

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

IN THE MATTER OF:

Nelco Diversified, Inc.

Appellant

Solicitation No.

VA-248-08-RP-1035

Department of Veterans Affairs

SBA No. VET-140

Decided: September 23, 2008

APPEARANCES

Felix E. Nelson, CEO, Nelco Diversified Inc., for Appellant.

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

Kenley S. Maddux, Esq., The Copley Law Firm, LLC, for The Tradesmen Group, Inc.

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 determination of the Small Business Administration's Director for Government Contracting (D/GC) that Nelco Diversified, Inc. (Appellant) failed to meet 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 February 1, 2008, The Department of Veterans Affairs (VA) issued Solicitation No. VA-248-08-RP-1035 (solicitation) for building renovations as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. The original proposal due date was March 6, 2008, later extended to March 25, 2008. VA awarded the contract to Nelco Diversified, Inc. (Appellant) on May 1, 2008, and a notification of award synopsis was posted on the Internet that same day. VA never sent formal notification letters to the unsuccessful offerors. On July 22, 2008, The Tradesmen Group, Inc. (Tradesmen), learned of the award to Appellant.

On July 24, 2008, Tradesmen filed a protest with the Contracting Officer (CO) asserting that Appellant was not an eligible SDVO SBC. Tradesmen asserted that Appellant's website indicated that persons not service-disabled veterans were in charge, and, when it attempted to contact Felix Nelson, Appellant's nominal CEO, Tradesmen was told he was not available and could not be told when he would be available.

On July 29, 2008, the Small Business Administration (SBA) Director for Government Contracting (D/GC) notified Appellant of the protest and requested a response. On August 6, 2008, Appellant responded.

On August 20, 2008, the D/GC sustained the protest and held Appellant was not an eligible SDVO SBC at the time it submitted its offer. First, Felix Nelson (Felix), the individual upon whom Appellant's claim of eligibility is based, received a rating decision from the VA on April 28, 2008, which states he is a veteran with a service related disability effective from September 18, 2007, the date he filed his claim. Therefore, at the time as of which Appellant's eligibility to be an SDVO SBC was determined, its March 25, 2008, offer, Felix did not have the documentation to establish he was a service-disabled veteran. Accordingly, Appellant is not an eligible SDVO SBC.

Even if Felix were an eligible service-disabled veteran, the D/GC determined he does not control Appellant. Mr. Daniel Nelson (Daniel), not Felix, is Appellant's President and Chief Financial Officer. Daniel is also Appellant's founder and former 100% owner. Daniel has been Appellant's President since its founding in 1990. Felix holds the "nominal" position of Chief Executive Officer (CEO). Appellant's bylaws do not create a CEO position, and thus grant no power to a CEO. Appellant's bylaws state that the President shall be the corporation's CEO. At Appellant's July 13, 2007 Shareholders and Directors meeting Felix became CEO, but the Board of Directors provided no duties for the position. Therefore, Felix does not hold the highest officer position at Appellant.

Further, while the July 13, 2007 meeting transferred 51% of Appellant's stock to Felix, he was not elected to Appellant's Board of Directors. In addition, Daniel holds Appellant's Florida contractor's license. The D/GC found that where a person holding a critical license also holds an equity interest in a concern, that person may found to control the concern. Therefore, the D/GC found that Daniel, not Felix, controlled Appellant.

B. Appeal Petition

On September 4, 2008, Appellant filed the instant appeal. First, Appellant argues that Tradesmen's protest was untimely, as the VA awarded the contract on May 1st and the protest was not filed until July 24th.

Second, Appellant argues the D/GC's determination was late, and thus should not be given effect.

Third, although Appellant acknowledges it could not prove it was 51% owned by a service-disabled veteran at the time of its offer, Appellant argues that because the VA has determined that Felix is a service-disabled veteran, which determination Appellant submitted to the D/GC, the D/GC erred in not finding him to be one.

Fourth, Appellant argues that Felix is its 51% owner, and the D/GC acknowledges that fact, so the firm should be found to be 51% owned by a service-disabled veteran.

Fifth, Appellant argues that its CEO's resume identifies he has unconditional control and manages its daily operations and holds a 51% stake in the company. The Annual Report identifies Felix as the CEO, the highest position in the corporation. The D/GC's determination is based upon an outdated bylaw. Further, Appellant argues the D/GC should have determined whether Felix controlled the concern by telephone interview or office visit, rather than relying on outdated documentation.

Sixth, Appellant asserts that on August 27, 2008, it held its annual meeting of shareholders, officers and directors, where its bylaws were amended, and the license transferred to Steven Hall, a key employee, all to cure the issues raised by the D/GC's determination. Appellant proffers as new evidence records of this meeting, together with other new evidence to support its appeal.

C. Tradesmen's Response

On September 12, 2008, Tradesmen filed a response to the appeal. Tradesmen asserts its protest was timely. Tradesmen received notice of the award on July 22nd, and filed its protest on July 24th. Tradesmen argues that its time to protest began to run with the notice given to unsuccessful offerors by the CO, and the award and announcement on a Government web page are not relevant to the issue. The CO has the responsibility for issuing notices to the unsuccessful offerors. Award and notice by the CO are separate events, and it is not the bidder's responsibility to search online for possible postings on the contracts it seeks. Tradesmen protested within five days of its receipt of the notice, and its protest was timely. Tradesmen also asserts the D/GC's substantive determination was correct.

D. The Agency Response

On September 12, 2008, SBA filed its response to the appeal. First, SBA asserts Tradesmen's protest was timely, because it was filed within five days of Tradesmen's receipt of notice from the CO.

Second, SBA asserts that while the D/GC's determination was late, the only effect of that delay is that the CO may award the contract. Here, award had already taken place prior to the protest. The determination should still stand.

Third, SBA argues the determination as to whether the individual upon whom the claim of eligibility is based must be made as of the date the challenged firm submits its offer. Since Felix had not received the VA's determination by the time Appellant submitted its offer, he was not eligible as a service-disabled veteran at that time, and Appellant was thus not an eligible firm.

Fourth, because Felix was not a service-disabled veteran, Appellant was not unconditionally owned at least 51% by a service-disabled veteran.

Fifth, SBA argues that the CEO title Felix held gave him no real powers, and thus the D/GC was correct in finding that he did not hold the highest executive position in the concern. The bylaws the D/GC relied upon were those Appellant submitted.

Sixth, the D/GC was correct in finding Felix did not have ultimate managerial and supervisory control over Appellant. SBA argues that when a critical license is held by an individual with an equity interest in the concern, that license holder may be found to control the concern.

Seventh, the evidence before the D/GC clearly established Felix was not on Appellant's Board of Directors.

Finally, SBA asserts the new evidence submitted by Appellant is inadmissible under the regulations, and cannot be considered.

E. The Protest File

The protest file before the D/GC includes a decision from the VA on Felix's case, dated April 28, 2008, finding that he has a service connected disability with an evaluation of 0% effective. However, Appellant submitted an incomplete copy of this determination, which includes only every other page of the document. The protest file further includes pages from Appellant's web site, prominently featuring Daniel as President and mentioning his extensive experience in construction.

The protest file also includes Appellant's 2007 annual report to the Florida Secretary of State, adding Felix to the list of officers and directors as CEO. The report does not specifically

identify Felix as a director, nor does it identify the other officers as directors. The protest file includes stock records which show Felix owns 51% of the stock, and Daniel owns 49%. Appellant's corporate bylaws are included, dated November 27, 1990. These provide that Appellant's President shall be the chief executive officer of the corporation. Art. IV, § 5. There are copies of resumes for all of Appellant's officers and directors, including Felix and Daniel.

IV. Discussion

A. Threshold Issues

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, including the protest file, 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.

The new evidence Appellant seeks to submit is EXCLUDED. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512.

Appellant argues Tradesmen's protest was untimely, and should have been dismissed. A protest of a firm's SDVO SBC status must be filed by close of business on the fifth business day after notification by the CO of the apparent successful offeror. 13 C.F.R. § 125.25(d)(1). Appellant argues that because Tradesmen filed its protest so long after the date of award and the posting online, it is thus untimely. But the regulation does not measure the time to protest from the date of award or of a general notice posted for the public. The time to protest begins to run from the date of the CO's notification to the unsuccessful offeror. In this case, due to VA's oversight, formal notification never occurred. On July 22nd, Tradesmen learned of the award and then promptly filed its protest. I conclude I must rule that Tradesmen's protest was timely. To hold otherwise would contradict the plain meaning of the regulation, and place an undue burden of vigilance on unsuccessful offerors, who have a right to expect a notification from the CO.

The regulation provides that SBA will determine the SDVO SBC status of a challenged firm within 15 business days of its receipt of the protest. 13 C.F.R. § 125.27(d). If SBA does not issue its determination within that time (or any extension the CO might grant) the CO may award the contract. *Id.* Here, SBA has exceeded the regulatory time limit. However, the prescribed consequence of exceeding the time limit has already taken place; the CO has awarded the contract. Nevertheless, the determination stands, because nothing in the regulation says that

a determination issued after the deadline is void or voidable. *Matter of Shiers Communication Specialists, Inc.*, SBA No. SDV-101, at 7 (2005). Appellant's argument the determination should not be given effect is meritless.

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. In determining whether an individual upon whom the claim of eligibility is based is a service-disabled veteran SBA will rely on the documentation from the VA, the Department of Defense, or the National Archives. 13 C.F.R. § 125.26(a).

Here, there is no question Felix currently has the documentation that he is a service-disabled veteran (albeit with only a 0% rating). However, there is also no question that Felix did not have that documentation on March 25th, the date offers were due, because the VA decision on this question came on April 28th. SDVO SBC eligibility is determined as of the date the challenged firm submits its offer for the subject SDVO SBC contract. 13 C.F.R. § 125.15(a)(1); *Matter of People Direct Placement Services, Inc.*, SBA No. VET-113, at 5 (2007). On March 25th, the latest date Appellant could have submitted its offer, Felix had not received documentation that established he was a service-disabled veteran, and Appellant thus had no claim whatever it was owned and controlled by a service-disabled veteran. Appellant's certification that it was eligible was not only false, but bordered on being in bad faith.

The fact that Felix's service-disabled status was granted effective September 18, 2007, is irrelevant. On March 25th, Felix had not received the VA's determination, and the certification was thus false. To rule otherwise here would not only be in contravention of the regulation, but would inject uncertainty and confusion into the process. The VA's determinations of service-disabled status can take months, even years to decide, and there is an appellate process beyond that. To find that merely a pending application for service-disabled veteran status made one eligible, when the resolution of the application could take longer than the award process (in some cases, longer than the term of contract performance) would unnecessarily allow ineligible firms to compete, and perhaps require recertification at time of award to ensure that only eligible firms received awards. Since the regulation provides for only one certification the appropriate rule is that a firm must be eligible at the time of that certification, to ensure that COs can rely on that certification.

Thus, while Felix owns 51% of Appellant, since Felix does not qualify as a service-disabled veteran, the D/GC correctly concluded Appellant is not 51% owned by service-disabled veterans.

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, and also have the managerial experience necessary to operate the business. 13 C.F.R. § 125.10(b) In the case of a corporation, service-disabled veterans must control the Board of Directors, either by

(1) owning at least 51% of the stock, having a seat on the board, and having sufficient stock to meet all supermajority voting requirements, or (2) the Board has a majority of service-disabled veterans. 13 C.F.R. § 125.10(e).

Appellant's bylaws clearly state that the corporation's President is to be the Chief Executive Officer. A separate position of Chief Executive Officer is not established in the bylaws. Florida law is clear that a corporation is governed by its Articles of Incorporation and bylaws, and that each officer shall perform the duties set forth in the bylaws. Fla. Stat. §§ 607.0202; 607.0206; 607.0841. It is thus clear that Felix does not occupy the position of the highest officer; Daniel does. Felix occupies a newly created position, unknown in the bylaws, with no set duties.

Appellant's argument the D/GC should have relied on information presented in resumes in contrast to the legally-binding documents of the corporation is risible. Further, Appellant's argument the D/GC consulted outdated bylaws is ludicrous. The D/GC relied upon the bylaws Appellant itself submitted. If they were in error, Appellant has only itself to blame. The D/GC did not err by relying upon the documents Appellant submitted to it, and Appellant cannot cure any failure to submit the appropriate documents on appeal. *Matter of Cambridge Federal Solutions, LLC*, SBA No. VET-135, at 4 (2008).

Appellant's argument that the D/GC should have made a field visit or telephone investigation to determine who was in charge of the corporation is also meritless. The regulation requires reliance on the identity of the corporation's highest officer and membership on the Board of Directors, which can be determined only from the legally-binding corporate documents. 13 C.F.R. § 125.10(b) & (e). It should also be noted that Tradesmen's telephone investigation provided the basis for its initial protest.

The D/GC also found that Felix was not a member of the Board of Directors, as required by the regulation. 13 C.F.R. § 125.10(e)(1). Appellant does not bother to contest this finding, and nothing in the protest file specifically identifies Felix as a Director, so I uphold this finding.

The D/GC further found Daniel controlled Appellant because of extensive involvement in the business, his large minority interest, and his holding the required Florida state contractor's license. The regulation requires that the management and daily business operation of a concern be controlled by service-disabled veteran in order for a firm to be found an eligible SDVO SBC. 13 C.F.R. § 125.10(a). The regulation requires that SBA go beyond the formalities of business ownership and titles to examine how an applicant concern is actually run on a daily basis. *Matter of Eason Enterprises OKC LLC, et al.*, SBA No. SDV-102, at 9 (2005). In doing so, OHA has held that SBA may look to the regulations and case law dealing with the issue of control for SBA's 8(a) Business Development Program (13 C.F.R. § 124.106) and the Small Disadvantaged Business Program (13 C.F.R. § 124.1002(b)(3)). *Id.*

Here, it is clear that Daniel was formerly the 100% owner of the business, is the person from whom Felix acquired his interest, remains the 49% owner, remains actively involved in the business, indeed, remains the corporation's President, and is featured prominently as President on the company's website. All of these are indicia of an ineligible individual who remains in

control of the concern. *Id.*, at 9-10. Further, Daniel remains the holder of Appellant's important Florida construction license. An ineligible individual who has an equity interest in an applicant concern and provides a critical license to the applicant may be found to have the power to control the concern. 13 C.F.R. § 124.106(g)(2). The D/GC was thus not in error to find that Daniel remained in control of the firm, given the multitude of the indicia of control by Daniel which are present here.

Finally, the changes Appellant made at its August 27th meeting in order to attempt to cure its deficiencies cannot be considered here. As noted above, OHA must consider only the protest file presented to the D/GC to determine whether the D/GC's determination as to eligibility status as of the time it made its certifications as to its SDVO SBC status was based on clear error of fact or law. 13 C.F.R. §§ 134.508; 134.512. Appellant is not permitted to cure any deficiencies by submitting new evidence on appeal. *Matter of Cambridge Federal Solutions, LLC*, SBA No. VET-135, at 4 (2008).

It is clear then that the D/GC made no error of fact or law when she found that Felix Nelson, the individual upon whom Appellant's claim of eligibility is based, was not a service-disabled veteran on March 25, 2008, when offers were due on the instant solicitation, and that therefore the firm was not an eligible SDVO SBC. Further, the D/GC made no error of fact or law when she determined that, even had Felix Nelson been a service-disabled veteran on that date, Appellant was not an eligible SDVO SBC because Felix did not control the firm. Felix Nelson did not control the firm because he did not hold the firm's highest officer position, was not a member of the Board of Directors, and Daniel Nelson exercised control of the firm as P resident, 49% stockholder still actively involved in the business, and holder of Appellant's Florida construction license.

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 Nelco Diversified, Inc. was not 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