

SMALL BUSINESS PROGRAMS
SUB COMMITTEE
DECEMBER 2014 REPORT

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IN THE NEWS

On November 12, 2014, the owner of a Pittsburgh DBE bridge company pleaded guilty in federal court to charges related to allowing his firm to be used as a front for contractors seeking government bridge work through a minority set-aside program. The DBE entered into 13 minority set-aside subcontracts worth \$2.3 million with a non DBE company. Prosecutors alleged that the two companies conspired to use the DBE to obtain profits from the DBE program. The DBE company was accused of performing no work on the projects. The scheme resulted in \$1.8 million in illegal proceeds with the owner of the DBE receiving a fee for participation in the scheme.

II. LEGAL OPINIONS

A. Small Business Administration – Office of Hearings and Appeals

IN RE: Size Appeal of AIS Engineering, Inc., Appellant, RE: ULTISAT, Inc.

SBA No. SIZ-5614, 2014 , 2014 WL 6708826

Facts: This case arises out of a size protest filed by AIS Engineering Inc. (AIS) against UltiSat, Inc. (UltiSat). On May 9, 2014 the U.S. Department of Veteran Affairs (VA) issued a RFP for Satellite Communications operations. The RFP stated that the VA planned to award a task orders through a group of indefinite delivery/indefinite quantity (ID/IQ) contracts known as Custom SATCOM Solutions- Small Business. The Contracting Officer (CO) set aside the order entirely for small businesses.

UltiSat was the awardee. AIS asked for a debriefing and then filed a bid protest with the GAO claiming that UltiSat did not provide the required small business representation with its proposal. On August 21, 2014, a VA contract specialist contacted the Area Office seeking confirmation whether UltiSat was still considered a Small Business under the ID/IQ since a task order was issued. The VA contract specialist also requested the SBA make a size status determination. The size specialist asked if the CO made an explicit request for a size recertification for the specific task order. The contract specialist stated that there had not been a specific recertification request.

On August 27, 2014, AIS sent a letter to the CO requesting that the CO initiate a size status inquiry against UltiSat. AIS argued that UltiSat was not a small business under the size standard for the solicitation; that the RFP is a stand-alone procurement rather than an order under an

existing ID/IQ contract and that the RFP required offerers to recertify size because it incorporated FAR clause 52.212-3.

The Size Determination.

The Area Office treated AIS August 27, 2014 letter as a size protest and dismissed the protest as untimely. The Area Office reasoned that on a long term contract such as the one in question, size may be challenged at (1) when the long-term contract is initially awarded; (2) when an option is exercised; or (3) If a CO requests recertification in conjunction with an individual order. The Area Office found that recertification was not requested and as a result there was no available mechanism for AIS to challenge UltiSat's size in connection with the task order.

The OHA Decision

The OHA upheld the appeal, reasoning that the regulations provide that a small business concern is qualified as a small business at the time it receives a contract and is considered to be small throughout the life of the contract. The SBA will not entertain a size protest against the award of an order under a long term contract, unless the procuring agency requested recertification in conjunction with the order. The argument that the inclusion of FAR 52.212-3 was a request for recertification was rejected because the OHA has specifically held that inclusion of standard FAR clauses does not constitute a request for certification.

B. Service-Disabled Veteran Owned Small Business Concern Appeal

In Re: PRECISE SYSTEMS, INC.

SBA No. VET-243, 2014; 2014 WL 6708827

Facts:

This is an appeal by Precise Systems, Inc. from a determination that it does not meet Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements. John Thomas Curtis is a service-disabled veteran and owns more than 51% of Precise's outstanding shares. The remaining shares are held by Precise's Employee Stock Ownership Plan. The outstanding shares are divided into two categories (1) Series A Common Stock and (2) Series B Convertible Preferred Stock. Series A is owned by Mr. Curtis and Series B is owned by the ESOP. On July 9, 2014 Precise was announced as the awardee on an RFP for aviation program support. The four unsuccessful bidders protested claiming that Precise is not an eligible SDVO SBC because it is not unconditionally and directly owned by a service disabled veteran due to its ESOP.

The Determination

The Acting Director of Government Contracting for the SBA sustained the protest finding that Precise's two groups of shares have separate voting rights on at least one issue. The Article of Incorporation allows Precise to declare and pay a dividend on any class or series of stock without declaring and paying a dividend on any other class or series of stock if stockholders of a majority of the shares of each of the classes or series of stock not receiving a dividend consent. It was concluded that this language restricted Mr. Curtis' right as a shareholder because it precluded him from using his share of Series A Common Stock to vote on dividends related to Series B Convertible Preferred. It was also noted that Series B is granted a preferred dividend right but Series A is not. Because Mr. Curtis does not own any Series B stock he does not own at least 51% of each class of voting stock as the regulation requires.

On appeal Precise argued that the corporate documents established one class of voting stock although it is arranged into two series. Precise pointed to language in its Articles of Incorporation where it states "each holder of Series A Common and Series B Convertible Preferred shall be entitled to one vote for each share thereof held. Except as otherwise provided herein, the Series A Common and the Series B Convertible Preferred, and the powers, preferences, and rights in respect thereof, and the qualifications restrictions and limitations thereon, shall be identical." Precise further argued that the regulation requires at least 51% of each class of voting stock outstanding must be owned by a service – disabled veteran. The regulation does not state each series must be 51% owned by a service disabled veteran. Precise argued that the Acting Director improperly expanded the definition of "class" of stock without any legal authority to do so.

The OHA rejected Precise's arguments. The OHA found that the SBA regulations are silent as to what constitutes a "class" of stock nor do they distinguish "class" or "series". The OHA found Precise's arguments unsupported by clear law or the corporate documents. OHA upheld the Acting Director's determination that the two groups of stock were sufficiently dissimilar such that they should be treated as two classes because Series B receive cumulative preferential dividends before Series A shareholders do.