

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

IN THE MATTER OF:

Glen/Mar Construction, Inc.

Appellant

RE: Corners Construction

Solicitation No. VA-260-08-RP-0446

SBA No. VET-145

Decided: December 30, 2008

APPEARANCES

Andy Brown, Director of Operations, Glen/Mar Construction, Inc., for Appellant.

Kevin R. Harber, Esq., Office of General Counsel, Small Business Administration,  
Washington, D.C., for the Agency.

DECISION

PENDER, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134.

II. Issue

Whether the Director for Government Contracting for the U.S. Small Business Administration made a clear error of fact or law in dismissing Appellant's protest. *See* 13 C.F.R. §§ 125.27(b), 134.508.

III. Background

A. Protest and Director for Government Contracting Determination

On August 25, 2008, the Department of Veterans Affairs (VA), VA Southern Oregon, Rehabilitation Center & Clinics issued Solicitation No. VA-260-08-RP-0446, for carpet replacement, as a 100% Veteran-Owned Small Business (VOSB) set aside. On September 29,

2008, the Contracting Officer (CO) awarded the contract to Corners Construction (Corners). On September 30, 2008, the CO notified Glen/Mar Construction, Inc. (Appellant) of award to Corners.

On October 2, 2008, Appellant submitted a protest to the CO via email. On October 4, 2008, the CO received a hard copy of Appellant's protest. Appellant protested Corners status as a VOSB. Appellant stated a non-veteran owner is in control of the company's overall management and administration. On October 14, 2008, the CO forwarded the protest to the U.S. Small Business Administration (SBA).

On November 20, 2008, the SBA Director for Government Contracting (D/GC) dismissed Appellant's protest because it was based on non-protestable allegations. 13 C.F.R. § 125.27(b). The D/GC stated, in accordance with SBA's regulations and the Federal Acquisition Regulations (FAR), SBA only has authority to rule on protests of Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC), where Appellant's protest challenges the VOSB status of Corners.

#### B. Appeal Petition

On December 1, 2008, Appellant filed the instant appeal of the D/GC's dismissal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts SBA's ruling is in stark contrast to the authority cited in FAR 19.3- Determination of Small Business Status for Small Business Programs. Appellant identified FAR 19.301(d) as granting SBA authority to determine VOSB status and providing SBA authority to levee penalties to companies misrepresenting themselves as VOSBs.

#### C. SBA Response

On December 10, 2008, SBA filed its Response to the Appeal. SBA contends the D/GC's dismissal was not based on a clear error of fact or law and should be upheld. SBA states the solicitation was a VOSB set-aside and not a SDVO SBC set-aside. SBA asserts the only veteran protests SBA is currently authorized to conduct are challenges to SDVO SBC status. SBA recognizes Appellant has fallen into a void in the current regulatory scheme, but asserts the certification process VA is currently implementing for VOSBs will protect the integrity of VOSB status. SBA states the FAR provisions cited by Appellant authorize the SBA to impose criminal penalties for misrepresentations of small business programs status, but the FAR provisions do not provide a process to protest VOSB status. SBA argues 13 C.F.R. § 125.26 requires an SDVO SBC protest to present specific allegations against a firm concerning its SDVO SBC eligibility and 13 C.F.R. § 125.27(b) obligates SBA to dismiss a protest that fails to do so. Moreover, SBA states under 13 C.F.R. § 125.8(b) the protest process is only available to a bidder that submits an offer on a SDVO SBC concern and therefore Appellant lacks standing to protest.

#### IV. Discussion

##### A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 business days of receiving the D/GC's determination, and thus the Appeal is timely. 13 C.F.R. § 134.503.

The standard of review for SDVO SBC appeals is whether the D/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.508. In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the D/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard in the context of a size appeal). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

##### B. Non-Protestable and Nonjusticiable Allegations

The D/GC relied on the text of 13 C.F.R. § 125.27(b) to dismiss Appellant's protest: "If SBA determines that the protest is premature, untimely, nonspecific, or is based on non-protestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal." SBA relied on this regulation to dismiss Appellant's protest because SBA asserts the protest was based on non-protestable allegations. Thus, the critical question is whether Appellant raised non-protestable allegations.

Appellant submitted a protest relying on SDVO SBC protest procedures but concerning a VOSB contract. The regulations governing the SDVO SBC protest and appeal process are specific to service-disabled veterans and do not apply to all veteran set-asides. Appellant attempted to appropriate the SDVO SBC protest process for a VOSB contract because no such process yet exists to police VOSB eligibility. However, the SBA does not have authority to rule on questions of VOSB status and therefore the D/GC had no choice but to dismiss Appellant's protest. Similarly, although I have authority to rule on SDVO SBC, 13 C.F.R. § 134.102(q), I do not have jurisdiction over VOSB eligibility, 13 C.F.R. § 134.102 (outlining OHA's jurisdiction); accordingly, this matter is not appropriate for OHA's consideration.

Because Appellant had no recourse to challenge a business's VOSB status, since regulations governing such a process have not yet to be enacted, Appellant attempted to apply the SDVO SBC regulations. However, the SDVO SBC regulations apply only to SDVO SBC contracts and cannot be used for other set-asides. Such an ad hoc use exceeds SBA's authority and could result in unintended consequences.

Based upon the foregoing, I conclude the D/GC was compelled to dismiss Appellant's protest.

V. Conclusion

After reviewing the record, I hold the written protest file supports the D/GC's dismissal of Appellant's protest. Accordingly, I must DENY the instant Appeal and AFFIRM the D/GC's dismissal of Appellant's protest.

The D/GC's determination is AFFIRMED and the Appeal is DENIED.

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

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THOMAS B. PENDER  
Administrative Judge