United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Jordan-Reses Supply Co., LLC	SBA No. VET-182
Appellant	Decided: February 17, 2010
RE: Vaughn Medical	

APPEARANCES

Lorraine M. Campos, Esq., Lawrence S. Sher, Esq., and Steven D. Tibbets, Esq., Reed Smith LLP, Washington, D.C., for Appellant.

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

DECISION

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

Did the Small Business Administration's Acting Director for Government Contracting make a clear error of fact or law in dismissing the protest of Jordan-Reses Supply Co., LLC because it based its protest on non-protestable allegations?

III. Background

A. Facts

1. On January 28, 2008, the Secretary of Veterans Affairs established department-wide small business program goals for FY 2008 and 2009. The Secretary established a small business goal of 28.7% (of total procurement dollars) and also established goals for specific types of small businesses, including service-disabled veteran-owned small business concerns (SDVO-SBCs).

2. The Department of Veterans Affairs (VA) entered into mandatory Blanket

Purchasing Agreements (BPA)[1] (using pricing lower than that of the Federal Supply Schedule) with five concerns for the purchase of breathing assistance devices. These concerns, followed by their size status, are:

a.	Vaughn Medical	SDVO SBC
b.	Medical Place, Inc.	VOSB
c.	Jordan-Reses Supply Company	Small Business
d.	Dimensions Medical Supply Group	SDVO SBC
e.	Sunrise Medical HHG dba Devilbliss	Large Business

3. On July 30, 2009, a VA contracting officer (CO) for VA's National Acquisition Center explained to the BPA holders that VA would be extending the BPAs for one year because the VA did not have a national contract in place, and award was not imminent for such a contract. In addition, the CO noted: "As these are mandatory BPAs VA facilities can use them at their discretion; however, facilities are to make a best value determination when making a decision which BPA to utilize. Also, Service Disabled Veteran Owned Small Business should receive first consideration in all VA procurements."

B. Protest

In a letter dated September 29, 2009, Jordan-Reses Supply Co., LLC, (Appellant) protested Vaughn Medical's (Vaughn) status as an eligible SDVO SBC to the Assistant Director of VA's National Acquisition Center. Appellant acknowledged the lack of a particular contracting officer. Appellant also conceded the BPAs were not contracts but asserted that contracts arise when orders are placed against the BPAs. Accordingly, Appellant addressed its protest to the head of the VA office responsible for administering the BPA between Vaughn and the VA.

Appellant's protest addressed standing and timeliness and quoted the applicable regulations, *i.e.*, 13 C.F.R. §§ 125.8(b); 125.25(c); and 125.25(d). However, rather than discussing why it was an interested party pursuant to 13 C.F.R. § 125.8, Appellant discussed the BPAs and claimed there was no contract until the VA issued an order under the BPA. Next, Appellant explained that the VA observes preferences in selecting which offeror's BPA to order against. Hence, Appellant alleges that the VA ordering activities are constantly entering into SDVO SBC set-aside contracts by observing preferences in placing orders against BPAs of companies like Vaughn. This makes Appellant a competing offeror for each order the VA places with Vaughn. Finally, Appellant claims that because the VA's placement of orders against Vaughn's BPA, each of which consummates in an SDVO SBC contract, is frequent and ongoing, Appellant's protest is timely and filed within five days following awards made by the VA.[2]

[1] The Record does not reflect when the VA entered into these BPAs.

[2] Appellant does not identify any specific order under Vaughn's BPA. Thus, there was no way for the SBA to determine whether the protest was, in fact, timely under the five day rule.

The remainder of Appellant's protest addresses Vaughn's status as an SDVO SBC. However, given the posture of this appeal, it is not necessary to recite Appellant's allegations.

C. SDVO SBC Status Determination

On January 6, 2010, SBA's Acting Director for the Office of Government Contracting (AD/GC) dismissed Appellant's protest. The AD/GC concluded Appellant based its protest on non-protestable allegations pursuant to 13 C.F.R. § 125.27(b). The AD/GC based his decision on the fact that there is no SDVO SBC set-aside procurement underlying Appellant's protest, *i.e.*, there was neither a sole source award nor a set-aside award based upon competition restricted to SDVO SBCs. *See* 13 C.F.R. § 125.14.

D. Appeal Petition

On January 19, 2010, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant first indicates that it cannot submit a contract (or solicitation number) because its protest arises under BPAs, pursuant to which the VA is observing a preference for SDVO SBCs. Appellant explains it has no information concerning these individual contracts arising from the BPAs.

Appellant asserts the AD/GC based his dismissal of its protest upon an error of law. Specifically, Appellant claims it was erroneous for the AD/GC to have dismissed its appeal on the basis that it did not involve an SDVO SBC set-aside. Instead, Appellant alleges, SBA has jurisdiction to consider any protest involving a contractor's use of size or status certification to gain an advantage in government contracting, so long as the technical requirements, such as timeliness, are met. (Appeal Petition 2.)

Appellant notes the AD/GC "pronounced" the procurement underling its protest was neither an SDVO SBC set-aside nor a sole-source award to an SDVO SBC. Therefore, Appellant alleges the only issue before OHA in this appeal is whether the AD/GC erroneously determined that SBA is without jurisdiction to decide its protest concerning Vaughn's misrepresentation of its status. Moreover, Appellant asserts the AD/GC based his dismissal on an impermissibly restrictive definition of the term "set-aside" that is contrary to applicable legal authorities. (Appeal Petition 3.)

Appellant reiterates its protest contention that the BPAs are not contracts and that no contract arises until the VA places an order against a BPA. Hence, Appellant alleges the basis for SBA's jurisdiction to consider the protest is that each order placed by the VA against Vaughn's BPA is a contract awarded in observation of an SDVO SBC preference and is, therefore, an SDVO SBC set-aside. (Appeal Petition 4.)

Appellant argues the dismissal of its protest is inconsistent with the authorities governing SBA's protest jurisdiction. Specifically, Appellant alleges that SBA's protest jurisdiction extends to instances in which a contractor's status certification creates an advantage in seeking award of a contract, even if the contract being competed for is a BPA formed under an FSS contract. Appellant notes that SBA has the responsibility for determining whether a party has misrepresented its size in connection with a particular procurement under FAR 19.307(b).

Appellant also cites various OHA size decisions, but no SDVO SBC decisions, in support of its argument. Appellant claims that if SBA cannot consider an SDVO SBC status protest such as Appellant's, then there is no mechanism to thwart a concern's misrepresentation of its SDVO SBC status to obtain award in this type of procurement, which is contrary to SBA's responsibility to ensure size and status integrity. (Appeal Petition 6-7.)

Appellant also notes that because OHA has ruled that it may hear status appeals under GSA Multiple Award Schedule (MAS) contracts, OHA should rule SBA has jurisdiction to consider Appellant's Protest. Appellant cites OHA size appeal decisions in support of its argument. (Appeal Petition 7-8.)

In an attempt to amplify its argument that the AD/GC relied upon an overly restrictive definition of "set-aside," Appellant again emphasizes that each order the VA placed against Vaughn's BPA is an SDVO SBC set-aside procurement. Appellant argues that FAR 19.501(a), which provides that set-asides may be total or partial, supports its position. In addition, Appellant quotes OHA size decisions pertaining to missing clauses or NAICS codes to support its contention that it is conduct, rather than formalities, that ultimately determines whether a procurement is a set-aside. Appellant alleges the VA's direction that SDVO SBCs be given preference when selecting a BPA is tantamount to a partial set-aside contemplated by FAR 19.501(a). (Appeal Petition 11, 13.)

Appellant also argues the AD/GC erred in concluding that BPA orders cannot constitute set-asides. When the AD/GC cited FAR 8.405-5 in support of his claim that FSS orders cannot be issued as SDVO SBC set-asides, Appellant alleges the AD/GC ignored the distinction between an order placed against an FSS schedule contract and a BPA. Moreover, Appellant challenges the AD/GC's claim that FAR 8.405-5 states an FSS order cannot constitute a set-aside and alleges the language in FAR 8.405-5 permitting consideration of various small business classes does anticipate a set-aside. (Appeal Petition 12.)

Appellant also argues the AD/GC mistakenly interpreted FAR 8.405-5 to mean that mandatory preference programs do not apply to FSS contracts. Appellant speculates that the AD/GC reasoned that orders placed against FSS contracts cannot constitute set-asides because it is not mandatory that Government ordering activities follow some of the requirements of FAR 19 when placing orders under FSS contracts. Appellant points out such reasoning would compel the conclusion that SBA could not consider a protest relating to a set-aside procurement unless that set-aside was mandatory under the FAR, and such a proposition is contradicted by Appellant's earlier-cited cases. (Appeal Petition 13.)

E. Response to the Appeal

On January 28, 2010, SBA filed its response to the appeal. SBA contends the AD/GC did not base his dismissal of Appellant's protest on a clear error of fact or law, and the dismissal should be upheld. SBA's position is that there is no evidence in the Record that establishes the procurement was a set-aside, and, therefore, SBA did not have the authority to decide the protest.

SBA notes there is no evidence in the Record that VA restricted the BPAs to only SDVO SBCs. Nor is there any evidence the VA ever restricted its orders to only SDVO SBCs. Instead, Appellant has only identified a "preference" for contracting with SDVO SBCs, and an agency

setting a priority in contracting to meet its contracting goals does not establish a set-aside.

SBA agrees that if Appellant were correct in its interpretation of SBA's decision, SBA's decision would be overly restrictive, *i.e.*, that orders against BPAs under FSS contracts cannot constitute set-aside procurements. However, SBA contends that "normally orders under FSS contracts do not constitute 'set-asides,' not that they never can." (Response 5.) SBA emphasizes the AD/GC correctly concluded that in this particular instance, based upon the facts before him, any order placed by VA (against its BPA with Vaughn) did not constitute a set-aside.

SBA also distinguishes the cases cited by Appellant by pointing out that the issue in three of the four cases cited by Appellant was not whether SBA had the authority to accept the protest, but rather at what point in time SBA should determine the concern's size. SBA then points out that the fourth case cited by Appellant, which did involve a schedule, was based upon SBA's size regulations that differ substantially from SBA's SDVO SBC regulations.

SBA insists there is no set-aside because clearly the VA had BPAs with five different contractors. Moreover, SBA points out there is no evidence the VA followed partial set-aside procedures as established in FAR 19.502-3, nor is there any other evidence to suggest the VA created even a partial set-aside in this instance.

SBA's final point is that Appellant is incorrect to rely upon SBA's size regulations in its attempt to create jurisdiction for SBA to consider SDVO SBC appeals. SBA notes the SDVO SBC regulations contain different language than SBA's size regulations.

IV. Analysis

A. Timeliness and Standard of Review

Appellant filed its appeal petition within 10 business days of receiving the AD/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

The standard of review for SDVO SBC appeals is whether the AD/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.508. In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the AD/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard applicable to both SDVO SBC and size appeals). Consequently, I will disturb the AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

B. The Merits

1. Applicable Regulations

Regulations governing SDVO SBC set-asides and status protests are contained exclusively in 13 C.F.R. § 125.8, *et. seq*. *See* 13 C.F.R. § 125.25(a). SBA size regulations, such as those set forth at 13 C.F.R. § 121.401-413, neither define an interested party nor establish

procedures applicable to SDVO SBC status protests. Instead, these regulations apply solely to protests concerning whether a firm is a small business, as opposed to whether a firm is owned and controlled by a service-disabled veteran. Consequently, the size cases Appellant cited in support of its arguments, which rely on regulations outside of 13 C.F.R. § 125.8, *et. seq*., have no relevance as precedent applicable to Appellant's protest or this appeal. 13 C.F.R. § 125.25(a); *see also Matter of AWG Servs. LLC*, VET-163 (2009); *Matter of DooleyMack Gov't Contracting, LLC*, SBA No. VET-159, at 5-6 (2009); *Matter of Markon, Inc.*, SBA No. VET-158, at 5 (2009). Accordingly, I will not further discuss any of the arguments Appellant has made in reliance upon the size appeal opinions, such as those cited or referenced in pages 6-10 and 13 of its Appeal Petition.

2. The Appeal is Based Upon Speculation

I also find Appellant based its appeal upon speculation because Appellant does not connect its general argument to the specific circumstances at issue. Specifically, there is *no* evidence in the Record showing the VA has actually placed any order against its BPA with Vaughn or competed an opportunity to receive an order under Vaughn's BPA. Moreover, even if the VA has placed orders against the Vaught BPA, there is no evidence that the VA is placing those orders because of the preference identified by Appellant. The VA could be ordering from the Vaughn BPA for any other number of reasons.

This means there is no evidence that Vaughn's SDVO SBC representation has affected any particular procurement. Thus, even assuming, *arguendo*, that the VA did apply the preference identified by Appellant to an order placed against the Vaughn BPA and that such an order could be considered a set-aside under 13 C.F.R. § 125.24(b), there is still insufficient proof—*i.e.*, there is no proof beyond Appellant's speculative assertions—of such an action. In other words, Appellant has failed to present credible evidence that the VA has taken any action (consisting of an order or orders against its BPA with Vaughn and the circumstances of those orders) that can trigger the right to protest Vaughn's SDVO SBC status.

3. There Is No Evidence of an SDVO SBC Set-Aside

In addition to there being no evidence of any specific order or orders in the Record, I find there is no clear evidence in the Record of an intent by the VA to establish or conduct a set-aside. Instead, VA stated it wanted to give "first consideration" to SDVO SBC's for all procurements, not just the breathing device BPAs. (Fact 3.) I find, as a matter of law, that under SBA's SDVO SBC regulations, such a statement, by itself, falls far short of establishing an SDVO SBC set-aside, which specifically limits award of a contract to SDVO SBCs.

According to 13 C.F.R. § 125.14, an SDVO SBC set-aside requires competition to be restricted to SDVO SBCs. This limitation of eligibility to compete is key to the question of whether there has been an SDVO SBC set-aside. Therefore, unless (1) there is a specific statement in a Synopsis, an IFB, or an RFP limiting the competition to SDVO SBCs; or (2) the contracting officer included the clause found at FAR 52.219-27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside, as required by FAR 19.1407, I hold the procurement has not been set aside for SDVO SBCs, and SBA will not consider a SDVO SBC protest of that procurement.

It is equally imperative that protestors identify a specific procurement in conjunction with a set-aside. Otherwise, there is no way to be sure that the contract has actually been set-aside for an SDVO SBC (or to establish protest timeliness as required by 13 C.F.R. § 125.25(d)). Consequently, absent the identification of an actual procurement that contains unambiguous set-aside language that can be used in conjunction with a contracting officer's notification to an unsuccessful bidder or offeror, SBA has no right under 13 C.F.R. § 125.8, *et seq*, to consider protest of a concern's SDVO SBC status.

V. Conclusion

After reviewing the record, I hold that Appellant has failed to present a prima facie case because Appellant based its protest upon speculation concerning what was actually happening between the VA and Vaughn. I also hold that Appellant protested a non-protestable issue, *i.e.*, Appellant's protest concerns a procurement that is not an SDVO SBC set-aside. Consequently, Appellant cannot establish any error of fact or law in the AD/GC's decision. Accordingly, I must DENY the instant appeal and AFFIRM the AD/GC's dismissal of Appellant's protest.

The AD/GC's determination is AFFIRMED and the appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge