

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

IN THE MATTER OF:)

METRiX Enterprise)
Solutions Inc.)

) Docket No. VET-2010-11-29-27

Appellant)

Solicitation No. SB1341-10-RP-0066,)

Contract No. SB1341-10-C-N0099)

U.S. Department of Commerce,)

National Institute of Standards)

and Technology)

APPEAL PETITION

Appellant, METRiX Enterprise Solutions Inc., 2099 Gaither Road, Suite 600, Rockville, Maryland 20850-4018 (METRiX Enterprise), a for-profit Delaware Stock Corporation and a Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC), a SDVO SBC declared ineligible by the U.S. Small Business Administra-

tion's Office of Government Contracting, as and for its Appeal Petition, alleges as follows:

INTRODUCTION

1. This is an Appeal Petition alleging clear errors of fact and clear errors of law in connection with an Eligibility Determination of Friday, November 19th, 2010. MET-RiX Enterprise received by facsimile this Eligibility Determination the day it was issued, Friday, November 19th, 2010. This Eligibility Determination was issued by the U.S. Small Business Administration's Office of Government Contracting (Office of Government Contracting) under Part 125 of 13 C.F.R., Chapter 1.

2. This Eligibility Determination was issued in response to a Size Protest, 13 C.F.R. § 121.1001(a)(1)(i), received on October 27th, 2010 by the Office of Government Contracting by referral from a Contracting Officer at the U.S. Department of Commerce, National Institute of Standards and Technology, of an electronic message from WiiKno, Incorporated, 701 Brazos, Suite 930, Austin, Texas 78701-2583 (WiiKno). This electronic message from WiiKno was dated October 15th, 2010, and this

electronic message from WiiKno challenged only METRiX Enterprise's possible affiliation, 13 C.F.R. § 121.103, with METRiX Technology, Incorporated, *not* the Control of METRiX Enterprise by Service-Disabled Veterans as is required by 13 C.F.R. § 125.10(a), (b) for SDVO SBC eligibility.

NATURE OF THE APPEAL

3. METRiX Enterprise, the firm which has received the Eligibility Determination by the Office of Government Contracting, files this Appeal as authorized by 13 C.F.R. § 125.28 and by 13 C.F.R. § 134.502. The U.S. Small Business Administration's Office of Hearings and Appeals has jurisdiction to conduct proceedings in this Appeal under 13 C.F.R. § 134.102(q).

4. The Office of Government Contracting has notified METRiX Enterprise in the Eligibility Determination of November 19th, 2010 that METRiX Enterprise may file this Appeal within ten business days of Friday, November 19th, 2010, the day METRiX Enterprise received the Office of Government Contracting's Eligibility Determination. This Appeal Petition is filed on Tuesday, November 30th, 2010, well within ten

business days of Friday, November 19th, 2010, and thus it is timely under 13 C.F.R. § 134.503.

FACTUAL ALLEGATIONS

THE OFFICE OF GOVERNMENT CONTRACTING'S ELIGIBILITY DETERMINATION

5. The Office of Government Contracting has determined, this as required by 13 U.S.C. § 632(q) and by 13 C.F.R. § 125.8(d), that Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, and Nicholas J. Morano, a Director of METRiX Enterprise, are both Veterans with Service-Connected Disabilities. Thus Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, and Nicholas J. Morano, a Director of METRiX Enterprise, are both eligible Service-Disabled Veterans. Office of Government Contracting Eligibility Determination, at page 3.

6. The Office of Government Contracting has determined, this as required by 13 C.F.R. § 125.9(d), that Robert J. Winebrener, the President and Chief Executive Offi-

cer of METRiX Enterprise, and Nicholas J. Morano, a Director of METRiX Enterprise, together unconditionally and directly own fifty-one percent of the stock certificates issued by METRiX Enterprise, a for-profit Delaware Stock Corporation. Office of Government Contracting Eligibility Determination, at pages 3 through 4.

7. The Office of Government Contracting has determined, this as required by 13 C.F.R. § 125.10(b), that Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, has over one year's experience "leading operations" of METRiX Enterprise. Office of Government Contracting Eligibility Determination, at page 5.

THE RECORD BEFORE THE OFFICE OF GOVERNMENT CONTRACTING

8. The Record before the Office of Government Contracting discloses, this as required by 13 C.F.R. § 125.10(b), that Robert J. Winebrener, as the President and Chief Executive Officer of METRiX Enterprise, holds the highest Officer position in the firm, and that Robert J. Winebrener has managerial experience of the extent and complexity needed as required to oversee the delivery of professional support serv-

ices, *viz.*, Mr. Winebrener possess “managerial experience in settings as complex as MSI and thus has the experience needed to run MSI.” METRiX’s Response, November 10th, 2010, at pages 5 through 6.

9. The Record before the Office of Government Contracting discloses, this as required by 13 C.F.R. § 125.10(e), that Robert J. Winebrener, as the President and Chief Executive Officer of METRiX Enterprise, and Nicholas J. Morano, a Director of METRiX Enterprise, together control the Board of Directors of METRiX Enterprise, a for-profit Delaware Stock Corporation. METRiX’s Response, November 10th, 2010, at page 6.

10. The Record before the Office of Government Contracting discloses, this as required by 13 C.F.R. § 125.10(a), that Robert J. Winebrener, as the President and Chief Executive Officer of METRiX Enterprise, makes long-term decisions for METRiX Enterprise. METRiX’s Response, November 10th, 2010, at page 6, and Exhibit 10.

11. The Record before the Office of Government Contracting discloses that METRiX Enterprise has more than one year’s experience delivering professional support

services to the U.S. Department of Health and Human Service's Agency for Health-care Research and Quality, Rockville, Maryland. METRiX's Response, November 10th, 2010, Exhibit 1, METRiX's Competitive Proposal, Appendix B, Past Performance.

FIRST CLEAR FACTUAL ERROR

12. As is clear from the Record before the Office of Government Contracting, there is no evidence, no document, which discloses or otherwise supports the conclusion of the Office of Government Contracting, Eligibility Determination, at page 5, that neither Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, nor Nicholas J. Morano, a Director of METRiX Enterprise, exercises managerial and supervisory control over the employees of METRiX Enterprise delivering professional support services, this as required by 13 C.F.R. § 125.10(a). Indeed, there is evidence to the contrary, and this evidence is that Mr. Winebrener has over one year's experience managing and supervising the delivery by METRiX Enterprise of professional support services to the U.S. Department of Health and Human Serv-

ice's Agency for Healthcare Research and Quality, Rockville, Maryland. Office of Government Contracting Eligibility Determination, at page 5.

SECOND CLEAR FACTUAL ERROR

13. As is clear from the Record before the Office of Government Contracting, there is no evidence, no document, which discloses or otherwise intimates that neither Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, nor Nicholas J. Morano, a Director of METRiX Enterprise, exercises long-term decision-making for METRiX Enterprise, this as required by 13 C.F.R. § 125.10-(a). Indeed, there is evidence to the contrary, and this evidence is that Mr. Winebrener and Mr. Morano together control the Board of Directors of METRiX Enterprise, a for-profit Delaware Stock Corporation. METRiX's Response, November 10th, 2010, at page 6.

THIRD CLEAR FACTUAL ERROR

14. As is clear from the Record before the Office of Government Contracting, there is no evidence, no document, which discloses or otherwise intimates that Rob-

ert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, does not exercise managerial and supervisory control, this as required by 13 C.F.R. § 125.10(a), over Mr. Emmet Cavanagh, Chief Operating Officer of METRiX Enterprise, and a person with more than twenty years' experience in technical project management, software development, systems architecture, and in the management of Federal Contracts of a highly technical nature. Indeed, there is evidence to the contrary, and this evidence is that Mr. Winebrener, at a meeting of the Board of Directors of METRiX Enterprise on October 16th, 2010, directed that METRiX Enterprise “establish a pipeline report to track projects,” and that METRiX Enterprise “identify hardware and software requirements for hosting the NIST [National Institute of Standards and Technology] development requirements.” METRiX’s Response, November 10th, 2010, Exhibit 10, “Executive Staff Meeting Minutes.”

FIRST CLEAR LEGAL ERROR

15. The Office of Government Contracting here has made negative findings on the issue of Control of an SDVO SBC as is required by 13 C.F.R. § 125.10, particular-

ly, that the premises of METRiX Enterprise are located in Rockville, Maryland but Mr. Winebrener and Mr. Morano are located in Ohio, “hundreds of miles away from MES’s place of business.” Office of Government Contracting Eligibility Determination, at page 3. But the Office of Government Contracting had from WiiKno *no* “credible evidence that the concern . . . is not controlled by one or more service-disabled veterans,” this as required by 13 C.F.R. § 125.26(b). Indeed, it was a *Size Protest*, 13 C.F.R. § 121.1001(a)(1)(i), from WiiKno which was referred to the Office of Government Contracting by a Contracting Officer at the U.S. Department of Commerce, National Institute of Standards and Technology, not a *SDVO SBC Status Protest*, 13 C.F.R. § 125.24(b).

SECOND CLEAR LEGAL ERROR

16. The Office of Government Contracting has wrongly determined that neither “you, Mr. Winebrener, or you, Mr. Morano, have managerial and supervisory control over those who possess technical expertise.” Office of Government Contracting Eligibility Determination, at page 5. This is legal error because it entirely ignores the de-

termination of the Office of Government Contracting that Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, has over one year's experience "leading operations" of METRiX Enterprise, Office of Government Contracting Eligibility Determination, at page 5, and that Mr. Winebrener, at a meeting of the Board of Directors of METRiX Enterprise on October 16th, 2010, directed that METRiX Enterprise "establish a pipeline report to track projects," and that METRiX Enterprise "identify hardware and software requirements for hosting the NIST [National Institute of Standards and Technology] development requirements," METRiX's Response, November 10th, 2010, Exhibit 10, "Executive Staff Meeting Minutes."

17. Just as is explained in *Matter of NuGate Group*, SBA No. VET-132, at 7 (2008), where a SDVO SBC's business, as here, involves a less supervision-intense business enterprise (here it is on-site information technology support services), and there is ample evidence before the Office of Government Contracting of the firm's Chief Executive Officer managing the firm's affairs, albeit remotely, there is no ground to

conclude that the Control requirements of 13 C.F.R. § 125.10(a), (b) have not been met.

THIRD CLEAR LEGAL ERROR

18. The Office of Government Contracting decides, unlawfully, that there is insufficient evidence, as is required by 13 C.F.R. § 125.10(a), (b), that either Mr. Winebrenner or Mr. Morano make “long-term decisions or manage the day-to-day business operations of MES,” Office of Government Contracting Eligibility Determination, at page 5.

19. This is clear legal error. Neither 13 C.F.R. § 125.10(a) nor 13 C.F.R. § 125.10(b) requires that Service-Disabled Veterans devote every waking hour to long-term decision-making and to the day-to-day management and administration of a firm’s business affairs. This is confirmed by provisions in 13 C.F.R. § 125.10(b) which require only “ultimate managerial and supervisory control,” and which allow the required technical expertise and the required professional licenses to be possessed by others.

20. The Control requirements of 13 C.F.R. § 125.10(a) and of 13 C.F.R. § 125.10(b) are met when the Record demonstrates, as here, that Service-Disabled Veterans conduct the firm's financial and administrative affairs, manage the firm remotely, and that the Contract at issue is a Contract which, unlike a construction Contract, concerns highly-technical work delivered by exempt professional employees who themselves conduct on-site interaction with the Government's representatives. *Matter of E2Si-SaLUT Joint Venture*, SBA No. VET-126, at 5 (2008).

FOURTH CLEAR LEGAL ERROR

21. The Office of Government Contracting here has wrongly made an Eligibility Determination of METRiX Enterprise's SDVO SBC Status, yet the Office of Government Contracting did not have before it a legally sufficient SDVO SBC Status Protest. 13 C.F.R. § 125.24(c) requires, *inter alia*, that:

A protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient. *Example:* A protester submits a protest stating that the awardee's owner is not a service-disabled veteran. The protest does not state any basis for this assertion. The protest allegation is insufficient.

22. It is the Contracting Activity's Contracting Officer, or an activity of the U.S. Small Business Administration other than the Office of Government Contracting, or any Offeror who submits a Competitive Proposal for a specific SDVO Contract, 13 C.F.R. § 125.8(b), who may challenge the status of a SDVO SBC, 13 C.F.R. § 125.24(b), but these SDVO SBC Status Protests must be based on credible evidence, *viz.*, on specific facts or allegations. An SDVO SBC Eligibility Determination, as here, may not be made *sua sponte* by the Office of Government Contracting, and may not be made on the basis of insufficient evidence when there is no credible evidence, *i.e.*, "protestable allegations" placed before the Office of Government Contracting by third parties, 13 C.F.R. § 125.26(c)(1).

23. The Office of Government Contracting exceeded its authority under 13 C.F.R. § 125.26(b) by making negative findings on the issue of Control of an Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC), Control as required by 13 C.F.R. § 125.10, Office of Government Contracting Eligibility Determination, at 6, because the Office of Government Contracting did so in the absence of credible

evidence or protestable allegations from third parties. Lacking credible evidence or protestable allegations from third parties to which it could respond, METRiX Enterprise did not have a fair opportunity to respond as is required by 13 C.F.R. § 125.27-(c)(1). In particular, METRiX Enterprise had no opportunity to respond to the Office of Government Contracting's assertion, an assertion made without fair notice, and an assertion upon which the Office of Government Contracting's Eligibility Determination is based, that Mr. Emmet Cavanagh could somehow "leverage his authority" and frustrate the required Control of METRiX Enterprise from a remote location by Mr. Winebrener and by Mr. Morano. *Id.*

24. The necessity for SDVO SBC's whose eligibility is challenged before the Office of Government Contracting to have a fair opportunity to respond to credible evidence or protestable allegations is confirmed by 13 C.F.R. § 134.512, a provision which precludes the Office of Hearings and Appeals from admitting evidence beyond the Record before the Office of Government Contracting. The Record is to be made below, before the Office of Government Contracting only and there on fair notice of the

challenges to which a response can be made by the SDVO SBC whose eligibility is questioned.

PRAYER FOR RELIEF

WHEREFORE, premises considered, METRiX Enterprise respectfully requests the U.S. Small Business Administration's Office of Hearings and Appeals to decide:

1. that the Office of Government Contracting exceeded its authority under 13 C.F.R. § 125.26(b) when it made negative findings on the issue of Control of an SDVO SBC as is required by 13 C.F.R. § 125.10, but the Office of Government Contracting did so in the absence of credible evidence or protestable allegations from third parties; and

2. that the Office of Government Contracting's Eligibility Determination of November 19th, 2010 is based on three clear errors of fact and is based on four clear errors of law, 13 C.F.R. § 134.508; and

3. that based on the factual determinations made by the Office of Government Contracting, paragraphs numbers 5. through 7. hereinabove; and based on the Rec-

ord before the Office of Government Contracting, paragraph numbers 8. through 11. hereinabove; METRiX Enterprise is an SDVO SBC where business Control is indeed vested in Robert J. Winebrener, the President and Chief Executive Officer of METRiX Enterprise, and in Nicholas J. Morano, a Director of METRiX Enterprise, both of whom are eligible Service-Disabled Veterans.

Respectfully submitted,

/s/ Cyrus E. Phillips IV

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November 30th, 2010

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PROOF OF SERVICE

Pursuant to 13 C.F.R. § 134.204(d) and 13 C.F.R. § 134.505(c), the undersigned hereby certifies, under the penalty of perjury, that on Monday, November 29th, 2010, he caused two copies of the foregoing Appellant's Appeal Petition to be sent by pre-paid overnight delivery, these addressed as follows:

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