

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

IN THE MATTER OF:

347 Construction Group,

Appellant,

Solicitation No. FA4427-12-R-0107-
HVAC

SBA No. VET-232

Decided: February 22, 2013

APPEARANCES

Jennifer L. Dauer, Esq., Diepenbrock Elkin LLP, Sacramento, California, for Appellant

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

DECISION

I. Background

A. The Procurement

On July 30, 2012, the Contracting Officer (CO) for the U.S. Department of the Air Force issued Request for Proposals (RFP) No. FA4427-12-R-0107-HVAC, seeking a contractor to renovate and repair heating and air conditioning systems at Travis Air Force Base, California. The CO set aside the procurement entirely for service-disabled veteran-owned small business concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 238220, Plumbing, Heating, and Air-Conditioning Contractors, with a corresponding size standard of \$14 million average annual receipts. Proposals were due August 30, 2012.

On September 21, 2012, the CO announced that the contract would be awarded to Total Team Construction Services (TTCS). That same day, the CO informed an unsuccessful offeror, 347 Construction Group (Appellant), that Appellant had been excluded from the competition because Appellant was not registered in the VetBiz database maintained by the U.S. Department of Veteran Affairs (VA). The CO stated:

The solicitation requires your company to be a certified Service Disabled Veteran-Owned Small Business at the time you submit your offer to be eligible for award. . . . A review of the [VA] website resulted in no record for [Appellant]. A call to [VA] clarified that your application has been received by [VA] but not approved, therefore, you are ineligible for award.

On September 27, 2012, Appellant responded to the CO's notice in a letter entitled "Protest of intended award on Solicitation No. FA4427-12-R-0107-HVAC." Appellant acknowledged that, at the time of proposal submission, Appellant was not registered in the VetBiz database. Appellant maintained, however, that registration in VetBiz was not necessary in order to qualify as an SDVO SBC for this procurement. Appellant further asserted that, insofar as the Air Force questioned Appellant's SDVO SBC eligibility, such a challenge should be directed to the U.S. Small Business Administration (SBA) for review. Appellant argued that its proposal represented the best value to the Air Force, and urged the CO to rescind the award to TTCS. Appellant did not dispute TTCS's status as an SDVO SBC.

After a delay of several months, the CO forwarded Appellant's protest to SBA on January 17, 2013.

B. D/GC Determination

On February 1, 2013, the Director of SBA's Office of Government Contracting (D/GC) dismissed Appellant's protest. The D/GC explained that, under 13 C.F.R. § 125.24(b), SBA will entertain a status protest only against the apparent successful offeror. In this case, Appellant did not attempt to challenge the eligibility of TTCS, the apparent awardee. Rather, Appellant sought review of Air Force's decision to exclude Appellant from the competition. The D/GC concluded that Appellant's "protest is challenging its own eligibility as an unsuccessful offeror, and not the eligibility of [TTCS]." (Determination at 1.) Because Appellant's protest did not dispute the SDVO SBC status of TTCS, the D/GC dismissed the protest.

C. Appeal Petition

On February 6, 2013, Appellant filed the instant appeal of the D/GC's dismissal with the SBA Office of Hearings and Appeals (OHA). Appellant argues that the Air Force exceeded its authority by excluding Appellant from the competition, because only SBA, not a procuring agency, has authority to decide a firm's SDVO SBC eligibility. (Appeal at 1.) Appellant reiterates its view that the Air Force should have forwarded its concerns to SBA as a protest of Appellant's SDVO SBC eligibility. Appellant further emphasizes that the sole basis cited by the Air Force for rejecting Appellant was that Appellant was not registered in the VetBiz database at the time of its offer. OHA has repeatedly held, however, that SBA regulations do not require a concern to be registered in VetBiz in order to be eligible as an SDVO SBC. *Matter of H&H — DMS Joint Venture*, SBA No. VET-229 (2012); *Matter of Mission Essentials, LLC*, SBA No. VET-222 (2011). Thus, Appellant reasons, the Air Force had no valid grounds to conclude that Appellant was not an eligible SDVO SBC. (Appeal at 3.)

D. SBA Response

On February 15, 2013, SBA submitted the Protest File and its response to the appeal. SBA agrees with Appellant that SBA alone has jurisdiction to determine the eligibility of firms for the SDVO SBC program. Thus, "[a] contracting officer has no authority to unilaterally declare [a] firm ineligible for the SBA's SDVO SBC program." (Response at 4.) Nevertheless,

SBA maintains that the D/GC correctly dismissed Appellant's protest because Appellant was not the apparent successful offeror for Solicitation No. FA4427-12-R-0107-HVAC. By regulation, SBA will only decide status protests pertaining to the apparent awardee. 13 C.F.R. § 125.24(b).

II. 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. Appellant filed the instant appeal within ten business days of receiving the D/GC's letter, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

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

As SBA correctly observes, the applicable regulations indicate that SBA will only entertain an SDVO SBC status protest directed against a procurement's apparent successful offeror. 13 C.F.R. § 125.24(b). This rule reflects the underlying policy that SBA will not impose the burdens of an eligibility review, or expend SBA's limited resources, unless it is clear that the protested concern is the likely awardee of the contract. In this case, Appellant does not dispute the SDVO SBC eligibility of the apparent awardee, TTCS. Because Appellant did not raise any valid status protest against TTCS, the D/GC properly dismissed Appellant's protest. 13 C.F.R. § 125.27(b).

Rather than challenge the eligibility of the apparent awardee, Appellant complains that the Air Force wrongly excluded Appellant from the competition. Appellant insists that (1) the Air Force had no authority to decide whether Appellant is an eligible SDVO SBC, and (2) even assuming the Air Force were permitted to assess SDVO SBC eligibility, the Air Force could not properly find Appellant to be ineligible based merely on the absence of VetBiz registration, as the instant procurement did not require such registration. These allegations pertain to the Air Force's conduct of the procurement, and therefore are in the nature of a bid protest. Bid protest allegations must be raised at the U.S. Government Accountability Office (GAO) or other similar forums, not at OHA. *See generally* 48 C.F.R. subpart 33.1. Indeed, in recent decisions, GAO has adjudicated bid protests quite similar to the arguments now advanced by Appellant. *E.g., A1 Procurement, JVG*, B-404618.3, July 26, 2011, 2011 CPD ¶ 140 (protester was properly excluded from the competition because it was not registered in the VetBiz database, which was required for the procurement in question); *Singleton Enterprises-GMT Mechanical, A Joint Venture*, B-310552, Jan. 10, 2008, 2008 CPD ¶ 16 (sustaining protest because procuring agency determined protester to be ineligible without referring the issue to SBA). Accordingly, insofar as

Appellant seeks to challenge the Air Force's decision to exclude Appellant from the competition, Appellant is pursuing this litigation in the wrong forum.

III. Conclusion

Appellant did not challenge the SDVO SBC eligibility of TTCS, so the D/GC correctly dismissed Appellant's protest. OHA lacks jurisdiction to decide whether the Air Force properly excluded Appellant from the competition. Accordingly, the appeal is DENIED, and the dismissal is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge