

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

IN THE MATTER OF:

A1 Procurement LLC/JVS,

Appellant,

RE: IND-MAR Services, Inc.

Solicitation No. HSCG80-12-Q-P45001  
United States Coast Guard  
Surface Forces Logistics Center

SBA No. VET-223

Decided: October 31, 2011

APPEARANCES

Derrick Storms, Esq., Storms and Associates, P.A., Miami, Florida, for Appellant

Nicholas V. Pulignano, Jr., Esq., Marks Gray, P.A., Jacksonville, Florida, for IND-MAR Services, 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 SBA's Assistant Director for Government Contracting made a clear error of fact or law in determining the protested concern is an eligible SDVO SBC. *See* 13 C.F.R. §§ 125.25(b), 125.26, 134.508.

III. Background

A. Protest and SDVO SBC Status Determination

On July 1, 2011, the United States Coast Guard, Surface Forces Logistics Center, in Norfolk, Virginia, issued this Solicitation No. HSCG80-12-Q-P45001 for Drydock Repairs on

the USCGC Tarpon. The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). Offers were due on July 29, 2011. On September 9, 2011, the CO informed offerors that IND-MAR Services, Inc. (IMS) would be awarded the contract. On September 13, 2011, A1 Procurement LLC/JVS (Appellant), protested IMS's claimed SDVO SBC status to the CO.

On September 14, 2011, the CO referred the protest to the Small Business Administration (SBA).

On October 7, 2011, the SBA's Acting Director, Office of Government Contracting (AD/GC) issued his determination that IMS is an eligible SDVO SBC for this procurement.

The AD/GC found that Donald Nickle and Ariel Duchesne, the individuals upon whom IMS's claim of eligibility is based, are service-disabled veterans.

The AD/GC further found that Mr. Nickle has a 25.5% ownership interest in IMS, Mr. Duchesne has a 25.5% interest in IMS, and North Florida Shipyards, Inc. (NFSY) owns a 49% interest in IMS. The AD/GC further found that there were no impermissible conditions on the veterans' ownership interests, nor were there any ownership options. The AD/GC concluded that IMS is majority owned (51%) by service-disabled veterans.

The AD/GC further found that Mr. Nickle is IMS's president, which IMS's By-laws specified is the concern's highest officer position. Further, Mr. Nickle has more than 25 years experience in the ship repair industry, along with a comparable amount of general management experience. Further, the AD/GC found that IMS has four directors, Mr. Nickle, Mr. Duchesne, Matthew Self, and Robert Wilson. The fact that Mr. Nickle and Mr. Duchesne together own a majority of the stock gives them the authority to appoint and remove directors at their discretion. IMS has no supermajority voting requirements and Mr. Nickle and Mr. Duchesne have the authority to vote each other's shares in the event one of them is absent. Accordingly, the AD/GC found that Mr. Nickle and Mr. Duchesne, two service-disabled veterans, together control IMS's board of directors.

The AD/GC considered the Teaming Agreement (Agreement) between IMS and NFSY, its minority shareholder. Mr. Nickle and Mr. Duchesne are both former NFSY employees. The Agreement provides for the joint performance of contracts. However, the Agreement gives NFSY no power to control IMS either directly or indirectly. The AD/GC found the Agreement contains standard commercial terms found in an arm's-length transaction. The AD/GC also found IMS's corporate documents give NFSY no special protections and give Mr. Nickle and Mr. Duchesne the ability to take any action they deem appropriate without regard to the rights of the minority shareholder. The AD/GC further found that Mr. Nickle and Mr. Duchesne derive their income from IMS, not NFSY.

The AD/GC therefore concluded that IMS is not unduly reliant upon NFSY to the point that it could not exercise independent business judgment, and the NFSY has no power to control IMS. The AD/GC thus concluded that IMS is owned and controlled by service-disabled veterans.

### B. Appeal Petition

On October 11, 2011, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts, first, that NFSY owns the majority interest in IMS. Appellant further argues that because NFSY is the former employer of Mr. Nickle and Mr. Duchesne, NFSY cannot be an IMS shareholder, citing 13 C.F.R. § 124.106(e)(2).

Appellant also asserts that IMS is completely reliant and dependent upon NFSY to perform all the requirements of the solicitation, including providing all labor, equipment, tolls, employees and capital. Appellant asserts IMS does not have its own business address, and uses NFSY's address at 2060 East Adams Street, Jacksonville, Florida. Appellant asserts IMS is reliant upon NFSY for licenses, in violation of 13 C.F.R. § 124.106(g)(2).

Appellant also asserts IMS is relying upon NFSY to perform 100% of the work on this contract in violation of 13 C.F.R. § 125.6(a)(1). Appellant further asserts NFSY retains more than 51% of IMS's profits, and that Mr. Nickle and Mr. Duchesne do not actually receive a 51% share of IMS's profits.

### C. Responses to the Appeal

#### 1. IMS's Response

On October 14, 2011, IMS responded to the appeal. IMS contends Appellant's allegations are false and unsupported by any proof or documentation.

Mr. Nickle and Mr. Duchesne are former NFSY employees who left that employment and began IMS in 2010. They are both employed full-time by IMS. They both have extensive experience in the field of ship repair.

IMS asserts that under its Agreement with NFSY the Project Manager of any contract awarded will be an IMS employee, and be responsible for contract performance. The operating capital account of the Agreement is established in IMS's name, and the majority of personnel utilized in any contract must be IMS employees during the performance period. IMS is responsible for the procurement of all material and services required to perform a contract, IMS is responsible for negotiating any contracts, is the party to any contract with the Government, and must perform at least 51% of the dollar amount of any labor portion of any contract, and maintain all records.

IMS asserts that Mr. Nickle and Mr. Duchesne together own and control IMS. They are service-disabled veterans, and together own a majority of the stock and control the board of directors.

IMS asserts NFSY has no power to control it. IMS further asserts it is not unduly reliant upon NFSY. IMS asserts no specialized licenses are required to perform this contract. Even if there were, IMS has the required ultimate managerial and supervisory control over any required license, pursuant to 13 C.F.R. § 125.10(b).

IMS further asserts that under the Agreement, it will perform at least 51% of the work required by this solicitation. IMS finally asserts that, as 51% shareholders, Mr. Nickle and Mr. Duchesne are entitled to 51% of IMS's profits, and thus Appellant's contrary assertions are without foundation.

## 2. SBA's Response

On October 21, 2011, SBA responded to the appeal. SBA contends the AD/GC's determination that IMS is an eligible SDVO SBC was not based on a clear error of fact or law and should be upheld.

SBA asserts the record establishes that Mr. Nickle and Mr. Duchesne are both service-disabled veterans. Protest File, Ex. 3 at 29-35. The stock ledger also establishes that both Mr. Nickle and Mr. Duchesne directly and unconditionally own 25.5% each of IMS's stock. Protest File, Ex. 3 at 40-49.

SBA further asserts that the record reflects that a service-disabled veteran with managerial experience of the extent and complexity required to run the firm holds the highest officer position and is responsible for day-to-day business operations, and that one or more service-disabled veterans control the board of directors. Protest File, Ex. 3 at 56-57, 62-66, 73-74, 83. Therefore, IMS is owned and controlled by one or more service-disabled veterans.

SBA further asserts Appellant's allegations that NFSY owns a majority interest in IMS, receives 51% of the profits of IMS, and is reliant upon NFSY for performance, has no employees, and is contracting out all the work under this contract, are all without foundation.

On October 14, 2011, Appellant filed a Reply to IMS's Response.

## IV. Discussion

### A. Timeliness, Reply, and Standard of Review

Appellant filed its appeal petition within 10 business days of receiving the AD/GC's determination, and thus the appeal is timely. 13 C.F.R. § 134.503.

A reply to a response is not permitted unless the Administrative Judge gives leave for it to be filed and served. Accordingly, I EXCLUDE Appellant's October 14<sup>th</sup> Reply from the record.

OHA reviews the AD/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, I may overturn the AD/GC's decision only if Appellant proves the AD/GC made a patent error based on the record before him.

## B. Analysis

To qualify as an eligible SDVO SBC, a concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. 13 C.F.R. § 125.9(a), (d). The record establishes that Mr. Nickle and Mr. Duchesne are service-disabled veterans. Protest File, Ex. 3, at 29-35. A review of the stock ledgers in the record establishes that Mr. Nickle directly and unconditionally owns 25.5% of IMS, and Mr. Duchesne directly and unconditionally owns 25.5% of IMS. Protest File, Ex. 3 at 40-49. Accordingly, it is clear that, contrary to Appellant's unfounded assertion that NFSY holds a majority interest in IMS, one or more service-disabled veterans directly and unconditionally own 51% of IMS's stock.

A service-disabled veteran must control the management and daily business operations of an SDVO SBC and possess the necessary qualifications to do so. 13 C.F.R. § 125.10(a) & (b). Mr. Nickle is IMS's president, which is the highest officer position under IMS's By-laws, and controls the day-to-day operations of the business. Protest File, Ex. 3, at 66, 73-74. Both Mr. Nickle and Mr. Duchesne have extensive experience in shipyard operations, and thus have the qualifications to run the concern. Protest File, Ex. 3, at 83-87.

Appellant argues NFSY's minority interest is prohibited, citing 13 C.F.R. § 124.106(e)(2). This is a regulation governing SBA's 8(a) Business Development program. The 8(a) Business Development regulations can provide guidance interpreting the control requirement for SDVO SBC eligibility. *Matter of Artis Builders, Inc.*, SBA No. VET-214, at 4 (2011). Here, however, Appellant seeks not merely to interpret the regulation, but to import a specific provision that is not found in the SDVO SBC regulations. Appellant does not and cannot cite to any authority for doing so. The AD/GC did not err in declining to apply this 8(a) BD program regulation to the SDVO SBC program.

IMS's board of directors does have four members, two of whom are Mr. Nickle and Mr. Duchesne. Under the IMS Shareholders' Agreement and By-laws, Mr. Nickel and Mr. Duchesne have the power to remove the members of the board at any time. Protest File, Ex. 3, at 64. In the event either Mr. Nickle or Mr. Duchesne is unable to attend a shareholders' meeting, the other has the right to vote his shares so that the 51% block of service-disabled veteran-owned stock may be voted as a block. Protest File, Ex. 3, at 56-57. A majority of the shareholders may call a meeting at any time, and vote to remove any or all of the board of directors. Protest File, Ex. 3, at 62-64. There are no supermajority voting requirements. Protest File, Ex. 3, at 57. Under the regulation, one or more service disabled veterans control a board of directors when they own at least 51% of all voting stock, are on the board, and have the percentage of stock necessary to overcome any supermajority voting requirements. 13 C.F.R. § 125.10(e)(1). Accordingly, Mr. Nickle and Mr. Duchesne control the board of directors, meeting the regulatory requirement that one or more service-disabled veterans control the board of directors.

The Agreement between IMS and NFSY provides that: the project manager for any contract will be an IMS employee, IMS is entitled to 51% of the income from any contract undertaken under the Teaming Agreement, the operating account for any contract will be in IMS's name, the majority of personnel used to perform a contract will be IMS employees during

the performance period, IMS will be responsible for procuring material and services required to complete the contract, IMS will be responsible for negotiating the contract, IMS will perform at least 51% of the total dollar amount of the labor portion of any contract, and IMS will execute any contract. Protest File, Ex. 3, at 80-81. Further, IMS submitted documentation that it did maintain a payroll, and thus had employees. Protest File, Ex. 3, at 108-09, 114-15. Therefore, there is no support in the record for Appellant's allegations that NFSY will perform 100% of the work on any contract, or that NFSY will retain most of the profits, or that Mr. Nickle and Mr. Duchesne will not receive 51% of IMS's profits.

Appellant asserts that IMS does not possess certain required licenses, is reliant upon NFSY for these licenses, and thus is in violation of 13 C.F.R. § 124.106(g)(2). However, as noted above, this is an 8(a) Business Development program regulation. The SDVO SBC regulation is applicable here. This regulation provides that service-disabled veterans need not possess any required license to control a concern if it can be demonstrated that they have ultimate managerial and supervisory control over the license holder. 13 C.F.R. § 125.10(b). Here, the Agreement provides that IMS will control any project, and Mr. Nickle and Mr. Duchesne control IMS, and therefore have managerial and supervisory control over any license holder the concern may retain for work.

Appellant's other allegations of dependence by IMS upon NFSY do not support a finding that IMS is not owned and controlled by service-disabled veterans. The regulations require that an SDVO SBC's management and daily business operations be controlled by a service-disabled veteran. Control is defined as both long-term decision making and day-to-day management of business operations. 13 C.F.R. § 125.10(a). Influence on a concern's business operations or managerial decisions does not amount to control. Factors such as the businesses having the same location, same line of business, the former employment of the service-disabled veterans by the alleged controlling firm, and the provision by the alleged controlling firm of business support services to the SDVO SBC do not support a finding that a concern is not owned and controlled by service-disabled veterans.<sup>1</sup> *Matter of DooleyMack Government Contracting, LLC*, SBA No. VET-159, at 5-6 (2009).

Here, the record clearly establishes that Mr. Nickle and Mr. Duchesne are service-disabled veterans who together directly own 51% of IMS, and there are no supermajority voting requirements. Mr. Nickel is IMS's president, which is IMS's highest officer position, and both Mr. Nickle and Mr. Duchesne have the requisite managerial experience to run the concern. Together, they control the board of directors. Thus, IMS is owned and controlled by service-disabled veterans, and the AD/GC made no error in his determination.

Therefore, Appellant cannot show the AD/GC based his determination on any clear error of fact or law. 13 C.F.R. § 134.508.

---

<sup>1</sup> Some of Appellant's allegations, if supported by the record, might support a finding IMS was affiliated with NFSY for this procurement under the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). However, that is an issue to be considered in a size protest and size appeal, and thus it is not before OHA here.

V. Conclusion

Accordingly, the AD/GC's determination that IND-MAR Services, Inc., is an eligible SDVO SBC was not based upon clear error. The AD/GC's determination is AFFIRMED, and the appeal is DENIED.

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

CHRISTOPHER HOLLEMAN  
Administrative Judge