

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

IN THE MATTER OF:

Fidelis Design & Construction, LLC,

Appellant,

RE: Homeland Security Construction
Corporation

Solicitation No. GS-03P-11-DX-C-0013
General Services Administration
Public Building Services
Philadelphia, Pennsylvania

SBA No. VET-221

Decided: September 30, 2011

APPEARANCES

Richard Bennett, President, for Appellant Fidelis Design & Construction, LLC

Victor G. Klingelhofer, Esq., and Laurel A. Hockey, Esq., Cohen Mohr, LLP,
for Homeland Security Construction Corp.

Alison M. Mueller, 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 SBA's Director for Government Contracting made a clear error of fact or law in dismissing the Appellant's protest 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 June 6, 2011, the U.S. General Services Administration (GSA) issued the subject solicitation for the renovation of the Child Care Playground on the Social Security Campus in Woodlawn, Maryland. The Contracting Officer (CO) set procurement aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC). On August 11, 2011, GSA issued a notice to unsuccessful offerors that Homeland Security Construction Corporation (HSCC) was the apparent successful offeror.

Also on August 11, 2011, Fidelis Design and Construction, LLC (Appellant), filed a protest of HSCC's SDVO SBC status with the CO. Appellant stated its protest was "due to suspicion of noncompliance" and "reasonable doubt that Homeland Security Construction Corp. is a CVE-Verified SDVOSB." Appellant further stated:

On August 11, 2011 we performed a search by name on the online Vendor Information Page Database (www.vip.vetbiz.gov), which yielded no record of a profile showing either a "pending" or "verified" status for Homeland Security Construction Corp. The solicitation emphasized being listed in the VIP Database, in accordance with VAAR 804.1102, to be deemed eligible to receive award under this solicitation. Homeland Security Construction Corp. has no profile on the VIP Database, and is therefore ineligible to participate or receive contract awards under this program.

The website belonging to Homeland Security Construction Corp. (<http://www.hsc-no1.com/index.php?docId=15>) represents the company as a "Service Disabled Veteran Owned Small Business". However, they display no CVE-issued¹ seal bearing the verified "SDVOSB" designation (see attachment 2).

Protest File, Tab 2, at 4

Appellant's attachments were printouts from the Department of Veteran Affairs (VA) VetBiz Registry, showing HSCC was not listed, and a printout from HSCC's website. Protest File, Tab 2, at 5-6. On August 15, 2011, the CO referred the protest to the Small Business Administration (SBA).

On August 31, 2011, SBA's Acting Director, Office of Government Contracting (AD/GC) dismissed Appellant's protest because it lacked the specificity required by 13 C.F.R. § 125.25(b) for an SDVO SBC protest. Protest File, Tab 1 at 1.

B. Appeal Petition

On September 15, 2011, Appellant filed the instant appeal with the SBA Office of

¹ The Center for Veterans Enterprise (CVE) is an office within VA's Office of Small and Disadvantaged Business Utilization.

Hearings and Appeals (OHA). Appellant asserts there is affiliation between HSCC and Meltech, Inc. (Meltech), a concern which is not an SDVO SBC. Appellant proffers evidence which it alleges shows affiliation between HSCC and Meltech.

C. Responses to the Appeal

On September 28, 2011, SBA responded 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 asserts first, that Appellant's proffer of evidence of HSCC's affiliation with Meltech constitutes new evidence on appeal and should be excluded.

Second, SBA asserts that Appellant's protest was based on non-protestable allegations, and thus failed to meet the regulatory requirements for specificity. A firm need not be registered on the VetBiz website to be an eligible SDVO SBC. Further, the display of SDVO SBC verification on firm's website is not a requirement for SDVO SBC eligibility. Accordingly, SBA argues that the AD/GC properly dismissed Appellant's protest for lack of specificity.

Also on September 28, 2011, HSCC responded to the appeal. First, HSCC argues that Appellant impermissibly raises new issues on appeal. Second, that Appellant's proffered new evidence must be excluded. Finally, that Appellant's protest lacks the required specificity because the VA registrations Appellant alleges HSCC lacks are not required here.

IV. Discussion

A. Timeliness, Standard of Review and New Evidence

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.

OHA reviews the AD/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 AD/GC's decision only if Appellant proves the AD/GC made a patent error based on the record before him.

Appellant attempts to submit new evidence on appeal. Specifically, Appellant attempts to document its allegations of HSCC's affiliation with Meltech. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512; *Matter of Markon, Inc.*, SBA No. VET-158 (2009). It cannot be clear error on the part of the AD/GC to fail to consider information never presented. This is especially true where, as here, the evidence has been publicly available all along on the websites from which Appellant downloaded it, yet Appellant failed to submit it to the AD/GC. *Matter of DAV Prime/Vantex Service Joint Venture*, SBA No. VET-138, at 4 (2008). The evidence Appellant submits with its appeal is thus EXCLUDED from consideration here.

B. Protest Specificity

An SDVO SBC protest must be specific. 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 AD/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

Under these rules, OHA has affirmed the AD/GC's dismissal of a protest alleging only that “it is our understanding” that an offeror does not qualify. *Matter of Service Disabled Veteran Manufacturing & ZAMS, Inc.*, SBA No. VET-122 (2007). 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). Here, Appellant's allegations that its protest is “due to suspicion of noncompliance” and “reasonable doubt that Homeland Security Construction Corp. is a CVE-Verified SDVOSB” are nothing more than statements of what Appellant wishes to prove, with no substantive factual content suggesting why HSCC is not eligible. These statements are similar to those OHA has found insufficiently specific in the past. Appellant's statements cannot be the basis for a specific protest, and mandated the AD/GC's dismissal of the protest. *Matter of AI Procurement JVD*, SBA No. VET-210, at 4 (2011).

Appellant also alleges that HSCC is not listed on the VA's Vendor Information Page Database, and that its website bore no CVE-issued “seal”. Registration on VetBiz database, or receipt of any VA certification or registration is not an SDVO SBC eligibility requirement. 13 C.F.R. §§ 125.9, 125.10. Only firms bidding on VA contracts must be certified in the VetBiz database. Here, GSA is the procuring agency, and such registration was not required. We have consistently held that when the VA is not the procuring agency, an allegation that the challenged concern is not listed on the VetBiz Registry or lacks CVE verification does not render the protest specific. *Matter of AI Procurement JVD*, SBA No. VET-210 (2011); *Matter of Savant Services Corporation*, SBA No. VET-154 (2009). Accordingly, Appellant's allegations do not allege any facts which would render HSCC ineligible as an SDVO SBC, and thus they do not render Appellant's protest specific.

Finally, I turn to Appellant's allegations raised for the first time in its appeal, which are unsupported because they are based on excluded evidence. I cannot consider these allegations here, because an insufficiently specific protest cannot be cured by submitting more specific information on appeal. *Matter of Allied Energy-Global*, SBA No. VET-107 (2006). Accordingly, I conclude that Appellant's appeal offers nothing which demonstrates that the AD/GC was in error in dismissing the protest.

Appellant's SDVO SBC protest against HSCC did not specify any factual basis for the allegation that HSCC 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 AD/GC based his dismissal of the protest on any clear error of fact or law. 13 C.F.R. § 125.27(b). Accordingly, I must DENY this appeal.

V. Conclusion

The AD/GC's dismissal of Appellant's protest was not based upon clear error. The AD/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