

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

IN THE MATTER OF:

SDV Solutions, Inc.

Appellant

RE: Kelco Computing Solutions

Solicitation No. AG-3144-S-10-0002

SBA No. VET-176

Decided: January 11, 2010

APPEARANCES

Robert E. Korroch, Esq., Williams Mullen P.C., Newport News, VA, for Appellant.

Christopher Roberts, President, Kelco Computing Solutions.

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

DECISION

I. Introduction & Jurisdiction

On October 21, 2009, the Contracting Officer (CO) for the U.S. Department of Agriculture, Fort Collins, Colorado, issued Solicitation No. AG-3144-S-10-0002 (RFQ) to procure HP Hardware Maintenance. The CO issued the RFQ as a 100% Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. Offers were due on November 2, 2009. The CO awarded the contract arising out of the RFQ to Kelco Computing Solutions (Kelco) on November 20, 2009. The CO also notified the unsuccessful offerors, including SDV Solutions, Inc. (Appellant) that the contract had been awarded to Kelco.

Appellant timely protested Kelco's SDVO SBC status on November 27, 2009. 13 C.F.R. § 125.25(d). On December 14, 2009, the U.S. Small Business Administration's (SBA) Acting Director of Government Contracting (AD/GC) issued a determination letter finding Appellant's protest of Kelco lacked specificity and dismissing Appellant's protest. On December 22, 2009, Appellant filed the instant appeal of the dismissal of its protest with SBA's Office of Hearings and Appeals (OHA). For the reasons discussed below, the AD/GC's dismissal of Appellant's protest is affirmed.

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

II. Issue

Did Appellant file a specific protest of Kelco's SDVO SBC status as required by 13 C.F.R. § 125.25(b) and 13 C.F.R. § 125.26(a) and (b)?

III. Background

A. The Protest

In its protest letter dated November 25, 2009 (received by the CO on November 27, 2009), Appellant made five separate allegations concerning Appellant's SDVO SBC eligibility. Appellant first alleged that Kelco "has not been verified as a SDVO SBC according to the Center for Veteran Enterprises¹ (CVE) and is not owned nor controlled by a Service connected Disabled Veteran per 13 C.F.R. 125.9 and 13 C.F.R. 125.10." Appellant noted the CVE database could form the basis of a protest as per OHA's decision *In the Matter of Robra Construction, Inc.*, SBA No. VET-160 (2009) and alleged that Mr. Chris Roberts, who is listed as Kelco's 100% owner, is not a Service-Disabled Veteran.

Appellant's second allegation was that Kelco is not a valid concern, *e.g.*, not a corporation, a partnership, an LLC or a joint venture and thus cannot be owned or controlled by a Service-Disabled Veteran. Further, according to *usaspending.com*, Kelco has never received a dollar from the Federal government. Moreover, Appellant asserted the only entity in California with the Kelco name is a company whose corporate registration has been suspended and provided evidence establishing this fact.

Appellant's third allegation was that Mr. Chris Roberts does not own 51% of Kelco or that a change in ownership does not satisfy 13 C.F.R. § 125.9(f). In support this allegation, Appellant furnished documentation from Dun & Bradstreet (D&B) that it claims supports its allegation.

Appellant's fourth allegation was that a search of California's Disabled Veterans Business Enterprises (DVBE) database shows that Kelco's DVBE application was denied in 2007. Appellant asserted this provides evidence Kelco is not an SDVO SBC.

Appellant's fifth allegation was that Mr. Roberts does not have the managerial experience of the extent and complexity need to run Kelco as required by 13 C.F.R. § 125.10(b). In support of this allegation Appellant provided a LinkedIn.com profile of Mr. Roberts that allegedly supports Mr. Robert's lack of experience.

¹ Appellant is referring to an official Department of Veterans Affairs database, which can be found at <http://www.vetbiz.gov/vip/vip.htm>.

B. AD/GC Determination

As stated above, the AD/GC dismissed Appellant's protest because it lacked specificity. The AD/GC concluded that Appellant failed to set forth specific facts or allegations to support its protest of Kelco's status. The AD/GC found Appellant had only made broad accusations with no proof to support its allegations. For example, the AD/GC noted that statements like Kelco "is not owned by a Service-Disabled Veteran per 13 C.F.R. § 125.9" and that Mr. Roberts is not the 51% owner of Kelco are not supported by the documents Appellant provided and that the documents Appellant provided do not conflict with Kelco's self-certification of its SDVO-SBC status.

The AD/GC closed by informing Appellant that its protest lacks specificity because it merely makes a statement asserting that Kelco is not a qualified SDVO SBC without articulating any underlying factual basis for the statement. Thus, contrary to 13 C.F.R. § 125.25(b) Appellant's protest does not allege specific facts showing that Kelco does not qualify as a SDVO SBC. Accordingly, the AD/GC dismissed Appellant's protest.

C. Appeal Petition

On December 22, 2009, Appellant filed the instant appeal petition. Appellant contends the AD/GC dismissed its protest in haste and overlooked several specific facts and allegations. Appellant argues the AD/GC dismissed its entire protest in error and that at least two protest grounds did set forth specific facts or allegations (Appeal at 3).

Appellant's first assignment of error is that its fifth protest allegation that Mr. Roberts lacks the qualifications to manage Kelco, was sufficiently specific. Appellant alleges the AD/GC did not address whether Mr. Roberts lacks the requisite management experience to run a concern that will be required to provide support and maintenance services for numerous computer hardware devices at several locations. Appellant claims the AD/GC did not consider that Mr. Roberts, who Appellant contends is apparently only a management or business consultant, is not qualified to manage Kelco.

Appellant's second assignment of error addresses its second protest allegation, *i.e.*, that Kelco is not a valid California business entity. Appellant avers the AD/GC should have addressed this allegation because Kelco's ORCA shows no federal contract performance history and the facts alleged within this aspect of its protest are true. Appellant argues the concerns it raises about Kelco's business status merit scrutiny.

Appellant then correctly points out that once a protest is dismissed for lack of specificity, the qualifications of the protested concern are not at issue. Instead, the only issue is whether the deciding official erred in dismissing the protest as lacking specificity. Appellant also alleges its protest was no less specific than the protest SBA found specific in *Robra Construction*.

D. Agency Response

On January 4, 2010, SBA submitted the protest file and the agency's response to the appeal petition. SBA contends that OHA should affirm the AD/GC's determination because it is not based upon clear error of fact or law.

SBA alleges that Appellant provided no credible basis or relevant support for its protest of Kelco. Instead, Appellant made broad (and bare) statements such as "Chris Roberts is not a Service-Disabled Veteran" without establishing Mr. Roberts would be unable to produce documentation proving his status. The SBA asserts Appellant's allegations and thus its protest are not in compliance with 13 C.F.R. § 125.25(b). In addition, SBA correctly points out that Appellant's protest contained conflicting assertions. Specifically, Appellant asserts Mr. Roberts is a 100% owner [of Kelco] while later alleging Mr. Roberts does not own 51% or more of Kelco.

SBA also alleges Appellant's protest contains challenges to Kelco's ability to perform the work required under the solicitation, not Mr. Robert's experience. Similarly, SBA avers Appellant's challenge to Kelco's status as a business is also a challenge to business competency rather than to SDVO SBC eligibility.

E. Evidentiary Submission by Kelco

On January 4, 2009, Kelco submitted documents that arguably refute the SDVO SBC eligibility allegations contained in Appellant's protest. However, as pointed out by Appellant in its January 6, 2009 Motion to Strike, OHA may not admit evidence beyond the written protest file. 13 C.F.R. § 134.512. Accordingly, I cannot consider Kelco's submission. In addition, I note that Kelco's submission is irrelevant to the question of whether Appellant's protest was sufficiently specific under 13 C.F.R. § 125.25 and 13 C.F.R. § 125.26, because the only issue before me in this appeal is whether the protest was specific, not Kelco's eligibility.

IV. Analysis

A. Standard of Review

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 only to determine whether the AD/GC made a clear error of fact or law. *Id.* Consequently, the Administrative Judge may disturb the AD/GC's determination only if he has a definite and firm conviction the AD/GC erred in making a key finding of law or fact. *See Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard applicable to both size appeals and SDVO SBC status appeals).

B. Protest Specificity

An SDVO SBC protest must be specific and a “protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations is insufficient.” 13 C.F.R. § 125.25(b). In addition, the AD/GC may only consider a protest that “presents specific allegations supporting the contention that the owner(s) cannot provide documentation from the VA, DoD, or the U.S. National Archives and Records Administration to show that they meet the definition of service disabled veteran...” and/or “presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans.” 13 C.F.R. § 125.26.

OHA has held that a protest based upon a concern’s absence from the CVE database is specific. *Matter of Veteran Construction Services, LLC*, SBA No. VET-103 (formerly SDV-103) (2005). In addition, as correctly noted by Appellant, SBA considered a contracting officer protest based upon the CVE to be sufficiently specific. *Robra Construction* at 2. Thus, an allegation concerning impediments found on the face of the CVE or a lack of a CVE entry on Kelco’s part could be sufficient to suggest Kelco’s owner cannot provide information from the VA that he is a service-disabled veteran as required by 13 C.F.R. § 125.26. However, the CVE entry Appellant provided for Kelco with its protest clearly shows Kelco is 100% owned by Mr. Roberts and that Kelco is registered as a veteran-owned small business, a SDVO SBC, and a small business. Thus, Appellant’s argument that Kelco has not been verified as a SDVO SBC is not supported by the CVE or based upon the CVE or any other credible evidence and is thus insufficient to meet the requirements of both 13 C.F.R. § 125.25(b) and 13 C.F.R. § 125.26. Accordingly, the AD/GC committed no error in dismissing Appellant’s appeal as lacking in specificity based upon the first ground cited by Appellant in its protest.

Appellant’s second protest ground, *i.e.*, Kelco’s business status or lack thereof, is actually a complaint about Appellant’s responsibility. I find Appellant’s second protest ground has no discernible connection with whether Kelco is or is not a valid SDVO SBC. Accordingly, Appellant’s second allegation cannot form the basis of a SDVO SBC protest because it addresses responsibility which is a matter solely for the CO to determine (FAR 9.1 *et. seq.*).

The D&B Report Appellant submitted with its third protest ground is not connected to its allegation that a SDVO SBC does not own 51% or more of Kelco. Moreover, the CVE entry Appellant provided states Mr. Roberts owns 100% of Kelco. That is, I cannot discern how any of the material contained in the D&B Report proves, Mr. Roberts does not own Kelco as required by 13 C.F.R. § 125.9.

Appellant’s fourth protest ground is irrelevant to SBA’s SDVO SBC program. It is profoundly irrelevant whether Kelco failed to qualify for California’s DVBE program because: (1) the requirements of that program were not before the AD/GC (or SBA); and (2) two years have passed and facts addressing eligibility can easily change in two years.

Appellant’s fifth protest ground is inadequate. Appellant makes a bare and unsupported allegation concerning Mr. Robert’s experience. More specifically, I find the copy of the webpage document from LinkedIn.com submitted by Appellant in support of its allegation does

not support its allegation. In addition, I find the webpage is scant and that the webpage is not probative of Mr. Robert's experience nor is it a document whose authenticity or reliability can be verified. It is therefore, not credible. Hence, Appellant's fifth protest ground does not meet the requirements of 13 C.F.R. § 125.26 because Appellant has presented no credible evidence of Mr. Roberts' lack of experience.

V. Conclusion

I hold the AD/GC made no error in dismissing Appellant's protest for a lack of specificity as defined by 13 C.F.R. § 125.25(b) and 13 C.F.R. § 125.26. I entirely agree with SBA that Appellant's protest is not internally consistent and I hold Appellant provided no credible evidence to cause a reasonable person to question Kelco's SDVO SBC eligibility. The dismissal is, therefore, AFFIRMED.

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

THOMAS B. PENDER
Administrative Judge