

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

IN THE MATTER OF:

McGoldrick Construction Services Corporation

Appellant

RE: Strategic Perspectives Development, LLC

Solicitation No.

VA-101-07-RP-0030 (101-07-006)

Department of Veterans Affairs

SBA No. VET-127

Decided: March 12, 2008

APPEARANCES

Douglas L. Patin, Esq., and Steven A. Pozefsky, Esq., Bradley Arant Rose & White, LLP, Washington, D.C., for Appellant.

Sam Q. Le, Esq., Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

DECISION

HOLLEMAN, 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 Small Business Administration's Director for Government Contracting's (DGC) determination that Strategic Perspectives Development, LLC (SPD) met the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements was based on clear error of fact or law. *See* 13 C.F.R. § 134.508.

III. Background

A. Protest

The Department of Veterans Affairs Office of Construction and Facilities Management issued Solicitation No. VA-101-07-RP-0030 (solicitation) as a SDVO SBC set-aside. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$31 million size standard to the solicitation.

On December 21, 2007, the CO notified McGoldrick Construction Services Corporation (Appellant) award was made to SPD. On December 28, 2007, Appellant filed a protest of the award on the grounds that: (1) SPD's qualifying veteran, General Eugene E. Habiger, lacks the managerial experience required by 13 C.F.R. § 125.10(b); (2) General Habiger does not control SPD as required by 13 C.F.R. § 125.10 because SPD is dependent on South Bay EDC, Inc. (South Bay); and (3) SPD is part of a team that does not meet the applicable size standard.¹ Appellant submitted evidence, including: profiles of SPD, General Habiger, and SPD's senior vice presidents; a copy of an earlier DGC determination for the procurement disqualifying MBH Ventures and Blackhawk Ventures LLC as an ineligible SDVO SBC; and photos and contact information for SPD and South Bay.

On January 2, 2008, the CO forwarded Appellant's protest to the DGC. The DGC notified SPD of the protest on January 4, 2008. On January 16, 2008, SPD responded to the protest. On January 29, 2008, SPD supplemented its response.

On January 30, 2008, the DGC denied Appellant's SDVO SBC protest. The DGC determined SPD met the SDVO SBC eligibility requirements. The DGC stated General Habiger is a service-disabled veteran, owns fifty-two percent of SPD, serves as SPD's sole manager, possesses the managerial experience necessary to run SPD, and resides in San Antonio, Texas, the location of SPD's headquarters and the solicitation worksite. *See* 13 C.F.R. § 125.8-10.

B. Appeal Petition

On February 11, 2008, Appellant appealed the DGC's determination with the Small Business Administration's (SBA) Office of Hearings and Appeals (OHA). Appellant asserts the DGC committed clear error of law and fact in concluding SPD is an eligible SDVO SBC. Appellant argues the DGC failed to apply the appropriate legal standard and failed to consider all the evidence. Appellant states the DGC concluded General Habiger controls SPD based on a superficial assessment of SPD's operating agreement and General Habiger's residence. Appellant argues the DGC overlooked SPD's reliance on South Bay for assistance preparing the

¹ Appellant's allegation that SPD is part of a team that exceeds the solicitation's NAICS code's size standard is treated as a formal size protest. The Small Business Administration Office of Government Contracting notified SPD that a formal size determination would be processed independent of the SDVO SBC status protest. *See Matter of SDV Solutions, Inc.*, SBA No. VET-116, at 9 (2007).

bid, office space, and equipment, as well as the fact South Bay's president, Mr. Paul Renteria, is also a 24% owner and vice-president of SPD. Appellant asserts based on the evidence the DGC erred in determining General Habiger exercises independent judgment and control over SPD.

C. SBA Response

On February 20, 2008, SBA responded to the Appeal. SBA asserts that the DGC applied the correct legal standard and properly reviewed the evidence to determine General Habiger controls SPD. SBA states the DGC determined General Habiger met the requirements of 13 C.F.R. § 125.10: (1) he holds SPD's highest officer position, (2) possesses the managerial experience necessary to control SPD; and (3) he is responsible for the long-term decision making and the day-to-day management of SPD. Moreover, SBA argues the DGC considered the evidence as a whole and reviewed the totality of the circumstances before concluding SPD is an eligible SDVO SBC.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 business days of receiving the DGC'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 DGC'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 DGC 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 DGC's determination only if I have a definite and firm conviction the DGC erred in making a key finding of law or fact.

B. Merits of Appeal

In order to qualify as an eligible SDVO SBC, a business must be owned and controlled by a service-disabled veteran. 13 C.F.R. § 125.8-10. Appellant does not dispute that SPD is owned by General Habiger or that General Habiger is a service-disabled veteran. Thus, the critical issue is General Habiger's ability to control SPD.

The requirements to establish control of an SDVO SBC are addressed in 13 C.F.R. § 125.10. In accordance with 13 C.F.R. § 125.10(a), the management and daily business operations of the business must be controlled by a service-disabled veteran. More specifically the service-disabled veteran must hold the highest officer position in the business, as well as have the managerial experience necessary to operate the business. 13 C.F.R. § 125.10(b)

The record establishes General Habiger serves as chief executive officer of SPD, the highest position in the business. 13 C.F.R. § 125.10(b). The record also includes SPD's operating agreement and minutes of member meetings establishing General Habiger is SPD's sole manager with complete discretion to manage SPD's affairs with or without the consent of the two minority members, Mr. Renteria and Mr. Michael Novak, who each hold a 24% ownership interest. Additionally, the record establishes General Habiger personally attended the pre-bid meeting and walk through for the solicitation and provided final authority on the bid.

Furthermore, the record demonstrates General Habiger possesses the managerial experience necessary to operate SPD. General Habiger gained extensive managerial experience in the United States Air Force, including serving as a Four-Star General, as well as acquired managerial experience overseeing four thousand personnel as Security Czar within the Department of Energy and as the former president and chief executive of the San Antonio Water System. In addition to gaining managerial experience through previous positions, the record demonstrates General Habiger has specific knowledge of the construction industry.

Despite Appellant's arguments to the contrary, the DGC did look beyond the paper support for General Habiger's control. The DGC evaluated Appellant's concerns about SPD's reliance on South Bay, including South Bay's assistance in bid preparation, South Bay's and SPD's shared address and phone number, and the influence of South Bay's president serving as a vice-president and minority shareholder of SPD.

As reflected in the record, South Bay's assistance with SPD's bid is not unique. SPD has previously retained another business to assist with bid preparation. SPD is under no obligation to give South Bay a percentage of the work awarded and General Habiger's sworn affidavit states South Bay's role on the solicitation will be less than 5%. With regards to SPD's shared address and phone lines, SPD is one of three² subtenants subletting 50% of South Bay's office space at a commercially-reasonable rate. SPD splits the rent equally with the other two businesses, as well as its share of utilities and phone services. Finally, there is no prohibition that SDVO SBC officers cannot be employed by other businesses. The record provides no evidence that Mr. Renteria's minority interest in SPD coupled with his role at South Bay could empower him to exert undue influence on or control SPD.

V. Conclusion

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

² The DGC's determination letter states SPD is "one of four subtenant firms." However, South Bay subleases half of its space to three businesses, SPD, The Novak Group, LLC, and Strategic Transitions. Thus, there are four businesses occupying the space, South Bay and three subtenants. This minor numerical error in the determination is not substantive and does not alter SPD's eligibility as a SDVO SBC.

The DGC's determination that SPD was an eligible SDVO SBC at the time it submitted its offer 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).

CHRISTOPHER HOLLEMAN
Administrative Judge