

**REDACTED DECISION FOR
PUBLIC RELEASE
United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

Advanced Environmental Solutions, Inc.

Appellant

RE: DUNAMIS Environmental Group, LLC

Solicitation No. FA8101-09-R-0002

Department of the Air Force

Tinker Air Force Base, Oklahoma

SBA No. VET-161

Decided: September 18, 2009

APPEARANCES

William E. Hughes, Esq., Whyte Hirschboeck Dudek S.C., Milwaukee, Wisconsin, for Appellant.

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

Gerald H. Werfel, Esq., Pompan, Murray & Werfel, P.L.C., Alexandria, Virginia, for DUNAMIS Environmental Group, LLC.

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 Small Business Administration (SBA) Acting Director for Government Contracting (AD/GC) made a clear error of fact or law in concluding that DUNAMIS Environmental Group, LLC (DEG) is controlled by a service-disabled veteran.

**REDACTED DECISION FOR
PUBLIC RELEASE**

III. Background

A. Solicitation and Protest

The Department of the Air Force (Air Force) at Tinker Air Force Base, Oklahoma, issued Solicitation No. FA8101-09-R-0002 (solicitation), for the transportation and disposal of hazardous waste, as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. On July 15, 2009, the Contracting Officer (CO) for the Air Force gave notice that the apparent successful offeror for the solicitation was DEG.

On July 20, 2009, Advanced Environmental Solutions, Inc. (Appellant) filed a protest with the CO alleging that DEG was not an eligible SDVO SBC at the time it submitted its offer. Appellant asserts a service-disabled veteran does not control the management and daily business operations of DEG.

On July 23, 2009, the CO forwarded the protest to the SBA AD/GC.

On August 11, 2009, the AD/GC denied Appellant's protest and concluded DEG is an eligible SDVO SBC. The AD/GC noted that DEG provided: (1) documentation from the Department of Veteran's Affairs demonstrating that Marty Minor is a veteran with a service-connected disability in compliance with 13 C.F.R. § 125.8; (2) a copy of DEG's operating agreement documenting Mr. Minor is the majority member and satisfies the ownership requirement in 13 C.F.R. § 125. 9; and (3) Mr. Minor's resume evidencing his experience in the transportation and disposal of hazardous waste and provisions in DEG's operating agreement instilling Mr. Minor with control in compliance with the control requirements in 13 C.F.R. § 125.10.

B. The Appeal

On August 11, 2009, Appellant received the AD/GC's protest determination and, on August 24, 2009, Appellant filed an appeal with the Office of Hearings and Appeals (OHA).

Appellant asserts the AD/GC's determination pertaining to control is based on clear error of fact and law. Appellant argues DEG is a newly-formed "shell" company with no offices, assets, equipment, or employees. Appellant states it demonstrated the addresses provided for DEG are addresses for a residence, a location on Tinker Air Force Base, a place of worship, and the business location for Eason Electronic's, an ineligible SDVO SBC.

Appellant asserts the AD/GC required DEG to submit fifteen documents in response to the protest, but DEG only submitted three. Appellant states the only documents DEG provided to the AD/GC that deal with control are Mr. Minor's resume and DEG's operating agreement and Appellant argues those documents provide no evidence that Mr. Minor controls the daily operations of DEG.

Moreover, Appellant argues the AD/GC erred in finding control by an individual who

**REDACTED DECISION FOR
PUBLIC RELEASE**

only recently took control and who has little experience in the industry, when, Floyd Eason, an ineligible individual is active in the management of the business. Appellant argues the AD/GC also ignored that Mr. Minor is employed with another company. Finally, Appellant concludes that the AD/GC's determination that Mr. Minor satisfies the control requirement is not supported by credible evidence.

C. SBA's Response

On August 31, 2009, SBA filed its Response to the Appeal. SBA contends the AD/GC's determination was not based on a clear error of fact or law and should be upheld. SBA states DEG is owned by two individuals, Mr. Minor and Mr. Eason, and Mr. Minor, the eligible service-disabled veteran, owns 51%. SBA argues that, for a firm to be in compliance with the control requirements in 13 C.F.R. § 125.10, the service-disabled veteran must possess managerial experience of the extent and complexity necessary to run the company and, in the case of a limited liability company, must serve as managing member.

SBA states Mr. Minor has the requisite experience and notes Mr. Minor's resume indicates he has twenty-two years of experience with power production management and has more than ten years of experience dealing with the removal, transportation, storage, and disposal of hazardous waste. Additionally, SBA recognizes Mr. Minor is the managing member and has authority to remove the other manager.

SBA argues the record does not support Appellant's allegations that Mr. Minor does not control DEG because he also founded and owns Dunamis Power Systems, LLC. Finally, SBA asserts that Mr. Eason's involvement and DEG's relationship with Eason Enterprises do not impede Mr. Minor's control. SBA states DEG is able to secure financing independent of Eason Enterprises and [REDACTED].

D. DEG's Response

On September 2, 2009, DEG responded to the appeal. DEG asserts the AD/GC's determination should be affirmed because Mr. Minor satisfies the test for control, 13 C.F.R. § 125.10, and the AD/GC's determination is not based on clear error of fact or law, 13 C.F.R. § 134.508. DEG states the record demonstrates DEG will use its own resources to perform the majority of the work under the contract. DEG also asserts it answered each and every question posed by the AD/GC and Appellant's suggestion DEG did not fully respond to the AD/GC's requests for information is untrue. Additionally, DEG emphasizes Mr. Minor has the requisite experience and training to manage DEG's day-to-day operations.

**REDACTED DECISION FOR
PUBLIC RELEASE**

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its Appeal Petition within 10 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 which 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. The 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. Appellant does not dispute that DEG is owned by Mr. Minor or that Mr. Minor is a service-disabled veteran. Thus, the critical issue is Mr. Minor's ability to control DEG.

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, as well as have the managerial experience necessary to operate the business. 13 C.F.R. § 125.10(b)

The record establishes Mr. Minor serves as managing member of DEG, the highest officer position in the business. 13 C.F.R. § 125.10(b). While both Mr. Minor and Mr. Eason are managers and share equal responsibility, Mr. Minor holds ultimate control because he can remove the other manager due to Mr. Minor's 51% membership interest. Mr. Minor's 51% interest endows him with legal control over all aspects of DEG's operations and the power to make both long-term and day-to-day decisions concerning DEG.

Furthermore, the record demonstrates Mr. Minor possesses the managerial experience necessary to operate DEG. While on active duty with the Air Force, Mr. Minor gained specific knowledge on the transportation and disposal of hazardous waste. Mr. Minor was responsible for the disposal of over 1000 gallons monthly of hazardous waste generated from power plant operations in Southeast Asia and he acquired seven years of hazardous cargo training.

**REDACTED DECISION FOR
PUBLIC RELEASE**

Additionally, Mr. Minor's resume demonstrates twenty-two years experience in management, training, and supervision.

Despite Appellant's arguments to the contrary, there is no evidence that Mr. Minor's ownership of Dunamis Power Systems impedes his ability to control DEG and there is no prohibition that a service-disabled veteran cannot create or own another business. As reflected in the record, DEG is not dependant on affiliates to perform the work awarded under the contract;

[REDACTED]

With regards to DEG's multiple addresses, Mr. Minor explains that the Tinker Air Force Base address is the office he was using when he started Dunamis Power Systems and that the church, house, and Eason Electric have nothing to do with the operations and he has corrected the address. The record provides no evidence that the multiple addresses could empower someone to exert undue influence on or control DEG.

Further, the documents which Appellant faults DEG for failing to submit are in fact inapposite here. The D/GC's document request was for corporate documents and, as a Limited Liability Company, DEG had no such documents. The record does not reflect that DEG failed to submit any documents responsive to the D/GC's request.

It is clear that Mr. Minor is a service-disabled veteran, that he owns a majority interest in DEG, that he holds DEG's highest officer position, and thus that he controls the firm. None of Appellant's arguments effectively challenge the D/GC's determination that DEG is an eligible SDVO SBC.

V. Conclusion

After reviewing the record, I find the written protest file supports the AD/GC's determination. Appellant has failed to establish any clear error of fact or law in the AD/GC's decision. Accordingly, I must deny the instant Appeal Petition, and affirm the AD/GC's finding.

The AD/GC's determination that DEG was 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