

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

CVE Protest of:

Covenant Construction Services,

Protester,

Re: Concord Construction, LLC

Solicitation No. 36C26320B0003

U.S. Department of Veterans Affairs

SBA No. CVE-152-P

Decided: June 8, 2020

APPEARANCES

Alan Sprinkle, President, Covenant Construction Services, Clive, Iowa

Paul Hutton, Managing Member, Concord Construction, LLC, Stuart, Iowa

DECISION

I. Introduction and Jurisdiction

On March 10, 2020, Covenant Construction Services (Protester) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Concord Construction, LLC (Concord) in conjunction with U.S. Department of Veterans Affairs (VA) Invitation for Bids (IFB) No. 36C26320B0003. Protester maintains that Mr. Paul Hutton, the service-disabled veteran upon whom Concord's eligibility is based, does not fully control Concord because he is employed full-time by another company. 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 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J.¹ Protester filed its protest within five business days after bid opening, so the protest is timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, this matter is properly before OHA for decision.

¹ The regulations at 13 C.F.R. part 134 subpart J became effective on October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

II. Background

A. Solicitation

On January 31, 2020, the Contracting Officer (CO) issued IFB No. 36C26320B0003 for a construction project in Des Moines, Iowa. The CO set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$39.5 million average annual receipts. Bids were due March 3, 2020.

B. Protest

On March 3, 2020, bids were opened and the CO announced that Concord was the lowest bidder and apparent awardee. On March 10, 2020, Protester, an unsuccessful bidder, filed the instant protest with the CO, challenging Concord's SDVOSB status. Protester alleged that Concord's majority owner and Managing Member, Paul Hutton, is a full-time employee of Core & Main, which is not an SDVOSB. Therefore, Protester asserted, Paul Hutton does not fully control Concord under 13 C.F.R. § 125.13(i)(7) and (k). (Protest at 1.) Protester further observed that the telephone number used by Paul Hutton at Concord is the same number as appears on his business card from Core & Main. (*Id.*) The CO forwarded the protest to SBA's Office of Government Contracting, which, in turn, directed the matter to OHA.

C. Concord's Response

On April 16, 2020, Concord responded to the protest. Concord acknowledges that Paul Hutton works full-time for Core & Main. Concord highlights, however, that it disclosed Paul Hutton's work at Core & Main to the VA's Center for Verification and Evaluation (CVE) during the verification process. (Response at 1.) Concord adds that because it is a start-up business, Paul Hutton cannot support himself financially by working exclusively for Concord, and as such needs other work in addition to Concord. (*Id.* at 2.)

D. Case File

On May 12, 2020, CVE provided a copy of the Case File to OHA. The Case File indicates that Concord is an LLC based in the state of Iowa. (CF, Exh. 1.) Concord is 51% owned by Paul Hutton and 49% owned by Dan Hutton. (CF, Exh. 46, at 1.) Paul Hutton and Dan Hutton are both Members of Concord, and Paul Hutton is the Managing Member. (CF, Exh. 46, at 1, 3.) Paul Hutton is a service-disabled veteran. (CF, Exh. 24.) Dan Hutton is neither a veteran nor a service-disabled veteran. (CF, Exh. 16.)

The Case File includes the resumes of Paul Hutton and Dan Hutton. According to his resume, Paul Hutton currently works for both Concord and Core & Main. (CF, Exh. 34.) Dan Hutton works only for Concord and has no other employment. (CF, Exh. 17.)

CVE requested that Concord provide additional information about Paul Hutton's outside employment. Concord responded:

Paul Hutton does work for Core & Main [and] started employment in September 2018. [His] responsibilities are Monday through Friday 8AM — 5 PM.

Paul Hutton works for [Concord] Monday through Friday 6PM — 9PM and some times on weekends.

(CF, Exh. 45, at 1.)

Concord supplemented its initial response to CVE's inquiry with an additional letter, stating:

Hours of Operation Concord Construction

[Concord] is a start-up company within its first year of operation.

Monday through Friday 6PM — 9 PM with some weekends also being used.

There are no shared resources between [Concord] and Core & Main.

(CF, Exh. 50 at 1.) Attached to the supplemental response was a letter from a manager at Core & Main. The manager stated:

Paul Hutton is currently a full-time employee of Core & Main. There is no conflict if Paul needs to address needs for [Concord] while working at Core & Main.

(*Id.* at 2.)

III. Discussion

A. Burden of Proof

As the protested firm, Concord has the burden of proving its eligibility as an SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Dates to Determine Eligibility

In a CVE Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of two dates: (1) the date of the bid or initial offer including price, and (2) the date the CVE Protest was filed. *See* 13 C.F.R. § 134.1003(c)(1). Here, Concord submitted its bid on March 3, 2020, and the instant protest was filed on March 10, 2020. Section II.B, *supra*. Thus, OHA must examine Concord's eligibility as of these dates.

Effective October 1, 2018, SBA issued new ownership and control regulations at 13 C.F.R. part 125, which also apply to SDVOSB procurements conducted by VA. 83 Fed. Reg.

48,908 (Sept. 28, 2018). In this case, both the date of the bid and the date of the CVE Protest are after the effective date of the new ownership and control regulations and, therefore, these new regulations apply to the substantive issues in this case.

C. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is owned and controlled by one or more service-disabled veterans. 13 C.F.R. §§ 125.12 and 125.13. The control requirement means that both long-term decision-making and “the day-to-day management and administration of the business operations” must be conducted by a service-disabled veteran. 13 C.F.R. § 125.13(a). SBA has established a rebuttable presumption that “a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work.” 13 C.F.R. § 125.13(k). In adopting this presumption, SBA explained that its principal concern was that, when the service-disabled veteran is not working for the concern during normal business hours, control over the concern's day-to-day management may have been improperly ceded to persons who are not service-disabled veterans. 83 Fed. Reg. 4005, 4007 (Jan. 29, 2018); 83 Fed. Reg. 48,908, 48,910 (Sept. 28, 2018).

In the instant case, Protester alleges that Concord's majority owner and Managing Member, Paul Hutton, does not fully control Concord because he works full-time for another company, Core & Main. Section II.B, *supra*. Concord admits that Paul Hutton works full-time for Core & Main, and the record confirms that, due to this outside employment, Paul Hutton is unable to work for Concord during normal business hours. Rather, Paul Hutton works full-time for Core & Main during normal business hours, and only part-time for Concord on evenings and some weekends. Section II.D, *supra*. Accordingly, the presumption at 13 C.F.R. § 125.13(k) applies, and the burden shifts to Concord to rebut the presumption.

In its response to the protest, Concord highlights that CVE knew of Paul Hutton's outside employment when it verified Concord. While it is true that Concord did disclose Paul Hutton's outside employment to CVE, such disclosure does not insulate a concern from a subsequent status protest. Indeed, every status protest under 13 C.F.R. part 134 subpart J is, by definition, brought against a concern that has already been verified by CVE.

Concord also points to a letter from a manager at Core & Main, in which the manager asserts that he perceives “no conflict if [Paul Hutton] needs to address needs for [Concord], while working at Core & Main.” Section II.D, *supra*. The manager's letter, though, does not purport to discuss whether Paul Hutton controls the daily operations of Concord. The manager's letter thus sheds no light on the central issue presented in this case.

Ultimately, Concord has not persuasively rebutted the presumption at 13 C.F.R. § 125.13(k), because Concord has not offered evidence that Paul Hutton does control the day-to-day management and administration of Concord's business operations. It is worth noting in this regard that Concord is silent as to the respective roles and responsibilities of Paul Hutton and Dan Hutton, Concord's minority owner who is not a service-disabled veteran. According to his resume, Dan Hutton works exclusively for Concord, and therefore can conduct the day-to-day

management and administration of Concord during normal business hours. Section II.D, *supra*. The instant case thus appears to present precisely the type of situation that concerned SBA in adopting 13 C.F.R. § 125.13(k), where the absence of the service-disabled veteran leads to daily operations effectively being controlled by a non-service-disabled veteran.

IV. Conclusion

Concord has not provided evidence to rebut the presumption at 13 C.F.R. § 125.13(k), and to show that a service-disabled veteran conducts the day-to-day management and administration of Concord. The protest is therefore SUSTAINED. 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).

KENNETH M. HYDE
Administrative Judge