

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

IN THE MATTER OF:

KRR Partners Joint Venture,

Appellant,

Solicitation No. R13PS20169

SBA No. VET-239

Decided: September 16, 2013

APPEARANCES

Steven J. Koprince, Esq., Petefish, Immel, Heeb & Hird, LLP, Lawrence, Kansas, for Appellant

Meagan K. Guerzon, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION¹

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 Director of Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining that KRR Partners Joint Venture (Appellant) does not meet the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements. *See* 13 C.F.R. § 134.508.

¹ This decision was initially issued under a protective order on September 16, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to file a request for redactions if it desired to have any information withheld from the published decision. Appellant responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

III. Background

A. Solicitation and Protest

On May 29, 2013, the U.S. Department of the Interior issued Invitation for Bids (IFB) number R13PS20169 for Red Bluff Diversion Dam Decommissioning in Tehama County, California. The Contracting Officer (CO) set aside the procurement entirely for 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. On July 10, 2013, the CO opened bids and announced that Appellant was the apparent successful bidder. Appellant is a joint venture between Aaron S. Demase (ASD), a sole proprietorship, and J.E. McAmis, Inc. (JEM).

On July 16, 2013, E.C. Smith, Inc. (ECS), the next lowest bidder, filed a protest challenging Appellant's status as an SDVO SBC. The CO forwarded the protest to the D/GC for consideration.

B. Joint Venture Agreement

On July 29, 2013, Appellant responded to the protest and submitted a copy of its joint venture agreement to the D/GC. The agreement contains the following provisions pertinent to this appeal:

2.0 MANAGING DIRECTOR/PROJECT MANAGER. Aaron S. Demase has been selected as the Managing Director and Project Manager for the contract and is an employee of [[ASD] (a sole-proprietor), a[n] SDVO SBC. He shall be responsible for contract performance, overseeing the contract, preparing a daily written log detailing all developments and aspects of the contract, and submitting such logs as required by the contract.

...

6.0 EQUIPMENT. Upon award of the contract identified [in the joint venture agreement], [JEM] will purchase, provide and or assist in the acquisition, in the name of the joint venture, facilities and equipment for the proper operation of this contract.

...

8.0 SOURCE OF LABOR. The venture will allow employees of [ASD] the first right to refuse employment during the pre-performance phase of the contract.

...

15.0 PERFORMANCE OF WORK. [Appellant] will self-perform 15% or more of all work on the contract.

(Protest File, Tab 10.)

C. D/GC Determination

On August 22, 2013, the D/GC issued her determination sustaining ECS's protest. The D/GC found that ASD, which holds a majority interest in Appellant, is owned and controlled by a service-disabled veteran and therefore qualifies as an SDVO SBC. (Determination at 3-4.) Because Appellant is a joint venture, however, Appellant also must comply with regulations pertaining to SDVO SBC joint ventures. After reviewing the Appellant's joint venture agreement, the D/GC determined that Appellant does not satisfy 13 C.F.R. § 125.15(b)(2)(iv), which requires that the joint venture agreement “[s]pecify[] the responsibilities of the parties with regard to contract performance.” In particular, Section 15.0 of the joint venture agreement merely indicated that Appellant would perform at least 15% of the contract, but “does not specify the responsibilities of the individual parties[] with regard to how the contract will be performed.” (*Id.* at 5.) The D/GC remarked that 13 C.F.R. § 125.15(b)(2)(iv) is an important rule because it is “necessary to protect the SDVO SBCs should any dispute arise from performance, and to ensure that non-SDVO SBCs do not take advantage of the special opportunity that SDVO SBC joint ventures allow.” (*Id.*) The D/GC concluded that Appellant does not meet all of the criteria for an SDVO joint venture, and is not eligible for award of the instant procurement.

D. Appeal

On August 27, 2013, Appellant filed the instant appeal. Appellant emphasizes that the D/GC determined Appellant to be ineligible solely because Appellant's joint venture agreement did not, in the D/GC's view, adequately detail the respective responsibilities of ASD and JEM during contract performance. Appellant contends that “[t]he D/GC's conclusion was arbitrary and unreasonable because the [joint venture agreement] contained wording nearly identical to that used in the SBA's own sample joint venture agreements.” (Appeal at 1.)

Appellant explains that, at the time they formed their joint venture, ASD and JEM were aware that certain issues would need to be addressed in their joint venture agreement. However, neither firm had previously been a party to such a joint venture. Therefore, ASD and JEM obtained, and relied upon, a sample agreement from SBA's website. (*Id.* at 4, Ex. B.) Although the sample agreement pertained to the 8(a) Business Development (BD) program rather than the SDVO SBC program, Appellant asserts that the two programs are quite similar with regard to the requirement that parties' responsibilities be specified in the joint venture agreement. *See* 13 C.F.R. §§ 124.513(c)(7) and 125.15(b)(2)(iv). Furthermore, Appellant states, a second sample agreement from SBA's website also addresses this requirement in a related fashion. (Appeal at 9, Ex. D.) Appellant maintains that Appellant utilized language similar to that found in these templates in preparing its joint venture agreement. Thus, “[b]ased on the SBA's own published guidance, [Appellant] had no reason to believe that any greater level of detail was required.” (*Id.* at 10.)

Appellant also argues that, contrary to the D/GC's determination, Appellant's joint venture agreement does sufficiently delineate the respective responsibilities of ASD and JEM. The D/GC focused narrowly on Section 15.0 of the agreement, but Section 2.0 states that Mr. Demase will oversee and manage the project, Section 6.0 indicates that JEM will furnish equipment and facilities, and Section 8.0 affords ASD's employees a right of first refusal in hiring. (*Id.* at 11.) Collectively, these sections “provide[] precisely the information the D/GC claims is missing.” (*Id.*)

E. SBA's Response

On September 6, 2013, SBA submitted the Protest File and SBA's response to the appeal. SBA contends that the D/GC correctly found that Appellant is not an eligible SDVO SBC joint venture; thus, OHA should affirm the determination.

SBA contends that the templates Appellant purportedly relied upon to develop its joint venture agreement “cannot be found on SBA's live website.” (Reply at 6.) Rather, those templates exist only on “archived” websites. (*Id.*) Further, the templates are no longer compatible with 8(a) BD program regulations, which were revised in 2011 and again in 2012. SBA maintains that the templates consist of mere boilerplate, and that joint ventures “must tailor the template to include the necessary information to satisfy the regulatory requirements.” (*Id.* at 7.)

SBA argues that Appellant's joint venture agreement “does not provide any specifics about the roles and responsibilities of the joint venturers for SBA or any other party to adequately determine what if any part of the performance of the contract will benefit the SDVO SBC as required by SBA regulations.” (*Id.* at 8.) According to SBA, the provisions referenced by Appellant in its appeal, such as 2.0 and 8.0, address other joint venture requirements, but shed no light on the respective responsibilities of ASD and JEM during contract performance. (*Id.* at 4-6.)

F. Reply

On September 10, 2013, four days after the close of record, Appellant moved to reply to SBA's response. Appellant explains that the reply “serves to refute the SBA's inaccurate and misleading legal arguments,” and does not merely repeat arguments already made in the appeal petition. (Motion at 1.) Accordingly, for good cause shown, Appellant's motion is GRANTED and the reply is ADMITTED into the record. *E.g., Matter of Golden Key Group, LLC*, SBA No. VET-236, at 6 (2013).

Appellant asserts that SBA “misunderstands the status of its own website” because both of the template agreements discussed in the appeal are presently available at www.sba.gov. (Reply at 4.) Further, the term “archive” refers to any systematic compilation of information; thus, the fact that website links may contain the word “archive” does not establish that the information found at those links is no longer valid. Appellant emphasizes that SBA alone is in control of its website. Consequently, if SBA believed the templates to be outdated or non-compliant with existing law, it was “SBA's obligation to remove them from its website, amend

the documents to conform to those requirements, and/or explain to the public that the documents are non-compliant.” (*Id.* at 7.) Because the templates were available through SBA's current website, Appellant reasonably assumed that the templates were sanctioned by SBA.

Appellant further argues that a description of the joint venturers' respective responsibilities need not be found in a separate provision, if that information is conveyed elsewhere in the joint venture agreement. Appellant reiterates its contention that, under Sections 2.0 and 8.0 of the joint venture agreement, ASD will “provide project management and be primarily responsible for labor.” (*Id.* at 12.) “Thus, although these items were not all contained in a single paragraph expressly dedicated to contract performance, the [joint venture agreement] contained ample detail about the respective responsibilities of the parties relative to contract performance.” (*Id.*)

IV. 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 determination, 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 her.

B. Analysis

SBA regulations require that “[e]very joint venture agreement to perform an SDVO contract must contain a clause . . . [s]pecifying the responsibilities of the parties with regard to contract performance.” 13 C.F.R. § 125.15(b)(2)(iv). In this case, I agree with SBA that Appellant's joint venture agreement does not meet this requirement. Rather, Section 15.0 of the agreement, which Appellant labeled “Performance of Work”, consists of a single sentence stating that Appellant “will self-perform 15% or more of all work on the contract.” *See* Section III.B, *supra*. This provision does not even attempt to describe the respective responsibilities of the joint venture partners, and therefore does not comply with 13 C.F.R. § 125.15(b)(2)(iv).

Appellant argues that, based on Sections 2.0, 6.0, and 8.0 of the joint venture agreement, the D/GC could have inferred that ASD will be “primarily responsible for management and labor” on the contract, whereas JEM will furnish equipment and facilities. (Appeal at 2, 5.) This argument fails because the provisions in question do not support the conclusion that ASD will provide labor for the contract. Rather, the only one of these provisions which addresses labor, Section 8.0, merely indicates that ASD employees will be given a right of first refusal in

employment.² *See* Section III.B, *supra*. Thus, while ASD may provide an initial source of labor for the contract, it is not evident that ASD is primarily responsible for labor during contract performance. Similarly, the joint venture agreement does not limit JEM's role to providing equipment and facilities. As a result, the D/GC reasonably determined that Appellant's joint venture agreement does not define the respective roles and responsibilities of ASD and JEM.

Appellant's contention that it relied to its detriment upon misleading sample agreements from SBA's website is also unavailing. While Appellant's point is well-taken that SBA bears responsibility for information contained on its public website, the fact remains that Appellant chose to rely on documents, created for a different SBA program, without seeking clarification from SBA as to whether these templates remained valid or required modification. Moreover, contrary to Appellant's arguments on appeal, both of the sample agreements do contain language requesting a description of the venturers' responsibilities. One of the templates specifically instructed the venturers to "describe services" performed by each of the venture partners. (Appeal, Ex. D at ¶ 12.0.) The other template omitted this instruction, but did warn that "a significant portion of the work" must be reserved for the 8(a) BD participant. (*Id.*, Ex. B at ¶ 6.0.) Based on these documents, then, Appellant should have been aware that some description of the respective responsibilities of the venturers was expected, so as to demonstrate that the SDVO SBC member of the venture would be meaningfully involved in contract performance.

V. Conclusion

For the above reasons, I DENY the appeal and AFFIRM the D/GC's determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge

² The record indicates that ASD is a sole proprietorship, so it is unclear whether ASD has any employees who might be subject to Section 8.0.