

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

IN THE MATTER OF:

Eagle Integrated Services, LLC

Appellant

Solicitation No. VA-244-09-RA-0298

SBA No. VET-172

Issued: December 10, 2009

APPEARANCES

C. Warren Trainor, Esq., Ehmann, Van Denbergh & Trainor, P.C., Philadelphia, PA, for Appellant.

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

DECISION

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On August 12, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA), Wilmington Veterans Affairs Medical Center issued Solicitation No. VA-244-09-RA-0298 (RFP) seeking proposals to upgrade electrical deficiencies. The RFP was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside, and the CO designated North American Industry Classification System (NAICS) code 238210, Electrical Contractors and Other Wiring Installation Contractors, with a corresponding size standard of \$14.0 million in average annual receipts.

On September 28, 2009, the CO awarded the contract to Eagle Integrated Services, LLC (Appellant). On September 29, 2009, the CO posted notice of the award to the Federal Business Opportunities website (<http://www.fbo.gov/>). On September 30, 2009, Wescott Electric Company, an unsuccessful offeror, protested Appellant's status as an eligible SDVO SBC.

B. AD/GC Determination

On November 12, 2009, the U.S. Small Business Administration's (SBA) Acting Director of the Office of Government Contracting (AD/GC) issued his determination letter finding that Appellant is not controlled by a service-disabled veteran and, therefore, does not meet the SDVO SBC eligibility requirements. The AD/GC determined Appellant was not an eligible SDVO SBC at the time it submitted its offer. The AD/GC first verified that Mr. Michael Parrish, Chairman and Chief Executive Officer (CEO) of Appellant, is a service-disabled veteran, as determined by the VA, pursuant to 13 C.F.R. § 125.8. The AD/GC next confirmed that Mr. Parrish directly and unconditionally owns at least 51% of Appellant, 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 determined that Mr. Parrish holds the highest officer position of Appellant and possesses the requisite experience necessary to run the business, as required by 13 C.F.R. § 125.10(b). However, the AD/GC concluded that Mr. Parrish does not control Appellant for two reasons. First, § 10.1 of Appellant's Operating Agreement provides that the Chief Information Officer (COO), Mr. Warren Geiger (Appellant's only other member), "shall have supervision of the day-to-day business affairs and property of [Appellant]." Based on this provision, the AD/GC found that Mr. Parrish does not control the day-to-day management and administration of Appellant, as required by 13 C.F.R. § 125.10(a). Second, § 7.2 of Appellant's Operating Agreement mandates that Appellant's managing members must act unanimously. Because, according to this provision, Mr. Parrish needs Mr. Geiger's consent before taking action on behalf of Appellant, the AD/GC found that Mr. Parrish does not have "control over all the decisions of the limited liability company," as required by 13 C.F.R. § 125.10(d). Accordingly, the AD/GC concluded that Appellant does not meet the SDVO SBC eligibility requirements.

C. Appeal Petition

On November 25, 2009, Appellant filed the instant appeal of the AD/GC's determination with SBA's Office of Hearings and Appeals (OHA). Appellant disputes the AD/GC's finding that it is not controlled by a service-disabled veteran. Appellant first argues that Mr. Parrish meets the requirements of 38 C.F.R. § 74.4 because he exercises control over all of Appellant's decisions. Appellant emphasizes § 10.4 of its Operating Agreement, which provides that the Chairman/CEO "shall have general supervision of the business affairs and property of [Appellant] and over its several officers." Appellant also asserts that the AD/GC's determination that the Chairman/CEO does not control Appellant's daily operations "runs counter to generally accepted business practices" because the Chairman/CEO is the direct supervisor of Appellant's only other member, the COO. (Appeal Petition, at 5.) Appellant explains that the Chairman/CEO has not delegated his duties or authority to the COO. Rather, the COO performs his duties "based on prior direction and policy established" by the Chairman/CEO. (Appeal Petition, at 5.) Appellant argues that it is supervision of the day-to-day business affairs and officers of a company that is contemplated by the "day-to-day management" requirement set forth in 13 C.F.R. § 125.10(a).

Appellant next argues that the AD/GC erred in relying on § 7.2 of Appellant's Operating Agreement. Instead, Appellant claims § 7.2 must be read together with § 7.5, which provides: "[n]otwithstanding anything to the contrary set forth herein, any tie vote of the Managers shall be broken by the Chairman." Thus, from Appellant's point of view, it is clear that the ultimate decisionmaking authority lies with Mr. Parrish, the Chairman/CEO and the service-disabled veteran. Appellant concludes that the AD/GC's determination should be reversed because Appellant is controlled by a service-disabled veteran as required by the applicable regulations.

D. Agency Response

On December 7, 2009, the SBA submitted the Protest File and the Agency's Response to the Appeal Petition. SBA submits that the AD/GC's determination was not based on any clear error and should be affirmed. SBA initially notes that Title 38 of the Code of Federal Regulations, cited by Appellant, is inapplicable here. SBA first contends that § 10.1 of Appellant's Operating Agreement clearly indicates that the COO "shall have supervision of the day-to-day business affairs and property of [Appellant]." SBA argues that the language of 13 C.F.R. § 125.10(a) is very precise and provides that the day-to-day management of the company must be *conducted* by the service-disabled veteran, not merely supervised by him or her.

SBA also claims that Appellant's reliance upon § 7.5 of its Operating Agreement to overcome the unanimity requirement in § 7.5 of that agreement is misplaced. § 7.2 clearly provides that decisions must be unanimously approved by Appellant's two managing members. SBA's position is that "while § 7.5 of [Appellant's] Operating Agreement does give Mr. Parrish the authority to override Mr. Geiger's vote, it does so only with regard to decisions voted on at formal meetings." Thus, if actions are taken informally, as is allowed under other provisions of the Operating Agreement, the requirement for unanimous approval still applies. Accordingly, Mr. Parrish cannot be said to have the power to control all of Appellant's decisions, as required by 13 C.F.R. § 125.10(d).

II. Discussion

A. Jurisdiction & Standard of Review

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

OHA reviews the AD/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, the Administrative Judge may only overturn the AD/GC's determination if Appellant proves that he made a patent error based on the record before him.

B. Analysis

As a threshold matter, SBA is correct that Title 38 of the Code of Federal Regulations does not apply here. This inquiry is governed solely by Title 13 of the Code of Federal Regulations, Parts 125 and 134. Pursuant to 13 C.F.R. § 125.10(a), a service-disabled veteran must control the management and daily business operations of a firm for the firm to be considered an eligible SDVO SBA. “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.” 13 C.F.R. § 125.10(a). In the case of an LLC, the service-disabled veteran must also serve as a managing member of the firm “with control over all decisions of the limited liability company.” 13 C.F.R. § 125.10(d).

The foremost hurdle for Appellant in this matter is that its own Operating Agreement is less than clear. With regard to whether Mr. Parrish, the service-disabled veteran in this case, has control over the day-to-day management of the firm, Appellant argues it is axiomatic that its Chairman/CEO has such control. There are only two members of Appellant, and supervisory authority is vested in the Chairman/CEO. Although this argument appeals to common sense, § 10.1 of Appellant’s Operating Agreement clearly carves out supervision of the day-to-day business affairs as an institutional responsibility for Appellant’s COO. Such a provision is problematic when the applicable regulation specifically requires that the day-to-day business operations must be conducted by the service-disabled veteran.

Similarly, Appellant argues § 7.5 of the Operating Agreement, which provides that the Chairman/CEO can break a tie vote of the managers at meetings, overcomes the unanimity requirement found in § 7.2. This raises more questions than it answers. How can there be a tie vote if unanimity is required by § 7.2? Does this tiebreaker provision (which expressly applies to “meetings”) apply when actions are taken “by written consent or telephone conference,” as permitted by § 7.6? Again, the unanimity provision (and its interplay with other provisions of the agreement) presents a difficult set of circumstances in light of the requirement that the service-disabled veteran must control all the decisions of the company.

It was Appellant’s burden at the protest level to prove that it is an eligible SDVO SBC. It is presently Appellant’s burden to prove that the AD/GC committed a clear error of fact or law in making his determination. Considering the ambiguities in Appellant’s Operating Agreement, it is uncertain whether Appellant meets the SDVO SBC eligibility requirements, and I cannot conclude that the AD/GC made a clear error in interpreting the agreement as he did. Instead, I must conclude the Record supports the AD/GC’s determination, and Appellant failed to meet its burden of proving clear error on appeal.

III. Conclusion

The AD/GC's determination was not based upon clear error. Thus, the AD/GC's status determination is AFFIRMED, and the instant appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge