

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

IN THE MATTER OF:

JHC Firestop, Inc.

Appellant

RE: MSC Associates, Inc.

Solicitation No. W912DY-10-T-0079
Department of the Army, Corps of Engineers
Huntsville, AL

SBA No. VET-193

Decided: May 20, 2010

ORDER REMANDING PROCEEDING

I. Background

On March 4, 2010, the Contracting Officer (CO) for the U.S. Army Corps of Engineers in Huntsville, Alabama (Army) issued Solicitation No. W912DY-10-T-0079 (RFP) seeking offers for a classroom-based course of instruction on basic fire protection engineering and fire extinguishing systems design. The CO designated the RFP as a service-disabled veteran-owned small business concern (SDVO SBC) set-aside and assigned North American Industry Classification System code (NAICS) 611430, Professional and Management Development Training.

On March 30, 2010, unsuccessful offerors, including JHC Firestop, Inc. (Appellant), were notified that the contract had been awarded to MSC Associates, Inc. (MSC). On March 31, 2010, Appellant protested the award of the contract to MSC. Specifically, Appellant made five claims: (1) MCS is not listed on the Central Contractors Registry (CCR); (2) MCS's Online Representations and Certifications Application (ORCA) is not accurate; (3) MSC is not an eligible SDVO SBC; (4) MSC does not possess the relevant experience necessary to perform the contract; and (5) price was the main factor in awarding the contract, contrary to the RFP.

On April 22, 2010, the Small Business Administration's (SBA or the Agency) Director of the Office of Government Contracting (D/GC) dismissed Appellant's protest. The D/GC dismissed Appellant's claims 1, 2, 4, and 5 as nonprotestable allegations pursuant to 13 C.F.R. § 125.27(b). The D/GC also dismissed Appellant's third claim—the allegation that MSC is not an eligible SDVO SBC—finding that it lacked specificity, as required by 13 C.F.R. § 125.25(b). The D/GC determined that Appellant “merely makes statements asserting MSC may not be a qualified SDVO SBC without articulating any underlying factual basis for the statements.”

On May 7, 2010, Appellant filed its appeal of the D/GC's dismissal to the SBA Office of Hearings and Appeals (OHA). Appellant's primary claim on appeal is that its allegation regarding MSC's SDVO SBC status was specific enough to warrant investigation. Appellant also notes that the D/GC dismissed its other allegations without addressing their substance. On May 12, 2010, Appellant filed a Motion to Amend Appeal offering new evidence in support of his contention that MSC is not an eligible SDVO SBC.

On May 18, 2010, the Agency filed its response to Appellant's appeal. The Agency argues that Appellant's bases for its claim that the owner of MSC is not a service-disabled veteran (MSC had not identified itself as an SDVO SBC on a prior contract or on its own website, and a U.S. Naval Academy-affiliated website did not provide evidence that MSC's owner is a service-disabled veteran) do not constitute evidence that MSC is not an eligible SDVO SBC. Thus, the basis for Appellant's claim is simply insufficient to sustain a protest of a concern's SDVO SBC status. The Agency contends the D/GC correctly concluded that Appellant's protest was nonspecific. Additionally, the Agency points out that Appellant's new evidence should not be accepted because new evidence is not permitted on appeal pursuant to 13 C.F.R. § 134.512.

II. Analysis

OHA decides SDVO SBC 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 the instant appeal within ten business days of receiving the D/GC's dismissal. 13 C.F.R. § 134.503. Thus, the appeal is timely and properly before OHA for decision. The standard of review for this appeal is whether the D/GC's dismissal is based upon 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).

As a preliminary matter, the D/GC properly dismissed Appellant's four claims relating to MSC's CCR, MSC's ORCA, MSC's experience, and the Army's process of selecting an awardee. The SBA has no jurisdiction over such matters, and, therefore, the D/GC was correct in not responding to them. Moreover, the CO represented to the D/GC in her referral letter that she had already addressed these matters with Appellant.

With regard to the issue of the specificity of Appellant's allegations pertaining to MSC's SDVO SBC status, however, I agree with Appellant that its protest was sufficiently specific. 13 C.F.R. § 125.25(b) provides that protests "must specify all the grounds on which the protest is based." The regulation goes on to explain that a protest that merely states that a concern is not an eligible SDVO SBC without providing facts or allegations to support the assertion is insufficient. *Id.* The example given in the regulation is applicable here: "A protestor submits a protest stating that the awardee's owner is not a service-disabled veteran. The protest does not state any basis for this assertion. The protest allegation is insufficient." Here, Appellant did much more than merely assert that MSC's owner is not a service-disabled veteran. Appellant set forth at least three separate and specific grounds for its belief: (1) MSC did not identify itself as an SDVO SBC in a previous contract; (2) MSC does not identify itself as an SDVO SBC on its

website; and (3) MSC's owner's service record, obtained from a U.S. Naval Academy-affiliated website, does not reflect a service-related disability.

The Agency is correct that Appellant's bases for its allegations do not constitute affirmative "evidence" that MSC is not an eligible SDVO SBC. However, the regulation does not require Appellant to provide affirmative evidence that MSC's owner is not a service-disabled veteran. Rather, it only requires Appellant to provide specific grounds to justify such an allegation. Appellant met that burden because it offered three different reasons to support its claim. Again, the most important point here is that Appellant did more than merely assert that MSC's owner is not a service-disabled veteran. Appellant provided several factual reasons for such a belief. That is all the regulation requires. Although Appellant's bases may not be adequate to establish that MSC's owner is not a service-disabled veteran, they are sufficient to sustain a protest and to warrant an investigation into MSC's status.

Furthermore—particularly in the case of a challenge to a business owner's status as a service-disabled veteran—such allegations are extremely difficult for a protestor to affirmatively prove with concrete evidence. On the other hand, it is extremely simply for the owner to disprove such an allegation. The owner merely needs to submit the requisite documentation from the Department of Veterans Affairs or the Department of Defense. With these considerations in mind, and upon review of Appellant's protest, Appellant's appeal, and the Agency's response, I find Appellant's protest to be sufficiently specific pursuant to 13 C.F.R. § 125.25(b).

Accordingly, I must remand this case to the D/GC for consideration of the protest. The Agency is correct that I am unable to consider any new evidence that Appellant submitted on appeal. 13 C.F.R. § 134.512. However, because the matter is being remanded, the D/GC may consider this evidence in making its determination.

III. Conclusion

For the foregoing reasons, the D/GC's dismissal of Appellant's allegation that MSC is not an eligible SDVO SBC is REVERSED, and that issue is REMANDED to the D/GC for consideration. The D/GC's dismissal of Appellant's other claims as nonprotestable is AFFIRMED.

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

THOMAS B. PENDER
Administrative Judge