

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

IN THE MATTER OF:

ETSC, LLC

Appellant

RE: Hendry Corporation

Solicitation No. HSCG80-11-Q-PHM004

SBA No. VET-202

Decided: November 16, 2010

APPEARANCES

Jeffrey T. Berry, President, ETSC, LLC, for Appellant.

Paralee White, Esq., Isaias “Cy” Alba IV, Esq., PilieroMazza PLLC, Washington, D.C., for Hendry Corporation

Christopher R. Clarke, 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 Director for Government Contracting made a clear error of fact or law in dismissing the protest of ETSC, LLC, for lack of specificity. *See* 13 C.F.R. §§ 125.25(b), 125.26, 125.27(b), 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On August 26, 2010, the U.S. Coast Guard, Surface Forces Logistics Center, in Norfolk, Virginia (Coast Guard), issued Solicitation No. HSCG80-11-Q-PHM004 for drydock and repairs. The Coast Guard set the procurement aside for Service-Disabled Veteran-Owned Small

Business Concerns (SDVO SBCs) and designated it under North American Industry Classification System (NAICS) code 336611, Ship Building and Repairing.

On October 7, 2010, the Contracting Officer (CO) informed offerors that the apparent successful offeror was Hendry Corporation (Hendry). On October 8, 2010, ETSC, LLC (Appellant), protested Hendry's claimed SDVO SBC status to the CO. The protest stated:

The basis for this challenge is as follows:

1. ETSC, LLC is aware of the requirements for claiming SDVOSB status, as defined by 13 C.F.R. § 125.8-125.10. Documentation substantiating that status for us and for our teammate, . . . , was included with our offer. We do not know if the Hendry Corporation included such documentation and challenge that they did, or did not. . . .
3. We can find no evidence that the current Owner and President of Hendry Corporation, Aaron W. Hendry, had any prior military service, and challenge that he did, or did not.

Protest at 1.

Appellant's protest included Hendry's Central Contractor Registration (CCR) listing wherein Hendry is identified under "Business Types" as "QF - Service Disabled Veteran Owned Business." Protest at 4. Appellant also included Hendry's SBA Profile, which identifies Hendry, under "Ownership and Self-Certifications," as "Service-Disabled Veteran, Veteran." Protest at 9. The protest also contained Hendry's Online Representations and Certifications Application (ORCA), including Hendry's certification as an SDVO SBC for NAICS code 336611. Protest at 21, 30.

On October 8, 2010, the Coast Guard referred the protest to the Small Business Administration (SBA). On October 26, 2010, the SBA's Director, Office of Government Contracting (D/GC) dismissed Appellant's SDVO SBC protest for lack of specificity pursuant to 13 C.F.R. § 125.25(b). The D/GC stated: "Your protest lacks specificity because it merely makes statements asserting that Hendry may not be a qualified SDVO SBC without articulating any underlying factual basis for the statements." Appellant received the D/GC's dismissal letter on October 27, 2010.

B. Appeal Petition

On November 1, 2010, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts that it, "as a private company, has neither the authority nor the ability to obtain the necessary documents that prove, in fact, that the Hendry Corporation is not eligible for SDVOSBC status." Appeal Petition at 2. Appellant further states:

Absent authorization to gain access to documentation which would verify Hendry Corporation's eligibility for SDVOSBC status, which would, therefore, constitute sufficient evidence, ETSC, LLC can only offer that contained within reference (c); namely, that no evidence could be found within public record to show any

prior military service for Mr. Aaron W. Hendry, without which the SDVOSBC status cannot be claimed.

Although the Hendry Corporation website identified Mr. Aaron W. Hendry as president and owner, it makes no claim of its SDV status, which was dismissed by ETSC, LLC, because it did not verify their status one way or another. Similarly, we could not find the Hendry Corporation listed in the VetBiz Registry. However, again, that provided no credible evidence of their SDV status. . . .

The premise upon which the D/GC dismissed the protest, imposes a burden of proof upon ETSC, LLC that cannot, within the constraints described in these arguments, be met, and that may only be verified by the SBA, exclusively, and was not.

Id.

C. Responses to the Appeal

On November 10, 2010, SBA filed its response to the appeal. SBA contends that the D/GC's dismissal of Appellant's protest was not based on a clear error of fact or law and should be upheld. SBA cites a prior OHA decision for the proposition that a protestor must do more than simply point to a lack of available information in order to satisfy the protest specificity requirement.

On November 10, 2010, Hendry filed its response to the appeal. Hendry also contends that the D/GC's dismissal of Appellant's protest was proper, citing two other OHA decisions.

IV. Discussion

A. Timeliness, Standard of Review, and New Evidence

Appellant filed its appeal petition within 10 business days of receiving the D/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

OHA reviews the D/GC's decision to determine whether it 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, I may overturn the D/GC's decision only if Appellant proves the D/GC made a patent error based on the record before her.

OHA's regulations prohibit the admission of evidence beyond the written protest file, and require all SDVO SBC appeals to be decided solely on a review of the written protest file and arguments made on appeal. 13 C.F.R. § 134.512. Here, Appellant introduced on appeal two items of new evidence not in the written protest file: (1) that Hendry's website does not mention SDVO SBC status, and (2) that Appellant could not find Hendry listed in the VetBiz Registry. Because new evidence may not be admitted on appeal, these two items are EXCLUDED.

B. Protest Specificity

An SDVO SBC protest must be specific. The D/GC will 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.” 13 C.F.R. § 125.26(a). 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 Federal Acquisition Regulation (FAR) rule similarly provides: “Assertions that a protested concern is not a service-disabled veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient.” 48 C.F.R. § 19.307(c). The SBA’s D/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

Under these rules, OHA has affirmed the D/GC’s dismissal of a protest alleging only that “it is our understanding” an offeror does not qualify. *Matter of Service Disabled Veteran Manufacturing & ZAMS, Inc.*, SBA No. VET-122 (2007) (ZAMS). OHA also has affirmed the dismissal of a protest that was nothing more than a request that SBA investigate an offeror. *Matter of One Step Ahead Enterprises, LLC*, SBA No. VET-155 (2009) (One Step).

Here, Appellant’s protest stated: “We do not know if the Hendry Corporation included [SDVO SBC] documentation and challenge that they did, or did not. . . . We can find no evidence that the current Owner . . . had any prior military service, and challenge that he did, or did not.” Appellant’s protest provides nothing more than did the protests in *One Step* and *ZAMS*, protests that merited dismissal because they made no specific facts or allegations.

A non-specific protest is not saved by the assertion, on appeal, that the protestor is not privy to documents containing the facts to support an allegation that an offeror is not an SDVO SBC. *Matter of Castle-Rose, Inc.*, SBA No. VET-180 (2010). Here, on appeal, Appellant makes exactly that assertion. I must reject that assertion as meritless.

Appellant’s SDVO SBC protest against Hendry did not specify any factual basis for the allegation that Hendry is not an SDVO SBC. Thus, the protest was not sufficiently specific under 13 C.F.R. §§ 125.25(b), 125.26(a). Therefore, Appellant cannot show the D/GC based her dismissal of the protest on any clear error of fact or law. 13 C.F.R. § 125.27(b)

V. Conclusion

Accordingly, the D/GC’s dismissal of Appellant’s protest was not based upon clear error. The D/GC’s dismissal of the protest is AFFIRMED, and the instant appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge