

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

IN THE MATTER OF:

Chevron Construction Services, LLC

Appellant

Solicitation No. VA-250-09-IB-0285

SBA No. VET-183

Decided: February 17, 2010

APPEARANCES

Aubrey L. Coleman, Jr. Esq., Douglas L. Tabelaing, Esq., Smith, Currie and Hancock, LLP, for the 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

Whether the Acting Director for Government Contracting (AD/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining Chevron Construction Services, LLC (Appellant) did not meet the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements at the time it submitted an offer for Solicitation No. VA-250-09-IB-0285. *See* 13 C.F.R. § 134.508.

III. Background

A. Protest and Acting Director for Government Contracting Determination

The U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA-250-09-IB-0285 (solicitation) and set the procurement aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). On September 28, 2009, the VA awarded the contract to Chevron Construction Services, LLC (Appellant). On October 13, 2009, The Geiler Company

(Geiler) protested Appellant's SDVO SBC status to the Government Accountability Office (GAO). On November 13, 2009, the VA's Contracting Officer adopted Geiler's protest in a letter to the Small Business Administration (SBA).

On December 23, 2009, SBA's Acting Director for Government Contracting (AD/GC) issued a determination that Appellant was not an eligible SDVO SBC.

The AD/GC found that Appellant was a Limited Liability Company, 51% of which is directly owned by Mr. Michael Clare, and 49% of which is owned by Triton Services, Inc. (Triton). Mr. Clare is a service-disabled veteran, with 20 years of management and marketing experience related to Sales, Business Development and Strategic Planning. Mr. Clare has a B.S. in Engineering, a Master's degree in Construction Management, and has taken additional business and engineering courses. Mr. Clare holds the office of Manager, which Appellant's Operating Agreement provides will have full authority to manage the company's affairs and to conduct business on behalf of the company.

Appellant occupies Triton's facilities without a lease, and pays \$1,500 a month in rent. Appellant receives administrative support from Triton, including receptionist services, clerical support, office furniture, computers, equipment, and tools. However, there is no formal agreement between Appellant and Triton for this administrative support.

Appellant asserted in response to the AD/GC's request for information on key employees that key employee identification was not required by this solicitation. Appellant responded to the AD/GC's request for licensing information by stating that neither the Federal government nor the State of Ohio requires contractor's licenses, and that Appellant does no work other than for those two governments. Appellant has no contractor's license, whereas Triton appears to have such licenses. Appellant's bond for this contract is unsecured.

Triton employs two of Appellant's officers, including its accounting manager. Appellant paid approximately \$100,000 in administrative fees in 2008, including Mr. Clare's salary. In 2008, Triton made a \$100,000 capital contribution to Appellant. There is no record of any 2008 capital contribution from Mr. Clare.

The AD/GC thus concluded Appellant is majority owned by a service-disabled veteran who holds the highest officer position in the firm.

The AD/GC also concluded that Mr. Clare does not control Appellant. Appellant operates out of Triton's office without a lease and utilizes Triton's personnel, equipment, and resources without a contractual right to them. Appellant has no legal right to utilize these resources, and Triton could withhold them at any time. Appellant possesses none of the customary licenses for its business, but Triton does. Further, Appellant is only able to pay its expenses with an additional capital contribution from Triton, which Mr. Clare did not match, leading the AD/GC to the conclusion Appellant is financially dependent upon Triton. Accordingly, the AD/GC found that Mr. Clare could not exercise independent business judgment as to Appellant without great economic risk, and thus does not control Appellant.

Accordingly, the AD/GC concluded Mr. Clare does not control Appellant and, therefore, Appellant is not controlled by a service-disabled veteran and not an eligible SDVO SBC.

### B. Appeal Petition

On January 8, 2010, Appellant appealed the AD/GC's SDVO SBC eligibility determination to SBA's Office of Hearings and Appeals (OHA). Appellant asserts the AD/GC's SDVO SBC eligibility determination is based on clear errors of fact and law. First, it was error to find that Mr. Clare was not in control of Appellant because Appellant did not possess the required license. Appellant is a general contractor located in Ohio, providing construction services to the Federal government in Ohio. Appellant asserts there are no licensing requirements for contractors providing construction services to the Federal government, nor is any license required to provide the construction services required by this solicitation. Further, the AD/GC did not identify what license it expected Appellant to have. Appellant argues the license issue is irrelevant, and the fact that Appellant does not possess an unidentifiable, non-existent, non-required license is not grounds for finding Mr. Clare does not control Appellant.

Appellant further disputes the AD/GC's conclusion that Mr. Clare does not exercise independent business judgment. The fact that Appellant has no lease with Triton is irrelevant, because its oral contract with Triton is valid, and the flexibility Appellant has under this arrangement falls in favor of Mr. Clare's being able to exercise independent business judgment. Similarly, with regard to the services Appellant receives from Triton, the lack of a formal written agreement does not preclude the existence of a legally binding oral contract. Appellant pays for accounting and administrative services on a direct-cost basis, and Appellant provides its own equipment, tools, computers, vehicles, marketing personnel, and estimators. Appellant argues that because it must obtain these services somewhere, why not from a party that is a part owner rather than a vendor.

Appellant further argues the AD/GC erred when taking Triton's capital contribution into account when considering whether he exercised independent business judgment. Mr. Clare also contributes his efforts, and a part owner is a logical place to obtain capital.

Appellant relies on *Matter of DooleyMack Contracting, LLC*, SBA No. VET-159 (2009), in arguing that influence on business operations or managerial decisions does not amount to power to control and that nothing in the record here supports the conclusion that Triton has the ultimate authority to administer Appellant's long-term business operations.

### C. SBA Response

On January 20, 2010, SBA filed a response. SBA states the AD/GC's determination that Appellant is not controlled by a service-disabled veteran was not based on an error of fact or law and should be affirmed.

SBA asserts that OHA has recognized that SBA's regulations for its 8(a) Business Development and Small Disadvantaged Business programs may be used to interpret the requirements of the SDVO SBC program, citing *Matter of Eason Enterprises OKC LLC*, SBA

No. VET-102 (2005). SBA must go beyond the corporate formalities to examine how a concern is actually run on a daily basis. Accordingly, SBA applied the rule that there may be business relationships with ineligible individuals or entities that cause such dependence that the applicant firm cannot exercise independent business judgment without great economic risk. 13 C.F.R. § 124.106(g)(4).

SBA asserts that Appellant's contract to occupy office space at Triton's premises is "paper formalities and financial gimmickry." SBA asserts Appellant has no legal right to occupy the space, because the space is paid for with money provided by Triton in its capital contribution, and Appellant likely could not afford office space otherwise.

SBA further asserts that whether a firm possesses a license for the type of work it performs and would normally need to operate can be used as a factor to determine whether the firm is an eligible SDVO SBC. SBA points out that according to Triton's website, it holds Master Plumbing and HVAC licenses in several states, including Ohio, while Appellant has no licenses.

SBA asserts that Mr. Clare's salary was, in effect, paid by Triton, Appellant's office space is rented from Triton with money from Triton, and Appellant relies on Triton for administrative services, accounting services, telephone service, faxes, and furniture. Further, two of Appellant's officers are Triton employees. Accordingly, SBA contends the AD/GC was correct in concluding Mr. Clare could not exercise independent business judgment and thus does not actually control the company.

On January 20, 2010, Appellant filed a brief reply to the response, reiterating some factual material already in the record. On February 2, 2010, Appellant filed a copy of the solicitation.

#### IV. Discussion

##### A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the AD/GC's determination, and 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 to determine whether the AD/GC based his decision upon a clear error of fact or law. 13 C.F.R. § 134.508; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the AD/GC's determination only if I have a definite and firm conviction the AD/GC erred in making a key finding of law or fact.

## B. Merits of the Appeal

In order to qualify as an eligible SDVO SBC, a business must be owned and controlled by a service-disabled veteran. 13 C.F.R. § 125.8-10. The AD/GC determination did not dispute Mr. Clare's service-disabled veteran status or his ownership of Appellant. Thus, the critical issue is his ability to control Appellant.

The requirements to establish control of an SDVO SBC are addressed in 13 C.F.R. § 125.10. The AD/GC determination explicitly stated Mr. Clare holds Appellant's highest officer position and possesses the requisite managerial experience of the extent and complexity necessary to run Appellant. 13 C.F.R. § 125.10(b). The AD/GC recognized Mr. Clare is the managing member with control over all decisions of the limited liability company. 13 C.F.R. § 125.10(d).

OHA has held that the control requirements for the SDVO SBC program are similar to those requirements for the 8(a) Business Development program and the Small Disadvantaged Business Program. *Matter of Eason Enterprises OKC LLC et al.*, SBA No. SDV-102, at 10 (2005). Further, SBA may apply the regulations and case law from those programs to analyze the issue of control in SDVO SBC programs, and to go beyond the formalities of business ownership to examine how the concern is actually run on a daily basis. *Id.*

Under the *Eason* precedent, the AD/GC was justified in determining whether business relationships existed that created such a dependence upon non-disadvantaged individuals or entities that the concern could not exercise independent business judgment without great economic risk. 13 C.F.R. § 124.106(g)(4). In *Matter of DooleyMack Government Contracting, LLC*, SBA No. VET-159 (2009), OHA determined that the record did not support a finding that the applicant firm could not exercise independent business judgment. The issue here is whether the AD/GC was justified in finding that Mr. Clare could exercise independent business judgment in his management of Appellant without great economic risk.

The AD/GC found that Appellant's lack of licenses, and Triton's possession of some licenses, was grounds for finding Appellant dependent upon Triton. However, the AD/GC did not identify which licenses it expected Appellant to have. Appellant argues that no licenses are necessary for the work it is performing. Nevertheless, the solicitation contains FAR clause 52.236-7, Permits and Responsibilities, which holds the Contractor responsible for obtaining all necessary licenses and permits. It seems clear that if Appellant was dependent upon Triton for necessary licenses, that would inhibit its independent business judgment. What is not at all clear from the record is just what licenses Appellant requires. The AD/GC cannot simply find Appellant does not possess a necessary license unless he identifies specifically just what license is in question, and why that license is essential to Appellant's business. If, as Appellant contends, it actually requires no licenses to perform its contracts, despite FAR clause 52.236-7, then the AD/GC cannot find this as a reason for Appellant's dependence on Triton. If, on the other hand, the solicitation requires the awardee to perform work for which a particular license is required, and Appellant is dependent upon Triton for that license, that would be an inhibition upon Appellant's ability to exercise independent business judgment. I conclude that a remand is appropriate here, for the AD/GC to conduct a further investigation into the facts.

The AD/GC erred in finding the absence of a written lease for Appellant's office space means that it occupies its offices "without any contractual right." Appellant correctly argues that oral contracts are contracts. The AD/GC does not dispute that there is an agreement between Appellant and Triton for the use of the office space and that Appellant has paid the agreed-upon rent. Accordingly, I find that Appellant's agreement with Triton for rental of office space is not grounds for finding it cannot exercise independent business judgment.

Similarly, Appellant's agreement with Triton for furniture, equipment, and personnel is not necessarily grounds for finding it cannot exercise independent business judgment. Again, an oral contract is a contract. There is not enough evidence in the record to determine whether the agreement here renders Appellant dependent upon Triton or not. I conclude a remand is appropriate here, in order to determine the specifics of the agreement between Appellant and Triton for equipment and personnel. The AD/GC then must analyze the agreement to determine whether it inhibits Appellant from exercising independent business judgment.

Finally, the AD/GC based his determination upon the additional capital contribution by Triton of \$100,000, without any equal additional contribution by Mr. Clare. This could indeed be a factor indicating financial dependency. Even though Mr. Clare is injecting his "sweat equity" into the firm, dependence upon Triton for money could inhibit Mr. Clare's exercise of his independent business judgment. On remand the AD/GC should weigh this with the other factors he must consider.

Accordingly, I find that the AD/GC erred in finding Appellant's lack of unspecified licenses and a written lease with Triton grounds for finding it could not exercise independent business judgment. Further, there is not enough information on Appellant's agreement with Triton for equipment and personnel to determine whether it impairs the firm's independence or not.

Therefore I VACATE the AD/GC's determination and REMAND this proceeding back to the AD/GC. On remand, the AD/GC will determine just what licenses, if any, Appellant requires for this procurement and other contracts that it does not have and that Triton does have. The AD/GC will determine just what the agreement is between Appellant and Triton for equipment and personnel, and whether this impairs the independence of Mr. Clare's business judgment. The AD/GC will weigh these factors with Triton's capital contribution to determine whether the independence of Mr. Clare's business judgment is compromised, and thus whether he actually controls the business.

#### V. Conclusion

The AD/GC's SDVO SBC eligibility determination is VACATED. This matter is REMANDED to the AD/GC for a new determination consistent with this decision.

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CHRISTOPHER HOLLEMAN  
Administrative Judge