United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Cooper-Glory, LLC	SBA No. VET-166
Appellant	Decided: October 27, 2009
Solicitation No. VA-247-09-RP-0257	

APPEARANCES

Sharon Burns Cash, CEO and 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 of Government Contracting (AD/GC) for the U.S. Small Business Administration (SBA) make a clear error of fact or law in determining that Cooper-Glory, LLC (Appellant) did not meet the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements at the time it submitted its bid for Solicitation No. VA-247-09-RP-0257 (RFP)? *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and AD/GC Determination

On June 26, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA), Augusta VA Medical Center issued the RFP seeking shuttle transportation services and designated the RFP as a 100% SDVO SBC set aside. On August 13, 2009, the CO notified unsuccessful offerors, including Phoenix Industries I, LLC (Phoenix), that Appellant was the apparent successful offeror. On August 17, 2009, Phoenix filed its protest alleging Appellant did

not meet the SDVO SBC eligibility requirements at the time it submitted its offer.

On October 5, 2009, the AD/GC issued his determination finding Appellant was not an eligible SDVO SBC at the time it submitted its offer. The AD/GC first verified that Ms. Sharon Burns Cash is a service-disabled veteran, as determined by the VA, then analyzed Appellant's compliance with the other SDVO SBC eligibility requirements. The AD/GC concluded that Appellant is neither owned nor controlled by a service-disabled veteran.

An eligible SDVO SBC must be directly owned by one or more service-disabled veterans. 13 C.F.R. § 125.9(a). Indirect ownership through another business entity is insufficient to meet this requirement. *Id.* For a limited liability company such as Appellant to qualify as an eligible SDVO SBC, "at least 51% of each class of member interest must be unconditionally owned by one or more service-disabled veterans." 13 C.F.R. § 125.9(c). The AD/GC also determined that the requirement that ownership must be direct also applies to joint ventures created as separate legal entities. *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007).

According to its own organizational documents, Appellant is owned by two entities: Glory Enterprises, Inc. (Glory) and Cooper-Atlanta Transportation Services, Inc. (Cooper). Glory is owned by Ms. Burns Cash. Cooper is owned by Dennis Cooper, who is not a veteran. Because Appellant is not directly owned by Ms. Burns Cash, but rather owned by Glory (which is in turn owned by Ms. Burns Cash), the AD/GC concluded that Appellant does not meet the direct ownership requirements set forth in the regulations.

In addition to direct ownership, the service-disabled veteran must also control the management and daily business operations of the concern if the concern is to be considered an eligible SDVO SBC. 13 C.F.R. § 125.10(a). In the case of a limited liability company, this means the service-disabled veteran must serve as a managing member. 13 C.F.R. § 125.10(d). Here, Glory is a managing member of Appellant, but Ms. Burns Cash is not. Therefore, the AD/GC concluded that Appellant has not complied with the regulations regarding control. Because Appellant is neither owned nor controlled by a service-disabled veteran, it is not an eligible SDVO SBC.

B. Appeal Petition

On October 8, 2009, Appellant filed the instant appeal with the SBA's Office of Hearings and Appeals (OHA). Appellant's primary argument is that 13 C.F.R. § 125.15(b) explicitly allows it to enter into a joint venture for the purposes of securing SDVO-SBC set aside contracts: "An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO contract." Furthermore, Appellant contends, SBA regulations allow such a joint venture to be a separate legal entity:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or

> permanent basis for conducting business generally. This means that the joint venture entity cannot submit more than three offers over a two year period, starting from the date of the submission of the first offer. A joint venture may or may not be in the form of a separate legal entity.

13 C.F.R. § 121.103(h). Appellant contends that although this definition is found in Part 121, which regulates size determinations, it is still applicable to this SDVO SBC status appeal, which is governed by Part 125, because Part 125 references Part 121. Specifically, 13 C.F.R. § 125.12 provides that an SDVO SBC may have affiliates, so long as the aggregate size of the SDVO SBC and its affiliates is small as defined in Part 121. Thus, Appellant concludes "[f]rom this internal reference, it is clear that the otherwise undefined term 'joint venture' as used in 13 C.F.R. § 125.15(b) must have the same definition as provided in Part 121" (Appeal, at 2 n.1). Further support for this position is found in 13 C.F.R. § 125.15(b)(4), which provides that "[t]he procuring activity will execute an SDVO contract in the name of the joint venture entity or SDVO SBC."

Appellant also alleges that *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007), does not apply to this case. Appellant claims that case was decided on a number of grounds, and the appellant's status as a joint venture was not a primary focus of the decision. Moreover, it is not clear that the Administrative Judge deciding that case considered the regulations to which Appellant points to support its position. Finally, Appellant argues that the AD/GC's determination violates the spirit of the Small Business Act, which aims to provide SDVO SBCs "the maximum practicable opportunity to participate in the performance of contracts let by any Federal Agency." 15 U.S.C. §637(d)(1). Based on the foregoing, it was clear error for the AD/GC to determine that Appellant is not owned by a service-disabled veteran.

With regard to control, Appellant claims the AD/GC erred in determining that Ms. Burns Cash was required individually, and not through Glory, to be a managing member of Appellant.

> The only difference between Glory, a corporation owned 100% by a service-disabled veteran, being the managing member of [Appellant] and Ms. Cash, a service-disabled veteran, individually being the managing member of [Appellant] is that the use of the corporate legal form insulates and protects Ms. Cash by providing her with an element of limited liability.

To apply the regulations this way, Appellant contends, goes against the mandate of the Small Business Act, which aims to protect and provide opportunities for service-disabled veterans. Appellant's form provides a level of protection for the service-disabled veteran individually, ensures that the service-disabled veteran controls the joint venture, and also ensures that the service-disabled veteran will receive 51% of the net profits because Ms. Burns Cash wholly owns Glory, which owns 51% of Appellant. Accordingly, the AD/GC erred when it determined that Appellant is not an eligible SDVO SBC.

C. SBA Response

On October 20, 2009, the SBA submitted the protest file and its response to the appeal petition. SBA contends that the AD/GC's determination that Appellant is not an eligible SDVO SBC is correct. The regulations clearly require an SDVO SBC to be directly owned by the

individual service-disabled veteran. Because Appellant is owned by two other firms, it cannot be directly owned or controlled by a service-disabled veteran. Furthermore, OHA has already considered the issue of joint ventures, and *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007), supports the AD/GC's conclusion that because Appellant is a separate legal entity, it cannot be treated as a joint venture under 13 C.F.R. § 125.15(b).

SBA disputes Appellant's contention that the definition of joint venture found in 13 C.F.R. § 121.103(h) applies to this matter. "The regulation cited by [Appellant] is appropriate for determining if [Appellant] is small for the solicitation, not whether [Appellant] is an eligible SDVO SBC." It is Part 125 that governs such inquiries, and 13 C.F.R. § 125.15(b) does not incorporate Part 121. SBA also takes issue with Appellant's citation of 13 C.F.R. § 125.15(b)(4). The Agency argues that provision merely stands for the proposition that the entity created by a joint venture agreement (not a separate legal entity) may sign an SDVO SBC contract. It does not, as Appellant attempts to construe it, support the conclusion that a joint venture formed under 13 C.F.R. § 125.15(b) may be formed as a separate legal entity.

Finally, SBA contends the AD/GC properly concluded that Appellant does not meet the control requirements set forth in the regulations. Again, the regulations clearly require the service-disabled veteran to be a managing member of an eligible SDVO SBC. Because Glory, and not Ms. Burns Cash individually, is a managing member, Appellant is not an eligible SDVO SBC. Accordingly, the AD/GC's determination was not based upon clear error and should be affirmed.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the AD/GC's determination. 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 only to determine whether the AD/GC made a clear error of fact or law. *Id*. Consequently, the Administrative Judge may only disturb the AD/GC's determination only if he has a definite and firm conviction the AD/GC erred in making a key finding of law or fact. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard applicable to both size appeals and SDVO SBC status appeals).

B. Analysis

To qualify as an eligible SDVO SBC, a concern must be directly owned and controlled by a service-disabled veteran. 13 C.F.R. § 125.9 -.10. The regulations specifically provide that "[a] concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement." 13 C.F.R. § 125.9(a).

Furthermore, contrary to Appellant's assertion, *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007) is controlling. With regard to the ownership requirement of 13 C.F.R. § 125.9(a), OHA ruled: "Although the record includes references to Appellant as a joint venture, Appellant is a separate legal entity, a limited liability company . . . . Appellant's ownership therefore fails to meet the explicit requirement of the regulation for eligibility." *Matter of IITS-Nabholz, LLC*, SBA No. VET-114, at 8. Hence, since Appellant is not directly owned by an eligible service-disabled veteran, it cannot qualify as an SDVO SBC.

Even though Appellant is correct that 13 C.F.R. § 125.15(b) specifically authorizes SDVO SBCs to engage in joint ventures, the definition of "joint venture" found at 13 C.F.R. § 121.103(h) is not relevant to 13 C.F.R. § 125.15(b). Part 121 addresses size determinations, not SDVO SBC eligibility as does Part 125. Accordingly, Appellant may not pluck a single definition from the size regulations (Part 121) and insert it into the completely unrelated SDVO SBC regulations (Part 125).

Moreover, simply because 13 C.F.R. § 125.12 references Part 121 cannot compel the conclusion that the definition of joint venture set forth in 13 C.F.R. § 121.103(h) applies to 13 C.F.R. § 125.15(b). 13 C.F.R. § 125.12 directs the reader to Part 121 specifically to address questions of size—"A concern may have affiliates provided that the aggregate size of the concern and all its affiliates is small as defined in part 121 of this chapter." Conversely, 13 C.F.R. § 125.15 deals solely with SDVO SBC status. In fact, this internal reference from Part 125 to Part 121 merely reinforces the point that if SBA intended to incorporate the definition of joint venture from Part 121 into Part 125, it would have explicitly done so. Instead, 13 C.F.R. § 125.15 itself simply does not indicate whether or not a joint venture may become a separate legal entity and still maintain its SDVO SBC status. A reading of 13 C.F.R. § 125.15 on its own would not render a clear understanding of the ways in which forming a joint venture as a separate legal entity would affect a concern's SDVO SBC eligibility.

Because Appellant is a separate legal entity owned by Cooper and Glory, two other business concerns, its ownership structure cannot meet the explicit eligibility requirements set forth in 13 C.F.R. § 125.9. Neither of Appellant's owners is a service-disabled veteran. Rather, Ms. Burns Cash, the owner of Glory, is a service-disabled veteran. Because Ms. Burns Cash individually does not directly own and control Appellant, Appellant cannot be an eligible SDVO SBC under Part 125. Once Cooper and Glory formed Appellant as a separate legal entity with Cooper and Glory as the owners, the joint venture became ineligible for SDVO SBC status.

V. Conclusion

I find the Record 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, the AD/GC's determination is AFFIRMED, and this appeal is DENIED.

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

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THOMAS B. PENDER
Administrative Judge