

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

IN THE MATTER OF:

SDV Solutions, Inc.,

Appellant,

RE: Four Points Technology, LLC

U.S. Department of the Treasury  
Financial Management Services,  
Washington, D.C.

SBA No. VET-116<sup>1</sup>

Decided: June 29, 2007

APPEARANCES

Sarah T. Zaffina, Esq., Albo & Oblon, LLP, Arlington, Virginia, for SDV Solutions, Inc.

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

Mark R. Dycio, Esq., T. Wayne Biggs, Esq., Derek L. Burrows, Esq., Law Offices of  
Mark R. Dycio, P.C., Fairfax, Virginia, for Four Points Technology, LLC

DECISION

I. Introduction and Jurisdiction

On May 2, 2007, SDV Solutions, Inc. (Appellant) protested the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) status of Four Points Technology, LLC (Four Points) after Four Points was awarded a contract pursuant to Solicitation No. 193895(v0321) issued by the U.S. Department of the Treasury, Financial Management Services (FMS). On May 30, 2007, the U.S. Small Business Administration (SBA) Director for Government Contracting (DGC) issued a determination denying Appellant's protest and finding Four Points met the SDVO SBC eligibility requirements at the time of its offer for the solicitation. On June 11, 2007, Appellant filed an appeal with the SBA Office of Hearings and Appeals (OHA). *See* 13 C.F.R. § 125.28.

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<sup>1</sup> OHA 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.

OHA decides SDVO SBC appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Accordingly, this matter is properly before OHA for decision.

## II. Issues

Whether the SDVO SBC status protest determination of the DGC was based on clear error of fact or law. 13 C.F.R. § 134.508.

Does a DGC have authority to issue a size determination as part of an SDVO SBC status protest determination?

## III. Facts

1. On March 7, 2007, FMS issued Request for Quotations (RFQ) No. 193895. On March 21, 2007, FMS reissued the requirements for RFQ as Solicitation No. 193895(v0321) (solicitation). FMS restricted the solicitation to SDVO SBCs. Quotes were due by March 27, 2007. On April 27, 2007, FMS awarded the contract arising out of the solicitation to Four Points. On April 30, 2007, FMS notified Appellant of the award to Four Points.

2. On May 2, 2007, Appellant filed a protest with FMS alleging Four Points was not an eligible SDVO SBC. Appellant challenged the SDVO SBC eligibility of Four Points on three specific grounds: (1) Four Points' Articles of Organization filed with the District of Columbia on April 5, 2002, indicate David J. Taylor is the only original organizer and Mr. Taylor is not a certified Service-Disabled Veteran (SDV); (2) Subsequent filings with the District of Columbia and Virginia in 2004, 2005, and 2006 were signed by Rusty Palmer as the authorized managing member, Mr. Palmer has demonstrated control over Four Points, and Mr. Palmer is not a certified SDV; and (3) Public information from Dun & Bradstreet accessed on April 30, 2007, lists three members of Four Points, Timothy Boyle, Mr. Palmer, and David Gilchrist, and Mr. Boyle and Mr. Palmer are not certified SDVs. Based on this information Appellant alleged Four Points was neither controlled nor owned by an SDV.

3. On May 8, 2007, the Contracting Officer (CO) for FMS forwarded Appellant's protest to the DGC.

4. On May 11, 2007, the DGC notified Four Points of Appellant's timely protest alleging Four Points is not an eligible SDVO SBC. SBA requested Four Points respond to Appellant's protest allegations, no later than May 18, 2007. Among other things, SBA required Four Points to:

[P]rovide evidence demonstrating that it is controlled by one or more SDVs. Such evidence must include (as applicable):

- A copy of the corporate bylaws, partnership agreement, or operating agreement
- A copy of the latest corporate meeting minutes

- Articles of incorporation
- Trust agreements
- Copies of agreements required for the operation of the business (e.g., franchise, license, and or similar contractual agreements with other concerns)
- Names, addresses, and resumes for all officers, directors, managing partners, and/or other managers of the firm

...

Protest File, at 214-15 (emphasis in the original).

5. On May 17, 2007, Four Points responded to SBA's May 11, 2007 request. Four Points provided: tax documents; documentation from the Department of Veterans Affairs certifying Mr. Gilchrist's certified SDV status; the names and addresses of those owning Four Points; the Operating Agreement for Four Points; a Lease Agreement; a credit application; meeting minutes; and other corporate documents and information. On May 22, 2007, Four Points supplemented its response with a copy of Mr. Boyle's Member Redemption Agreement and a copy of the monetary consideration referenced within the Member Redemption Agreement. Four Points did not submit *resumes* for all officers, directors, managing partners, and/or other managers as required by SBA.

6. On May 30, 2007, SBA denied Appellant's protest. The DGC determined, based on the totality of the evidence in the Record that Mr. Gilchrist is an SDV who owns and controls Four Points. In addition, the DGC summarized Appellant's protest and listed the evidence Four Points provided to SBA. Among the evidence (documents) the DGC referred to were:

- a. A copy of the Department of Veterans Affairs certification of Mr. Gilchrist's SDV status;
- b. Documents supporting the establishment of Four Points as a Limited Liability Corporation;
- c. Documents tending to establish Mr. Gilchrist has held the highest position in Four Points, that of managing member, since December 2005;
- d. Undated minutes of the annual meeting for Four Points that purport to establish Mr. Gilchrist owns 51% of Four Points (confirmed by Exhibit A to the Operating Agreement with the same information); and
- e. Various financial documents, including tax returns, security agreements, credit applications, and notices of assignment under Federal contracts.

7. Based upon the evidence provided to SBA by Four Points, the DGC determined that an SDV (Mr. Gilchrist) owns 51% of Four Points pursuant to 13 C.F.R. § 125.9; Mr. Gilchrist, as an SDV, controls Four Points as manager of Four Points; and under 13 C.F.R. § 125.11, Four Points was a small concern under NAICS code 423430.

8. There is no evidence in the Record concerning Mr. Gilchrist's experience or qualifications to run Four Points, such as a resume or a curriculum vitae, although Four Points' attorney claimed Mr. Gilchrist had the requisite experience as required by 13 C.F.R. § 125.10(b)

in a May 17, 2007 letter to the DGC. Nor did the DGC address Mr. Gilchrist's experience in his May 30, 2007 determination.

#### IV. Discussion

##### A. Arguments

##### 1. Appellant's Arguments on Appeal

Appellant alleges SBA's DGC committed clear error of fact and law in determining Four Points is an eligible SDVO SBC. Appellant argues Mr. Palmer, who is not an SDV, is the managing member of Four Points. Appellant asserts: Mr. Palmer filed corporate documents in the District of Columbia and Virginia identifying himself as manager of Four Points; Mr. Palmer is listed as the founder of the company on Four Points' website; Mr. Palmer provided ownership information to Dun & Bradstreet; and Mr. Palmer is listed as the primary contact in the Central Contractor Registration database.

Appellant notes Mr. Palmer filed the Application and Petition for Reinstatement of Articles of Organization for Four Points in the District of Columbia on May 5, 2006, and Mr. Palmer signed the Application as the Authorized Manager or Member. Appellant asserts there have been no subsequent filings in the District of Columbia removing Mr. Palmer's managerial authority. Appellant argues Mr. Palmer's filing of sworn documents in the District of Columbia asserting he is the manager of Four Points demonstrates Mr. Gilchrist, an SDV, does not control Four Points, as required by 13 C.F.R. § 125.10.

Appellant asserts, under SBA regulations, the SDV, Mr. Gilchrist, must have control over all decisions and the authority cannot be delegated to an individual who is not an SDV, Mr. Palmer. Appellant argues, despite this requirement, all publicly available documents indicate Mr. Palmer manages the daily operations of Four Points. Appellant alleges Mr. Palmer has made daily and long-term decisions for Four Points. Based on Mr. Palmer's involvement with Four Points, Appellant argues the SBA determination that Four Points is eligible as an SDVO SBC is based on a clear error of fact and law.

Appellant also alleges SBA did not assess Mr. Gilchrist's managerial experience in making its determination on Four Points' SDVO SBC status. Appellant asserts SBA's failure to assess Mr. Gilchrist's experience in evaluating his ability to control Four Points exhibits clear error of fact and law in determining the SDVO SBC status of Four Points.

##### 2. SBA Response

On June 18, 2007, SBA filed a response to the Appeal. SBA asserts the DGC's determination that Mr. Gilchrist is an SDV who owns and controls Four Points is not based on an error of fact or law and the determination should be upheld. SBA argues the Appellant cites documents that are outdated and irrelevant. With regards to ownership, SBA cites to the minutes of Four Points' Annual Members Meeting, which indicate Mr. Gilchrist owns fifty-one percent of each class of membership interest. SBA asserts, based on Mr. Gilchrist's membership interest in

Four Points, the Record supports the determination that an SDV owns Four Points. Further, SBA states the Amended Operating Agreement identifying Mr. Gilchrist as Manager of Four Points and vesting him with authority to make decisions supports the determination that an SDV controls Four Points. SBA argues Mr. Gilchrist's control is also evidenced through the contracts, leases, and financing agreements signed by Mr. Gilchrist in the Record.

### 3. Four Points Response

On June 19, 2007, Four Points filed a response to the Appeal. Four Points asserts the DGC's determination should be sustained. Four Points argues Appellant's arguments are based on unsupported assumptions and allegations relying on irrelevant documents. Four Points asserts it cooperated fully with the SBA to provide documentation and evidence to support that Mr. Gilchrist owns and controls Four Points. Four Points states, despite Appellant's assertions to the contrary, there were only two members of Four Points at the time the offer was made and the ownership requirements of 13 C.F.R. § 125.9(c) are satisfied. Four Points also argues the Record includes ample evidence of Mr. Gilchrist's experience managing the organization from 2005 to the present and therefore Four Points meets the control requirements of 13 C.F.R. § 125.10. Four Points states the Record sufficiently supports the DGC's determination that Four Points is an eligible SDVO SBC and the determination should be affirmed.

#### B. Applicable Regulation

##### 1. Control of an SDVO SBC

Four Points is a Limited Liability Company (Fact 6). Appellant raised Mr. Gilchrist's control of Four Points as an issue in its protest and appeal. 13 C.F.R. § 125.10 governs control of an SDVO SBC. 13 C.F.R. § 125.10 provides, in pertinent part:

Who does SBA consider to control an SDVO SBC?

(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 (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran). Control by one or more service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran).

(b) Managerial position and experience. A service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such 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 (or in the case of a veteran with permanent and severe

disability, the spouse or permanent caregiver of such veteran) 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.

...

(d) Control over a limited liability company. In the case of a limited liability company, one or more service-disabled veterans (or in the case of a veteran with permanent or severe disability, the spouse or permanent caregiver of such veteran) must serve as managing members, with control over all decisions of the limited liability company.

...

The language in 13 C.F.R. § 125.10(b) is conjunctive. That is, when a specific protest is made concerning control, in addition to finding whether an SDV holds the highest position in a concern, the DGC is also required to find whether the SDV has managerial experience of the extent and complexity needed to run the concern. Thus, if an Appellant properly raises actual control or experience, the DGC must address both control and experience because 13 C.F.R. § 125.10 requires proof of both.

The requirement for a dual or conjunctive finding contained in 13 C.F.R. § 125.10(b) is understandable. In writing 13 C.F.R. § 125.10(b), SBA realized that if it did not require SDVs to have experience sufficient to run a concern the SDV seemingly had the power to control on paper, the paper control would have no real effect. Instead, SBA would have created an opportunity to establish a fiction designed to gain award of SDVO SBC set-aside contracts and that could weaken the integrity of the SDV program.

## 2. Size Determination

The DGC also found Four Points to be a small concern under NAICS code 423430. Nevertheless, 13 C.F.R. § 121.1002 states:

The responsible Government Contracting Area Director or designee makes all formal size determinations in response to either a size protest or a request for a formal size determination, with the exception of size determinations for purposes of the Disaster Loan Program, which will be made by the Disaster Area Office Director or designee responsible for the area in which the disaster occurred.

In addition, 13 C.F.R. § 125.11 states:

(a) At time of contract offer, an SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract, (b) If the contracting officer is unable to verify that the SDVO SBC is small, the concern

shall be referred to the responsible SBA Government Contracting Area Director for a formal size determination in accordance with part 121 of this chapter.

### 3. The Record

The standard of review applicable to this appeal is whether the DGC's SDVO SBC protest determination was based upon a clear error of fact.<sup>2</sup> 13 C.F.R. § 134.508. Further, 13 C.F.R. § 134.512 provides:

What are the limitations on new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto.

My review in an SDVO SBC appeal is limited to the record the DGC relied upon in rendering the SDVO SBC determination.

### C. Analysis

#### 1. Introduction

On its surface, this appeal appears to involve only whether Four Points is 51% owned and controlled by Mr. Gilchrist. However, in application, 13 C.F.R. § 125.10(b) requires that the DGC base his determination of control upon more than a mere finding that an SDV has the power to run or actually runs the operations of a concern. Instead, 13 C.F.R. § 125.10(b) mandates a two step process, *i.e.*, the DGC must find: (1) the concern is controlled by an SDV; and (2) the SDV has managerial experience consistent with the requirements of the regulation.

I also note that the DGC discusses the size of Four Points in his determination. This discussion and conclusion has no legal effect because only the Government Contracting Area Director may issue a formal size determination.

#### 2. The Record Does Not Support the SDVO SBC Determination

The Record before me contains no evidence that Mr. Gilchrist is qualified to manage or operate Four Points (Facts 5 and 8). This absence of evidence is despite SBA's May 11, 2007 written directive to Four Points that it provide evidence demonstrating that Four Points "is controlled by one or more SDVs [and] . . . evidence *must* include . . . Names, addresses, and

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<sup>2</sup> I note that SBA changed the title of the Assistant Administrator of Government Contracts (AA/GC) position referenced in 13 C.F.R. § 134.508 to the title Director for Government Contracting (DGC referenced throughout this decision). The duties remain the same.

resumes for all officers, directors, managing partners and/or managers of the firms.” (emphasis in italics added) (Fact 4).

The SBA's requirement for Four Points to provide a resume to prove control is clear evidence that the SBA knew it needed proof that an eligible SDV had the requisite experience for the DGC to determine Four Points was controlled by that SDV. Nevertheless, the DGC did not discuss the issue of Mr. Gilchrist's experience in the SDVO SBC determination. Since the DGC did not even review if Mr. Gilchrist had the management experience as 13 C.F.R. § 125.10(b) requires, it was clear error for the DGC to determine Four Points is controlled by an SDVO SBC.<sup>3</sup>

In addition, I note that Four Points also realized it was required to prove Mr. Gilchrist had the requisite experience to prove it was controlled by an SDV. Specifically, counsel for Four Points stated:

SBA's regulations further state at 13 C.F.R. section 125.10 that the management and daily business operations of an SDVO SBC must be controlled by one or more service-disabled veterans. . . . In the case at hand, and thus in the case of Four Points, David Gilchrist, a service-disabled veteran, undertakes the management and daily business operations of Four Points, an SDVO SBC.

Moreover, in compliance with 13 C.F.R. section 125.10(b) David Gilchrist holds the highest officer position in the concern (as a manager) and possesses the managerial experience of the extent and complexity needed to run Four Points as a going concern.

Protest File, at 68 (May 17, 2007 letter from Counsel for Four Points to DGC).

Along with the plain meaning of 13 C.F.R. § 125.10(b), I find counsel's statement to be an admission that proof of managerial experience is required to prove Four Points was controlled by an SDV. Despite this admission, Four Points inexplicably failed to comply with the SBA's precise directive to produce resumes detailing the experience of its management. Although I decline to draw a negative inference from Four Points' omission, I do find the DGC should have discussed the absence of the information SBA required in the SDVO SBC determination<sup>4</sup> and that the DGC's failure to do so is clear error because of the criticality of this requirement.

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<sup>3</sup> See *Matter of Eason Enterprises OKC, LLC*, SBA No. VET-102, at 9-11. (2005)(explaining regulations require SBA to go beyond titles and to review individuals' experience in the industry and in management to determine control).

<sup>4</sup> See 13 C.F.R. § 121.1008(d), which addresses the question of when SBA may take an adverse inference when a concern fails to provide requested information. I note that it is a common practice for SBA's Area Offices to take negative inferences.



### 3. The SDVO SBC Determination Erroneously Found Four Points to be a Small Concern Under the Applicable NAICS Code

Only an Area Office within SBA's Office of Government Contracting may issue a formal size determination. 13 C.F.R. § 121.1002 and 13 C.F.R. § 125.11. Accordingly, it is clear error for the DGC to find Four Points to be a small concern under the applicable NAICS code. This is because, if the SDVO SBC's size status is in issue, there is no provision for informal size opinions, which have no force and effect of law. Instead, all size matters must be referred to the cognizant Area Office for a formal size determination.

### V. Conclusion

Four Points failed to provide evidence critical to a finding of control of it by an SDV as required by 13 C.F.R. § 125.10(b). Specifically, Four Points failed to provide evidence, as required by SBA, of the experience of its management. Hence, Four Points failed to establish that its SDV manager had management experience of the extent and complexity needed to run Four Points. Accordingly, it is both an error of law and fact for the DGC to have found that Four Points is controlled by an SDV. Therefore, pursuant to 13 C.F.R. § 125.27(g), the FMS CO may not count award of the contract arising from the solicitation to an SDVO SBC and Four Points cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it can prove it is controlled by an SDV as required by 13 C.F.R. § 125.10(b).

Appellant's Appeal is GRANTED. The DGC's May 30, 2007 SDVO SBC determination finding Four Points to be an eligible SDVO SBC concern is REVERSED.

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

THOMAS B. PENDER  
Administrative Judge