

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

IN THE MATTER OF:

Reese Goel JV

Appellant

Solicitation No. VA-245-10-IB-0023
U.S. Department of Veterans Affairs

SBA No. VET-199

Issued: August 3, 2010

ORDER DISMISSING APPEAL

I. BACKGROUND

A. Protest and Appeal

On March 19, 2010, the Department of Veterans Affairs (VA) Office of Small and Disadvantaged Business Utilization (OSDBU) received a protest, filed by Environmental Design & Construction, LLC, from the Contracting Officer (CO) for Solicitation No. VA-245-10-IB-0023. The protest challenged the eligibility of Reese Goel JV (Appellant) as a service-disabled veteran-owned small business concern (SDVO SBC).

On June 21, 2010, the OSDBU issued a determination that Appellant is not an eligible SDVO SBC. The determination provides that it is effective immediately and is final, and it does not inform Appellant of any right to appeal the determination.

On July 13, 2010, Appellant filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) of OSDBU's determination that it is not an eligible SDVO SBC. In the Appeal Petition, Appellant asserts that OHA has jurisdiction over this protest pursuant to 13 C.F.R. § 134.102(q), which provides that OHA has the authority to decide "[a]ppeals from the Service-Disabled Veteran-owned SBC Program ownership and control status under part 125 of this chapter."

B. The Order to Show Cause

On July 15, 2010, I issued an Order to Show Cause why the appeal should not be dismissed for lack of jurisdiction. The Order provided:

SBA has statutory authority to decide any challenge to the eligibility of small business concerns. 15 U.S.C. § 637(m)(5) and 657f; *See Matter of United Medical Design Builders, LLC*, SBA No. VET-197, at 8 (2010). The statute gives this authority only to SBA. SBA decides protests of a concern's SDVO SBC status under regulations promulgated under the authority of that statute. 13 C.F.R.

§§ 125.24 *et seq.* OHA decides appeals of protests of SDVO SBC status under regulations promulgated under the authority of that statute. 13 C.F.R. §§ 134.102(q), 134.501 *et seq.* However, these regulations grant OHA jurisdiction only over appeals from protest decisions by SBA under 13 C.F.R. Part 125.

In December, 2009, the VA added § 819.307 to the Department of Veterans Affairs Acquisition Regulations (VAAR). 74 Fed. Reg. 64619, 64631-32 (Dec. 8, 2009) (codified at 48 C.F.R. § 819.307). The new VAAR 819.307 provides that the Executive Director of VA's OSDBU will decide SDVO SBC protests unless and until an interagency agreement has been executed with SBA to allow SBA's Director of Government Contracting to decide such protests. 48 C.F.R. § 819.307(a), (c). The rule also provides that "[t]he Executive Director's decision shall be final." 48 C.F.R. § 819.307(c). The text of this rule specifically provides:

All protests relating to whether an eligible VOSB or SDVOSB is a "small" business for the purposes of any Federal program are subject to 13 CFR Part 121 and must be filed in accordance with that part. For acquisitions under the authority of subpart 819.70, *upon execution* of an interagency agreement between VA and the SBA pursuant to the Economy Act (31 U.S.C. 1535), regarding service-disabled veteran-owned or veteran-owned small business status, contracting officers shall forward all status protests to the Director, Office of Government Contracting (D/GC), U.S. Small Business Administration (ATTN: VAAR Part 819 SDVOSB/ VOSB Small Business Status Protests), 409 3rd Street, SW., Washington, DC 20416, for disposition. Except for ownership and control issues to be determined in accordance with 38 CFR Part 74, protests shall follow the procedures set forth in FAR 19.307 for both service-disabled veteran-owned and veteran-owned small business status. However, contracting officers shall be solely responsible for determining VOSB and SDVOSB compliance with VAAR 804.1102.

...

(c) *Until execution* of the interagency agreement referenced in subsection (a), for acquisitions under the authority of subpart 819.70, the Executive Director, VA Office of Small and Disadvantaged Business Utilization (OSDBU) shall decide all protests on service-disabled veteran-owned or veteran-owned small business status whether raised by the contracting officer or an offeror. Ownership and control shall be determined in accordance with 38 CFR Part 74. The Executive Director's decision shall be final.

48 C.F.R. § 819.307 (emphasis added).

As Appellant notes in its Appeal Petition, the regulation does not specify

the appeals process for determinations made by the VA OSDBU while the SBA and VA are negotiating the interagency agreement. Appellant argues that it is entitled to appeal the OSDBU determination. Nevertheless, the rule does provide that “[t]he Executive Director’s decision shall be final” and does not provide for appeals. Indeed, the VA decision letter attached to the appeal gives Appellant no appeal rights.

In consideration of these facts, I ordered Appellant to show cause why this matter should not be dismissed for lack of jurisdiction. I also requested that the VA and the SBA provide comments regarding this jurisdictional question.

C. Appellant’s Response

On July 23, 2010, Appellant responded to the Order. Appellant asserts that only SBA has the statutory authority to decide SDVO SBC status protests, while the VA has no such authority. Appellant relies on *Matter of United Medical Design Builders, LLC*, SBA No. VET-197 (2010), which held that there was nothing in the applicable statute or regulations to supplant SBA’s authority to decide SDVO SBC protests. Accordingly, Appellant asserts OHA should take jurisdiction over this appeal. Alternatively, Appellant asserts SBA should direct the CO to submit the protest to SBA’s Director of Government Contracting (D/GC) for a determination

Neither the VA nor SBA filed any response to the Order.

II. DISCUSSION

OHA is a creation of regulation and, as such, has only that jurisdictional authority granted to it in its regulation. *See generally* 13 C.F.R. § 134.102. OHA’s jurisdictional regulation grants it the authority to decide “Appeals from the Service-Disabled Veteran-owned SBC Program ownership and control status under part 125 of this chapter.” 13 C.F.R. § 134.102(q). Part 125 of Title 13 of the Code of Federal Regulations contains SBA’s regulations governing SBA’s SDVO SBC program. Those regulations provide that protests concerning whether a firm meets SBA’s SDVO SBC eligibility requirements must be forwarded to SBA’s D/GC for determination. 13 C.F.R. §§ 125.25(c), (e); 125.27.

The regulations further provide that such determinations may be appealed to OHA. Specifically, 13 C.F.R. § 125.28 provides: “The protested concern, the protestor, or the contracting officer may file an appeal of an SDVO status protest determination with OHA in accordance with part 134 of this chapter.” Part 134 contains SBA’s rules of procedure governing proceedings before OHA. It is clear from the context of these regulations that they confer jurisdiction upon OHA to hear SDVO SBC appeals from determinations issued by SBA’s D/GC. Throughout Part 125, the only “SDVO status protest determination” that is contemplated is one issued by the SBA’s D/GC. Additionally, Parts 125 and 134 explicitly reference one another, supporting the assertion that OHA’s jurisdiction extends only to those matters plainly within SBA’s control.

The determination at issue in this appeal was rendered by VA’s OSDBU. Contrary to the regulations explicitly granting OHA the authority to hear appeals of SDVO SBC determinations issued by the SBA’s D/GC under Part 125, there is no regulatory provision granting OHA the

authority to handle an appeal of a determination issued by the VA's OSDBU. Thus, although Appellant is correct that SBA has the statutory authority to make its own initial determinations of SDVO SBC status, there is nothing in the applicable statutes or regulations which might permit SBA's OHA to reach out and take appellate jurisdiction over the VA's OSDBU's SDVO SBC status determination. There is simply no regulation that gives OHA jurisdiction over the OSDBU's determinations, and, therefore, OHA has no jurisdiction to review them.

In fact, VA's own regulation provides that the OSDBU's SDVO status determination is final. 48 C.F.R. § 819.307(c). VA's regulation provides for a determination by the OSDBU until execution of an interagency agreement with SBA, which will allow for referral of SDVO SBC status protests to the SBA's D/GC. *Id.* This agreement is not yet in place. The result of this regulation is that VA has created its own SDVO status protest process with which neither SBA nor OHA may interfere.

It may be, as Appellant argues, that VA's regulation exceeds its statutory authority, but this Office has no power to review regulations. *See, e.g., Size Appeal of Evolver, Inc.*, SBA No. SIZ-4854 (2007) ("OHA has no jurisdiction to consider any challenge to SBA's regulations." (citing *Size Appeal of Terra Excavating, Inc.*, SBA No. SIZ-4785 (2006))); *Ecological Planning and Toxicology, Inc.*, SBA No. SIZ-3919 (1994) ("Appellant challenges the propriety and fairness of this regulation . . . we decline to do so as it is beyond our jurisdictional grant of power."). Additionally, the VA OSDBU's determination purports to be a final agency decision. OHA's authority lies in issuing final agency decisions for SBA, 13 C.F.R. § 134.515(a), but OHA has no jurisdiction to review final decisions of other agencies. Instead, these matters are for a court of competent jurisdiction.

Further, OHA has no means to conduct a proper review of the OSDBU's decision. OHA has no authority to compel OSDBU to submit the VA's administrative record of the protest proceedings, which would be essential to any meaningful review of the determination. Nor does OHA have the power to compel the OSDBU to submit the protest itself to the D/GC for review by SBA. OSDBU issued its own determination completely outside of SBA procedures, and OHA simply has no jurisdiction to interfere with the VA's own process.

Finally, Appellant's reliance on *United Medical* is misplaced. In that case, the appellant argued that the VA's regulations precluded SBA from conducting a review of the subject concern's SDVO SBC status. OHA held that SBA still had the statutory and regulatory authority to review any SDVO SBC protest presented to the D/GC. That holding remains undisturbed. Here, a protest was not presented to SBA, but was decided by the VA OSDBU, and Appellant now seeks OHA review. There is no authority for this Office to undertake that review, and thus I must DISMISS the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge