

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

_____)	
IN THE MATTER OF:)	
)	
People Direct Placement Services, Inc.)	Docket No. VET-2006-12-20-09
)	
Appellant)	Decided: January 18, 2007
)	
_____)	

APPEARANCES

Don Eric Salom., Esq.
for Petitioner
People Direct Placement Services, Inc.

Kevin R. Harber, Esq.
Office of General Counsel
Small Business Administration
for the Agency

DIGEST

In an appeal of a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) determination, the record is limited to the evidence presented to the Associate Administrator for the Office of Government Contracting, and new evidence may not be admitted on appeal.

For an applicant to be an eligible SDVO SBC, the service-disabled veteran, upon whom the claim of eligibility is based, must hold enough stock to overcome any supermajority voting requirements.

DECISION

HOLLEMAN, Administrative Judge:

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.

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I. BACKGROUND

A. Protests

On July 27, 2006, the United States Marine Corps issued Request for Proposal (RFP) M00681-06-R-0012, a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) competitive set-aside, under North American Industry Classification System (NAICS) code 561320, with a size standard of \$11.5 million. The RFP closed on September 15, 2006 and final proposal revisions were due on October 3, 2006.

On November 23, 2006, the Marine Corps awarded the contract to People Direct Placement Services, Inc. (Appellant) and pre-award notices, required by FAR 15.503(a)(2), were submitted to three unsuccessful offerors. On November 27, 2006, Like New Pool Cleaning & Repair Services, Inc. (New Pool) and KMEA each filed protests, asserting: Appellant is not a SDVO SBC, as defined by FAR § 52.212-3 and 38 U.S.C. § 101(2) & (16); Appellant appears to have been created for the subject solicitation; and Appellant is related to the incumbent contractor. The Marine Corps Contracting Officer forwarded the two offerors' protests and a Contracting Officer protest to the Small Business Administration (SBA).

B. Appellant's Response

SBA notified Appellant of the KMEA and Contracting Officer protests on November 30, 2006, and on December 1, 2006, SBA notified Appellant of the New Pool protest. On December 4, 2006, Appellant submitted a response to the protests to the SBA.

Appellant presented evidence that David Tonick, the individual upon whom Appellant's claim of eligibility is based, owns 51 percent of Appellant. The Koosharem Corporation owns the remaining 49 percent of Appellant. Appellant also submitted a copy of documentation from the Department of Veteran Affairs attesting to Mr. Tonick's status as a service-disabled veteran.

Appellant provided: a copy of minutes from Appellant's Board of Directors, a copy of Appellant's bylaws, and a copy of Appellant's Articles of Incorporation. Appellant submitted documentation that Mr. Tonick is Appellant's President and is on Appellant's Board of Directors. Appellant also provided a copy of Mr. Tonick's resume. Appellant did not include any tax documents since the corporation was formed on August 31, 2006.

C. Size Determination

On December 12, 2006, the Acting Associate Administrator for the Office of Government Contracting (AAA/GC) requested a formal size determination on Appellant due to Appellant's affiliation with multiple other entities. On December 27, 2006, the SBA, Office of Government Contracting-Area VI, issued Size Determination Case Number 6-2007-025, finding Appellant other than small since it failed to respond to the request for information. *See* 13 C.F.R. § 121.1008(d).

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D. SBA Determination on SDVO SBC Status

On December 15, 2006, the AAA/GC issued a final determination that Appellant was not an eligible SDVO SBC. The AAA/GC affirmed that Mr. Tonick is a service-disabled veteran, owns a 51 percent interest in Appellant, is Appellant's President, is a member of the Board of Directors, and possesses the managerial experience necessary to operate Appellant. However, because Mr. Tonick holds less than the 60 percent of outstanding shares of stock needed to overcome the supermajority voting requirements included in Article 2.6 of Appellant's bylaws, the AAA/GC could not conclude that Mr. Tonick controls the corporation. Accordingly, the AAA/GC determined Appellant did not meet the requirements of eligibility under 13 C.F.R. § 125.10, since a service disabled veteran does not control Appellant.

E. Appeal Petition

On December 20, 2006, Appellant filed an appeal of the AAA/GC's decision with this Office. Appellant acknowledges that Article 2.6 of Appellant's bylaws requires a 60 percent supermajority. Appellant states that the inclusion of the 60 percent supermajority requirement was inadvertent. Appellant presents that Article 6.8 of its bylaws allows the shareholders and directors to amend the bylaws to delete the supermajority language. Appellant asserts a unanimous amendment deleting the supermajority language has been executed and a copy of the amendment was forwarded to the SBA. Appellant also attached a copy of the amendment to its appeal petition. The effective date of the amendment is September 7, 2006.

Appellant concludes by asserting, based on the amendment, the AAA/GC's determination should be reversed and Appellant's eligibility as an SDVO SBC should be reinstated.

F. New Pool and KMEA Response

On January 3, 2007, New Pool and KMEA submitted a response to Appellant's appeal. First, New Pool and KMEA assert the amendment submitted with Appellant's appeal petition should not be considered. New Pool and KMEA note Appellant did not forward the amendment to the SBA in response to the protest and this appeal must be decided based on a review of the evidence in the protest file relied on by the AAA/GC to make his determination. 13 C.F.R. §§ 134.511 & 134.512. Second, New Pool and KMEA argue Appellant's appeal fails to meet the requirements of 13 C.F.R. § 134.505 since Appellant does not allege clear error of law or fact. Third, New Pool and KMEA notes Appellant is not disputing that it was not a SDVO SBC at the time it submitted its bid due to the language of its bylaws, but that Appellant is arguing to correct the error to receive the contract. New Pool and KMEA state allowing Appellant to correct the error in its bylaws after the submission of bids, and after the AAA/GC's determination, would be a violation of the Competition in Contracting Act. Finally, New Pool and KMEA argue Mr. Tonick does not control Appellant, but that Appellant is actually owned, operated, and managed by the Koosharem Corporation. Based on the arguments and information provided in their response, New Pool and KMEA request the AAA/GC's determination be affirmed.

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G. SBA Response

On January 4, 2007, SBA responded to the Petition. SBA asserts that the AAA/GC's decision was correct and should be sustained.

In responding to Appellant's Petition, SBA argues: there is no evidence that the 60 percent supermajority requirement was repealed prior to the bid submission, Appellant did not submit the amendment during the protest, the amendment is now inadmissible, and the appeal is moot due to the subsequent size determination.

SBA states Appellant presented the amendment removing the supermajority language in its bylaws only after the AAA/GC's determination that the supermajority requirement rendered Appellant ineligible for SDVO SBC status. SBA notes although Appellant's amendment removing the supermajority requirement has an effective date of September 7, 2006, the document provides no indication of when it was actually executed. SBA states the amendment repealing the supermajority language was not included in the protest file and the AAA/GC's determination was based on the information before him at the time he made the determination. Citing SBA regulations and Office of Hearings and Appeals (OHA) case law, SBA argues the AAA/GC's determination cannot be deemed erroneous based on new information submitted during the appeal. Moreover, SBA argues even if the undated amendment was considered admissible, the document is not evidence that Appellant was in compliance with 13 C.F.R. § 125.10(e) at the time it submitted its bid. Finally, SBA argues since Appellant was deemed other than small for the size standard assigned to this procurement, the SDVO SBC appeal is moot.

II. DISCUSSION

A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 business days of receiving the AAA/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 AAA/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 AAA/GC based his decision upon a clear error of fact or law. Consequently, I will disturb the AAA/GC's determination only if I have a definite and firm conviction the AAA/GC erred in making a key finding of law or fact.

B. Eligibility Requirements for an SDVO SBC

An SDVO SBC is a concern which is small, which is at least 51 percent owned by one or more service-disabled veterans, and the management and daily business operations of which are controlled by one or more service-disabled veterans. 13 C.F.R. § 125.8(g).

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Control by one or more service-disabled veterans means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans. 13 C.F.R. § 125.10(a). A service-disabled veteran must hold the highest officer position in the concern, usually president or chief executive officer. 13 C.F.R. § 125.10(b). Additionally, in the case of a corporation, a service-disabled veteran must own at least 51 percent of all voting stock, be on the board of directives, and hold the stock necessary to overcome any supermajority voting requirements. 13 C.F.R. § 125.10(e)(1).

C. New Evidence

As a threshold matter, I EXCLUDE Appellant's proffered new evidence. The regulations explicitly limit review of an SDVO SBC determination to the written protest file before SBA at the time of the determination, and to the arguments on appeal. 13 C.F.R. § 134.512. It cannot be error on the part of the AAA/GC to fail to consider a document not presented to him. The undated amendment to its bylaws submitted by Appellant, Appeal Petition, Exhibit 1, was not presented to the AAA/GC in response to the protest and I will not consider it now. Further, this undated document, unaccompanied by any minutes of any shareholders meeting enacting it, is not on its face a reliable document, and cannot be the basis for a finding concerning Appellant's eligibility as of September 14th.

D. Date SDVO SBC Eligibility Is Determined

SDVO SBC eligibility is determined as of the date the business submitted its initial offer for a SDVO SBC set-aside contract. 13 C.F.R. § 125.15(a)(1). Failure by an alleged SDVO SBC to meet SDVO SBC eligibility requirements cannot later be cured after submission of the initial offer. Accordingly, Appellant's SDVO SBC eligibility is determined as of September 14, 2006, the date it submitted its initial offer to RFP M00681-06-R-0012, a SDVO SBC competitive set-aside, under NAICS code 561320, with a size standard of \$11.5 million.

E. Merits of Appeal

After reviewing the record, I find the written protest file supports the AAA/GC's determination. Mr. Tonick is clearly a veteran with a service-related disability. The AAA/GC properly relied on Appellant's official records in determining the ownership of the concern. Mr. Tonick is the owner of a 51 percent interest in Appellant. The AAA/GC indicated Mr. Tonick is Appellant's President and holds the highest officer position in the concern.

The AAA/GC correctly recognizes it is not enough for qualification as an SDVO SBC that a concern is majority-owned and headed by a service-disabled veteran. The service-disabled veteran owner "must have the percentage of voting stock necessary to overcome any super majority voting requirements." 13 C.F.R. § 125.10(e)(1). Article 2.6 of Appellant's bylaws state "when a quorum is present at any meeting, the vote of a supermajority of at least sixty percent (60%) of the holders of stock having voting power present in the person or represented by proxy

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shall decide” various corporate actions. Clearly, Appellant’s bylaws include a supermajority requirement. Since Mr. Tonick holds less than the requisite 60 percent of stock necessary to overcome Appellant’s supermajority requirement, the AAA/GC was justified in finding that Mr. Tonick is unable to control Appellant and, hence, Appellant is not controlled by a service-disabled veteran.

I thus conclude that the AAA/GC’s finding that Mr. Tonick does not control Appellant is supported by the record.

Appellant has thus failed to establish any clear error of fact or law in the AAA/GC’s decision, indeed, Appellant alleges no such error. Accordingly, I must deny the instant Appeal Petition, and affirm the AAA/GC’s finding.¹

III. CONCLUSION

Thus, I conclude the AAA/GC did not err in finding Appellant is 51 percent owned by a service-disabled veteran, but that it is not controlled by a service-disabled veteran. Therefore, the AAA/GC’s determination is AFFIRMED and the appeal of Appellant People Direct Placement Services, Inc., is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge

¹ Further, an additional reason for finding Appellant ineligible has arisen since the determination appealed here. The finding that Appellant is not a small business makes it ineligible to be an SDVO SBC. 13 C.F.R. § 125.11.