

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

IN THE MATTER OF:

JBL System Solutions,

Appellant,

RE: Empire Avionics Corp.

Solicitation No. SPE4A5-15-T-AF98

SBA No. VET-252

Decided: November 23, 2015

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant.

Christopher R. Clarke, 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. Background

A. Solicitation and Protest

On July 5, 2015, the U.S. Department of Defense, Defense Logistics Agency (DLA) issued Request for Quotations (RFQ) No. SPE4A5-15-T-AF98 for pressure switches. The RFQ stated that the procurement would be conducted as a combined service-disabled veteran-owned small business concern (SDVO SBC) set-aside and small business set-aside pursuant to Defense Logistics Acquisition Directive 52.219-9015. (RFQ at 2.) On September 22, 2015, DLA announced that Empire Avionics Corp. (Empire) was the apparent successful offeror.

¹ Appellant requested confidential treatment of this appeal. Pursuant to 13 C.F.R. § 134.205(f), OHA afforded counsel an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now publishes the decision in its entirety

On September 23, 2015, JBL System Solutions (Appellant), an unsuccessful offeror, submitted a protest to the CO challenging Empire's status as an SDVO SBC. The protest stated:

Respectfully, we protest the award of this award to [Empire], as we challenge their new status as a Self-Certified SDVOSB. For many years, Empire was a Woman Owned Business (Owned by Ms. Patricia Rome – see attachments), but recently changed to a Self-Certified SDVOSB. We can find no documents with the NY Department of State that would indicate any changes to their ownership structure or event changes to their information within their [System for Award Management] registration that meet the following criteria from (see Code of Federal Regulations (CFR) 13 C.F.R. § 125.8 – 125.10):

- The Service Disabled Veteran (SDV) must have a service-connected disability that has been determined by the Department of Veterans Affairs or Department of Defense
- The SDVOSBC must be small under the North American Industry Classification System (NAICS) code assigned to the procurement
- The SDV must unconditionally own 51% of the SDVO SBC
- The SDVO must control the management and daily operations of the SDVO SBC
- The SDV must hold the highest officer position in the SDVO SBC

[Appellant] has been in communications with the NY and National SBA regarding this company and they strongly recommended that when [Appellant] was an interested party (this solicitation) that we protest the award challenging their status as a SDVOSB. That was the only means their offices would have to conduct an investigation into Empire's claim to be a SDVOSB.

The attached information is a screen shot from the NY Department of State website and Empire's statement to the State of NY that Ms. Patricia Rome is the CEO and owner. No records show any change of ownership that would allow them to modify their status to Service Disabled, therefore they should not be allowed to win this award as a SDVOSB.

(Protest File (PF), Ex. 3, at 00013-00014.)

Attached to the protest, Appellant offered two exhibits. First, Appellant included a record from the New York Secretary of State, showing Patricia M. Rome as Empire's Chief Executive Officer. (*Id.* at 00029.) The record did not indicate when this information was last updated, and contained a disclaimer that “[t]his office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except the chief executive officer.” (*Id.*) Second, Appellant provided Empire's “Business Corporation Biennial Statement” for the February 2009 filing period. (*Id.* at 00015.) The statement identified Patricia M. Rome as Empire's CEO, and was signed by her as Empire's “Owner.” (*Id.*) Under the heading “Street Address of the Principal Executive Office (A Post Office Box cannot be substituted),” the statement listed the name Daniel Rome along with Empire's street address. (*Id.*)

The CO forwarded Appellant's protest to the U.S. Small Business Administration (SBA) for review.

B. D/GC Determination

On October 22, 2015, SBA's Director of Government Contracting (D/GC) dismissed Appellant's protest for lack of specificity. The D/GC found that Appellant's protest did not “contain any specific facts regarding why Empire may not meet the requirements” of the SDVO SDC program. (PF, Ex. 1, at 00002.) In particular, the protest did not allege, and failed to provide any facts or evidence, that Empire's owner, Patricia Rome, is not a service-disabled veteran. (*Id.*, at 00002 – 00003.) Although the protest asserted that Empire had recently begun to represent itself as an SDVO SBC after previously self-certifying as a woman-owned small business (WOSB), SBA regulations “do not prevent a firm from both being woman owned and SDVO SBC, and there is no requirement that certification be completed in certain order or at the same time.” (*Id.*, at 00003.) The D/GC also considered the exhibits attached to Appellant's protest. One of the exhibits “is from February 2009,” and the other exhibit contained a disclaimer that the state of New York “does not record the information that [Appellant] wants.” (*Id.*) Therefore, the D/GC concluded, Appellant has not offered any valid reason to question Empire's self-certification as an SDVO SBC.

C. Appeal

On November 4, 2015, Appellant appealed the D/GC's decision to the SBA Office of Hearings and Appeals (OHA).² Appellant requests that OHA vacate the dismissal and remand the protest for further review.

Appellant argues that its protest was sufficiently specific because Appellant alleged that Empire has long self-certified as a WOSB but until recently had not self-certified as an SDVO SBC. Further, the exhibits attached to the protest indicated that Empire had previously identified Patricia Rome as its CEO and owner, and Daniel Rome as its “Principal Executive Officer.” (Appeal at 2.) Appellant maintains that Patricia Rome “is presumably a non-veteran,” whereas Daniel Rome “presumably, is a service-disabled veteran.” (*Id.*) Therefore, by highlighting Patricia Rome's “ongoing high-level involvement in the firm,” the protest cast doubt on whether Empire is owned and controlled by a service-disabled veteran. (*Id.*)

Appellant argues that SBA has established a low bar for protest specificity, and that Appellant's protest exceeded this standard by pointing to “Patricia Rome's ownership and managerial involvement” with Empire. (*Id.* at 5.) Further, the protest was sufficiently detailed to have enabled Empire to respond to the allegations. (*Id.* at 6.) Appellant contends that *Matter of JHC Firestop, Inc.*, SBA No. VET-193 (2010) is analogous to the situation presented here. In *JHC Firestop*, OHA found a protest sufficiently specific when the protester challenged the status of a concern that had not identified itself as an SDVO SBC on a previous contract or on its

² Appellant filed the appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503.

website, and where a U.S. Naval Academy website did not identify the challenged firm's owner as a veteran. (*Id.*) Therefore, Appellant asserts, it is not necessary for a protester to offer concrete proof that the protested firm is ineligible. Only if the protest lacks “any semblance of evidentiary support for its allegations” should OHA deem the protest insufficiently specific. (*Id.* at 7.)

Appellant argues that “although the protest did not allege in black-and-white terms that Patricia Rome is not a service-disabled veteran, it was clear from the face of the protest that this was [Appellant's] contention.” (*Id.* at 9.) Moreover, even assuming that Patricia Rome actually is a service-disabled veteran, the exhibits attached to the protest raise the question of whether Patricia Rome or Daniel Rome is Empire's highest officer. “In other words, if Patricia Rome is not a service-disabled veteran, the document calls into question the company's ownership by a service-disabled veteran; if she is one, the document calls into question whether Empire is controlled by a service-disabled veteran. In either case, the document provides specific information calling Empire's SDVOSB eligibility into question.” (*Id.* at 11.)

D. SBA's Response

On November 17, 2015, SBA responded to the appeal. SBA argues that the D/GC's determination should be upheld and the appeal denied.

SBA states that a valid protest “must specify all the grounds upon which the protest is based.” (Response at 3, quoting 13 C.F.R. § 125.25(b).) Additionally, the protest must address, through information and allegations, which SDVO SBC requirements the protested concern does not meet. (*Id.*) SBA contends that the protest here essentially made two allegations: (i) Patricia Rome is not a service-disabled veteran; and (ii) Empire only recently began self-certifying as an SDVO SBC. However, neither allegation was accompanied by sufficiently specific information.

SBA maintains that the protest contained “exactly zero” evidence that Patricia Rome is not a service-disabled veteran. (*Id.* at 4.) Indeed, even on appeal, Appellant merely assumes that Patricia Rome is not a service-disabled veteran, and then “repeats the unsupported fact as if [it] is true.” (*Id.*) Therefore, the D/GC correctly found that Appellant's protest did not raise a valid basis to question Empire's eligibility. (*Id.* at 3-4.)

Next, SBA states that, based on Appellant's assumption that Patricia Rome is not a service-disabled veteran, Appellant further supposed that Empire would need to drastically revise its corporate structure in order to qualify as an SDVO SBC, and that such changes have not actually occurred. (*Id.* at 4.) Again, though, Appellant offered no current or relevant evidence to support its allegations. (*Id.* at 5.)

SBA also notes that, on appeal, Appellant attempts to raise a question of whether Patricia Rome or Daniel Rome is Empire's highest officer. This contention, though, “never appeared in the actual protest” and should not now be considered. (*Id.* at 4.)

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 clear error based on the record before him.

B. Analysis

SBA regulations state 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). The regulations provide the following example of an insufficiently specific protest:

A protester submits a protest stating that the awardee's owner is not a service-disabled veteran. The protest does not state any basis for this assertion. The protest allegation is insufficient.

Id. The D/GC must dismiss a non-specific protest. *Id.* § 125.27(b); *Matter of METRiX Enterprise Solutions, Inc.*, SBA No. VET-208 (2010) (vacating D/GC's determination because the underlying protest should have been dismissed as non-specific).

In the instant case, I must agree with SBA and the D/GC that Appellant's protest was not sufficiently specific. As Appellant acknowledges, the gravamen of the protest was that the CEO and owner of Empire, Patricia Rome, is not a service-disabled veteran. The protest, though, did not directly state this allegation, and the only rationale offered to support this claim was that Empire had recently begun to represent itself as an SDVO SBC after previously self-certifying as a WOSB. As the D/GC correctly observed, these two categories of small businesses are not mutually exclusive, and it is possible for the same firm to be both a WOSB and a SDVO SBC. Section II.B, *supra*. Thus, Appellant in effect offered no basis for its claim that Patricia Rome is not a service-disabled veteran, and the protest therefore is essentially the same as the example of a non-specific protest provided in 13 C.F.R. § 125.25(b), where the protester alleges that “the awardee's owner is not a service-disabled veteran” but “does not state any basis for this assertion.” Accordingly, the D/GC did not err in dismissing Appellant's protest as non-specific. *See also Matter of ETSC, LLC*, SBA No. VET-202 (2010) (protest alleging that “We can find no evidence that the current Owner . . . had any prior military service, and challenge that he did, or did not” was properly dismissed as insufficiently specific); *Matter of Castle-Rose, Inc.*, SBA No. VET-180 (2010).

Appellant also attached exhibits to its protest. The exhibits, though, do not purport to address whether Patricia Rome is a service-disabled veteran, the key issue Appellant sought to

raise in its protest. Rather, Appellant appears to have submitted these materials to show that, assuming Patricia Rome is not a service-disabled veteran, “[n]o records show any change of ownership that would allow [Empire] to modify [its] status to Service Disabled.” Section II.A, *supra*. As the D/GC observed in his determination, however, one of the exhibits in question is more than six years old, and the other exhibit merely lists Empire's address and the name of its CEO as of an unknown date. Section II.B, *supra*. Thus, even accepting Appellant's premise that Patricia Rome is not a service-disabled veteran, the exhibits shed no light on whether Empire currently is an eligible SDVO SBC, as Empire could have restructured itself to become eligible sometime before the date of self-certification. In short, then, Appellant's protest and the attached exhibits did not set forth any valid reason to doubt Empire's self-certification as an SDVO SBC. *Matter of MJL Enterprises, LLC*, SBA No. VET-240, at 4 (2013) (recognizing that “Government officials are expected to rely upon offerors' representations absent some reason to question them.”).

Appellant also argues that the instant case is analogous to *Matter of JHC Firestop, Inc.*, SBA No. VET-193 (2010), where OHA overturned a determination that a protest was insufficiently specific. In *JHC Firestop*, though, OHA found that the protester “did much more than merely assert that [the challenged firm's] owner is not a service-disabled veteran.” *JHC Firestop*, SBA No. VET-193, at 2. In particular, the protester “set forth at least three separate and specific grounds for its belief,” including documentation that the challenged firm's owner was a veteran but had no service-related disability. *Id.* at 2-3. Conversely, Appellant's protest here did not contain any comparable level of detail. Rather, Appellant's protest simply asserted that Empire previously represented itself as a WOSB and recently began to self-certify as an SDVO SBC. The protest did not directly allege, and offered no reason to believe, that Empire's owner is not a service-disabled veteran. Thus, the instant case is readily distinguishable from *JHC Firestop*.

Lastly, on appeal, Appellant argues for the first time that Daniel Rome is a service-disabled veteran, and that Empire is not an eligible SDVO SBC because Daniel Rome does not own at least 51% of Empire, nor does he control the management and daily operations of Empire. Section II.C, *supra*. These allegations need not be explored in detail because they were not raised in Appellant's protest. It is settled law 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); *Matter of VETcorp, Inc.*, SBA No. VET-205 (2010).

IV. Conclusion

Appellant has failed to establish any error of fact or law in the D/GC's dismissal of Appellant's protest. Accordingly, I DENY the instant appeal and AFFIRM the D/GC's dismissal of Appellant's protest.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge