

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

IN THE MATTER OF:

Michael Ogden Pratt

Appellant

Solicitation No. W52P1J-10-T-3017
Department of the Army
Army Contracting Command
Rock Island Contracting Center

SBA No. VET-200

Decided: August 30, 2010

APPEARANCES

Randall K. Spencer, Esq., Provo, Utah, for Appellant.

Timothy Miguel Willardson, Esq., Salt Lake City, Utah, for H&H Builders, Inc.

Kevin R. Harber, Esq., Office of General Counsel, for the Small Business Administration.

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 Small Business Administration's Director for Government Contracting made a clear error of fact or law in concluding Appellant's management and day-to-day operations are not controlled by a Service-Disabled Veteran. *See* 13 C.F.R. §§ 125.10, 134.508.

III. Background

A. Facts

1. On March 17, 2010, the Department of the Army, Army Contracting Command, Rock Island Contracting Center issued Solicitation No. W52P1J-10-T-3017 (RFP), for control of vegetation through spraying at Tooele Army Depot and spraying and mowing vegetation at Deseret Chemical Depot, both in Utah. The Contracting Officer (CO) set the procurement aside

for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs).

2. The RFP's statement of work contains strict herbicide use requirements, which, among other things, require the contractor to have a license from the State of Utah to apply the required chemicals (RFP, Section 13290, page 5 of 82). The RFP contains other strict requirements related to the use and disposal of herbicides.

3. On April 1, 2010, Michael Ogden Pratt (Appellant) submitted his proposal. The Contracting Officer awarded the contract arising from the RFP to Appellant on May 6, 2010.

4. On May 10, 2010, H & H Builders, Inc. (H&H), an unsuccessful offeror, protested Appellant's SDVO SBC status with the CO. H&H's counsel first protested Appellant's status as an SDVO SBC, *i.e.*, counsel alleged Appellant's ORCA certification does not represent Appellant is either veteran-owned or service-disabled. In a follow-on letter also dated May 10, 2010, H&H's counsel referenced Department of Veterans Affairs Verification guidelines and alleged Appellant is a student at the Medical School at the University of Utah and that he is employed by the U.S. Marine Corps. H&H's counsel also alleged its owner could not reach Appellant at the telephone number listed on VetBiz.gov after calling several times.

5. On July 6, 2010, the CO forwarded the protests to the Small Business Administration (SBA) Director of Government Contracting (D/GC) in accordance with 13 C.F.R. § 125.25 for an SDVO SBC status determination.

6. On July 16, 2010, the SBA forward H&H's protest to Appellant. SBA noted that H&H accused Michael Pratt of not being a service-disabled veteran, of being a full time medical student and an employee of the Marine Corps, and as such, is incapable of managing the day-to-day operations of the firm. SBA also noted that H&H alleges the contact information for Appellant is a voice mail box.

7. Appellant responded to the protest on July 23, 2010, with additional information on August 2, 2010. Michael Pratt is a service-disabled veteran and honorably discharged former U.S. Marine. Appellant is a sole proprietorship. Mr. Pratt established Appellant as a business, obtained the requisite State of Utah commercial pesticide business license, and found a subcontractor to perform work required under the RFP that he could not perform. In addition, Michael Pratt has previous grounds maintenance experience.

8. Michael Pratt's resume lists his construction and grounds keeping experience as "1998-present" including "several grounds keeping and landscaping jobs" and "masonry construction experience." The resume also states he served in the Marines 2000-2004, received a B.S. degree in 2008, and was a high school math teacher 2008-2009.

B. D/GC Status Determination

On August 10, 2010, the D/GC issued her determination concluding Appellant did not meet the SDVO SBC eligibility requirements as of the date it submitted its proposal under the RFP. The D/GC first found Mr. Pratt is an eligible service-disabled veteran and meets the ownership requirements.

As for control, the D/GC found Mr. Pratt did not control Appellant's management and daily business operations as of the date Appellant submitted its proposal as required by 13 C.F.R. § 125.10(a). The D/GC noted Michael Pratt is a full time medical student. The D/GC then stated: "Given the demands placed upon you by your attendance at medical school and in the absence of any proof to the contrary, I cannot conclude that your full time medical studies afford you sufficient time to also be able to manage the day-to-day business operations of the firm."

The D/GC next addressed Michael Pratt's experience to manage Appellant. The D/GC found that Michael Pratt's resume does not indicate he possesses any general management or supervisory experience or any meaningful experience in the grounds maintenance industry. The D/GC also noted that Appellant had subcontracted the herbicide application portion of the base year of the contract to the incumbent contractor for the past twelve years. Hence, the D/GC concluded that it appears that Michael Pratt lacked the experience of the extent and complexity needed to run the firm's day-to-day business operations (and that in fact, the work was actually being accomplished by the incumbent). Thus, the D/GC concluded a service-disabled veteran does not control Appellant as required by 13 C.F.R. § 125.10.

The D/GC thus concluded that Appellant is not an eligible SDVO SBC.

C. Appeal Petition

On August 12, 2010, Appellant's counsel filed the instant appeal of the D/GC's determination with the SBA Office of Hearings and Appeals (OHA). Appellant asserts the D/GC's only real basis for finding against Appellant is Michael Pratt's status as a medical student. Appellant alleges the Record contains no evidence to support the D/GC's conclusion that Michael Pratt lacks the time to manage the day-to-day affairs of Appellant and ignored the fact that Michael Pratt had indeed been running the business. Appellant argues the D/GC's decision is punitive and punishes Michael Pratt for working hard to earn money to support himself and his family, and pay for school, while he is attending school.

Appellant also argues the Record is sufficient to establish that Michael Pratt, as evidenced by his previous experience in grounds maintenance, his establishment of Appellant as a business, including obtaining a business license, obtaining appropriate subcontractors, and submitting an appropriate bid for the RFP has demonstrated Michael Pratt has the requisite experience to manage Appellant.

Appellant also notes it rebutted every factual allegation made in H&H's protest and that the D/GC should not have considered the control issue because H&H did not raise it in its protest. For example, H&H did not allege Michael Pratt could not manage Appellant because he was attending medical school or that he lacked the requisite experience to manage Appellant. Therefore, these grounds were not timely raised as required by FAR 33.103(e).

D. SBA's Response to the Appeal

On August 23, 2010, SBA filed its response to the appeal. SBA contends the D/GC did not base her determination on a clear error of fact or law and should be upheld. SBA claims the Record forced the D/GC to find a service-disabled veteran did not control Appellant at the time

of its offer as required by 13 C.F.R. § 125.10.

SBA argues that because Michael Pratt is a full-time medical student his studies would leave him with insufficient time to conduct the management and administration of Appellant's day-to-day business operations. Therefore, it was not an error to find a lack of control.

SBA also argues that Michael Pratt's resume is vague and lacking in detail and does not provide any significant information regarding his management and supervisory experience or his experience in the grounds maintenance industry generally. Thus, it was not an error of fact or law for the D/GC to find that Michael Pratt did not possess management experience of the extent and complexity needed to run Appellant as required by 13 C.F.R. § 125.10(b).

SBA's final argument is that because Appellant subcontracted out a key portion of the work required under the RFP to the incumbent, when considered with Michael Pratt's status as a medical student and his vague resume, "suggests the very real possibility Appellant serves as a pass-through or false front to funnel the protested contract to a firm that is no longer eligible to perform it directly."

E. H&H's Opposition to the Appeal

Counsel for H&H filed a timely Opposition to the Appeal. H&H argues the D/GC's determination is correct. H&H alleges Michael Pratt does not control Appellant's day-to-day operations and that he has not demonstrated the ability to manage the business at issue. Moreover, H&H claims Appellant was given actual notice of the issues regarding the status of Michael Pratt.

H&H alleges that because Michael Pratt is a medical student he cannot control his business as required because the work required by the RFP can occur between February and October. H&H claims Michael Pratt can only manage the work required by the RFP when he is not a full time student, since being a student is his priority. Thus, Michael Pratt cannot manage the work as required.

H&H alleges SBA gave Michael Pratt the opportunity to submit anything he desired to show he had the managerial ability to run Appellant. Instead, Michael Pratt submitted documents that demonstrate he does not have the ability to manage Appellant. More specifically, H&H argues Michael Pratt's resume did not identify sufficient job experience or training to manage a business performing Federal contracts. H&H also rejects Appellant's claim that Michael Pratt had sufficient grounds maintenance job related experience by arguing that over the past 12 years, Michael Pratt had only a limited opportunity to perform such work.

IV. Analysis

A. Timeliness and Standard of Review

Appellant filed its appeal petition within 10 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 of the Appeal

13 C.F.R. § 125.10(a) requires that a service-disabled veteran must control a concern's management and daily business operations. For the purpose of this appeal, this means Michael Pratt must have controlled Appellant's daily operations and long-term decision making when Appellant submitted its proposal on April 1, 2010. Based upon the Record, there is no doubt that Michael Pratt had the power to control Appellant's daily business operations and long-term decision making since Appellant is a sole proprietorship. The problem here is that the D/GC concluded that: (1) Because Michael Pratt is a full time medical student he does not have the time to manage Appellant's operations; (2) Michael Pratt lacks sufficient general management or supervisory experience in the grounds maintenance industry.

The Record does not support the D/GC's conclusion that Michael Pratt's status as a full time medical student prevents him from managing his business. Instead, the Record contains no evidence addressing how much time a medical student must spend to be a successful student. Similarly, there is no evidence in the Record capable of supporting a conclusion that a medical student cannot successfully manage a business during summer break or even during the academic year. Nor is there any prohibition in the regulations against a full time student operating a business. Nevertheless, the D/GC assumes that a medical student cannot manage a grounds maintenance business, when it is likely significant work will occur when school is not in session. Therefore, I hold that if the D/GC is going to conclude a medical student (or any other student) will not have the time to manage a grounds maintenance contract (or any other contract for that matter), the Record must contain some proof of how much time it takes a student to successfully attend school and how much time is needed to manage the contract in question. Since the Record contains no such proof, this part of the determination must be reversed.

Specific job related management experience is not required by 13 C.F.R. § 125.10(b). Rather, 13 C.F.R. § 125.10(b) states:

Managerial position and experience. A service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such 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 (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) 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.

Nor does the regulation prohibit a veteran from operating another business or being a full time student. In fact, the regulation provides no criteria. Rather, the service-disabled veteran need only have experience of the extent and complexity needed to run the concern.

Nevertheless, for example, if a putative contractor is responsible for performing construction contracts, mass producing or developing electronic devices, or writing software, etc., specific experience to manage a concern accomplishing such work may be necessary under 13 C.F.R. § 125.10.

The RFP requires removal of unwanted vegetation, either mechanically or by use of herbicides (Facts 1 and 2). This work is not complicated and the management experience required of the service-disabled veteran to manage this work is less. And, even though the RFP states that the use of the herbicides requires a license (Fact 2), there is no requirement in 13 C.F.R. § 125.10 that the service-disabled veteran actually do this work, only that the veteran have sufficient experience to manage the work. This means it is permissible for a disabled veteran to subcontract the work. Moreover, the mere act of hiring an experienced subcontractor to perform the work is arguably proof of management skill. Consequently, because Michael Pratt: (1) has previous grounds maintenance experience (Fact 8); (2) is a U.S. Marine Corps veteran (Fact 7); (3) properly established Appellant as a business (Fact 7); (4) submitted a proper offer under the RFP to the CO who judged him to be a responsible offeror and did not refer the matter to SBA for a certificate of responsibility (Fact 3);¹ and (5) found someone to do work he could not perform himself, I find Appellant has established Michael Pratt has experience of the extent and complexity needed to run Appellant while performing grounds maintenance work required by this RFP.

The D/GC and SBA also have confused performance of key work by a subcontractor (who is an ineligible incumbent) with the issue of having the managerial experience of the extent and complexity needed to run Appellant required by 13 C.F.R. § 125.10(b). Although not specifically referencing 13 C.F.R. § 121.103(h)(4), I find the D/GC and SBA have conflated matters pertaining to the ostensible subcontractor rule found at 13 C.F.R. § 121.103(h)(4) with the experience requirements of 13 C.F.R. § 125.10 in discussing Appellant's alleged inability to perform the herbicide work.² This is patent error, for among other things 13 C.F.R. § 121.103 is inapplicable to SDVO SBC determinations. *Matter of Singleton Enterprises-GMT Mechanical, A Joint Venture*, SBA No. VET-130, at 7 (2008). Further, I reiterate that the test under 13 C.F.R. § 125.10 is whether the service-disabled veteran has the experience of the extent and complexity needed to run the concern, not to perform all the work required by the contract. Finally, I find there is no probative evidence in the Record that Michael Pratt is a front or conduit for another concern.

¹ See FAR 9.103 and 19.6.

² Among other factors, 13 C.F.R. § 121.103(h)(4) specifically requires be considered is the issue of incumbency when the incumbent is ineligible to perform the current work. Moreover, the standard is whether the subcontractor is performing primary and vital (key) contract work or whether the protested concern is unusually reliant upon its subcontractor.

V. Conclusion

After reviewing the record, I hold the written protest file fails to support the D/GC's determination. Therefore, Appellant has established a clear error of fact or law in the D/GC's decision and I must GRANT the instant appeal and REVERSE the D/GC's determination. Appellant is an eligible SDVO SBC for this contract.

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

THOMAS B. PENDER
Administrative Judge