

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

IN THE MATTER OF:

Veterans Contractors Group JV, LLC,

Appellant,

RE: Industria Paschen JV, LLC

Solicitation No. W912P8-13-B-0021

SBA No. VET-233

Decided: March 11, 2013

APPEARANCES

Jeffery J. Arceneaux, Veterans Contractors Group JV, LLC, Metairie, Louisiana

David M. Rambhajan, Industria Paschen JV, LLC, Chicago, Illinois

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

DECISION

I. Background

A. Solicitation and Protest

On October 31, 2012, the Contracting Officer (CO) for the U.S. Army Corps of Engineers issued Invitation for Bids (IFB) No. W912P8-13-B-0021, seeking a contractor to perform flood protection construction work in Plaquemines Parish, Louisiana. 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 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$33.5 million average annual receipts. Bid opening occurred on January 17, 2013. Industria Paschen JV, LLC (IPJV) was the lowest bidder and apparent awardee.

On January 18, 2013, an unsuccessful bidder, Veterans Contractors Group JV, LLC (Appellant), submitted a protest to the CO alleging that IPJV “does not appear to meet the requirements of forming a valid [SDVO joint venture]” under 13 C.F.R. § 125.15, and that IPJV “appears to have exceeded the [[maximum] number of contracts [allowed] in a two year period” under 13 C.F.R. § 121.103(h). (Protest at 1.) Appellant quoted from SBA regulations, but offered

no specific facts, explanation, or documentation to support its allegations against IPJV. The CO forwarded Appellant's protest to the U.S. Small Business Administration (SBA) for review.

B. D/GC Determination

On February 6, 2013, the Director of SBA's Office of Government Contracting (D/GC) dismissed Appellant's protest as insufficiently specific. The D/GC explained that, under 13 C.F.R. § 125.25(b), a status protest merely asserting that the protested concern is not an eligible SDVO SBC, without setting forth specific facts or allegations, is insufficient. (Determination at 1.) Here, the D/GC found that Appellant's protest lacked any specific facts or allegations; instead, Appellant “merely made an allegation and quoted [SBA's] regulations.” (*Id.* at 2.) Because the protest did not articulate any basis to question IPJV's eligibility as an SDVO SBC, the D/GC dismissed Appellant's protest. In a footnote, the D/GC stated that the portion of Appellant's protest pertaining to 13 C.F.R. § 121.103(h) was not properly before him, because that allegation involved a size, rather than eligibility, issue.

C. Appeal Petition

On February 15, 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 D/GC erred in rejecting its protest for lack of specificity. Appellant maintains that its protest provided the D/GC enough information to commence an investigation of IPJV's compliance with 13 C.F.R. §§ 125.15 and 121.103(h). (Appeal at 4.) Appellant emphasizes that, in order to form a proper SDVO Joint Venture (JV), both members of the JV must be small businesses. In this case, Appellant states that one of the IPJV participants, F.H. Paschen-S.N. Nielsen & Associates (F.H. Paschen), is a very large concern, and does not meet the size standard of the solicitation at issue. (*Id.*) Further, Appellant maintains that JVs may not exceed three contract awards in a two-year period. Appellant contends that IPJV has been awarded 42 contracts between 2011 and 2013. Appellant complains that the D/GC failed to investigate the protest allegations at a “minimal level”, and asserts that the D/GC would have found IPJV ineligible had he conducted any meaningful review. (*Id.* at 5.)

Attached to its appeal, Appellant seeks to introduce new evidence. Appellant submits an *Engineering News* article listing F.H. Paschen as having more than \$500 million in revenues during 2011; F.H. Paschen's Representations and Certifications in the System for Award Management (SAM) indicating that the company is not a small business under NAICS code 237990; IPJV's Representations and Certifications in SAM stating that IPJV is an SDVO SBC; and an USASpending.gov printout showing awards made to IPJV. Appellant offers no explanation why this information was not provided with its protest.

D. IPJV Response

On February 26, 2013, IPJV filed its response to the appeal. IPJV contends that it is a proper SDVO JV eligible for SDVO SBC set-asides. (IPJV Response at 1.) IPJV states that it has not been awarded any federal contracts since its formation. Additionally, the two firms comprising the JV — Industria Inc. and F.H. Paschen — have an SBA-approved mentor-protégé

agreement under the 8(a) program. (*Id.*) IPJV argues that the prior contract awards alleged by Appellant were actually awarded to a different JV between the same mentor and protégé. Under SBA regulations, a mentor and protégé are permitted to form multiple JVs. Further, IPJV argues, the USASpending.gov data provided by Appellant consists mostly of “delivery orders and change orders, not contract awards.” (*Id.*)

E. SBA Response

On February 28, 2013, SBA submitted the Protest File and its response to the appeal. SBA maintains that the D/GC correctly dismissed Appellant's protest because the protest lacked specificity and did not provide any factual basis to support the allegations. (SBA Response at 4.) SBA contends that Appellant's claim that IPJV failed to comply with 13 C.F.R. § 121.103(h) is a size issue beyond the scope of a status protest. (*Id.* at 5.) Further, argues SBA, the new evidence now submitted by Appellant on appeal is inadmissible. SBA insists that OHA may only consider evidence present in the written protest file. (*Id.*)

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

SBA regulations instruct that 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). Similarly, OHA has recognized that an allegation that the challenged firm fails to comply with SBA regulations, without any supporting evidence or information, does not constitute a valid protest. *Matter of AI Procurement, LLC/JVH*, SBA No. VET-224 (2011). A non-specific protest will be dismissed. 13 C.F.R. § 125.27(b).

Here, Appellant's protest alleged that IPJV does not meet the requirements for forming an SDVO JV, but offered no evidence or rationale. The protest went on to quote from SBA regulations, but at no point explained why Appellant believed IPJV to be an ineligible bidder for the procurement at issue. Accordingly, the D/GC correctly determined that Appellant's protest was insufficiently specific, as the protest amounted to no more than bare assertions and did not provide the D/GC with any basis upon which to initiate an investigation. *Matter of One Step*

Ahead Enters., LLC, SBA No. VET-155, at 4 (2009) (finding an “unsupported and vague” protest was properly dismissed because it merely requested an investigation of the challenged firm); *Matter of Service Disabled Veteran Manufacturing & ZAMS, Inc.*, SBA No. VET-122, at 2 (2007) (affirming dismissal of a protest alleging only that “it is our understanding” that an offeror does not qualify). Furthermore, although Appellant now attempts to introduce additional information to corroborate its protest allegations, this information was not provided in Appellant's protest, and it is well-settled that “an insufficiently specific protest cannot be cured by submitting more specific information on appeal.” *Matter of Fidelis Design & Construction, LLC*, SBA No. VET-221, at 4 (2011).

III. Conclusion

Appellant's protest did not provide specific facts or evidence of IPJV's ineligibility, so the D/GC properly dismissed the protest. 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