

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

IN THE MATTER OF:

Government Contracting Services, LLC

Appellant,

RE: Washington Patriot Construction, LLC

Solicitation No. W912DW-12-R-0035

SBA No. VET-230

Decided:, November 30, 2012

APPEARANCES

S. Christopher Easley, Esq., The Easley Law Group, PS, Tacoma, Washington, for Appellant

Jonathan A. DeMella, Esq., and Benjamin D. Greenberg, Esq., Oles Morrison Rinker & Baker LLP, Seattle, Washington, for Washington Patriot Construction, LLC.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION¹

I. Introduction

This case involves the dismissal of a protest against Washington Patriot Construction, LLC (WPC). The U.S. Small Business Administration (SBA) and the protestor, Government Contracting Services, LLC (Appellant), jointly request that the matter be remanded to SBA's Director of Government Contracting (D/GC). WPC opposes the motion. For the reasons discussed *infra*, the motion is granted, and the case is remanded.

II. Background

¹ This decision was initially issued on November 27, 2012. Pursuant to 13 C.F.R. § 134.205, I afforded the protested concern, Washington Patriot Construction, LLC (WPC), an opportunity to file a request for redactions if it desired to have any information withheld from the published decision. WPC responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

A. Solicitation and Protest

On August 18, 2012, the Contracting Officer (CO) for the U.S. Army Corps of Engineers issued Solicitation No. W912DW-12-R-0035 (RFP), seeking a contractor to construct an access control point at Joint Base Lewis-McChord North, Washington. The CO set aside the procurement entirely for service-disabled veteran-owned (SDVO) small business concerns (SBCs), and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$33.5 million in average annual receipts. Offers were due September 17, 2012.

On September 19, 2012, the CO notified offerors that WPC was the apparent successful offeror. On September 25, 2012, Appellant, a disappointed offeror, filed a protest challenging WPC's status as an eligible SDVO SBC.²

B. D/GC Determination

On October 16, 2012, the D/GC dismissed Appellant's protest as insufficiently specific. The D/GC determined that the protest was defective because it “merely makes statements asserting that WPC may not be a qualified SDVO SBC without articulating any underlying factual basis for the statements.” (Dismissal Letter 2.) According to the determination, Appellant alleged in the protest that WPC was not eligible for award because its SDVO SBC status was pending with the U.S. Department of Veterans Affairs (VA) and, according to the report from the VET Biz Vendor Information Page (VIP) database system, the application was in process. In response to this allegation, the D/GC explained that “the mere fact that a firm is not listed in the VIP database does not determine SDVO SB eligibility for non-VA procurements.” (*Id.*)

C. Appeal

On October 31, 2012, Appellant filed the instant appeal of the D/GC's dismissal with the SBA Office of Hearings and Appeals (OHA).³

Appellant maintains that the D/GC clearly erred in dismissing the protest because the protest contained specific facts and allegations, as required by 13 C.F.R. § 125.25. In particular, Appellant contends it asserted in the protest that WPC is owned by two business entities, Traugutt Construction, LLC and Wade Perrow Construction, LLC, and not by any individual person who is a service-disabled veteran. Appellant also emphasizes that it submitted a copy of WPC's certificate of formation, showing the ownership structure of WPC. According to Appellant, this documentation demonstrates that WPC does not meet the direct ownership requirements of 13 C.F.R. § 125.9(a).

² The protest is not part of the record before OHA.

³ Appellant represents that it received the D/GC's determination by facsimile on October 17, 2012. (Appeal at 2.) Appellant filed the instant appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503.

Appellant also argues that it provided factual assertions and supporting documentation that the service-disabled veteran at WPC, Mr. Michael Traugutt, does not hold the highest officer position and is not the only managing member with control over WPC's decisions, as 13 C.F.R. § 125.10(d) contemplates. Appellant explains that it submitted WPC's 2012 limited liability company renewal and annual report to the D/GC. This documentation lists Mr. Traugutt as one of WPC's four managers.

D. WPC Response

On November 8, 2012, WPC filed its response with OHA. WPC maintains that Appellant's protest was insufficiently specific, and was properly dismissed.

WPC first addresses Appellant's contention that the protest set forth specific facts to support the allegation that WPC did not meet the SDVO SBC eligibility requirements. According to WPC, Appellant does not dispute the D/GC's finding that absence from the VIP database is not proper grounds for protest. Rather, Appellant argues that its protest contained other factual assertions and supporting documentation that WPC did not meet the ownership and control requirements for SDVO SBC eligibility.

WPC then addresses Appellant's contention that the D/GC failed to consider Appellant's assertions and documentation. According to WPC, this argument fails for two reasons. First, the D/GC's determination did not state that his inquiry ended with the conclusion that the VIP argument lacked merit. Second, in WPC's view, the dismissal is still appropriate upon examination of Appellant's documentation and allegations.

Next, WPC contends that the protest was insufficiently specific because it consisted only of vague assertions questioning whether an alleged affiliate has an ownership interest in, or control over, WPC. According to WPC, these statements fail to allege that WPC does not meet the control and eligibility requirements.

WPC goes on to argue that, contrary to Appellant's assertions, Appellant never stated in its protest that WPC is owned by two separate business entities and not an individual person who is a service-disabled veteran.

WPC then addresses Appellant's argument that the certificate of formation, filed June 16, 2009, establishes that a service-disabled veteran does not own WPC. WPC contends Exhibit C to the protest, which WPC filed after the certificate of formation, lists Mr. Traugutt as one of WPC's owners.

Next, WPC addresses Appellant's argument that Appellant provided factual assertions and documentation that Mr. Traugutt is one of several managing members and does not hold the highest officer position in, or exercise control over, WPC. WPC contends this assertion is not found in the protest. The only allegations regarding control are in the context of whether the alleged affiliate controls WPC.

Lastly, WPC argues that Appellant's contentions that Mr. Traugutt does not own or have

direct control over WPC are meritless. WPC emphasizes that Mr. Traugutt owns 51% of WPC and has a 51% majority voting interest as a member and manager. WPC contends the operating agreement and Mr. Traugutt's supporting declaration establish that Mr. Traugutt is charged with conducting WPC's day-to-day management. Moreover, Mr. Traugutt is president of WPC, so he holds the highest officer position. WPC contends these facts are consistent with the intent of WPC's owners, as expressed in the operating agreement.

E. Motion to Dismiss and Opposition Thereto

On November 9, 2012, SBA and Appellant moved to dismiss the appeal. SBA and Appellant state that they have agreed that SBA will rescind the dismissal of Appellant's protest.

On November 16, 2012, WPC filed its opposition to the motion. WPC contends that the protest was properly dismissed, and requests that OHA deny the motion, direct SBA to respond to the appeal, and adjudicate the appeal on the merits.

WPC complains that SBA did not consult WPC prior to filing the motion to dismiss. WPC argues that had SBA or Appellant contacted WPC prior to filing the motion, WPC could have saved substantial time and resources responding to the appeal.

III. Discussion

A. Jurisdiction and Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. 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 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

B. Analysis

I find it appropriate to remand this matter to the D/GC. By offering to rescind the dismissal of Appellant's protest, SBA is, in effect, acknowledging error. Therefore, "[a]s a matter of judicial economy, it is appropriate to give SBA the opportunity to reconsider its decision." *Size Appeal of A2Z Promo Zone*, SBA No. SIZ-5365, at 1 (2012) (granting SBA's motion to remand despite intervenor's objection). When the D/GC reassesses the protest, WPS will have the opportunity to make any argument it chooses to the D/GC, and may appeal an adverse determination to OHA. Thus, remanding the case is not prejudicial to WPS. *Id.*

IV. Conclusion

I hereby VACATE the D/GC's dismissal of Appellant's protest, and REMAND this matter to the D/GC for further consideration.

KENNETH M. HYDE
Administrative Judge