

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Service-Disabled Veteran Owned Small Business Concern Appeals]

IN THE MATTER OF: MISSION ESSENTIALS, LLC, APPELLANT
RE: CLIVEDEN TECHNOLOGY
SBA No. VET-222
Solicitation No. Y77383X
October 20, 2011

Appearances

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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

Whether the SBA's Acting Director, Office of Government Contracting (AD/GC) made a clear error of fact or law in dismissing a protest for lack of specificity. See 13 C.F.R. §§ 125.25(b), 125.26, 125.27(b), 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On September 12, 2011, the National Science Foundation issued to Cliveden Technology (Cliveden) Purchase Order No. NSFDCS11P1576 from Solicitation No. Y77383X, a procurement set aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC).

On September 13, 2011, Mission Essentials, LLC (Appellant) filed a protest asserting that Cliveden was not an eligible SDVO SBC. Protest file, Tab 2. Appellant asserted it was protesting the award under 13 C.F.R. part 125 and Veterans Affairs Acquisition Regulation (VAAR) part 819. Appellant asserted that:

Cliveden Technology's web site sets forth that it is a joint venture with Blue Tech and has been in business since 2005. It claims that it is a Veteran Owned Business Concern, not a service disabled veteran owned small business (SDVOSB) and does not hold certification as a SDVOSB. If certification is pending, VetBiz

will have issued an email providing status. Based on the absence of data in VetBiz, Cliveden Technology is not an SDVOSB and ineligible for award. Further, as a joint venture, even if they are an SDVOSB, they are not eligible for award because the procurement at issue does not exceed either half the value of the NAICS small business annual revenue size standard (this procurement does not approach 50% of the value of any revenue based size standard, nor does it exceed \$10M if the NAICS code is based on number of employees.

Protest File, Tab 2 at 3.

The next day, Appellant supplemented its protest, asserting that Cliveden was a joint venture between Tudor Technologies and Blue Tech, founded in 2005, neither of which were listed on VetBiz as service-disabled veteran-owned small businesses. Appellant asserts that Cliveden was prohibited from submitting proposals as a joint venture after its two-year anniversary, citing 13 C.F.R. § 121.103(h).

Appellant included a citation to a Department of Veterans Affairs (VA) website, including the information that an eligible SDVO SDBC concern must be managed by a service-disabled veteran and its ownership must be direct. Appellant also questioned Cliveden's size.

On September 22, 2011, SBA's AD/GC dismissed Appellant's protest because it lacked the specificity required by 13 C.F.R. § 125.25(b) for an SDVO SBC protest. Protest File, Tab 1 at 1. The AD/GC stated that the mere fact that a firm is not listed in VetBiz does not make it ineligible as an SDVO SBC. The AD/GC further states Appellant's protest merely makes statements asserting Cliveden may not be a qualified SDVO SBC without articulating any factual basis for the statements.

B. Appeal Petition

On September 30, 2011, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA).

Appellant asserts that Cliveden is not an SDVOSB. Appellant asserts it showed that Cliveden lacks VetBiz certification and did not hold itself out as being a service-disabled veteran-owned business on its website. Appellant asserts it relied on Cliveden's public declaration of being only veteran-owned with no mention of service-disabled veteran status. Appellant asserts SBA should have investigated this.

Appellant further asserts that Cliveden is a joint venture based on posts on the Blue Tech website that Cliveden is a joint venture of Blue Tech and Tudor Technologies. Appellant states Cliveden cannot meet the direct ownership requirement at 13 C.F.R. § 125.9. Appellant argues that Appellant made this specific claim to SBA.

Appellant asserts the instant procurement was too small for a joint venture to bid on, citing 13 C.F.R. § 125.15(b)(1)(i). Appellant further asserts that Cliveden is a joint venture formed in 2005. Appellant argues that Cliveden is more than two years old and is too old to be able to bid on this contract, citing 13 C.F.R. § 121.103. Appellant further asserts that Appellant provided enough information to require SBA to exert the minimal effort necessary to investigate Cliveden, citing, Matter of Veteran Construction Services, LLC, SBA No. VET-103 (2005).

C. Response to the Appeal

On October 12, 2011, SBA responded to the appeal. SBA contends that the AD/GC's dismissal of Appellant's protest was not based on a clear error of fact or law and should be upheld.

SBA argues Appellant's protest was based on non-protestable allegations, and thus

failed to meet the regulatory requirements for specificity. A firm need not be registered on the VetBiz website to be an eligible SDVO SBC. Further, the display of SDVO SBC verification on a firm's website is not a requirement for SDVO SBC eligibility. Accordingly, SBA argues that the AD/GC properly dismissed Appellant's protest for lack of specificity.

SBA argues that Appellant's other allegations goes to questions of size and affiliation and are therefore inapposite to this appeal.

IV. Discussion

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.

OHA reviews the AD/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 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, I may overturn the AD/GC's decision only if Appellant proves the AD/GC made a patent error based on the record before him.

B. Inapposite Allegations

OHA's jurisdiction extends to appeals from determinations by the AD/GC concerning the status, ownership, or control of a concern which represents itself as an SDVO SBC. 13 C.F.R. §§ 134.102(q), 134.501. Appellant's allegations as to Cliveden's size do not go to issues of status, ownership, or control of an SDVO SBC and the AD/GC properly did not consider them. These allegations should have been referred for a size determination, but the record does not reflect whether this was done. 13 C.F.R. § 125.25(a).

C. Protest Specificity

1. Standards for Specificity

An SDVO SBC protest must be specific. 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 Federal Acquisition Regulation (FAR) rule similarly provides, "Assertions that a protested concern is not a service-disabled veteran-owned small business concern, without setting forth specific facts or allegations, are insufficient." 48 C.F.R. § 19.307(c). The SBA's AD/GC must dismiss a non-specific protest. 13 C.F.R. § 125.27(b).

2. Allegations Regarding VetBiz

Here, Appellant's appeal alleges that its protest was under 13 C.F.R. part 125 and VAAR part 819. However, VAAR part 819 is not applicable here. The VAAR is specific to VA procurements. *Matter of Airborne Construction Services, LLC*, SBA No. SIZ-203 (2010). This procurement is a National Science Foundation procurement and is thus under SBA's SDVO SBC regulations. Under SBA's regulations there is no requirement that a firm be included in VA's VetBiz database. 13 C.F.R. §§ 125.9, 125.10. Accordingly, an allegation that a firm is not listed on the VetBiz database, or that its website displays no statement that the business is owned and controlled by a service-disabled veteran is not valid grounds for a protest under SBA's regulations. Therefore, OHA has consistently held, when the VA is not the procuring agency, an allegation that the challenged concern is not listed on the VetBiz registry

is insufficiently specific. 13 C.F.R. § 125.25(b); see Matter of Fidelis Design & Construction, LLC, SBA No. VET-221 (2011).

It is true that the fact the VA requires listing on the VetBiz database has caused some confusion, which is compounded when other procuring agencies insert such a requirement in their solicitations. However, SBA's regulations on ownership and control of SDVO SBCs go to questions of the service-disabled veteran status of the individual upon whom the concern's claim of eligibility is based, and do not require a listing on VetBiz. 13 C.F.R. §§ 125.9, 125.10. A procuring agency's inclusion of such a requirement in its solicitation is not grounds for an SDVO SBC protest to SBA. It may be grounds for a protest based upon an awardee's failure to comply with a requirement of the solicitation, but SBA has no jurisdiction to entertain such protests, and a protestor seeking to disqualify a successful bidder on such grounds must seek another forum.

Appellant relies upon Matter of Veteran Construction Services, LLC, SBA No. VET-103 (2005), which remanded the matter to the Office of Government Contracting on the basis of a protest alleging a concern was not listed on VetBiz. However, that case has since been superseded by the line of cases ending in Fidelis, which hold that such an allegation does not raise a specific ground for a protest.

C. Allegations Regarding Cliveden's Joint Venture Status

Nevertheless, I find that Appellant made another allegation which was specific and which the AD/GC failed to address.

Appellant asserts, based upon information from the concern's website, that Cliveden failed to comply with the joint venture regulation for SDVO SBCs at 13 C.F.R. § 125.15(b). A concern submitting an offer on an SDVO SBC contract must represent that, if it is a joint venture, it is an eligible joint venture in its representation of its SDVO SBC status. 13 C.F.R. § 125.15(a)(4). An SDVO SBC protest may address whether the concern meets the SDVO SBC requirements set forth in 13 C.F.R. § 125.15(a). 13 C.F.R. § 125.25(a). Accordingly, Appellant's protest raised a specific issue as to Cliveden's SDVO SBC status under 13 C.F.R. § 125.15(a)(4), that is, whether it complied with the joint venture regulation at 13 C.F.R. § 125.15(b). The AD/GC failed to address this issue.

Accordingly, because Appellant raised a specific issue which the AD/GC failed to address, I conclude that I must remand this matter to the AD/GC for a determination of Cliveden's SDVO SBC status. [FN1]

V. Conclusion

The AD/GC's dismissal of Appellant's protest was based upon clear error. I therefore VACATE the dismissal and REMAND this matter to the AD/GC for a determination of the SDVO SBC status of Cliveden Technology.

Christopher Holleman

Administrative Judge

FN1. The AD/GC also failed to address Appellant's allegation that Cliveden did not meet the direct ownership standard, because it is a joint venture between two concerns. 13 C.F.R. § 125.9(a). However, an allegation that a concern is a joint venture between two businesses alone is insufficient to support an allegation that a concern is not directly owned by a service-disabled veteran. Matter of Construction Engineering Services, LLC, SBA No. VET-213 (2011). Accordingly, I find that the AD/GC's failure to address this issue was harmless error.