

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

IN THE MATTER OF:

Airborne Construction Services, LLC

Appellant

Solicitation No. VA-250-10-IB-0150

U.S. Department of Veterans Affairs

SBA No. VET-203

Issued: November 17, 2010

ORDER DISMISSING APPEAL

I. Background

A. Protest and Appeal

On June 29, 2010, Fleet Services and Installation, LLC (Fleet) filed a protest with the U.S. Department of Veterans Affairs (VA) Contracting Officer (CO) for Solicitation No. VA-250-10-IB-0150, challenging the status of Airborne Construction Services, LLC (Appellant) as a service-disabled veteran-owned small business concern (SDVO SBC). The CO submitted the protest to VA's Office of Small and Disadvantaged Business Utilization (OSDBU).

On September 28, 2010, the VA 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 October 15, 2010, Appellant filed the instant appeal of the VA OSDBU's determination with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). Appellant argues the SBA Office of Government Contracting, Area IV (Area Office) performed a size determination on Appellant, determined that Appellant is a small business, and specifically found that Mr. Todd Martin Henry, a service-disabled veteran, controls Appellant. Appellant also asserts that OHA has jurisdiction over this protest pursuant to 13 C.F.R. §§ 125.28 and 134.102, which confer authority upon OHA to review determinations of a concern's SDVO status made under 13 C.F.R. Part 125.

Appellant asserts the original protest was filed pursuant to 13 C.F.R. Part 125, and the VA OSDBU exceeded its statutory authority in making the eligibility determination. Appellant relies upon the *Matter of United Medical Design Builders, LLC*, SBA No. VET-197 (2010), in contending that only SBA has the authority to make SDVO status determinations, contrary to the VA OSDBU's statement that it is authorized to make such determinations by Veterans Affairs

Acquisition Regulations (VAAR) § 819.307. 48 C.F.R. § 819.307. Appellant also alleges the VA OSDBU determination contains numerous errors of law and fact and requests that OHA reverse the determination.

### B. Agency Response

On October 25, 2010, the SBA filed its response to the appeal petition. The SBA argues OHA lacks regulatory jurisdiction to hear this appeal, as explained in the *Matter of Reese Goel JV*, SBA No. VET-199 (2010). In that case, OHA reasoned no regulation authorizes OHA to hear appeals of VA OSDBU determinations, VAAR § 819.307 authorizes the VA OSDBU to make final agency decisions regarding SDVO SBC status apart from the SBA regulations, OHA has no authority to compel the VA OSDBU to produce an administrative record or submit to an appeal of its determination, and 13 C.F.R. §§ 125.28 and 134.102 only grant OHA the authority to hear status appeals of determinations made by the SBA Director of Government Contracting (D/GC). The SBA thus contends OHA has already rejected Appellant's argument that OHA has jurisdiction to hear appeals from VA OSDBU determinations, and OHA should dismiss this appeal pursuant to *Reese Goel*.

The SBA next asserts it has no obligation to decide SDVO SBC protests relating to procurements conducted under VAAR Part 819 because the Small Business Act mandates only that the SBA decide status protests filed in relation to procurements issued in accordance with FAR Subpart 19.14. The SBA explains the Small Business Act creates a government-wide procurement program for SDVO SBCs but does not detail procedures for the SBA to verify the eligibility of participating firms. 15 U.S.C. § 657f (2010). Instead, the Act provides that the enforcement and verification procedures promulgated with regard to the government-wide women-owned small business procurement program are applicable to the SDVO SBC program. 15 U.S.C. § 657f(d). The SBA goes on to explain that, in relation to the women-owned small business procurement program, the Act requires the SBA to establish verification procedures for eligibility challenges arising "under this subsection." 15 U.S.C. § 637(m)(5)(A)(i) (2010). Accordingly, the SBA reasons the Small Business Act does not require the SBA to decide every SDVO SBC eligibility challenge, but only those arising under the government-wide procurement program for SDVO SBCs created by the Small Business Act.

The procedures related to the SBA's SDVO SBC procurement program are set forth at 13 C.F.R. Part 125 and require that a firm is small and is owned and controlled by a service-disabled veteran to be eligible for assistance under the program. FAR Subpart 19.14 permits the use of the SBA's SDVO SBC procurement program by any federal agency that employs one or more contracting officers, summarizes the requirements set forth at 13 C.F.R. Part 125, and requires contracting officers to insert FAR clause 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, into solicitations issued under FAR Subpart 19.14. The SBA concludes that where the Small Business Act requires the SBA to adjudicate challenges to a firm's eligibility to receive assistance "under this subsection," it refers to challenges arising under the SBA's government-wide SDVO SBC procurement program, which uses the procedures set forth at 13 C.F.R. Part 125 and FAR Subpart 19.14. Thus, according to the SBA, if a solicitation does not include FAR clause 52.219-27, as required by FAR Subpart 19.14, it is

not issued pursuant to the SBA's government-wide SDVO SBC procurement program, and the SBA is not required to decide eligibility protests filed in connection with the procurement.

The SBA goes on to argue that because the procurement in question was conducted under a VA-specific procurement program, which employs VA's own SDVO SBC eligibility, set-aside, and status protest rules at 38 C.F.R. Part 74 and VAAR Part 819, the VA OSDBU was authorized to make a determination of Appellant's eligibility pursuant to VAAR § 819.307. The SBA explains that the Veterans Benefits, Health Care, and Information Technology Act of 2006 § 502, 38 U.S.C. § 8127 (2010), empowers the VA to implement its own SDVO SBC set-aside program by authorizing the VA to create a database of firms verified as SDVO SBCs and to set aside contracts for those firms. The SBA contends a close reading of this statute establishes: (1) the VA SDVO SBC set-aside program created by 38 U.S.C. § 8127 is separate and distinct from the SBA's government-wide SDVO SBC procurement program; (2) Congress did not intend for the two programs to overlap; (3) Congress specifically obligated the SBA to determine small business size of firms that participate in the VA SDVO SBC set-aside program, but not to determine a firm's eligibility; and (4) Congress granted the VA authority to enforce certifications for its SDVO SBC set-aside program, but did not indicate whether the VA is required to create a status protest mechanism, so the decision of whether to create such a mechanism lies within the VA's discretion. *See* 38 U.S.C. § 8127(d), (e), (f), (g), (i), (k). The SBA analyzes each of these sections in detail.

The SBA explains that 38 U.S.C. § 8127(i) sets forth a priority for contracting preferences within the VA SDVO SBC set-aside program. This section requires that when the VA sets aside a procurement for SDVO SBCs, the VA must do so "pursuant to subsection (b), (c), or (d)," which authorize the VA to award contracts noncompetitively, on a sole-source basis, or using restricted competition. 38 U.S.C. § 8127(i)(1). The SBA contends the direction that the VA issue solicitations "pursuant to subsection (b), (c), or (d)" mandates that the VA use the set-aside procedures of 38 U.S.C. § 8127 and not any other statute. The SBA emphasizes that this section does not refer to the SDVO SBC procurement program created by the Small Business Act, despite referencing other SBA set-aside programs. Instead, Congress used a different description for SDVO SBCs in this section ("small business concerns owned and controlled by veterans with service-connected disabilities") than in the Small Business Act ("small business concerns owned and controlled by service-disabled veterans"), demonstrating its intent for the VA to establish its own procurement program rather than using the SBA's procurement program. *Compare* 15 U.S.C. § 657f *with* 38 U.S.C. § 8127(i)(1).

The SBA next explains that 38 U.S.C. § 8127(k) sets forth definitions that identify the SBA's role in the VA's SDVO SBC procurement program. Specifically, 38 U.S.C. § 8127(k)(1) provides "[t]he term small business concern has the meaning given that term under section 3 of the Small Business Act," and 38 U.S.C. § 8127(k)(2) defines "small business concern owned and controlled by veterans" without any reference to the Small Business Act and in different terms than the Small Business Act's definition of the same term. *Compare* 15 U.S.C. § 632(q)(3) *with* 38 U.S.C. § 8127(k)(2). The SBA contends this section clarifies the SBA's role in the VA SDVO SBC procurement program, and that role is only to determine size. The different definitions of "small business concern owned and controlled by veterans" demonstrate that

Congress intended that the VA SDVO SBC procurement program be separate from the SBA SDVO SBC procurement program.

The SBA then points out that 38 U.S.C. § 8127(d), (e), and (f) authorize the VA to implement its own SDVO SBC set-aside program. Subsection (d) allows the VA to set aside procurements to SDVO SBCs, subsection (e) requires that firms be listed in the VA SDVO SBC database to be eligible for such set-asides, and subsection (f) sets forth the requirements for the database, most importantly that the VA must verify each firm's SDVO SBC eligibility. The SBA argues that because Congress requires the VA to set up and maintain its own database of SDVO SBCs, it is clear Congress did not intend the VA to use the SBA's SDVO SBC procurement program for set-asides issued under 38 U.S.C. § 8127, and it is clear that the two programs are separate and are not meant to overlap.

Finally, the SBA contends 38 U.S.C. § 8127(g) makes the VA responsible for enforcement of the VA SDVO SBC procurement program because that section allows the VA to monitor misrepresentations and requires the VA to debar violators from future contracting with the VA. Importantly, the SBA argues, subsection (g) does not mention the SBA and does not authorize the SBA to handle enforcement of status misrepresentations for the VA SDVO SBC set-aside program. Additionally, although the subsection does not require the VA to create a protest process, the SBA contends the VA has the authority to create a protest mechanism because agencies are expected to fill interstices of statutes via rulemaking. *See, e.g., Pub. Serv. Co. of N.H. v. U.S. Nuclear Regulatory Comm'n*, 582 F.2d 77, 82 (1st Cir. 1978). The SBA concludes it is plausible for the VA to set up a protest process in order to identify misrepresentations, as subsection (g) authorizes it to do.

Pursuant to the authority delegated to it by 38 U.S.C. § 8127, the VA set up the VetBiz Vendor Information Pages database, with eligibility requirements set forth at 13 C.F.R. Part 74. Notably, the eligibility requirements for admission into the VA database are entirely different from the eligibility requirements for the SBA's SDVO SBC procurement program which, as explained above, are set forth at 13 C.F.R. Part 125. Because 38 U.S.C. § 8127 allows the VA to set aside procurements for firms in the database, the VA also implemented regulations to govern its procurement program. These regulations are found at VAAR Part 819. 48 C.F.R. Part 819. These rules require contracting officers to include VAAR clause 852.219-10 when setting aside procurements for SDVO SBC firms. VAAR clause 852.219-10 is different from FAR clause 52.219-27 in several respects, most importantly in that it requires firms to be both registered and verified in the VA database to be eligible for the award of the set-aside.

VAAR § 804.1102 provides that although firms must be registered in the VA database to be eligible for SDVO SBC set-aside awards, the VA will not enforce the verification requirement until January 1, 2012. The Veterans Benefits Act of 2010, Pub. L. No. 111-275, 124 Stat. 2864 (2010), was signed into law on October 13, 2010, and directs the VA to initiate verification of all firms in the VA database within sixty days. However, the SBA explains the VA still has regulatory authority to award a set-aside contract to an unverified firm, and because registration in the database is based on self-certification, there is significant potential for fraud. The SBA theorizes that to combat potential abuses of the program, the VA created the status protest procedure set forth at VAAR § 819.307, which authorizes the VA OSDBU to decide eligibility

protests filed in connection with VA SDVO SBC set-aside procurements until an interagency agreement is executed between the VA and the SBA (at which time the protests will be decided by the SBA D/GC) and does not provide for any appeal procedures.

The SBA also offers a number of policy arguments as to why the VA retains jurisdiction over SDVO SBC eligibility protests filed in connection with VAAR Part 819 procurements and why OHA's jurisdiction cannot overlap with it: (1) the eligibility requirements for the VA SDVO SBC set-aside program set forth at VAAR Part 819 are different from those governing the SBA SDVO SBC procurement program, so the VA will develop expertise in applying its own rules, and it is not necessary for the SBA to do so; (2) VAAR Part 819 procurements are distinct and separate from FAR Subpart 19.14 procurements, and overlapping jurisdiction would blur the distinction between the VA SDVO SBC procurement program and the SBA SDVO SBC procurement program; (3) VAAR Part 819 authorizes the VA to penalize firms with VA-specific debarment, so the VA should control both the database verification process and the status protest process so it may retain all relevant information to decide whether debarment is necessary, otherwise a firm that loses a status protest may escape debarment simply because the VA did not handle the protest; (4) firms filing status protests in relation to VAAR Part 819 procurements should not be permitted to forum shop, and overlapping jurisdiction between the VA and the SBA could result in non-uniform determinations; (5) under VAAR Part 819, firms may protest the eligibility of a veteran-owned small business, whereas the SBA program allows only protests of the eligibility of service-disabled veteran-owned small businesses, so there is a strong potential for confusion if the VA is required to share jurisdiction with regard to SDVO SBCs but not with regard to veteran-owned small businesses; and (6) the SBA should not be permitted to second-guess the VA's verification decisions. For these reasons, the SBA contends, the VA retained jurisdiction over VAAR Part 819 eligibility protests. In fact, the SBA argues, even if the SBA and the VA execute an interagency agreement to allow the SBA D/GC to decide these protests, the VA would retain final decisionmaking authority because, under the Economy Act, an agency cannot fully transfer an administrative duty. *See* 31 U.S.C. § 1535 (2010); 3 Office of General Counsel, Government Accountability Office, Principles of Federal Appropriations Law 12-70 to 12-72 (3d ed. 2008).

The SBA also argues the Small Business Act prohibits the SBA from sharing jurisdiction with the VA over VAAR Part 819 SDVO SBC status protests. Specifically, the SBA contends Section 18(a) bars the SBA from duplicating the activity of another agency. 15 U.S.C. § 647(a). Thus, the SBA asserts it cannot operate a status protest process for VA SDVO SBC set-asides if the VA is also operating such a process. The execution of an interagency agreement between the SBA and the VA to allow the SBA to decide such protests will not violate Section 18(a), as long as the SBA will decide all the protests, so as to avoid duplication.

The SBA challenges Appellant's contention that the SBA should take jurisdiction over the protest at issue because it cited 13 C.F.R. Part 125 instead of VAAR Part 819. The SBA asserts jurisdiction depends upon the type of procurement at issue, not on the language of the protest. Because the two procurement programs are separate and distinct, a protestor cannot decide which agency has jurisdiction merely by citing certain regulations. Additionally, the SBA contends it does not have the authority to apply the VA's eligibility rules, which are different from the SBA's eligibility rules. Nothing in 38 U.S.C. § 8127 or VAAR Part 819 authorizes the

SBA to interpret or apply the VA's own eligibility rules relating to its own SDVO SBC procurement program.

Finally, the SBA urges OHA to overrule the *United Medical* case. The SBA contends the decision has caused confusion (as demonstrated by the appeal at hand) among practitioners and contracting officers regarding whether the VA or the SBA is responsible for deciding eligibility protests filed in connection with VAAR Part 819 procurements. The SBA emphasizes that based on its analysis, nothing in the Small Business Act, 38 U.S.C. § 8127, the SBA's regulations, the VA's regulations, the FAR, or the VAAR authorizes or implies dual jurisdiction. The SBA asserts it is now the SBA's practice to decline jurisdiction over all SDVO SBC status protests related to VA SDVO SBC set-asides. Accordingly, the SBA asks OHA to dismiss the instant appeal and to overrule *United Medical* to the extent it holds that SBA has an obligation to adjudicate protests brought in relation to VAAR Part 819 procurements.<sup>1</sup>

### C. Fleet's Response

On October 25, 2010, Fleet filed its response to the appeal petition. Fleet, too, requests that OHA dismiss the appeal for lack of jurisdiction. Fleet contends Appellant's reliance on *United Medical* is misplaced because that case indicates OHA has jurisdiction to hear appeals from SDVO status determinations issued by the SBA D/GC, not to hear appeals from status determinations issued by the VA OSDBU. Fleet asserts the *Reese Goel JV* case establishes that OHA does not have jurisdiction over status determinations issued by the VA OSDBU. Fleet also refutes Appellant's substantive allegations of error in the OSDBU determination.

## II. Discussion

As explained at length in the *Reese Goel* decision, OHA has no authority to decide appeals from VA OSDBU eligibility determinations. *Matter of Reese Goel JV*, SBA No. VET-199 (2010). It is clear from the context of 13 C.F.R. Parts 125 and 134 that those regulations only confer jurisdiction upon OHA to hear SDVO SBC appeals from determinations issued by SBA's D/GC. There is no regulatory authority for OHA to hear appeals of determinations issued by the VA's OSDBU. As OHA held in *Reese Goel*, "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." *Id.* at 4. OHA cannot consider Appellant's argument that the VA exceeded its statutory authority by issuing VAAR § 819.307 because OHA has no authority to review regulations. *Id.*

Appellant's contention that the VA OSDBU determination is null and void is meritless. VAAR § 819.307 provides that the Executive Director of VA's OSDBU will decide SDVO SBC status protests relating to acquisitions issued under the authority of VAAR subpart 819.70 until an interagency agreement has been executed with SBA to allow SBA's D/GC to decide such

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<sup>1</sup> It should be noted that SBA's position here is diametrically opposed to its position in *United Medical*. There, SBA argued that the SBA D/GC had authority to adjudicate all challenges to the SDVO SBC status of firms taking part in the Federal procurement process, including the status of offerors in procurements conducted by the VA under 38 U.S.C. § 8127.

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 rule does not provide for an appeal from a VA OSDDBU determination, and no interagency agreement has yet been executed.

Moreover, Appellant’s contention that the SBA decided the issue of control also lacks merit. The Area Office determined only that Mr. Henry controls Appellant “[u]nder the terms of [13 C.F.R.] § 121.103(c)(1)” because he owns a majority interest in Appellant. This regulation relates only to whether Appellant is a small business, not to whether it is an eligible SDVO SBC under Part 125. The control requirements listed in Part 125 are wholly unrelated to the limited definition of control set forth in Part 121. The Area Office’s size determination has no effect upon the VA OSDDBU determination, nor would it have any effect on a determination issued by the SBA D/GC under 13 C.F.R. Part 125.

Finally, as in *Reese Goel*, Appellant’s reliance on *United Medical* is misplaced. In *United Medical*, the appellant argued that VA’s regulations preclude the SBA D/GC from conducting a review of the subject concern’s SDVO status. OHA determined SBA may still review any SDVO status protest presented to the SBA D/GC under 13 C.F.R. Part 125. The protest at issue was not presented to SBA, but was decided by the VA OSDDBU, and OHA may not review it.

Although *United Medical* is not directly at issue here, the SBA is correct that the decision has caused confusion in the SDVO SBC community. The decision provides: “the fact that the RFP was issued pursuant to 38 U.S.C. § 8127 has no effect on SBA’s authority and mandate to decide SDVO SBC protests.” After careful review of the statutes and regulations at issue, I agree with the SBA’s conclusion that dual jurisdiction between the SBA and the VA over protests filed in connection with procurements issued under VAAR Part 819 is impractical and was not intended by Congress. Rather, I agree with the SBA’s revised position that 38 U.S.C. § 8127 creates a parallel procurement process for firms owned and controlled by service-disabled veterans. The SBA hears challenges to the SDVO SBC status of offerors in Federal procurements conducted under 15 U.S.C. § 657f, and OHA has jurisdiction to hear appeals from the D/GC’s decisions under 13 C.F.R. §§ 125.28 and 134.102. The VA OSDDBU has jurisdiction to hear challenges to the SDVO SBC status of offerors in procurements conducted by the VA under 38 U.S.C. § 8127, and OHA has no jurisdiction to review those determinations until the agreement contemplated in VAAR § 819.307 is executed.

Accordingly, I hereby overrule *United Medical* to the extent it holds that the SBA has an obligation to adjudicate protests brought in relation to VAAR Part 819 procurements. The SBA currently has no authority or obligation to decide SDVO SBC status protests filed in connection with procurements issued under VAAR Part 819, and the SBA’s decision to reject jurisdiction for such protests is consistent with the statutes and regulations at issue. Consequently, SDVO SBC status protests relating to VAAR Part 819 must be decided by the VA OSDDBU until an interagency agreement is executed between the VA and the SBA to allow the SBA D/GC to decide such protests under VAAR § 819.307. Additionally, as explained above, and consistent with the holding in *Reese Goel*, OHA has no authority to hear appeals from VA OSDDBU status determinations.

III. Conclusion

Because OHA lacks jurisdiction to hear the instant appeal, the appeal is hereby DISMISSED.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge