

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

IN THE MATTER OF:

Teamus Construction Co., Inc.

Appellant

Solicitation Nos. VA-244-08-1B-0330
and VA-244-08-1B-0347

SBA No. VET-146

Decided: January 6, 2009

APPEARANCES

Thomas E. Weiers, Jr., Esq., Thorp Reed & Armstrong, LLP, for Appellant.

Sam Q. Le, Esq., Office of General Counsel, Small Business Administration, 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 D/GC's determination that a service-disabled veteran did not actually control the applicant firm was based on clear error of fact or law. *See* 13 C.F.R. § 134.508.

III. Background

A. Solicitation

On July 31, 2008, the Veterans Administration (VA) issued Solicitation VA-244-08-1B-0330 for construction of a Domiciliary Resident/Rehab Treatment Program Facility in Butler, PA. On August 11, 2008, the VA issued Solicitation No. VA-244-08-1B-0347 for construction of a Community Living Center, also in Butler, PA. Both solicitations were issued as 100%

Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-asides and specified sealed-bidding procedures. Bid opening for the first solicitation was September 5th, and for the second September 10th. After bid opening, VA identified Teamus Construction Co., Inc. (Appellant), as the apparent successful offeror for both contracts.

B. The Glancy Protest

On October 23, 2008, VA received copies of protests originally filed at the Government Accountability Office (GAO) by R.A. Glancy & Sons (Glancy), an unsuccessful bidder on both contracts. Glancy attached reports it had commissioned by a private investigations firm. The private investigator had investigated Appellant's operations and Appellant's relationship with James Construction Company (James). Both Appellant and James have their offices at 243 East Main Street, Carnegie, PA (243 East Main).

The investigators were unable to locate Charles Martino, Appellant's owner and the individual upon whom its claim of eligibility as an SDVO SBC is based, and thus Glancy alleged in its protest that Charles Martino does not exist. The investigators further found that the building at 243 East Main is owned by Sandra and James W. Stevenson, James's president and secretary/treasurer, respectively. One of the Stevenson's sons, James A., is Appellant's secretary/treasurer. Another, Shawn, is its vice president and an attorney whose office is at 243 East Main.

The investigators discovered Appellant did not have its own job application forms or marked construction equipment, but rather, all job applications and equipment are marked with James's name. The investigators were told by an employee that James and Appellant are run by the same people, and a former employee stated that James and Appellant are the same company.

C. The VA Protest and SBA Investigation

On October 27, 2008, the Contracting Officers on both subject solicitations filed SDVO SBC protests of Appellant's status with the Small Business Administration's (SBA) Office of Government Contracting (OGC), and attached the Glancy protests.

On November 3, 2008, SBA's OGC consolidated the protests, notified Appellant of them by fax, and requested Appellant's response by November 10th. Handwritten notes in the protest record indicate SBA's OGC followed up on its notification by telephone to Appellant on November 12, but was told the time of Mr. Martino's return was unknown. The next day, Shawn Stevenson returned SBA's call stating Appellant had not received the initial faxed notice and request. SBA granted Appellant an extension to November 18.

Appellant's response to the protest established that Charles Martino is Appellant's president and 51% owner. Mr. Martino is a veteran with a service-connected disability. Mr. Martino also holds positions in several other businesses, including Martino's Restaurant and Delicatessen, Inc. (Martino's Deli); K.B. Pizza Crust Co. (K.B. Pizza Crust); Franklin Bakery, Inc. (Franklin Bakery); and Primo Investments. Shawn Stevenson is Appellant's vice president

and 25% owner, and he holds positions in James and other concerns. Jamie A. Stevenson¹ serves as Appellant's secretary/treasurer, and owns the remaining 24%. An engineer, he is also listed on James's website as that firm's project manager.

Appellant provided its lease for Suite 202 at 243 East Main. The lease commenced on February 12, 2007, and names James W. Stevenson as Lessor and Appellant as Tenant. For the period from February 12, 2007, to January 31, 2010, the lease requires Appellant to make rent payments of \$2,200.00 "per month, in advance, without demand, on or before the first day of each month." The lease also contains a "parol evidence clause," which provides: "This instrument constitutes the final, fully integrated expression of the agreement between the LESSOR and the TENANT. As such, it cannot be modified or amended in any way except in writing signed by the LESSOR and TENANT." Appellant submitted no such written modifications or amendments to the lease. SBA's staff took note that, despite Appellant's significant rent obligations set out in the lease (covering over nine months of 2007), Appellant did not seek any rent deduction on its 2007 Federal income tax return.

The lease contains no provision for build-out of Appellant's leased space or any terms related to build-out, such as what improvements will be made, who will pay for them, what deadlines apply, and how (or whether) Appellant's obligation to pay rent is affected by any issues (such as delay) that might arise relating to build-out.

On November 18, 2008, SBA again tried to contact Mr. Martino at Appellant's office, this time to request additional information. SBA was told he was not there. The next day, Shawn Stevenson returned the call and faxed to SBA the requested additional information. Appellant submitted an expanded resume for Mr. Martino stating he founded Appellant in 2007 because he was seeking a new challenge in a field closely related to the work he performed in his family's plumbing business from 1969 to 1971. Mr. Martino was president of Primo's Bakery from 1971 to 1987. Mr. Martino has owned Martino's Deli since 1984. He has been president of K.B. Pizza Crust since 1987, and of Franklin Bakery since 1989.

SBA's own research, contained in the protest file, shows Martino's Deli is a restaurant/caterer with \$600,000 in annual revenues. It is located in Franklin, PA, at an address also listed as Mr. Martino's residence. This address is 86 miles and 90 minutes drive from Appellant's office in Carnegie. The restaurant is registered as an SDVO SBC government contractor. Mr. Martino is listed as the sole or primary contact for the restaurant on the Central Contractor Registry, SBA's Dynamic Small Business Search, the VA's VetBiz directory, Dun & Bradstreet's Business Profile, and the Pennsylvania Department of State Business Entity records. The restaurant's website directs customers to contact Mr. Martino directly for information on sales and delivery. The restaurant is open 8:00 am to 8:00 pm Monday through Thursday and 8:00 am to 9:00 pm Friday and Saturday. SBA contacted the restaurant on November 18th and 19th and was told both times that Mr. Martino had just left.

¹ "Jamie" is apparently the nickname of James A. Stevenson.

D. The D/GC's Determination

On November 21, 2008, SBA's Director of the Office of Government Contracting (D/GC) determined that Appellant was not an eligible SDVO SBC. The D/GC did find that Mr. Martino was a real individual and a service-disabled veteran, and that he unconditionally owned 51% of Appellant.

Nevertheless, the D/GC concluded that Mr. Martino did not control Appellant. The D/GC came to this conclusion based upon the distance of Mr. Martino's restaurant and residence from Appellant's place of business; the fact that he is owner, president and sole contact for the restaurant; and the restaurant's long hours, that Mr. Martino could not also conduct Appellant's day-to-day management and operations.

The D/GC further found that Appellant had failed to present any persuasive evidence to establish Mr. Martino did control day-to-day operations. Mr. Martino's resume is vague in describing his responsibilities at Appellant, stating he is involved with the concern's "growth and development," "business objectives," "organizational policies," "general organizational maintenance," and "industrial, labor and public relations policies." Mr. Martino failed to identify daily operational or administrative duties he conducted for Appellant. In addition, Appellant has directed all of SBA's administrative inquiries to Shawn Stevenson. This evidence all reinforced the D/GC's conclusion Mr. Martino did not control Appellant's day-to-day operations.

In addition, the D/GC concluded Mr. Martino lacked the managerial experience of the extent and complexity needed to run the firm. Here, Appellant is apparent successful bidder for two construction contracts with an aggregate value of nearly \$14 million, involving complex work. Mr. Martino has run a restaurant since 1984, and had no experience in the construction industry prior becoming Appellant's president in 2007. Mr. Martino's resume states that management of Appellant is a new challenge for him and that construction management is closely related to his work at his family's plumbing business from 1969 to 1971. Mr. Martino's experience does not add up to the experience necessary to manage a construction firm.

The D/GC further noted Appellant's close relationship with James, an established construction firm. Jamie A. Stevenson, James's project manager is a shareholder, board member and secretary/treasurer for Appellant. Appellant and James are located in the same building, owned by James W. Stevenson, secretary/treasurer of James. The fact Appellant took no tax deductions for its rent obligations under the lease suggests that the lease is not valid or not followed. The D/GC thus concluded that Mr. Martino relies on James to manage Appellant's business.

E. Appeal Petition

On December 3, 2008, Appellant filed the instant appeal of the D/GC's determination with the Office of Hearings and Appeals (OHA). Appellant asserts there was a conflict of interest in VA independently pursuing an untimely protest filed by Glancy, when Mr. Glancy's sister-in-law is Chief Contracting Officer for the VA's Pittsburgh Medical Center.

Appellant asserts Mr. Martino controls its operations; the D/GC's determination to the contrary is a clear error of law and fact. Appellant asserts SBA never called its offices to speak with Mr. Martino about his responsibilities with the concern, and asserts that any questions the D/GC had could have been resolved in a conversation with Mr. Martino.

Appellant asserts that, while Mr. Martino's primary residence is in Franklin, PA, he has another residence in Bridgeville, PA, less than 10 minutes from Appellant's offices. Further, his primary residence is only 40 miles from the work required under the subject solicitations. Appellant asserts that under *Matter of E2Si-SaLUT Joint Venture*, SBA No. VET-126 (2008) this is not a great enough distance to preclude control of contract performance.

Appellant asserts Mr. Martino's ownership of another business does not preclude his control of Appellant. Appellant asserts an on-site manager handles much of the operation of the restaurant. Appellant argues that since Mr. Martino was not present at the restaurant when SBA called, the D/GC was not entitled to presume that he had extensive involvement which would preclude his day-to-day management of Appellant. Appellant argues there is no prohibition on SDVO SBC officers being employed by other businesses, citing *Matter of McGoldrick Construction Services Corporation*, SBA No. VET-127 (2007).

Appellant asserts Mr. Martino's resume establishes his control of Appellant. Appellant points to its November 18, 2008 letter to SBA, in which it identifies Mr. Martino's work experience. The letter states that Mr. Martino plans business objectives and develops organizational policies. The letter states that Mr. Martino has developed guidelines for planning, scheduling and maintenance. He has created alliances with vendors as a strategy against downturns. Mr. Martino is responsible for spearheading new business and provides valuable direction with regard to prospective clients. Mr. Martino plans industrial, labor and public relations policies. He reviews activity reports and financial statements to determine status in attaining objectives. Mr. Martino is also a "steadying force" which insures smooth operating both internally and with customers and subcontractors.

Appellant asserts that VA contracting officers could confirm Mr. Martino's control of Appellant's operations on previous VA contracts. Appellant further asserts that additional investigation would have established Mr. Martino's extensive role in implementing the company's healthcare and retirement plans, and his dealing with concern's accountant and insurance agents.

Appellant asserts that Mr. Martino's duties as president are set by the firm's bylaws, which provide that he has the management of the corporation.

Appellant also asserts that Shawn Stevenson properly responded to SBA's inquiries, because he is Appellant's general counsel. Further, Mr. Martino invites SBA to call him in his letters to SBA.

Appellant argues that the D/GC failed to follow the precedent on *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102 (2005). *Eason* 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. Appellant asserts SBA did not do so here. Appellant also asserts there was a much stronger case in *Eason* that a person other than a service-disabled veteran was controlling the company.

Appellant asserts, in addition, that Mr. Martino has the requisite management experience to run the firm. Appellant asserts Mr. Martino has overseen eight VA construction projects and has demonstrated the required on-site interaction and supervision. Appellant states that if the VA had legitimate concerns about Mr. Martino's control and supervision, it would have raised them on its own without prompting by Glancy's untimely protest. Further, the D/GC erred in stating Mr. Martino had no construction experience, because his two years' experience in plumbing is a matter of record. Further, the record indicates Mr. Martino was responsible for constructing three new bakeries for one of his companies, and supervised renovation projects for another of his businesses. Appellant distinguishes *Matter of Singleton Enterprises-GMT Mechanical, a Joint Venture*, SBA No. VET-130 (2008), where a disabled veteran was found not to have any experience as a contractor. Appellant asserts Mr. Martino has the experience, and can demonstrate he has the actual managerial control, as required by *Singleton*.

Finally, Appellant asserts SBA erred in finding James managed Appellant. First, Appellant asserts it expected to be able to respond to specific inquiries concerning the protests and the investigators' report attached, but that SBA made no such inquiry. Further, while Jamie Stevenson has an ownership position with Appellant and is a James employee, these facts alone cannot support a conclusion that James controls Appellant. There is no common ownership between the two firms. SBA failed to address the resume of Jason Martino, Mr. Martino's son, who has been a project manager at Appellant since its start in 2007, and which resume lists five VA construction projects. Jason Martino has never worked for James.

Appellant adds that its office space at 243 East Main is separate from James, with a separate entrance. Appellant asserts it did not pay rent in 2007 because a buildout of its space was not completed until 2008, and it now pays rent. In 2007, Appellant operated out of temporary space at the building, from Mr. Martino's home, and from jobsite trailers. (Appellant does not note that it apparently paid no rent for this space, either.) Appellant further asserts it shares no employees or administrative functions with James.

F. SBA Response

On December 12, 2008, SBA responded to the Appeal. SBA argues that Mr. Martino has failed to demonstrate he has the managerial experience and ability to run a construction firm. Further, SBA asserts James appears to be heavily involved in Appellant's operations, and thus the real party in control of Appellant's day-to-day operations.

G. Appellant's Reply

On December 15, 2008, Appellant moved to reply to SBA's Response. The record in this case closed by regulation, with SBA's filing of its Response. 13 C.F.R. § 134.513. A review of

the response reveals nothing Appellant could not have addressed in its appeal petition.² I therefore DENY Appellant's motion to reply.

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; *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 8 (2005). 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. Eligibility Requirements for an SDVO SBC

An SDVO SBC is a concern which is small, 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). *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102 (2005).

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). The service-disabled veteran must have managerial experience of the extent and complexity needed to run the concern. 13 C.F.R. § 125.10(b). These regulations require that SBA go beyond the formalities of business ownership and titles and to examine how the applicant concern is actually run on a daily basis. *Eason Enterprises*, at 9.

C. The SDVO SBC Protest and Appeals Process

A protest of a concern's SDVO SBC status must be submitted within five business days after notification by the contracting officer of the identity of the apparent successful offeror. 13 C.F.R. § 125.25(d)(1). Only SBA or the contracting officer may submit a protest after that time.

² I note that in its reply Appellant asserts Mr. Martino did speak to SBA officials. This assertion is contrary to the documentation in the protest record SBA submitted, and is part of the reply which I am excluding. I must therefore conclude that Mr. Martino never personally spoke with SBA officials concerning these protests.

13 C.F.R. § 125.25(d)(3). SBA will notify the protested concern of the protest, forward a copy of the protest, and notify the concern of its right to respond within ten business days from the date of the notice. 13 C.F.R. § 125.27(c). SBA's D/GC must determine the SDVO SBC status of the protested firm within 15 business days of its receipt of the protest, or the contracting officer may award the contract without regard to the SBA determination. 13 C.F.R. § 125.27(d).

The D/GC's determination must be appealed to OHA within ten business days of the receipt of the determination (13 C.F.R. § 134.503); and OHA must rule within 15 business days of the close of record, or the contracting officer may award the contract without regard to OHA's ruling. 13 C.F.R. § 134.514. Discovery and oral hearings are not permitted in these appeals. 13 C.F.R. § 134.511. The Administrative Judge may not admit any evidence beyond the written protest file. 13 C.F.R. § 134.512.

This regulatory scheme provides for prompt adjudication of the SDVO SBC protests and appeals, bearing in mind that a pending procurement is awaiting the final outcome of the process. The protest must be promptly filed, and SBA immediately notifies the protested concern and gives a short time for it respond to the protest, and then issues a determination. The process calls for all participants to act promptly, and to respond at once and completely to all issues raised with all information at their disposal. The process does not provide for endless rounds of further investigations. The D/GC must make her determination quickly on the basis of the information submitted in the protest and the protested firm's response, and must be able to rely on the information presented as being complete.

Here, Appellant did not, and still does not, appreciate the nature of the process. Rather than providing all information at once to SBA, Appellant asserts it was "reasonable" for it to believe that it could respond to the protest allegations at some later time when SBA would ask specific questions. Appellant asserts SBA should have interviewed Mr. Martino, but SBA tried unsuccessfully to reach him several times. SBA's calls to Appellant were never returned by Mr. Martino, but by Shawn Stevenson. Appellant appears to envisage a far more lengthy process than is called for in the regulation. The protested concern must come forward immediately with all evidence in response to the protest, in order to meet the short deadlines of the process. Appellant's failure to do so here cannot be remedied on appeal. It was not error for the D/GC not to consider evidence Appellant never presented, nor was it error not to interview an individual as elusive as Mr. Martino.

As noted above, new evidence cannot be considered on appeal, and the record is limited to the evidence before the D/GC at the time she made her decision. *See Matter of Nelco Diversified, Inc.*, SBA No. VET-140, at 5 (2008). Accordingly, I EXCLUDE from consideration the new evidence Appellant presents on appeal. This exclusion includes the information on Mr. Martino's other residence, his on-site manager at the restaurant, the eight VA construction projects Mr. Martino allegedly oversaw, and its explanation for having made no payment of rent in 2007. This information was not part of the record before the D/GC, and most of what Appellant attempts to present here is mere assertion without documentation.

D. The Merits

Appellant here attempts to argue first, that there was a conflict of interest in the VA contracting officers who adopted Glancy's protest. Appellant makes unsubstantiated allegations without supporting evidence. In any event, they are irrelevant here. Only the protests were made by the CO. The D/GC, untainted by any allegation of conflict, investigated on her own and dismissed those allegations, such as Mr. Martino's nonexistence, which were not grounded in fact.

It is clear that Mr. Martino is Appellant's majority owner, that he is a service-disabled veteran, and that he holds the highest officer position in the organization. The question presented is, does he actually control the operations of the concern. SBA's inquiry must go beyond the formalities of business ownership and titles to examine how the applicant concern is actually run on a daily basis. *Matter of Eason Enterprises OKC LLC*, SBA No. SDV-102, at 9 (2005). The various provisions of Appellant's corporate documents which Appellant attempts to rely upon to establish Mr. Martino's control are thus irrelevant here, as they do not address the question of whether Mr. Martino actually controls the firm on a day-to-day basis.

Appellant argues that the 86-mile distance between Mr. Martino's restaurant and residence should not be a factor in determining Mr. Martino's lack of control relying on *Matter of E2Si-SaLUT Joint Venture*, SBA No. VET-126 (2008). However, that case is clearly distinguishable. There, the service-disabled veteran's residence and the firm's headquarters were in the same town, and there was no question that he was in control of day-to-day operations. The proposed job site was some 100 miles away, but OHA noted there that the contract was not a construction contract, and thus did not require the type of day-to-day supervision a construction contract does. OHA has held that the nature of construction routinely requires on-site interaction with customers and supervision of effort by subcontractors and other trades, and this type of effort cannot be performed by telephone or email. *Matter of First Capital Interiors, Inc.*, SBA No. VET-111, at 7 (2006).

In this case, Petitioner's business is construction, and Mr. Martino's residence and other business are removed from Appellant's place of business. These are factors, together with the nature of the construction business, which support the D/GC's finding that Mr. Martino does not actually control Appellant.

Another factor supporting the D/GC's conclusion that Mr. Martino does not control Appellant is his restaurant business. It is a long-established restaurant and catering business, which lists Mr. Martino as the principal contact person for all its many services, located at Mr. Martino's residence. The restaurant business is another type of business which requires intensive on-site supervision of kitchens, dining rooms, staff, and dealing with vendors. It is also unrelated to the construction business. Mr. Martino's involvement with his other business supports the D/GC's determination he was not in control of Appellant's business.

Appellant argues that there is no prohibition against SDVO SBC officers having employment in other firms, citing *Matter of McGoldrick Construction Services Corporation*,

SBA No. VET-127 (2008). Again, the Appellant's cited case is distinguishable. In *McGoldrick*, the officer whose employment was at issue was not the service-disabled veteran upon whom the challenged firm's claim of eligibility was based. While there is no prohibition against employment in another firm, the degree of effort the service-disabled veteran upon whom a firm's claim of eligibility is based must be putting into that other employment must be considered when determining if that individual actually controls the challenged firm's day-to-day operations. Here, Mr. Martino has another, very labor-intensive business for which he is the main contact person. It was appropriate for the D/GC to take this fact into consideration in making her determination.

The record does not establish that Mr. Martino has the managerial experience of the extent and complexity needed to run the concern. For experience in construction work, Mr. Martino can only point to two years of experience in a family plumbing business, in addition to work supervising the construction of three pizza bakeries in his capacity as president of K.B. Pizza Crust, which latter work Appellant chose not to emphasize in its submission to the D/GC. Further, the construction of the bakeries would likely have been the responsibility of the contractors K.B. Pizza Crust hired for the jobs. Mr. Martino's resume does not indicate that K.B. Pizza Crust served as its own general contractor. Mr. Martino would then have overseen matters as the ultimate customer, not as the contractor charged with the work itself. This role is not the same as being the contractor.

Appellant relies on *Matter of Singleton Enterprises-GMT Mechanical, A Joint Venture*, SBA No. VET-130 (2008), but there an individual with considerably more experience in plumbing (13 years) than Mr. Martino was found not to have the requisite experience to manage a construction company. *Singleton* also emphasized that mere experience working in a construction-related field was not enough to be found to have the necessary managerial experience. There must be some evidence establishing the number of employees supervised and the complexity of the contracts managed in order to determine whether the service-disabled veteran actually has the necessary experience to manage the firm. *Singleton*, at 6. Appellant established only that Mr. Martino has performed as a plumber, and was president of a company which had some construction work done for it. This scenario is not sufficient to meet the burden of establishing that the D/GC's finding was clear error.

Appellant also fails to establish error in the D/GC's finding that James and its personnel manage Appellant day-to-day. The common address at 243 East Main and the lack of payment of rent are factors which point to control by James.³ The lease contains no special provision for nonpayment of rent under any circumstances. Under the lease Appellant was obligated to make substantial rental payments, and yet these were apparently never made. This suggests the lease was sham, and that Appellant, James, and the Stevensons transact business with each other at less than arm's-length.

³ Appellant's assertion it paid no 2007 rent was paid because a buildout was not completed, while excluded from formal consideration, is worth noting for its lack of credibility. In a commercial lease which explicitly provided that it was a fully-integrated expression of the agreement between lessor and tenant, there is neither a buildout clause, nor a written lease modification.

Further, James Stevenson, an owner and secretary/treasurer of Appellant, is a project manager for James, and a member of the family which owns James. Shawn Stevenson, another minority owner who responded to SBA's telephonic queries to Appellant, is also a member of that family. When an individual is allegedly in day-to-day control of a business, and yet, like Mr. Martino, is never present to personally respond to SBA's inquiries, it is not unreasonable to consider his failure to personally respond in considering whether he actually is in day-to-day control of the business. There is sufficient evidence in the record to support the D/GC's finding that James is managing Appellant's day-to-day operations more than is Mr. Martino.

Mr. Martino's own resume is vague in its description of his duties, and tends to lapse into the use of buzzwords rather than specify the actual tasks he performs for his construction company. The duties of Mr. Martino's son Jason are not at issue here, and the D/GC properly did not address them.

Here, while Mr. Martino is Appellant's president, his residence is 86 miles from Appellant. His residence is also the location of a restaurant/caterer of which is also president and principal contact, and which thus must require intensive effort from him. He has little experience in construction management, and Appellant is co-located with James, a construction firm, one of whose project managers is also a minority owner of Appellant. Another member of the Stevenson family which owns James is a minority owner of Appellant and is the individual responded to SBA's telephonic inquiries. Mr. Martino never personally responded to any of SBA's inquiries. All of this evidence from the written protest file supports the D/GC's determination, and Appellant has failed to establish clear error in the determination.

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 finding.

The D/GC's determination that Appellant is not controlled by a service-disabled veteran 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