

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

_____)	
IN THE MATTER OF:)	
)	
First Capital Interiors, Inc.)	Docket Nos. VET-2006-12-06-08(RMD)
)	VET-2006-10-25-07
Appellant)	
)	
Solicitation Nos. VA-538-06-1B-0007)	Decided: January 10, 2007
VA-538-06-1B-0022)	
Department of Veterans Affairs)	
Medical Center)	
Chillicothe, Ohio)	
_____)	

APPEARANCES

Eric Ballew, President, for Appellant, First Capital Interiors, Inc.

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

DECISION

PENDER, Administrative Judge:

Jurisdiction

This appeal originally arose from an October 16, 2006 determination of the Small Business Administration’s (SBA) Associate Administrator for Government Contracting (AA/GC) sustaining protests of First Capital Interiors, Inc.’s (Appellant) eligibility to represent itself as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). The October 16, 2006 determination was appealed, and on November 14, 2006, I issued *Matter of First Capital Interiors, Inc.*, SBA No. VET-111 (2006) (the Remand Order), remanding the matter to the AA/GC for a new determination. On November 21, 2006, the AA/GC issued his determination on remand; he again concluded Appellant was not an eligible SDVO SBC. On December 6, 2006, Appellant timely appealed the November 21, 2006 determination.

The SBA’s Office of Hearings and Appeals (OHA) reviews SDVO SBC status appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Therefore, OHA has jurisdiction to decide this appeal.

Facts

The Remand Order contains the detailed facts of the case. The instant appeal arises out of IFBs for construction issued by the Department of Veterans Affairs (DVA) Medical Center in Chillicothe, Ohio in August of 2006. The facts that relate to the control issue are:

1. The work solicited by the DVA is to be performed at the DVA Medical Center in Chillicothe, Ohio.

2. Eric Ballew owns 51% of Appellant's issued voting stock. Eric Ballew's father, Allen Ballew, gifted to him the 51% ownership on June 14, 2006. The remaining 49% of Appellant's voting stock is owned by Mr. Ballew's mother, Ms. Donna Ballew. Donna Ballew is Appellant's Secretary.

3. Before June 14, 2006, Allen Ballew was President and Chairman of Appellant's Board of Directors. Eric Ballew became Appellant's President and Chairman of its Board of Directors on June 14, 2006.

4. Appellant is a construction firm that operated at a loss in 2004 and 2005. Appellant's principal place of business is Chillicothe, Ohio. Appellant occupies space from Allen and Donna Ballew under an oral agreement. Appellant has also leased office space in Visalia, California.

5. Eric Ballew resides in Visalia, California. In addition to his interest in Appellant, Mr. Ballew was self-employed during 2006, *i.e.*, two recording companies and Picket Construction, all located in California.

6. Eric Ballew worked for Allen Ballew General Contractor, Inc. (ABGC) between January of 1998 and November of 2001, performing duties as a laborer, carpenter, and estimator assistant. In November of 2001 he entered on active duty with the U.S. Navy and performed duties as a personnel clerk while on active duty. Mr. Ballew was honorably discharged in November of 2005. Mr. Ballew performed work for Appellant between June 14, 2006 and September of 2006 that included General Management, Marketing, Bidding Oversight, Review of Drawings, Project Selection, Business Planning, Remote Site Set-Up, and pursuit of Sole Source set-aside opportunities.

7. The record contains no evidence showing that Eric Ballew has ever managed a construction concern or managed the performance of a Government construction contract.

The Remand Order

I vacated and remanded the AA/GC's October 16, 2006 determination because the SBA's position upon appeal was inconsistent with it. That is, the AA/GC based his determination finding Appellant was ineligible to represent itself as an SDVO SBC concern on a conjunction of three reasons. However, on appeal, the SBA abandoned one of those reasons.

To provide guidance to the AA/GC upon remand, I analyzed the reasons that SBA did not abandon. These two reasons were:

1. Because Eric Ballew resides over 1900 miles away from Chillicothe, Ohio, in California and is self-employed there, Appellant has not established Eric Ballew controls Appellant's daily business operations as required by 13 C.F.R. § 125.10(a); and
2. Eric Ballew's resume does not demonstrate he possesses any managerial training or experience of the extent and complexity needed to operate Appellant as required by 13 C.F.R. § 125.10(b).

I found the Record supported these reasons. Accordingly, I found that if the SBA elected to determine Appellant was an ineligible SDVO SBC concern because of either of these two reasons, it would not have made a clear error of fact or law.

SBA Determination Upon Remand

As mentioned, the AA/GC issued a determination in response to the Remand Order on November 21, 2006. The AA/GC again concluded Appellant was not an eligible SDVO SBC.

In his remand determination, the AA/GC summarized the facts and reiterated that the substance of the underlying protest by the Tradesmen Group, Inc. (TGI) and the Contracting Officer (CO) was that Appellant is not owned and controlled by one or more service-disabled veterans. The AA/GC then applied the applicable regulations to the facts in the Record and determined that:

- a. Appellant is not controlled by a service-disabled veteran because at the time Appellant submitted its bid for the two procurements, Mr. Ballew resided and worked in California, while Appellant is located in and performs construction work in Chillicothe, Ohio; and
- b. Eric Ballew lacks managerial training or experience sufficient to comply with the requirements of 13 C.F.R. § 125.10(b).

The AA/GC concluded that, based upon each of these two reasons, a service-disabled veteran does not control Appellant as required by 13 C.F.R. § 125.10.

Appellant's Allegations on Appeal

In its November 28, 2006 Appeal Petition (filed at OHA on December 6, 2006), Appellant makes several allegations why the AA/GC's eligibility determination is clearly in error. Appellant:

- (1) Reiterates the arguments it made in its October 25, 2006 appeal petition (the original appeal petition) and further asserts that it "has been deprived of its due process";

(2) Alleges the CO combined two protests into one and for two different procurements on two different dates. Because Appellant's business status and eligibility changed between September 12, 2006 and September 22, 2006, it has been denied due process because its size has not been tested as of September 22, 2006;

(3) Alleges the Code of Federal Regulations (CFR) requires a new SDVO SBC eligibility determination be made upon a remand, which here would require new evidence available as of September 22, 2006. However, no new determination was made and existing instructions prevented the possibility of a new determination, further denying due process;

(4) Avers the AA/GC's reference to an "operating agreement" in the "Ownership" portion of the determination is in error because there is no evidence of one in the Record and thus the decision is based upon an error of fact;

(5) Alleges that an erroneous date for a name change in the "Ownership" part of the determination contributed to erroneous decision-making;

(6) Alleges (concerning control) that -

(a) The AA/GC ignored evidence establishing that the distance from a project or other office does not matter and that Appellant's principal office was in California;

(b) Eric Ballew's work at Pyramid Recording and Triphonik had concluded in May of 2006 and would not interfere with the control of Appellant which he assumed in June of 2006;

(c) All work commitments in California ended before the bid dates;

(d) Eric Ballew's resume shows his experience is adequate and he does control Appellant and any allegations to the contrary are false; and

(e) Since the Chicago Area Office of the SBA concluded Eric Ballew controls Appellant when determining Appellant's size, the issue of control has been decided. [Appellant then makes a confusing argument about the AA/GC allegedly concluding that legal control could be overcome by the family relationship between Mr. Ballew and his parents.]

(7) Avers that the size determination referenced in the AA/GC's November 21, 2006 SDVO SBC eligibility determination has already taken place and that Eric Ballew was found to control Appellant. Accordingly, Appellant alleges, because the Area Office found Mr. Ballew has full legal control, the AA/GC is in error;

(8) Avers the AA/GC's conclusion that Appellant may not submit offers on future SDVO SBC procurements is not in accordance with the CFR, which provide that if appellant "changes ownership, etc., that it may submit offers." (Appeal Petition at 2); and

(9) Challenges guidance to the AA/GC, in the Remand Order, that “a company in CA cannot control a project in Ohio” (Appeal Petition at 3), because Eric Ballew can control an on-site supervisor, his subordinate, as many construction concerns do throughout the United States.

On December 9, 2006, Appellant filed a Motion to Remand the question of its SDVO SBC status back to SBA for a new eligibility determination. Appellant based this motion upon the allegedly tardy release of documents it requested under the Freedom of Information Act (FOIA). Appellant’s FOIA request pertained to a SDVO SBC protest the SBA dismissed that VTSDJ, LLC¹ (VTSDJ) submitted to the DVA CO. Appellant claims the tardy release of the VTSDJ protest documents by the DVA Office of General Counsel and SBA justifies remand.

SBA’s Response to the Appeal Petition

The SBA emphasizes the deference OHA must afford the AA/GC under the clear error standard. It notes that merely because reasonable minds may differ on the wisdom of a particular decision does not mean that decision is clearly erroneous. Following its discussion on the deference due the AA/GC, SBA presents the following arguments in its Response:

(1) The AA/GC’s determination in this matter was not clearly erroneous. SBA notes that the Record could support a conclusion that the Ballew family chose to take advantage of Eric Ballew’s disabled status by designating him as the nominal owner and operator of a family-controlled firm that would compete for SDVO SBC contracts in Ohio. SBA asserts that Appellant is seeking to gain award of contracts to which it is not entitled and thus it is depriving other small firms that are legitimately owned and controlled by serviced-disabled veterans from receiving the procurement assistance Congress intended for them;

(2) The Area Office’s size determination and the AA/GC’s SDVO SBC eligibility determination are not in conflict. It is the Area Office’s role to determine size and the AA/GC’s role to determine SDVO SBC eligibility. Control for a size determination may be hypothetical whereas control for SDVO SBC eligibility requires actual control. Thus, SBA asserts, that while an Area Office may find control for purposes of a size determination, that is not an official agency determination as to who actually controls that concern for the purpose of an SDVO SBC eligibility determination; and

(3) Appellant’s Motion for Remand is without merit and should be dismissed. SBA asserts that matters occurring outside of the SBA SDVO SBC protest process (the FOIA request and a dismissed protest) have no bearing on the instant appeal. In addition, SBA avers that Appellant’s allegations of a conspiracy among SBA, VTSDJ and the DVA, allegedly designed to deprive Appellant of the ability to respond to VSTDJ’s protest, is ridiculous, for SBA dismissed the protest without considering it on October 3, 2006.

¹ An unsuccessful offeror for the DVA procurements whose SDVO SBC protest to the SBA was dismissed as untimely.

Discussion

I. Introduction

In writing this decision I note that I have considered each argument offered by Appellant. For instance, I accept that technology permits many types of control beyond what were possible years ago. I also accept, to the extent it is relevant, that Mr. Ballew is no longer involved in the recording businesses. What is more, even though I may not have addressed every one of Appellant's arguments in detail, I considered all of them as shown by my recitation of them above.

I also note that SBA recognizes an important legal argument while addressing the standard of review applicable to this appeal. That is, SBA properly asserts the AA/GC has the responsibility to make SDVO SBC eligibility determinations. SBA then correctly asserts that even if I were so inclined, I may not substitute my judgment for that of the AA/GC unless he made a clear error of fact or law, for my role is to evaluate whether the Record supports the determination using the clear error standard, not to make *de novo* findings of fact followed by my own analysis of those facts.

The Record in this matter supports the AA/GC's finding that Appellant is not controlled by a service-disabled veteran. The Record also supports the AA/GC's finding that Eric Ballew lacks the necessary management training or experience to run Appellant. Either one of these findings alone is sufficient to support a determination that Appellant is not an eligible SDVO SBC. Accordingly, I do not have a definite conviction the AA/GC made an error in determining that Appellant is not an eligible SDVO SBC.

However, Appellant correctly asserts that the AA/GC lacked the authority to conclude Appellant may not submit any future offers for SDVO SBO procurements. Appellant may do so if it meets the criteria outlined below.

II. Applicable Law

A. Timeliness

Appeal of an AA/GC's SDVO SBC eligibility determination must be within 10 business days after receipt of the AA/GC's decision. 13 C.F.R. § 134.503.

B. Standard of Review

The standard of review for SDVO SBC appeals is whether the AA/GC's protest 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 AA/GC based his or her decision upon a clear error of fact or law. (*See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review, which is common to both size and SDVO SBC

appeals.) Consequently, I will disturb the AA/GC's determination only if I have a definite and firm conviction the AA/GC erred in making a key finding of law or fact.

C. SDVO SBC Control Requirements

Portions of 13 C.F.R. Part 125 relevant to this appeal include:

§ 125.10

(a) General. To be an eligible SDVO SBC, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans Control by one or more service-disabled veterans means that both the long-term decisions [sic] making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans

(b) Managerial position and experience. A service-disabled veteran . . . must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager . . . need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

§ 125.27

(g) Effect of determination. SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (*e.g.*, it changes its ownership to satisfy the definition of an SDVO SBC set forth in Sec. 125.8).

III. Analysis

A. Timeliness

Appellant appealed the AA/GC's determination within 10 business days of receiving it as required by 13 C.F.R. § 134.503. Thus, this matter is properly before me.

B. Did the AA/GC Make a Clear Error of Fact or Law in
Finding Eric Ballew did not Control Appellant?

Facts in the Record pertaining to the issue of control in this appeal show Appellant is:

1. Seeking to perform SDVO SBC set-aside work at the DVA Medical Center in Chillicothe, Ohio (Fact 1);
2. A very small (almost a start-up) construction contractor headquartered in Chillicothe, Ohio (Fact 4);
3. 51% owned by a service-disabled veteran living and working in Visalia, California, and who was made a gift of the 51% ownership by his father on June 14, 2006 (Facts 2, 3, and 5); and
4. 51% owned by a service-disabled veteran who has approximately four years of experience working for a construction firm since 1998, served in the U.S. Navy as a personnel clerk, and who has no experience that involves serving in a management position with a construction firm (Facts 6 and 7).

1. Control by a Service-Disabled Veteran

These facts fully support the AA/GC's determination that Eric Ballew does not control Appellant as required by 13 C.F.R. § 125.10. The AA/GC reasonably concluded that Eric Ballew could not control an Ohio-centered construction company performing projects in Chillicothe from California as required by 13 C.F.R. § 125.10(a).

While not always technically demanding, construction routinely requires on-site interaction with customers and supervision of effort by subcontractors and other trades. Construction management requires both visual and tactile supervision and interaction. Even though it is possible that a remotely-owned concern may hire an on-site superintendent or project manager to oversee construction, that is much more typical of concerns larger and more established than Appellant. Thus, neither OHA nor SBA maintains a concern cannot manage a job that is 2000 miles away from its headquarters. Rather, I hold it is not clearly erroneous for the Area Office to conclude that Eric Ballew cannot manage Appellant's day-to-day business operations as required by 13 C.F.R. § 125.10(a), which would consist largely of construction contracts being performed in Ohio, via telephone or e-mail (especially at night), from three time zones away.

Appellant's claim that it can hire local superintendents also tends to defeat an argument of day-to-day control by a service-disabled veteran. Hypothetically, with a concern as small as Appellant, if the local superintendent has enough authority to act for Appellant by directing subcontractors, negotiating with the Government, and making decisions as needed, then it would not be unreasonable for the AA/GC to conclude that the service-disabled veteran is not managing the day-to-day activities of the concern as required by 13 C.F.R. § 125.10(a).

The SBA's determination is realistic. Appellant is not the Ford Motor Company, *i.e.*, Appellant does not possess the kind of infrastructure that permits long distance (almost 2000 miles and three time zones) or remote control management of a construction concern by a service-disabled veteran as intended by 13 C.F.R. § 125.10(a). Certainly, it is counter-intuitive for Appellant to contend the relatively inexperienced Eric Ballew will make long-term decisions for Appellant and then day-to-day manage and administer Appellant's operations in Chillicothe, while simultaneously residing and working² in California. Rather, as the evidence of Donna Ballew's role suggests, it is far more likely that Appellant will use the existing structure of ABGC to control Appellant.

2. The Effect of the Area Office's Size Determination

Appellant argues that the Area Office's finding that Eric Ballew controlled Appellant means the AA/GC erred in finding Appellant was not controlled by a service-disabled veteran. However, Appellant's argument misapprehends the purpose of the Area Office's determination, which was to determine if Appellant and any affiliates were small concerns under the relevant size standard (*See* 13 C.F.R. §§ 121.101, 103, 405(b) and 1002).³ Specifically, for size determinations under 13 C.F.R. Part 121, Area Offices determine whether an individual has the power to control a concern, not whether the person actually exercises the control (13 C.F.R. § 121.103(a)). This standard is different from the standard in 13 C.F.R. § 125.10(a), for 13 C.F.R. § 125.10(a) requires actual control for SDVO SBO eligibility. Finally, I note, as the SBA points out, that 13 C.F.R. § 125.25(a) only permits the AA/GC to make determinations concerning SDVO SBC eligibility, which includes control.

Accordingly, I hold the AA/GC did not make a clear error of fact or law when he determined Eric Ballew did not control Appellant as required by 13 C.F.R. § 125.10(a).

3. Sufficiency of Eric Ballew's Management Experience

The Record does not demonstrate Eric Ballew possesses management experience. Rather, it shows he worked for his father's company and was self-employed in California. However, 13 C.F.R. § 125.10(b) requires the service-disabled veteran, Eric Ballew, to have the managerial experience of the extent and complexity needed to run the concern. Given Eric Ballew's very limited experience, I hold the AA/GC did not make a clear error of fact or law when he determined that Eric Ballew lacks the managerial experience necessary to manage a

² While Eric Ballew now maintains his music jobs are over, the resume in the Record says such employment is "to Present."

³ In its size determination finding Appellant to be a small concern, the Area Office found that Appellant was affiliated with ABGC because of the identity of interest between Eric Ballew and his mother, the owner of ABGC, under 13 C.F.R. § 121.103(f). Then, the Area Office aggregated the size of Appellant and ABGC (and another concern) as required by 13 C.F.R. § 121.103(a)(6).

construction concern performing Government Construction Contracts in a location almost 2000 miles from where he lives and works.

The facts applicable to this appeal suggest that Mr. Ballew's service-disabled veteran status is his primary qualification for his ownership and putative role with Appellant. On its face, the facts are such that a reasonable person could conclude that Allen Ballew gifted ownership of Appellant to Eric Ballew on June 14, 2006, so that the family would have a sister concern, operating from ABGC's place of business, and ostensibly owned and controlled by a service-disabled veteran, that could compete for SDVO SBC set-aside projects in their home area (Chillicothe, Ohio).

C. Did the AA/GC Make a Clear Error of Fact or Law in Concluding Appellant May Not Submit Offers on Any Future SDVO SBC Procurements?

Appellant asserts that the AA/GC erred when he concluded that Appellant may not submit offers on any future SDVO SBC procurements. Appellant asserts that if it "changes ownership, etc.," Appellant may submit offers on future procurements. Appellant's point is well taken. These regulations unequivocally permit a concern to submit offers on future SDVO SBC procurements if it overcomes the reasons for the protest and satisfies the definition of an SDVO SBC. 13 C.F.R. § 125.27(g) (emphasis added.) Accordingly, the part of the November 21, 2006 determination stating Appellant may not submit offers on any future SDVO SBC procurements goes too far. Appellant may submit offers under future SDVO SBC procurements if it first overcomes the reasons for the protest and satisfies the requirements for SDVO SBC eligibility stated elsewhere in 13 C.F.R. Part 125.

D. Appellant's Petition for Remand

There is no provision for OHA to consider a petition for remand in the SDVO SBC protest and appeal regulations in 13 C.F.R. Part 125. Rather, OHA has authority to hear appeals of SDVO SBC eligibility determinations pursuant to 13 C.F.R. § 125.28. At present (in this Decision) OHA is considering and acting upon Appellant's timely appeal of the AA/GC's November 21, 2006 SDVO SBC eligibility determination. This is the limit of OHA's review authority.

VTSDJ's protest is irrelevant, for the SBA dismissed it as untimely without considering its merits. Later, the AA/GC issued a SDVO SBC determination applicable to Appellant in response to protests filed by TGI and the CO. Therefore, even if OHA had regulatory jurisdiction to consider Appellant's Remand Petition, I must deny Appellant's Remand Petition because VTSDJ's protest has had no effect and could not have any effect on matters before OHA.

Conclusion

SDVO SBCs must be controlled by service-disabled veterans. The AA/GC found a service-disabled veteran did not, as required by 13 C.F.R. § 125.10: (1) Control Appellant's day-

to-day management and administration of its business operations; and (2) Have managerial experience of the extent and complexity needed to run the concern.

In this Appeal, Appellant failed to show the AA/GC made a clear error of fact or law in determining it was ineligible to qualify as an SDVO SBC. Rather, the Record shows that:

a. Eric Ballew cannot readily or actually control Appellant's day-to-day management and administration of its business operations in Chillicothe, Ohio, while he resides in California; and

b. Eric Ballew currently lacks managerial experience of the extent and complexity needed to run Appellant.

However, Appellant's argument that the AA/GC may not prohibit it from submitting future offers under SDVO SBC procurements is well taken. As Appellant states, the regulations grant no such authority. Rather, 13 C.F.R. § 125.27(g) specifically provides that an offeror may submit future offers if it overcomes the reasons for the protest.

Appellant's Petition for Remand raises matters outside of OHA's jurisdiction. Appellant's Petition for Remand raises matters irrelevant to matters actually before OHA. Accordingly, Appellant's Petition for Remand is DENIED.

For the foregoing reasons, Appellant's Appeal is DENIED in part and AFFIRMED in part. That is, while the AA/GC's determination that Appellant is not currently an eligible SDVO SBC is AFFIRMED, that part of the AA/GC's SDVO SBC determination concluding Appellant may not submit offers on any future SDVO SBC procurements is REVERSED. Instead, while Appellant is an ineligible concern for the procurements relevant to this appeal, Appellant may submit offers under future SDVO SBC procurements if it overcomes the reasons for the protest.

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

THOMAS B. PENDER
Administrative Judge