

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

IN THE MATTER OF:

Everything Parking, Inc.

Appellant

Solicitation No.

VA-528-08-RP-0054

U.S. Department of Veterans Affairs

SBA No. VET-136

Decided: June 25, 2008

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 (D/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining that Everything Parking, Inc. (Appellant) is an ineligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and D/GC Determination

On January 28, 2008, the U.S. Department of Veterans Affairs, Western New York Healthcare System, issued the subject solicitation as a total SDVO SBC set-aside. On May 1, 2008, the contract was awarded to Appellant.

On May 1, 2008, In & Out Valet Co. (In & Out) protested Appellant's SDVO SBC status with the Contracting Officer (CO). In & Out's protest alleged that Appellant's service-disabled veteran owner, Mr. Curtis Springer, did not control or manage Appellant. In & Out alleged, in part:

(4) Brian Haupricht is listed as the President of [Appellant] on the Corporate Roles and Mr. Springer, to our knowledge as of the time of the proposal was submitted held no official title within the company.

....

(6) In and Out Valet Co. suggests reviewing www.parking.net as well as www.ccr.gov these two sites will validate this information. As of today May 1, 2008 no mention of Mr. Springer exists to show that he is anything more than a Majority Stockholder of this company, which is attempting to use his disability to acquire contracts in which they are not qualified for, under the rules of the CFR, and the FAR.

On May 2, 2008, the CO referred In & Out's protest to the SBA Office of Government Contracting. On May 9, 2008, SBA notified Appellant of the protest and provided Appellant with a copy of the protest. SBA requested that Appellant provide a variety of documents to prove its SDVO SBC status, including its corporate meeting minutes and the names and addresses of all officers and directors.

On May 16, 2008, Appellant filed its response to the protest, its articles of incorporation, bylaws, tax returns, and Mr. Springer's Form DD-214. On May 20, 2008, Appellant asserted its directors were Mr. Springer and Mr. Brian Haupricht. Appellant further asserted Mr. Springer "is the majority shareholder and holds the highest office, as well as controlling interest, in [Appellant]. He has maintained this status since he bought the shares of Aaron Shocket [on] August 1, 2004." Appellant did not provide any documentation establishing Mr. Springer as Appellant's director or highest officer.

On May 29, 2008, the D/GC issued a determination finding Appellant was not controlled by one or more service-disabled veterans as required by 13 C.F.R. § 125.10 and thus Appellant does not qualify as a SDVO SBC.

The D/GC found that Mr. Springer qualified as a service-disabled veteran and owned Appellant, in compliance with 13 C.F.R. § 125.9. The D/GC found, however, that Mr. Springer was not on Appellant's Board of Directors, in violation of 13 C.F.R. § 125.10(e)(1). The D/GC found that while Mr. Springer's resume indicated he was Appellant's Director, the Record "does not contain any documentation demonstrating that he has actually been elected to the firm's board of directors." Determination, at 4. The D/GC found Mr. Haupricht's (Appellant's 29 percent stockholder) protest response claiming that Mr. Springer was a member of Appellant's Board of Directors unpersuasive absent "evidence indicating that [Mr. Springer's membership] has been included in [Appellant's] corporate minute book or filed with the corporate records as required by [Appellant's bylaws]." Determination, at 4.

Further, the D/GC found there was no evidence that Mr. Springer controlled the Board by having the percentage of voting stock necessary to overcome any supermajority voting requirement as mandated by 13 C.F.R. § 125.10(e)(1). Specifically, while Mr. Springer holds 63 percent of Appellant's outstanding shares of voting stock, Appellant's Shareholder Agreement

stipulates that approval of shareholders owning at least 80 percent of the firm's stock is required for various actions. Accordingly, the D/GC found that Mr. Springer's stock ownership was insufficient to overcome Appellant's supermajority voting requirements.

The D/GC then found that while Mr. Springer had the managerial experience necessary to run Appellant, Mr. Springer did not hold the highest officer position in violation of 13 C.F.R. § 125.10(b). Instead, the D/GC found that Mr. Haupricht, a non-service disabled veteran, was Appellant's President and thus under § 5.8 of Appellant's bylaws, Appellant's Chief Executive Officer (CEO).

Finally, the D/GC found that Mr. Springer did not control the day-to-day management of Appellant under 13 C.F.R. § 125.10(a) because Mr. Springer spends a significant amount of time in Ohio (Appellant is headquartered in North Carolina), where Mr. Springer owns and operates a nursing home. Absent evidence of Mr. Springer's ability to remotely oversee Appellant, the D/GC concluded that a service-disabled veteran does not control Appellant and thus Appellant is an ineligible SDVO SBC.

B. Appeal

On June 4, 2008, Appellant filed the instant appeal of the D/GC's determination with the SBA Office of Hearings and Appeals (OHA). Appellant states that because its bylaws are vague, Appellant had its attorneys "draw up a more specific agreement" showing that Mr. Haupricht and Mr. Springer were members of the Board and clarifying that Mr. Springer is CEO and Chairman of the Board. Appellant attached a May 20, 2008 document signed by Appellant's shareholders that elects Mr. Haupricht and Mr. Springer to the Board of Directors. Appellant also attached a May 29, 2008 document signed by Appellant's Board that appoints Mr. Springer as Chairman of the Board and CEO.

Appellant then refutes the D/GC's conclusion that Mr. Springer does not manage Appellant's daily operations. Appellant asserts that Mr. Springer no longer owns the Ohio nursing home (he sold it three years ago, as indicated on Mr. Springer's resume). Appellant maintains that Mr. Springer continues to own the nursing home's building and land, but Mr. Springer merely collects rent and pays taxes on the property. Appellant also attached Mr. Springer's tax returns evincing his rental real estate income from the nursing home. Appellant asserts that Mr. Springer has no operational involvement in the Ohio nursing home. Appellant contends that Mr. Springer bought a home in South Carolina in order to manage Appellant.

C. SBA Response

On June 13, 2008, SBA filed its response to Appellant's appeal. SBA urges OHA to affirm the D/GC's determination because the Record before the D/GC did not demonstrate that Appellant was controlled by a service-disabled veteran. SBA argues that although Appellant has taken steps to remedy some of the eligibility problems identified in the determination, the fact remains that at the time of its offer, Appellant was ineligible to represent itself as a SDVO SBC. Further, under 13 C.F.R. § 134.512, OHA may not admit evidence beyond the written protest file and should not consider the documents Appellant provided for the first time on appeal.

SBA also asserts that even if Appellant had taken the corrective actions prior to the determination, Appellant “would nevertheless remain ineligible to represent itself as an SDVO SBC given that Mr. Springer still does not hold a sufficient ownership stake to overcome [Appellant’s] supermajority voting requirement.” Response, at 8. SBA notes:

While [Appellant] retains the right under 13 C.F.R. § 125.27(g) to request that SBA re-examine its SDVO SBC status in the wake of the corrective actions it has taken, the firm will still need to either reduce the approval threshold under ¶ 8(b) of its August 1, 2004 Shareholder Agreement to less than sixty-three percent, or Mr. Springer will need to increase his ownership stake in the firm to at least eighty percent of [Appellant’s] outstanding stock [in order to qualify as an SDVO SBC].

Response, at 8.

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 her 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 that 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

Date SDVO SBC Eligibility is Determined

To be eligible for award of an SDVO SBC set-aside contract, the concern must be small within the size standard corresponding to the NAICS code assigned to the contract at the time of its contract offer. 13 C.F.R. § 125.11(a). In addition, an SDVO SBC must submit its representation that it is an SDVO SBC as of the time it submits its initial offer, including price, for a specific contract. 13 C.F.R. § 125.15(a)(1). Accordingly, a concern cannot cure its SDVO SBC failings once the concern has submitted its offer. Appellant must meet the regulatory control requirements as of the date of its submission of its initial offer, and it cannot alter its documents after that date in order to qualify for the procurement it sought.

New Evidence

I am not allowed to consider evidence submitted for the first time on appeal. The regulations explicitly limit review of an SDVO SBC determination to the written protest file before the D/GC at the time of the determination, and to the arguments on appeal. 13 C.F.R. § 134.512. Further, it cannot be error on the part of the D/GC to fail to consider a document not presented to her and not even in existence at the time of her determination. Accordingly, I EXCLUDE Appellant's proffered new evidence.

Control by a Service-Disabled Veteran

Pursuant to 13 C.F.R. § 125.10(b), a service-disabled veteran must hold the highest officer position in a concern. Further, one or more service-disabled veterans must control the Board of Directors. 13 C.F.R. § 125.10(e). A service-disabled veteran must be a member of the Board of Directors and have the percentage of voting stock necessary to overcome any supermajority voting requirements in order to control the Board of Directors. 13 C.F.R. § 125.10(e)(1).

Here, In & Out's protest put Appellant on notice that it needed to establish its service-disabled veteran owner, Mr. Springer, held the highest officer position and was a member of Appellant's Board of Directors. Appellant's response, however, merely asserted that Mr. Springer was a member of the Board and held the highest officer position. Appellant did not provide any documentation to support its assertion, aside from Mr. Springer's resume that stated he was Appellant's Director.

Section 3.3 of Appellant's corporate bylaws state that Appellant's directors "shall be elected at the annual meeting of shareholders." Further, § 2.11 provides, "Any action required or permitted to be taken at a meeting of the shareholders may be taken without a meeting if one or more written consents, setting forth the action so taken, shall be signed by all of the persons who would be entitled to vote upon such action at a meeting . . . and delivered to the Corporation to be included in the corporate minute book or filed with the corporate records." Appellant did not provide any evidence of a shareholder meeting electing Mr. Springer to the Board or shareholder consent (documented in the corporate records) in Mr. Springer's election to the Board.

Further, while Appellant's response stated that Mr. Springer held the highest office (without identifying what office he actually held), Section 5.8 of Appellant's bylaws provide that the President shall be the Chief Executive Officer "unless there is appointed a Chairman of the Board who is also designated the Chief Executive Officer." Appellant did not provide any evidence demonstrating that Mr. Springer has been appointed Chairman of the Board or officially designated the Chief Executive Officer. Instead, the Record reflects that Mr. Haupricht, a non-service-disabled veteran, is Appellant's President and thus Appellant's Chief Executive Officer under Section 5.8 of Appellant's bylaws.

Therefore, I find Appellant's unsupported assertion that Mr. Springer is a director and holder of Appellant's "highest office" to be per se insufficient to prove control under 13 C.F.R.

§ 125.10 when Appellant's bylaws specifically require documentation. When probative records should exist, a protested concern must provide them or the D/GC will find it is not controlled by a service-disabled veteran.

Accordingly, I find the D/GC did not commit clear error in finding Appellant an ineligible SDVO SBC.

V. Conclusion

Appellant has failed to establish a clear error of fact or law material to the D/GC's determination. Accordingly, 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