

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

IN THE MATTER OF:

AVMAJ Joint Venture

Appellant

Solicitation No. VA-786A-09-RA-0149
Department of Veteran Affairs
National Cemetery Administration
Washington, D.C.

SBA No. VET-188

Decided: April 13, 2010

APPEARANCES

Kevin M. Cox, Esq., Camardo Law Firm PC, Auburn, N.Y., for the Appellant.

Kevin R. Harber, 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 Director for Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) make a clear error of fact or law in determining that AVMAJ Joint Venture (Appellant) and M.C. Avino, Inc. are ineligible for a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside contract? *See* 13 C.F.R. § 134.508.

III. Background

A. Solicitation and Protest

On September 30, 2009, the Department of Veterans Affairs, National Cemetery Administration, in Washington, D.C., issued the instant solicitation for replacing an underground fuel storage tank with an above-ground one. The solicitation was set aside for SDVO SBCs.

AVMAJ Joint Venture (Appellant), a joint venture between M.C. Avino, Inc. (Avino) and Major Interiors, Inc. (Major) submitted its bid on October 12, 2009.

On January 20, 2010, the CO filed her own protest of Appellant's SDVO SBC eligibility. The CO's protest asserted that the Joint Venture Agreement did not comply with 13 C.F.R. § 125.15(b), and that too much of the work would be contracted out. The CO referred the protest to the SBA's Director for Government Contracting (D/GC) for an SDVO SBC status determination.

On January 27, 2010, SBA provided Appellant with a copy of the protest and a list of documents for Appellant to submit to SBA. The list included, for the joint venture participant controlled by the service-disabled veteran, a copy of the Articles of Incorporation and the corporate by-laws. On February 5, 2010, counsel for Appellant responded to the SBA's request and included Avino's Certificate of Incorporation and other requested documents but not Avino's by-laws. On February 18, 2010, SBA again requested a copy of Avino's Articles of Incorporation and by-laws.

On February 22, 2010, counsel for Appellant submitted copies of various corporate resolutions of Avino, minutes of meetings of Avino's Board of Directors, and other documents. The minutes of Avino's September 14, 2007, organizational meeting, and its 2007, 2008, and 2009 annual meetings all show Mr. Avino was elected as the sole director and president. On September 14, 2007, a resolution of the directors and shareholders adopted by-laws.

The February 22nd submission included neither the by-laws, nor an explanation for not providing them. The protest file also contains a February 17, 2010 e-mail from Appellant's counsel stating counsel had passed the request for by-laws along to his client.

B. The Director for Government Contracting's Determination

On March 8, 2010, the D/GC issued her determination, concluding Appellant was not an eligible SDVO SBC at the time it submitted its bid. This outcome followed the D/GC's conclusion she could not determine that Avino, the firm upon which Appellant's claim of eligibility was based, was an eligible SDVO SBC.

The D/GC found Michael C. Avino is a veteran with a service-connected disability. The D/GC further found Mr. Avino owns 100% of Avino's stock. In addition, corporate minutes Appellant submitted demonstrate Mr. Avino is Avino's President and CEO, and sole Director. Further, the record shows Mr. Avino's residence is within reasonable commuting distance of both Avino's headquarters and the contract worksite, and Mr. Avino has 25 years experience in the construction industry.

However, despite more than one specific request, Appellant never provided the D/GC with copies of Avino's Articles of Incorporation and by-laws. Accordingly, the D/GC could not conclude that Mr. Avino: holds the highest officer position in the firm, controls the Board of Directors, or manages the firm's day-to-day business operations. Therefore, the D/GC concluded Avino is not an eligible SDVO SBC.

As to Appellant, because Avino does not meet the requirements of SDVO SBC eligibility, neither does Appellant. The D/GC also referred Appellant for a size determination, because it had submitted more than three offers over a two year period, contrary to the requirements of 13 C.F.R. § 121.103(h). The D/GC did find Appellant would have met the requirements for joint venture profit distribution eligibility and control if Avino had demonstrated it was a qualified SDVO SBC.

B. Appeal Petition

On March 22, 2010, Appellant filed its appeal petition with the SBA Office of Hearings and Appeals (OHA). Appellant argues the D/GC committed clear errors of fact in overlooking certain of its submissions. Appellant argues the D/GC erred in concluding Appellant was not eligible for the contract.

Appellant asserts its submission to the D/GC included its Certificate of Incorporation, which, under New York law, is the equivalent of the Articles requested by the D/GC. Appellant asserts it is clear error for the D/GC to demand a document not required by state law, and to penalize Appellant for not producing it. Appellant further asserts the regulations do not require that challenged firms produce their by-laws. Appellant also submits a copy of its By-laws with the instant appeal.

Appellant asserts the D/GC erred in excluding from the record Avino's corporate minutes. Appellant cites the New York statute: "[A]ll officers as between themselves and the corporation shall have authority and perform such duties in the management of the corporation as may be provided in the by-laws, or, to the extent not provided, by the board (of directors)." N.Y. Bus. Corp. Law § 715(g).

Appellant argues the minutes and resolutions of the Board of Directors provided to the D/GC establish that Mr. Avino is Avino's President, CEO and sole Director, and as such holds the highest officer position. Appellant also argues Mr. Avino has the ability and authority to manage the corporation's day-to-day affairs, pointing to his resume showing 25 years of management and supervisory experience in the construction industry.

Appellant also argues it was error for the D/GC to find she could not determine whether Appellant controls the Board of Directors, when it was clear from the minutes submitted Mr. Avino is Avino's sole Director, and owns 100% of the firm's stock.

Appellant argues the D/GC made an error of law in not concluding Mr. Avino controls the board and holds the highest officer position as these conclusions could be drawn from the other documents provided, as well as the SDVO SBC regulations.

Appellant attaches as an exhibit to its appeal the Avino by-laws. Appellant also includes additional copies of documents previously submitted to the D/GC.

C. SBA's Response

On March 31, 2010, SBA filed its response to the appeal petition. SBA asserts the D/GC twice requested Avino's Articles and by-laws, and both times Appellant failed to provide them and offered no explanation for doing so. SBA points out Appellant was represented by New York counsel throughout the process, and never explained that Avino has no Articles of Incorporation because New York law does not require them.

Further, Appellant failed to produce Avino's By-laws, which did exist, and which New York corporations are required by law to have. N.Y. Bus. Corp. Law § 601. SBA argues that SBA has reviewed the status of many firms pursuant to the Agency's SDVO SBC protest process, and has found ineligible a number of firms that would otherwise have been judged eligible based upon provisions in their articles, by-laws, operating agreements, and other organizing documents. The D/GC could not conclusively find Avino eligible without a review of its by-laws. Appellant failed to meet its burden of establishing its eligibility.

SBA further asserts Appellant's new evidence is inadmissible. While Appellant now finally submits Avino's By-laws, this evidence was not submitted to the D/GC and is thus inadmissible.

IV. Discussion

A. Timeliness and New Evidence

Appellant filed the instant appeal within ten business days of receiving the D/GC's eligibility determination. Thus, the appeal is timely. 13 C.F.R. § 134.503.

The new evidence Appellant seeks to submit, Avino's by-laws, is EXCLUDED. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512; *Matter of Markon, Inc.*, SBA No. VET-158 (2009). This is especially true when the evidence has been in Appellant's possession all along, and yet it failed to submit it to the D/GC. *Matter of DAV Prime/Vantex Service Joint Venture*, SBA No. VET-138, at 4 (2008). The regulations were designed to speedily process SDVO SBC protests and appeals, and cannot work if challenged firms fail to timely produce the evidence requested. The fact that the regulations do not specifically require the production of articles and by-laws is irrelevant. The regulations address the issue of control of the challenged firm, an issue which requires the examination of a firm's organizing documents, including articles and by-laws, to resolve. The D/GC properly requested the by-laws. Appellant's counsel failed to produce them, and failed to provide any explanation for the failure to do so.

Here, Avino's by-laws had been available to Appellant all along, the D/GC requested them twice, and yet Appellant failed and refused to submit them. They are thus not in the protest file and therefore cannot be considered here.

B. Standard of Review

The standard of review for this appeal is whether the D/GC's determination is based upon clear error of fact or law. 13 C.F.R. § 134.508. In evaluating whether there is a clear error of fact or law, OHA does not consider 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 D/GC based her decision upon a clear error of fact or law. *Id.* Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction that she made key findings of law or fact that are mistaken. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals).

C. Merits of the Appeal

To be eligible for award of an SDVO SBC set-aside contract, a concern must submit its representation that it is an SDVO SBC as of the time it submits its initial offer, including price, for a specific contract. 13 C.F.R. § 125.15(a)(1). It is the challenged firm's burden at the protest level to prove that it is an eligible SDVO SBC. *Matter of Eagle Integrated Services, LLC*, SBA No. VET-172, at 4 (2009). To meet the control requirement of SDVO SBC eligibility, the service-disabled veteran must be responsible for long-term decision making as well as day-to-day management and administration of business operations. 13 C.F.R. § 125.10(a). Additionally, the service-disabled veteran must hold the highest officer position in the concern. 13 C.F.R. § 125.10(b).

Here, the D/GC did make an error of law. Appellant submitted Avino's Certificate of Incorporation. Because it sets forth the basic terms of a corporation's existence, a New York corporation's "Certificate of Incorporation" is the same thing as its "Articles of Incorporation." *See N.Y. Bus. Corp. Law § 402; Black's Law Dictionary 107, 219, 228 (7th ed. 1999)* (defining articles of incorporation, certificate of incorporation, and corporate charter). I conclude the D/GC erred in not recognizing Avino's Certificate of Incorporation as its Articles of Incorporation. Appellant's counsel would have been well advised to explicitly explain this to the D/GC. However, the D/GC should be charged with knowledge of this basic principle of corporate law, and should not have drawn an adverse inference from the absence of non-existent Articles of Incorporation.

The D/GC did find in her determination that the record demonstrates Mr. Avino is President, CEO, sole member of the Board of Directors and sole shareholder of Avino. Further, the D/GC found Mr. Avino has the qualifications to run the firm and lives within commuting distance of Avino's headquarters and the work site for this procurement.

Nevertheless, Appellant failed to submit Avino's by-laws, despite two specific requests for them. In determining who controls a corporation, a review of the firm's by-laws is crucial:

Bylaws are the rules and regulations or private laws enacted by the corporation to regulate, govern and control its own actions, affairs and concerns and its

shareholders or members and its directors and officers with relation to each other and among themselves in their relation to the corporation. Bylaws are the relatively permanent and continuing rules of action adopted by the corporation for its own government and that of the individuals composing it and containing, in whole or in part, the direction, management and control of its affairs. Primarily, they look to the future.

8 Fletcher Cyclopedic Corporations ¶ 4166 (2010) (footnotes omitted).

Appellant's own citation to the New York statute establishes that it is a corporation's by-laws which determine the authority and duties of a corporation's officers. N.Y. Bus. Corp. Law § 715(g). Accordingly, the D/GC was unable to definitively determine whether Mr. Avino truly controlled the corporation, without reference to the firm's by-laws. Further, the record reflects that Avino's vice-president receives a higher salary than Mr. Avino, thus raising some legitimate question as to the degree of Mr. Avino's control. (*See Minutes of Avino's Organizational Meeting, September 14, 2007*) Under the circumstances, and given the fact that the by-laws are central to the question of control of the corporation, the D/GC was justified in drawing an adverse inference when Appellant failed to submit the by-laws, despite two specific requests. *Matter of Cambridge Federal Solutions, LLC*, SBA No. SIZ-131, at 6-7 (2008).

Appellant failed to provide the D/GC with the information necessary to make a determination as to the control and management of Avino. Appellant's counsel did not submit the by-laws, even though they were available and the D/GC had specifically requested them twice. While Appellant submitted some information, the D/GC could not be certain of Mr. Avino's control of Avino without a review of the by-laws. The New York statute (§ 715(g)) Appellant cites makes clear that a firm's by-laws determine the duties of its officers, and thus their power to control the firm.

Therefore, the D/GC's insistence upon obtaining the by-laws was not only reasonable, but the only way to accurately determine whether Mr. Avino actually controls the firm. In the absence of the by-laws and any explanation for their absence, the D/GC's determination that she could not conclude Mr. Avino controlled Avino was reasonable, and cannot be said to be erroneous.

Accordingly, I conclude that the D/GC's determination was not based upon clear error, and that the determination should be, and is, AFFIRMED.

V. Conclusion

After reviewing the record, I find the written protest file supports the D/GC's determination. Accordingly, I must deny the instant Appeal Petition, and affirm the D/GC's finding.

The AD/GC's determination that Appellant was not an eligible SDVO SBC at the time it submitted its offer is AFFIRMED and the Appeal is DENIED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge