

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

IN THE MATTER OF:

Robra Construction, Inc.

Appellant

Solicitation No. N40085-09-R-8433

SBA No. VET-160

Decided: September 14, 2009

APPEARANCES

Daniel R. Weckstein, Esq., Vandeventer Black LLP, Norfolk, Virginia, for Appellant.

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

DECISION

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 Acting Director for Government Contracting (AD/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in concluding that the individual, on which Robra Construction, Inc.'s service-disabled veteran-owned small business concern (SDVO SBC) eligibility is based, did not provide the documentation required to demonstrate he meets the definition of a service-disabled veteran as set forth in 13 C.F.R. § 125.8. *See* 13 C.F.R. §134.508.

III. Background

A. Protest and Acting Director for Government Contracting Determination

On February 5, 2009, the contracting officer (CO) for the Department of the Navy, Camp Lejeune, North Carolina, awarded an SDVO SBC multiple award construction contract to four contractors in response to Solicitation No. N40085-09-R-8433 (solicitation).

On July 20, 2009, the CO notified the SBA Office of Government Contracting that Robra Construction, Inc. (Appellant) self-represented it was an SDVO SBC when Appellant submitted its proposal on July 1, 2008. The CO stated the Department of Veterans Affairs (VA) Center for Veterans Enterprise had not verified Appellant's status. Accordingly, the CO protested Appellant's SDVO SBC status based on the Appellant's failure to provide sufficient evidence that the firm is owned by a service-disabled veteran.

On August 11, 2009, based on the information Appellant provided, the AD/GC determined that Appellant did not meet the SDVO SBC eligibility requirements at the time Appellant submitted its offer for the solicitation. Citing 13 C.F.R. § 125.8, the AD/GC stated that a firm's SDVO SBC eligibility is predicated upon ownership and control by a veteran with service-related disabilities. The AD/GC indicated Appellant did not submit any documentation from the VA attesting to the fact that the individual upon whom eligibility is based, Aubrey Wilson, has a service-connected disability and, therefore, the AD/GC concluded that Mr. Wilson is not a service-disabled veteran as that term is defined by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8. The AD/GC noted the information provided demonstrated Mr. Wilson owned and controlled Appellant, but, because the documentation did not demonstrate Mr. Wilson is a service-disabled veteran, the AD/GC concluded a service-disabled veteran does not own or control Appellant.

B. Appeal Petition

On August 24, 2009, Appellant appealed the AD/GC's determination with the SBA Office of Hearings and Appeals (OHA).

Appellant asserts Mr. Wilson owns and controls Appellant and is a veteran due to his service in the Army from 1979 to 1983. Appellant states Mr. Wilson was injured and disabled while in the Army. Appellant asserts Mr. Wilson applied for a VA rating in 1984, but the VA deferred the rating decision and then disallowed the claim. Appellant argues Mr. Wilson is disabled and eligible to receive a disability rating from the VA, but the VA and Army failed to act properly on records submitted in 1984. Appellant has included documentation from an August 10, 2009 visit to an orthopedics practice to support its assertions regarding Mr. Wilson's disability.

Additionally, Appellant argues the AD/GC has applied an inappropriate test because there is no statutory requirement that Appellant provide a VA letter or rating for Mr. Wilson to qualify as an SDVO SBC. Appellant asserts the requirement that the service-connected disability be determined by the VA in writing only applies to those with permanent and severe disability and no such requirement exists for service-disabled veterans. Appellant indicates 38 U.S.C § 101, Executive Order No. 13360, and 13 C.F.R. § 125.8 do not require a service-disabled veteran have a letter from the VA and, accordingly, the AD/GC committed a clear error of law and fact. Appellant asserts the AD/GC's approach violates U.S. Court of Appeals for the Federal Circuit case law which has held if a veteran produces lay evidence of service-related disability, the burden shifts to the government to rebut the presumption of service-connection by clear and convincing evidence. Appeal, at 8-9 (citing *Dambach v. Secretary of Veterans Affairs*, 223 F.3d 1376 (Fed. Cir. 2000)).

C. SBA Response

On August 31, 2009, SBA filed its response to the appeal. SBA contends the AD/GC's determination that Appellant did not establish that Mr. Wilson was a service-disabled veteran at the time Appellant submitted its proposal was correct and should be affirmed. Citing 13 C.F.R. 125.26(a), SBA asserts that documentation from the VA, Department of Defense (DOD), or the U.S. National Archives and Records Administration is required to meet the definition of a service-disabled veteran. SBA states, Appellant's response to SBA's request for information indicated that Appellant did not have the necessary documentation to demonstrate the Mr. Wilson was a recognized service-disabled veteran at the time Appellant submitted its proposal. SBA argues, based on the Record before the AD/GC, Mr. Wilson was not a service-disabled veteran and the AD/GC had to conclude that Appellant, who is owned and controlled by Mr. Wilson, is not owned and controlled by a service-disabled veteran.

SBA also objects to Appellant's submission of new evidence. SBA asserts that 13 C.F.R. 134.512 requires SDVO SBC appeals to be decided solely on the evidence in the protest file before the AD/GC. SBA states Appellant submitted the new evidence to create a rebuttable presumption under federal law that Mr. Wilson is a service-disabled veteran. SBA asserts, however, it has neither the expertise nor the authority to verify service disability. SBA states Appellant's reliance on *Dambach v. Secretary of Veterans Affairs* demonstrates such evidence should be presented to the VA so the VA can make a final determination on service disability.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the AD/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 AD/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 AD/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 AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

B. New Evidence

As a threshold matter, I must exclude Appellant's proffered new evidence. The regulations explicitly limit review of an SDVO SBC determination to the written protest file before SBA at the time of the determination and to the arguments on appeal. 13 C.F.R. § 134.512. It cannot be error on the part of the AD/GC to fail to consider a document not presented to him. The August 10, 2009 orthopedic records were not presented to the AD/GC in

response to the protest and I will not consider the orthopedic records now. Further, Appellant's status as an SDVO SBC must be determined as of the date Appellant submitted its proposal, July 1, 2008. 13 C.F.R. § 125.15(g) Appellant cannot after the fact cure any defect in its documentation of Mr. Wilson's status.

C. Challenge to Service-Disabled Veteran Status

An SDVO SBC is a concern which is small, is at least 51% owned by a service-disabled veteran, and is controlled by a service-disabled veteran. 13 C.F.R. § 125.8(g). An SDVO SBC can be challenged based on service-connected disability, permanent and severe disability, or veteran status. 13 C.F.R. § 125.26. When a protest record contains VA or DOD documents that show an individual is a service-disabled veteran, the documents are accepted as determinative of status. Here, the issue is whether Mr. Wilson, the individual upon whom Appellant's claim of eligibility is based, meets the definition of service-disabled veteran as set forth in 13 C.F.R. §125.8.

Appellant did not submit VA or DOD documents to support Mr. Wilson's service-disabled veteran status. In Appellant's response to the protest, Mr. Wilson notes he has scheduled a civilian evaluation of his disability, but acknowledges that he is aware it is a government's evaluation that is required. Appellant did not submit evidence from the VA or DOD attesting to Mr. Wilson's service-connected disability. Without recognition from the VA or DOD that Mr. Wilson is a service-disabled veteran, the AD/GC cannot find that Mr. Wilson is a service-disabled veteran as defined by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8.

Neither SBA nor OHA have the statutory or regulatory authority to evaluate veteran eligibility nor does SBA or OHA have the capacity or expertise to evaluate a claim of disability. Those determinations rest with the VA or DOD, and OHA does not review them. 13 C.F.R. § 134.508; *Matter of IITS-Nabholz, LLC*, SBA No. VET-114, at 7 (2007).

The AD/GC's service-disabled veteran eligibility determination is not an assessment of Mr. Wilson's disability, but is based on the lack of documentation from the VA attesting to the fact that Mr. Wilson is a service-disabled veteran as defined by 15 U.S.C. § 632(q) and 13 C.F.R. 125.8. The AD/GC determined that Appellant had failed to provide the documentation necessary to establish Mr. Wilson's status. Therefore, Appellant had failed to establish one of the necessary conditions for eligibility. The AD/GC made no error in finding that Appellant had not established Mr. Wilson's service-disabled veteran status eligibility when Appellant failed to provide VA documentation of Mr. Wilson's service-related disability.

The parties agree that Appellant is owned and controlled by Mr. Wilson. However, because Appellant was unable to establish Mr. Wilson's service-disabled veteran eligibility, the AD/GC's determination Appellant failed to meet the requirements for ownership and control by a service-disabled veteran is supported by the record and is not based on clear error of fact or law.

V. Conclusion

After reviewing the record, I find the written protest file supports the AD/GC's determination.

Appellant has failed to establish any clear error of fact or law in the AD/GC's decision. Accordingly, the AD/GC's determination is **AFFIRMED** and the appeal of Appellant, Robra Construction, Inc., is **DENIED**.

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

THOMAS B. PENDER
Administrative Judge