

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

VSBC Protest of:

Anderson Boneless Beef Holdings, LLC,

Protestor,

Re: Olga H. Barrios

Solicitation No. 12-3J14-24-B-0596

U.S. Department of Agriculture

SBA No. VSBC-409-P

Decided: October 25, 2024

APPEARANCES

Jonathan D. Perrone, Esq., Whitcomb, Selinsky, P.C., Denver, Colorado, for Appellant Anderson Boneless Beef Holdings, LLC

Sarah C. Reida, Esq., Legal Meets Practical, LLC, Roswell, Georgia, for Olga H. Barrios.

DECISION¹

I. Introduction and Jurisdiction

On September 6, 2024, Anderson Boneless Beef Holdings, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Olga H. Barrios (Barrios), in connection with the U.S. Department of Agriculture Solicitation No. 12-3J14-24-B-0596 to the U.S. Small Business Administration (SBA), Office of Hearings and Appeals (OHA). Protestor alleges that Barrios is not eligible for the subject SDVOSB set aside. For the reasons discussed *infra*, I DENY the protest.

OHA adjudicates SDVOSB status protests under 15 U.S.C. § 657f and 13 C.F.R. part 134 subpart J.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, the protested concern informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

II. Background

A. Solicitation and Protest

On August 14, 2024, the U.S. Department of Agriculture (USDA) issued Solicitation No. 12-3J14-24-B-0596 (Solicitation) for Frozen Beef Products. The Contracting Officer (CO) set 30% of the procurement aside for small business, and 10% aside for SDVOSB and designated North American Industry Classification system (NAICS) code 311611, Animal (Except Poultry) Slaughtering, with a corresponding 1,500 employee size standard, as the appropriate code. Offers were due on August 26, 2024.

On August 30, 2024, the CO announced awards to a number of firms, including three SDVOSB concerns, among which were Protestor and Barrios. On September 6, 2024, Protestor filed this Protest. Protestor asserts Barrios is not certified by SBA as an SDVOSB. Ms. Barrios' husband, Robert H. Barrios, Jr., d/b/a Barrios Distributing does appear to be a certified SDVOSB. Protestor alleges that Mr. Barrios is engaged in numerous outside activities such that he cannot devote himself full-time to his SDVOSB enterprise. Neither Robert or Olga Barrios owns a meat processing facility, and they are thus unusually reliant upon subcontractors to fulfill the primary and vital requirements of the Solicitation. (Protest at 1-2.)

Protestor alleges Ms. Barrios is not in the VetCert database and thus is not a certified SDVOSB. They both share the same SAM unique entity identifier (UEI) which Mr. Barrios uses in VetCert (he has no SAM profile) and Mr. Barrios uses it only in SAM (she has no VetCert profile). The USASpending profile page associated with the UEI shows only the entry for Ms. Barrios, as well as nearly \$500,000 in contract awards since 2008. (Protest at 2.)

Another entity, Barrios Foods, Inc. (BFI) which does not have a VetCert profile and for which Mr. Barrios is listed as primary point of contact uses the same UEI. This concern uses the same San Diego address as Mr. and Ms. Barrios, as does a concern named Kraken Seafood. (*Id.* at 2-3.)

Protestor argues that Ms. Barrios is not an SDVOSB and asks that OHA find her ineligible for this award and order her removed from the VetCert database. (*Id.*, at 3.)

Protestor further asserts Mr. Barrios should be removed from the database because he is engaged in numerous outside activities that prevent him from devoting time to his SDVOSB business. (*Id.* at 4, citing 13 C.F.R. § 128.203(i).) Protestor further asserts that Mr. Barrios does not own or operate a meat-processing facility and thus must rely upon subcontractors to perform the primary and vital requirements of this Solicitation. The USDA summary of bids received identifies the vendor as “Olga H. Barrios” but names the associated plant as “Barrios/Cherry Meat-Chicago, Il.” Cherry Meaty Packers, Inc., located approximately 2,000 miles from Mr. Barrios, is another awardee under this Solicitation. The Barrios website does not represent that it provides such services, it bills itself as a food distributor and restaurant owner.

Protestor argues Barrios is unusually reliant on non-SDVOSB subcontractors to perform the primary and vital requirements and are thus violating the ostensible subcontractor rule. (*Id.*, at 3-4, citing 13 C.F.R. § 128.401(g)).

B. Protest Response

On October 4, 2024, Ms. Barrios responded to the protest. The response includes an affidavit from Ms. Barrios. In the affidavit, Ms. Barrios stated that she is not a service-disabled veteran, but is rather the widow of Mr. Barrios, who was a service-disabled veteran.² Ms. Barrios further stated that in 1982, Mr. Barrios established a sole proprietorship where he did business as Barrios Distributing (BD). This entity qualified as an SDVOSB and is included in VetCert. (Barrios Affidavit, at 1.)

BD operates from commercial space separate from that of Kraken Seafood, an unrelated entity, and moved from the San Diego location mentioned in the Protest in 2022. After Mr. Barrios' death, she confirmed that BD continued to qualify as an SDVOSB under the surviving spouse rule at 13 C.F.R. § 128.202(i). She completed the self-certification as an SDVOSB on SAM.gov, which included changing the name to “Olga H. Barrios.” This is now a sole proprietorship owned and operated by Ms. Barrios. She acquired all interest in the business through Mr. Barrios' will. (*Id.*, at 2.)

Ms. Barrios submitted a change request to SBA in October of 2023. The documents she submitted confirmed Mr. Barrios's death, their marriage and a copy of Mr. Barrios' trust, “as the firm was held via trust.” She verified that she is 100% owner of “Olga H. Barrios” and is listed as the point of contract. SBA approved the change request on July 10, 2024. Thereafter, Barrios submitted an offer for this procurement on August 26, 2024. (*Id.*, at 2.)

For this procurement, Barrios is providing products solely from Cherry, a USDA approved vendor and certified small business. Barrios has performed contracts under NAICS code 311611 for many years. Ms. Barrios asserts the concern was the subject of an SBA size determination, which found it compliant with the nonmanufacturer rule under 13 C.F.R. § 121.406. (*Id.*, at 3.)

In her response to the Protest, Ms. Barrios states she is not a service-disabled veteran, but the widow of Mr. Barrios, who was a service-disabled veteran. In response to Protestor's allegation that Olga H. Barrios is not registered in the VetCert database and is therefore not eligible, she asserts this seeks review of a contracting officer decision and is not properly before OHA. She argues OHA has jurisdiction over the veteran status of the qualifying veteran, whether the concern is owned and controlled by the qualifying veteran, and whether the concern is in compliance with the ostensible subcontractor rule. (Response to Protest, at 1-3.)

Ms. Barrios further argues that determination for award eligibility due to listing in an SDVOSB database is a procurement decision over which OHA does not have jurisdiction. Ms.

² Mr. Barrios died on January 10, 2022. (Case File (CF), Exh. 48.)

Barrios argues OHA conceded this in *Matter of 347 Construction Group*, SBA No. VET-232 (2013), where it found the issue of exclusion from a database was in the nature of a bid protest allegation, outside OHA's jurisdiction. Here, it would be a contracting officer decision outside OHA's jurisdiction. (*Id.*, at 2-3.)

Ms. Barrios goes on to assert she is included in the VetCert database. The UEI is the same as for Robert H. Barrios d/b/a Barrios Distributing, while SBA has approved the change request, and the updated name is included in the SAM.gov listing, VetCert did not update the entity name. (*Id.*, at 3.)

Ms. Barrios states the protest ground relating to Mr. Barrios's outside activities is based on out of date and inaccurate information. Mr. Barrios has died, and the concern's eligibility is based upon his surviving spouse. (*Id.*, at 4-5.)

Ms. Barrios further argues the protest ground alleging a violation of the ostensible subcontractor rule is inapplicable to a procurement for manufactured products. In these cases, the nonmanufacturer rule applies. (*Id.*, at 5, citing *Size Appeal of Invisio Communications, Inc.*, SBA No. SIZ-6084 (2021).) NAICS code 311611 is a manufacturing NAICS code, accordingly the nonmanufacturer rule, not the ostensible subcontractor rule applies. (*Id.*, at 5-6.)

C. Supplemental Protest

On October 9, 2024, Protestor filed a Supplemental Protest. Protestor challenges Ms. Barrios's eligibility under the surviving spouse rule. Under the rule, an SDVOSB concern continues to be eligible if, on the death of the qualifying veteran, certain conditions are met. The first condition is: “The surviving spouse of the deceased veteran acquires such veteran's ownership in such concern.” (Supplemental Protest at 1-2, citing 13 C.F.R. § 128.202(i)(1)(i).) Protestor maintains that Ms. Barrios cannot meet this requirement:

In California, a “sole proprietorship is not a legal entity separate from its individual owner.” *Ball v. Steadfast-BLK*, 196 Cal. App. 4th 694, 701 (2011). Likewise, a sole proprietorship and a tradename used by that sole proprietorship are not separate legal entities. *Providence Washington Ins. Co. v. Valley Forge Ins. Co.*, 42 Cal. App. 4th 1194, 1206 (1996) (noting that “sole proprietorships operating under trade names are not distinct legal entities”); *Pinkerton's, Inc. v. Superior Court*, 49 Cal. App. 4th 1342, 1348 (1996) (noting that the “[u]se of a fictitious business name does not create a separate legal entity”). As such, upon the death of the owner of a sole proprietorship, the business does not continue to exist as a separate legal entity because a sole proprietorship is not distinct from its owner. *Arana v. Crespin*, 2018 Cal. Super. LEXIS 88310 at *7.

(*Id.*, at 2.)

Protestor argues that when the owner of a sole proprietorship dies, the assets properly belong to their estate. However, the business itself will cease to exist, because the owner and the business are not separate entities. The regulation's plain language requires the surviving spouse

acquire the veteran's ownership interest in such concern. But there is no ownership interest to acquire from a sole proprietorship when the proprietor dies. Interest can only be acquired from a separate legal entity that continues to exist irrespective of the deaths of the owners, like a corporation. BD was not a separate legal entity from Mr. Barrios, they were one and the same. As of Mr. Barrios' death, the sole proprietorship bearing his name ceased to exist. There is no ownership interest for Ms. Barrios to acquire, and so she cannot meet the requirements of the regulation, and her sole proprietorship cannot be an SDVOSB. (*Id.*, at 3.)

D. Response to Supplemental Protest

On October 18, 2024, Ms. Barrios responded to the Supplemental Protest. Mr. Barrios also includes an affidavit. She asserts Robert H. Barrios d/b/a Barrios Distributing was established as a sole proprietorship in 1982. It has been an SDVOSB for 16 years, first with the U.S. Department of Veteran Affairs (VA) and now with SBA. Mr. Barrios was tasked with representing the concern to pursue its SDVOSB designations with VA and SBA. (Second Barrios Affidavit, at 1.)

After Mr. Barrios died, Ms. Barrios initiated a change request to report ownership in the concern as a surviving spouse. She had to submit many documents, including Mr. Barrios's will and Schedule A to the Barrios Family Trust. (*Id.*, at 2.) Ms. Barrios reports that she continued with the process until SBA granted the change request with herself as sole proprietor as Olga H. Barrios. (*Id.*, at 3-4.)

In her Response to the Supplemental Protest, Ms. Barrios takes note of the surviving spouse rule which provides that a small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service disabled veterans, whose death causes the concern to be less than 51% owned by one or more service-disabled veterans, will continue to qualify if the surviving spouse of the deceased veteran acquires the veteran's ownership interest in the concern, that veteran had a service-connected disability, and the concern was included in the data base. (Response to the Supplemental Protest, at 1-2, citing 13 C.F.R. § 128.202(i)(1).)

Ms. Barrios notes that to qualify as an SDVOSB, a business must be a small business concern as defined in 13 C.F.R. Part 121. 13 C.F.R. § 128.200(b). A business concern or concern is defined as:

A business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(*Id.*, at 3, citing 13 C.F.R. § 121.105(a)(1).)

Ms. Barrios further notes that “A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative. . . .” (*Id.*, citing 13 C.F.R. § 121.105(b).) While the surviving

spouse rule makes no exceptions for the type of entity to which it applies, an individual proprietorship is a type of business concern recognized by SBA. The regulation requires that a spouse “acquire” the interest in a concern, and Protestor argues that this is not possible for a sole proprietorship. Ms. Barrios argues the rigid definition of “acquire” which Protestor urges here would exclude sole proprietorships from the rule. This would create an absurd result. A SAM UEI is attached to Olga H. Barrios, as well as federal contract obligations. A holding that upon Mr. Barrios's death the business concern no longer exists would leave these contracts with no party to perform them. (*Id.*, at 3.)

Ms. Barrios asserts that upon the death of Mr. Barrios, his will provided that Ms. Barrios became sole trustee and trustor of the business via the Barrios Family Trust, a revocable living Trust which held his property. Mr. Barrios bequeathed to Ms. Barrios his ownership in the concern as he owned it. She thus acquired his interest in the SDVOSB under the surviving spouse rule. (*Id.*, at 4.)

A review of the record here shows that Mr. Barrios created the Barrios Family Trust on December 17, 2001, and restated it on November 16, 2016. Among the assets conveyed into the trust was his interest in the sole proprietorship at issue here, BD. According to Article 4 of Mr. Barrios' will dated November 16, 2016, those portions of his estate not disposed of in Articles 1-3, which included his interest in BD, goes into the Barrios Family Trust.

III. Discussion

A. Burden of Proof and Date of Eligibility

As the protested firm, Barrios has the burden of proving her eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the case file and the information provided by the protester, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestor and Barrios is part of the record.

OHA determines the eligibility of the protested concern's SDVOSB status as of the date of the initial offer, including price. 13 C.F.R. § 134.1003(e)(1).

B. Analysis

Protestor's first ground alleges that Barrios is not an eligible SDVOSB as Ms. Barrios is not listed in the VetCert database. However, this is not a ground for an SDVOSB protest, which is based upon the veteran status of the qualifying veteran, whether concern is owned and controlled by a Service-Disabled Veteran, whether concern complies with the ostensible subcontractor rule, or, if the concern is a joint venture, whether it complies with the joint venture requirements at 13 C.F.R. § 128.402(c). 13 C.F.R. § 134.1003. Further, Ms. Barrios is listed in the database after all, and Protestor concedes this. Supplemental Protest, at 2. Accordingly, this ground of the protest is meritless.

The second ground, that Mr. Barrios does not devote his full-time efforts to the concern contrary to the requirements of 13 C.F.R. § 128.203(i), is also meritless, because Mr. Barrios is deceased, and no similar charge is made against Ms. Barrios. The third ground, that Ms. Barrios is in violation of the ostensible subcontractor rule, is meritless because the ostensible subcontractor rule does not apply here. This a procurement for manufactured goods under a manufacturing NAICS code. The ostensible subcontractor rule does not apply to procurements for manufactured products. *See, e.g., Size Appeal of Invisio Communications, Inc.*, SBA No. SIZ-6084, at 10 (2021); *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072, at 11 (2020); *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6068, at 9 (2020); *Size Appeals of ProActive Techs., Inc. et al.*, SBA No. SIZ-5772, at 26 (2016); *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884, at 7 (1994).

The one remaining ground for this protest is raised in the Supplemental Protest, that Ms. Barrios is not an eligible SDVOSB under the surviving spouse rule. The rule provides that:

A small business concern owned and controlled by one or more service-disabled veterans immediately prior to the death of a service-disabled veteran who was the owner of the concern, the death of whom causes the concern to be less than 51% owned by one or more service-disabled veterans, will continue to qualify as a small business concern owned and controlled by service-disabled veterans during the time period specified in paragraph (i)(2) of this section if:

- (i) The surviving spouse of the deceased veteran acquires such veteran's ownership interest in such concern;
- (ii) Such veteran had a service-connected disability (as defined in 38 U.S.C. 101(16)); and
- (iii) For a Participant, immediately prior to the death of such veteran, and during the period described in paragraph (i)(2) of this section, the small business concern is included in the certification database.

13 C.F.R § 128.202(i)(1).

Protestor concedes that Ms. Barrios meets the requirements of subparagraphs (ii) and (iii). Supplemental Protest at 2. Protestor contends that Ms. Barrios does not and cannot meet the requirement of subparagraph (i), because Ms. Barrios could not acquire Mr. Barrios' ownership interest because he operated BD as a sole proprietorship, and Mr. Barrios' interest expired with him.

However, as Ms. Barrios points out, SBA has specifically included sole proprietorships among those businesses which are included in the category of "business concerns." 13 C.F.R. § 121.105(b). The surviving spouse rule does not exclude any type of business from its operation, and it would not facilitate the goals of the program to interpret the regulation in such a way that spouses of sole proprietors could not take over their spouse's business and continue in the performance of Government contracts. In any event, the BD is not strictly a sole proprietorship.

Mr. Barrios put his ownership interest in the concern into the Barrios Family Trust. His will passed the interest in the Family Trust to Ms. Barrios upon his death. Therefore, the challenged concern here is not strictly a sole proprietorship. The interest in the concern was included in the Barrios Family Trust which passed to Ms. Barrios upon the death of Mr. Barrios. It was through Mr. Barrios' will that Ms. Barrios acquired her ownership of the concern. Ms. Barrios then did "acquire" Mr. Barrios' ownership through the Trust and Mr. Barrios' will. Thus, Ms. Barrios is operating as an SDVOSB under the surviving spouse rule.

Accordingly, I conclude that Barrios has met the burden of establishing that it is an eligible SDVOSB. The instant protest is meritless, and I DENY it.

IV. Conclusion

For the above reasons, the protest is DENIED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN
Administrative Judge