United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Corners Construction	SBA No. VET-190
Appellant	Issued: April 29, 2010
Solicitation No. R10PS20R28 Department of the Interior	

APPEARANCES

Pamela J. Mazza, Esq., and Kelly E. Buroker, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant.

William L. Bruckner, Esq., Bruckner & Walker, San Diego, CA, for Kevcon, Inc.

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

DECISION

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On January 20, 2010, the Contracting Officer (CO) for the U.S. Department of the Interior, Bureau of Reclamation issued Solicitation No. R10PS20R28 (IFB) seeking bids for repairs to the Shasta Dam Spillway Bridge in Shasta County, California. The IFB was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside.

On February 19, 2010, bids were opened, and Corners Construction (Appellant) was the apparent low bidder. On February 23, 2010, Kevcon, Inc. (Kevcon), the second lowest bidder, protested Appellant's status as an eligible SDVO SBC.

B. AD/GC Determination

On March 25, 2010, the U.S. Small Business Administration's (SBA) Director of the Office of Government Contracting (D/GC) issued her determination letter finding that Appellant is not controlled by a service-disabled veteran and, therefore, does not meet the SDVO SBC eligibility requirements. The D/GC first verified that Ms. Rachele Brewer, President of Appellant, is a service-disabled veteran, as determined by the VA, pursuant to 13 C.F.R. § 125.8. The D/GC next confirmed that Ms. Brewer directly and unconditionally owns at least 51% of Appellant, as required by 13 C.F.R. § 125.9. Finally, the D/GC analyzed the issue of control pursuant to 13 C.F.R. § 125.10.

The D/GC acknowledged that Appellant's General Partnership Agreement indicates that Ms. Brewer and Mr. James Corners are general partners of the firm and that Ms. Brewer has the final decision on all matters involving the firm. Nevertheless, the D/GC noted that the Agreement also indicates that the day-to-day management will be performed by both partners. Additionally, the D/GC found that Ms. Brewer has no general management or supervisory experience in construction before her recent involvement with Appellant, whereas Mr. Corners has more than thirty years of construction experience. Furthermore, the AD/GC noted that Appellant's address is also Mr. Corners's personal residence. Based on these observations, the D/GC found that it is Mr. Corners who is primarily responsible for the management of Appellant, and that Ms. Brewer does not control Appellant as required by 13 C.F.R. § 125.10. Accordingly, the D/GC concluded that Appellant does not meet the SDVO SBC eligibility requirements.

C. Appeal Petition

On April 8, 2010, Appellant filed the instant appeal of the D/GC's determination with SBA's Office of Hearings and Appeals (OHA). Appellant argues "the D/GC either ignored or misinterpreted information submitted by [Appellant], causing it to mistakenly conclude that [Appellant] was ineligible to bid on or receive award under the Solicitation." (Appeal Petition 3.) Specifically, after a careful recitation of the facts, Appellant disputes the D/GC's finding that it is not controlled by a service-disabled veteran.

First, Appellant takes issue with the D/GC's concerns that Ms. Brewer does not control the day-to-day operations of Appellant. Appellant points out that Ms. Brewer is President of Appellant, and the General Partnership Agreement explicitly provides that, although the day-to-day management will be performed by both partners, Ms. Brewer will have the final decision on all matters. Additionally, Appellant asserts that if the D/GC had questions about its day-to-day management, she had a duty to make an inquiry into how the firm actually operates on a daily basis and should not have relied on formalities such as one partial statement from the short General Partnership Agreement. *See Teamus Constr. Co., Inc.*, SBA No. VET-146 (2009). Appellant discusses Ms. Brewer's various responsibilities with the company and concludes that had the D/GC properly examined its daily operations, she would have determined that Ms. Brewer controls and is responsible for the day-to-day management of the business.

Second, Appellant addresses Ms. Brewer's alleged lack of management experience.

Appellant alleges the D/GC erred in failing to take into account Ms. Brewer's military experience. Appellant contends "Ms. Brewer's military duties required management skills that are very similar to those required to run a business." Appellant also asserts the D/GC failed to give proper credit to Ms. Brewer's experience with Appellant since its establishment in November 2007. Appellant claims Ms. Brewer has gained valuable experience by managing the day-to-day operations and long-term administration of the firm over the past two years. Appellant has been awarded and has successfully performed contracts, and Appellant's success illustrates Ms. Brewer's adequate experience in controlling the firm.

Finally, Appellant contends it was error for the D/GC to rely on the fact that Appellant's address was listed as Mr. Corners's personal residence. Appellant explains that its operations were conducted that address until July 1, 2009, during which time Ms. Brewer leased the space from Mr. Corners and paid rent for it. However, at the time Appellant submitted its bid, it had already moved to a new location. Thus, the address cannot be a legitimate basis to determine that Ms. Brewer did not control Appellant.

Appellant concludes Ms. Brewer does control the firm's operations, the D/GC's determination was in error, and OHA should overturn the determination. In the alternative, however, Appellant requests that it be given the opportunity to modify its General Partnership Agreement to clarify Ms. Brewer's role if OHA affirms the determination.

D. Agency Response

On April 19, 2010, the SBA submitted the Protest File and the Agency's Response to the Appeal Petition. SBA submits that the D/GC's determination was not based on any clear error and should be affirmed. The Agency emphasizes that Appellant's own General Partnership Agreement indicates that the day-to-day management of the firm is a joint responsibility of both partners. The Agency indicates the Agreement is not entirely clear, *see Matter of Eagle Integrated Services, LLC*, SBA No. VET-172 (2009), and Appellant recognizes this because it offers to amend the Agreement. The Agency argues that in the face of Appellant's less-than-clear Agreement, it cannot have been clear error for the D/GC to conclude that Ms. Brewer does not control the company.

The Agency next addresses Ms. Brewer's management experience. The Agency points out that Ms. Brewer possesses only one year of active military service during which she served as a wheeled vehicle mechanic. The Agency questions what management skills she acquired during the performance of these duties. Furthermore, Ms. Brewer's resume does not support her claim that she has significant management experience or any training or experience in the construction industry. Again, the Agency asserts in cannot have been clear error for the AD/GC to determine that Ms. Brewer lacked sufficient experience to control Appellant on the basis of this Record.

Finally, the Agency concedes that Appellant's headquarters is no longer the personal residence of Mr. Corners, but contends that this error was harmless. *Matter of Command Languages, Inc.*, SBA No. VET-149 (2009). "[I]t is evidence from the D/GC's mention of this issue in passing that it did not serve as a key basis for her determination." (Agency Response 7.)

The Agency concludes that, given the facts before the D/GC, it was not error for her to determine that Appellant is not controlled by a service-disabled veteran and does not meet the SDVO SBC eligibility requirements.

E. Kevcon's Response

On April 23, 2010, Kevcon filed its Response to the Appeal Petition. Kevcon also asserts that the D/GC's determination was not based on clear error and should be affirmed. Kevcon first contends there is nothing in the Record to support Appellant's opinion that Ms. Brewer gained supervisory or management experience during her time with the military. Kevcon also points out that although there are Letters of Recommendation in the Record regarding Mr. Corners, there are no such letters pertaining to Ms. Brewer. Kevcon maintains that the D/GC's findings were logical based on a review of Ms. Brewer's resume and do not constitute clear error.

Kevcon next disputes Appellant's argument that had the D/GC properly examined its day-to-day operations, she would have concluded that Ms. Brewer controls the firm. Kevcon argues that Ms. Brewer merely took control of Appellant without any management or construction experience or education and that Mr. Corners, who has extensive construction experience and for whom the firm is named, really controls the company. *See Eason Enters. OKC LLC*, SBA No. VET-102, at 9 (2005). Appellant asserts the D/GC should have disregarded the General Partnership Agreement or conducted an examination of its operations if the Agreement were unclear. Kevcon asserts that Appellant merely disagrees with the D/GC's conclusions, but offered no documents or methodology for the D/GC to examine its day-to-day operations (other than its two-page General Partnership Agreement) and no documentary support for the activities Ms. Brewer allegedly controls. Kevcon also notes that it was Mr. Corners, not Ms. Brewer, who signed the bid for the instant IFB.

Kevcon then claims the regulations are clear and unequivocal in requiring that a service-disabled veteran must have control over the long-term and day-to-day decisions of the firm. Kevcon asserts Appellant challenged the D/GC's interpretation of its General Partnership Agreement in arguing that the Agreement gives Ms. Brewer control over day-to-day operations. However, according to Kevcon, Appellant never addressed the issue of long-term decisions, which are not covered in the Agreement and which are an affirmative requirement of the regulation. Furthermore, Kevcon again emphasizes that it was Mr. Corners, not Ms. Brewer, who signed the bid in this instance.

Kevcon concludes that Appellant failed to argue or prove clear error by the D/GC. Rather, Appellant disagreed with the D/GC's findings. According to Kevcon, Appellant offered no evidence or argument to support a finding of clear error. Kevcon requests that OHA affirm the D/GC's finding.

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 D/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 D/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 D/GC's determination if Appellant proves that he made a patent error based on the record before him.

B. Analysis

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). Additionally, the service-disabled veteran must hold the highest officer position in the firm and "must have managerial experience of the extent and complexity needed to run the concern." 13 C.F.R. § 125.10(b). In the case of a partnership, the service-disabled veteran must also serve as a general partner "with control over all partnership decisions." 13 C.F.R. § 125.10(d).

Appellant contends Ms. Brewer controls the day-to-day operations of the company pursuant to the General Partnership Agreement, which provides that "[t]he day-to-day management of [Appellant] will be performed by both Partners," and that Ms. Brewer "will have the final decision on all matters."[1] Based in part on this same language, the D/GC determined to the contrary that Ms. Brewer does not have control over Appellant. Appellant argues that the D/GC should not have relied upon the Agreement, but should have conducted an investigation into how Appellant is run on a daily basis. Appellant cites as support *Teamus Construction Co., Inc.*, SBA No. VET-146 (2009), which indicates that the regulations applicable to SDVO SBC protests "require that SBA go beyond the formalities of business ownership and titles and to examine how the applicant concern is actually run on a daily basis."

Although the D/GC is required to look past the formalities to the day-to-day operations of a firm in determining eligibility, it is ultimately Appellant's burden to prove it is an eligible SDVO SBC. *Matter of VetIndy, LLC*, SBA No. VET-175, at 5 (2010). Thus, it was Appellant's

[1] Contrary to Appellant's claim that the D/GC ignored the language indicating that Ms. Brewer would have final say on all matters, the D/GC explicitly acknowledged this language in her determination: "[W]hile the Agreement states that you, Ms, Brewer, will have the final decision on all matters involving the firm, it also declares that the day-to-day management of the company will be performed by both partners." (Determination 3.)

responsibility to provide the D/GC with some other evidence that Ms. Brewer controls Appellant. The only evidence regarding Ms. Brewer's role in Appellant's operations is her resume entry for Appellant, which provides in its entirety:

> I opened a [SDVO SBC] as a Partnership. I am responsible for the day-to-day operations of the business. My company performs Construction and Service contracts. I am responsible for all of the accounting and tracking of each contract. I make all decisions regarding choice of projects, subcontractors, bonding, insurance, investment, and other duties of a well established company. I am also the point of contact for all Contract Personnel on each project. I Superintend on a project to project basis.

Ms. Brewer's resume is not particularly detailed[2] (especially in comparison with the resume of Mr. Corners, which lists specific projects and training), offering only vague and broad categories of duties. Moreover, the D/GC obviously took Ms. Brewer's resume into account in her determination because it is specifically referenced. Given that the Agreement and the resume were the only documents provided regarding Appellant's day-to-day operations, the D/GC had no choice but to rely on them.

Additionally, a party "'must be bound by the actual language of its organizing documents.'" *Id.* (quoting *Matter of NuGate Group,* SBA No. VET-132, at 6 (2008)). Here, Appellant's General Partnership Agreement is unclear in that it provides both: (1) that Ms. Brewer has "the final decision on all matters" and (2) that both partners share control over the day-to-day management of the firm. The provision in which this language appears is entitled "Partnership Management." Because day-to-day management is mentioned explicitly in the provision, the language that follows, which gives Ms. Brewer "the final decision on all matters," can be construed to give Ms. Brewer the final say over only day-to-day management decisions. As Kevcon points out, this reasonable interpretation of the provision does not address Ms. Brewer's control (or lack thereof) over long-term decisionmaking, which is required by 13 C.F.R. § 125.10(a), or over "all partnership decisions," as required by 13 C.F.R. § 125.10(d).

On the other hand, because the provision says Ms. Brewer has "the final decision on all matters," the clause could be read, as Appellant seems to argue, as conferring on Ms. Brewer control over long-term decisionmaking and all partnership decisions, as well as day-to-day management decisions. This, too, would be a reasonable interpretation of the provision.

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[2] Appellant now argues (without providing any documentary evidence, though such new evidence would not be accepted pursuant to 13 C.F.R. § 134.512 in any case) that Ms. Brewer performs the crucial tasks necessary to move Appellant's operations forward. Appellant lists in detail in the Appeal Petition the various tasks the Ms. Brewer performs for Appellant. However, this information was not before the D/GC. It is well-settled that the D/GC cannot have erred based on information that was not in the Record before her. *See, e.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073 (2009); *Size Appeal of The Refinishing Touch*, SBA No. SIZ-4615 (2004). The general principle that the Agency could not have erred based on information that was unavailable to it is equally applicable to SDVO SBC appeals as to size appeals.

Nevertheless, given the lack of clarity in the Agreement, and given the reasonableness of the first interpretation of the provision as a whole, I cannot find that it was clear error for the D/GC to construe the Agreement against Appellant. *See Matter of Eagle Integrated Services, LLC,* SBA No. VET-172 (2009).

With regard to Ms. Brewer's experience, or lack thereof, Appellant argues it was error for the D/GC to fail to take into account Ms. Brewer's military experience and her experience with Appellant since its establishment in November 2007. Although Appellant argues that Ms. Brewer's time in the military provided her with management and supervisory experience, there is no evidence in the Record to support such a position. Again, the only evidence regarding Ms. Brewer's military experience is her resume, which indicates that she was trained in "light wheeled mechanics school, combat lifesaver courses, hand to hand combat, weaponry, and Physical training." Her duties included: "Vehicle maintenance and repair, OP Guard, CP Guard, Dining Facility Guard, Fire Guard, roving patrol, construction, and convoy driver." Ms. Brewer also spent fourteen months deployed to Iraq.

While commendable, this list of military training and duties in no way indicates or elucidates how Ms. Brewer gained "valuable construction experience and . . . learned to manage and supervise people." (Appeal Petition 7.) If Ms. Brewer obtained specific management, supervisory, or construction experience during her time in the military, she should have listed clearly those relevant experiences in her response to the protest. Absent some specific connection between Ms. Brewer's military experience and her current alleged management and construction duties, I cannot find that the D/GC erred in failing to consider this experience in satisfaction of the requirement that she "must have managerial experience of the extent and complexity needed to run the concern." 13 C.F.R. § 125.10(b).

I also find Appellant's claim that the D/GC failed to take Ms. Brewer's experience with Appellant into account lacks merit. The D/GC concluded that Ms. Brewer "did not possess and general management or supervisory experience or any meaningful construction experience in the construction industry *prior to your recent involvement in [Appellant]*." (Determination 3 (emphasis added).) The inference to be drawn from this statement is that the D/GC did not fail to consider Ms. Brewer's experience with Appellant, she merely found it to be insufficient to meet the requirement of 13 C.F.R. § 125.10(b).

Finally, I agree with the Agency that the D/GC's reference to the Appellant's address being the same as Mr. Corners's personal address constitutes only harmless error. The Agency concedes that the Record supports Appellant's assertion that it no longer shares an address with Mr. Corners and did not share an address at the time Appellant submitted its bid. Nevertheless, the D/GC's reference to the address was minor, and the other evidence in the Record supports the D/GC's determination that Appellant is not controlled by a service-disabled veteran. Thus, this error is harmless and does not warrant reversal of the determination.

Because Appellant's General Partnership Agreement is ambiguous, and because the Record does not support the assertion that Ms. Brewer has sufficient experience to control Appellant, I find Appellant has not met the requirements of 13 C.F.R. § 125.10(a), (b), and (d). Thus, Appellant is not an eligible SDVO SBC for this or future solicitations.

III. Conclusion

The D/GC's determination was not based upon clear error. Thus, the D/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).

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CHRISTOPHER HOLLEMAN
Administrative Judge