

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

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IN THE MATTER OF:	)	
	)	
IITS-Nabholz, LLC	)	Docket No. VET-2007-02-02-01 <sup>1</sup>
	)	
Appellant	)	Decided: February 28, 2007
	)	
Solicitation No. DOL069RB20275	)	
U.S. Department of Labor	)	
Division of Job Corps	)	
A&E and Construction Services	)	
Washington, D.C.	)	

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APPEARANCES

Felipe Wright, CEO, IITS  
for Appellant  
IITS-Nabholz, LLC

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

DIGEST

When the authenticity of the documentation proffered to establish an individual's status as a service-disabled veteran is reasonably questioned, and the agency which purportedly issued the documentation cannot authenticate it or the status of the individual, the individual has failed to establish his or her status as a service-disabled veteran.

A limited liability company which is owned 51% by a firm which is owned and controlled by an individual who purports to be a service-disabled veteran, upon whom the limited liability

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<sup>1</sup> This Office now prefaces its Docket and Decision Numbers for Service-Disabled Veteran-Owned Small Business Concern appeals with the prefix "VET" to prevent confusion with other types of SBA appeals.

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company's claim of eligibility as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) is based, and 49% by another firm does not meet the requirement that an SDVO SBC be directly owned by a service-disabled veteran.

When the individual upon whom an applicant firm's claim of eligibility as an SDVO SBC is based lives in Maryland and the applicant firm's headquarters and the site of the work to be performed is in Arkansas, and the nature of the work to be performed is construction, the individual cannot be found to control the day-to-day operations of the firm.

When the operating agreement of an applicant firm requires the consent of 75% of the ownership to sell, lease, mortgage, or otherwise transfer the company's assets and the applicant firm is only 51% owned by a firm, which is owned by an individual upon whom the applicant firm's claim of eligibility as an SDVO SBC is based, the applicant firm cannot be found to be controlled by a service-disabled veteran.

### 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.

### I. BACKGROUND

#### A. Protests

On September 25, 2006, the United States Department of Labor (DOL) issued Solicitation No. DOL069RB20275 for commercial and institutional building construction. The Contracting Officer (CO) designated the solicitation a 100% Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. The North American Industry Classification System (NAICS) code is 236220 (Commercial and Institutional Building Construction) with a corresponding \$31 million annual receipts size standard. On December 7, 2006, two bids were opened, read, and recorded. Intelligent Information Technology Solutions-Nabholz, LLC, (Appellant) self-represented as a SDVO SBC and was the apparent low-bidder.

On December 12, 2006, Jacob-Reliable Enterprises (Jacob-Reliable), the other bidder, filed a protest against Appellant with the Government Accountability Office (GAO). Jacob-Reliable alleged that Appellant does not qualify as an SDVO SBC, is not small, and did not comply with instructions to bidders. Jacob-Reliable's GAO protest was dismissed and redirected

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to the CO. The CO forwarded Jacob-Reliable's protest to the Small Business Administration (SBA) Office of Government Contracting-Area V (Area Office) in Fort Worth, Texas.

The Area Office forwarded Jacob-Reliable's SDVO SBC status protest to the SBA's Office of Government Contracting Headquarters in Washington, D.C. On December 19, 2006, the Area Office dismissed the size protest since Jacob-Reliable did not provide specific evidence that Appellant exceeds the \$31 million size standard; the Area Office's dismissal of the size protest was affirmed by the Office of Hearings and Appeals on February 5, 2007. *Size Appeal of Jacob-Reliable Enterprises*, SBA No. SIZ-4836 (2007). Jacob-Reliable's concerns about Appellant's compliance with bid requirements were resolved by the CO.

#### B. Appellant's Response

SBA notified Appellant of Jacob-Reliable's SDVO SBC status protest on December 28, 2006. On January 4, 2007, Appellant submitted a response to the protest to the SBA.

Appellant stated that its winning bid for Solicitation No. DOL069RB20275 was nearly \$4 million less than Jacob-Reliable's bid. Appellant included evidence that the owner and CEO of IITS and majority partner of Appellant, Felipe Wright, is a veteran with service-connected disabilities. Appellant requested, based on the facts, the DOL's economic interest, and the spirit of the SBA, that Appellant be allowed to perform the contract.

In its response, Appellant attached a copy of the Appellant's mentor-protégé agreement, the Appellant's joint venture agreement, the bid abstract for Solicitation No. DOL069RB20275, a letter from the Department of Veterans Affairs (VA) stating Mr. Wright has service-connected disabilities, a copy of Mr. Wright's VA identification card, a copy of Appellant's Articles of Organization, Mr. Wright's resume, and IITS's Chief Financial Officer's resume.

On January 8, 2007, SBA requested additional information from Appellant. On January 9, 2007, Appellant responded to SBA's request and submitted the Operating Agreement of IITS, copies of IITS two most recent tax returns, and resumes for IITS's CEO, CFO, and Senior Vice President of Construction Management Services.

On January 18, 2007, SBA requested Appellant provide the Operating Agreement of the Operating Company for Appellant which was referenced in Appellant's Joint Venture Agreement. Appellant forwarded the Operating Agreement to SBA on January 19, 2007.

#### C. SBA Determination on SDVO SBC Status

On January 23, 2007, the Acting Associate Administrator for the Office of Government Contracting (AAA/GC) considered Appellant's SDVO SBC status, ownership, and control and issued a final determination that Appellant was not an eligible SDVO SBC.

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The AAA/GC was unable to verify Mr. Wright is a service-disabled veteran. Due to some discrepancies in the letter Appellant submitted regarding Mr. Wright's service-connected disabilities, the SBA contacted the VA to confirm the letter's authenticity and Mr. Wright's eligibility. The VA reported that it was unable to confirm the authenticity of the letter or locate records of Mr. Wright's service-connected disability. Based on this information, the AAA/GC determined that Appellant was unable to satisfy the requirements of 13 C.F.R. § 125.8.

Additionally, the AAA/GC determined since Appellant is not directly held by one or more service-disabled veterans, but is held indirectly through an intervening company, the requirements of direct ownership imposed by 13 C.F.R. § 125.9 are not fulfilled.

Finally, the AAA/GC determined Appellant is not controlled by a service-disabled veteran. Based on the geographic distance between Mr. Wright's domicile and place of work, Appellant's offices, and the DOL work site, as well as the nature of construction projects, the AAA/GC could not conclude that a service-disabled veteran conducts the day-to-day management and administration of Appellant's operations. Moreover, the AAA/GC noted Appellant's Operating Agreement limits the power of a service-disabled veteran to control Appellant as required by 13 C.F.R. § 125.10 because consent of 75% of the ownership is required to sell, lease, mortgage or otherwise transfer the company's assets. Accordingly, based on the totality of the evidence, the AAA/GC determined Appellant did not meet the requirements of an SDVO SBC established by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8.

#### D. Appeal Petition

On February 2, 2007, Appellant filed an appeal of the AAA/GC's decision with this Office. Appellant asserts that it disagrees with the AAA/GC's conclusions regarding its SDVO SBC status.

With respect to the issue of service-disabled veteran status, Appellant professes not to understand why the AAA/GC questioned the veracity of the evidence of Mr. Wright's service-disabled veteran status. Appellant resubmits information on Mr. Wright's service-disabled veteran status provided to the AAA/GC. Appellant also seeks to submit new evidence with its appeal petition. Appellant proffers a new letter confirming Mr. Wright's service-disabled status, dated January 23, 2007, and obtained after the AAA/GC's determination.

Appellant argues that the AAA/GC's determination that Appellant is not directly owned by a service-disabled veteran misinterprets "the spirit, intent and language of 13 C.F.R. § 125.9." Appellant argues that it is in compliance with Federal Acquisition Regulation § 19.1403. Moreover, Appellant asserts that IITS is not an intervening entity in the joint venture and that if the AAA/GC's determination is upheld than most joint ventures will be deemed invalid.

As for control, Appellant concedes that the AAA/GC is correct the project will take place in Arkansas, Appellant is located in Arkansas, and Mr. Wright is located in Maryland; however,

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Appellant states nothing impedes Mr. Wright from periodically traveling to Arkansas and that managers, supervisors, and superintendents will be assigned to the project via the joint venture to insure operations are timely and cost efficient. Appellant argues, based on the AAA/GC's logic, any CEO residing in one area cannot control operations in another area. Appellant also disputes the AAA/GC's determination that a service-disabled veteran does not control the joint venture due to the Operating Agreement; Appellant asserts the Operating Agreement provided to SBA was a draft and that it is a living document that can be changed or amended to adapt to circumstances.

Although the AAA/GC did not consider Appellant's size because the matter was pending before the Office of Hearing and Appeals, Appellant asserts that all agreements were timely submitted to SBA. Appellant states since IITS meets the size standard, Nabholz, Appellant's mentor and joint venture partner did not have to meet the size standard.

Appellant concludes by asserting it meets all the requirements for award of the contract and that awarding the contract to Appellant has many benefits.

#### E. SBA Response

On February 14, 2007,<sup>2</sup> SBA responded to the Appeal. SBA asserts that the AAA/GC's decision was correct and should be sustained.

SBA argues the AAA/GC's determination that Appellant failed to satisfactorily establish Mr. Wright is a service-disabled veteran was not based upon clear error of fact or law. SBA states after noting discrepancies in the service-disabled veteran status letter provided by Appellant, SBA contacted the VA. The VA was unable to authenticate the letter or locate records indicating Mr. Wright is a service-disabled veteran. SBA argues based on the concerns about the validity of the letter and the information gained from the VA, the AAA/GC's determination was well-founded.

SBA states although Appellant presents itself as a joint venture between IITS and Nabholz, Appellant is in fact a separate limited liability company. Thus, SBA could not review Appellant under the joint venture provisions, as suggested by Appellant, but SBA was required to review Appellant as a separate legal entity. SBA states, in accordance with Appellant's Operating Agreement, Appellant is owned by IITS and Nabholz and, in turn, IITS is owned by Mr. Wright. SBA asserts, since Appellant is a concern principally owned by a business entity, Appellant is unable to satisfy the direct ownership eligibility requirements of 13 C.F.R. § 125.9. Thus, the AAA/GC's determination that Mr. Wright does not directly own Appellant is justified.

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<sup>2</sup> On February 13, 2007, the deadline for SBA's response, the Federal government in the Washington, D.C. area closed early due to inclement weather. Due to the closure, I orally granted SBA a one-day extension to file its response.

SBA notes 13 C.F.R. § 125.10(a) requires a service-disabled veteran to be responsible for day-to-day management and administration of business operations. SBA asserts the record demonstrates Mr. Wright lives over one thousand miles away from Appellant's offices and the project construction site. Based on the geographic distance and the nature of construction projects, SBA argues the AAA/GC's determination was reasonable. Moreover, SBA states Appellant acknowledges its intent to hire others to oversee day-to-day management and administration of business operations for the DOL project.

SBA argues Mr. Wright's ability to control Appellant is further limited by the Operating Agreement. SBA asserts Mr. Wright's 51% ownership interest in Appellant is only indirect through his ownership of IITS. Further, Mr. Wright's 51% ownership is not significant enough to meet Appellant's Operating Agreement's required consent of 75% ownership to make certain decisions. SBA argues Appellant's suggestion that the Operating Agreement can be amended does not remedy the situation. SBA states Appellant must be an eligible SDVO SBC as of the date it submitted its bid and problems with eligibility cannot be retroactively corrected.

## 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 the Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 8 (2005). 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. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 11-12 (2006) (discussing the clear error standard which is applicable to size appeals and SDVO SBC appeals). 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. Date SDVO SBC Eligibility Is Determined

To be eligible for award of an SDVO SBC set-aside contract, the concern must be small within the size standard corresponding to the NAICS code assigned to the contract at the time of its contract offer. 13 C.F.R. § 125.11(a). In addition, an SDVO SBC must submit its representation that it is an SDVO SBC as of the time it submits its initial offer, including price, for a specific contract. 13 C.F.R. § 125.15(a)(1). Accordingly, any failure by an applicant for SDVO SBC status to meet SDVO SBC eligibility requirements cannot be cured once the concern has submitted its offer. Thus, for this procurement, Appellant must be SDVO SBC eligible as of

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December 7, 2007. Any argument by Appellant that its organizational documents are “living agreements” of some kind is meritless. Appellant must meet the regulatory requirements of ownership and control as of the date of its submission of its initial offer, and it cannot alter its document after that date in order to qualify for the procurement it sought.

### 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 January 23, 2007 letter from the VA confirming Mr. Wright’s veteran status, Appeal Petition, Exhibit 4, was not presented to the AAA/GC in response to the protest and I will not consider it now.<sup>3</sup> Further, as noted above, Appellant’s status as an SDVO SBC must be determined as of December 7th. Appellant cannot after the fact cure any defect in its documentation of Mr. Wright’s status.

### D. Merits of Appeal

An SDVO SBC is a concern which is small, which is at least 51% 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).

#### 1. Challenge to Service-Disabled Veteran Status

An SDVO SBC can be challenged based on service-connected disability, permanent and severe disability, or veteran status. 13 C.F.R. § 125.26. When a protest record contains VA or DOD documents that show an individual is a service-disabled veteran, the documents are accepted as determinative of status. Here the issue is whether Mr. Wright, the individual upon whom Appellant’s claim of eligibility is based, meets the definition of service-disabled veteran or service-disabled veteran with a permanent and severe disability as set forth in 13 C.F.R. §125.8.

Based on the VA documentation Appellant submitted, the AAA/GC noted the VA letter was unlike VA documentation submitted in other SDVO SBC cases. The letterhead appeared to have been copied and pasted into the document from another source, and the VA’s name was misspelled. Further, the address listed did not conform to that of VA’s Washington Regional

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<sup>3</sup> While SBA was not bound to consider this information, the AAA/GC did in fact inquire into Mr. Wrights’ status on the basis of the new documentation. Once again, the VA was unable to confirm the authenticity of the proffered letter. VA did inform the AAA/GC that Mr. Wright filed a claim for a service-connected disability on January 23, 2007. This is, of course, after the December 7th date as of which Appellant’s eligibility must be determined.

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Office. Owing to these discrepancies SBA contacted the VA to confirm the letter's authenticity and Mr. Wright's status as a service-disabled veteran. The VA was unable to verify the letter or Mr. Wright's status. Without recognition from the VA or DOD that Mr. Wright is a service-disabled veteran, the AAA/GC could not find that Mr. Wright is a service-disabled veteran as defined by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8.

Neither the SBA nor this Office evaluates veteran eligibility. Those determinations rest with the VA or DOD, and this Office will not review them. 13 C.F.R. § 134.508. However, the issue here is whether the VA actually made such a determination. SBA attempted to verify the documentation Appellant provided, and the VA could not do so. The AAA/GC thus determined that Appellant had failed to provide the documentation necessary to establish Mr. Wright's status. Therefore, Appellant had failed to establish one of the necessary conditions for eligibility. The AAA/GC made no error in attempting to verify the information in a questionable document, and in finding that Appellant had not established Mr. Wright's status once the VA failed to verify the information.

## 2. Challenge to Ownership

Even if Mr. Wright had been found to be a service-disabled veteran, Appellant has failed to meet the ownership and control requirements of the regulation.

The regulatory mandate is clear and unequivocal; a service-disabled veteran's ownership of an SDVO SBC must be unconditional and direct. 13 C.F.R. § 125.9(a); *see In the Matter of The Wexford Group International*, SBA No. SDV-105, at 7-8 (2006). In the case of a business that is organized as a limited liability company, at least 51% of each class of each member must be unconditionally owned by one or more service-disabled veterans. 13 C.F.R. § 125.9(c). However, a concern which is owned by another business entity that is in turn owned and controlled by a service-disabled veteran does not meet the regulatory ownership requirement. 13 C.F.R. § 125.9(a).

Although the record includes references to Appellant as a joint venture, Appellant is a separate legal entity, a limited liability company, which filed its articles of organization with the Secretary of State of Arkansas on November 14, 2006. Appellant concedes it is owned by two corporations; IITS owns 51% and Nabholz owns the remaining 49%.

Appellant's ownership therefore fails to meet the explicit requirements of the regulation for eligibility. The regulation expressly provides that a concern such as Appellant, a limited liability company, must be at least 51% directly owned by a service disabled veteran. Appellant does not meet this requirement because it is owned by two corporations. Further, the regulation also provides that a concern such as Appellant, a concern owned by corporations with the majority owner in turn owned by the individual upon whom the claim of eligibility is based, does not meet the requirement of direct ownership by a service-disabled veteran. Appellant's arguments that the AAA/GC's finding violated the spirit and intent of the regulation is meritless.



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The regulation is explicitly drafted to exclude firms such as Appellant from SDVO SBC status. Accordingly, the AAA/GC did not err in finding that Appellant was not directly owned by a service-disabled veteran.

### 3. Challenge to Control

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). In the case of a limited liability company, the service-disabled veteran must serve as managing member with control over all the company's decisions. 13 C.F.R. § 125.10(d).

Appellant failed to meet the requirements of the regulations. Due to the significant distance between Mr. Wright, who lives in Maryland, Appellant's office in Arkansas, and the solicitation work site in Arkansas, as well as the nature of the work required by the solicitation, the AAA/GC determined Mr. Wright did not control day-to-day management and administration of business operations as required by 13 C.F.R. § 125.10(a). Although some industries may allow for day-to-day management and business operations to be ably handled from a distant location, the inherent nature of construction mandates onsite supervision and direction. Construction routinely requires on-site interaction with customers and supervision of effort by subcontractors and other trades. *Matter of First Capital Interiors, Inc.*, SBA No. VET-112, at 8 (2007). Appellant cannot cure the deficiency by Mr. Wright "periodically" traveling to Arkansas.

Moreover, Appellant's Operating Agreement requires for consent of 75% of the ownership to sell, lease, mortgage or otherwise transfer the company's assets means Mr. Wright lacks the ability to independently control all decisions; thus, Appellant fails to meet the requirements of 13 C.F.R. § 125.10(d). The argument that the document may be revised later is meritless. As noted above, Appellant's status must be determined as of December 7th, the date of its submission of its offer. 13 C.F.R. § 125.11(a).

The AAA/GC's determination Appellant failed to meet the requirements for control is supported by the record and is not based on clear error of fact or law.

### III. CONCLUSION

After reviewing the record, I find the written protest file supports the AAA/GC's determination.

Appellant has 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,

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and affirm the AAA/GC's finding.

The AAA/GC's determination is AFFIRMED and the appeal of Appellant, IITS-Nabholz, LLC, is DENIED.

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

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CHRISTOPHER HOLLEMAN  
Administrative Judge