

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

IN THE MATTER OF:

VetIndy, LLC

Appellant

Solicitation No. W912P4-09-B-0010

SBA No. VET-175

Decided: January 4, 2010

APPEARANCES

Thomas O. Crist, Esq., and James L. Ervin, Jr., Esq., Benesch, Friedlander, Coplan & Aronoff, LLP, Columbus, OH, for Appellant.

Michael K. Ashar, Esq., Michael K. Ashar & Associates, Vermilion, OH, for Northstar Contracting, Inc.

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 July 31, 2009, the Contracting Officer (CO) for the U.S. Department of Defense, Department of the Army, Corps of Engineers, Buffalo District issued Solicitation No. W912P4-09-B-0010 (IFB) seeking bids for excavation and disposal of dredged material in Cleveland, Ohio. The IFB 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 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$33.5 million in average annual receipts.

On September 9, 2009, bid opening was conducted. On September 18, 2009, the CO awarded the contract to VetIndy, LLC (Appellant), the low bidder. On September 29, 2009, Northstar Contracting, Inc. (Northstar), an unsuccessful bidder, protested Appellant's status as an eligible SDVO SBC. On October 14, 2009, the U.S. Small Business Administration's (SBA)

Acting Director of the Office of Government Contracting (AD/GC) dismissed Northstar's protest as untimely. On October 16, 2009, the SBA's Assistant Director of the Office of Contract Assistance adopted Northstar's protest, thereby initiating a valid SBA protest against Appellant.

B. AD/GC Determination

On December 3, 2009, the AD/GC issued his determination letter finding that Appellant was not controlled by a service-disabled veteran at the time it submitted its offer and, therefore, did not meet the SDVO SBC eligibility requirements. The AD/GC first verified that Mr. Matthew Herchick, Managing Member 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. Herchick directly and unconditionally owns 51% of Appellant, as required by 13 C.F.R. § 125.9 (the other 49% is owned by one entity, IE Group, Inc./Indy Equipment, Inc.). Finally, the AD/GC analyzed the issue of control pursuant to 13 C.F.R. § 125.10.

The AD/GC determined that Mr. Herchick, as Managing Member, 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. Herchick does not control Appellant for two reasons. First, Mr. Herchick is the owner and operator of four business concerns in addition to Appellant. The AD/GC emphasized that Mr. Herchick had not provided any evidence to demonstrate how he is capable of running all five businesses or to identify how much time he regularly devotes to each business. Accordingly, the AD/GC found he could not conclude that Mr. Herchick is able to conduct the day-to-day business operations of Appellant as required by 13 C.F.R. § 125.10(a).

Second, 13 C.F.R. § 125.10(a) also requires that the service-disabled veteran control the long-term decisionmaking of the company, and 13 C.F.R. § 125.10(d) requires that, in the case of a limited liability company, the service-disabled veteran must be a managing member with control over all decisions of the company. The AD/GC pointed out that various provisions of Appellant's Operating Agreement restrict Mr. Herchick from exercising full control over the company. Specifically, Section 2.4(E) requires that both members sign contracts binding the company, Section 2.8 provides that neither member alone has the power to sign a labor agreement on behalf of the company, Section 2.10 requires that both members approve withdrawals from the company's bank account, and Section 9.1 requires the written consent of both members before a variety of actions (such as releasing the company's debt or selling its assets) can be taken on the company's behalf. Because, according to these provisions, Mr. Herchick needs the other member's consent before taking various actions on behalf of Appellant, the AD/GC found that Mr. Herchick does not have control over the long-term decisionmaking or over all the business decisions of the company, as required by 13 C.F.R. § 125.10(a) and (d). Accordingly, the AD/GC concluded that Appellant does not meet the SDVO SBC eligibility requirements.

C. Appeal Petition

On December 14, 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 and argues the decision is based upon clear error of fact and law. Amid a lengthy recitation of the facts, Appellant first argues that Northstar's protest was untimely and unsupported by evidence and, therefore, should not be given any consideration. Appellant next contends that Mr. Herchick has sufficient time available to devote to Appellant's day-to-day business activities. Appellant confirms that Mr. Herchick has an interest in four other firms. Nevertheless, Appellant claims its business is now Mr. Herchick's main focus. Mr. Herchick's home inspection business, Professional Eye Home Inspection, LLC, was formerly his main source of income. However, since the downturn of the real estate market, that business is no longer profitable. After that business was "decimated," Mr. Herchick formed three other entities, including Appellant, to seek government construction contracts. His first successful foray into SDVO-SBC set-asides is Appellant's instant contract. Thus, Mr. Herchick is dissolving the other entities, and will devote his time to Appellant.

Appellant also argues that Mr. Herchick has control over all the decisions of the company. Mr. Herchick prepared the bid for this solicitation, executed the solicitation, executed the award, and signed the bond without the help of Indy Equipment, Inc. Appellant acknowledges that its "Operating Agreement could be construed as requiring secondary approval for [Mr. Herchick's] business decisions." (Appeal Petition, at 13.) Notwithstanding the imperfections in the agreement, Appellant claims in practice Mr. Herchick absolutely controls the business and all its decisions, as the parties intended. Appellant asserts that the offending provisions in the Operating Agreement are merely boilerplate language and do not affect how Appellant is actually run. These provisions have not prevented Mr. Herchick from freely executing contracts on behalf of Appellant (and were not intended to do so), and the intentions and conduct of the parties should overcome these provisions. Finally, in an attempt to correct these deficiencies, Appellant has executed and attached to its Appeal Petition a new Operating Agreement to accurately reflect how Appellant has operated since its inception. Appellant concludes that the AD/GC's determination should be reversed because Appellant is undoubtedly controlled by a service-disabled veteran, as required by the applicable regulations.

D. Northstar Response

On December 22, 2009, Northstar filed its response to the Appeal Petition. Northstar first points out that the AD/GC's determination was based upon an SBA protest, and not upon its own protest, which was dismissed as untimely. Northstar also argues that the Appeal Petition is misleading in its account of Mr. Herchick's lack of activity in his other businesses. In support of this contention, Northstar attaches to its Response documents indicating that another of Mr. Herchick's businesses besides Appellant was recently awarded a federal contract in another city. Northstar also disputes Mr. Herchick's qualifications and alleges Appellant is merely a shell to circumvent the SDVO SBC set-aside regulations. Finally, Northstar supports the AD/GC's determination that Appellant's Operating Agreement hinders Mr. Herchick's control of the company.

E. Agency Response

On December 23, 2009, SBA submitted the Protest File and the Agency's Response to the Appeal Petition.¹ SBA first objects to Appellant's submission of its newly executed Operating Agreement. The document was not before the AD/GC when he made his determination and, therefore, must not be admitted or considered. 13 C.F.R. § 134.512. Moreover, SBA argues, SDVO SBC eligibility is determined as of the date the company submitted its offer for the instant procurement. Thus, the new Operating Agreement is inapposite here.

SBA next submits that the AD/GC's determination was not based on any clear error and should thus be affirmed. First, SBA asserts that the burden was on Appellant to demonstrate that Mr. Herchick controls Appellant. *Matter of Cambridge Fed. Solutions, LLC*, SBA No. VET-135 (2008). Here, SBA argues, the AD/GC lacked any basis to conclude that Mr. Herchick was capable of controlling Appellant because Appellant failed to provide any information indicating that Mr. Herchick's four other business interests required only a minimal time commitment.

Second, SBA contends it was not error for the AD/GC to rely on those provisions in Appellant's Operating Agreement that gave the company's minority member the ability to control various company decisions to conclude that Mr. Herchick lacks control over Appellant. As the AD/GC discussed, there were four different provisions that required consent from both members for a variety of company actions dealing with a diverse array of business matters. "However, Appellant argues that the [A]D/GC should have ignored the evidence presented by these clearly-worded provisions and instead somehow divined the fact that [Appellant's] members actually conducted themselves in a manner that both contravened its Operating Agreement and was entirely consistent with SDVO SBC regulations." (Agency Response, at 10.) SBA asserts the AD/GC could only make a determination based on the Record before him and committed no error in so doing here. Accordingly, SBA concludes, the AD/GC's determination was not based upon clear error of fact or law and should be affirmed.

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

¹ On December 15, 2009, I issued a Notice and Order in this matter explicitly directing the Agency to address the issues raised in *Matter of Bancroft GS, Inc.*, SBA No. VET-171 (2009). Although it now appears, upon review of the full Record, that the issues raised in that case are inapplicable here, it is unclear why the Agency chose not to address those issues in its Response when I specifically requested that it do so.

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, Northstar is correct that the AD/GC’s determination was based on an SBA protest, not on Northstar’s protest. SBA is not bound by the same five-day time limit as other interested parties. 13 C.F.R. § 125.25(d)(3). Thus, the AD/GC properly considered the protest. As a second threshold matter, SBA is correct that Appellant’s new Operating Agreement is both inadmissible and irrelevant. 13 C.F.R. § 134.512 (“The Judge may not admit evidence beyond the written protest file nor permit any form of discovery.”); *Matter of Cedar Electric, Inc./Pride Enterprises, Inc., JV*, SBA No. VET-129 (2008) (“[T]he D/GC must determine SDVO SBC eligibility as of the date Appellant submits its initial offer. 13 C.F.R. § 125.15(a)(1) (requiring a concern to certify it is an SDVO SBC when it submits its initial offer). . . . A putative SDVO SBC cannot cure its lack of eligibility after submission of the initial offer.” (citing *Matter of People Direct Placement Services, Inc.*, SBA No. VET-113, at 5 (2007))). Therefore, the new Operating Agreement is EXCLUDED from the Record. Northstar’s new evidence must also be EXCLUDED for the same reasons.

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 SBC. “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 AD/GC determined that Mr. Herchick lacks control over Appellant for two reasons: (1) it was unclear based on the Record whether Mr. Herchick has sufficient time to devote to Appellant’s operations, and (2) various provisions of Appellant’s Operating Agreement restrict Mr. Herchick’s complete control over Appellant’s business decisions by requiring consent from the minority member to undertake certain actions. With regard to the first ground, I cannot find that the AD/GC committed clear error based on the Record before him. SBA is correct that it is Appellant’s burden to prove that it is an eligible SDVO SBC. Although it may have been prudent for the AD/GC to request further information about Mr. Herchick’s other companies before making an adverse determination, I cannot find that this failure was an abuse of the AD/GC’s discretion. Furthermore, even if the AD/GC had committed an error on this point, the second ground is sufficient on its own to determine that Mr. Herchick lacks control over Appellant.

With regard to its Operating Agreement, Appellant essentially argues that the Agreement should be disregarded in favor of an examination of its daily business operations. However, a party “must be bound by the actual language of its organizing documents.” *Matter of NuGate*

Group, SBA No. VET-132, at 6 (2008). The regulations explicitly require that the service-disabled veteran have “control over all decisions of the limited liability company.” 13 C.F.R. § 125.10(d). I understand Appellant’s argument that Mr. Herchick does in fact and in practice have such control over its operations. Nevertheless, as Appellant itself acknowledges, the Operating Agreement gives a large measure of control to the minority member.

As previously discussed in the AD/GC’s determination, Section 2.4(E), under the heading “Submission of Bids, Negotiation, and Execution of the Contracts,” provides that “[a]n authorized representative of each Member on behalf of the Company will sign the Contracts, all modifications to the Contracts which require the signature of the contractor, and all certifications of claims where certifications are required”; Section 2.8, “Labor Issues,” provides that “[n]either member has the authority to sign a labor agreement on behalf of the Company related to any activities related to the Contracts without the written authorization of the other Member”; Section 2.10, “Bank Account,” provides that “[a]ll withdrawals and transfers from the account will require the signature of at least one appointed signatory from each Member”; and Section 9.1, “Restricted Activities,” provides a list of activities that “[n]o Member, without the written consent of the other Member shall” undertake, including releasing company debts, engaging in transactions outside the ordinary course of business, and selling or otherwise disposing of company assets.

These provisions would undoubtedly allow the minority member to limit some level of Mr. Herchick’s control over Appellant if it chose to do so. In other words, even though it appears highly unlikely in this factual scenario, the minority member could exercise the control legally reserved for it by the Operating Agreement, with the result that Mr. Herchick would no longer exercise “control over all decisions” of Appellant. Regardless of Appellant’s argument that this was not the intent of the parties, the legal effect is the same—the minority member has the ability to restrict Mr. Herchick’s control. The regulation is very clear: the service-disabled veteran must have “control over all decisions” of an LLC for it to be considered an eligible SDVO SBC. The provisions of Appellant’s Operating Agreement, at the time it submitted its offer, outlined above clearly enable the minority member to interfere with Mr. Herchick’s control over Appellant.

In light of these provisions, I cannot conclude the AD/GC committed an error in concluding that Mr. Herchick does not control the business. *See Matter of Eagle Integrated Services, LLC*, SBA No. VET-172 (2009) (noting that “[t]he foremost hurdle for Appellant in this matter is that its own Operating Agreement is less than clear,” and holding that the AD/GC committed no error in finding a lack of control based on ambiguities in the Operating Agreement). Thus, I must conclude the Record supports the AD/GC’s determination.

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