

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

IN THE MATTER OF:

JHC Fire Containment Solutions, Inc.

Appellant

RE: 2H&V Construction Services, LLC

Solicitation No. VA-248-09-RP-0462  
VISN 8 Procurement Business Division  
Miami, Florida

SBA No. VET-173

Decided: December 17, 2009

APPEARANCES

James J. Sheils, Vice President, JHC Fire Containment Solutions, Inc. for Appellant.

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

DECISION

HOLLEMAN, 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 Acting Director for Government Contracting for the U.S. Small Business Administration made a clear error of fact or law in dismissing JHC Fire Containment Solutions, Inc.'s protest for lack of specificity.

### III. Background

#### A. Solicitation and Protest

On August 8, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA), issued Solicitation No. VA-248-09-RP-0462 (RFP) seeking proposals for fire seal electrical closets within certain buildings of the VA's Miami, Florida, Medical Center. The RFP was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside.

On September 24, 2009, the CO awarded the contract to 2H&V Construction Services, LLC (2H&V). On October 2, 2009, JHC Fire Containment Solutions, LLC (Appellant) filed a protest of 2H&V's SDVO SBC status.

Appellant stated in its protest (quotation is exact):

- a. The company [2H&V] is listed in both CCR and VetBiz with a Mr. Greg Scott as the "Managing Member". Other sources list a Mike Howell as a Member. We request a determination as to the ownership status and positions occupied by Mr.'s Scott & Howell, as defined by their articles of incorporation.
  - b. 2H&V Construction Services, LLC is a categorized as a Joint Venture with South Gulf, Inc. We request to understand the positions each entity occupies in the joint venture, i.e. whether either are owned/controlled by the other as in a joint venture, what position Mr.'s Scott/Howell occupy within the Joint Venture, and whether or nor the preponderance of work alters the degree of ownership exercised by either Mr. Scott of Mr. Howell, or otherwise affects their status as a self-certified SDVOSB.
  - c. The ORCA record for 2H&V is expired. If it was expired prior to the submittal date for proposals, we would like to see the properly annotated paperwork, submitted in accordance with the section entitled, REPRESENTATIONS AND CERTIFICATIONS; 3.1 52.204-8 ANNUAL REPRESENTATIONS AND CERTIFICATIONS (FEB 2009), which begins on page 24, and which substitutes for the ORCA if paragraph D is not satisfied.
2. SDVOSB status. We protest the fact the 2H&V Construction Services, LLC, is not a verified SDVOSB. ...

Appellant's protest went on to cite various statutes, tout its own capabilities, and address issues of responsibility and responsiveness which are not relevant here.

### B. AD/GC Determination

On November 18, 2009, the U.S. Small Business Administration's (SBA) Acting Director of the Office of Government Contracting (AD/GC) issued his determination letter dismissing Appellant's protest as insufficiently specific.

The AD/GC found that Appellant's protest merely stated that (1) Appellant requests verification of information available on 2H&V; (2) Appellant protests that 2H&V is not a verified SDVO SBC; and (3) Appellant asked for a full disclosure of the technical evaluation factors.

The AD/GC found that the statements in Appellant's protest are not specific factual allegations bearing on 2H&V's SDVO SBC status. The protest merely makes statements that 2H&V may not be a qualified SDVO SBC without giving any factual basis for those statements. The AD/GC found that Appellant's first allegation is actually a request that SBA verify information about 2H&V. Appellant's second allegation merely states 2H&V is not verified without referencing facts to support the allegation. The third allegation requests information used by the VA in evaluating the proposals.

The AD/GC concluded Appellant had failed to make factual allegations that would support a protest, and thus he dismissed Appellant's protest as insufficiently specific.

### C. Appeal Petition

On November 25, 2009, Appellant filed the instant appeal of the AD/GC's determination with SBA's Office of Hearings and Appeals (OHA). Appellant disputes the AD/GC's finding its protest was insufficiently specific.

Appellant argues the documentation it requested in its protest must be available, and that Appellant itself has been required to provide it in response to other protests. Appellant asserts SBA must have information on 2H&V's status in its records. Appellant further asserts that SBA cannot expect it to be more specific, because it does not have access to 2H&V's records or to SBA's records.

Appellant argues further that 2H&V is not a verified SDVO SBC. Appellant asserts this is a VA matter, and 2H&V is not listed on the mandatory VetBiz.gov website. Appellant argues that because 2H&V is not listed on this website as verified it is ineligible to be an SDVO SBC.

Appellant also requests the technical evaluation factors for this procurement and raises responsibility and responsiveness issues regarding 2H&V.

### D. Agency Response

On December 7, 2009, the SBA submitted the Protest File and the Agency's Response to

the Appeal Petition. SBA submits that the AD/GC's determination was not based on any clear error and should be affirmed. SBA argues Appellant's protest was required to provide some credible evidence that 2H&V was either (1) owned by persons who could not produce documentation to verify their status as service-disabled veterans; or (2) not at least 51% owned and controlled by service-disabled veteran(s). SBA argues that because none of Appellant's statements in its protest made either of these claims, they were insufficiently specific.

SBA further asserts Appellant's argument 2H&V is not a verified SDVO SBC is irrelevant because there is no requirement that a firm be verified as an SDVO SBC before it may participate in the SDVO SBC program. In addition, SBA asserts the technical evaluation factors Appellant requests are irrelevant to this appeal. Finally, SBA asserts Appellant's new allegation on appeal, that 2H&V is not listed on VetBiz.gov, is not admissible here and is further irrelevant to the instant appeal.

#### IV. Discussion

##### A. Jurisdiction & Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Appellant filed the instant appeal within ten business days of receiving the AD/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

OHA reviews whether the AD/GC's determination is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, the Administrative Judge may only overturn the AD/GC's determination if Appellant proves that he made a patent error based on the record before him.

The new evidence Appellant seeks to submit is EXCLUDED. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512; *Matter of Markon, Inc.*, SBA No. VET-158 (2009).

##### B. Analysis

This inquiry is governed solely by Title 13 of the Code of Federal Regulations, Parts 125 and 134. Pursuant to 13 C.F.R. § 125.10(a), a service-disabled veteran must control the management and daily business operations of a firm for the firm to be considered an eligible SDVO SBC. "Control by one or more service-disabled veterans means that both the long-term decision[] making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans." 13 C.F.R. § 125.10(a). In the case of an LLC, the service-disabled veteran must also serve as a managing member of the firm "with control over all decisions of the limited liability company." 13 C.F.R. § 125.10(d).

SBA will only consider an SDVO SBC protest which either (1) presents specific allegations that the owners of the challenged firm cannot produce documentation that they are

service-disabled veterans (13 C.F.R. § 125.26(a)); or (2) presents credible evidence that the challenged firm is not 51% owned and controlled by one or more service-disabled veterans. 13 C.F.R. § 125.26(b). SBA must dismiss an insufficiently specific protest. 13 C.F.R. § 125.27(b); *Matter of C3T Construction Company, Inc.*, SBA No. VET-157 (2009).

Appellant's protest made no reference whatever to the service-disabled veteran status of 2H&V's owners. The other statements in Appellant's protest present no evidence whatever as to 2H&V's ownership and control by service-disabled veterans. Appellant did not even make any clear allegations as to 2H&V's ownership and control. Rather, Appellant asks questions and requests a determination as to 2H&V's status. Appellant presented no information which can be the basis of an investigation, or give the challenged firm notice of what aspect of its ownership and control is under challenge. Appellant merely asks questions it expects SBA to investigate and answer. This does not meet the regulatory standard of specificity for protests of a firm's SDVO SBC status. *Matter of JDDA/HBS Joint Venture*, SBA No. VET-121, at 4 (2007).

Appellant's contention that it does not have the information necessary to make a specific protest, and that it is SBA's duty to investigate 2H&V, carries no weight here. The regulation puts the burden on the protestor to meet the threshold test of presenting some credible evidence before SBA will accept the protest and begin an investigation, and many protestors have met that burden. However, Appellant failed to meet that burden here.

Further, Appellant's contention that 2H&V was not listed on certain websites as a "verified" service-disabled veteran-owned firm does nothing to render its protest specific. The fact that a firm is not listed on a registry, which cannot be an exhaustive list of eligible firms, is not credible evidence that it is not an eligible SDVO SBC. *Matter of Savant Services Corporation*, SBA No. VET-154 (2009).

Appellant's protest further raised questions as to 2H&V's ability to perform the work of this procurement, the evaluation factors used to make the award; however these questions are beyond the scope of the SDVO SBC protest and appeals process. They are unrelated to 2H&V's eligibility as an SDVO SBC, and we cannot consider them here. There are other avenues available in which to raise such issues, and Appellant should have explored them.

Appellant's protest merely asked some questions about 2H&V's organization, and raised no clear question, let alone present credible evidence, that 2H&V was not at least 51% owned and controlled by service-disabled veterans. Accordingly, the AD/CG properly dismissed the protest as insufficiently specific. 13 C.F.R. § 125.27(b); *Matter of C3T Construction Company, Inc.*, SBA No. VET-157 (2009).

Appellant has failed to meet its burden of proof, and I must dismiss its appeal. *Matter of Gonneville, Inc.*, SBA No. VET-125 (2008).

V. Conclusion

After reviewing the record, I conclude the written protest file supports the AD/GC's dismissal of Appellant's protest. Therefore, Appellant has failed to establish any clear error of fact or law in the D/GC's decision. 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. 13 C.F.R. § 134.515(a).

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CHRISTOPHER HOLLEMAN  
Administrative Judge