

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

IN THE MATTER OF:

Four Points Technology, LLC

Petitioner

Solicitation No. 193895(v0321)
U.S. Department of the Treasury
Financial Management Service
Washington, D.C.

SBA No. VET-120

Decided: August 17, 2007

APPEARANCES

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

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

ORDER DENYING PETITION FOR RECONSIDERATION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On July 19, 2007, Four Points Technology, LLC (Four Points), filed a Petition for Reconsideration of my decision in *Matter of SDV Solutions, Inc.*, SBA No. VET-116 (2007) (the *SDV Solutions* decision).

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides appeals of Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) protest determinations, including requests for reconsideration, 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 me for reconsideration.

II. Issue

Whether Four Points has made a clear showing of an error of fact or law material to the *SDV Solutions* decision. 13 C.F.R. § 134.515(b).

III. Background

On June 29, 2007, I issued the *SDV Solutions* decision. In that decision I found Four Points had failed to provide to the SBA's Director for Government Contracting (DGC) evidence pertaining to the experience of its management. This evidence was critical to the DGC's finding that Four Points is controlled by a service-disabled veteran as required by 13 C.F.R. § 125.10(b). Thus, I concluded it was an error of law and fact for the DGC to have found that Four Points is controlled by a service-disabled veteran and I reversed the DGC's May 30, 2007 determination finding Four Points to be an eligible SDVO SBC concern for the instant procurement.

On July 19, 2007, Four Points filed a timely PFR. On July 24, 2007, I issued a Notice and Order that permitted any interested party to respond by July 31, 2007. On July 31, 2007, SDV Solutions filed its opposition to the PFR.

IV. Discussion

A. Arguments

1. Four Points' Arguments

While admitting it failed to produce the resume of Mr. Gilchrist (Four Points' President and CEO) (as required by SBA), Four Points argues "the Record contains documentation that clearly recites Gilchrist's career history and experience and, thus, a sufficient basis for determining he possesses the ability to effectively manage Four Points." Specifically, Four Points asserts the Record contains various contracts, financing and security agreements, and Notices of Assignment relating to other government contracts executed by Mr. Gilchrist showing he has been exercising control over Four Points' day-to-day activities and operations "for the past three years." In addition, Four Points argues that SDV Solutions provided a Dun and Bradstreet Background Report (D&B Report) that serves the same function as a resume. Finally, Four Points argues the excerpt from its webpage in the Record concerning its leadership team (also provided by SDV Solutions) provided information about Mr. Gilchrist's experience, to wit:

"Chief" Gilchrist has over 22 years experience in government programs, personnel, contracts, and logistics management. During his tenure in the U.S. Navy, Mr. Gilchrist managed supply and warehousing for aviation materials, developed and managed an aviation tool control program and maintained an Individual Material Readiness Listing (IMRL). Mr. Gilchrist was also an U.S. Government certified purchasing agent for over seven years. With well over 15 years experience in GSA purchasing and a variety of other government contracts, he has also managed hazardous material/hazardous water programs in relation to Florida EPA requirements. During his last active duty assignment, Chief Gilchrist provided oversight for the instruction, supervision, and evaluation of well over 200 active duty personnel. Retired as a Service Connected Disabled Veteran, Gilchrist saw action while on active duty in Desert Shield, Desert Storm, and Bosnia.

(Record at 57)

Four Points asserts that when all of the documents it has identified are read together, they are sufficient to “paint a detailed history of Gilchrist’s career history and his ample qualifications to manage Four Points, a reseller of IT [Information Technology] equipment.” Accordingly, Four Points asserts it was not clear error for the DGC to have omitted discussion of Mr. Gilchrist’s qualifications to run Four Points and it was clear error of fact for me to have found the Record contains no evidence on this issue.

Further, Four Points asserts SDV Solutions did not raise the issue of Mr. Gilchrist’s managerial experience to control the concern and thus it was unnecessary for the DGC to discuss this issue in the DGC’s analysis of control under 13 C.F.R. § 125.10. In support, Four Points quotes from SDV Solutions’ protest, which stated:

1. Four Points Technology L.L.C. original Articles of Organization filed with the District of Columbia on April 5, 2002 list David J. Taylor as the only original organizer. . . .
2. Subsequent filings with the District of Columbia and State of Virginia On July 30, 2004, April 21, 2005 and May 5, 2006 has Rusty Palmer signing off as the authorized managing member of Four Points Technology L.L.C. . . . Rusty Palmer has demonstrated control over Four Points Technology L.L.C. as the manager prior to and after the arrival of David Gilchrist [sic] (President). . . .
3. Public information from D&B printed on April 30, 2007 lists three members of Four Points Technology L.L.C.. This information was provided verbally to D&B by Rusty Palmer. . . .

Alternatively, if managerial experience must be discussed, Four Points requests the matter be remanded to the DGC.

Four Points also challenges the sufficiency of the protest and whether it related to Mr. Gilchrist’s managerial experience or proffered any credible evidence that he lacked managerial experience. Thus, Four Points argues, there was no reason for the DGC to address the qualifications of Mr. Gilchrist.

2. SDV Solutions’ Arguments

SDV Solutions argues Four Points has failed to establish OHA made a clear error of fact or law material to its decision in *SDV Solutions*. Accordingly, OHA should deny Four Points’ PFR.

SDV Solutions offers that 13 C.F.R. § 125.10 requires legitimate SDVO SBCs to be controlled by a service-disabled veteran with appropriate managerial experience. Thus, upon a protest, the DGC must address both control and experience in determining whether a business is an eligible SDVO SBC. Further, there must be specific proof in the Record of Mr. Gilchrist’s

experience to manage Four Points. Absent that proof and the DGC's failure to address the evidence in the Record or the requirement for experience, the DGC made clear errors of both fact and law.

Finally, SDV Solutions points out that OHA may remand an SDVO SBC determination under 13 C.F.R. § 134.515(c) only if the determination fails to sufficiently address issues of decisional significance, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. SDV Solutions asserts that since the evidence in the record is inadequate to support a finding that Mr. Gilchrist has the requisite experience, the DGC had little to review or explain and thus OHA lacks authority to remand the matter to the DGC for a new SDVO SBC status determination.

B. Applicable Regulation and Law

Control requirements for eligible SDVO SBCs are addressed in 13 C.F.R. § 125.10, which states:

(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.

(emphasis added).

As explained in the *SDV Solutions* decision (at 6), the requirements of 13 C.F.R. § 125.10(b) are conjunctive. That is, in addition to addressing whether a service-disabled veteran holds the highest position in a concern, this regulation requires the DGC to find whether the service-disabled veteran has managerial experience of the extent and complexity needed to run the concern and, thus, whether the service-disabled veteran is capable of controlling the concern.

Hence, if a protesting concern properly raises either 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 to demonstrate both aspects of control deters potential abuse of the program where qualified individuals who are not service-disabled veterans transfer the legal right to control a concern to an inexperienced and thus unqualified service-disabled veteran who would merely serve as a front for the purposes of gaining set-aside government contracts.

Protest requirements for ownership and control are addressed in 13 C.F.R. § 125.26, which states, in relevant part:

(b) Ownership and control. In cases where the protest is based on ownership and control, the Associate Administrator for Government Contracting will consider a protest only if the protester presents credible evidence that the concern is not 51% owned and controlled by one or more service-disabled veterans. . . .

13 C.F.R. § 125.26(b) does not require a protesting concern to prove why a concern is not owned or controlled by a service-disabled veteran. Rather, 13 C.F.R. § 125.26(b) requires a protester to present “credible evidence” that a concern is not owned or controlled by a service-disabled veteran. Because the most reliable information concerning ownership and control of a concern is usually only in the hands of the protested concern, it follows that this standard is not rigorous. Rather, the standard is such that if the “credible evidence” provided by the protesting concern is sufficient to provide reasonable notice as to the grounds upon which the ownership and control of the protested concern is questioned, that is sufficient. Thus, if the DGC (SBA) and the protested concern received reasonable notice of the nature of the protest, that is sufficient.

PFRs for Service-Disabled Veteran Owned Small Business Concern appeal decisions are controlled by 13 C.F.R. § 134.515(b). The regulation states:

(b) The Judge may reconsider an appeal decision within 20 calendar days after service of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within 20 calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

PFRs, whether initiated by a party or a judge, must be considered with exceptional care. *Seldovia Native Ass’n Inc. v. United States*, 36 Fed. Cl. 593, 594 (1996), *aff’d*, 144 F.3d 769 (Fed. Cir. 1998) (quoting *Carter v. United States*, 207 Ct. Cl. 316, 318 (1975)).

A PFR must be based upon clear error of law or mistake of fact in the original decision and is not intended as an opportunity to relitigate a matter. 13 C.F.R. § 134.227(c); *see Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992) (citations omitted). A PFR is appropriate only in limited circumstances, such as where OHA has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties. *See Quaker Alloy Casting Co. v. Gulfco*

Indust., Inc., 123 F.R.D. 282, 288 (N.D.Ill. 1988) (quoting *Above The Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A PFR “must be supported ‘by a showing of extraordinary circumstances which justify relief.’” See *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff’d*, 250 F.3d 262 (Fed. Cir. 2000)). Reconsideration of a decision is not meant as an opportunity to recapitulate the cases and arguments previously considered in the original decision. See *Fru-Con Constr. Corp.*, 44 Fed. Cl. at 301 (quoting *Cataret Savings Bank, F.A. v. Shushan*, 721 F. Supp. 705, 706 (D.N.J. 1989)).

C. Analysis

1. SDV Solutions’ Protest Raised the Issue of Both Aspects of Control and Four Points’ Response Recognized This Fact

In its protest, SDV Solutions disputed who controlled Four Points by asserting Mr. Palmer controlled Four Points, *e.g.*,

2. Subsequent filings with the District of Columbia and State of Virginia On July 30, 2004, April 21, 2005 and May 5, 2006 has Rusty Palmer signing off as the authorized managing member of Four Points Technology L.L.C. . . . Rusty Palmer has demonstrated control over Four Points Technology L.L.C. as the manager prior to and after the arrival of David Gilchrist [sic] (President). . . .
3. Public information from D&B printed on April 30, 2007 lists three members of Four Points Technology L.L.C.. This information was provided verbally to D&B by Rusty Palmer. . . .

SDV Solutions’ protest allegation necessarily made Mr. Gilchrist’s control and qualifications to control Four Points the issue. As I found in the *SDV Solutions* decision, SBA required Four Points, when proving control, to provide resumes for all officers, directors, managing partners, and/or other managers of the firm. SBA’s action confirms that it too understood that qualifications were at issue. What is more, Four Points’ May 17, 2007 Response to the Protest contended Mr. Gilchrist “possesses the managerial experience of the extent and complexity needed to run Four Points as a going concern.” (Record at 32 and Fact 8, *SDV Solutions*.) However, Four Points provided no evidence, not even the resumes SBA specifically requested, to support its contention.

Four Points’ Response to the Appeal Petition further confirmed Four Points understood Mr. Gilchrist’s experience was at issue. Near the close of its Response to the Appeal Petition, counsel for Four Points wrote:

Despite SDV’s bald allegations that Gilchrist does not actually exert the required level of control or have the experience necessary to manage Four Points, the record contains ample evidence dating from 2005 to the present of Gilchrist’s management of the organization. See *Id.* At the very least, Gilchrist clearly has gained the experience necessary [sic] manage the company, as required by the

SDVO SBC regulations, over the past two (2) years, if he did not already possess such expertise. As such, the record clearly supports the Director's determination that the requirements of 13 C.F.R. § 125.10 are satisfied.

(Response to Appeal Petition at 6-7).¹ Based upon the foregoing, I find Four Points recognized the issue of Mr. Gilchrist's control of Four Points and thus his managerial experience was at issue. Hence, Four Points had an obligation, in addition to establishing his legal right to control Four Points, to prove Mr. Gilchrist actually had the management experience required by 13 C.F.R. § 125.10(b).

2. Four Points' Challenge of the Adequacy of the Protest is Inappropriate

OHA does not permit parties to make arguments concerning matters they failed to address previously, unless there was no way they could have anticipated the matter would be at issue (the party could not have addressed the issue). As I have already found, SDV Solutions challenged control of Four Points. This, of necessity, made an issue of whether Mr. Gilchrist had the: (1) legal right to control Four Points as its highest officer; and (2) managerial experience of the extent and complexity needed to run Four Points. Therefore, Four Points' challenge to the adequacy of the protest is both late and inappropriate.

To review, SBA provided Four Points with SDV Solutions' May 2, 2007 protest on May 11, 2007 and required it to respond to SDV Solutions' protest allegations (*SDV Solutions* decision, Fact 4). Four Points replied to SDV Solutions' protest allegations on May 17, 2007² and amended its reply on May 22, 2007. Even though Four Points provided significant detail concerning Mr. Gilchrist's legal right to control the operations of Four Points, Four Points made no attempt pursuant to 13 C.F.R. § 125.26(b) to challenge the credibility of the evidence underlying SDV Solutions' protest. Nor did Four Points challenge the credibility of SDV Solutions' protest allegations pursuant to 13 C.F.R. § 125.26(b) in its Response to the Appeal Petition. Based upon these facts, I hold it is too late for Four Points to mount a challenge of SDV Solutions' protest allegations pursuant to 13 C.F.R. § 125.26(b) in its PFR because it waived its right to challenge the specificity of the protest allegations when it chose not to challenge the specificity of the protest in response to the protest.

Even if I had not held Four Points waived its right to argue the sufficiency of SDV Solutions' protest, I still would find SDV Solution's protest to be sufficient. As I explained above (IV. B.), 13 C.F.R. § 125.26(b) is not a rigorous standard given the short time limit for filing a protest and SBA's expectation that it is the protested concern that will possess the more accurate information. Hence, there is no requirement that the protester's evidence be the best or even correct.³ As long as the evidence SDV Solutions submitted provided reasonable notice as to the grounds upon which SDV Solutions challenged ownership and control of the protested concern, the protest is sufficient.

¹ See also Response at pages 3-4.

² Four Points erroneously dated its reply as March 17, 2007.

³ If a protested concern were to establish a protester had alleged evidence in bad faith, this would mean the protest was insufficient under 13 C.F.R. § 125.26(b).

In the present instance, plainly relying upon public information, SDV Solutions asserted Four Points was not controlled by a service-disabled veteran since neither Mr. Palmer nor Mr. Boyle (two of Four Points' three members) was a service-disabled veteran. SDV Solutions also provided the web page excerpt that Four Points relies upon in this instance to establish Mr. Gilchrist's experience.

Four Points later established that Mr. Gilchrist owned 51% of Four Points and is Four Points' sole manager. However, I cannot say the evidence Four Points provided made SDV Solutions' allegations or evidence not credible within the meaning of 13 C.F.R. § 125.26(b).

Instead, SDV Solutions' evidence placed SBA and Four Points on reasonable notice as to the grounds of SDV Solutions' protest, *i.e.*, that Four Points was neither owned nor controlled by a service-disabled veteran. For example, part of what SDV Solutions alleged proved to be true, for neither Mr. Palmer nor Mr. Boyle was a service-disabled veteran and both had previously had an ownership interest in Four Points before Mr. Gilchrist obtained his 51% ownership interest. Thus, there was a basis for SDV Solutions' protest, for Mr. Gilchrist has not always owned 51% of Four Points, nor had he always been its manager. When I consider these facts with the evidence that SDV Solutions provided indicating Mr. Palmer had signed off as the managing member of Four Points, it is plain that SDV Solutions provided a credible basis to support a protest alleging that Four Points was not controlled by a service-disabled veteran.

3. When Control is Raised, Managerial Experience is Necessarily an Issue of Decisional Importance

SDV Solutions credibly raised the issue of who controlled Four Points. In response, SBA required Four Points to prove who owned and controlled Four Points and to provide resumes of its management. In issuing his determination the DGC did not discuss or address Mr. Gilchrist's experience.

Under 13 C.F.R. § 125.10(b), proof of control also requires the person having the legal ability to control the concern have managerial experience of the extent and complexity needed to run the concern, *i.e.*, the service-disabled veteran in legal control must actually have the capability to control the concern. Accordingly, when the DGC finds a service-disabled veteran legally controls a concern, the DGC must also discuss why the evidence in the record is sufficient to find the service-disabled veteran has the requisite experience required by 13 C.F.R. § 125.10(b). If the DGC does not find that the service-disabled veteran has the experience required by 13 C.F.R. § 125.10(b) and discuss the evidence supporting such a finding, as is true in this case, then the DGC did not discuss an issue of decisional significance. Accordingly, I would have had the discretion to remand the determination to the DGC (13 C.F.R. § 134.515(c)) provided there was sufficient evidence in the record for the DGC to determine Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points.

4. The Evidence in the Record is Insufficient to Establish Mr. Gilchrist's Managerial Experience

I considered the entire Record before ruling the Record was insufficient to establish Mr. Gilchrist had the experience needed to run Four Points. Contrary to Four Points' assertion, the issue is not merely the absence of a resume, although that is relevant. Rather, the issue is that the Record underlying the DGC's determination lacks reliable evidence that Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points, because Four Points failed to provide evidence, as required by SBA, of the experience of its managers.

Four Points alleges the Record contains three pieces of evidence that when considered together prove Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points.

While Four Points did provide sufficient evidence that Mr. Gilchrist had the legal ability to control Four Points, it did not provide any evidence beyond that. Thus Four Points did not, as required by 13 C.F.R. § 125.10(b) and the SBA in its May 11, 2007 letter, provide evidence that Mr. Gilchrist had managerial experience of the extent and complexity needed to run Four Points. Instead, Four Points provided evidence that legal control of Four Points had been transferred from an individual who is not a service-disabled veteran to an individual who is a service-disabled veteran and that the person transferring control was still prominent within Four Points. Contrary to Four Points' suggestion in its PFR (at page 8), this transfer should have raised, in the DGC's mind, a red flag concerning Mr. Gilchrist's actual control of Four Points.

Nevertheless, the most specific piece of evidence Four Points advocates is the web page excerpt that allegedly summarizes Mr. Gilchrist's experience and qualifications. This document contains inherent weaknesses. First, this excerpt is merely a vague thumbnail sketch of Mr. Gilchrist's experience. This document is conclusory and contains no details as to when Mr. Gilchrist's claimed experience occurred, no specific explanation of Mr. Gilchrist's role, or military rank, and no identification of for how long or where the experience mentioned occurred. In addition to the lack of specificity, this excerpt also fails to mention management training or education undertaken by Mr. Gilchrist. Therefore I hold as a matter of law that this web page does not contain sufficient reliable and specific information for a reasonable person to conclude Mr. Gilchrist had managerial experience of the extent and complexity needed to run Four Points.

Four Points also argues I should consider the information provided in the D&B Report in the Record. First, the D&B Report is hearsay and is not a business record of Four Points, but of D&B. Second, the D&B Report contains no indication of why it is reliable, *e.g.*, who created it and when. Third, it contains no detail that establishes Mr. Gilchrist's managerial experience. Thus, even though OHA has found a D&B report can be sufficient to support a specific size protest,⁴ it is not probative evidence to establish experience under the facts of this case. Consequently, I must: (1) decline to give the D&B Report any weight; and (2) specifically find that no reasonable person can give the D&B Report any weight because it is unreliable hearsay and because it does not contain sufficient relevant information to help a reasonable person

⁴ See *Size Appeal of Allan Baker, Inc. d/b/a Korrekt Optical*, SBA No. SIZ-4486 (2002).

conclude, even when considered with all the other information in the Record, that Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points.

Four Points also argues I should utilize the business records to find Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points. I decline to do so. All these documents show is that Mr. Gilchrist signed them or is mentioned therein, not that he understood them or negotiated them. To derive more meaning from these records requires speculation, which is always inappropriate. Accordingly, I hold they are not probative of Mr. Gilchrist's experience and cannot be used by a reasonable person to conclude Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points.

In writing the *SDV Solutions* decision, I found there was no evidence in the record concerning Mr. Gilchrist's experience or qualifications to run Four Points, such as a resume or a curriculum vitae (Fact 8). It would have been more precise to find the Record contains insufficient probative evidence for a reasonable person to conclude Mr. Gilchrist is qualified to manage or operate Four Points as required by 13 C.F.R. § 125.10(b). Notwithstanding, the result is the same.

5. SDV Solutions Contains No Clear Error of Fact or Law

As explained in *Size Appeal of Taylor Consultants*, SBA No. SIZ-4775, at 11 (2006), a clear error standard, such as the one articulated in 13 C.F.R. § 134.515(b) that is applicable to Four Points' PFR, requires that I have a definite or firm conviction that I made an error in the original decision that is material to that decision before I can grant a petition for reconsideration.

I have no conviction I made an error in *SDV Solutions*. Rather, I hold there is no material error in *SDV Solutions* for the record manifestly does not contain sufficient evidence for a reasonable person to conclude Mr. Gilchrist has managerial experience of the extent and complexity needed to run Four Points as required by 13 C.F.R. § 125.10(b).

V. Conclusion

I have considered the Record and the Arguments of the Parties. I find Four Points has not made a clear showing of an error of fact or law material to the *Matter of SDV Solutions, Inc.*, SBA No. VET-116 (June 29, 2007) decision. Accordingly, I DENY Four Points' Petition for Reconsideration.

THOMAS B. PENDER
Administrative Judge