

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

IN THE MATTER OF:

Jamaica Bearings Company,

Appellant,

Solicitation No. SPE4A4-16-V-9118

SBA No. VET-257

Decided: August 9, 2016

APPEARANCES

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

Bryan Rudgers, for Appellant

DECISION

I. Introduction and Jurisdiction

This is an appeal of a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) finding that Jamaica Bearings Company (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). On appeal, Appellant argues the determination is erroneous and should be reversed or remanded to the D/GC for further consideration. For the reasons discussed *infra*, the appeal is GRANTED.

OHA decides appeals of SDVO SBC status determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. The record reflects that the appeal was received at OHA within ten business days of Appellant's receipt of the D/GC determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, and Protest

On April 5, 2016, the Defense Logistics Agency (DLA) issued Solicitation No. SPE4A716TF020, seeking a contractor to provide 77 Parts Kits, Linear AC. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs. Appellant submitted a timely proposal, self-certifying as an eligible SDVO SBC.

On April 19, 2016, the CO announced Appellant was selected for award. JBL System Solutions, Inc. (JBL), an unsuccessful offeror, protested the award, stating that “while [Appellant] may or may not be owned and operated by a qualified Service Disabled Veteran, they do not meet the qualifications of the SBA to be a Small Business.” (Protest, at 1.) The protest added that due to Appellant's size, they should not pretend to be an SDVO SBC.

B. D/GC Determination

On June 22, 2016, the D/GC found Appellant did not meet SDVO SBC eligibility requirements because it failed to respond to any of the D/GC's inquiries and did not provide a response to the protest allegations.

The D/GC explained that Appellant failed to provide any information that its owner is not a veteran with a service related disability. The D/GC further found that, per SBA regulations, Appellant is not at least 51% owned by a service-disabled veteran, nor controlled by such individual. (Determination, at 2-3.)

The D/GC concluded that Appellant failed to meet SDVO SBCs eligibility requirements and thus is prevented from receiving the instant award. (*Id.* at 3.)

C. Appeal¹

On June 30, 2016, Appellant filed an appeal of the D/GC's decision with SBA's Office of Hearings and Appeals (OHA). Appellant argues that its local SBA office, Region II, has previously found Appellant to meet SDVO SBC eligibility.

Appellant explains that it was bought by Mr. Frank Negri in 1934, a veteran, and later his son, Mr. Peter Negri, took control of Appellant's daily operations in 1996. Mr. Peter Negri took 100% ownership of Appellant in 1997, and in 2014 became its CEO. (Appeal, at 2.) Appellant adds that Mr. Peter Negri holds more than 51% of the voting shares, and exercises daily operational control of Appellant. (*Id.* at 3.) Appellant concludes that per 15 U.S.C. § 657(f), Appellant is controlled by a service-disabled veteran.

D. Agency Response

On July 26, 2016, SBA responded to the appeal. SBA requests that OHA affirm the D/GC's decision Appellant fails to qualify as an SDVO SBC.

SBA notes that after receiving the notice from DLA on May 12, 2016, regarding the status challenge against Appellant, the D/GC notified Appellant a response to the allegations would be due on June 15, 2016. The notice stated that failure to respond or provide sufficient information would lead to an adverse decision against Appellant. (SBA Response, at 2.)

¹ Even though the appeal was filed with OHA, Appellant addresses the appeal to the D/GC and explains that it is a response to the D/GC's previous requests for information.

SBA argues OHA's precedent is clear. OHA's role is not to conduct a *de novo* review of whether a challenged concern meets the eligibility criteria to be considered an SDVO SBC, but whether the decision by the D/GC's decision was based 'upon a clear error of fact or law.' (*Id.* at 4; citing *Matter of Cedar Electric, Inc./Pride Enterprises, Inc., JV*, SBA No. VET-129, at 4 (2008).) SBA further contends that SDVO SBC appeals do not allow for the submission of evidence beyond the existing written protest file, therefore limiting any SDVO SBC appeal to the documentary evidence at the time of the D/GC's decision.

Here, Appellant attempts to provide information on appeal that it failed to submit to the D/GC, despite the explicit notice given to Appellant. This attempt is in violation of the SBA regulation preventing new evidence from being submitted on appeals of SDVO SBC protest determinations. (*Id.* at 5; citing 13 C.F.R. § 134.512.) SBA observes that a similar situation occurred in *Matter of DAV Prime/Vantex Service Joint Venture*, SBA No. VET-138 (2008), wherein OHA found that evidence available at the time the concern responded to the protest, but failed to provide it to the D/GC, would not be considered on appeal. Therefore, any evidence provided by Appellant on appeal should be dismissed. (*Id.* at 6.) Lastly, SBA argues that based on similar OHA decisions, "it cannot have been an error of either fact or law for the D/GC to conclude he was unable to determine that [Appellant] meets the eligibility requirements for an SDVO SBC as established by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8 *et seq.*" (*Id.* at 6-7; citing *Matter of Meadowgate Technologies, LLC*, SBA No. VET-115 (2007).)

E. OHA's Order For Comments

On July 28, 2016, I issued an Order For Comments, seeking a response to an issue that the parties failed to address; whether the D/GC should have dismissed the initial status protest by JBL as nonspecific.

On July 29, 2016, Appellant responded to the order. Appellant states that under 13 C.F.R. § 125.25(b), JBL's status protest was not specific and the D/GC should have dismissed it. Appellant argues the protest spoke to annual revenue and number of employees, yet did not address why Appellant is not an SDVO SBC. (Appellant's Response, at 1.)

On August 5, 2016, SBA responded to OHA's order. SBA states that "the protest JBL filed in connection with the underlying procurement does contain specific allegations with regard to [Appellant]'s claim to being a small business, the protest made no allegations, specific or otherwise, with regard to Appellant's SDVO SBC status." (SBA Response, at 1-2.) SBA concedes the D/GC failed to have any "legal basis" for continuing forward based on an unspecified SDVO SBC status protest, and should have referred the matter for a size determination. (*Id.* at 2.)

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

SBA regulations are clear: “[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). Further, 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.*) Here, the protest does not even rise to this level, as the protest simply states that Appellant “may or may not” be controlled by a service-disabled veteran. The protest does not directly allege that Appellant is not owned and controlled by a service-disabled veteran, and gives no reason which would support such an assertion.

Even though the D/GC went forward with the status determination despite the clear nature of the protest's lack of specificity, I must now reverse the D/GC's determination. OHA has previously reversed a D/GC status determination when, on appeal, it appeared clear that the D/GC should have initially dismissed the protest because it did not meet SBA's regulatory standard for specificity. In *Matter of METRiX Enterprise Solutions, Inc.*, SBA No. VET-208 (2010), OHA vacated the D/GC's determination because the underlying protest should have been dismissed as non-specific. Under 13 C.F.R. § 125.27(b), the D/GC was required to dismiss JBL's protest because it simply failed to be specific enough as to challenge Appellant's service-disabled veteran status. Accordingly, I find the D/GC erred in not dismissing JBL's protest as non-specific.²

² While JBL failed to make a definite, forthright allegation that Appellant is not owned and controlled by a service-disabled veteran, it did make specific allegations addressing Appellant's size, which is not at issue here. SBA, may, of course, adopt JBL's allegations and file a size protest at any time. 13 C.F.R. § 121.1004(b).

IV. Conclusion

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

CHRISTOPHER HOLLEMAN
Administrative Judge