

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

IN THE MATTER OF:

CymSTAR LLC

Appellant

Solicitation No. FA8223-07-R-20477

Department of the Air Force

Hill Air Force Base, Utah

SBA No. VET-123

Decided: November 28, 2007

APPEARANCES

Adam D. Grandon, Esq., Hall Estill, P.C., Tulsa, Oklahoma, for Appellant.

John A. Corder, Manager and CEO of CymSTAR LLC, Tulsa, Oklahoma, for Appellant.

Clyde Crawford, President of ACME Services, LLC, Albuquerque, New Mexico, for ACME Services, LLC.

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

DECISION

PENDER, Administrative Judge:

I. 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.

II. Issue

Whether the Director for Government Contracting for the U.S. Small Business Administration made a clear error of fact or law in determining that CymSTAR LLC is an ineligible Service-Disabled Veteran-Owned Small Business Concern. *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and Director for Government Contracting Determination

On July 17, 2007, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA8223-07-R-20477 as a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. On September 30, 2007, an award was made to CymSTAR LLC (Appellant). On September 30, 2007, the Contracting Officer (CO) notified unsuccessful offerors that Appellant was the successful offeror.

On October 3, 2007, ACME Services, LLC (ACME) filed a protest arguing that service-disabled veterans do not control Appellant's management and daily business operations, but rather Appellant is managed and controlled by its President, a non-service-disabled veteran.

On October 4, 2007, the CO forwarded Appellant's protest to the Small Business Administration's (SBA) Director for Government Contracting (D/GC). On October 16, 2007, Appellant filed its response to the protest and supporting documentation.

On October 25, 2007, the D/GC issued his determination finding that Appellant did not meet the SDVO SBC eligibility requirements at the time of offer for the instant solicitation. The D/GC found Appellant satisfied 13 C.F.R. § 125.9 because one or more service-disabled veterans directly and unconditionally own at least 51 percent of Appellant. The D/GC then found that Appellant satisfied the requirements of 13 C.F.R. § 125.10(b) as Mr. Corder, a service-disabled veteran, holds the highest officer position (Manager and CEO) at Appellant and has the managerial experience to run the concern.

However, the D/GC found that Appellant failed to comply with 13 C.F.R. § 125.10(d), which requires that one or more service-disabled veterans have control over all decisions of the firm. Under Appellant's Operating Agreement, the Manager (Mr. Corder) cannot make a fundamental decision without the written consent/ratification of a super-majority (defined in Article II of the Operating Agreement as more than sixty-six percent) vote of Appellant's members. Since the service-disabled veterans (Messrs. Corder and Witt) collectively have only a 63.24¹ percent ownership interest in Appellant, the D/GC found "they do not possess a sufficient ownership interest to overcome the firm's super-majority voting requirement for fundamental decisions," in violation of 13 C.F.R. § 125.10(d).

The D/GC further found that service-disabled veterans were not conducting the day-to-day management and administration of Appellant's business operations in violation of 13 C.F.R. § 125.10(a). The D/GC found that the President², a non-service-disabled veteran, conducted the daily management of Appellant under the supervision of Mr. Corder (who, along with Mr. Witt,

¹ The D/GC incorrectly tabulated a 62.4 percent interest. However, Mr. Corder has a 37.87 percent interest, and Mr. Witt has a 25.37 percent interest, for a total 63.24 percent interest. Protest File, Ex. 2, at 38.

² Mr. Nick is Appellant's President and former Manager. Protest File, Ex. 2, at 108.

resides over 200 miles from Appellant's corporate office in Tulsa, Oklahoma). The D/GC noted that 13 C.F.R. § 125.10(a) "does not speak in terms of a service-disabled veteran having 'ultimate authority' for a firm's daily management" but rather requires that a veteran "conduct" daily business operations. Determination, at 5. Accordingly, Appellant was found to violate the requirements of 13 C.F.R. § 125.10(a) and, as such, was found to be an ineligible SDVO SBC.

B. Appeal Petition

On November 7, 2007, Appellant filed the instant appeal of the D/GC's determination with the Office of Hearings and Appeals (OHA). First, Appellant disputes the D/GC's finding that the service-disabled veteran manager, Mr. Corder, did not personally conduct Appellant's day-to-day management at the time of Appellant's bid submission. Appellant asserts the D/GC incorrectly relied on the fact that Mr. Corder delegated limited business duties to his direct subordinate, Appellant's President (Mr. Nick). Appellant maintains that Mr. Corder conducts the day-to-day management of Appellant in accordance with 13 C.F.R. § 125.10(a). Appellant also asserts that Mr. Corder's supervision of his technical personnel, including the President (an aerospace engineer), is in compliance with 13 C.F.R. § 125.10(b).

Appellant argues that the D/GC wrongly interpreted the existence of sixty-one special powers of attorney authorizing Appellant's President to act upon various business decisions as evidence of Mr. Corder's abdication of day-to-day management. Appellant argues that these powers of attorney are not general powers, but rather specific, and evince Mr. Corder's control over Appellant's business operations by specifically delineating the President's powers. As further evidence of Mr. Corder's daily communications with staff, Appellant attached a log of approximately 800 emails between Mr. Corder and personnel and a log of 2800 business documents from Mr. Corder's files; both logs spanned the duration of the subject solicitation (Exhibits D and E).

Appellant also alleges error with the D/GC's finding that Mr. Corder could not have conducted day-to-day control over Appellant because Mr. Corder lives in Colleyville (a Ft. Worth suburb), Texas, while Appellant's headquarters are in Tulsa, Oklahoma. Appellant contends that working remotely does not hinder Mr. Corder's ability to manage Appellant's affairs.

Next, Appellant asserts the D/GC's finding that Appellant's ownership structure does not give its service-disabled veteran owners control over all of Appellant's decisions is a clear error. Appellant alleges that Messrs. Corder and Witt's 63.24% membership interest in Appellant gives them control over all of Appellant's decisions. While Appellant's Operating Agreement provides that a super-majority vote of more than sixty-six percent is required to make fundamental decisions, Appellant notes that its Operating Agreement, Section 12.1, states that "[a]ll Amendments to this Agreement shall require a Majority Vote of the Members." Because Mr. Corder and Mr. Witt can amend the definition of "Super-Majority Vote" at any time, thereby negating the effect of the super-majority requirement, Appellant asserts the service-disabled veteran members maintain control of Appellant.

Finally, Appellant argues that the D/GC's statement that Appellant is prohibited from

submitting offers on future SDVO SBC procurements is a misstatement of the regulations. Appellant argues that because the subject contract has already been awarded, Appellant is merely prohibited from submitting another offer as an SDVO SBC until it overcomes the reasons for the protest, citing 13 C.F.R. § 125.27(g).

C. Protestor Response

On November 15, 2007, ACME filed a Response. First, ACME argues that Appellant's new evidence (Exhibits D and E) must be excluded from consideration under 13 C.F.R. § 134.512.

Next, ACME asserts that the D/GC accurately noted that Appellant's limited liability company (LLC) status requires that one or more service-disabled veterans have control over all decisions. 13 C.F.R. § 125.10(d). Thus, ACME argues it was not clear error for the D/GC to conclude that Appellant violated 13 C.F.R. § 125.10(d) because service-disabled veterans only have a 62.4 percent ownership interest in Appellant, which does not overcome the firm's super-majority voting requirement of sixty-six percent for fundamental decisions.

ACME then argues that Appellant's position that another provision in Appellant's Operating Agreement allows the service-disabled veteran members to change the definition of super-majority vote at any time, and thus grant the veteran members the power to make fundamental decisions, fails for two reasons. First, SDVO SBC eligibility is determined as of the date the business submits its initial offer for an SDVO SBC set-aside under 13 C.F.R. § 125.15(a)(1). Thus, Appellant's eligibility should be determined as of August 14, 2007³, and as of that date, Appellant's super-majority voting provision was in effect and service-disabled veterans did not control Appellant. Second, ACME asserts that the fact that service-disabled veterans have the power at any time to change the definition of a super-majority vote does not change the fact that as of August 14, 2007, Appellant "had super-majority membership or voting requirements in effect which limited the rights of service-disabled veteran owners." Response, at 3 (emphasis in original) (citing *Matter of Technical and Project Engineering, LLC*, SBA No. SDV-110, at 7 (2006)).

ACME then asserts that the D/GC reasonably concluded that service-disabled veterans did not conduct Appellant's day-to-day management and instead contracted out day-to-day management to a non-service-disabled veteran. Finally, ACME submits that the D/GC's determination that Appellant was prohibited from submitting future offers as an SDVO SBC was a harmless error.

D. SBA Response

On November 19, 2007, SBA responded to the Appeal. First, SBA asserts that the language of 13 C.F.R. § 125.10(a) is very precise and requires the day-to-day management of a firm be conducted by service-disabled veterans. SBA argues that Mr. Corder is *delegating*

³ ACME's Response incorrectly references August 16, 2007, as the date of Appellant's initial offer.

management to a non-service-disabled veteran, which is not the same as *conducting* the management of a firm's daily business operations. SBA asserts that this fact, coupled with Mr. Corder residing over two hundred miles from Appellant's place of business, demonstrates that the D/GC determination was not based on clear error.

Next, SBA asserts that on the date Appellant submitted its bid on the subject solicitation, Appellant's Operating Agreement required approval of members holding at least sixty-six percent of the membership interests in the firm before Appellant's service-disabled veteran Manager could make a "fundamental decision" affecting the firm. SBA notes that the fact that the Operating Agreement could be amended at a hypothetical date in the future is irrelevant under 13 C.F.R. § 125.15(a)(1) because SDVO SBC eligibility is determined as of the date a business submits its initial offer for an SDVO SBC set-aside contract. Because Appellant's service-disabled veteran owners did not hold the requisite membership interest at the time of offer, SBA argues the D/GC's determination that one or more service-disabled veterans did not control all of the firm's business decisions as required by 13 C.F.R. § 125.10(d) was not based on clear error.

Finally, SBA avers that the D/GC determination "explicitly acknowledges that the prohibition against [Appellant] submitting bids on SDVO SBC contracts in the future may be rescinded by SBA if the firm makes those changes necessary to bring it into compliance with the program regulations." SBA Response, at 11.

E. Appellant's Reply

On November 19, 2007, Appellant moved to reply to ACME's response "in order to rebut certain mischaracterizations and errors..." Reply, at 1. First, Appellant reiterates its argument on appeal that Mr. Corder and Mr. Witt can amend the definition of super-majority vote at any time and, accordingly, service-disabled veterans have control over all decisions of the company.

Next, Appellant contends ACME mischaracterizes the determination as concluding that daily management was contracted out to non-service-disabled veterans. Instead, Appellant asserts that the D/GC found that Mr. Corder had supervisory authority over Appellant's President. Appellant then asserts that Mr. Corder filed Appellant's protest response, contrary to ACME's assertion otherwise.

Finally, Appellant asserts that Exhibits D and E should be admitted into the Record as these documents support its "arguments on appeal," which are allowed to be considered under 13 C.F.R. § 134.512. Alternatively, Appellant argues that OHA should remand the proceeding for a new SDVO SBC determination that considers these exhibits.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 business days of receiving the D/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 D/GC's 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 D/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard which is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

B. New Evidence

As a threshold matter, I must EXCLUDE Appellant's proffer of new evidence (Exhibits D and E) because 13 C.F.R. § 134.512 explicitly limits my 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. Moreover, it cannot be error on the part of the D/GC to fail to consider a document not presented to him. Therefore, since Appellant did not present the evidence contained in Exhibits D and E to the D/GC in response to the protest, I cannot consider Exhibits D and E now.

In excluding Exhibits D and E, I note that ACME's protest specifically alleged that a non-service-disabled veteran, Mr. Nick, was in charge of Appellant's daily business operations. Thus, Appellant had an opportunity to respond to ACME's specific allegation of control by Mr. Nick by placing Exhibits D and E in the Record before the D/GC as provided by 13 C.F.R. § 125.27(c)(1). Accordingly, Appellant cannot now argue it is merely submitting Exhibits D and E to support its arguments on appeal, for it had an opportunity to provide Exhibits D and E in responding to ACME's protest.

C. Eligibility Requirements for an SDVO SBC

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

The issue in this appeal is whether service-disabled veterans control Appellant. 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 an LLC, one or more service-disabled veterans must serve as managing members with control over all decisions of the LLC. 13 C.F.R. § 125.10(d).

D. Merits of Appeal

Compliance with 13 C.F.R. § 125.10(d)

Appellant is an LLC with 63.24 percent of its membership interests owned by service-disabled veterans. Control over an LLC is governed by 13 C.F.R. § 125.10(d), which provides, “In the case of a limited liability company, one or more service-disabled veterans...must serve as managing members, with control over all decisions of the limited liability company.”

Section 5.1 of Appellant’s Operating Agreement provides that Mr. Corder, a service-disabled veteran, is the Manager and CEO and thus holds Appellant’s highest officer position in compliance with 13 C.F.R. § 125.10(b). Appellant’s Operating Agreement, section 5.3(B), provides that Appellant’s Manager “shall not, without the written consent or written ratification of the specific act by a Super-Majority Vote of the Members, enter into or make a Fundamental Decision...on behalf of the Company.” Because 13 C.F.R. § 125.10(d) provides that service-disabled veteran managing members must have control over all decisions, these members must necessarily have control over all fundamental decisions.

However, Article II of Appellant’s Operating Agreement limits the control over fundamental decisions by service-disabled veteran members. Article II defines “Super-Majority Vote” as “the affirmative vote, or written consent in lieu of a vote, of Members having the right to vote more than sixty-six percent (66%) of the Outstanding Units held by all the Members.” Since Messrs. Corder and Witt collectively hold less than sixty-six percent of the outstanding units, service-disabled veteran owners do not have the super-majority vote needed to make a fundamental decision, in violation of 13 C.F.R. § 125.10(d).

Appellant argues that because Messrs. Corder and Witt hold sufficient ownership interests in Appellant to amend the Operating Agreement at any time, thereby negating the effect of the super-majority requirement, service-disabled veteran owners effectively have the power to control all of Appellant’s business decisions.

However, SDVO SBC eligibility is determined as of the date Appellant submits its initial offer because 13 C.F.R. § 125.15(a)(1) requires a concern to certify it is an SDVO SBC when it submits its initial offer. Accordingly, Appellant had to meet the control requirements outlined in 13 C.F.R. § 125.10 as of August 14, 2007. Failure by a putative SDVO SBC to meet SDVO SBC eligibility requirements cannot later be cured after submission of the initial offer. *See Matter of People Direct Placement Services, Inc.*, SBA No. VET-113, at 5 (2007). Thus, whether Appellant could hypothetically amend the super-majority voting requirements in the future is irrelevant, for Appellant did not meet the requirement that a service disabled veteran have actual control over *all* decisions of the LLC as of the date it submitted its offer and self-certified itself as an SDVO SBC. Accordingly, I hold the D/GC did not commit clear error in finding Appellant failed to satisfy the requirements of 13 C.F.R. § 125.10(d).

Compliance with 13 C.F.R. § 125.10(a)

Because I have held the D/GC did not commit clear error in finding Appellant failed to satisfy the requirements of 13 C.F.R. § 125.10(d), it is not critical that I reach the issue of Appellant's compliance with 13 C.F.R. § 125.10(a). Nevertheless, based upon the Record before the D/GC, I cannot say the D/GC made a clear error of fact or law when he concluded Appellant did not comply with 13 C.F.R. § 125.10(a) because a service-disabled veteran did not conduct the day-to-day management and administration of Appellant.

Future SDVO SBC Procurements

Appellant correctly asserts that the D/GC erred in concluding that Appellant may not submit offers on any future SDVO SBC procurements. SBA regulations unequivocally permit a concern to submit offers on *future* SDVO SBC procurements if it cures the eligibility issues and satisfies the definition of an SDVO SBC. 13 C.F.R. §§ 125.27(g), 125.28. Accordingly, the part of the determination stating Appellant may not submit offers on any future SDVO SBC procurements is in error, although it is a harmless error. Appellant may submit offers under future SDVO SBC procurements if it cures the reasons for the protest and satisfies the requirements for SDVO SBC eligibility stated elsewhere in 13 C.F.R. Part 125.

V. Conclusion

After reviewing the record, I hold the written protest file supports the D/GC's determination. Therefore, Appellant has failed to establish any clear error of fact or law in the D/GC's decision. Accordingly, I must deny the instant Appeal Petition, and affirm the D/GC's finding.

The D/GC's determination is AFFIRMED and the Appeal is DENIED.

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

THOMAS B. PENDER
Administrative Judge