

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

IN THE MATTER OF:

Castle-Rose, Inc.

Appellant

RE: Battalion Construction & Supply, LLC

Solicitation No. HSCG88-09-R-623066

SBA No. VET-179

Decided: January 29, 2010

APPEARANCES

Jason Smith, Vice President, Castle-Rose, Inc., for Appellant.

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

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 Small Business Administration's Acting Director for Government Contracting made a clear error of fact or law in dismissing the protest of Castle-Rose, Inc. for lack of specificity. *See* 13 C.F.R. §§ 125.27(b), 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On February 19, 2009, the Department of Homeland Security, United States Coast Guard, in Oakland, California (Coast Guard), issued Solicitation No. HSCG88-09-R-623066, for regional multiple award contracts for construction at various facilities. The Coast Guard designated portions of the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs).

On October 23, 2009, the Coast Guard informed unsuccessful offerors of the identity of 21 apparent successful offerors for two portions of the procurement designated for SDVO SBCs. On October 30, 2009, Castle-Rose, Inc. (Appellant) protested both the SDVO SBC status and the size status of Battalion Construction & Supply, LLC (Battalion Construction), and five other apparent awardees. The protest states:

The following factual information is [publicly] available via the SBA's Dynamic Small Business Search, the Department of Veterans Affairs VETBIZ registry and miscellaneous web sites. This factual information represents a cursory search of easily accessible information and does not constitute an exhaustive review. Only those apparent awardees with obvious issues readily identifiable within this limited review are currently protested. Due to the nature of self-certification of SDVO SBC status, it may be possible that other apparent awardees not listed in this protest could still be ineligible.

Protest File at 32 (quoting Protest at 2). There follows a chart listing six apparent awardees, their locations, regulatory citations, and alleged violation(s). The part concerning Battalion Construction states:

Battalion Construction & Supply appears to be a division of Utility Construction, Inc. in violation of SDVO control and size standard regulation.

Protest File at 32 (quoting Protest at 2).

On November 25, 2009, the Coast Guard referred the protest to the Small Business Administration (SBA). On December 4, 2009, the SBA's Office of Government Contracting-Area VI issued Size Determination No. 6-2010-028 concluding Battalion Construction is a small business. On December 22, 2009, the SBA's Acting Director of the Office of Government Contracting (AD/GC) dismissed Appellant's SDVO SBC protest for lack of specificity pursuant to 13 C.F.R. § 125.25(b).

## B. Appeal Petition

On December 31, 2009, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts its protest provided sufficient information for the government to cross-reference Battalion Construction and Utility Construction using the Dynamic Small Business Search engine and verify that Battalion Construction and Utility Construction share facilities. Therefore, Appellant asserts, the AD/GC should not have dismissed the protest for lack of specificity.

Appellant also provides the additional assertions of fact that the Central Contractor Registration shows Battalion Construction and Utility Construction have the same address and fax number. Thus, on this basis alone, the "default assumption" of FAR 19.101(6)(ii) (defining common facilities) is that Utility Construction controls Battalion Construction in violation of the SDVO SBC ownership and control regulations at 13 C.F.R. §§ 125.9 & 125.10(a). Further, Utility Construction is an 8(a) Business Development Program Participant.

### C. Response to the Appeal

On January 14, 2010, SBA filed its response to the appeal. SBA contends that the AD/GC's dismissal of Appellant's protest was not based on a clear error of fact or law and should be upheld. SBA notes Appellant failed to point to any specific facts or to provide any supporting documentation to substantiate its bare assertion that Battalion Construction is a division of another concern.

SBA also moves for dismissal of the appeal as moot because on January 5, 2010, the AD/GC sustained another offeror's protest of Battalion Construction, resulting in the determination that Battalion Construction is not an eligible SDVO SBC.

## IV. Analysis

### A. Timeliness and Standard of Review

Appellant filed its appeal petition within 10 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 on Appeal

The judge may not admit evidence beyond the written protest file on appeal. 13 C.F.R. § 134.512. Here, Appellant presents in its appeal additional assertions of fact not presented in its protest. These additional assertions of fact constitute new evidence on appeal. Thus, they must be EXCLUDED from the record on appeal.

### C. Motion to Dismiss

On January 14, 2010, the day before the record in this case closed, the SBA filed and served its motion to dismiss the instant appeal. The regulations governing appeals provide a 20-day response period for other parties to respond to a motion. 13 C.F.R. § 134.211(c). Thus, the response period for SBA's Motion to Dismiss would not expire until February 3, 2010 and would unnecessarily delay resolution of this appeal. Rather than hold the record in this case open for any possible responses, I find it more beneficial to deny SBA's Motion to Dismiss, and to proceed to the merits of the appeal.

The SBA's Motion to Dismiss is DENIED.

D. 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). The SBA's AD/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

As to a particular concern, the AD/GC may only consider a protest that "presents specific allegations supporting the contention that the owner(s) cannot provide documentation . . . 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.

Appellant's SDVO SBC protest against Battalion Construction contained only unsupported allegations and thus was not sufficiently specific. 13 C.F.R. § 125.25(b). At best, the protest suggests that Utility Construction owns part of Battalion Construction, and tells the SBA to provide its own supporting documentation by doing internet searches in the Dynamic Small Business Search database and the VETBIZ registry, websites not known for providing the specific ownership information on business concerns that would be necessary to support Appellant's allegation that one concern owns a large share of the other. Moreover, the protest's reference to unnamed miscellaneous web sites is merely a request for SBA to initiate a fishing expedition. Alternatively, had Appellant included in its protest printouts of the information it claimed to have obtained over the internet, it is highly likely the AD/GC would have found Appellant's protest specific and thus would have acted upon it rather than dismiss it.

Appellant has not shown on appeal that the AD/GC based its dismissal of Appellant's protest on any clear error of fact or law. Therefore, I conclude the AD/GC made no clear error in dismissing Appellant's protest for lack of specificity. 13 C.F.R. § 125.27(b).

V. Conclusion

After reviewing the record, I hold 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 AD/GC's decision. Accordingly, I must DENY the instant appeal and AFFIRM the AD/GC's dismissal of Appellant's protest.

The AD/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