

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

IN THE MATTER OF:

Teracore, Inc.

Appellant

RE: P3 Partners, LLC

Solicitation No. HSTS03-09-R-CIO119

SBA No. VET-170

Issued: December 4, 2009

APPEARANCES

Janine S. Benton and Kathy C. Potter, Benton Potter & Murdock, P.C., Washington, D.C., for Appellant.

G. Matthew Koehl, Shook Doran Koehl, LLP, Washington, D.C., for P3 Partners, LLC.

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

DECISION

I. Introduction & Jurisdiction

On July 1, 2009, the Contracting Officer (CO) for the U.S. Department of Homeland Security, Transportation Security Administration, issued Solicitation No. HSTS03-09-R-CIO119 (RFP) to procure Information Technology Project and Program Support Services for its Office of Information Technology. The RFP was issued as a 100% service-disabled veteran-owned small business concern (SDVO SBC) set-aside. On September 28, 2009, unsuccessful offerors were notified that the contract had been awarded to P3 Partners, LLC (P3).

On October 6, 2009, Teracore, Inc. (Appellant) filed a protest alleging that P3 is not an eligible SDVO SBC. Specifically, Appellant alleged that the long-term decision making and day-to-day management of P3 are not controlled by a service-disabled veteran. On October 30, 2009, the U.S. Small Business Administration's (SBA) Acting Director of Government Contracting (AD/GC) issued a determination letter finding that P3 does meet the SDVO SBC eligibility requirements. On November 16, 2009, Appellant filed the instant appeal of that determination with SBA's Office of Hearings and Appeals (OHA).

OHA decides SDVO SBC eligibility appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Appellant filed its appeal petition within ten business days of receiving the AD/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this appeal is properly before OHA for decision.

II. Background

A. AD/GC Determination

As stated above, on October 30, 2009, the AD/GC issued his determination finding Appellant was an eligible SDVO SBC at the time it submitted its offer. The AD/GC first verified that Mr. Charlie E. Rolader is a service-disabled veteran, as determined by the U.S. Department of Veterans Affairs, pursuant to 13 C.F.R. § 125.8. The AD/GC next confirmed that Mr. Rolader directly and unconditionally owns 51% of P3, as required by 13 C.F.R. § 125.9. Finally, the AD/GC analyzed the issue of control pursuant to 13 C.F.R. § 125.10.

The AD/GC found the documentation submitted by P3 indicates that Mr. Rolader is the firm's sole manager and Chief Executive Officer (CEO) and is responsible for the day-to-day operations of the firm. Additionally, Mr. Rolader has approximately thirty years of management experience, including managing complex information technology systems. The AD/GC also determined that although Mr. Rolader holds an ownership interest in three other firms—Gemini Consultant Solutions, Comprehensive Enterprise Solutions, LLC (CES), and Sharold Holdings, LLC—"there is no evidence to lead [the AD/GC] to conclude that [Mr. Rolader] would be unable to devote the necessary time to conduct on-site management of P3 or the subject solicitation" (AD/GC Determination Letter, at 4). The AD/GC concluded that P3 is owned and controlled by a service-disabled veteran and, thus, is eligible to receive the award of the contract at issue.

B. Appeal Petition

On November 16, 2009, Appellant filed the instant appeal petition. Appellant contends the AD/GC's determination is erroneous based on two grounds. First, Appellant claims the AD/GC failed to discuss (1) a fourth company that is also owned and controlled by Mr. Rolader, Corporate Suites of River Park Commons, LLC (CSRPC), and (2) the General Services Administration (GSA) Mission Oriented Business Integrated Services (MOBIS) Schedule contract awarded to CES, one of the other companies owned by Mr. Rolader. Appellant claims the record upon which the AD/GC's determination is based is incomplete because it fails to reveal that Mr. Rolader also owns CSRPC.¹ Appellant also claims that another of Mr. Rolader's companies, CES, was awarded a GSA MOBIS contract in 2008 and actively sought other large

¹ In addition to protesting P3's SDVO SBC status, Appellant also protested P3's size. On November 5, 2009, SBA's Office of Government Contracting—Area III issued a Size Determination. The Size Determination discussed Mr. Rolader's ownership of CSRPC, which appears to be where Appellant first learned of this ownership interest.

federal contracts, which, according to Appellant, contradicts the Area Office's finding that CES is merely an "occasional subcontractor" of P3.

Second, Appellant asserts the AD/GC incorrectly applied the regulation regarding control when it concluded that Mr. Rolader was able to control the day-to-day operations of P3 while maintaining ownership of multiple other companies. Appellant argues that Mr. Rolader's ownership and "involvement as a CEO in at least three companies, two of which are certified as SDVOSBs and are the recipients of multiple government contracts calls into serious question whether the long-term decision making and the day to day management and administration of P3 is conducted by a service disabled veteran" (Appeal Petition, at 4). Appellant concludes that on these bases, the AD/GC's determination should be reversed.

C. P3 Response

On November 25, 2009, P3 filed its response to the appeal petition. P3 admitted that it inadvertently failed to disclose Mr. Rolader's relationship with CSRPC in its response to the protest.² Nevertheless, P3 contends that any evidence regarding Mr. Rolader's ownership of CSRPC is new evidence that must be excluded from the record. P3 cites *Matter of Robra Construction, Inc.*, SBA No. VET-160 (2009) for the proposition that information not presented to the AD/GC may not be presented for the first time on appeal because the scope of OHA's review is limited to the existing Record. Moreover, P3 argues, Mr. Rolader's ownership of CSRPC does not call into question the AD/GC's crucial finding, supported by evidence in the Record, that Mr. Rolader spends 95% of his time running P3's business operations. Thus, any alleged error resulting from the AD/GC's failure to consider Mr. Rolader's ownership of CSRPC is, at most, harmless error.

With regard to the GSA MOBIS contract, P3 asserts the Record conclusively establishes that there have been no sales or orders under the contract. Thus, "it would have been fundamentally unreasonable for the AD/GC to determine that a P3 affiliate's ownership of a contract with no sales and no performance rendered Mr. Rolader unable to devote sufficient time to control P3" (P3 Response, at 2). P3 concludes that Appellant has failed to show that the AD/GC committed any clear error of fact or law.

D. Agency Response

On December 1, 2009, SBA submitted the protest file and the agency's response to the

² P3 provides in its response:

This failure to identify [CSRPC] was plainly not intentional: (1) P3 volunteered information about the related and more active P3 affiliate Sharhold which built and maintains the townhomes for which payments are made to [CSRPC]; (2) P3 identified [CSRPC] in the parallel size protest proceeding; and, (3) P3 would not have been disadvantaged relative to the merits of [Appellant's] SDVO SBC protest by identifying [CSRPC], given that [CSRPC] is an entity formed solely to receive rental payments from the townhomes, has no operating agreement, and requires essentially no time or attention from Mr. Rolader.

appeal petition. SBA contends that OHA should affirm the AD/GC's determination because it is not based upon clear error of fact or law. With regard to Mr. Rolader's ownership of CSRPC, SBA asserts the AD/GC did not address the issue "for the simple reason that P3's response to the protest did not mention the existence of CSRPC" (Agency Response, at 6). SBA offers *Matter of Cedar Electric, Inc./Pride Enterprises, Inc., JV*, SBA No. VET-129 (2007), for the proposition that it could not have been clear error for the AD/GC to fail to consider a matter that was never presented to him. Furthermore, SBA argues that P3's failure to disclose the existence of CSRPC was a minor omission and would not have affected the ultimate determination because Mr. Rolader's involvement in CSRPC is not time-consuming.³ Thus, this omission is nothing more than harmless error, and the AD/GC's determination should not be disturbed on this basis.

With respect to Appellant's allegations regarding the GSA MOBIS contract, SBA also notes that CES has performed no work on the contract. Additionally, SBA points out that CES has no employees, and its only existing revenues were generated from \$15,000 worth of work that Mr. Rolader himself performed as a subcontractor for P3. Furthermore, SBA argues that although the AD/GC did not specifically discuss the GSA MOBIS contract in his determination, he did examine the broader issue of Mr. Rolader's involvement with CES, and the GSA MOBIS contract itself is irrelevant to whether Mr. Rolader controls P3. "The [A]D/GC's decision not to engage in a detailed discussion of a contract under which no orders have been placed, no funds have been provided, and no work has been done cannot reasonably be viewed as constituting reversible error" (Agency Response, at 8).

Finally, SBA disputes Appellant's claim that the AD/GC failed to properly analyze whether Mr. Rolader is able to control the day-to-day operations of P3 while maintaining ownership of multiple other companies. SBA emphasizes that there is no rule that a service-disabled veteran owner's involvement in other companies renders him unable to control the day-to-day management of his protested firm. Rather, SBA argues it is "*substantial* outside involvement by the service-disabled veteran owner of a protested concern [that] may render him or her unable to adequately conduct the day-to-day management and administration of the protested concern's business affairs" (Agency Response, at 9). Here, SBA stresses that there is no evidence that Mr. Rolader's ownership interests in other firms impedes his ability to control P3. SBA concludes none of Appellant's arguments or evidence are sufficient to rebut Mr. Rolader's statement that he is able to devote 95% of his time to conducting P3's business.

E. Appellant's Motion to File a Reply

On December 2, 2009, Appellant filed a Motion for Permission to File a Reply to the Agency Response. Appellant requests permission to file a reply and notes that "[Appellant] believes that the Agency Response supports its position that the SBA Determination was fatally flawed and must be reversed." Appellant also seeks an extension of time to review the Protest File and P3's Response once it receives those documents.

³ SBA references the Area Office's findings in the Size Determination and notes: "CSRPC was formed for the sole purpose of receiving rental income from Sharold Holdings. CSRPC conducts no business activities or operations and requires no meaning commitment of Mr. Rolader's time or attention."

The Record in this matter closed by regulation on November 25, 2009. 13 C.F.R. § 134.513. On November 24, 2009, I issued a Protective Order that extended the Record solely to allow the Agency to file its Response after all counsel were admitted under the Protective Order. A review of the Agency Response “reveals nothing Appellant could not have addressed in its appeal petition.” *Matter of Teamus Construction Co., Inc.*, SBA No. VET-146, at 6-7 (2009). In fact, Appellant contends the Agency Response supports its position, so it is unclear why Appellant seeks to file a reply. Furthermore, Appellant does not have the right to file a reply. Rather, pursuant to the applicable regulations, I must decide SDVO SBC appeals “solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto.” 13 C.F.R. § 134.512; *see also Matter of Gonneville, Inc.*, SBA No. VET-125, at 2 (2008). Accordingly, Appellant’s Motion is DENIED.

III. Discussion

A. Standard of Review

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 controlled by one or more service-disabled veterans. 13 C.F.R. § 125.10(a). “Control by one or more service-disabled veterans means that both the long-term decisions making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans.” *Id.* The crux of this dispute is whether Mr. Rolader is able to control the long-term decision making and the day-to-day business operations of P3.

With regard to the AD/GC’s failure to consider Mr. Rolader’s ownership of CSRPC, P3 and SBA are correct that I may not consider new evidence on appeal. 13 C.F.R. § 134.512. P3 and SBA are also correct that the AD/GC could not have committed an error based on information that was not presented to him. *See, e.g., Matter of Robra Constr., Inc.*, SBA No. VET-160, at 3 (2009).⁴ Moreover, I agree with P3’s and SBA’s assessment of the situation. Although it is regrettable that P3 failed to include information about CSRPC in its response to

⁴ Nevertheless, there may be an argument that new evidence should be considered if it was previously withheld by the protested concern. I need not examine that question here because I find any error resulting from the omission in this instance was harmless.

the protest, it does not appear the omission was based in a desire to withhold information, and it is highly unlikely that considering the information would have changed the AD/GC's determination. There is no evidence that Mr. Rolader's involvement would change the AD/GC's finding that Mr. Rolader is able to control the operations of P3. I cannot conclude the AD/GC based his determination on a clear error of fact due to this omission. Here, if any error resulted from the exclusion of this information, it was harmless.

Similarly, although it is unclear whether the AD/GC specifically considered the GSA MOBIS contract, it is clear that he considered Mr. Rolader's role in the operations of CES because he discussed CES in the determination letter. Thus, I cannot conclude the AD/GC committed a clear error by failing to specifically mention the GSA MOBIS contract. He considered the overriding issue of Mr. Rolader's involvement in CES, and that is sufficient. Moreover, as P3 and SBA point out, there has been no performance under this contract. Thus, even if it were clear that the AD/GC did not consider the contract, the Record does not show the contract could have affected his ultimate determination that Mr. Rolader has ample time to devote to the operations of P3, and failure to consider this contract could not constitute anything more than harmless error.

Finally, I disagree with Appellant's argument that the above omissions call into question Mr. Rolader's ability to control both the long-term decision making and day-to-day operations of P3. After reviewing the Record, the AD/GC chose to credit Mr. Rolader's sworn statement that he "spends at least 95 percent of [his] time managing P3's day-to-day business operations and its long term business planning and determinations" (Declaration of Charlie Evan Rolader, at ¶ 25). It is within the AD/GC's discretion to credit this statement, and Appellant has presented nothing sufficient to prove that he committed a clear error in doing so.⁵ I find the omission of any discussion regarding Mr. Rolader's ownership of CSRPC or the GSA MOBIS contract does not affect this finding. The AD/GC correctly applied the regulations at issue and concluded that P3 is an eligible SDVO SBC.

IV. 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).

THOMAS B. PENDER
Administrative Judge

⁵ I am not saying the AD/GC's discretion is unfettered, for it is not. Instead, I am saying the AD/GC did not abuse his discretion under facts of this particular appeal.