

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

IN THE MATTER OF:

Piedmont Contracting & Design, Inc.

Appellant

Solicitation No. VA-251-09-RA-0168

SBA No. VET-169

Decided: November 24, 2009

APPEARANCES

John W. Henke, III, Esq., Southfield, Michigan, for Appellant.

Meagan K. Guerzon, 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 Piedmont Contracting & Design, Inc. (Appellant) was not controlled by a service-disabled veteran (SDV) at the time it submitted its bid for Invitation for Bid No. VA-251-09-RA-0168 (IFB)? *See* 13 C.F.R. § 125.10(a) and 13 C.F.R. § 134.508.

III. Background

A. Protest and AD/GC Determination

On May 18, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA), Contract Service Center, Battle Creek, Michigan, VA Medical Center (Medical Center) issued the IFB under the Recovery Act to Replace Roads Curbs and Gutters Phase V at the Medical Center as a 100% Service-Disabled Veteran-Owned Small Business Concern

(SDVO SBC) set aside. The CO received 11 bids and opened them on June 24, 2009. Appellant is the apparent low bidder.

On September 16, 2009, in a detailed and specific letter, the CO filed a protest alleging Appellant did not meet the SDVO SBC eligibility requirements at the time it submitted its offer. The CO explained he had no contact with Mr. Erick Ortiz, the alleged SDV, during the bidding process, but did have contact with the owners of another concern, STE Construction Services, Inc. (STE) that were shareholders of Appellant. The CO also stated Appellant shared an address with STE. Finally, the CO explained that during his responsibility verification, he received information that indicated Mr. Ortiz was not one of the individuals possessing the necessary skills and experience that would make Appellant a responsible contractor.

On October 16, 2009, the AD/GC issued his determination finding Appellant was not an eligible SDVO SBC at the time it submitted its offer. First, the AD/GC verified that Mr. Erick Ortiz, who owns 51% of Appellant, is a SDV, as determined by the VA. Next, the AD/GC analyzed Appellant's compliance with the other SDVO SBC eligibility requirements and concluded that a SDV did not control Appellant.

The AD/GC reviewed the SDVO SBC eligibility regulations concerning control and noted a SDV must: (1) make the long-term decisions; and (2) manage and administer of the concern's day-to-day business operations to be considered an eligible concern. 13 C.F.R. § 125.10(a). Based upon the Operating Agreement in the Record, the AD/GC concluded Mr. Ortiz does not control Appellant's long-term decision making because Article VII requires unanimous consent of all shareholders for actions by the shareholders.

Next, the AD/GC found that Article VI of the Operating Agreement states that each of Appellant's officers has "the power to do all things necessary or convenient to carry out the Company's business and affairs." Since Appellant has two officers and only one of them, Mr. Ortiz, is a SDV, the AD/GC determined a SDV does not control the daily business operations of Appellant.

The AD/GC also found that, pursuant to Article VI of the Operating Agreement, Mr. Ortiz does not hold the highest officer position within Appellant, since Article VI only identified Mr. Ortiz as an officer, along with Ms. Catherine Richter, and not as the highest officer or holding the highest position. Thus, pursuant to 13 C.F.R. § 125.10(b), Appellant is an ineligible concern.

The AD/GC also found that a SDV did not control Appellant's Board of Directors as required by 13 C.F.R. § 125.10(e). The AD/GC again applied Article VI of Appellant's Operating Agreement and noted that the concept of two equal officers denies control of the board to the SDV. The AD/GC found that Article VI's requirement for unanimous consent by the shareholders before the officers can act, also denies control to Mr. Ortiz.

The AD/GC concluded that as a practical matter, and pursuant to Appellant's Operating Agreement, Appellant has two equal owners, Mr. Ortiz and Ms. Richter. Hence, Appellant is not controlled by a SDV, and it is not an eligible SDVO SBC.

B. Appeal Petition

On October 29, 2009, Appellant filed the instant appeal with the SBA's Office of Hearings and Appeals (OHA). Appellant amended its appeal on November 2, 2009. Appellant alleges: (1) Appellant is managed and operated by Mr. Ortiz; (2) Mr. Ortiz is Appellant's highest officer or President; and (3) Mr. Ortiz controls Appellant's direction.

Appellant claims the AD/GC overlooked the fact that Mr. Ortiz self-identified himself as Appellant's highest officer. Thus, since 13 C.F.R. § 125.10(b) does not require specific designation of officers, that is good enough to make Mr. Ortiz Appellant's highest officer.

Appellant also contends Mr. Ortiz's 51% ownership of Appellant means he controls the day-to-day management and long-term decision making of Appellant. Appellant alleges there is no specific prohibition against shared management responsibilities and that Appellant's Operating Agreement gives control of Appellant to either officer (Mr. Ortiz or Ms. Richter). Appellant argues the AD/GC ignored the intent of Mr. Ortiz and Ms. Richter that Mr. Ortiz would control the management of Appellant.

Appellant claims there is an ambiguity in Article VII of the Operating Agreement about who controls Appellant because of voting requirements. Appellant claims this "ambiguity" was corrected in an Amended and Restated Operating Agreement (dated May 29, 2009), which was effective on May 29, 2009. Appellant further argues that because there appears to be an ambiguity/conflict in Operating Agreement paragraphs 7.2 and 7.2.2, local law requires any interpreter of the agreement look to the intent of the parties to ascertain the meaning of the language.

Although Appellant's Operating Agreement does not provide for a board of directors, Appellant argues that North Carolina law gives control of Appellant's Board of Directors to Mr. Ortiz because of his 51% ownership. Accordingly, Appellant alleges North Carolina law made it unnecessary to resort to the Operating Agreement.

Appellant asserts that its Amended and Restated Operating Agreement removes the issues raised in the AD/GC's determination. Appellant attaches a copy of this document to its Appeal Petition.

C. SBA Response

On November 9, 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. SBA's Response emphasizes the unanimous voting requirements of the Operating Agreement are adequate to find Mr. Ortiz does not control Appellant, despite his 51% ownership of Appellant's shares. For example, Article 7.2.1 of the Operating Agreement requires unanimous consent to make a capital expenditure of more than \$5,000 or a decision to borrow more than \$5,000.

SBA asserts that all of Appellant's management decisions require the vote of or the

consent of the SDV, Mr. Ortiz and the vote of Ms. Richter who does not have SDV status. SBA rejects the argument that since Mr. Ortiz, by himself, can manage Appellant he has control. SBA alleges this power is irrelevant because of the requirement for approval by all shareholders of Appellant's actions.

SBA challenges Appellant's application of North Carolina law on ambiguity. SBA asserts there is no ambiguity to trigger North Carolina law because Article 7.2, which states, "each Shareholder has one vote for each share owned by that Shareholder" does not conflict with Article 7.2.2 which specifies that "Any and all votes, decisions, and determinations or action by the Shareholders . . . shall be made on, and require the affirmative vote of all of the Shares." SBA points out that Article 7.2 relates to how many votes each shareholder may cast and Article 7.2.2 relates to a different matter – how many affirmative votes are required to pursue an action. Thus, based upon the Operating Agreement, the AD/GC's determination was correct.

SBA reiterates that Mr. Ortiz does not control Appellant's day-to-day operations. SBA alleges that since Appellant created two officers with equal powers the non-SDV officer can control decision making because she can effectively veto any action taken by Mr. Ortiz (Operating Agreement Article 6.1). This means Mr. Ortiz cannot effectively control Appellant without Ms. Richter's approval. In addition, because Article 6.2 of the Operating Agreement states Ms. Richter, as Appellant's other officer, has equal ability to do all things necessary to run Appellant's business, she too can control Appellant. This power by Ms. Richter is contrary to the requirements of 13 C.F.R. § 125.10.

SBA further reiterates Mr. Ortiz does not hold Appellant's highest officer position. SBA explains the Operating Agreement does not distinguish between Mr. Ortiz and Ms. Richter and that each can essentially veto the actions of the other. Therefore, regardless of what Appellant alleges insofar as what duties Ms. Richter or Mr. Ortiz may have assumed, the only executed document, the Operating Agreement, makes it plain neither has supremacy.

SBA's final argument is that unlike 13 C.F.R. § 125.10(e) requires, Mr. Ortiz does not control Appellant's Board of Directors. SBA argues that since Appellant admits there is no Board of Directors in its Appeal Petition, Mr. Ortiz cannot possibly control a non-existent entity. Consequently, Appellant cannot show the SDV is even on the Board of Directors and thus cannot show he could overcome any supermajority voting requirements as required by 13 C.F.R. § 125.10(e)(1). Further, SBA asserts that when the lack of a board is considered with the requirement for a unanimous vote before taking any action (a vote of all the shares under Article 7.2) it is plain the only way any action can be accomplished, including establishing a Board of Directors, is with consent of the non-SDV (Ms. Richter), which means Appellant cannot comply with 13 C.F.R. § 125.10(e).

SBA opposes admission into the record of Appellant's Amended and Restated Operating Agreement.

IV. Analysis

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 based its determination 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 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. Merits

To qualify as an eligible SDVO SBC, a SDV must control the concern. 13 C.F.R. § 125.10. This means the SDV must have the exclusive power to control the concern – the power cannot be shared or ambiguous. The only version of Appellant's Operating Agreement before the AD/GC requires unanimous consent of all shareholders for any substantive action. The Operating Agreement also provides each officer of Appellant has equal power. Because of the clear and unambiguous terms of Appellant's Operating Agreement, it is impossible for me to conclude Mr. Ortiz, the SDV, has the exclusive power to control Appellant. Instead, Articles VI and VII of the Operating Agreement provide that Ms. Catherine Richter, who is both a shareholder and an officer of Appellant, has the same power to control Appellant as does Mr. Ortiz.

Appellant's appeal addresses irrelevant issues. Appellant provided the Operating Agreement the AD/GC based his decision upon. Because of the Operating Agreement's unanimous voting requirements and equal grants of power to Appellant's officers, the Operating Agreement clearly provides that both Mr. Ortiz and Ms. Richter have equal power to control Appellant. This means: (1) Mr. Ortiz's 51% ownership is irrelevant to the control issue; and (2) Mr. Ortiz's title is immaterial.

I also specifically find there is nothing ambiguous about Appellant's Operating Agreement. Both Article VI and VII require unanimous shareholder consent for almost all actions and Article VI names two officers with equal powers. Nor can I find anything between paragraph 7.2 and 7.2.2 of Article VII of the Operating Agreement that is inconsistent with the stated requirement for unanimous consent stated in paragraph 7.2 and hold that SBA's argument on that point is correct. Finally, any argument of ambiguity ignores: (1) the certainty that Article VI of the Operating Agreement governs Appellant's management; and (2) that nothing in Article VII contradicts Article VI. Accordingly, since Mr. Ortiz does not have the exclusive power to manage Appellant, Appellant cannot be an eligible concern under 13 C.F.R. § 125.10(a).

Unlike Appellant alleges, Mr. Ortiz's 51% ownership share in Appellant is irrelevant under North Carolina law because he and Ms. Richter agreed to make it so. Based upon Appellant's own interpretation, *i.e.*, the text including "or in an agreement" in the paragraph preceding the law quoted by Appellant (Appeal Petition at 3), Appellant concedes that North Carolina law actually permits corporations to place limits upon the power of a majority shareholder, *e.g.*, "Unless other provided in the Articles of Corporation or by-law. . . ." Because Mr. Ortiz and Ms. Richter agreed to require unanimous consent for all actions by shareholders (each other) in Articles VI and VII of Appellant's Operating Agreement, they agreed, as permitted by North Carolina law, that unanimous consent is required to run Appellant. Regardless, this argument does not alter the fact that both Mr. Ortiz and Ms. Richter signed the Operating Agreement and thereby agreed that each has equal and non-exclusive power, as officers of Appellant, to run Appellant. This arrangement is prohibited by 13 C.F.R. § 125.10(a).

Finally, it is irrelevant to my review of the AD/GC's October 16, 2009 determination that there may be an Amended and Restated Operating Agreement. The fact remains that the Operating Agreement Appellant provided is the only Operating Agreement before me as part of the Record. Since I cannot consider anything not before me in reviewing the AD/GC's determination, only the contents of the Operating Agreement provided by Appellant to the AD/GC and that require unanimous shareholder action are relevant. 13 C.F.R. § 134.512.

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 determination. 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).

THOMAS B. PENDER
Administrative Judge