United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Valor Contracting, LLC	SBA No. VET-194
Appellant	Decided: May 28, 2010
Solicitation No. VA-250-10-RA-0094 Department of Veterans Affairs	

APPEARANCES

J. Mark Trimble, Esq., Rohrbachers Cron Manahan Trimble & Zimmerman Co., LPA, Toledo, OH, for Appellant.

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

DECISION

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On February 11, 2010, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA) issued Solicitation No. VA-250-10-RA-0094 (IFB) seeking bids for a construction project 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 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts.

On March 16, 2010, bids were opened, and Valor Contracting, LLC (Appellant), was the apparent low bidder. On March 25, 2010, the CO protested Appellant's status as an eligible SDVO SBC. The CO indicated that she could not ascertain: (1) whether Appellant is directly and unconditionally owned by a service-disabled veteran or (2) whether the management and daily business operations of Appellant are controlled by a service-disabled veteran.

B. AD/GC Determination

On April 30, 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 was not unconditionally owned and controlled by a service-disabled veteran at the time it submitted its offer and, therefore, did not meet the SDVO SBC eligibility requirements. The D/GC first verified that Mr. Lorne R. Trainor, General Manager of Appellant, is a service-disabled veteran, as determined by the VA, pursuant to 13 C.F.R. § 125.8. The D/GC next analyzed the issues of ownership and control.

With regard to ownership, the D/GC determined that Mr. Trainor owns 51% of Appellant, and Mr. Derek W. O'Loughlin owns 49%. However, the D/GC also found that certain provisions of Appellant's Operating Agreement imposed unacceptable conditions on Mr. Trainor's ownership in violation of 13 C.F.R. § 125.9. Specifically, ¶ 12.3 provides that no member may withdraw without Mr. O'Loughlin's approval, and ¶ 13.1.4 gives Mr. O'Loughlin alone the power to dissolve Appellant. Additionally, ¶ 8.10 imposes a strict covenant not to compete on Mr. Trainor. The D/GC noted that in contrast, ¶ 15.1 expressly gives Mr. O'Loughlin the right to engage or invest in other business ventures.

Quoting *Matter of the Wexford Group International, Inc.*, SBA No. SDV-105 (2006), the D/GC stated that "unconditional ownership means that a service-disabled veteran . . . 'must immediately have an absolute right to do anything' he wants to do with his ownership interest whenever he wants.'" The D/GC concluded that Mr. Trainor's ownership is not unconditional because the provisions of the Operating Agreement outlined above effectively deny him the right to withdraw from involvement with Appellant and the right to continue as Appellant's owner without Mr. O'Loughlin's permission. Thus, the D/GC found Appellant does not meet the unconditional ownership requirement set forth in 13 C.F.R. § 125.9.

With regard to control, the D/GC explained that 13 C.F.R. § 125.10(a) and (b) mandate that a service-disabled veteran hold the highest officer position in the firm, possess the relevant experience needed to run the concern, and be responsible for the day-to-day management of the firm's business operations. The D/GC found that Mr. Trainor is the General Manager, and the Operating Agreement indicates that the General Manager is responsible for Appellant's day-to-day business operations. The D/GC also found that Mr. Trainor has over forty years of management experience. Thus, the D/GC concluded that Appellant satisfies the requirements of 13 C.F.R. § 125.10(a) and (b).

Additionally, in the case of a limited liability corporation, 13 C.F.R. § 125.10(d) requires that a service-disabled veteran control all decisions of the firm. The D/GC again looked to Appellant's Operating Agreement, which provides in ¶ 8.3 that for an action to be valid as an action of the company, the action must be "approved by Members holding 100% of the votes." The D/GC explained that the same provision indicates that each member has votes equal to his ownership interests, so the approval of all members is required for any decision to be considered made by Appellant. The D/GC determined that this provision demonstrates that Mr. Trainor does not have control over all the decisions of Appellant, as required by 13 C.F.R. § 125.10(d). Based on the foregoing, the D/GC concluded that Mr. Trainor does not unconditionally own or

control Appellant, and, therefore, Appellant is not an eligible SDVO SBC.

C. Appeal Petition

On May 14, 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 made a clear error of fact in interpreting its Operating Agreement. Appellant discusses ¶¶ 1.7, 7.3, 8.1, 8.3, 8.5, 8.6, 8.8, 8.10, 12.3, and 15.5. The CO cited many of these provisions in her protest as sections that may be relevant to the D/GC's determination. However, because the D/GC did not rely on or even mention (aside from noting that the CO thought them relevant) many of the provisions Appellant discusses, Appellant's analysis of these provisions is irrelevant here.

With regard to ¶ 8.10, which imposes the covenant not to compete upon Mr. Trainor, Appellant argues that the provision is necessary because it is Mr. Trainor who brings all the necessary experience and knowledge to the business that will make it successful. In contrast, Mr. O'Loughlin brings only financial backing and staffing to the business. Thus, it is important that Mr. Trainor be prohibited from competing with Appellant because he is responsible for Appellant's success, whereas Mr. O'Loughlin is only providing support.

Appellant next argues that ¶ 12.3, which provides that no member may withdraw without Mr. O'Loughlin's approval, is a "relatively unimportant provision" because if Mr. Trainor chose to withhold his services at any time, Appellant would become worthless. In other words, Appellant cannot operate without Mr. Trainor's expertise, so he has the power to end Appellant's existence if he no longer wishes to be involved with Appellant.

Appellant then addresses ¶ 15.1 (which Appellant miscites as ¶ 15.5), the provision that expressly gives Mr. O'Loughlin the right to engage or invest in other business ventures. Appellant submits that the provision merely recognizes the fact that Mr. O'Loughlin currently operates other companies and is not a full-time employee of Appellant. Appellant reiterates that Mr. O'Loughlin only provides financial and staffing support. Appellant contends this provision has little to do with management or control of Appellant.

Finally, Appellant discusses the issue of control over Appellant's operations. Appellant notes the D/GC focused on ¶ 8.3, which mandates that an act of the company requires approval of 100% of member votes. However, Appellant argues that ¶ 8.6 specifically identifies the only areas over which members have authority, and ¶ 8.6.4 sets forth the only areas that could be construed as constituting day-to-day management: "to employ, retain, terminate or otherwise secure the services of any employees, attorneys, accountants, advisers and others deemed necessary by the Members to facilitate the conduct of the Company's business." Moreover, Mr. Trainor is the General Manger, and ¶ 8.7 also expressly provides that the General Manager controls the day-to-day operations of Appellant. Thus, because control over the daily operations of Appellant is explicitly delegated to Mr. Trainor as General Manager, and because Mr. Trainor's vote as a member would be required to approve any member action, Mr. Trainor does have control over the decisions of Appellant and has complete authority to operate the firm.

Appellant concludes that the D/GC erred in interpreting the foregoing provisions of its Operating Agreement. Nevertheless, Appellant notes that it is willing to revise the Agreement to clarify that the firm is owned and controlled by Mr. Trainor.

D. Agency Response

On May 25, 2010, SBA submitted the Protest File and the Agency's Response. SBA submits that the D/GC's determination was not based on any clear error and should thus be affirmed. SBA, like the D/GC, notes that requirement of unconditional ownership set forth in 13 C.F.R. § 125.9 mandates that there can be absolutely no conditions or limitations upon the service-disabled veteran's right to exercise full ownership rights. *Wexford*, SBA No. SDV-105. SBA asserts that Appellant cannot meet this requirement because its Operating Agreement imposes several restrictions on Mr. Trainor's ownership rights. Most notably, ¶ 12.3, prevents Mr. Trainor from ending his involvement with Appellant without Mr. O'Loughlin's approval, and ¶ 13.1.4 gives Mr. O'Loughlin alone the power to dissolve Appellant.

SBA contends that these provisions seriously limit Mr. Trainor's ownership interest because he cannot end or continue his ownership of Appellant without Mr. O'Loughlin's permission. SBA argues that the rights to end or continue one's involvement with a firm are important elements of ownership. According to SBA, because these provisions appear in Appellant's Operating Agreement, Appellant clearly cannot meet the *Wexford* standard, under which the service-disabled veteran must be able to do whatever he wants with his ownership interest whenever he wants.

SBA also disputes Appellant's claim that these provisions are meaningless. SBA claims that whereas Appellant argues that it cannot survive without Mr. Trainor's expertise, the record reflects that Mr. O'Loughlin also possesses over twenty-five years of construction and contracting experience. SBA posits that Mr. Trainor's service-disabled veteran status is the only thing Appellant needs from him. Similarly, whereas Appellant argues that Mr. Trainor could effectively withdraw merely by withholding his services, SBA contends this would be viewed as a breach of the Operating Agreement that could subject Mr. Trainor to legal liability. SBA concludes that based on these facts it cannot have been clear error for the D/GC to determine that Appellant is not unconditionally owned by Mr. Trainor.

SBA next addresses the issue of control. SBA notes that in prior cases OHA has strictly applied the requirement, set forth in 13 C.F.R. § 125.10(d), that the service-disabled veteran maintain control over "all decisions" of the firm, so that "lack of control over some specified decisions that require a supermajority approval" negates compliance. *Matter of Heritage of Am., LLC*, SBA No. VET-142, at 8 (2008). Here, ¶ 8.3 of Appellant's Operating Agreement gives each member votes equal to their ownership share and indicates that any action of the company must be approved by 100% of member votes. Because Mr. Trainor owns only 51% of Appellant, according to the SBA, he lacks sufficient member votes to control all decisions of the firm.

SBA rejects Appellant's argument that the 100% requirement should not disqualify Appellant because it means that Mr. Trainor's approval would be required for all actions of the firm. Instead, SBA contends OHA has rejected similar arguments. According to SBA, in *Matter*

of Firewatch Contracting of Florida, LLC, SBA No. VET-137 (2008), OHA determined that the fact that the service-disabled veteran's approval was required under a supermajority voting requirement did not override the fact that the service-disabled veteran could not independently control all the decisions of the firm. SBA thus concludes that the D/GC committed no error in determining that Appellant is not controlled by Mr. Trainor. Because Appellant is not unconditionally owned or controlled by a service-disabled veteran, SBA requests that the D/GC's determination 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 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 she made a patent error based on the record before her.

B. Analysis

To qualify as an eligible SDVO SBC, 13 C.F.R. § 125.9 requires that "[a] concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans." The D/GC determined that Appellant is not unconditionally owned by a service-disabled veteran. Pursuant to 13 C.F.R. § 125.10(a) and (b), a service-disabled veteran must control the management and daily business operations of a firm and possess the necessary qualifications to do so. The D/GC determined that Appellant did meet these requirements. However, in the case of a limited liability company, 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 D/GC determined that Appellant could not satisfy this condition. Thus, the two issues presented in this appeal are: (1) whether Mr. Trainor unconditionally owns Appellant, and (2) whether Mr. Trainor controls all decisions of the firm.

With regard to unconditional ownership, the D/GC determined that Appellant's Operating Agreement places impermissible restrictions upon Mr. Trainor's ownership rights. Appellant argues these provisions are essentially meaningless, and the D/GC placed too much emphasis on them. Based on my review of the Operating Agreement, I agree with the D/GC that the constraints it places on Mr. Trainor's ownership rights are at odds with the unconditional ownership requirement set forth in 13 C.F.R. § 125.9. Specifically, ¶ 12.3 provides that "[n]o member may voluntarily withdraw from [Appellant] without the consent of Derek W. O'Loughlin." Obviously, this restricts Mr. Trainor's right to terminate his involvement with Appellant. Appellant's argument that Mr. Trainor could withdraw whenever he likes because the

success of Appellant depends upon him is without merit. 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 Operating Agreement here expressly provides that Mr. Trainor may not voluntarily and unilaterally withdraw, and, as SBA points out, such an action may be perceived as a breach of the agreement.

Furthermore, ¶ 13.1. provides that Appellant may be terminated in the event of any of four conditions: the sale of all Appellant's assets, the unanimous agreement of the members, the entry of a decree of judicial dissolution, and "at the direction of Derek W. O'Loughlin." Thus, only Mr. O'Loughlin possesses the unilateral ability to terminate Appellant. The fact that Mr. O'Loughlin may do so without Mr. Trainor's consent is undoubtedly a restriction on Mr. Trainor's ownership rights.[1] As the D/GC and the SBA pointed out, OHA has determined that unconditional ownership means the service-disabled veteran "must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want." *Wexford*, at 8. The restrictions in the Operating Agreement do not allow Mr. Trainor to do anything he wants with his interest. Most importantly, he may not withdraw and sell his membership interest in Appellant without the consent of Mr. O'Loughlin. Moreover, he may not retain his membership interest if Mr. O'Loughlin decides to terminate Appellant. The D/GC made no error in determining Mr. Trainor does not unconditionally own 51% of Appellant.

With regard to control, the D/GC again found that the Operating Agreement precludes the conclusion that Mr. Trainor controls all decisions of the firm. Specifically, ¶ 8.3 provides: "Each Member shall have votes equal to their Membership Interest in [Appellant] . . . . Except as otherwise provided in this Agreement, any action taken by the Members shall be the valid act of the Company, if approved by the Members holding 100% of the votes." Appellant argues that because Mr. Trainor's vote would be required to approve any member action, as he is 51% owner of Appellant, he does have control over all decisions of the firm.[2] However, as SBA asserted, OHA has previously held that the fact that the service-disabled veteran's vote is required to attain a supermajority to approve certain decisions does not change the fact that the service-disabled veteran does not have the ability to independently *control* those decisions. *Firewatch Contracting*, SBA No. VET-137, at 6. The regulation is very clear: the service-disabled veteran must have "control over all decisions" of a limited liability company for it to be considered an eligible SDVO SBC. This provision of Appellant's Operating Agreement enables Mr. O'Loughlin to interfere with Mr. Trainor's control over Appellant. Accordingly, the AD/GC committed no error in concluding that Mr. Trainor does not control the business.

Lastly, I note that Appellant offered to revise its Operating Agreement to comply with SBA's interpretation of the regulations. However, the D/GC and OHA must determine

[1] I note that Appellant failed to address ¶ 13.1 in its appeal petition.

[2] I note that Appellant seemed to focus on the question of whether Mr. Trainor controls the management and daily business operations of Appellant. The D/GC specifically found that Mr. Trainor does control the day-to-day management of Appellant. It is Mr. Trainor's control over "all decisions" of the firm that is at issue here. In any event, Appellant's argument still applies to the "all decisions" issue.

eligibility as of the date of Appellant's initial offer for the instant procurement. *See* 13 C.F.R. § 125.15(a) (noting that an SDVO SBC must certify its SDVO SBC status with its initial offer); 13 C.F.R. § 134.512 (prohibiting an OHA Judge from considering new evidence on appeal). Any change in Appellant's ownership structure or Operating Agreement subsequent to that date would be irrelevant to this appeal. Based on the facts presented here, the D/GC properly determined that Appellant is not unconditionally owned or controlled by a service-disabled veteran and thus is not an eligible SDVO SBC.

III. Conclusion

The D/GC's determination was not based upon clear error. Thus, the instant appeal is DENIED, and the D/GC's status determination is AFFIRMED.

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