

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

VSBC Protest of:

Winergy, LLC,

Protestor,

Re: Atlantic First Industries Corporation

Solicitation No. 36C26224Q1891

U.S. Department of Veterans Affairs

SBA No. VSBC-424-P

Decided: February 11, 2025

APPEARANCES

Andrew Connor, Managing Member, Winergy, LLC, Fort Wayne, Indiana

Lap Kwan Chu, President, Atlantic First Industries Corporation, Manhasset, New York.

DECISION¹

I. Introduction and Jurisdiction

On December 13, 2024, Winergy, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Atlantic First Industries Corporation (AFIC), in connection with U.S. Department of Veterans Affairs (VA) Request for Quotations (RFQ) No. 36C26224Q1891. Protestor contends that AFIC will be unduly reliant upon a non-SDVOSB subcontractor to perform the contract, in contravention of 13 C.F.R. §§ 128.401(g) and 134.1003(c). For the reasons discussed *infra*, the protest is sustained.

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 AFIC 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.

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redaction decision for public release.

II. Background

A. The RFQ

On October 7, 2024, VA issued RFQ No. 36C26224Q1891, seeking a contractor to inspect and certify ventilation equipment at the VA Greater Los Angeles Healthcare System. (RFQ, SF 1442.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of \$19 million average annual receipts. (*Id.*) The RFQ was structured as a procurement of commercial items and services under Federal Acquisition Regulation (FAR) part 12. (*Id.*)

According to the RFQ's Statement of Work, the contractor will provide "all parts labor, transportation, parts, equipment, supervision, and expertise to perform on-site bi-annual inspections and certifications of Government-Owned Fume Hoods, Ventilation Devices, Biological Safety Cabinets (BSC), Laminar Flow Devices, Isolators, Biosafety Hazard Hoods, Sterile Workbenches, Radiation Safety Hoods, Buffer, Ante spaces, and Pharmacy Clean Rooms." (RFQ at 31.)

The RFQ stated that "[c]ontractor personnel performing inspection and certification services shall be fully accredited and certified to conduct tests, evaluations and certification of the equipment assigned." (*Id.* at 42.) More specifically, "[c]ontractor personnel shall have validated Certificate of Accreditation from National Sanitation Foundation (NSF) International: Biohazard Cabinet Field Certifier Accreditation Program." (*Id.*) The RFQ added that "[t]he certificate of accreditation shall specify the initial and expiration dates and this certification shall be verifiable on the NSF website." (*Id.*)

The RFQ explained that "Price alone is the sole evaluation factor." (*Id.* at 49.) VA would award a single contract "to the responsible offeror whose offer, conforming to the solicitation, offers the lowest price, whose offered price does not exceed the amount of funding available for the procurement, and whose offered price is found to be reasonable." (*Id.*)

AFIC submitted its offer, including price, on October 23, 2024. There were no subsequent proposal revisions. On December 10, 2024, unsuccessful offerors were notified that AFIC had been awarded the contract.

B. Proposal

AFIC's proposal stated that AFIC "is a compliance and facility inspection services company that specializes in healthcare, commercial, and manufacturing projects." (Proposal at 5.) AFIC is based in Manhasset, New York. (*Id.* at 1.) The proposal did not indicate whether AFIC planned to utilize subcontractor(s) to perform the contract, nor delineate how work would be divided between AFIC and any subcontractor(s). Instead, throughout the proposal, individuals performing the work were identified as "our technicians." (*Id.* at 7-8.)

The proposal stated that AFIC would provide a “team of four highly trained technicians” who “are accredited by NSF.” (*Id.* at 5.) The technicians “collectively possess over 55 years of experience in delivering testing and certification services, ensuring we can provide the prompt and professional service required by the [VA] Greater Los Angeles Healthcare System.” (*Id.* at 7.) Additionally, “[w]ith six technicians located within a 50-mile radius, we can respond to emergencies within 48 hours' notice.” (*Id.*) According to the proposal, AFIC “maintain[s] an extensive network of distributors for prompt access to replacement parts.” (*Id.*)

Accompanying its proposal, AFIC provided copies of its technicians' certifications from NSF. (Proposal, Certifications at 9-11.) The NSF-certified technicians are [XXXXXXXXXXXX XXXXXXXXXXXXXXXX]. (*Id.*) All three technicians are identified as employees of Controlled Environment Management, LLC (CEM), a subsidiary of Technical Safety Services LLC (TSS).² (*Id.*)

C. Protest

On December 13, 2024, Protestor timely filed the instant protest. The CO forwarded the protest to OHA for review.

In the protest, Protestor alleges that AFIC will be unduly reliant upon TSS, a non-SDVOSB subcontractor, to perform the contract. (Protest at 2.) Protestor highlights that the procurement requires the contractor to utilize NSF-certified technicians. (*Id.*) AFIC, though, is not listed in the NSF certification system, nor does AFIC have any NSF-certified employees. (*Id.*) Since AFIC itself is unable to self-perform the required work, AFIC must subcontract these tasks. (*Id.*) Protestor contends that AFIC likely intends to subcontract the work to TSS, a non-SDVOSB. (*Id.*) As a result, “TSS is performing the ‘primary and vital requirements of the contract’ ([13] CFR 134.1003c) by providing the onsite testing at the Los Angeles VAMC, while AFIC employees remain in New York and act only as the project administrators.” (*Id.*)

Protestor points to OHA's decision in *Size Appeal of CardioMetrix, Inc.*, SBA No. 4051 (1995) to support its position. There, the solicitation sought a contractor to provide medical laboratory testing. (*Id.*) Even though the prime contractor asserted that it would provide 55% of the labor, the subcontractor was performing the vital and primary contract requirements. (*Id.*) Furthermore, the prime contractor did not operate in the medical laboratory business. (*Id.*) As such, OHA held that the prime contractor and subcontractor were affiliated for the procurement. (*Id.* at 3.) Protestor asserts that AFIC similarly violates SBA regulations. (*Id.*)

Protestor concludes that “[a]cquiring [an] SDVOSB contract and subcontracting all of the work out to a non-SDVOSB business disregards both the spirit and rules of the [SDVOSB] set-aside [program].” (*Id.*) Protestor identifies four other VA procurements in which Protestor believes AFIC is improperly subcontracting the required work to TSS. (*Id.* at 3-5.)

² TSS acquired CEM in 2023. See *Technical Safety Services Acquires Controlled Environment Management, LLC*, <https://techsafety.com/technical-safety-services-acquires-controlled-environment-management> (Sept. 21, 2023).

D. AFIC's Response

On December 26, 2024, AFIC responded to the protest. AFIC maintains that Protestor is abusing the protest process to pursue “frivolous and unfounded protests” against AFIC. (Response at 1.) In AFIC’s view, Protestor seeks only to “disrupt the procurement process, create delays, and increase costs for both the government and the competing contractors.” (*Id.*) AFIC lists three prior procurements in which Protestor filed unsuccessful bid protests against AFIC. (*Id.* at 2.) Additionally, in 2024, Protestor filed an SDVOSB status protest against AFIC, which OHA dismissed as untimely.³ (*Id.*)

E. OHA's Request for Information

On January 23, 2025, OHA issued an Order, pursuant to its authority at 13 C.F.R. § 134.1007(g), requesting that AFIC further address its compliance with the ostensible subcontractor rule, particularly “whether AFIC will self-perform the primary and vital aspects of this procurement.” (Order at 2.) OHA noted that AFIC’s proposal “apparently indicates that all certified personnel performing the inspections are employees of TSS or its subsidiary, [CEM], not employees of AFIC.” (*Id.*) Furthermore, AFIC’s Response to the protest did not address the merits of Protestor’s allegations; instead, AFIC highlighted that Protestor has filed other unsuccessful protests against AFIC. (*Id.*)

F. AFIC's Response to OHA's Order

On January 23, 2025, AFIC responded to OHA’s Order. AFIC offers a chart purporting to show the dollar value of payments that AFIC has made, or intends to make, to TSS for the instant procurement and nine other procurements. (Response to Order at 1.) In each instance, according to AFIC, payments to TSS will not exceed 50% of the total contract dollar value. (*Id.*) AFIC reiterates that Protestor has filed other unsuccessful protests against AFIC. (*Id.* at 2.)

For the instant procurement, AFIC asserts that, of the total contract price of \$[XXXXXX], AFIC expects to pay TSS \$[XXXXXX], or [less than 50%]. (*Id.* at 1.) With regard to the division of responsibilities between itself and TSS, AFIC states:

TSS is responsible for providing expert certification of cleanrooms and biosafety cabinets. AFIC oversees the coordination, scheduling, and supply inventory for these certifications.

(*Id.* at 3.) AFIC adds that “[a]ll work performed by TSS’s technicians is coordinated and overseen by AFIC, ensuring alignment with the project’s goals and maintaining compliance with the limitations on subcontracting.” (*Id.* at 2.)

³ VSBC Protest of Winergy, LLC, SBA No. VSBC-372-P (2024).

G. Case File

The Case File (CF) reflects that AFIC is a corporation based in the state of New York. (CF, Exh. 94.) Mr. Lap Kwan Chu, a service-disabled veteran, owns 100% of AFIC, and is AFIC's President, Secretary, and Treasurer. (CF, Exhs. 40, 50, 130.) AFIC's primary industry is in NAICS code 541350, Building Inspection Services. (CF, Exh 74.) In a letter dated April 27, 2020, AFIC stated that “[l]licenses are not a requirement for the jobs we are conducting.” (CF, Exh. 43.) On February 20, 2024, SBA recertified AFIC as an SDVOSB for a period of three years. (CF, Exh. 14.)

III. Discussion

A. Burden of Proof

As the challenged concern, AFIC has the burden of proving its eligibility as an SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Date to Determine Eligibility

In an SDVOSB status protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of the date of its initial offer which includes price, or in situations involving the ostensible subcontractor rule, as of the date of final proposal revisions. 13 C.F.R. § 134.1003(e)(1). Here, AFIC submitted its initial offer including price on October 23, 2024, and there were no subsequent proposal revisions. Section II.A, *supra*. Therefore, OHA must examine AFIC's SDVOSB eligibility as of October 23, 2024, using the substantive ownership and control regulations in effect on that date.

C. Analysis

There is no dispute that AFIC itself is an SDVOSB. Sections II.C and II.G, *supra*. Rather, the sole question presented here is whether AFIC will subcontract the primary and vital requirements of this procurement to a non-SDVOSB, TSS.

SBA regulations governing the SDVOSB program instruct 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).

In the instant case, Protestor alleges that AFIC's non-SDVOSB subcontractor, TSS, will perform the "primary and vital" aspects of the contract, and that AFIC will be heavily dependent upon TSS to perform the contract. Section II.C, *supra*. In support, Protestor observes that the procurement calls for the inspection and certification of ventilation equipment at the VA Greater Los Angeles Healthcare System. Section II.A, *supra*. The procurement additionally mandates that such tasks must be performed by NSF-certified technicians. *Id.* AFIC, though, does not employ any NSF-certified technicians. Section II.C, *supra*. Protestor's allegations are bolstered by AFIC's proposal, which does not reflect that AFIC will self-perform any portion of this work with its own employees. The proposal thus does not identify any AFIC employees who will be involved with this procurement, nor any tasks that will be self-performed by AFIC. Section II.B, *supra*. Instead, all of the NSF-certified technicians who will perform the substantive contract requirements are employees of TSS. *Id.* In response to OHA's request for additional information, AFIC concedes that TSS alone will be responsible for "expert certification of cleanrooms and biosafety cabinets," and AFIC characterizes its own role as "oversee[ing] the coordination, scheduling, and supply inventory for these certifications." Section II.F, *supra*.

The record thus reflects that AFIC will delegate the primary and vital requirements of this contract to its non-SDVOSB subcontractor, TSS. Although AFIC may manage the contract, a review of the RFQ does not support the conclusion that project management is a "primary and vital" aspect of this contract. Notably, the RFQ did not instruct offerors to propose any managerial personnel, and no managerial tasks are discussed in the RFQ. Section II.A, *supra*.

Furthermore, OHA has consistently held that, in a procurement that is predominantly 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); *VSBC Protest of Elevated Techs., Inc.*, SBA No. VSBC-376-P, at 13 (2024).

In response to the protest, AFIC suggests that it is not in violation of the ostensible subcontractor rule, based on the language of 13 C.F.R. § 128.401(g)(2). Section II.F, *supra*. The regulation permits that a prime contractor may be found compliant with the ostensible subcontractor rule by demonstrating that it will adhere to applicable limitations on subcontracting restrictions:

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); *see generally CVE Protest of U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P (2020).

AFIC, however, has not persuasively shown that it will comply with the limitations on subcontracting. AFIC's proposal did not identify any tasks or functions that AFIC will self-perform, or any AFIC employees that will be involved in contract performance. Section II.B, *supra*. Nor does AFIC explain how it would meet limitations on subcontracting restrictions. Section II.F, *supra*. Although AFIC states, in conclusory fashion, that AFIC intends to pay TSS [less than 50%] of a total contract price \$[XXXXXX], AFIC offers no supporting evidence, such as sworn statements or subcontracts, to corroborate the accuracy of the reported payments. AFIC thus has not carried its burden of proof in this proceeding. *See, e.g., Elevated Techs.*, SBA No. VSBC-376-P, at 13.

An additional problem for AFIC is that the instant procurement appears to be a mixed procurement of supplies and services. The RFQ thus stated that the contractor must provide "parts" and "equipment" in addition to labor, and AFIC's proposal similarly indicated that AFIC "maintain[s] an extensive network of distributors for prompt access to replacement parts." Sections II.A and II.B, *supra*. SBA regulations make clear that when a procurement calls for a combination of supplies and services, but is assigned a services NAICS code, the prime contractor may subcontract no more than 50% of the services aspects of the procurement to entities that are not similarly situated. 13 C.F.R. § 125.6(b); *see also Spartan Med.*, SBA No. VSBC-366-P, at 7. The RFQ here was assigned a services NAICS code (541690, Other Scientific and Technical Consulting Services), yet AFIC does not attempt to delineate how much of the instant procurement is for services as opposed to supplies, and AFIC does not argue, let alone demonstrate, that it will subcontract no more than 50% of the dollar value of the services portion of the procurement. Section II.F, *supra*.

In sum, AFIC bears the burden of proof in this proceeding, and has not shown that it will comply with 13 C.F.R. § 125.6. As the record otherwise reflects that TSS, not AFIC, will perform the primary and vital contract requirements, AFIC is not eligible for this award due to violation of the ostensible subcontractor rule. 13 C.F.R. §§ 128.401(g) and 134.1003(c).

IV. Conclusion

AFIC will subcontract the large majority, if not all, of the primary and vital contract requirements to TSS, a non-SDVOSB contractor, in contravention of the ostensible subcontractor rule. The protest therefore is SUSTAINED to that extent, and AFIC is not an eligible SDVOSB for the instant procurement. Pursuant to 13 C.F.R. § 134.1007(j)(2), the CO either must terminate the contract awarded to AFIC, or must make a written determination that termination is not in the best interests of the government. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(B); 13 C.F.R. § 134.1007(i).

KENNETH M. HYDE
Administrative Judge