

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

IN THE MATTER OF:

DooleyMack Government Contracting, LLC

Appellant

RE: Firewatch Contracting of Florida, LLC

Solicitation No. VA-248-09-RP-0387

SBA No. VET-159

Decided: September 11, 2009

APPEARANCES

Cyrus E. Phillips, IV, Esq., Arlington, Virginia, for the Appellant.

John S. Vento, Esq., and Rhys P. Leonard, Esq., Trenam, Kemker, Scharf, Barkin, Frye, O'Neil & Mullis, P.A., Tampa, Florida, for Firewatch Contracting of Florida, LLC.

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

DECISION

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 Acting Director for Government Contracting (AD/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining DooleyMack Government Contracting, LLC (Appellant) did not meet the Service-Disabled Veteran Owned Small Business Concern (SDVO SBC) eligibility requirements at the time it submitted an offer for Solicitation No. VA-248-09-RP-0387. *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and Acting Director for Government Contracting Determination

On May 20, 2009, the U.S. Department of Veterans Affairs (VA), Bay Pines VA Healthcare System, issued Solicitation No. VA-248-09-RP-0387 (solicitation), for the renovation and installation of several pneumatic tube systems, as a total SDVO SBC set-aside. Offers were due on June 17, 2009.

On June 29, 2009, the Contracting Officer (CO) awarded the contract to Appellant. On June 30, 2009, the CO notified unsuccessful offerors, including Firewatch Contracting of Florida, LLC (Firewatch), that the contract was awarded to Appellant.

On July 7, 2009, Firewatch protested Appellant's SDVO SBC eligibility status and size. The CO referred Appellant's protest to the SBA Office of Government Contracting.

On August 4, 2009, the AD/GC determined that Appellant did not meet the SDVO SBC eligibility requirements at the time Appellant submitted its offer for the solicitation. The AD/GC stated that a firm's SDVO SBC eligibility is predicated upon ownership and control by a veteran with service-connected disabilities. The AD/GC noted Appellant satisfied service-disabled veteran status, pursuant to 13 C.F.R. § 125.8, by providing a letter from the VA attesting to the fact that James Vendola is a veteran with a service-connected disability. The AD/GC recognized Appellant satisfied direct and unconditional ownership by a service-disabled veteran, as required by 13 C.F.R. § 125.9, by demonstrating that Mr. Vendola owns fifty-one percent interest in Appellant without any impermissible conditions on his ownership interest.

With respect to control, 13 C.F.R. § 125.10, the AD/GC concluded that Mr. Vendola: holds Appellant's highest officer position; possesses managerial experience of the extent and complexity necessary to run Appellant; is responsible for the long-term decision making and day-to-day administration of Appellant's business operations; and has the power to control all decisions of Appellant. However, the AD/GC also noted DooleyMack Constructors, Inc., and Appellant's minority owner, DooleyMack Constructors, LLC, maintain close ties with Appellant by: being located in the same building; supplying capital contributions to Appellant; using the same logo and similar name; and providing accounting, information technology, and human resources for Appellant. Based on the totality of the circumstances, the AD/GC determined that business relationships exist which cause such dependence that Appellant cannot exercise independent business judgment without economic risk and, therefore, the AD/GC concluded Appellant was unable to demonstrate that a service-disabled veteran controls Appellant as mandated by 13 C.F.R. § 125.10. The AD/GC also noted he had referred the case for a size determination due to potential affiliation among Appellant, DooleyMack Constructors, Inc., and DooleyMack Constructors, LLC.

B. Appeal Petition

On August 11, 2009, Appellant appealed the AD/GC's SDVO SBC eligibility determination to SBA's Office of Hearings and Appeals (OHA). Appellant asserts the AD/GC's SDVO SBC eligibility determination is based on clear errors of fact and law. Appellant states the AD/GC's determination erroneously indicates Mr. Vendola worked for and Appellant receives business support from DooleyMack Constructors, LLC. Appellant also argues the record does not support the AD/GC's assertion that Appellant trades on the goodwill of DooleyMack Constructors, LLC.

Appellant states the AD/GC's determination on control was not based on SDVO SBC eligibility requirements in 13 C.F.R. § 125.10, but was based on size eligibility provisions. Appellant argues, despite finding unconditional and direct ownership by a service-disabled veteran, the AD/GC determined Appellant did not satisfy control requirements based on the totality of the circumstances relied on when evaluating size eligibility. Appellant asserts the AD/GC erred in relying on size eligibility criteria reserved for SBA Government Contracting Area Offices. Appellant also argues the AD/GC committed legal error in concluding Mr. Vendola does not control Appellant despite concluding there were no impermissible conditions on his ownership. Additionally, Appellant argues the AD/GC erred in relying on DooleyMack Constructors, LLC's initial cash capital contributions to Appellant to determine Mr. Vendola lacks control of Appellant. Finally, Appellant asserts the AD/GC erred in determining Mr. Vendola does not control Appellant because it is located in the same building as DooleyMack Constructors, LLC. Appellant argues leasing separate space in the same building is not evidence of control.

C. Firewatch Response

On August 18, 2009, Firewatch filed a response. Firewatch asserts the AD/GC's determination that Appellant is not a valid SDVO SBC is correct and should be affirmed. Firewatch argues minor typographical errors confusing DooleyMack Constructors, LLC, and DooleyMack Constructors, Inc., in the AD/GC's determination do not undermine the soundness of the determination. Firewatch also asserts Appellant misrepresents that the AD/GC relied on size standards in reviewing the totality of the circumstances, when in fact it is standard practice under 13 C.F.R. § 125.10 to consider the full scope of the concern's actual operations and relationships with entities and individuals. Firewatch notes Mr. Vendola's twenty-two year work history with DooleyMack Constructors, Inc., and the continuing connection between Appellant and DooleyMack Constructors, LLC, support the AD/GC's determination that Mr. Vendola does not satisfy the control requirements in 13 C.F.R. § 125.10.

Firewatch also contends that it is reasonable for the AD/GC to conclude that the Mr. Vendola is prevented from exercising control when Appellant's minority owner, DooleyMack Constructors, LLC, provided ninety percent of the initial capital, and DooleyMack Constructors, Inc., is providing support services. Finally, Firewatch notes Appellant, DooleyMack Constructors, Inc., and DooleyMack Constructors, LLC, are all located in the same building which is owned and operated by the principal owner of DooleyMack Constructors, Inc., and DooleyMack Constructors, LLC. Firewatch asserts, considering the full scope of Appellant's operations and relationships with entities and individuals, Appellant is so beholden

to DooleyMack Constructors, Inc., and DooleyMack Constructors, LLC, that Mr. Vendola cannot exercise independent business judgment without economic risk.

D. SBA Response

On August 20, 2009, SBA filed a response. SBA states the AD/GC's determination that Appellant is not controlled by a service-disabled veteran was not based on an error of fact or law and should be affirmed. SBA argues the record demonstrates Appellant is so dependent on DooleyMack Constructors, LLC, that its ability to exercise independent judgment is seriously infringed. To support the AD/GC's determination that Appellant is dependent on the DooleyMack family of companies, the SBA cites: Appellant's similar name; Appellant's shared logo; Appellant's work in the same line of business; Appellant's shared location; Mr. Vendola's prior work for DooleyMack Constructors, Inc.; DooleyMack Constructors, LLC's minority interest in Appellant; DooleyMack Constructors, LLC's cash capital contribution to Appellant; and Appellant's support services agreement with DooleyMack Constructors, Inc. SBA argues the collective weight of the evidence indicates Appellant is substantially connected with and seriously dependent upon DooleyMack Constructors, LLC, and DooleyMack Constructors, Inc.

SBA concedes that the AD/GC's determination misstates that Mr. Vendola worked for DooleyMack Constructors, LLC, rather than DooleyMack Constructors, Inc., and similarly misstates Appellant's business support services agreement is with DooleyMack Constructors, LLC, instead of DooleyMack Constructors, Inc. SBA states the typographical errors are regrettable, but are harmless and understandable given the companies similar names.

SBA argues there is no support for Appellant's assertions that the AD/GC improperly decided the protest based on size regulations instead of SDVO SBC regulations. SBA asserts the AD/GC's reference to the "totality of the circumstances" was not a reference to size regulations, but simply recognition that the AD/GC weighed all the evidence. Additionally, SBA argues Appellant misunderstands that unconditional ownership by a service-disabled veteran does not have direct bearing upon the control analysis and does not preclude SBA from determining that a service-disabled veteran lacks control of the firm.

SBA dismisses Appellant's arguments that the AD/GC committed clear error by focusing solely on DooleyMack Constructors, LLC's cash capital contributions to Appellant because SBA states that Appellant did not provide the AD/GC with evidence of non-cash capital contributions. Finally, SBA states the AD/GC did not err in noting Appellant's close geographic proximity to DooleyMack Constructors, LLC, supports the conclusion DooleyMack Constructors, LLC, has the ability to control Appellant.

In conclusion, SBA asserts the record sufficiently supports that Appellant is reliant upon DooleyMack Constructors, LLC, and DooleyMack Constructors, Inc., and, accordingly, the AD/GC's determination that Appellant does not qualify as an SDVO SBC because the firm is not controlled by a service-disabled veteran was not based on a clear error of fact or law.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the AD/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 AD/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 AD/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 that is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

B. 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. The AD/GC determination did not dispute Mr. Vendola's service-disabled veteran status or his ownership of Appellant. Thus, the critical issue is Mr. Vendola's ability to control Appellant.

The requirements to establish control of an SDVO SBC are addressed in 13 C.F.R. § 125.10. The AD/GC determination explicitly stated Mr. Vendola holds Appellant's highest officer position and possesses the requisite managerial experience of the extent and complexity necessary to run Appellant. 13 C.F.R. § 125.10(b). The AD/GC recognized Mr. Vendola is the managing member with control over all decisions of the limited liability company, 13 C.F.R. § 125.10(d), and the AD/GC concluded that Mr. Vendola is responsible for both the long-term decision making and the day-to-day management and administration of Appellant's business operations 13 C.F.R. § 125.10(a). Accordingly, Appellant meets the control requirements outlined in 13 C.F.R. § 125.10.

The AD/GC, however, went further than 13 C.F.R. § 125.10. The AD/GC was concerned by Appellant's close ties with DooleyMack Constructors, Inc., and DooleyMack Constructors, LLC. The AD/GC notes Appellant's ties with the companies, including: the businesses work in the same industry; Mr. Vendola's prior work connection; the businesses same location; the significant initial cash capitalization to Appellant; and provision of business support services to Appellant. Based on the business relationships, the AD/GC concluded there is such dependence that Appellant cannot exercise independent business judgment without great economic risk and that Appellant cannot satisfy 13 C.F.R. § 125.10.

The AD/GC's conclusion is in error. The AD/GC provided a thoughtful and thorough analysis of control under 13 C.F.R. § 125.10, explicitly relating all the applicable provisions, 13 C.F.R. § 125.10(a), (b), and (d), to the facts in the record and concluded Appellant met those requirements. However, despite the analysis under the regulation that the Appellant satisfied the control requirements, the AD/GC then raised a myriad of facts followed by a determination that Appellant does not satisfy 13 C.F.R. § 125.10. The record does not support the AD/GC's conclusion.

Section 125.10 requires an SDVO SBC's management and daily business operations to be controlled by a service-disabled veteran. Control is defined as both the long-term decision making and the day-to-day management and administration of the business operations. 13 C.F.R. § 125.10(a). Influence on business operations or managerial decisions does not amount to control. A prior work relationship, a landlord, a lease, a financial supporter, and a business support agreement may influence managerial decisions, in fact, as a minority member of Appellant DooleyMack Constructors, LLC, has a right to provide recommendations, but there is nothing in the record to demonstrate these facts amount to control under SBA's SDVO SBC regulations.

The record provides no evidence to support to the conclusion that DooleyMack Constructors, Inc., or DooleyMack Constructors, LLC, has the ultimate authority to administer and manage Appellant's long-term or daily business operations. SBA's determination that the Appellant's ties to DooleyMack Constructors, Inc., or DooleyMack Constructors, LLC, create such dependence that Appellant cannot exercise independent judgment is simply not supported in the record.

Accordingly, the AD/GC's ultimate conclusion was unreasonable and contrary to the weight of the evidence in the record. SBA's rationale ignores that Appellant's owner, president, and managing member, Mr. Vendola, a service-disabled veteran, owns a majority interest in Appellant and possesses the managerial experience necessary to run the business. Moreover, the record contains no evidence of conditions tied to the lease, capital contribution, or business support agreement which vest DooleyMack Constructors, Inc., or DooleyMack Constructors, LLC, with any control over Appellant.

For these reasons, after a review of the record, I find the SBA's conclusion that a service-disabled veteran, Mr. Vendola, does not control Appellant is not supported in the record and is in error. In so holding, I note this decision is limited to control under SBA's SDVO SBC regulations.

V. Conclusion

Appellant's appeal is GRANTED and the AD/GC's SDVO SBC eligibility determination is REVERSED and VACATED.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.515(a).

CHRISTOPHER HOLLEMAN
Administrative Judge