United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Hamilton Pacific Chamberlain, LLC	SBA No. VET-201
Appellant	Decided: November 8, 2010
Solicitation No. W912ES-10-T-0101 U.S. Department of the Army	

APPEARANCES

Donald H. Hadley, Esq., Donald H. Hadley, LLC, Rockville, Maryland, for Appellant.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, DC, for the Agency.

DECISION

HOLLEMAN, Administrative Judge:

I. Background

A. Solicitation and Protest

On August 23, 2010, the Contracting Officer (CO) for the U.S. Department of Defense, Department of the Army, Corps of Engineers issued Solicitation No. W912ES-10-T-0101[1] (RFP) seeking quotes for filling cracks and seal coating asphalt pavement at the Eau Galle Lake Project in Wisconsin. The RFP was a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside,[2] and the CO designated North American Industry Classification System (NAICS) code 237310, Highway, Street, and Bridge Construction, with a corresponding size standard of $33.5 million in average annual receipts. The RFP closed on September 3, 2010. On September 10, 2010, the CO awarded the contract to Hamilton Pacific Chamberlain, LLC (Appellant). On September 16, 2010, Valley Paving, Inc. (Valley Paving), an unsuccessful

[1] The solicitation number was previously identified as W912ES-10-P-0180. To clarify, that number is the contract number, not the solicitation number.

[2] Amendment 2, issued on August 24, 2010, changed the solicitation from a small business set-aside to an SDVO SBC set-aside.

offeror, protested Appellant's status as an eligible SDVO SBC.

B. D/GC Determination

On October 12, 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 directly owned or controlled by a service-disabled veteran and, therefore, is not an eligible SDVO SBC. The D/GC first verified that Mr. Griffin Hamilton, President of Hamilton-Pacific, Inc. (which owns 51% of Appellant), is a service-disabled veteran pursuant to 13 C.F.R. § 125.8. The D/GC went on to examine the issues of ownership and control pursuant to 13 C.F.R. §§ 125.9 and 125.10

The D/GC explained that Appellant, a limited liability company, has two members: Hamilton-Pacific, Inc., which owns 51% of Appellant, and Chamberlain Contractors, Inc., which owns 49% of Appellant. The D/GC noted that Appellant failed to produce stock certificates for Hamilton-Pacific, Inc. Nevertheless, based on these facts, the D/GC concluded that Appellant is not directly owned by a service-disabled veteran, as required by 13 C.F.R. § 125.9. *See Matter of IITS-Nabholz*, SBA No. VET-114 (2007).

The D/GC next explained that a service-disabled veteran must hold Appellant's highest officer position, must have the managerial experience necessary to run Appellant, must be responsible for both Appellant's long-term decisionmaking and day-to-day business administration, and must be a managing member of Appellant. 13 C.F.R. § 125.10. The D/GC indicated that Appellant failed to provide resumes of its employees or Appellant's lease agreement, so she was unable to determine who has the requisite experience to run the firm or who actually has day-to-day control over its operations. After reviewing Appellant's Operating Agreement, the D/GC explained that the authority to manage and control the firm varies depending on the action being taken, and, as a result, she was unable to conclude that Mr. Griffin Hamilton has the power to control the firm's business decisions. Furthermore, the D/GC could not conclude that Mr. Griffin Hamilton is a managing member of Appellant, because Appellant has only two corporate members. Consequently, the D/GC concluded that Appellant is not controlled by a service-disabled veteran, as required by 13 C.F.R. § 125.10. Based on the foregoing analysis, the D/GC determined Appellant is not an eligible SDVO SBC.

C. Appeal Petition

On October 21, 2010, Appellant filed the instant appeal of the D/GC's determination with SBA's Office of Hearings and Appeals (OHA). Appellant indicates that portions of the determination are difficult to reconcile with the applicable regulations and raises concerns about its ability to cure the grounds on which it was found not to be an eligible SDVO SBC. First, Appellant contends the determination overreaches when it provides that Appellant is prohibited from submitting offers on future SDVO SBC procurements. Instead, Appellant argues, 13 C.F.R. § 125.27(g) provides that Appellant may offer on future SDVO SBC procurements if it cures the reasons why the protest was sustained. *See Matter of Cedar Elec., Inc./Pride Enters., Inc., JV*, SBA No. VET-129 (2008).

Next, Appellant challenges the language in the determination indicating it is final until appealed or until relief is granted pursuant to 13 C.F.R. § 125.27(g). Appellant claims the language is misleading because there is no process by which it may apply for affirmative relief, such as reinstatement as an eligible SDVO SBC, nor is there authority for such a process. Appellant also submits that the requirement that it change its Central Contractor Registration (CCR) and Online Representations and Certifications Application (ORCA) to reflect that it is no longer an eligible SDVO SBC may be interpreted as a permanent order and does not permit Appellant to change the entries if it cures its eligibility deficiencies. Finally, Appellant disputes the D/GC's representations that it failed to submit stock certificates, a lease, and resume information. Appellant asserts this information was submitted as part of the record. Appellant requests that the determination and record be clarified on these points.

D. Agency Response

On November 1, 2010, the SBA submitted the Protest File and the Agency's Response to the Appeal Petition. The Agency first agrees with Appellant that it did submit the stock certificates and lease agreement and agrees to modify the determination to reflect the submission. However, the Agency points out that Appellant has not argued, nor does the Agency believe, that any of the errors Appellant alleges would affect the validity of the D/GC's determination. Rather, the SBA asserts the D/GC correctly applied the applicable regulations, and the determination should be affirmed.

The SBA next contends the other language Appellant challenges is accurate, consistent with the applicable regulations, and does not require modification. First, the SBA claims the language indicating Appellant may not submit offers on SDVO SBC procurements until the determination is reversed or relief is granted pursuant to 13 C.F.R. § 125.27(g) is accurate, as evidenced by the language of 13 C.F.R. § 125.27(g) itself. The SBA also argues this language has been challenged and upheld by OHA in the past. *Matter of Singleton Enters.-GMT Mech., A Joint Venture*, SBA No. VET-130 (2008). The SBA next asserts the language indicating Appellant must amend its CCR and ORCA entries is also accurate and consistent with the applicable regulations. *See* 13 C.F.R. § 125.29. The SBA contends that because the determination includes language indicating that Appellant can bid on future SDVO SBC procurements if the determination "is overturned on appeal or relief is granted pursuant to 13 C.F.R. § 125.27(g)," the language Appellant challenges is not misleading. The SBA concludes the determination should be affirmed, but agrees to modify the determination to reflect that certain information was submitted prior to its issuance.

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

Appellant makes no substantive arguments of fact or law against the merits of the D/GC's determination. Appellant does not attempt to argue that it is a qualified SDVO SBC. Instead, Appellant's arguments all go to the D/GC's alleged burdens on Appellant's attempts to cure the defects in its status as an SDVO SBC.

Appellant first contends the determination contains factual errors regarding its documentary submissions to the D/GC, and the SBA agrees. Specifically, Appellant asserts it submitted the requested stock certificates and lease agreement prior to the issuance of the determination. Accordingly, I find it was clear factual error for the D/GC to indicate that Appellant failed to submit stock certificates or a lease agreement. As noted above, the SBA has agreed to modify the determination letter accordingly.

Appellant also contends it was error for the D/GC to indicate that no resume or other documentation was provided with regard to each of the managers of Hamilton-Pacific, Inc. and Chamberlain Contractors, Inc. Appellant claims it provided resume information for those managers in tabular form within Enclosure 5 accompanying Appellant's response to the protest. The SBA did not respond to this issue. Enclosure 5 is a list of shareholders, officers, and directors of Hamilton-Pacific, Inc. and Chamberlain Contractors, Inc and includes very brief descriptions of each manager's experience. For example, Mr. Griffin Hamilton's entry lists the years of his Navy experience, as well as the years of four other positions, including his current position as President of Hamilton-Pacific, Inc.

I find the D/GC's indication that Appellant failed to produce resumes was not a clear error. There are no resumes in the record, and although these brief entries in Enclosure 5 include some information that may also be included on a resume, the entries list only the years a position was held and do not include any information regarding the duties performed. This information is insufficient to constitute a resume and was inadequate to allow the D/GC to determine whether these managers have the necessary experience to run Appellant's business operations. I do not agree with Appellant that this requires modification of the determination.

Appellant contends certain other language in the D/GC's determination is misleading. As noted above, I may only review the determination for clear error, and I find no clear error in any of the language Appellant challenges. First, Appellant takes issue with the paragraph that indicates the determination is final unless reversed on appeal "or relief is granted pursuant to 13 C.F.R. § 125.27(g)." That section provides:

> SBA's determination is effective immediately and is final unless overturned by OHA on appeal. If SBA sustains the protest, and the contract has not yet been

> awarded, then the protested concern is ineligible for an SDVO SBC contract award. If a contract has already been awarded, and SBA sustains the protest, then the contracting officer cannot count the award as an award to an SDVO SBC and the concern cannot submit another offer as an SDVO SBC on a future SDVO SBC procurement unless it overcomes the reasons for the protest (e.g., it changes its ownership to satisfy the definition of an SDVO SBC set forth in §125.8).

13 C.F.R. § 125.27(g). Appellant argues the language in the determination can be viewed as a permanent ban on submitting offers for SDVO SBC contracts and can be construed to require obtaining affirmative relief under 13 C.F.R. § 125.27(g), for which there is no process.

I disagree. It is clear upon reading 13 C.F.R. § 125.27(g) that a firm may submit offers on future SDVO SBC procurements if it cures the grounds for its ineligibility. Appellant's claim that the language can be misunderstood because there is no process for obtaining affirmative relief under 13 C.F.R. § 125.27(g) lacks merit. The language in the determination cites the regulation, and the regulation itself is clear that once Appellant cures its deficiencies, it may submit offers on future SDVO SBC procurements. There is no requirement for affirmative relief, nor does the language in the determination imply one. Furthermore, the SBA has used this same language in previous SDVO SBC status determinations, and I am unaware of any situation in which the concerns Appellant raises have affected a firm's ability to compete for future SDVO SBC procurements.

Finally, Appellant contends the requirement that Appellant amend its CCR and ORCA entries can be interpreted as a permanent order not permitting any future change. The determination letter provides: "[Appellant] must immediately update its [CCR and ORCA] entries to reflect the fact that the firm is no longer entitled to claim that it is an SDVO SBC for purposes of federal procurement opportunities." This language merely notifies Appellant that it must correct any representations that it is an eligible SDVO SBC. It in no way mandates or even implies that Appellant is unable to change its CCR and ORCA entries once it cures its eligibility issues. Instead, the language is consistent with both 13 C.F.R. § 125.29, which provides that firms may be subject to criminal penalties for failing to correct inaccurate representations, and 13 C.F.R. § 125.27(g), which allows firms to compete for future SDVO SBC contracts upon curing the firm's eligibility deficiencies. I find no clear error in this language, and I find it is not necessary to clarify the determination.

III. Conclusion

The D/GC's status determination was not based upon clear error, so it is AFFIRMED. Appellant is not an eligible SDVO SBC. However, the appeal is GRANTED IN PART only insofar as it seeks a factual correction pertaining to the submission of information before the issuance of the determination letter. The D/GC must issue, no later than November 19, 2010, an amended letter reflecting that Appellant did submit stock certificates and a lease agreement prior to the issuance of the determination. The appeal is DENIED in all other respects.

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

CHRISTOPHER HOLLEMAN
Administrative Judge