

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

VSBC Protest of:

Winergy LLC,

Protestor,

Re: Atlantic First Industries Corporation

Solicitation No. 36C24525P0612

U.S. Department of Veterans Affairs

SBA No. VSBC-445-P

Decided: September 22, 2025

APPEARANCES

Paul O. Sauerteig, Esq., Snow & Sauerteig LLP, Fort Wayne, Indiana, for Protestor

Stephanie D. Wilson, Esq., Rachael C. Haley, Esq., Charles L. Bonani, Esq., Berenzweig Leonard, LLP, McLean, Virginia, for Atlantic First Industries Corporation (AFIC)

DECISION

On July 9, 2025, Winergy LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Atlantic First Industries Corporation (AFIC), in connection with the U.S. Department of Veterans Affairs (VA), Solicitation No. 36C24525P0612. The Contracting Officer (CO) forwarded the protest to the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) for review. Protestor alleges that AFIC is not a qualified SDVOSB for the subject procurement because AFIC has an ostensible subcontractor. For the reasons discussed *infra*, I DENY this protest.

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 EBG had been awarded the contract, so the protest is timely. 13 C.F.R. § 134.1004(a)(3). Accordingly, this matter is properly before OHA for decision.

## I. Background

### A. Solicitation

In 2025, the VA issued Solicitation No. 36C24525P0612, seeking a contractor to perform fume hood certification and repairs for the Washington, DC VA Medical Center. (Solicitation at 1.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 811310 — Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance — with a corresponding \$12.5 million annual receipts size standard. (*Id.*)

The Solicitation's Statement of Work (SOW) explains that it includes “all work necessary to support the required equipment and supplies needed (description below) to provide the Annual Certifications in the Main Lab and Research Lab Annual Certification.” (Solicitation at 7). The Scope of Service provides that “the vendor will provide all necessary, [sic] labor, materials, necessary [sic] to provide the Annual Certifications in the Main Lab and Research Lab and the Certification services.” (*Id.*) The prime contractor is also responsible for filling out an infection control risk assessment and ensuring compliance with all applicable legal requirements regarding worker health and safety, as well as hazardous material reporting. (*Id.* at 8-9).

AFIC submitted its offer, including price, on the deadline date of June 4, 2025. On June 20, 2025, AFIC was awarded the contract. Protestor was notified of the award on June 24, 2025 when the award notification was published to the Federal Procurement Data System — FPDS.gov.

### B. Protest

On June 25, 2025, Protestor timely filed the instant protest.

In the protest, Protestor alleges AFIC will be unduly reliant upon **[Subcontractor]** a non-SDVOSB subcontractor, to perform the contract. (Protest at 2.) Protestor highlights that the procurement requires the contractor show they have specialized experience and technical competence in performing the work. (Solicitation at 36). AFIC, by contrast, has no full-time field technicians trained to perform biological safety cabinet testing as described in the SOW, which means that AFIC is unable perform the testing and certification tasks required. (Protest at 2). In order to perform the required tasks, AFIC is subcontracting all of the work to **[Subcontractor]**, which means that **[Subcontractor]** is acting as an ostensible contractor upon which AFIC is unusually reliant. By outsourcing the “primary and vital” elements of the procurement to its subcontractor, AFIC is in violation of the ostensible subcontractor rule, 13 C.F.R. § 134.1003(c).

Appellant cites the OHA case of *Size Appeal of CardioMetrix, Inc.*, SBA No. SIZ-4051 (1995) as an illustrative example of this rule in application. There, the appellant, despite being projected to perform 55% of the total work as opposed to the subcontractor's 45%, was ruled to be in violation of the ostensible subcontractor rule because Appellant would not performing the vital and primary requirements of the subject procurement — in that case, medical laboratory

testing. Protestor further emphasizes that, unlike *CardioMetrix*, in the instant matter AFIC cannot even claim that they are performing over 50% of the work since they have no employees that can actually perform the testing work needed at the location. (Protest at 2-3).

Protestor also relies upon a 2025 OHA decision involving the same parties, *VSBC Protest of Winergy, LLC*, SBA No. VSBC-424-P (2025), in which OHA held that AFIC was using **[the same Subcontractor]** as an ostensible subcontractor for a nearly identical procurement at the Los Angeles VA Medical Center.

Protestor also references four other examples where it alleges AFIC subcontracted all of the work to another vendor:

- **RFQ No. 36C26223Q0090**: A procurement to provide pharmacy testing services at the Carl T Hayden VA Medical Center located in Phoenix, Arizona. Protestor alleges that AFIC had no properly certified technicians and would use **[the same Subcontractor]** as an ostensible subcontractor. While an appeal on these grounds was rejected by the CO, it is now approximately 30 months since the beginning of that contract with evidence that **[Subcontractor]** is performing all of the work (namely, that all pharmacy equipment tested at the facility has **[Subcontractor]** certification stickers, and all reports are authored and signed by **[Subcontractor]** employees). (See Attachment 5).

- **Solicitation No. 36C25724P0152**: A procurement to perform laboratory equipment testing services for the Northern Texas VA Healthcare System. Protestor alleges that AFIC is subcontracting all of the work to **[Subcontractor]**. On July 8, 2024 photos were collected of the **[Subcontractor]** certification stickers that were placed on the lab equipment at the Dallas VA Medical Center. (See Attachment 6).

- **Solicitation No. 36C24824Q1088**: A procurement to perform pharmacy testing services for all VA medical facilities in Region 8 (all of Florida and the Caribbean). Protestor alleges that AFIC is subcontracting all of the work to **[Subcontractor]**. All certification stickers and reports have the **[Subcontractor]** logo and are signed by **[Subcontractor]** employees. (See Attachment 7).

- **Solicitation No. 36C26324Q0953**: A procurement to perform pharmacy testing services at the VA Medical Center in Sioux Falls, South Dakota. Protestor alleges AFIC is subcontracting all of the work to **[Subcontractor]**. The SOW for the procurement requires the certification technician to have the CETA cleanroom testing certification, which no employee of AFIC possesses.

Finally, because this procurement is not considered construction work, SBA's clarifications to the ostensible contractor rule in its recent Final Rule do not apply to AFIC for the instant matter. See 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023).

For the above-listed reasons, OHA should find that AFIC is ineligible for award for the instant procurement. (Protest at 5-6).

### C. Protest Response

AFIC's initial deadline to respond to the protest was August 7, 2025, but upon obtaining counsel was granted an extension due to good cause and in the interest of a complete record. On September 5, 2025, AFIC, through its counsel, responded to the protest.

AFIC first explains its subcontract relationship with **[Subcontractor]** and how it adheres to the limitations on subcontracting. (Response at 3). (*See* Exh. 2, Proposal). The Proposal states that AFIC “will be subcontracting the non-critical task to **[Subcontractor]** whom we have an established working relationship.” (*Id.* at 5). Furthermore, AFIC details how it will ensure compliance with the limitations on subcontracting by explaining that it will “maintain detailed labor tracking and reporting systems to monitor performance and verify that at least 50% of the cost of contract performance incurred for personnel is expended by [AFIC's] own employees, excluding materials.” (*Id.*)

Additionally, AFIC claims that it will be responsible for the following tasks related to contract administration, compliance, and project management:

- Act as the sole point of contact with the Government and all communications.
- Arrange kickoff meetings with the Government to ensure contract obligations are met.
- Prepare and submit all required compliance documentation in accordance with contract terms.
- Oversee all contract deliverables, milestones, and reporting obligations.
- Retain full responsibility for deliverables, regardless of any subcontractor involvement.
- Maintain all official certification and inspection records for audit readiness.
- Assign an AFIC Project Manager to provide regular status updates and progress reports throughout the certification period.
- In the event samples or equipment fail USP <797> standards, AFIC will coordinate retesting with the Pharmacy to restore compliance.
- Develop work schedules and assign tasks to subcontractor staff.
- Supervise and direct all activities performed by subcontractors to ensure adherence to standards.
- Monitor progress and ensure timely completion of all services.

- Prepare and issue all contract deliverables, including official laboratory reports, ensuring all inventoried equipment is tested and compliant.
- Respond to any questions or inquiries from the VA regarding laboratory reports.
- Maintain complete records and documentation in compliance with USP <797> guidelines for auditing purposes.

(See Exh. 3, **[Individual 1]** Declaration). The response then gets into its legal arguments.

First, the response contends that AFIC can demonstrate by a preponderance of the evidence that it will comply with the limitations on subcontracting requirements such that **[Subcontractor]** is not an ostensible subcontractor. (Response at 6). Because the procurement is a services contract, to which 13 C.F.R. § 125.6(a)(1) applies, AFIC needs to demonstrate that it will not pay more than 50% of the amount paid by the government to its non-similarly situated subcontractor. (*Id.*) The total value of the Subcontract is **[REDACTED NUMBER]**, which represents only **[REDACTED PERCENTAGE]** of the overall contract value. (Exh. 3 at 1-2). And because the procurement is purely for services, there are no materials or other direct costs that need to be accounted for in the limitations on subcontracting calculation.

Moreover, AFIC's compliance with the limitations on subcontracting in 13 C.F.R. § 125.6 is — in and of itself — sufficient evidence that **[Subcontractor]** is not an ostensible subcontractor under 13 C.F.R. § 128.401. Indeed, 13 C.F.R. § 128.401(g)(2) requires:

In the case of a contract or order for services . . . 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 . . . will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

13 C.F.R. § 128.401(g)(2) (emphasis supplied in Response).

Further, when SBA updated this rule in 2023, the preamble to the final rule specifically stated:

SBA believes that meeting the applicable limitation on subcontracting requirement is sufficient to overcome any claim of the existence of an ostensible subcontractor.

88 Fed. Reg. at 26164, 26166 (April 27, 2023).

AFIC then cited numerous OHA cases upholding the principle that a prime contractor need only comply with the limitations on subcontracting provisions related to services at 13 C.F.R. § 125.6(a)(1) in order to satisfy the ostensible subcontractor requirements.

AFIC's second argument is that Protestor failed to provide credible evidence that AFIC will not meet the limitations on subcontracting or that **[Subcontractor]** is an ostensible subcontractor. AFIC relies upon *VSBC Protest of Data Monitor Systems, Inc.*, SBA No. VSBC-423-P (2025), in which the protestor based its ostensible subcontractor allegations on speculation because the awardee was a newly organized company that lacked revenue and federal contracting experience. That protestor reasoned that on this basis, and given the common management between the awardee and its subcontractor, that subcontractor would very likely perform the primary and vital requirements of the contract. OHA ultimately denied the protest because that protestor failed to provide credible evidence beyond those speculative grounds that there was a violation of the ostensible contractor rule. (*See Data Monitor Systems, Inc.* at 14-15). This protest is similarly based on mere allegations and speculative grounds rather than credible evidence, as required by 13 C.F.R. § 134.1003(c). (Response at 9).

Here, Protestor relies upon a previous OHA decision, regarding an entirely separate procurement, involving these same two parties from February 2025, *VSBC Protest of Winergy, LLC*, SBA No. VSBC-424-P (2025). In that case, OHA determined that AFIC offered “no supporting evidence, such as sworn statements or subcontracts, to corroborate the accuracy of the reported payment.” (*Id.* at 6). That decision was based upon AFIC's failure to carry its burden of proof in demonstrating its compliance with the limitations on subcontracting — however, AFIC's failure to adequately address the allegations raised in that matter do not constitute credible evidence that **[Subcontractor]** is an ostensible subcontractor to AFIC for the purposes of this procurement. (*Id.*) For this matter, AFIC has provided OHA with its Proposal for the procurement, a copy of the Subcontract, and a Declaration in support of the calculation of its compliance with the limitations on subcontracting. (*See Exhs. 2, 3, and 4*). Accordingly, for this matter, AFIC has carried its burden of proof and demonstrated its compliance with the limitations on subcontracting by a preponderance of the evidence. (Response at 10).

Protestor also relies upon pictures of **[Subcontractor]** certifications from four other procurements for which it alleges that AFIC subcontracted “all the work to another contractor as AFIC has no employees with the certification or technical capability to perform such testing.” (Response at 9, *citing* Protest at 3-5). However, Protestor provides no concrete evidence to support this assertion besides those pictures.

Finally, the case that Protestor cites to support its ostensible contractor allegation, *Size Appeal of CardioMetrix, Inc.*, SBA No. SIZ-4051 (1995), is outdated and inapplicable. (Response at 10). Not only is *CardioMetrix* a size protest — not a status protest — it was also decided in 1995 under very different regulations. Whereas the regulation at issue in *CardioMetrix, Inc.* required the prime contractor to perform 50% of the work, the current applicable regulation (most recently updated in 2016) merely provides that the prime contractor “will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.” (Response at 10, *citing* 13 C.F.R. § 125.6(a)(1)). (emphasis supplied in Response).

For the above-listed reasons, OHA should deny this protest and affirm that AFIC is eligible to be awarded the Contract in accordance with 13 C.F.R. § 128.401. (Response at 11).

## II. Discussion

### A. Burden of Proof and Date of Eligibility

As the protested firm, AFIC has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the Case File and the information provided by the Protestor, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestor and AFIC is part of the record. OHA determines the eligibility of the protested concern's SDVOSB status as of the date of the initial offer, including price. 13 C.F.R. § 134.1003(e)(1).

### B. Analysis

This appeal hinges on the ostensible subcontractor rule and the “primary and vital” requirements of the instant Solicitation.

SBA regulations governing the SDVOSB program require 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). (*also see generally CVE Protest of U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P (2020).

OHA has also consistently held that, in a procurement for services, “a prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work.” *VSBC Protest of Spartan Med., Inc.*, SBA No. VSBC-366-P, at 7 (2024) (quoting *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 12 (2018)); *see also VSBC Protest of Elevated Techs., Inc.*, SBA No. VSBC-325-P, at 6 (2023).

However, because the instant procurement is designated for services, AFIC, 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 the dollar value of services to entities that are not similarly situated.

A recent OHA case has a similar fact pattern: *VSBC Protest of Elevated Technologies, Inc.*, SBA No. VSBC-376-P (2024). In that case, the contract was for elevator maintenance and repair services. The prime contractor, Blue Spader, planned to outsource the actual repair work to a subcontractor because it didn't have employees in the state where the work was to be performed. Blue Spader claimed its proposal would adhere to the limitations on subcontracting,

which stipulate that no more than 50% of the dollar value of services could be paid to entities that are not “similarly situated.”

However, in *Elevated Technologies*, “Blue Spader's proposal was silent as to how work would be divided between Blue Spader and its subcontractors[,] . . . the proposal did not even identify the proposed subcontractors, let alone delineate what work they will perform. . . . [Nor did] Blue Spader explain, in response to the protest, how it would meet limitations on subcontracting restrictions.” (*Id.* at 13). Additionally, the “summary Work Breakdown Structure (WBS)” — a bulleted list of tasks Blue Spader claimed it would perform — was submitted during the protest but was deemed an argument rather than credible evidence by OHA because it lacked supporting documentation, such as sworn statements or subcontracts. (*Id.*)

By contrast, AFIC here has submitted a sworn Declaration that clearly outlines the division of labor between itself and its subcontractor, **[Subcontractor]**. While **[Subcontractor]** will perform a significant portion of the fume hood certification and repair tasks, AFIC will be responsible for equally critical administrative, recordkeeping, documentation, compliance, and reporting activities. These tasks account for the majority — **[REDACTED PERCENTAGE]** — of the contract's overall value. (Section II.C, *supra*).

The details of this Declaration are further supported by AFIC's proposal, which closely aligns with the terms of the solicitation. This breakdown is distinct from the one OHA dismissed in *Elevated Technologies*, *supra*, because it's consistent with and supported by the AFIC proposal. The Declaration states that AFIC will, among other things:

- Act as the sole point of contact with the Government and all communications . . .
- Prepare and submit all required compliance documentation in accordance with contract terms . . .
- Maintain all official certification and inspection records for audit readiness . . .
- Respond to any questions or inquiries from the VA regarding laboratory reports . . .
- Maintain complete records and documentation in compliance with USP <797> guidelines for auditing purposes.

(See Exh. 3, **[Individual 1]** Declaration). (Section II.C, *supra*).

In regard to the lack of concrete evidence, AFIC properly cited *VSBC Protest of Data Monitor Systems, Inc.*, SBA No. VSBC-423-P (2025). In that case, the protest was denied precisely because it was based on speculative grounds — the assumption that a new company with limited experience and shared management would fail to perform the contract's primary requirements. Similarly, Protestor here has not provided the credible evidence required by 13 C.F.R. § 134.1003(c) to support its assertion that AFIC will violate the limitations on subcontracting or that **[Subcontractor]** is an ostensible subcontractor. This is highlighted by



Protestor's use of images showing [Subcontractor] certification stickers on equipment in the other referenced procurements. Those pictures, on their own, do not prove that AFIC is failing to perform its contractual duties or that it is improperly subcontracting all the work, even as it pertains to those specific procurements, let alone this one. Without any corroborating documentation or sworn statements, these images amount to nothing more than unsupported allegations.

On a related note, Protestor's reliance on the previous OHA decision involving these parties, *VSBC Protest of Winergy, LLC*, SBA No. VSBC-424-P (2025), is similarly unpersuasive. While AFIC may have failed to meet its burden of proof in that separate and unrelated matter, that past shortcoming does not constitute credible evidence for this current procurement. The circumstances are different, and AFIC's actions here stand on their own.

In this case, AFIC has met its burden of proof by a preponderance of the evidence. AFIC submitted its Proposal, a copy of its subcontract with [Subcontractor], and a sworn Declaration that clearly demonstrates its compliance with the limitations on subcontracting. These documents provide the concrete evidence that was lacking in the previous *Winergy* case and which Protestor has failed to provide here. By supplying this detailed and corroborated information, AFIC has shown that its division of labor and financial arrangement with its subcontractor adheres to the relevant regulations.

Finally, the case cited by Protestor on the ostensible subcontractor rule, *Size Appeal of CardioMetrix, Inc.*, SBA No. SIZ-4051 (1995), is inapposite. The pertinent regulations have undergone significant changes since 1995. Whereas the regulation at issue in *CardioMetrix* required the prime contractor to perform 50% of the work, the current applicable regulation is a less burdensome requirement that the prime contractor merely “not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.” (*See* 13 C.F.R. § 125.6(a)(1)).

Returning to the ostensible subcontractor rule, SBA recently revised its rule on whether a contractor is performing the primary and vital requirements of a contract:

In the case of a contract or order set-aside or reserved for small businesses for services, specialty trade construction or supplies, SBA will find that a small business prime 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 small businesses, where the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

13 C.F.R. § 121.103(h)(3)(iii) (emphasis supplied).

Moreover, SBA itself also noted during the issuance of the rule that it “believe[d] that meeting the applicable limitation on subcontracting requirement is sufficient to overcome any claim of the existence of an ostensible subcontractor.” 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023). (emphasis supplied).

SBA also stated in its final version of the revisions to the ostensible subcontractor rule that “a prime contractor should be able to use the experience and past performance of its subcontractors to strengthen its offer.” *See* 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023); 13 C.F.R. § 121.103(h)(3)(ii).

Recent OHA precedent has upheld these interpretations of the updated regulation, holding that “[w]hen the subject procurement is viewed in the aggregate . . . [and the prime contractor] is performing a majority of the total work required by the contract[,] [t]he specific methods and mechanisms through which a proposal seeks to comply with the pertinent regulations are irrelevant so long as they [overall] are being complied with. . . . [M]eeting the applicable limitations on subcontracting, in turn, provides sufficient evidence to overcome Appellant's claim — indeed, any claim — regarding the existence of an ostensible subcontractor” *Size Appeal of Bowhead Enterprise, Science, and Technology, LLC*, SBA No. SIZ-6352 at 18.

Viewing the subject procurement in the aggregate, it is clear that the prime contractor, AFIC, will have substantial responsibilities throughout the entire period of performance, as the tasks outlined in both the Proposal itself and subsequent Declaration detail. Furthermore, both documents closely align with the requirements contained within the Solicitation itself, and the tasks contained therein constitute a majority of the total work required for the subject procurement.

In sum, because AFIC's Proposal and Declaration establish that it will be performing a majority of the work here and performing the primary and vital requirements of the contract, AFIC has thus met its burden of establishing that it is an eligible SDVOSB for this procurement. I must therefore DENY this Protest.

#### IV. Conclusion

For the above reasons, the protest is DENIED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN  
Administrative Judge