

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

VSBC Protest of:

Panakeia, LLC,

Protestor,

Re: Warrior Service Company, LLC

Solicitation No. 36C24923R0041

U.S. Department of Veterans Affairs

SBA No. VSBC-352-P

Decided: April 19, 2024

ORDER GRANTING MOTION TO DISMISS

I. Background

On March 6, 2024, Panakeia, LLC (Protestor) protested both the size and Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Warrior Service Company, LLC (WSC), in conjunction with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C24923R0041. The Contracting Officer (CO) forwarded the status portion of the protest to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) for review.

The RFP sought a contractor to perform in-home oxygen and ventilator services for VA patients in Kentucky. (RFP, SF 1449.) The CO set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding size standard of \$19 million average annual receipts. (*Id.*)

In its protest, Protestor alleged that the apparent awardee, WSC, will be unusually reliant upon a non-SDVOSB subcontractor to perform the instant contract. (Protest at 1.) More specifically, Protestor contended that WSC “lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.” (*Id.* at 3, citing *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011).) According to Protestor, WSC's only relevant experience stems from two contracts awarded in July 2023, so WSC presumably relied upon a subcontractor's experience to win the contract. (*Id.*) Furthermore, in a prior OHA decision later affirmed by the U.S. Court of Federal Claims, WSC was found to have violated the ostensible subcontractor rule. (*Id.* at 3-4.)

On March 28, 2024, WSC moved to dismiss the protest, or in the alternative for summary judgment. In WSC's view, Protestor suggests that WSC will rely upon Community Medical Supply, Inc. (CMS), the same subcontractor at issue in the prior litigation, to perform the instant procurement. (Motion at 4.) WSC did not, however, propose to subcontract any portion of this contract to CMS. (*Id.* at 5.) Further, Protestor does not advance any concerns regarding WSC's proposal for the instant procurement. (*Id.*) Indeed, because Protestor has not examined WSC's proposal, Protestor could not possibly identify any fault in that proposal. (*Id.*) WSC concludes that the protest amounts to nothing more than a “general expression of displeasure” with VA's award decision, and should be dismissed. (*Id.* at 6.)

The CO forwarded OHA a copy of WSC's proposal. The proposal indicates that, upon award, WSC plans to subcontract portions of the work to two other concerns. (Proposal, Vol II. at 2-3.) CMS is not one of the proposed subcontractors. (*Id.*) WSC further represents that, as the prime contractor, WSC will comply with applicable limitations on subcontracting restrictions. (*Id.* at 3.) Specifically, WSC will self-perform more than 51% of the contract, and will retain control over “all primary and vital portions of the contract.” (*Id.*)

In accordance with 13 C.F.R. § 134.211(c), OHA afforded Protestor the opportunity to respond to WSC's motion. (Order at 1.) Protestor did not file a response.

## II. Analysis

I agree with WSC that this protest should be dismissed. Under OHA's rules of procedure, when a non-moving party fails to respond to a motion, the non-moving party is “deemed to have consented to the relief sought.” 13 C.F.R. § 134.211(c). Accordingly, by not opposing WSC's motion to dismiss, Protestor “is deemed to have consented to the dismissal.” *Size Appeal of Optivision, Inc.*, SBA No. SIZ-5740, at 12 (2016); *see also Matter of 3BG Mktg. Sols., LLC*, SBA No. BDPE-602, at 2 (2022); *Size Appeal of DB Sys. Tech., Inc.*, SBA No. SIZ-5961, at 2 (2018).

WSC's motion is also persuasive on its merits. In late 2019, SBA amended its rules to permit status protests challenging a prime contractor's reliance upon a non-SDVOSB subcontractor. *See generally* 13 C.F.R. §§ 128.401(g) and 134.1003(c). The regulations provide, however, that:

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). Because the instant procurement is for services, WSC, the prime contractor, need only comply with the “Limitations on Subcontracting” provisions related to

services at 13 C.F.R. § 125.6(a)(1). That regulation, in turn, stipulates that the prime contractor may subcontract no more than 50% of services to entities that are not similarly situated. Here, WSC's proposal indicates that WSC will self-perform a majority of the work, and will subcontract less than 50% of contract value to two subcontractors. Section I, *supra*. Thus, WSC's proposal appears to comply with § 125.6(a)(1). Even if OHA were to reach the merits of the protest, then, the protest appears deficient, as Protestor has not shown any reason to believe that WSC's proposal would contravene § 128.401(g). *See, e.g., CVE Protest of Veterans Care Med. Equip., LLC*, SBA No. CVE-241-P, at 11 (2022); *CVE Protest of Welch Constr., Inc.*, SBA No. CVE-210-P, at 4 (2021); *CVE Protest of In and Out Valet Co.*, SBA No. CVE-174-P, at 4 (2020).

### III. Conclusion

For the above reasons, WSC's motion to dismiss is **GRANTED** and the protest is **DISMISSED**. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.1007(b).

KENNETH M. HYDE  
Administrative Judge