

Cite as: *Matter of METRiX Enterprise Solutions, Inc.*, SBA No. VET-208 (2010)

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

IN THE MATTER OF:

METRiX Enterprise Solutions, Inc.

Appellant

Solicitation No. SB1341-10-RP-0066
National Institute of Standards and Technology
U.S. Department of Commerce
Gaithersburg, Maryland

SBA No. VET-208

Issued: December 10, 2010

APPEARANCES

Cyrus E. Phillips IV, Esq., Albo & Oblon LLP, Arlington, Virginia, for Appellant.

Sam Q. Le, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency.

DECISION

HOLLEMAN, Administrative Judge:

I. Background

On June 25, 2010, the Contracting Officer (CO) for the U.S. Department of Commerce, National Institute of Standards and Technology issued Solicitation No. SB1341-10-RP-0066 (RFP) seeking a health information technology query and retrieval tool. The RFP was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. The CO assigned North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of \$7 million in average annual receipts.

On October 4, 2010, the CO posted an award notice to the Federal Business Opportunities website (<http://www.fbo.gov>) indicating that the procurement had been awarded to METRiX Technologies, Inc. (METRiX Technologies). On October 14, 2010, the CO posted a modified award notice indicating the procurement had actually been awarded to METRiX Enterprise Solutions, Inc. (Appellant) and explaining the previous award notice was based on an administrative error.

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On October 15, 2010, WiiKno, Inc., (WiiKno) an unsuccessful offeror, protested the award of the contract to Appellant. The protest alleges that Appellant shares a location with METRIX Technologies, which WiiKno believes to be a small woman-owned business. The protest alleges: "My understanding was that the effort was for a company that was Service Disabled Veteran Owned Small business and under \$7 million. It appears there may be an issues [sic] with affiliation between the two companies and the size standard of the women owned business is unknown."

On October 18, 2010, the CO forwarded the protest to the U.S. Small Business Administration (SBA) Director of the Office of Government Contracting (D/GC). On November 3, 2010, the D/GC notified Appellant that it had received a protest challenging Appellant's status as an eligible SDVO SBC and requested a response. On November 10, 2010, Appellant filed a response arguing that it is an eligible SDVO SBC. A footnote in that response provided:

[Appellant] respectfully disagrees with this decision not to dismiss WiiKno's protest. WiiKno's protest does not present credible evidence that [Appellant] is not 51% owned and controlled by one or more service-disabled veterans. Nor does it present specific allegations supporting the contention that [Appellant] cannot provide documentation that it meets the definition of service-disabled veteran. See 13 C.F.R. § 125.26.

On November 19, 2010, the D/GC issued its determination that Appellant is not an eligible SDVO SBC because it is not controlled by a service-disabled veteran.

On November 29, 2010, Appellant filed the instant appeal petition. Appellant mounts a substantive challenge to the D/GC's determination and also argues the D/GC should not have accepted the protest because it was not legally sufficient pursuant to 13 C.F.R. §§ 125.25(b) and 125.27(c)(1).

On December 8, 2010, the SBA filed its response to the appeal petition. The SBA argues the D/GC correctly determined that Appellant is not controlled by a service-disabled veteran. The SBA does not address the legal sufficiency of WiiKno's protest except to note in its recitation of the facts that "[t]he CO identified the protest as an SDVO SBC protest" and that "the protest itself alleged that the CO had made award to [Appellant], a non-SDVO firm."

II. Discussion

A. Jurisdiction & Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Appellant filed the instant appeal within ten business days of receiving the D/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

¹ I note Appellant quoted and applied these regulations properly, but miscited them as appearing at 13 C.F.R. §§ 125.24(c) and 125.26(c)(1).

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OHA reviews the D/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, OHA may only overturn the D/GC's determination if Appellant proves that he made a patent error based on the record before him.

B. Analysis

13 C.F.R. § 125.25(b) provides:

Protests must be in writing and must specify all the grounds upon which the protest is based. 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.

Furthermore, 13 C.F.R. §125.27(b) provides that nonspecific protests will be dismissed, and 13 C.F.R. §125.27(c)(1) provides that the SBA will notify the protested concern of the protest and its chance to respond "[i]f SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations."

Based upon these regulations, the protest underlying the D/GC's determination in this matter is clearly insufficiently specific. The protest provides only that WiiKno believed the RFP to be an SDVO SBC set-aside and alleges only that Appellant may be affiliated with METRiX Technologies. There is not even a direct assertion that Appellant is not an eligible SDVO SBC, let alone specific facts or allegations that could serve as a basis for such an assertion.

It is the CO who characterized this protest as an SDVO SBC protest, but the CO's characterization of a protest is not enough to render it a specific SDVO SBC protest. Specificity must be based on the text of the protest itself. It would have been more appropriate to consider this protest a size protest, not an SDVO SBC protest, because the only concrete allegation therein is that Appellant is affiliated with METRiX Technologies. Moreover, as indicated, the protest does not allege that Appellant is not an SDVO SBC or state any specific reasons for believing it to be ineligible as an SDVO SBC. Thus, the protest should have been dismissed pursuant to 13 C.F.R. §125.27(b). Consequently, the D/GC should not have issued its determination, and I have no choice but to vacate it.²


² OHA has previously held that sufficiency of the protest underlying the D/GC's determination is a substantive issue that may not be raised for the first time on appeal. *Matter of Four Points Tech., LLC*, SBA No. VET-120, at 7 (2007). I find Appellant sufficiently raised the issue of the sufficiency of WiiKno's protest by including the footnote quoted above in its response to the D/GC.

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III. Conclusion

The D/GC's determination was based upon clear legal error because the underlying protest was legally insufficient. Thus, this appeal petition is GRANTED, and the D/GC's status determination is REVERSED and VACATED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).



CHRISTOPHER HOLLEMAN
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2010, I served the foregoing by facsimile transmission upon the following:

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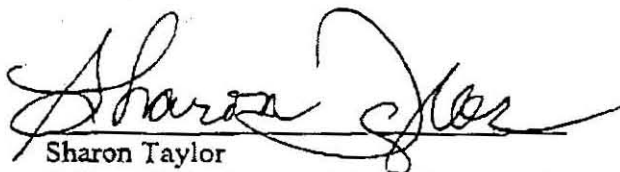
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