United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: SOF Associates--JV, Appellant, Solicitation No. FA8509-12-R-32444 Department of the Air Force Air Force Life Cycle Management Center Robins Air Force Base, Georgia	SBA No. VET-234 Decided: June 26, 2013

APPEARANCES

Keith A Graham, Esq., Marchena and Graham, P.A., Orlando, Florida, for Appellant

Christopher R. Clarke, 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 Director for Government Contracting made a clear error of fact or law in finding Appellant does not meet the requirements for a joint venture under the Service-Disabled Veteran-Owned Small Business Concern program.

III. Background

A. Protest and SDVO SBC Status Determination

On October 10, 2012, the Department of the Air Force issued Solicitation No. FA585809-12-R-32444. The Contracting Officer (CO) set the procurement aside 100% for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). On November 9, 2012, SOF Associates — JV (Appellant), a joint venture, submitted its proposal. On March 22, 2013, the Air Force awarded a contract to Appellant. The CO notified unsuccessful offerors between March 23rd and March 25th.

Warfighter Support, LLC, JV (Warfighter), protested Appellant's SDVO SBC status on March 29, 2013. Warfighter alleged that Appellant is owned by four concerns, only one of which is an SDVO SBC, and that Appellant does not meet the regulatory requirements for an SDVO SBC joint venture. Among other issues raised, Warfighter alleged Appellant fails to meet the requirements for an SDVO SBC joint venture at 13 C.F.R. § 125.15(b).

On April 3, 2013, the Small Business Administration (SBA) notified Appellant of Warfighter's protest and requested that Appellant, the joint venture, and Absolute Disaster Services, LLC (ADS), the joint venturer claiming to be an eligible SDVO SBC, respond to the protest with documents establishing that ADS is an eligible SDVO SBC and Appellant is an eligible joint venturer. The notice stated "SBA will be examining all areas of SOF as part of this protest." (Protest File, Ex. 6, at 718). The notice also made clear that SBA required documentation as to both the joint venture and ADS. (*Id.*)

On May 10, 2013, SBA's Director of Government Contracting (D/GC) found Appellant is not an eligible SDVO SBC. The D/GC did find that George Hernandez, the individual upon whom ADS's claim of eligibility is based, is a service-disabled veteran, that Mr. Hernandez directly owns a majority interest in ADS, and that he controls the company. Therefore, ADS is an eligible SDVO SBC.

Appellant submitted its Joint Venture Agreement (Agreement), dated November 2, 2012, between ADS, LOUi Consulting Group, Inc. (LOUi), Netsoft Associates, Inc. (NAI), and Alpha Omega Consulting, Inc. (AOC). Under the Agreement, ADS has a 51% interest ownership interest in Appellant, NSAI 24%, LOUi 20% and AOC 5%.

As to Appellant's eligibility, the D/GC found Appellant has at least one member, ADS, that is an SDVO SBC. Nevertheless, the D/GC found that ADS is not the managing venturer. The Agreement provides that ADS will be Managing Director of the Joint Venture, and will select a Project Manager, "who shall be an employee of ADS." The Agreement identifies a Mr. Randy Shearer as initial Project Manager. But the other documentation Appellant provided states that Mr. Shearer would not be Project Manager, but that Mr. Pedro Vasquez, Jr. would be Project Manager. The D/GC further found that the record does not identify Mr. Vasquez as an ADS employee, but as the signatory for another joint venture member, LOUi, its Director of Department of Defense programs. Further, Article 4.4 of the Agreement requires that:

> The Joint Venture [Appellant] will have a minimum of quarterly Board meeting[[s], and will require 100% representation from all Joint Venture members. On tactical and strategic business issues, Joint Venture members will be represented in accordance to their equity share in the Joint Venture. Any motion will require a 66% approval by the Board members in order to be passed and implemented.

The D/GC found that an employee of another joint venturer is managing day-to-day operations as Project Manager, and all other decisions require a supermajority vote of the Board. The D/GC thus concluded that ADS is not managing the joint venture, and its employee is not serving as

Project Manager.

Further, the D/GC noted that the regulations require the joint venture agreement to contain a provision specifying the responsibilities of the parties. The Agreement provides at Article 2.1:

> The parties shall share, as hereafter provided, the general obligations and responsibilities for the services to be performed under the Project Agreement and subsequent contract. ADS shall perform, at a minimum, 51% (or the maximum allowable by SBA to maintain SDVOB certification) of the labor dollars portion of the Project Agreement by utilizing its professional staff and other employees that may be required under the Project Agreement. In no event shall each of the remaining JV members perform more than 49% (in aggregate) or the maximum allowable by the SBA to maintain SDVOB certification, of the labor dollars portion of the Project Agreement. Subject to the foregoing, the parties shall determine the actual labor dollars portion of the Project Agreement to be performed by each party upon entering into the Project Agreement.

The D/GC concluded that this provision, and the Agreement generally, fails to specify the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract, as required by the regulation.

Accordingly, the D/GC determined that Appellant is not an eligible SDVO SBC joint venture, because ADS is not managing the project, the Project Manager is not ADS's employee, and the Agreement does not provide any specificity with regard to the responsibilities of the parties.

B. Appeal Petition

On May 24, 2013, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA).

Appellant asserts that ADS is the only Managing Director and 51% owner of Appellant. Article 1 limits the purpose of the Joint Venture to bidding on and performing the instant procurement. Appellant further argues that under Florida law joint ventures are limited to performing a specific project and terminate when that project is completed. Appellant points out that the Agreement provides that ADS owns 51% of Appellant and will perform at least 51% of the work. Appellant further asserts that Article 4.1 gives ADS sole authority and responsibility for the contract:

> ADS, as the SDVOB [sic] venture, shall be and is hereby appointed the Managing Director of the Joint Venture (the “Managing Director”) and is hereby charged with, and agrees to assume the responsibility and authority for, overseeing and managing the performance by the Joint Venture of its obligations under the Project Agreement. The Managing Director shall select and appoint a Project Manager (the “Project Manager”) for the Joint Venture, who shall be an employee

> of ADS. The Project Manager shall be responsible for the day-to-day management of the work in accordance with the requirements of the Project Agreement and subsequent contract, performance of the Project Agreement, overseeing activities at the job sites under the Project Agreement, reporting to and implementing the instructions of the Managing Director, and act as primary representative to the Joint Venture. . . . The initial Project Manager shall be Randy Shearer.

Appellant asserts that the Agreement provides that all parties shall comply with SBA requirements and regulations, to include changes to the Agreement. (Appeal at 5; Article 15.7). Appellant argues that Articles 1, 4.1, and 4.4, and Florida law give ADS full control over Appellant, and that the D/GC erred in his conclusion to the contrary. The Agreement is to be construed to comply with SBA regulations. Mr. Hernandez, through ADS, has power to hire and fire ADS employees, including the Project Manager.

Appellant also argues that the issue of ADS lacking control over Appellant was not raised in the protest, and Appellant had no opportunity to respond to any questions raised by SBA concerning the Agreement, because the protest did not challenge a single provision of the Agreement and SBA gave Appellant no notice of any protest directed to any Agreement provision, or opportunity to present evidence relating to the grounds on which SBA relies to disqualify Appellant.

Appellant argues that SBA is precluded from considering a protest that was not made with specificity. Further, SBA sustained the protest on new grounds, a clear error of law and fact, and denied Appellant its due process rights to present argument and evidence on the disqualification grounds contained only in the SBA decision. Appellant asserts SBA made no inquiry as to what the joint venturers intended with respect to defining tactical or strategic issues in Article 4.4, and did not notify Appellant of any concerns it had about the Agreement.

Appellant asserts the SBA erred in finding Article 4.1 seems to imply overall control of Appellant by ADS, arguing instead that Article 4.1 gives ADS direct, unequivocal control over Appellant. Appellant asserts SBA misconstrues Article 4.4. “Strategic and tactical” decision was meant to allow Appellant to pursue another solicitation or business opportunity, which gives ADS more control than Florida law would ordinarily provide.[1] (Appeal at 10-11) Appellant argues SBA is presuming the venturers would violate those portions of the Agreement giving ADS control and requiring compliance with SBA's regulations.

Appellant also argues that SBA gave no notice that Appellant's installation of Mr. Vasquez as Project Manager was an issue. Appellant attempts to discuss the reasons for the substitution of Mr. Vasquez. Appellant also asserts that the Agreement must be analyzed as of the date of proposal submission, when no Project Manager was required to be in place. Appellant asserts that there is no regulation prohibiting ADS from hiring the employee of another joint venturer. Appellant argues that the Agreement places Mr. Vasquez under ADS's direct control. (Appeal at 12-13)

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[1] Appellant provides no citation for this assertion.

Appellant also argues that it is clear that ADS has sole responsibility for overseeing the project, and the Agreement gives ADS the authority over the other venturers with respect to controlling the project. Appellant also argues that SBA did not ask why Mr. Vasquez rather than Mr. Shearer became Program Manager. Appellant argues SBA is presuming that the venturers will breach the Agreement by granting LOUi control over the Project Manager.

As to the provision requiring that the duties of the joint venturers be specified, Appellant argues the D/GC should have looked only at the general grant of power to ADS in Article 4.1, which gives ADS responsibility and authority over the other joint venturers with respect to all aspects of the contract.

C. Response to the Appeal

On June 5, 2013, SBA responded to the appeal. First, SBA objects to Appellant's submission of new evidence, contained in Appellant's brief regarding the substitution of Mr. Vasquez for Mr. Shearer. SBA points out that SBA did ask about the Project Manager, Mr. Shearer's status, and requested documentation. (SBA Response at 4-5; Protest File, Ex. 4, at 20) Appellant responded that when the Agreement was drafted, Appellant had no employees. Initially it had intended to hire Mr. Shearer. "Subsequently, however, Mr. Hernandez decided not to hire Mr. Shearer and instead hired Mr. Pedro Vasquez, Jr., as the project manager." (*Id.* at 19) SBA asserts Appellant is attempting to present facts on appeal not presented to the D/GC. (SBA Response at 4)

SBA also asserts Appellant is attempting to present evidence of the joint venturers' intent not present in the Agreement, when it tries to argue the meaning of "tactical and strategic issues". SBA moves that this new evidence be excluded.

SBA then argues that the decision of the D/GC to review Appellant's eligibility is correct. The SDVO SBC program is a self-certifying program, and the main venue for evaluating the eligibility of the self-certifying firms is through these protests. SBA thus responds to protests by determining if a concern meets all the requirements of the program, and therefore the decision is not limited to the issues raised by the protestor. SBA points out that its notice to Appellant of the protests stated, "SBA will be examining all areas of SOF as part of the protest." (SBA Response at 8; Protest File, Ex. 6, at 718)

SBA further asserts that Appellant's own response to the D/GC explicitly discussed the eligibility of the joint venture, and asserts that in that response, Appellant argued that does meet the requirements of 13 C.F.R. § 125.15(b). (Protest File, Ex. 5, at 23-25)

SBA asserts the D/GC properly determined that the Project Manager is not an ADS employee. Appellant informed SBA that Mr. Vasquez is Project Manager, and that Mr. Vasquez is identified in the record as being a LOUi employee. Appellant's argument that Mr. Shearer was Project Manager at the time of the proposal asks the SBA to ignore reality. Further, Appellant's argument it had no notice that this issue went to its eligibility is contradicted by SBA's request for information on the issue. Appellant's argument that there is no regulation preventing ADS from hiring the employee of a non-SDVO SBC venturer as Project Manager is inapposite here

because nothing in the record shows that ADS ever hired Mr. Vasquez.

SBA also argues the D/GC was correct to conclude that ADS is not the managing venturer under Article 4.4. SBA asserts Appellant attempts to add new evidence to change the language of the Agreement. The phrase: "tactical or strategic business issues" is not defined, and therefore the D/GC correctly concluded this language could arguably cover a range of issues, and the supermajority requirement could limit ADS's control.

SBA concludes by arguing the D/GC was correct in finding Appellant had failed to meet the requirements of 13 C.F.R. § 125.15(b)(2)(iv). This provision requires that SDVO SBC joint venture agreements specify the duties of each joint venturer.

IV. Discussion

A. Timeliness and Standard of Review and New Evidence

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.

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

Appellant attempts to submit new evidence on appeal. Appellant's method of doing so a little unusual, by introducing into its Appeal Petition facts not included in its submission to the D/GC. Nevertheless, the rules for the introduction of new evidence remain. 13 C.F.R. § 134.512 provides: "The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition and response(s) filed thereto." I do not have discretion to admit any new material. *Matter of Veterans Construction Services, Inc.*, SBA No. VET-167, at 4 (2009). Accordingly, the portions of the Appeal Petition which discuss the substitution of Mr. Vasquez for Mr. Shearer and the intent of the joint venturers as to Article 4.4 are EXCLUDED from consideration here.

B. Merits of the Appeal

Appellant argues that Warfighter's protest should have been dismissed as insufficiently specific, and it did not identify the Agreement as a basis for protest. This argument is meritless. Warfighter specifically alleged, among other assertions, that Appellant failed to meet the requirements for an SDVO SBC joint venture at 13 C.F.R. § 125.15(b); therefore, Warfighter made a specific allegation, and Appellant had notice that its Agreement's compliance with the regulations was at issue. Warfighter was under no obligation to identify individual Agreement provisions in conflict with the regulation. The Agreement was, of course, not available to Warfighter. OHA has recognized that protest allegations are difficult for a protestor to prove

without access to concrete evidence. The challenged concern, however, does have access to the information to prove its own eligibility. In such cases, a protest such as Warfighter's is sufficiently specific. *Matter of JHC Firestop, Inc.*, SBA No. VET-193, at 2-3 (2010).

Appellant further argues that ADS does not lack control over Appellant, and that Appellant had no notice that any Agreement provisions were in question. Again, Appellant's arguments are meritless. As noted above, the question of Appellant's compliance with the regulation was specifically raised in the protest. Further, SBA's notice to Appellant specifically stated that it would "be examining all areas of SOF as part of the protest". (Protest File, Ex. 6, at 718). The notice also made clear that SBA required documentation as to joint venture and ADS. (*Id.*) The protest and the notice made clear to Appellant that the issues of ADS's control over the Appellant, and of the Agreement's compliance with the regulations, were all at issue. For Appellant to raise this issue at this point is almost disingenuous, because Appellant's own response to the D/GC explicitly discussed the eligibility of the joint venture, and Appellant there asserted it does meet the requirement of 13 C.F.R. § 125.15(b). (Protest File, Ex. 5, at 23-25)

The regulation provides that an SDVO SBC may enter into a joint venture with another SDVO SBC for purposes of performing an SDVO contract. 13 C.F.R. § 125.15(b). However, "Every joint venture agreement to perform an SDVO contract must contain" certain provisions enumerated in the regulation. 13 C.F.R. § 125.15(b)(2). It is instructive to note that the regulation uses the word "must." The regulation requires that these terms be in place, and there can be no exceptions.

The D/GC found Appellant had failed to meet the requirements of 13 C.F.R. § 125.15(b)(2). First, because ADS is not really the managing venturer. The regulation states that each joint venture agreement must contain a provision:

> Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the SDVO contract. . . .

13 C.F.R. § 125.15(b)(2)(ii).

The D/GC found that while ADS is an eligible SDVO SBC, the Agreement fails to meet the requirements of this section because of the supermajority requirement of Article 4.4 and because the record shows the Project Manager is not an ADS employee. Appellant argues that the provisions of the Agreement which give ADS control and which provide that Appellant will comply with SBA regulations meet the requirements of the regulation. Appellant attempts to provide, *post hoc*, a definition of "strategic and tactical." There is no support in the record for this, and thus the D/GC was not in error to not consider it.

Appellant's arguments are meritless. The provision clearly requires a supermajority vote, which ADS by itself could not provide, to approve "tactical and strategic business issues" without defining just what those issues are. This provision, thus, would give a wide latitude for the non-SDVO SBC firms to exercise negative control over any issue it deemed "tactical and

strategic."[2] This provision has the potential of hobbling ADS in its management of the joint venture. Appellant's assertion that SBA presumes the other venturers would not honor the other parts of the Agreement, giving ADS control and requiring compliance with SBA regulations, misses the point. The point is that Article 4.4 gives them the power to do so, and to constrain ADS in its management of Appellant. The SDVO SBC's control must be unequivocal. Therefore, the D/GC did not err in concluding that Appellant did not comply with the regulation requiring the SDVO SBC be the managing venturer.

The D/GC further found the Agreement failed to comply with the requirement that the Project Manager be the SDVO SBC's employee. Appellant argues here that it had no notice that Mr. Vasquez's employment status was an issue. This is also meritless. First, the regulation specifically requires that the project manager be an employee of an SDVO SBC. Second, SBA specifically requested that Appellant provide information to confirm that the named Project Manager was an ADS employee. Appellant responded by identifying Mr. Vasquez as the Project Manager, and provided SBA with no other information. Appellant thus failed to answer SBA's question, was the Project Manager an ADS employee? SBA's communication, as well as the regulation, made it clear that the Project Manager must be an ADS employee, yet the documentation Appellant had provided in response to the protest identified Mr. Vasquez as an LOUi employee. (Protest File, Ex. 5, at 41, 42) Appellant thus had notice Mr. Vasquez's status was at issue, and Appellant failed to provide any evidence that he was an ADS employee.

Appellant further asserts that SBA erred in relying upon Appellant's email to SBA, because the determination of eligibility must be made as of the date of Appellant's offer. While it is generally true that the determination must be made as of the date of Appellant's offer. *Matter of HANA-JV*, SBA No. VET-227, at 6 (2012), here Appellant's documentation as of the date its submission failed to establish that the Project Manager was an ADS employee. The D/GC attempted to clarify the matter, and the answer he received indicated that a change was to be made from the Agreement, but with a Project Manager who, according to the record, was an LOUi employee. The D/GC properly found that Appellant had failed to designate an ADS employee as Project Manager.

Appellant argues there is no SBA provision preventing ADS from hiring the signatory of a non-SDVO SBC joint venturer and naming him Project Manager. However, there is no evidence in the record that ADS did hire Mr. Vasquez. It is the responsibility of the challenged concern to provide SBA with the necessary documentation demonstrating its eligibility. *Matter of Cambridge Federal Solutions, LLC*, SBA No. VET-135, at 4 (2008).

On the basis of the record before him, the D/GC did not err in concluding that Appellant's Project Manager, Mr. Vasquez, was not an ADS employee. This requirement is not optional, the regulation explicitly states it. *Matter of HANA-JV*, SBA No. VET-227, at 7-8 (2012). The D/GC did not err in finding Appellant had not complied with the regulation.

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[2] Indeed, based on the usual understanding, it would seem that very few issues are neither "tactical" nor "strategic."

The other provision the D/GC found Appellant had violated requires the joint venture agreement to contain a provision:

> Specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract. . . .

13 C.F.R. § 125.15(b)(2)(iv).

The Agreement clearly contains no such provision. Appellant attempts to argue that the D/GC should have looked only at the general grant of authority to ADS in Article 4.1, which gives ADS responsibility and authority over the other joint venturers with respect to all aspects of the contract. However, the regulation does not call for such a general grant of authority. Rather, it demands the joint venture agreement specifically identify just what the responsibilities of each joint venturer will be with regard to contract negotiation, labor sources and performance. This provision protects the interests of all parties, in case disputes arise from the contract. Appellant's Agreement contains no such provision, and so the D/GC did not err in finding Appellant had failed to comply with the regulation, and is not an eligible SDVO SBC joint venture.

In conclusion, I find that the D/GC did not err in finding that Appellant's Agreement failed to comply with the regulatory requirements of 13 C.F.R. § 125.15(b)(2)(ii)&(iv), and therefore that Appellant is not an eligible SDVO SBC joint venture.

V. Conclusion

After reviewing the record, I find the written protest file supports the D/GC's determination. Appellant has failed to establish any clear error of fact or law in the D/GC's decision. Accordingly, I must deny the instant Appeal Petition, and affirm the D/GC's finding.

The D/GC's determination that SOF Associates —JV is not an eligible SDVO SBC joint venture at the time it submitted its offer 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