeaPort-e task order was untimely because no recertification was required. OHA should likewise conclude that Appellant's protest here was untimely. (*Id.*)

III. Discussion

SBA regulations provide that a WOSB or EDWOSB status protest must be filed “prior to the close of business on the fifth day after notification by the contracting officer of the apparent successful offeror or notification of award.” 13 C.F.R. § 127.603(c)(1). An untimely protest must be dismissed. *Id.* § 127.604(b). Further, with regard specifically to orders under a Multiple Award Contract, SBA regulations state that a concern will retain its status as a WOSB or EDWOSB for the entire duration of the contract, unless the CO requests recertification in conjunction with a particular order:

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

Id. § 127.503(h)(1).

In the instant case, ReMilNet self-certified as a WOSB when it submitted its offer for the SeaPort-e contract in 2014, and no status protest was filed at that time. Section II.C., *supra*. Pursuant to 13 C.F.R. § 127.503(h)(1), then, ReMilNet is “considered an WOSB/EDWOSB for each order issued against the contract, unless a contracting officer requests a new WOSB or EDWOSB certification in connection with a specific order.” It is undisputed that the CO here did

not request recertification for the instant task order. Accordingly, Appellant's protest was untimely because it was not filed within five days after award of ReMilNet's SeaPort-e contract or an order requiring recertification.

The instant case is closely analogous to OHA's decision in *Matter of Redhorse Corporation*, SBA No. VET-261 (2017), *recons. denied*, SBA No. VET-263 (2017) (PFR). In *Redhorse*, OHA found that the D/GC erred by not dismissing a status protest as untimely, because the protest pertained to a task order for which recertification was not required. *Redhorse*, SBA No. VET-261, at 4-5. As a result, OHA vacated the D/GC's determination.

Appellant argues that 13 C.F.R. § 127.503(h)(1) and *Redhorse* should not apply here due to unique aspects of the SeaPort-e contracts, but this argument is unpersuasive. By its own terms, 13 C.F.R. § 127.503(h)(1) applies to orders under Multiple Award Contracts, and the term "Multiple Award Contract" is defined in SBA regulations to include "[a]ny [ID/IQ] contract entered into with two or more sources pursuant to the same solicitation." 13 C.F.R. § 125.1. Moreover, as the Marine Corps correctly observes, OHA has addressed the SeaPort-e contracts in prior decisions, and has held that a protest against a SeaPort-e task order is untimely if recertification is not requested. *Size Appeal of Quantum Professional Services, Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR). Accordingly, I see no basis to conclude that 13 C.F.R. § 127.503(h)(1) and *Redhorse* do not apply in the instant case.

Lastly, Appellant's argument that it would have been improper to dismiss Appellant's protest because the D/GC previously entertained a similar protest against Appellant is meritless. Appellant has provided little information about the earlier protest, so it is unclear whether that protest involved a task order that required recertification. Further, the earlier protest was not appealed to OHA and thus cannot be considered binding precedent in any event.

IV. Conclusion

For the above reasons, the D/GC's determination is VACATED and the appeal is DISMISSED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.227(b)(5).

KENNETH M. HYDE
Administrative Judge