

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

IN THE MATTER OF:

KDV, Inc.

Appellant

Solicitation No. VA-249-10-RA-0001
VA Medical Center
Louisville, Kentucky

SBA No. VET-189

Decided: April 22, 2010

APPEARANCES

James H. Roberts, III, Esq., Van Scoyoc Kelly, PLLC, Washington, D.C., for Appellant.

Meagan K. Guerzon, 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 concluding the Service-Disabled Veteran (SDV) did not control Appellant because the SDV neither controlled Appellant's management and daily business operations nor had the management experience of the extent and complexity needed to run Appellant? 13 C.F.R. § 125.10. *See* 13 C.F.R. § 134.508.

III. Background

A. Facts and Protest

1. On October 30, 2009, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Louisville, Kentucky (VA), issued RFP No. VA-249-10-RA-0001 (RFP). The CO set the procurement aside for Service-Disabled

Veteran-Owned Small Business Concerns (SDVO SBCs) and designated NAICS code 238220, Plumbing, Heating, and Air-Conditioning Contractors, with a size standard of \$14 million.

2. The original synopsis for the RFP stated, in relevant part that the VA:

will be issuing a solicitation for the demolition and replacement of the existing boiler system. Sources are being sought for those contractors whose primary experience exist in the replacement and installation of boiler systems. The NAICS code applicable to this solicitation is 238220. However this project will require the specialization of several construction and specialty trades which overlap the following NAICS codes: 221330, 236220, 238990, 238210, 238290 and 238390. Project will include, but is not limited to the demolition, asbestos removal, equipment replacement, provisions for temporary backup boiler system, interior building finishing as well as some additional specialty construction trades.

3. The modified synopsis for the RFP, describing the work in more detail, stated:

[P]rovide construction services to replace three existing water-tube boilers, associated equipment and renovate the existing boiler plant facility. Project work will include, but is not limited to the demolition, asbestos removal, equipment replacement, provisions for temporary backup boilers and related work as required per the plans and specifications to be provided on or before October 30, 2009. The period of performance to complete this project is 180 calendar days from receipt of Notice To Proceed.

4. The RFP's SF 1442 provides that the construction cost range for the project would be between \$2 and \$5 million and that award would be made based on past performance, similar project experience and price. In addition, the SF 1442 noted a date for a site visit and encouraged all offerors to attend. Responses for the RFP were due on December 4, 2009.

5. On January 4, 2010, the CO awarded the contract arising from the RFP to KDV, Inc. (Appellant). The CO notified unsuccessful offerors of the award by mail (postmarked January 5, 2010).

6. On January 14, 2010, Dunbar Mechanical Contractors (DMC) informed the CO it had received the mailed notice of the award to Appellant on January 9, 2010. DMC noted award had not been posted on FedBizOpps.gov.

7. In its January 14, 2010 letter to the CO, DMC protested award of the contract to Appellant. DMC alleged a Service-Disabled Veteran (SDV) is not in control of Appellant as required by 13 C.F.R. § 125.10 and the business relations indicate that Appellant may be a joint venturer under 13 C.F.R. § 121.103(h)(4) (the ostensible contractor rule). DMC also alleged the business relationship between Appellant and T.E.M. Electric Co. Inc. (TEM) causes Appellant not to meet the small business size standard for this solicitation. DMC next alleged: (1) TEM operates and controls Appellant; (2) Mr. Gary Masterson, a Vice President of TEM, also serves as Appellant's Vice President; and (3) Appellant's main point of contact, as shown in the CCR,

is Mr. Masterson; and (4) Appellant's address and phone number are the same as TEM's Louisville office. DMC provided documentary evidence supporting its allegations.

8. On January 25, 2010, the CO forwarded DMC's SDVO SBC protest to SBA's Director of Government Contracting (D/GC) noting the protest was timely. On February 5, 2010, the SBA notified Appellant it had received a timely protest of its SDVO SBC eligibility and that it had referred the size protest to the appropriate Office of Government Contracting – Area III, for a size determination. On February 10, 2010, appellant submitted its response to the SDVO SBC protest to the D/GC. On February 11, 2010, the CO notified SBA she was retracting her statement that DMC's protest was timely. The CO based this retraction upon her assumption that DMC had received automatic notice of the award to Appellant through posting on FedBizOpps.

9. In reliance upon the CO's February 11, 2010 letter, the Area Director for Area III (Area III Director) dismissed DMC's size protest as untimely on February 11, 2010. In dismissing the size protest, the Area III Director specifically referenced 13 C.F.R. § 121.1004(a)(3)(i) as authority, which only applies to size determinations. DMC however, established there was no FedBizOpps notice and the D/GC continued with the determination of SDVO SBC eligibility that is the subject of this appeal.

10. On February 16, 2010, the Area III Director initiated his own size protest and on March 15, 2010, issued Size Determination 3-2010-42 (Size Determination) concluding Appellant was an eligible small business. The Size Determination discussed Appellant's relationship with TEM and concluded they were not affiliated and that Mr. Browning had the power to control Appellant.

11. During the course of investigating Appellant's SDVO SBC eligibility, the D/GC investigated Appellant's website. In the Personnel section of Appellant's website, Appellant stated:

Roy Browning is the owner and president of KDV and is responsible to researching the ever growing opportunities that arise for his SDVOSB, KDV, Inc.
...

Tom [Masterson]'s main roll within KDV is Marketing and Business Development. Tom is responsible for identifying, developing, and evaluating marketing strategies based on knowledge of establishment objectives, market characteristics, cost and markup factors. He brings over 30 years of experience in all phases of the general contracting industry. . . .

Terry [Lucas] is responsible for the managing the day to day operations of KDV to ensure that the highest standards of safety, customer service, quality control and documentation are delivered to our clients. Terry is a confident professional with over 25 years of combined experience in Operations and Project Management in the United States and overseas. Terry's project experience includes construction projects in the commercial and industrial arenas including

multiple High Tech projects overseas in Costa Rica and mainland China. Terry also has a very strong background in HVAC, and Energy Management Systems that includes electronic, pneumatic and DDC systems.

12. Appellant's RFP proposal identified eight key personnel for performance of the contract. The first three key personnel, and the roles assigned them, are:

a. Tom Masterson, Owner and Vice President of KDV will be the project executive overseeing the plan of work, the accountability and responsibility of the work team, interfacing between resources, personnel, subcontractors, equipment and schedule.

b. Terry Lucas, Operations Manager/Project manager of KDV will be responsible [for] leading the project team. He not only understands the requirements of this project, but his approach will keep several key items the highest of priorities: safety, quality, schedule/resources, craftsmanship and customer specifications.

c. Robert J. McCauley, Superintendent of KDV will be responsible for day to day operations of all onsite personnel.

The Proposal does not appear to propose any role for Mr. Browning.

B. D/GC Eligibility Determination

On March 26, 2010, the D/GC issued her determination that an SDV did not control Appellant and thus Appellant is not an eligible SDVO SBC. The D/GC found: (1) Appellant is 51% owned by Mr. Roy Browning; (2) Mr. Browning is an SDV; and (3) Mr. Browning is Appellant's President. Following these findings, the D/GC addressed the control requirements of 13 C.F.R. § 125.10 and concluded the Record established Appellant did not comply with all of them. The D/GC came to this conclusion after reviewing Appellant's submissions, its technical proposal, and the contents of Appellant's website.

More specifically, the D/GC concluded that Mr. Browning does not manage Appellant's daily operations and that Mr. Browning did not have the managerial experience of the extent and complexity needed to run Appellant. The D/GC noted that Mr. Browning had no experience with construction contracting. Instead, he had been a hair stylist between 1971 and 1990 and a service manager at multiple automobile dealerships between 1990 and June of 2008. Mr. Browning established Appellant in 2005, while he was still working as a service manager for various automobile dealerships.

The D/GC found that Mr. Thomas Masterson, who is not an SDV, is Appellant's Vice President, owns 49% of Appellant, and owns 100% of TEM. In addition, Appellant and TEM share facilities, a phone system and a copy machine, and Appellant utilizes TEM's accounting, human resources, and supervisory personnel. Further, Mr. Masterson has extensive experience in electrical and construction contracting, while Mr. Terry Lucas, the third individual listed on Appellant's website, has no ownership interest in either Appellant or TEM.

Further, the D/GC noted Appellant's website states Mr. Lucas is its daily manager, "managing the day to day operations of KDV to ensure that the highest standards of safety, customer service, quality control and documentation are delivered to our clients." Mr. Lucas has 25 years of Operations and Project Management experience. The website describes Mr. Masterson's role as "identifying, developing, and evaluating marketing strategies based on knowledge of establishment objectives, market characteristics, cost and markup factors" and notes he has 30 years of experience in all phases of general contracting. In comparison, the website describes Mr. Browning's duties as "researching the ever growing opportunities that arise for his SDVOSB, KDV, Inc."

The D/GC also noted that Appellant's Proposal verifies that Mr. Browning is not the daily manager of Appellant's affairs. Specifically, Appellant did not identify Mr. Browning in the list of key personnel. Instead, Appellant lists Mr. Tom Masterson, Mr. Lucas, Mr. Robert McCauley, Mr. Gary Masterson, and others as key personnel. Tom Masterson is listed as the "project executive overseeing the plan of work, the accountability of the work team, interfacing between resources, personnel, subcontractors, equipment and schedule." Further, the proposal describes Mr. McCauley's role for the procurement as being "responsible for day-to-day operations of all onsite personnel." Hence, Mr. Browning is not supervising contract work and is not interacting with customers, subcontractors, and other trades and the D/GC could only conclude an SDV does not manage Appellant's daily operations and thus is not in compliance with 13 C.F.R. § 125.10(b).

The D/GC also noted inconsistencies between the proposal and the arguments made by Appellant in response to the protest. For example, Mr. Browning's resume, the proposal, and both TEM's and Appellant's unemployment tax filings demonstrate Mr. Browning does not manage Appellant, yet Appellant claims otherwise in response to the protest. Mr. Browning has experience in the automotive repair and hair salon industries, but none in construction contracting. This is in stark contrast to the experience of Mr. Tom Masterson and Mr. Lucas.

C. Appeal Petition

On March 29, 2010, Appellant appealed the D/GC's determination to the SBA Office of Hearings and Appeals (OHA). Appellant asserts, because the two earlier SBA decisions were both in Appellant's favor and neither one has been appealed, OHA should vacate the D/GC's March 26, 2010 SDVO SBC eligibility determination concluding Appellant is ineligible.

Appellant notes that the Area III Director first dismissed DMC's size protest on February 11, 2010 as untimely. Appellant notes no one appealed this dismissal to OHA.

Appellant also notes that the Area III Director issued a size determination on March 15, 2010. In this size determination, the Area Office found Appellant was small under the applicable size standard. In addition, the Area Office found: (1) Mr. Browning owns Appellant; (2) Mr. Browning "runs the day to day operations of KDV and is not reliant on TEM for the business to succeed;" (3) Mr. Browning has the power to control Appellant; and (4) Appellant is

not affiliated with any other concern.¹ In addition, Appellant alleges the eligibility determination is inconsistent with the findings of the March 15, 2010 size determination that found Mr. Browning controlled Appellant. Appellant referred to 13 C.F.R. § 121.103 and alleges that the finding of control made in the March 15, 2010 size determination, wherein the Area Office considered ownership, control, management, previous relationships, and contractual relationships, means the March 26, 2010 SDVO SBC eligibility is wrong because it is contrary to the March 15, 2010 size determination. Moreover, Appellant alleges there is no effective difference between the regulatory standard of “control” applied in the March 26, 2010 SDVO SBC determination and the “affiliation” standard applied in the March 15, 2010 Size Determination. Therefore, the March 15, 2010 size determination is *res judicata/collateral estoppel* over the subject matter of the March 26, 2010 SDVO SBC eligibility determination that is the subject of the current appeal.

Appellant alleges the D/GC ignored the February 11, 2010 Size Protest Dismissal when it issued the March 26, 2010 SDVO SBC eligibility determination and thus the eligibility determination is contrary to the February 11, 2010 Dismissal.

Appellant also moves for a Summary Decision because of the February 11, 2010 dismissal of DMC’s size protest and the March 15, 2010 size determination where Mr. Browning was found to control Appellant. Appellant alleges the absence of an appeal of the February 11, 2010 dismissal means no proper protest existed for the D/GC to consider. Appellant also alleges the March 15, 2010 size determination is dispositive of the control issue involving Mr. Browning under the doctrine of *res judicata*.

D. Appellant’s Supplement

Although it did not move to do so pursuant to 13 C.F.R. § 134.207(b), Appellant supplemented its appeal on April 6, 2010. Appellant attached a April 5, 2010 letter from the Area III Director reopening the size determination issued on March 15, 2010. The letter referred to the March 26, 2010 SDVO SBC determination (at issue here) and its findings that Mr. Browning does not manage Appellant and Appellant relies too much on TEM in the instant procurement as the basis for the reopening. Appellant asserts that: (1) D/GC’s office has a pattern of reopening Area III cases; (2) Appellant properly disclosed all required documents and information to SBA; and (3) Mr. Browning, though not listed as key personnel in the Proposal, does control Appellant.

In addition, although not addressed in its original appeal petition, Appellant points to 13 C.F.R. § 125.10(b), which states the SDV need not have the technical expertise or required license to be found in control as long as he has ultimate managerial or supervisory control over those who do. Appellant alleges Mr. Browning has such control.

¹ If I were reviewing this determination I consider it likely I would have either remanded or reversed it because it ignores: (1) the Record that should have been available to the Area Office, *e.g.*, Facts 11 and 12 above; and (2) that 13 C.F.R. § 121.103(h)(4) requires an area office consider the protested concern’s proposal.

E. SBA Response to the Appeal

On April 7, 2010, SBA filed its response to the appeal. SBA contends the D/GC's determination is correct and should be affirmed. SBA notes that the focus of Appellant's argument is that the D/GC is bound by the February 11, 2010 Dismissal of DMC's protest as untimely. SBA notes that Appellant does not challenge the evidence or arguments made by the D/GC in support of her conclusion that the an SDV does not control Appellant. Instead, Appellant again argues that the D/GC is bound by collateral estoppel to defer to the conclusions of the Area III Director.

SBA points to Appellant's April 6, 2010 Supplement and notes that Appellant, for the first time, addresses the merits of the D/GC's determination that an SDV did not control Appellant. Although Appellant argues there that Mr. Browning has ultimate managerial and supervisory control over Appellant's employees who possess the necessary technical experience, SBA asserts that Appellant referred to no evidence in the Record to support its position nor did it attempt to rebut the D/GC's finding.

SBA basically asserts the D/GC's decision is supported by the Record and should be affirmed. SBA notes that DMC's protest was timely since it received notice of award to Appellant on January 9, 2010. 13 C.F.R. § 125.25(d).

SBA alleges Appellant's arguments concerning the March 15, 2010 size determination are irrelevant because the size determination is based on Part 121 of the CFR while the SDVO SBC eligibility (status) determination of the D/GC is based solely upon Part 125 of the CFR. In addition, the issue of Appellant's size was not before the D/GC.

SBA also reviewed the evidence underlying the D/GC's conclusion that an SDV does not control Appellant's daily operations as required by 13 C.F.R. § 125.10. SBA notes that other than being the 51% owner and President of Appellant, Mr. Browning, the SDV, has no management responsibilities, but is only responsible for "researching the ever growing opportunities that arise for his SDVOSB, KDV, Inc." The SBA noted this did not compare to the responsibilities described for Mr. Tom Masterson, Mr. Lucas, or McCauley nor their experience.

SBA notes that OHA has emphasized that construction routinely requires on-site interaction with customers and supervision of effort by subcontractors and other trades and this type of effort cannot be performed remotely. *Matter of First Capital Interiors, Inc.*, SBA No. VET-111, at 7 (2006). SBA argues that absence of Mr. Browning from the key personnel and the Proposal's identification of Mr. McCauley as being responsible for day-to-day operations and Tom Masterson as project executive overseeing the plan of work supports the D/GC's conclusion that an SDV does not manage the daily operations as required for a nearly \$5 million construction contract.

F. Appellant's Reply to SBA's Response

On April 8, 2010, again without requesting leave to do so, Appellant filed a "rebuttal" to SBA's Response. Appellant contends SBA's counsel erred in referring to the March 15, 2010 size determination as new evidence not before the D/GC at the time of her March 26, 2010 SDVO SBC determination concerning Appellant. In support, Appellant points out the D/GC's March 26, 2010 determination itself refers to the March 15, 2010 size determination on page 4. Appellant also argues against SBA's emphasis on the fact Appellant pays some employees more than it pays Mr. Browning.

IV. Analysis

A. Timeliness and Standard of Review

Appellant filed its appeal petition within ten business days of receiving the D/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 D/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 D/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 in the context of a size appeal). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

B. The Merits

1. The February 11, 2010 Dismissal of DMC's Size Protest

Appellant attempts to make much of the February 11, 2010 dismissal of DMC's size protest. This dismissal is irrelevant to the SDVO SBC protest, because the Area III Director had no authority to take action on an SDVO SBC protest, timely or not. SDVO SBC protests are within the exclusive purview of the D/GC (13 C.F.R. § 125.25(c) and (e)). Consequently, reference to SBA in 13 C.F.R. § 125.27 can only be to the D/GC. Because only the D/GC may act upon a SDVO SBC protest, the Area III Director's action has no effect. In addition, in dismissing the protest on February 11, 2010, the Area III Director referenced 13 C.F.R. § 121.1004(a)(3)(i). Because this regulation pertains only to size protests, the Area III Director's action can have no effect on this SDVO SBC appeal. *See* 13 C.F.R. § 125.25(a) and (c). Hence, I need not address this issue further.

2. The March 15, 2010 Size Determination is Irrelevant

Appellant alleges the March 15, 2010 Size Determination finding it small means the D/GC's determination on its SDVO SBC eligibility is: (1) incorrect; and (2) barred by *res judicata/collateral estoppel*. Appellant is mistaken. Appellant has confused size determinations conducted pursuant to regulations found in 13 C.F.R. Part 121, with SDVO SBC eligibility determination issues found at 13 C.F.R. Part 125. This is problematic, for size determinations are predicated on the power to control a concern (13 C.F.R. § 121.103(a)). In contrast, control under the SDVO SBC Program must be actual and the SDV allegedly in control must have managerial experience of the extent and complexity needed to run the concern. 13 C.F.R. § 125.10(a) and (b). Accordingly, the March 15, 2010 Size Determination can have no bearing on the SDVO SBC eligibility determination underlying this appeal because the Area III Director premised it upon entirely different regulations and standards. Consequently, the issues decided in the March 15, 2010 size determination are of a different subject matter and can have no effect on the authority of the D/GC to decide Appellant's SDVO SBC eligibility.

3. Appellant Has Failed to Establish the D/GC's Determination is in Error

13 C.F.R. § 125.10 provides:

(a) *General*. To be an eligible SDVO SBC, the management and daily business operations of the concern must be controlled by one or more service-disabled veterans . . . 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

(b) *Managerial position and experience*. A service-disabled veteran . . . must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager . . . need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

The Record before me is clear, as is the D/GC's careful and well-constructed analysis of the Record. The contract is a multi-million dollar boiler replacement contract that requires coordination of numerous construction trades. While Mr. Browning is an experienced hair stylist and automotive service manager, he has no experience managing construction contracts that would enable him to manage Appellant as it performs the complex requirements of the RFP. In addition, I find the Record (including Appellant's Proposal and Website) clearly establishes that Mr. Browning is not going to run the daily operations of Appellant, but rather that Mr. Tom Masterson and Mr. McCauley will. Similarly, the Record establishes that Mr. Browning will not exercise managerial or supervisory control over Mr. Tom Masterson or Mr. McCauley. Accordingly, I cannot find the D/GC committed any error in concluding Mr. Browning does not control Appellant as required by 13 C.F.R. § 125.10.

Appellant also does not challenge the facts in its Proposal and Website showing Mr. Browning does not control the daily operations of Appellant. Nor does Appellant challenge the D/GC's conclusion that Mr. Browning lacked the managerial experience of the extent and complexity needed to run Appellant as it performed a complex boiler replacement contract worth millions of dollars. Instead, Appellant's focus is on its own erroneous conclusion that the March 15, 2010 size determination establishes Mr. Browning controls Appellant for the purpose of the SDVO SBC eligibility as well as for size eligibility. Because the standards are different, I find Appellant has effectively not challenged the D/GC's determination and certainly not in a matter capable of establishing clear error.

4. Appellant's Supplemental Filings

The specific regulations governing SDVO SBC appeals contain no provision for the filing of additional filings beyond the Appeal Petition and the SBA Response. 13 C.F.R. § 134.505 and 134.510. The general regulations applicable to all OHA appeals do permit such a filing, but they require a motion asking permission. 13 C.F.R. § 134.207(b). Appellant filed no such motion. Hence, I am not obligated to even consider Appellant's Supplemental Filings. Nevertheless, I have considered Appellant's Supplemental Filings of April 6, 2010 and April 8, 2010. Neither is convincing.

Appellant's April 6, 2010 filing: (1) Reargues what effect the March 15, 2010 size determination should have on the SDVO SBC determination and alleges a referee is needed; (2) Argues the meaning of Appellant's key personnel designation; and (3) Argues Mr. Browning actually does control Appellant. The later filing merely alleges the D/GC was aware of the March 15, 2010 size determination and argues the import of Roy Browning's salary at Appellant.

As I have already explained, the March 15, 2010 size determination is irrelevant to the D/GC's SDVO SBC eligibility determination. Moreover, in the event there is any doubt, I find the Record clearly and convincingly establishes that Mr. Browning will not run Appellant's daily operations and that he lacks the requisite experience needed to manage Appellant as it performs the work required by the RFP. Nor is there even a scintilla of evidence to suggest Mr. Browning has demonstrated he has the ultimate managerial and supervisory control over those who do have the technical expertise needed to perform the contract. Instead, the Record proves Mr. Browning has no relevance to either the operation of KDV or the contract resulting from the RFP. In addition, I note that Mr. Browning's complete lack of construction experience makes it virtually impossible for him to exert any kind of meaningful control over those who do run Appellant's operations. Consequently, even after considering Appellant's Supplemental Filings there is no reason to disturb the D/GC's well reasoned and well supported findings.

V. Conclusion

After reviewing the record, I find the written protest file supports the D/GC's determination.

Appellant has failed to establish any clear error of fact or law in the D/GC's decision. Accordingly, the D/GC's determination is AFFIRMED and the 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