

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

IN THE MATTER OF:

DAV Prime/Vantex Service Joint Venture

Appellant

Solicitation No. W911S2-08-T-3009

SBA No. VET-138

Decided: August 15, 2008

APPEARANCES

Brian Finley, DAV Prime, Inc., Larue, Texas, for Appellant.

Kevin R. Harber, 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 (D/GC) determination that neither DAV Prime, Inc., nor DAV Prime/Vantex Service Joint Venture 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 and Determination

On March 14, 2008, the Directorate of Contracting at Fort Drum, New York, issued a solicitation seeking the provision of portable chemical toilet services. The Contracting Officer (CO) set the procurement totally aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs) and designated North American Industry Classification System

(NAICS) code 562991, Septic Tank and Related Services, with a corresponding \$6.5 million annual receipts size standard as the appropriate code for the procurement.

On June 2, 2008, the CO sent notice to the unsuccessful offerors that DAV Prime/Vantex Service Joint Venture (Appellant) was the successful offeror. Appellant is a joint venture between Vantex Service Corporation (Vantex) and DAV Prime, Inc. (DAV), a firm claiming SDVO SBC status. Vantex is the incumbent on this contract. On June 5, 2008, Major Contracting Service, Inc. (MCS), an unsuccessful offeror, filed a protest with the CO. MCS asserted Appellant would not be controlled by a Service-Disabled Veteran. On June 10th, the CO forwarded the protest to the Small Business Administration (SBA).

On June 26, 2008, SBA notified Appellant of the protest, and gave it the opportunity to respond. The letter advised Appellant it must provide “evidence demonstrating that it is controlled by” one or more Service-Disabled Veterans, and that failure to provide sufficient information and supporting documentation to establish Appellant was an eligible SDVO SBC would result in an adverse decision (emphasis in original).

On July 3, 2008, Appellant responded to the protest, denying MCS’s allegations. On July 15, 2008, Karen C. Hontz, SBA’s Director for Government Contracting (D/GC) sustained MCS’s protest.

The D/GC found that a joint venture may bid on an SDVO SBC contract if only one of the members is an SDVO SBC. 13 C.F.R. § 125.15(b). DAV claims eligibility as an SDVO SBC, and so Appellant’s claim of eligibility rests on DAV’s claim of eligibility. The D/GC further found that DAV controls the joint venture and receives at least 51% of the joint venture’s net profits, thus meeting the regulatory requirements for an SDVO SBC joint venture, provided DAV is an eligible SDVO SBC.

The D/GC further found that Brian S. Finley, the individual upon whom DAV’s claim of eligibility is based, is a Service-Disabled Veteran who unconditionally owns a majority interest in DAV, controls its Board of Directors, and has the highest position in the firm.

However, the D/GC found that Mr. Finley does not control the day-to-day management and administration of the DAV’s operations. The D/GC explained Mr. Finley is currently employed by Ernest Cobb County, Inc. (Cobb County), as a Route Manager and by Clearview Ventures (Clearview) as an Operations Consultant. Conversely, Mr. Finley’s resume did not identify any involvement on his part with the conduct of DAV’s business operations. Moreover, while Mr. Finley resides in Kennesaw, Georgia, DAV’s main address is Peoria, Illinois, and its mailing address in Larue, Texas. The contract at issue is to be performed at Fort Drum, New York, and Mr. Finley apparently plans only one trip to Fort Drum as part of administering this contract. Accordingly, the D/GC found that DAV, and thus Appellant’s, day-to-day management and administration is not controlled by a Service-Disabled Veteran. Appellant, therefore, is not an eligible SDVO SBC joint venture.

### B. Appeal Petition

On July 25, 2008, Appellant filed the instant appeal. Appellant asserts Mr. Finley does, in fact, control Appellant's day-to-day business. Appellant further asserts DAV had little business prior to bid submission on this contract, but what business operations it had were performed by Mr. Finley. Mr. Finley has terminated his employment with Cobb County. He retains his position with Clearview, but it is not demanding of his time.

Appellant further asserts that modern toilet companies operate and manage operations remotely. DAV's office is wherever Mr. Finley is located, with his computer and cell phone. He oversees daily operations electronically. Appellant asserts the D/GC erred in finding Mr. Finley does not manage its day-to-day operations.

### C. SBA's Response

On August 4, 2008, SBA responded to the Appeal. SBA asserts the SDVO SBC program regulations require SBA to go beyond the formalities of business ownership and titles, and examine how the concern is actually run on a daily basis. Appellant's response to the protest included no information on the management practices of the portable toilet industry in general or of Appellant in particular. Nor did the response to the protest address the fact that Mr. Finley's address is so distant from all relevant DAV locations. Therefore, SBA asserts, the D/GC's determination was correct based upon the evidence before her.

Further, the information Appellant attempts to submit on appeal concerning Mr. Finley's resignation from Cobb County, his minimal involvement with Clearview, and the management practices of portable toilet firms generally and Appellant's management practices in particular, are new evidence, inadmissible here on appeal.

## 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 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. SBA's Claim of Privilege

The Agency submits a claim of privilege under the deliberative process privilege as draft versions of the D/GC's determination, analysis by SBA personnel of the protest, and the attorney-client privilege as to the legal opinions on the protest. Appellant did not object to SBA's claim of privilege. The Administrative Judge finds, after an *in camera* inspection of the documents, that they fall within the claimed privileges. These documents are internal predecisional memoranda embodying the analysis and recommendations of agency officials to the D/GC and, thus, the documents are protected under the deliberative process privilege to protect the Agency's decision-making process. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975); *Matter of Henze Industries*, SBA No. SDBA-111, at 7-9 (1999). The legal advice is also protected under the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Henze Industries*, SBA No. SDBA-111, at 7-9. The Administrative Judge GRANTS the Agency's claim of privilege.

### C. New Evidence

As a threshold matter, I EXCLUDE Appellant's proffered new evidence. The regulations explicitly limit review of an SDVO SBC determination to the written protest file that was before SBA at the time of the determination, and to the arguments on appeal. 13 C.F.R. § 134.512; *Matter of Meadowgate Technologies, LLC*, SBA No. VET-115, at 3 (2007). It cannot be error on the part of the D/GC to fail to consider information never presented to her, or actions that had not yet taken place.

Here, Appellant was informed in SBA's protest notification letter that it must present evidence demonstrating it is controlled by a Service-Disabled Veteran and that failure to provide sufficient information to establish this control would result in an adverse decision. Appellant failed to provide this information, even though SBA's protest notification letter advised Appellant it must provide evidence demonstrating that is controlled by one or more Service-Disabled Veterans, and that failure to provide such information would result in an adverse decision.

Appellant's proffered information regarding Mr. Finley's light duties at Clearview, his management practices, and the management practices of portable toilet companies in general was all available at the time of Appellant's response to the protest, yet Appellant presented none of it to the D/GC. SDVO SBC eligibility is determined as of the date a challenged firm submits its initial offer and so Mr. Finley's resignation from Cobb County after the D/GC's determination is irrelevant here. *Matter of People Direct Placement Services, Inc.*, SBA No. VET-113, at 5 (2007); 13 C.F.R. § 125.15(a)(1). Appellant's proffered evidence was not presented to the D/GC in response to the protest and I will not consider it now.

### D. Merits of the 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. An SDVO SBC may enter into a joint venture agreement with one or more small businesses for the purpose of performing an SDVO

contract. 13 C.F.R. § 125.15(b). Here, Appellant's eligibility depends upon DAV's eligibility. The issue on appeal is thus whether a Service-Disabled Veteran controls DAV.

It is not enough for qualification as an SDVO SBC that a concern is headed and majority-owned by a Service-Disabled Veteran. 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). 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. *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 10 (2005).

DAV's eligibility thus depends upon Mr. Finley's control of its day-to-day management and business operations. Mr. Finley lives in Georgia, DAV's two addresses are in Illinois and Texas, and the instant contract is to be performed in upstate New York. These locations are hundreds of miles apart, and the record before the D/GC was bereft of information as to how Mr. Finley would manage DAV's affairs and this contract from Georgia. Well-established precedent supports the D/GC's determination that under this fact pattern, the Service-Disabled Veteran does not control the management and day-to-day operations of the concern. *Matter of IITS-Nabholz, LLC*, SBA No. VET-114, at 9 (2007); *Matter of First Capital Interiors, Inc.*, SBA No. VET-112, at 8-9 (2007).

Accordingly, I find Appellant has failed to meet its burden of establishing there was any error in the D/GC's determination that DAV is not controlled in its day-to-day management and operations by a Service-Disabled Veteran, that DAV thus is not an eligible SDVO SBC, and that Appellant is therefore not an eligible joint venture between an SDVO SBC and another small concern.

## 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 D/GC's determination that DAV Prime/Vantex Service Joint Venture failed to meet the requirements of an 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