United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
HANA-JV,	SBA No. VET-227
Appellant,	Decided: February 22, 2012
Solicitation No. W9124J-11-R-0006	

APPEARANCES

David S. Cohen, Esq., and Laurel A. Hockey, Esq., Cohen Mohr LLP, Washington, D.C. For Appellant

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

Richard B. Oliver, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for TsiCorp, the Protestor

DECISION[1]

I. Background

On February 18, 2011, the Department of the Army, Mission and Installation Contracting Command (Army) issued Solicitation No. W9124J-11-R-0006-09-R-2628 (solicitation) seeking a contractor to perform public works support services at Fort Hood, Texas. The procurement was set-aside exclusively for service-disabled veteran-owned small business concerns (SDVO SBCs).

On August 29, 2011, the Contracting Officer (CO) notified unsuccessful offerors that the contract had been awarded to HANA-JV (Appellant). On September 1, 2011, TsiCorp (Tsi), a disappointed offeror, protested Appellant's SDVO SBC eligibility. The CO referred Appellant's protest to the Small Business Administration (SBA) Office of Government Contracting.

[1] This decision was initially issued on February 8, 2012, under a protective order to prevent the disclosure of confidential or proprietary information. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information withheld from the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

On December 8, 2011, the Director of the Office of Government Contracting (D/GC) determined that Appellant is not an eligible SDVO SBC. The D/GC stated that Appellant is a joint venture of Merit Contracting, Inc. (Merit) and Omni Corporation (Omni). Although the D/GC determined that Merit qualifies as an SDVO SBC, the D/GC found Appellant failed to meet four of the regulatory requirements for SDVO SBC joint ventures found in 13 C.F.R. § 125.15. The D/GC specifically determined that: (1) Appellant did not designate Merit as Appellant's managing venturer; (2) Appellant did not designate an employee of Merit as Appellant's project manager; (3) Appellant did not establish that 51% of net profits will be distributed to the SDVO SBC; and (4) Merit and Omni did not define their respective responsibilities with regard to contract performance, source of labor, and negotiation of the contract. The D/GC did find that Appellant met the requirement that an SDVO SBC retain the joint venture's records. 13 C.F.R. § 125.15(b)(2)(vi).

The D/GC explained that to be an eligible joint venture Merit (the SDVO SBC member of the venture) must serve as the managing venturer and a Merit employee must serve as project manager. The D/GC stated Appellant's joint venture agreement states that Merit and Omni will each appoint one Managing Director and the two Managing Directors will "make all decisions by mutual agreement." (Determination at 6 (quoting Joint Venture Agreement ¶ 2.0).) Because Omni's consent is required for all actions taken by the joint venture, the D/GC determined Appellant does not have an SDVO SBC managing venturer as required by regulation.

Similarly, the D/GC stated the joint venture agreement simply indicates that a Merit employee will be the project manager without identifying a specific employee. The D/GC concluded that Mr. Harold Rose, an Omni employee, who is in charge of managing the transition portion of the contract, is managing the contract. The D/GC acknowledged that Appellant indicated that Mr. Rose is not the project manager and that Appellant has not yet hired a project manager, but the D/GC determined that, in the absence of a project manager, Mr. Rose is effectively serving in that role.

The D/GC also found Appellant's joint venture agreement deficient with respect to profit sharing and specifying the responsibilities of the parties in performing the contract. The D/GC noted that Appellant's joint venture agreement indicates that Merit will share 51% of the net operating income and net operating losses of the joint venture. The D/GC stated that net operating income does not have a clear meaning in the joint venture agreement and that SBA's regulations clearly require that the SDVO SBC be entitled to 51% of net profits rather than net operating income. (Determination at 7.)

Finally, the D/GC determined Appellant's joint venture agreement includes a blanket statement that the parties will comply with applicable SBA regulations, rather than delineating each party's responsibilities. The D/GC stated that the parties are required to agree on the responsibilities of each party to protect the SDVO SBC's interests if a dispute arises. Because the parties did not specify the responsibilities in any meaningful way, the D/GC determined Appellant was not in compliance with 13 C.F.R. § 125.15(b)(2)(iv).

II. Appeal Petition

On December 21, 2011, Appellant filed the instant appeal of the D/GC's determination with the SBA Office of Hearings and Appeals (OHA), claiming that the determination contains errors of fact and law.

Appellant first argues that the D/GC erred in finding that Appellant did not designate Merit, the SDVO SBC member of the joint venture, as the managing venturer. Appellant complains that, in its November 4, 2011 response to the protest, Appellant identified Merit as the managing venturer, but the D/GC disregarded Appellant's letter without explanation. (Appeal at 9.) Appellant further argues that, although the joint venture agreement provides for two Managing Directors who will make decisions by mutual agreement, Merit nevertheless controls Appellant's decision-making. Appellant emphasizes that, under this arrangement, "Omni cannot make any decision without Merit." (*Id.* at 11.) Appellant also highlights that the project manager, who will manage the day-to-day aspects of contract performance, will be an employee of Merit.

Appellant next argues that the D/GC erred in finding that Appellant's project manager is an employee of Omni, and that Appellant did not comply with 13 C.F.R. § 125.15(b)(2)(ii). Appellant observes that the joint venture agreement states that "The Project Manager for this contract will be an employee of MERIT." Furthermore, in its response to the protest, Appellant notified the D/GC that "The project manager for the contract has not been hired and when actually selected, will be an employee of Merit Contracting, Inc." In response to the D/GC's concern that Mr. Rose, an employee of Omni, appeared to be serving as project manager, Appellant reiterates that Mr. Rose is only Appellant's phase-in leader during the transition period, not the project manager.

Appellant also challenges the D/GC's finding that the joint venture agreement between Merit and Omni did not specify their respective responsibilities as required by 13 C.F.R. § 125.15(b)(2)(iv). Appellant states that it is a populated joint venture, and will hire its own employees, except for the project manager, to perform the contract. Appellant insists that "[g]iven that the joint venture will be populated, and that the employees of [Appellant] will be responsible for performing all necessary tasks under the contract, other than project management, the [D/GC] was wrong in expecting any further delineation of responsibility between Merit and Omni." (*Id.* at 16-17.)

Appellant also argues that the D/GC erred in finding that Merit will not receive at least 51% of the joint venture's net profits. Appellant contends that the joint venture agreement does provide that Merit is entitled to a 51% share of net operating income, and argues that the D/GC incorrectly found that the terms "net profit" and "net operating income" have different meanings. Appellant further emphasizes that SBA itself, in a sample joint venture agreement for the 8(a) program, uses the terms interchangeably.

Appellant requests that OHA grant this appeal and find that Appellant is an eligible SDVO joint venture.

III. Responses to the Appeal

A. SBA

On January 18, 2012, SBA filed its response to the appeal. SBA argues that the D/GC's determination is correct and should be affirmed.

SBA asserts that the joint venture agreement neither establishes Merit as the managing venturer nor gives Merit control over the management of the joint venture as required by regulation. SBA contends that the first instance of Merit being mentioned as the managing venturer is in Appellant's response to the protest. Similarly, Appellant's proposal and joint venture agreement do not identify a specific Merit employee as a project manager. SBA states Appellant's proposal and appeal note phase-in team leaders, not Merit employees, will handle hiring and training of personnel for this project and thus the project manager could be screened, selected, and trained by Omni personnel. SBA argues the D/GC correctly relied on the documents governing the joint venture at the time Appellant submitted its offer and correctly concluded the joint venture did not meet regulatory requirements.

As to the D/GC's decision regarding profits, SBA notes distinctions between “net profit,” the term in the regulation, and “net operating income,” the term incorporated in Appellant's joint venture agreement, but concedes that SBA itself has occasionally used both terms. Due to this inconsistency, SBA accepts Appellant meets this requirement of the regulation, but encourages OHA to rule that all future joint ventures should use the precise language of the regulation.

Finally, SBA argues that the D/GC's determination that Appellant failed to specify the parties' contract responsibilities should be affirmed. SBA argues that Appellant's joint venture agreement does not provide any specifics about the roles of the joint venturers to allow SBA to adequately ascertain what if any part of the performance of the contract will benefit the SDVO SBC. SBA asserts the proposal does not include a clear summary depicting the roles. Moreover, SBA reiterates that the regulation requires the delineation in the joint venture agreement.

B. Tsi

On January 18, 2012, Tsi filed its opposition to the appeal. Tsi argues the D/GC reasonably found Appellant did not meet the regulatory requirements for SDVO SBC joint ventures and Appellant failed to show clear error. Tsi states Appellant's joint venture agreement requires consent by Omni for all actions taken by the joint venture, does not designate Merit as the managing venturer, and does not designate a project manager. Tsi asserts that Appellant's arguments that SBA ignored Appellant's November 4, 2011 response to the protest on these issues are misplaced. Tsi argues SBA is required to base its eligibility determination on evidence that existed at the time of the initial offer submission, including the SDVO SBC joint venture agreement, rather than a self-serving response to a protest. As for the project manager role, Tsi notes: regardless of title, Mr. Rose, an Omni employee, was leading the first phase of the contract; Merit did not propose any employee for the phase-in team in the joint venture agreement; and Appellant's proposal and joint venture agreement present no candidate for project manager other than Mr. Rose. Finally, Tsi dismisses Appellant's arguments that because

Appellant is a populated joint venture, no further delineation of responsibilities is necessary. Tsi asserts, having chosen to submit an offer as an SDVO SBC, Appellant must comply with the regulatory requirements, including specifying the parties' responsibilities for contract performance.

IV. Discussion

A. Jurisdiction and 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, OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

B. Analysis

SBA regulations provide that a joint venture may be considered eligible to bid on an SDVO SBC contract if the joint venture is composed of an SDVO SBC and one or more other business concerns, and each concern is small under the applicable size standard for the procurement. In addition, the joint venture must meet all of the requirements set forth in 13 C.F.R. § 125.15(b). In this case, the D/GC determined that Appellant, a joint venture between Merit and Omni, did not meet four of those eligibility requirements. First, the D/GC determined that Appellant did not designate Merit, the SDVO SBC member of the joint venture, as the managing venturer. Second, even assuming Merit were the managing venturer, the D/GC determined that Appellant did not designate an employee of Merit as the project manager. Third, the D/GC held that Appellant did not establish that Merit would receive 51 % of the joint venture's net profits. Fourth, the D/GC determined that the joint venture agreement did not specifically define the responsibilities of the joint venture partners.

Appellant disputes each of these rationales, but any one of the grounds cited by the D/GC is a sufficient basis to conclude that Appellant is not an eligible joint venture. Because I find that the record clearly supports the D/GC's determination on the first two counts, I must uphold the D/GC's determination that Appellant does not meet the joint venture eligibility requirements. It is therefore unnecessary to address Appellant's arguments with respect to the remainder of the D/GC's findings.

1. Managing Venturer

Pursuant to 13 C.F.R. § 125.15(b)(2)(ii), "Every joint venture agreement to perform an SDVO contract must contain a provision ... [d]esignating an SDVO SBC as the managing

venturer of the joint venture." In this case, the D/GC determined that Appellant's joint venture agreement did not meet this requirement. Rather, Appellant's joint venture agreement stated that:

> There shall be two Managing Directors, one appointed by Merit and one appointed by Omni. The Managing Directors shall make all decisions by mutual agreement, including but not limited to execution of any contract documents and [authorizing] any expenditures that exceed the project line item budgets.

(Joint Venture Agreement ¶ 2.0.) The joint venture agreement further stated that Omni and Merit must "jointly agree on all hiring" (Joint Venture Agreement ¶ 8.0), and that neither party could write checks without the approval of the other. (Joint Venture Agreement ¶ 5 ("All checks drawn on the Operating Account will require two (2) signatures, one from each joint venturer.")). The D/GC concluded that "[b]ased on the terms of the agreement [Appellant] does not have an SDVO SBC managing venturer as required by SBA regulations." (Determination at 6.) In addition, the structure of Appellant's joint venture was problematic because it requires that "Omni must consent to all actions taken by the joint venture." *Id.*

Appellant counters that its November 4, 2011 response to the protest made clear that Merit will serve as the managing venturer. Appellant argues that the D/GC improperly ignored this evidence. This argument fails for two reasons. First, 13 C.F.R. § 125.15(b)(2) requires that an SDVO SBC be designated as managing venturer in the joint venture agreement itself; designation in a different document, which is not part of the joint venture agreement, is therefore not sufficient. Second, the D/GC made his determination based on Appellant's eligibility at the time of self-certification. 13 C.F.R. § 125.15. As a result, the D/GC correctly relied on documents governing the joint venture at the time Appellant submitted its offer, and not on statements made after the offer. *E.g.*, *Matter of Apex Ventures, LLC*, SBA No. VET-219, at 6 (2011) ("[T]he AD/GC based his determination on [the challenged firm's] status at the time of self-certification. Developments that occurred after the date of self-certification are irrelevant to this analysis."); *Matter of Cedar Electric, Inc./Pride Enters., Inc., JV*, SBA No. VET-129, at 4 (2008) ("[T]he D/GC must determine SDVO SBC eligibility as of the date [the challenged firm] submits its initial offer .... A putative SDVO SBC cannot cure its lack of eligibility after submission of the initial offer.").

Appellant also argues that Merit is, for all practical purposes, Appellant's managing venturer. Appellant insists that, because the joint venture agreement requires the approval of both venturers for many decisions, Merit controls decision-making because "Omni cannot make any decision without Merit." (Appeal at 11.) Appellant further contends that the project manager, who is responsible for overseeing day-to-day contract performance, will be an employee of Merit, thereby ensuring control over Appellant's daily operations.

I find no merit to Appellant's arguments. Based on the joint venture agreement, the D/GC correctly reasoned that both Merit and Omni must consent to all significant actions taken by the joint venture. (Determination at 6.) Under this arrangement, Merit does not fully control Appellant's decision-making, because Omni enjoys veto power over all significant decisions. At best, it might be said that Omni and Merit share decision-making equally; on these facts, the D/GC could reasonably conclude that Merit lacks the autonomy and authority necessary to be

considered the "managing venturer." *Cf., Matter of Piedmont Contracting & Design, Inc.*, SBA No. VET-169 (2009) (service-disabled veteran did not exclusively control a concern when operating agreement required "unanimous consent of all shareholders for any substantive action"). Appellant's contention that Merit controls decision-making through the project manager is also baseless. As discussed below, the parties in this case vigorously dispute whether the project manager is even a Merit employee. In any event, the joint venture agreement makes clear that the project manager is subordinate to the Managing Directors in Appellant's decision-making. (*See* Joint Venture Agreement ¶ 2 (explaining that the project manager is responsible for "implementing the instructions of the Managing Directors")). Thus, even supposing that the project manager is actually a Merit employee, this would not establish that Merit controls Appellant's decision-making.

For these reasons, the D/GC properly concluded that Appellant did not comply with 13 C.F.R. § 125.15(b)(2)(ii), because Merit is neither designated, nor otherwise serving, as the managing venturer.

2. Project Manager

The D/GC also determined that Appellant did not comply with the regulatory requirement that an SDVO joint venture agreement contain a provision "[d]esignating ... an employee of the managing venturer as the project manager for the performance of the SDVO contract." 13 C.F.R. § 125.15(b)(2)(ii). Appellant's joint venture agreement stated that "[t]he Project Manager for this contract will be an employee of MERIT," but did not identify any particular person as Appellant's project manager. (Joint Venture Agreement ¶ 2.0.) Furthermore, the D/GC determined that Mr. Harold Rose, an employee of Omni, appeared to be functioning as *de facto* project manager, at least during the transition phase. The D/GC observed that, even after award of the contract, Appellant "has still not identified a 'project manager' [and] has not presented to SBA any letters of intent or any other documentation showing who, other than Mr. Rose, will be managing the project." (Determination at 6.) Likewise, the appeal petition does not identify a specific person as project manager.

I find no reversible error in the D/GC's decision. It is true, as Appellant emphasizes, that the joint venture agreement does express an intent that the project manager will be an employee of Merit. As quoted above, however, the applicable regulation requires that a project manager be "designat [ed]" in the joint venture agreement itself. Thus, the regulation can reasonably be understood as requiring that a specific employee of the SDVO SBC be identified as project manager in the joint venture agreement; as such, a mere statement of intention that the project manager will be an employee of the SDVO SBC is not sufficient.[2] It is also worth noting that an

[2] OHA's decision in *Matter of Singleton Enterprises-GMT Mechanical, A Joint Venture*, SBA No. VET-130 (2008), *recons. denied*, SBA No. VET-133 (2008) (PFR) is not to the contrary. In that case, OHA determined that a joint venture agreement complied with the requirement to designate a project manager by stating that "either Mr. Thompson or an employee of the SDVO SBC" would manage the contract. *Singleton*, SBA No. VET-130 at 7. Accordingly, in *Singleton*, a specific employee of the SDVO SBC was designated as project manager; it was only an alternate project manager that was not identified.

SBA sample agreement for use with 8(a) joint ventures — which Appellant itself attached to appeal petition — identifies a specific person as the joint venture's project manager. (Appeal Petition, Attachment 4, ¶ 2.0.) OHA has long recognized that the 8(a) and SDVO programs are substantially similar, such that the requirements of the 8(a) program are instructive in understanding the SDVO SBC program. *E.g.*, *Matter of Marine Construction Services, LLC*, SBA No. VET-216, at 5 n.1 (2011).

Even aside from the issue of whether Appellant was required to identify a specific person as the project manager in the joint venture agreement, the D/GC also determined that Mr. Rose, an employee of Omni, was effectively serving as Appellant's project manager. Appellant disputes the D/GC's conclusion, arguing that Mr. Rose is only the "Phase-In Leader" overseeing transition, and is not the project manager. The D/GC, however, rejected this argument, explaining that:

> The clear intent of [13 C.F.R. § 125.15(b)(2)(ii)] is to ensure that the individual with the responsibility to oversee the performance of the contract must be an employee of the SDVO SBC. This includes all aspects and phases of performance. If a contract has several phases of performance, th[e]n an SDVO SBC employee must be managing each phase.

(Determination at 6-7.) I find the D/GC's reasoning persuasive. A representative of the SDVO SBC should not only have the title of "project manager," but also should substantively manage each phase of contract performance. Here, it is undisputed that Mr. Rose is, at a minimum, leading the transition phase. In other words, at least one significant part of contract performance is not being managed by an employee of Merit, the SDVO SBC.

Accordingly, the D/GC reasonably concluded that Appellant did not comply with 13 C.F.R. § 125.15(b)(2)(ii). Appellant did not designate a specific employee of the SDVO SBC as its project manager in the joint venture agreement. Further, the SDVO SBC is not managing all phases of contract performance.

V. Conclusion

The record supports the D/GC's determination that Appellant is not an eligible joint venture. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge