

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

IN THE MATTER OF:

H&H -- DMS Joint Venture,

Appellant

RE: Kepa Services, Inc.

Solicitation No. W911-SA-12-R-0001
Department of the Army --MICC
MICC-ICO Fort McCoy

SBA No. VET-229

Decided: May 14, 2012

APPEARANCES

Timothy Miguel Willardson, Esq., For H & H — DMS JV

Christopher R. Clarke, Esq., Office of General Counsel, Small Business Administration
Washington, D.C.

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 Acting Director, Office of Government Contracting (AD/GC) made a clear error of fact or law in dismissing a protest for lack of specificity. *See* 13 C.F.R. §§ 125.25(b), 125.26, 125.27, 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On December 22, 2011, the Department of the Army (Army) issued Solicitation No. W911-SA-12-R-0001 for maintenance, repair, and minor construction work and set the procurement aside for Service Disabled Veteran Owned Small Business Concerns (SDVO SBCs). On March 30, 2012, the Army made award to Kepa Services, Inc. (Kepa).

On April 5, 2012, H&H-DMS Joint Venture (Appellant) protested Kepa's SDVOSBC status. Appellant stated:

The specific grounds of this protest are that KEPA is not an SDVO SBC. Therefore, Kepa is not a responsible bidder, and its bid is non-responsive. Enclosed herewith are printouts from the U.S. Department of Veterans Affairs website. This site lists all currently certified Veteran Owned Small Businesses and Service Disabled Veteran Owned Small Businesses. One of the printouts shows all of the subject businesses in Wisconsin with names starting with the letters H through L. Kepa is conspicuous by its absence. The other printout is a search for all businesses, in all states, that are VOSB or SDVOSB. There are no businesses that contain "Kepa" in the name.

On April 19, 2012, the Small Business Administration's (SBA) Director of the Office of Government Contracting (D/GC) dismissed Appellant's protest as insufficiently specific.

B. Appeal Petition

On April 27, 2012, Appellant filed the instant appeal of the D/GC's dismissal of its protest with the SBA Office of Hearings and Appeals (OHA). Appellant denies its protest was not specific. Appellant argues "'Specific' means 'precise and clear in making statements.'" Appellant asserts it clearly and precisely stated that Kepa was not an SDVO SBC, and went on to assert Kepa was not listed as an SDVO SBC by the Department of Veterans Affairs (VA).

Appellant further asserts: "Non-listing by the VA is *prima facie* evidence that a business is NOT a Service Disabled Veteran Owned Small Business Concern." Appellant asserts that a business which does not comply in all respects with the requirements of 38 C.F.R. Part 74 will not be listed by the VA. Appellant argues that a concern not listed by the VA has not met the ownership and control requirements for an SDVO SBC. Appellant compares the VA database to a state government's directory of driver's licenses, where anyone not listed in the directory is not a licensed driver.

Appellant seeks to submit as new evidence a letter it received from VA concerning its own status.

Appellant argues that SBA should not permit an ineligible business to receive an award, merely because Appellant does not know the precise reason for its ineligibility.

C. Response to the Appeal

On May 7, 2012, SBA responded 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 first objects to Appellant's submission of new evidence, because the regulations governing SDVO SBC appeals do not permit it.

SBA further asserts that a protest which merely states that a firm is not listed on the VA database is not specific. Appellant made no allegation that Kepa was not owned and controlled by service disabled veterans, and thus no allegation which could sustain a protest.

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 him.

Appellant attempts to submit new evidence on appeal. Specifically, Appellant attempts to submit a letter it received from VA. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512; *Matter of Fidelis Design & Construction, LLC*, SBA No. VET-221, at 3-4 (2011). It cannot be clear error on the part of the D/GC to fail to consider information never presented. This is especially true where, as here, the evidence has been in Appellant's possession all along, yet Appellant failed to submit it to the D/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

1. Standards for 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 D/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

2. Allegations Regarding Inclusion in VA's Database

The instant appeal is based upon a false statement of law, that a concern's failure to appear on the VA database is *prima facie* evidence that a concern is not an eligible SDVO SBC. This is simply not true. Appellant is referring to regulations regarding VA small business programs and VA procurements. 38 C.F.R. Part 74. However, these regulations are not applicable here, but are specific to VA procurements. *Matter of Mission Essentials, LLC*, SBA No. SIZ-222, at 4 (2011).

This procurement is an Army procurement and is thus under SBA's SDVO SBC regulations. Under SBA's regulations there is no requirement that a firm be included in VA's VetBiz database. A concern need not be listed in VETBiz in order to bid on procurements for Federal agencies other than the VA. 13 C.F.R. §§ 125.9, 125.10. Accordingly, an allegation that a firm is not listed on the VetBiz database is not valid grounds for a protest under SBA's regulations. Therefore, OHA has consistently held, when the VA is not the procuring agency, an allegation that the challenged concern is not listed on the VetBiz registry is insufficiently specific. 13 C.F.R. § 125.25(b); *see Matter of Mission Essentials, LLC*, SBA No. VET-222, at 4 (2011).

It is true that the fact the VA requires listing on the VetBiz database has caused some confusion, which is compounded when other procuring agencies insert such a requirement in their solicitations. However, SBA's regulations on ownership and control of SDVO SBCs go to issues of ownership and control of the challenged concern, and do not require a listing on VetBiz. 13 C.F.R. §§ 125.9, 125.10; *Mission Essentials, supra*.

Appellant's sole allegation is that Kepa is not listed in the VA's database. Appellant made no allegations concerning whether Kepa was owned and controlled by service-disabled veterans. Accordingly, Appellant made no specific allegation that Kepa was ineligible, and the D/GC properly dismissed the protest.

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