

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

IN THE MATTER OF:

Markon, Inc.

Appellant

Solicitation No. HSHQDC-08-R-00038
Department of Homeland Security

SBA No. VET-158

Decided: September 1, 2009

APPEARANCES

Lorraine M. Campos, Esq., Steven D. Tibbets, Esq., Reed Smith LLP, for Appellant.

Christopher R. Clarke, Esq., Office of General Counsel, Small Business Administration.

Edward James Ziek, President, for Savant Services Corporation.

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 concern whose highest officer position is not held by a service-disabled veteran may qualify for SDVO SBC status.

III. Background

A. Protest

On June 19, 2009, the Department of Homeland Security (DHS) issued a notice identifying the apparent successful offerors for its Program Management, Administrative, Clerical and Technical Services (PACTS) procurement, Solicitation No. HSHQDC-08-R-00038.

This procurement was set aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). One of the apparent successful offerors was Markon, Inc. (Appellant). On June 20, 2009, Savant Services Corporation (Savant) filed a protest which alleged Appellant was not an SDVO SBC and was therefore not eligible for award. On June 26, 2009, the Contracting Officer forwarded Savant's protest to the Small Business Administration (SBA).

On July 6, 2009, the SBA informed Appellant of the protest, and requested that it submit its response, together with its corporate documents and other information.

On July 8, 2009, Appellant responded to the protest. Appellant is a Virginia corporation, and Appellant's claim of eligibility is based on Robert J. Keller, a service-disabled veteran who owns 51% of the concern's stock. Mr. Keller is chairman of Appellant's Board of Directors. Appellant's president is Matthew J. Dean, who owns 40% of the stock. Appellant's By-laws provide:

The officers of the corporation shall be a president, vice-president and secretary. Such other officers and assistant officers as may be deemed necessary may be elected or appointed by the directors.

The president shall be the principal executive officer of the corporation, shall in general supervise and control all the business and affairs of the corporation. He shall, when present, preside at all meetings of the stockholders and of the directors.

Markon By-laws, Article IV, at Tab 4 of Protest File.

Appellant's submission also includes resumes for Mr. Keller and Mr. Dean. Mr. Keller's resume states he is "Responsible for strategic direction and overall financial decisions of the company." Mr. Dean's resume states he is "Providing executive oversight to entire Markon staff and contracts. Responsible for profit and loss of the company and management of the office line management staff."

B. The D/GC Determination

On July 22, 2009, SBA's Acting Director of Government Contracting (D/GC) issued a determination that Appellant was not an eligible SDVO SBC. The D/GC found that Mr. Keller was a service-disabled veteran, and did own 51% of Appellant's stock. However, he further found that Appellant did not meet the control requirements. Specifically, he found that Mr. Keller, the individual upon whom Appellant's claim of eligibility is based, was not Appellant's president. Therefore, Mr. Keller did not hold the highest officer position in the corporation, and did not manage the concern's day-to-day affairs. Accordingly, the D/GC found Appellant was not controlled by a service-disabled veteran, and was not an eligible SDVO SBC.

C. The Appeal

On August 5, 2009, Appellant filed the instant appeal. Appellant first moves for the

admission of new evidence. This evidence, among other issues, establishes that on July 27, 2009, Appellant amended its By-laws to provide that the Chairman/CEO shall be the principal executive officer of the corporation.

Appellant discusses its business history, and that of Mr. Keller's prior company, which Mr. Keller had founded and solely owned.

Appellant argues it is controlled by a service-disabled veteran, and meets the requirements of 13 C.F.R. § 125.10. Mr. Keller, a service-disabled veteran, owns 51% of the firm's stock, sits on and chairs the Board of Directors, and the company has no supermajority voting requirements. Appellant argues SBA has applied a general control regulation ignoring the more applicable specific regulation, and that it meets the requirements for control. Further, the By-laws provide for the appointment of other officers, such as chairman, the office Mr. Keller holds. Appellant argues SBA should have considered this and found that Mr. Keller controlled the firm from his position as chairman.

Appellant further argues that the D/GC's decision elevates form over substance in a manner contrary to OHA precedent in *Size Appeal of Hartsville Oil Mill*, SBA No. SIZ-3129 (1989). Here, the only evidence SBA considered regarding day-to-day control and long-term decision-making were Appellant's By-laws. Mr. Keller has exercised primary authority over all aspects of Appellant's business since its inception. Appellant argues the form of formal officer positions should be rejected in favor of the substance of Mr. Keller's actual control of the firm.

D. The Savant Response

On August 13, 2009, Savant filed a response to the appeal. Savant takes issue with Appellant's account of its corporate history, and questions Appellant's truthfulness generally. Savant further asserts that Appellant's By-laws clearly establish the office of president as the highest officer position in the corporation, and since Mr. Keller does not hold that position, Appellant is ineligible. Savant further asserts the By-laws are unambiguous and Virginia law requires that they be given their plain meaning.

E. The Agency Response

On August 14, 2009, SBA responded to the appeal. SBA argues that the regulation requires that the service-disabled veteran upon whom an applicant firm's claim of eligibility is based must hold the highest officer position in the firm. In the case of Appellant, that officer position is president, and Mr. Keller does not hold that office. SBA further asserts that the regulations require that an applicant firm meet both the general requirements of control and the specific requirement applied to the regulations.

SBA opposes the motion to admit new evidence, and asserts that there is no evidence that, prior to the Appellant's submission of its offer on this solicitation, Appellant had an officer position higher than president.

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) (*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. New Evidence

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; *Matter of Nelco Diversified, Inc.*, SBA No. VET-140 (2008). Further, the primary evidence Appellant seeks to submit here documents a change in its By-laws that was not in effect at the time Appellant submitted its offer, which is the date as of which SDVO SBC eligibility is determined. 13 C.F.R. § 125.15(a)(1); *Matter of People Direct Placement Services, Inc.*, SBA No. VET-113, at 5 (2007). Therefore, it cannot be relevant to Appellant's eligibility. Further, it could not have been presented to the D/GC. It cannot have been error for the D/GC to have failed to consider a document that was not only not presented to him, but which, indeed, was not in existence at the time. *Matter of Cedar Electric, Inc./Pride Enterprises, Inc., JV*, SBA No. VET-129 (2007).

C. Merits

An SDVO SBC is a small business 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); *Matter of NuGate Group*, SBA No. VET-132, at 6 (2008).

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 NuGate*, at 6. If the applicant firm is a corporation, a service-disabled veteran must control the Board of Directors. 13 C.F.R. § 125.10(e).

It is clear from this review of the regulation that an applicant for the SDVO SBC program must meet both the specific requirements of the regulation, and the general requirement that the

service-disabled veteran actually control the business. The general requirement that the service-disabled veteran actually control the company is important, and SBA will go behind the corporate formalities to establish that a service-disabled veteran actually controls the firm. *See Nelco Diversified, supra*; *see also NuGate*, at 6.

Nevertheless, the specific provisions in the regulation are mandatory, and cannot be waived. The regulation is very clear: the service-disabled veteran must hold the highest officer position in the concern. 13 C.F.R. § 125.10(b). The rule admits of no exceptions. Even if a firm meets other requirements for control, it is ineligible if its highest officer position is not held by a service-disabled veteran. *Matter of Heritage of America, LLC*, SBA No. VET-142, at 7-8 (2008).

Here, Appellant's own By-laws are also very clear. The highest officer position in the firm is the president, who "shall be the principal executive officer of the corporation, shall in general supervise and control all the business and affairs of the corporation." The fact that the By-laws permit other officers to be appointed does not change the fact that it is the president who is vested with the power to manage the corporation. And Appellant's president is not a service-disabled veteran. Accordingly, Appellant is ineligible under the regulation.

This result is also mandated by state law. Appellant is a Virginia corporation, and under the governing Virginia law, when the language of a corporation's By-laws is plain and unambiguous, a court will not attempt to look beyond the plain meaning. *Virginia High School League, Inc. v. J.J. Kelly High School*, 254 Va. 528, 531; 493 S.E. 2d 362, 364 (1997). There is thus no need to consider the interpretation Appellant attempts to place on them.

Further, it is noteworthy that it was Mr. Dean who responded to all of SBA's requests for information on behalf of Appellant. This is consistent with the evidence of the resumes for Mr. Keller and Mr. Dean which Appellant submitted. These resumes describe Mr. Keller as giving more general direction for the company, while it is Mr. Dean who is the hands-on manager, controlling the day-to-day affairs of the corporation. I therefore conclude that Appellant's argument that the result here elevates form over substance is simply not supported by the record.

Appellant's reliance on *Size Appeal of Hartsville Oil Mill*, SBA No. SIZ-3129 (1989) is misplaced. First, that case was interpreting the affiliation rules in SBA's size regulations, which are not applicable here. *Matter of Firewatch Contracting of Florida, LLC*, SBA No. VET-137, at 6 (2008). Second, that case was interpreting a regulation and did not reach a conclusion at variance with the plain meaning of that regulation, which Appellant requests that I do here.

V. Conclusion

Accordingly, I conclude that Appellant has failed to meet its burden of demonstrating clear error in the D/GC's determination. Appellant's highest officer is its president, and that individual is not a service-disabled veteran. Appellant is therefore ineligible for SDVO SBC status.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge