

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

IN THE MATTER OF:

International Logistics Group, LLC.

Appellant

Solicitation No. FA8540-09-R-20044

SBA No. VET-162

Decided: October 1, 2009

APPEARANCES

John C. Willis, President, for Appellant

Christopher R. Clarke, 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

Did the Acting Director for Government Contracting (Acting DGC) for the U.S. Small Business Administration (SBA) make a clear error of fact or law in concluding the Service-Disabled Veteran (SDV) did not own Appellant because a Transfer of Ownership Agreement applicable to Appellant contains rights of first refusal on sale of the SDV's ownership share and restricts the value of the SDV's share "regardless of the value of the company or assets at time of sale." 13 C.F.R. § 125.9. *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and Acting Director for Government Contracting Determination

On April 20, 2009, the contracting officer (CO) for the Department of the Air Force, Warner Robins Air Logistics Center, Georgia, issued RFP No. FA8540-09-R-20044 (RFP) for advisory and assistance services/support personnel for aircraft avionics equipment. The CO

set-aside the procurement for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs).

On May 8, 2009, International Logistics Group, LLC (Appellant) submitted its offer under the RFP. On July 15, 2009, the CO informed the unsuccessful offerors that Appellant was the successful offeror. The CO noted she would award the contract to Appellant if she did not receive a challenge before close of business on July 20, 2009.

In a July 20, 2009 letter to the CO, HMR Tech, LLC (HMR), an unsuccessful offeror under the RFP, protested Appellant's status as an SDVO SBC pursuant to 13 C.F.R. § 125.24. HMR alleged Appellant's CEO, Ms. Nancy Malone, was not a service-disabled veteran (SDV) and that Ms. Malone does not actively manage and control Appellant's daily operations. The Air Force provided HMR's protest to SBA's Acting Director of the Office of Government Contracting (Acting DGC) on August 3, 2009.

SBA informed Appellant of HMR's protest on August 4, 2009. SBA repeated HMR's protest grounds and required Appellant to provide a variety of information concerning its ownership, including: (1) Proof that Appellant's majority owners are SDVs; (2) Name and address of Appellant's owners; (3) Percentage of ownership held by SDVs; (4) Copies of stock certificates; (5) A certified stock ledger; (6) Buy/sell agreements; and (7) Shareholder agreements. SBA also required Appellant to prove it was controlled by one or more SDVs and required Appellant to provide listed information, *e.g.*, (1) Copy of corporate by-laws, partnership agreement or operating agreement; (2) A copy of the latest corporate meeting minutes; (3) Articles of incorporation; (4) Trust agreements; (5) Copies of agreements required for operation of Appellant's business; (6) A list of all owners, partners, directors, officers or principal shareholders/stockholders, etc.

Appellant responded to the SBA on August 11, 2009. Appellant established Ms. Malone is an SDV. Appellant also provided other evidence, including documentation that showed Ms. Malone had purchased 51% of Appellant in February 2009. Among other things, the February 4, 2009 Transfer of Ownership Agreement to Ms. Malone states:

**Future Sale:** At no time will Ms. Malone or her estate: sell, dispose, or lease in whole and/or part any portion of her 51% ownership of [Appellant] and/or its subsidiary without first offering the ownership in writing to Mr. John C. Willis Sr. and Mr. Timothy R. Watson for the price it was sold to Ms. Malone (\$500.00) regardless of the value of the company or assets at time of sale. Mr. Willis (Sr.) and Mr. Watson will have sixty days to exercise the right to buy back the 51% of the company from Ms. Malone. The sixty days will begin the date of written notification the sale is received from Ms. Malone by Mr. Willis and Mr. Watson.

Appellant also argued Ms. Malone controls Appellant. Appellant notes Ms. Malone is not a full-time employee of another concern and that she exercises day-to-day control of Appellant. Appellant identified Mr. John Willis Sr., as its President and Mr. Tim Watson as its Senior Vice President.

On August 21, 2009, based on the information Appellant provided, the Acting DGC determined that Appellant did not meet SDVO SBC eligibility requirements at the time Appellant submitted its offer for the solicitation. Citing 13 C.F.R. § 125.9, the Acting DGC determined the Transfer of Ownership Agreement established Ms. Malone does own a 51% share of Appellant.

Specifically, the Acting DGC determined Ms. Malone's ownership is not unencumbered. Instead, the restrictive rights of first refusal in favor of Mr. Willis and Mr. Watson are severe. The Acting DGC noted that SBA considers the right to share in profits (and bear losses) and to benefit from the growth of a company to be a key indicator of the true extent of an individual's ownership interest in a given firm. The Acting DGC pointed out that were this not the case, someone could be listed as primary owner even though that individual is not entitled to share in all the usual benefits of ownership. In consequence, the Acting DGC determined that Ms. Malone, even though she is an SDV, does not unconditionally own Appellant and therefore Appellant was ineligible to submit offers for SDVO SBC procurements.

#### B. Appeal Petition

On September 3, 2009, Appellant appealed the Acting DGC's determination to the SBA Office of Hearings and Appeals (OHA). Appellant alleges the Acting DGC made an error in fact "by misinterpreting the intent of the transfer of Ownership Agreement and made an error in law by not considering the state statutes that govern guidance on the operation and control of corporate and partnership shares for the State of Georgia." (Appeal at 5)

Appellant alleges it received advice that indicated it could place restrictions on the transfer of ownership under Georgia law. Thus, Appellant claims it acted under authority of Georgia law when it executed the Transfer of Ownership Agreement.

Appellant claims SBA erred when it determined Ms. Malone would not share in Appellant's profit and loss. Appellant alleges that under Georgia law, profits and losses will be applied to each partner's income tax at the end of the year. (Appeal at 7)

Appellant also claims Ms. Malone viewed the guaranteed \$500.00 buyback as protection to her. Appellant claims this protected her initial investment of \$500.00.

#### C. SBA Response

On September 15, 2009, SBA filed its response to the appeal. SBA contends the Acting DGC's determination that Appellant is not unconditionally owned by an SDV is correct. SBA notes 13 C.F.R. § 125.9 requires unconditional ownership by an SDV and that the Acting DGC found Ms. Malone's ownership interest in Appellant, as stated in the Transfer of Ownership Agreement, contained a unique restrictive condition. Specifically, the value of Ms. Malone's ownership share was permanently fixed at \$500.00, regardless of anything that could happen later. Thus, Ms. Malone ownership interest was encumbered with restrictive conditions and thus was not indicative of true ownership, *e.g.*, Ms. Malone would not see the benefit of her

ownership because the value of her interest would not grow while the value of the other members' interests would. (Agency Response at 4)

SBA agrees with the Acting DGC's statement that a key indicator of ownership is the right to benefit from that ownership and argues Ms. Malone could not benefit from her ownership. SBA also argues the right of first refusal contained in the Transfer of Ownership Agreement also places restrictive conditions on Ms. Malone's ownership.

SBA argues it is irrelevant that the restrictions placed on Ms. Malone's ownership are legal under Georgia law. SBA points out:

There are many issues involving legal entities that are allowed under various state laws, but none-the-less run afoul of SBA's SDVO SBC's eligibility requirements. For example, states routinely allow the creation of holding companies, but SBA's regulations clearly do not allow this business structure, even though that structure would be allowed under various states law. See 13 C.F.R. § 125.9(a). The issue is that Petitioner has instituted an ownership structure that strips a key benefit of ownership from the service-disabled veteran, while the ownership interests of the non-service-disabled veterans have no such restrictions.

Agency Response at 6.

SBA also opposes Appellant's argument that Ms. Malone: (1) Was aware of and accepted the terms of ownership applicable to her, which cured the defect in Appellant's ownership structure; and (2) Believed the ownership agreement was beneficial and thus she could agree to it. SBA points out SBA's rules establish the standard for eligibility and an SDV may not waive them, regardless of the understanding or belief of the SDV.

#### IV. Discussion

##### A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the Acting DGC'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 Acting DGC'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 Acting DGC 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 in the context of a size appeal). Consequently, I will disturb the Acting DGC's determination only if I have a definite and firm conviction the Acting DGC erred in making a key finding of law or fact.

### B. New Evidence

As a threshold matter, I must exclude Appellant's argument of new evidence or changed conditions, *i.e.*, that Appellant removed all the restrictions and conditions tied to Ms. Malone's shares of the company following the Acting DGC's determination. (Appeal at 7-8) First, 13 C.F.R. § 134.512 explicitly limits review of an SDVO SBC determination to the written protest file before SBA at the time of the determination and to the arguments on appeal. Thus, Appellant's argument cannot be considered. Second, SBA must determine Appellant's status as an SDVO SBC as of the date Appellant submitted its proposal, which was May 8, 2009. 13 C.F.R. § 125.15(a). Accordingly, Appellant cannot cure Ms. Malone's lack of unconditional ownership after May 8, 2009 and have it affect the current procurement.

### C. Ms. Malone Does Not Unconditionally Own Appellant

The very first eligibility requirement for SDVO SBC status is in 13 C.F.R. § 125.9, which provides:

A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

(a) Ownership must be direct. Ownership by one or more service disabled veterans must be direct ownership.

...

(c) Ownership of a limited liability company. In the case of a concern which is a limited liability company, at least 51% of each class of member interest must be unconditionally owned by one or more service-disabled veterans.

OHA has addressed the meaning of unconditional as contained in 13 C.F.R. § 125.9 before. Specifically, in *Matter of The Wexford Group International, Inc.*, SBA No. SDV-105, at 5 (2006), we held:

In the context of 13 C.F.R. § 125.9, unconditional necessarily means there are no conditions or limitations upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

The facts of this appeal are undisputed. As of May 8, 2009, the Transfer of Ownership

Agreement provided Ms. Malone did not have the right to sell her stake in Appellant for a price exceeding \$500.00, regardless of its value. Nor could she sell her ownership stake to anyone she chooses. Hence, Ms. Malone's ownership rights were conditional and encumbered. Thus, I hold Appellant was not unconditionally owned by an SDV and Appellant is ineligible for award under the RFP.

I have also considered Appellant's argument concerning the application of Georgia law. While it may be true that Appellant's Transfer of Ownership Agreement may comply with Georgia law, that compliance is irrelevant. Georgia law does not control eligibility under the SDVO SBC program. Instead, 13 C.F.R. § 125.9, *et. seq.*, controls SDVO SBC eligibility. Hence, because Appellant is ineligible under 13 C.F.R. § 125.9, nothing further needs to be considered.

Nor is it relevant that tax on profit has to be paid by the owners based upon their percentage ownership interest. Instead, the only relevant test is whether, under 13 C.F.R. § 125.9, Ms. Malone had unconditional ownership as of the date Appellant submitted its offer.

I also reject Appellant's arguments that since Ms. Malone: (1) Was aware of the restriction on her ownership and her knowledge cured the defect in Appellant's ownership; and (2) Considered her ownership interest to be beneficial. Ultimately, it is irrelevant what Ms. Malone may have thought, for 13 C.F.R. § 125.9 governs, not the opinion of the SDV. In other words, the SDV may not agree to waive the requirements of 13 C.F.R. § 125.9, for any reason.

#### V. Conclusion

After reviewing the record, I find the written protest file supports the Acting DGC's determination.

Appellant has failed to establish any clear error of fact or law in the Acting DGC's decision. Accordingly, the Acting DGC'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(b).

---

THOMAS B. PENDER  
Administrative Judge