United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
NuGate Group	SBA No. VET-132
Appellant	Decided: April 24, 2008
Solicitation No. VA261-08-RQ-0041 Department of Veterans Affairs	

APPEARANCES

Nancy Camardo, Esq., Camardo Law Firm, P.C., Auburn, New York, for Appellant.

Sam Q. Le, Esq., Office of General Counsel, Small Business Administration.

Matthew V. Edwards, Esq., Department of Veterans Affairs.

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 a firm is an eligible Service-Disabled Veteran-Owned Small Business Concern for a contract where the firm's principal office and the site of contract performance are 2,000 miles away from the Service-Disabled Veteran's home, and the firm's Partnership Agreement gives all partners the right to manage the firm.

III. Background

A. The Protest

On February 26, 2008, the Contracting Officer (CO) for the Department of Veterans Affairs (VA) gave notice that the apparent successful offeror for Solicitation No. VA261-08-RQ-0041 for janitorial services was NuGate Group (Appellant). The solicitation was set aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs).

On February 26, 2008, the CO filed his own protest of Appellant's status as an SDVO SBC, and forwarded the protest to the Small Business Administration (SBA) Director for Government Contracting (D/GC). On February 29, 2008, SBA informed Appellant of the protest and requested a response. The CO questions whether Appellant is actually controlled by a Service-Disabled Veteran.

B. The Response to the Protest

On March 7, 2008, Appellant responded to the protest. The Response included a Department of Veterans Affairs determination that Mr. Ronald Lewis, the individual upon whom Appellant's claim of eligibility is based, is a Service-Disabled Veteran. It includes Mr. Lewis's resume. Mr. Lewis served in the United States Air Force from 1964 to 1985, rising to the rank of Master Sergeant. He attended the Community College of the Air Force and the Noncommissioned Officer Academy. Mr. Lewis worked for the United States Postal Service from 1986 to 2003. Mr. Lewis formed Appellant with two other partners, Aaron Lewis and Jamila Stanford, in 2007. Mr. Lewis has a 51% interest in Appellant, Mr. Aaron Lewis a 29% interest, Ms. Stanford a 20% interest.

In a declaration filed with the Response, Mr. Lewis states that he is partner with a 51% interest in Appellant. He states all of Appellant's daily operations are focused on securing contracts. He actively monitors FedBizOpps to seek contracting opportunities. This work can be performed at any computer. Mr. Lewis reviews solicitations, makes an outline for Appellant's proposal, and reviews and approves the final proposals prior to submission. He then appoints one of his partners to be responsible for contract administration, who must have his approval before acting on Appellant's behalf. Mr. Lewis further states his intention to take an active role in the contract performance, despite being some distance from the job sites. Mr. Lewis asserts modern technology permits him to manage contracts that are performed some distance away from his home.

Appellant further submitted its Partnership Agreement (the Agreement). The Agreement states that the initial capital contribution of the partners would be:

Ronald Lewis	$0
Aaron Lewis	$500
Jamila Stanford	$500

Ms. Stanford is designated the firm's "Tax Matters Partner." The Agreement further

provides:

> **Section 4.01**. Ordinary Business Activities of the Partnership. All Partners of the Partnership shall share in management of the Ordinary Business Activities of the Partnership; however, all activities of the Partnership that are outside of the Ordinary Business Activities of the Partnership shall be conducted by or delegated by the majority partner. "Ordinary Business Activities of the Partnership" shall mean the normal day-to-day business activities of the Partnership and **exclude** activities involving decisions that could potentially have a substantial current or future impact upon Partnership assets, debts, income, or expenses.
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> **Section 4.02.** Regardless of whether or not they shall be considered outside the "Ordinary Business Activities of the Partnership", the following activities of the Partnership shall be conducted only by authorization of the majority partner:
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> a. The hiring or firing of Partnership employees;
> b. Incurrence of any expense in excess of $5,000;
> c. Purchase of any assets or inventory with a value in excess of $10,000;
> d. Entering into any lease with annual payments in excess of $10,000;
> e. Entering into any loan agreement or debt to or from the Partnership in excess of $10,000; and
> f. Entering into any contract with a monetary value in excess of $100,000.

C. The Determination

On March 19, 2008, SBA's D/GC issued a determination finding Appellant was not an eligible SDVO SBC. The D/GC found that Mr. Lewis was a Service-Disabled Veteran, and that he had a majority ownership interest in Appellant. However, the D/GC concluded Mr. Lewis did not control Appellant.

The D/GC noted that Mr. Lewis resides in Elmore, Alabama, more than 2,000 miles from Appellant's business office in San Jose, California, and more than 2,000 miles from the Palo Alto worksite of the instant contract.

Mr. Lewis has no management experience since 1985. His resume shows no experience managing firms remotely. The technology which Appellant asserts has made remote management possible has changed considerably since 1985, and there is no evidence Mr. Lewis has the experience to use it to manage a janitorial services firm such as Appellant. Further, management of a start-up company like Appellant will require considerable day-to-day supervision, especially with a janitorial services firm, which ordinarily will require onsite supervision of employees.

The D/GC further noted the other two partners both reside in San Jose, California, location of Appellant's business office. They are thus more likely to administer the firm's business operations and exercise day-to-day control. Moreover the Agreement states that all partners will share in the "Ordinary Business Activities of the Partnership," and thus allocates management of the firm's day-to-day affairs to all partners, which means Mr. Lewis does not control the day-to-day management of the firm.

On March 20, 2008, Appellant received the determination, and on April 2, 2008, Appellant filed the instant appeal.

D. The Appeal

Appellant asserts Mr. Lewis has control of the firm. He has 51% ownership, which cannot be diluted, and he has control of the firm's operations. Appellant asserts that, under the Agreement, Mr. Lewis has control over all decisions relating to contract performance, since all such decisions would potentially impact partnership assets, debts, income, or expenses. Appellant asserts the Agreement's language allowing for shared management should not be construed as granting shared control among the partners. Further, the Agreement's § 4.02 lists the important actions which can only be undertaken with the approval of the majority partner.

Appellant argues Mr. Lewis's Declaration establishes that he controls the work Appellant performs. Despite any errors in the text of the Agreement, it was always the intent of all partners to give Mr. Lewis complete control over all partnership functions.

Mr. Lewis's resume establishes his extensive management experience, and nothing in the regulation requires a Service-Disabled Veteran's management experience to come within any set period of time. Under OHA's case law, the only firms found ineligible because the Service-Disabled Veteran was too distantly located to manage the work have been construction firms. Here, the janitorial contract has a very detailed scope of work, which sets out the tasks to be performed, and thus there is less need for close supervision by the firm's principal. Further, the instant contract requires some remote management, because it requires performance in three different locations.

Appellant further argues that Mr. Lewis will not require knowledge of advanced computer software to manage the firm from a remote location. The basic technologies of e-mail, telecopier, express courier services and cell phones will permit him to manage the firm from Alabama. Appellant cites OHA's decision in *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-166 (2006), which held that an owner's constant physical presence was not required to manage a firm. Here, it was always the intent of Mr. Lewis and partners that he always have complete control over all partnership functions. The D/GC erred in finding that Mr. Lewis was not in control of the firm.

E. Response to the Appeal

On April 10, 2008, SBA responded to the appeal. SBA argues that the D/GC correctly went beyond Appellant's formal partnership documents and analyzed the specifics of

Appellant's operations. The D/GC considered the distance between Mr. Lewis's residence and Appellant's business office and operations. SBA argues, based on OHA's case law, that an owner based so far away from the firm's headquarters and place of contract performance cannot be in control of the firm's day-today operations. SBA also points out the OHA decision Appellant relies upon was later vacated. *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-169 (2006). SBA argues that Appellant has not explained how, led by a manager with no experience in the industry and no experience in remote management, it intends to perform quality assurance to the extent required by the VA heath care system.

While ineligible individuals may be involved in the management of an SDVO SBC, the firm must still establish that the Service-Disabled Veteran conducts the firm's day-to-day management and long term planning. SBA argues the language of the Agreement supports the D/GC's decision, by giving Mr. Aaron Lewis and Ms. Stanford the power to control Appellant. Further, the fact that only Mr. Aaron Lewis and Ms. Stanford contributed the initial funds to Appellant supports a determination that Mr. Lewis does not control the firm.[1] The D/GC was not in error in finding that Appellant had failed to establish Mr. Lewis did not control the firm.

On April 14, 2008, the VA also filed a response to the appeal. The VA asserts Appellant's argument establishes it does not understand the complexity of the work to be performed. The VA asserts its experience with this type of contract mandates it is absolutely imperative to have the project manager in close proximity to the work site. The VA argues Mr. Lewis's resume shows almost 20 years experience in mail handling since his management experience as an NCO. The VA asserts Mr. Lewis's credentials do not establish the ability to manage Appellant from a distance. VA further asserts the Mr. Aaron Lewis's resume shows significant project manager experience here, and it is clear he will be the real manager. The VA also asserts *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-166 (2006), was vacated in *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-169 (2006), and thus it is not authority upon which Appellant may rely.

When SBA filed and served its response it failed to serve the Protest File on Appellant. In a telephonic conference on April 15, 2008, I orally ordered the Agency Representative to serve the Protest File on Appellant. The Agency Representative complied with my Order on April 16th.

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.

[1] SBA also argued from information in Appellant's proposal that Mr. Aaron Lewis and Ms. Stanford controlled Appellant. However, the proposal was not in the Protest File, and the D/GC did not rely on or mention it, so for SBA to rely on it here is an impermissible *post hoc* rationalization. *See Matter of L.D.V., Inc.*, SBA No. BDP-257 (2007).

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; *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 8 (2005) (*Eason*). 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. Merits of the Appeal

1. Eligibility Requirements for an SDVO SBC

An SDVO SBC is a small concern 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); s*ee also Eason*, at 8-9.

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); *see also Eason*, at 8-9.

However, it is not enough for qualification as an SDVO SBC that a concern is majority-owned and headed by a Service-Disabled Veteran. The concern's long-term decision making and day-to-day management must be controlled by one or more Service-Disabled Veterans. 13 C.F.R. § 125.10(a). SBA must go beyond the formalities of business ownership and titles and to examine how the applicant concern is actually run on a daily basis. *Eason*, at 9.

2. Appellant's Eligibilty

It is clear from the record that the D/GC properly found that Mr. Lewis is a Service-Disabled Veteran, and that he owns 51% of Appellant. The issue here is whether Mr. Lewis controls Appellant. Here, the D/GC properly looked at the actual operation of the company, beyond the question of ownership.

First, the language of § 4.01 of the Agreement undercuts Appellant by granting Mr. Aaron Lewis and Ms. Stanford the authority to manage Appellant's operations. Appellant's argument that management is different from control is specious; there are no grounds for finding any real difference between the two words. Appellant's additional argument that this was not its intent is also specious; Appellant must be bound by the actual language of its organizing documents. While the documents also enumerate a number of important business decisions which require Mr. Lewis's approval, the regulation is clear that the Service-Disabled Veteran

must also control the day-to-day management and operations of the company. It is equally clear the Agreement was designed so that Mr. Aaron Lewis and Ms. Stanford would share that management and control of day-to-day operations with Mr. Lewis. The Agreement fails to give Mr. Lewis all the power that the regulation requires he has over Appellant's business, and thus disqualifies Appellant as an SDVO SBC.

Further, the very real question of Mr. Lewis's distance from the business's operations supports the D/GC's finding of a lack of control. Both Appellant's headquarters and the place of contract performance are located in California, 2,000 miles from Mr. Lewis's location. OHA's precedents have upheld findings of a lack of control based upon the Service-Disabled Veteran being located such a long distance from the site of contract performance and the place of business. *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007); *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 (2006). While both of those cases involved construction contracts, the reasoning in both cases supports the D/GC's determination here. In each case the contract involved a Service-Disabled Veteran living a very long distance from both the firm's headquarters and the place of contract performance, and a contract which required intense supervision. In those cases, the contract was for construction; here it is for janitorial services, which the VA asserts requires close supervision. Thus, the same principles apply here, and these cases support a finding that Mr. Lewis is not in control of Appellant.

In *Matter of E2Si-SaLUT Joint Venture*, SBA No. VET-126 (2008) by contrast, the Service-Disabled Veteran lived in the same community as the firm's headquarters, the place of contract performance was only a few hours drive away, and the contract did not require intense supervision. Therefore, in that case the Service-Disabled Veteran was found to control the company. SBA and the VA are correct that *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-166 (2006) was vacated in *Matter of Minority Temporary Agency, Inc.*, SBA No. SDBA-169 (2006), albeit in response to a joint motion after settlement, and thus is, strictly speaking, not precedent. Even if it were precedent however, that case involved a different, less supervision-intense business (employment agency), and there was ample documentation in the record of the firms' principal managing its affairs from abroad. Accordingly, the case is distinguishable even were it not vacated.

Here, Mr. Lewis lives and works 2,000 miles from both Appellant's principal business office and the worksite of this procurement. There is no record of him having any experience in managing this type of contract, or having experience managing any enterprise from a remote location. Mr. Lewis's management experience is not more recent than 1985. While there may be no problem for him in adapting to new technologies, he has no experience in managing with them from a remote location. In addition, the VA asserts this type of procurement requires close, on-site supervision, which Mr. Lewis will not be able to provide.

More importantly, the firm's very structure gives the two minority partners the right to manage the day-to-day affairs of the company, two partners who put up cash to start this partnership when Mr. Lewis put up nothing. The record contains ample evidence to support the D/GC's finding that Mr. Lewis does not actually control Appellant.

Accordingly, I must find that nothing in the record before me leads to definite and firm

conviction that the D/GC made a clear error of fact or law in finding that Mr. Lewis did not control Appellant and that Appellant was thus not owned and controlled by a Service-Disabled Veteran. Therefore, I must DENY the instant appeal.

V. Conclusion

After reviewing the record, I find the written Protest File supports the D/GC's determination. 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 determination.

The Appellant's appeal is DENIED and the D/GC's protest determination that NuGate Group is not an eligible SDVO SBC is AFFIRMED.

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

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CHRISTOPHER HOLLEMAN
Administrative Judge