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

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| IN THE MATTER OF:<br><br>Alpha Terra Engineering, Inc.,<br><br>Appellant,<br><br>Solicitation No. W912HQ-13-R-0001 | SBA No. VET-238<br><br>Decided: September 12, 2013 |

APPEARANCES

David F. Barton, Esq., The Gardner Law Firm, San Antonio, Texas, for Appellant

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

## 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 Director of Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining that Alpha Terra Engineering, Inc. (Appellant) does not meet the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements. *See* 13 C.F.R. § 134.508.

### III. Background

#### A. Solicitation and Protest

On January 30, 2012, the Department of the Army, U.S. Army Corps of Engineers, issued Solicitation No. W912HQ-13-R-0001 for management and training support services. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs. Initial offers were due March 1, 2013, and Final Proposal Revisions were due May 24, 2013. Appellant and Vali Cooper International, LLC (VCI) submitted timely proposals, self-certifying as eligible SDVO SBCs.

On July 17, 2013, the CO announced that Appellant was selected for award. On July 23, 2013, VCI, a disappointed offeror, filed a protest challenging Appellant's status as an SDVO SBC. VCI alleged that Appellant is not controlled by a service-disabled veteran. To support this allegation, Appellant asserted that the Texas Franchise Public Information Reports show changing leadership roles, and web searches show Appellant having several owners. VCI also alleged that Appellant is not listed in the Department of Veterans Affairs (VA) Center for Veterans Enterprise (CVE) database. The next day, the CO forwarded the protest to the D/GC.

B. D/GC Determination

On August 16, 2013, the D/GC issued her determination sustaining VCI's protest. The D/GC concluded Appellant is not an eligible SDVO SBC because Appellant is not controlled by one or more service-disabled veterans, as 13 C.F.R. § 125.10 requires.

The D/GC first explained that Mr. Harold von Dran is a service-disabled veteran who unconditionally owns 79.279% of Appellant.[1] Therefore, Appellant satisfies the ownership requirement for SDVO SBC eligibility, 13 C.F.R. § 125.9(d). Determination at 4.

The D/GC next explained that to be an eligible SDVO SBC, one or more service-disabled veterans also must hold the highest officer position, possess the necessary managerial experience, and control the concern's management and daily operations. 13 C.F.R. § 125.10(a) and (b). Here, the Area Office explained, Mr. von Dran is Appellant's president, treasurer, and chairman of the board. He has 37 years' experience in environmental and mechanical engineering, project management, government acquisitions, and electronic systems repair. According to Appellant's By-laws, Mr. von Dran, as president, “is the principal executive officer of the corporation and is subject to control by the board of directors.” The By-laws go on to state that the “President will supervise and control all of the business activities of the corporation” and “preside at all shareholders and directors meetings, and perform any other duties as prescribed by the board of directors.” Thus, the D/GC concluded, Appellant meets the eligibility requirements in 13 C.F.R. § 125.10(a) and (b).

The D/GC went on to explain, however, that when the concern is a corporation, one or more service-disabled veterans must control the board of directors. *Id.* § 125.10(e). The D/GC observed Appellant's By-laws stating that, “[a] quorum for directors meetings will be a majority of the directors. Once a quorum is present, business may be conducted at the meeting .... Each director will have one vote. The majority of the directors will be sufficient to decide a matter, unless a greater number is required by the Articles of Incorporation or state law.” PF, Tab 2, p. 110. The D/GC explained that Appellant's board has four directors: Mr. Fred Waterman, Mr. Wayne Crist, Mr. Ute von Dran, and Mr. Harold von Dran.[2] The D/GC asserted that, other than

[1] The remaining 20.721% is owned by four people: Ute von Dran (7.928%); Kai Uwe Edward von Dran (.793%); Wayne Crist (4%) and Fred and Marjory Waterman (8%). The D/GC asserted “none of the minority stockholders claim SDV status.” Determination at 5.

[2] On January 28, 2013, Appellant passed a resolution to increase the board of directors from four to five members but left the fifth position vacant.

Harold von Dran, the other directors are not service-disabled veterans.[3] Thus, because three of the four board members are not service-disabled veterans and the By-laws require a majority of directors for a quorum, the D/GC determined these non-service disabled veterans could block a quorum.[4] Thus, Mr. Harold von Dran does not have ultimate control of the board of directors. *Matter of Reese Servs., Inc.*, SBA No. VET-231, at 6 (2003) (finding negative control where non-service-disabled veterans could block a quorum).

C. Appeal

On August 20, 2013, Appellant filed an appeal of the D/GC's decision with SBA's Office of Hearings and Appeals (OHA).[5] Appellant insists that the determination is clearly erroneous and should be reversed.

Appellant asserts it is in fact controlled by a service-disabled veteran. Appellant argues the ability of the non-service-disabled veterans to exercise negative control over Appellant "is merely a potential that has not yet occurred." Appeal at 1. Appellant then explains that, since receiving the D/GC's determination, it has amended its By-laws so as to eliminate this potential for negative control. *Id.* at 2. Appellant attached a copy of the By-laws to the appeal.

That same day, Appellant filed a supplement to the appeal.[6] In the supplement, Appellant argues that Mr. Harold von Dran, as chairman and president, can call a special meeting of the shareholders and the board of directors for the express purpose of removing a director. As 79.279% owner, Mr. von Dran can remove any director attempting to thwart his ability to control Appellant. He has the authority to replace the director or leave the seat vacant. Therefore, any ability on the part of the other directors is illusory. Supplement at 2.

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[3] In its response to the appeal, SBA explained that Mr. Crist is also a service-disabled veteran. Response at 2 n.1. Appellant clarified that it sent this information to SBA for the first time with its appeal. Supplement at 2.

[4] Even if Appellant had informed the D/GC that Mr. Crist was a service-disabled veteran, it would not affect the D/GC's determination that non-service-disabled veterans could block a quorum, because two of four falls short of the requisite majority.

[5] OHA received the appeal and the supplement to the appeal after 5 pm eastern time on August 19, 2013. "Any submission received at OHA after 5 p.m. eastern time is considered filed the next business day." 13 C.F.R. § 134.204(b)(2). Nevertheless, Appellant filed the appeal within 10 business days of receiving the determination, so the appeal is timely. *Id.* § 134.503.

[6] Upon reviewing the appeal, OHA issued an order to show cause questioning whether Appellant met the pleading standard set forth at 13 C.F.R. § 134.509(a)(1). Appellant then explained that it had filed a supplement to the appeal. Upon reviewing the supplement, I found Appellant alleged sufficient facts so as to meet the pleading requirement, and set the record to close on September 5, 2013.

On August 28, 2013, Appellant filed a second supplement to the appeal.[7] Appellant points out that its By-laws, as of January 27, 2006, provide, "The vote of the holders of a majority of the shares entitled to vote will be sufficient to decide any matter. . . ." Appellant argues Mr. von Dran therefore has unconditional control over Appellant. Moreover, Mr. von Dran's majority interest precludes his removal by a minority owner at a special meeting. Appellant reiterates that, as chairman and president, Mr. von Dran controls all of Appellant's activities.

Appellant argues that it satisfies the VA's regulations regarding control of a veteran-owned small business.

Lastly, Appellant contends VCI's protest was not sufficiently specific. In Appellant's view, the charge of changing ownership "does not substantiate" the allegation that Appellant is not owned and controlled by a service-disabled veteran.

D. SBA's Response

On September 9, 2013, SBA submitted the Protest File (PF) and SBA's response to the appeal. SBA contends the D/GC correctly found that Appellant is not fully controlled by service-disabled veterans; thus, OHA should affirm the determination.

SBA challenges Appellant's argument that the ability of non-service-disabled veterans to block a quorum is only a potential. SBA retorts that "it would be unreasonable for [the D/GC] to speculate about the willingness of various parties to exercise their powers under the By-laws." Response at 6. SBA also objects to the admission of Appellant's revised By-laws because this evidence was not before the D/GC. *Matter of Cedar Elec., Inc./Pride Enters., Inc. JV*, SBA No. VET-129, at 4 (2008) (citing 13 C.F.R. § 134.512).

SBA then addresses Appellant's contention that any power on behalf of the non-service-disabled veterans is illusory because Mr. Harold von Dran can call a special meeting and remove them. SBA points out that it is a majority of the board of directors that replaces a director, not a majority of shareholders. The By-laws provide, "Filling Director Vacancies. A vacancy on the board of directors may be filled by majority vote of the remaining directors, even if technically less than a quorum. A director elected to fill a remaining term will hold office until the next annual shareholder meeting." PF, Tab 2, at p. 111. SBA argues that where the By-laws enable non-service-disabled veterans to prevent a quorum and prevent the service-disabled veteran from quickly and easily removing and replacing directors, SBA will find that the service-disabled veteran does not control the board of directors. *See Matter of Artis Builders, Inc.*, SBA No. VET-214 (2011).

[7] On September 4, 2013, SBA moved for an extension of time to respond to the extra arguments Appellant presented in Appellant's second supplement. OHA granted the motion and extended the close of record to September 9, 2013.

## IV. Discussion

### A. Jurisdiction, Standard of Review, and New Evidence

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. 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 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). 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.

Appellant attempts to submit new evidence on appeal in the form of its revised By-laws. As SBA points out, though, the regulations do not permit me to consider this new evidence. 13 C.F.R. § 134.512 ("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.") Accordingly, Appellant's By-laws are EXCLUDED from consideration.

### B. Analysis

For the reasons discussed *infra*, I find that VCI's protest was timely and specific, and that the D/GC erred in determining that Appellant is not controlled by one or more service-disabled veterans. I therefore grant the appeal.

Appellant argues to no avail that the Area Office should have dismissed the protest as insufficiently specific. OHA has held that a protester may not simply allege that a concern is not an eligible small business, but must offer some rationale in support of its allegation. *Matter of Veterans Contractors Group JV, LLC*, SBA No. VET-233 (2013). Here, Appellant does not argue that VCI offered no rationale supporting its allegation. Rather, Appellant takes issue with the strength of VCI's rationale, arguing that changing ownership "does not substantiate" the allegation that Appellant is not owned and controlled by a service-disabled veteran. This argument is unpersuasive because VCI made a specific allegation that Appellant was not owned and controlled by a service-disabled veteran and offered changing leadership and ownership as evidence. Appellant therefore had notice that its ownership and operations were at issue. 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 VCI's is sufficiently specific. *Matter of SOF Assocs. - JV*, SBA No. VET-234 (2013) (citing *Matter of JHC Firestop, Inc.*, SBA No. VET-193, at 2-3 (2010)).

Appellant's argument that it satisfies the VA's regulations regarding control of a veteran-owned small business does not bear on OHA's decision here. OHA has explained that "the two programs are employed by two separate federal agencies, and they are ultimately unrelated." *Matter of Benetech, LLC*, SBA No. VET-225 (2011) (citing *Matter of SDV Solutions,*

*Inc.*, SBA No. VET-185 (2010) ( "[B]ecause the VA's verification program is administered by the VA, it is not something SBA has to consider and to my knowledge has never been considered by SBA to date."). Therefore, it is of no import to SBA whether Appellant has satisfied VA's regulations for control.

Nevertheless, I agree with Appellant that the determination is erroneous. The D/GC reasoned Appellant is not an eligible SDVO SBC because the non-service disabled veterans can block a quorum. This conclusion rests on Appellant's By-laws, which provide that "[a] quorum for directors meetings will be a majority of the directors." PF, Tab 2, at 110. Thus, because only two of Appellant's four directors are service-disabled veterans, the remaining directors could prevent a quorum. Appellant argues though that such negative control is illusory because the By-laws further provide that "[a] director may be removed from office, with or without cause, at a special meeting of the shareholders called for that purpose." *Id.*, Tab 2, at 111. As a result, Mr. von Dran, as majority owner, can remove any directors seeking to thwart his control over Appellant. SBA counters that, even so, Mr. von Dran cannot immediately appoint directors to replace those he removed. The By-laws specifically provide that "[a] vacancy on the board of directors may be filled by majority vote of the remaining directors, even if technically less than a quorum. A director elected to fill a remaining term will hold office until the next annual shareholders meeting." *Id.* SBA then relies on *Artis Builders* for the proposition that a majority shareholder must be able to quickly replace directors to overcome such negative control.

SBA's position is untenable. First, I must rely upon the regulation which provides that a service-disabled veteran is held to control a board of directors when the service-disabled veteran owns at least 51% of the voting stock, is on the board, and holds sufficient stock to overcome any supermajority voting requirements. 13 C.F.R. § 125.10(e)(1). Appellant's By-laws contain no supermajority voting requirements. PF, Tab 2, at 106-113. Here, Mr. von Dran is a service-disabled veteran, is on the board, and holds nearly 80% of the stock, sufficient to meet any voting requirements.

Further, according to the 2006 By-laws, Mr. von Dran has the power to remove every other director at a special shareholders meeting, if he so chose. PF, Tab 2, at 111. As the only remaining director, he could then appoint new directors of his choosing. Mr. von Dran, therefore, has the ability to exercise full control over Appellant.

SBA also mistakes OHA's reasoning in *Artis Builders*. The holding in that case relied directly on provisions in the challenged firm's By-laws that are not present here. Under the Bylaws at issue in *Artis Builders*, there was cumulative voting and shareholders could not remove directors individually, but only in the entirety. Taken together, these provisions permitted a minority shareholder to vote for one of two directors and therefore prevent a quorum. Accordingly, *Artis Builders* does not speak to the time frame by which shareholders must appoint new directors.

Here, Mr. von Dran's ownership of nearly 80% of Appellant's stock, and his presence on the board, give him the power to control Appellant, and the D/GC was thus in error in finding that Mr. von Dran did not control Appellant.

## V. Conclusion

For the above reasons, I GRANT the appeal and REVERSE the D/GC's determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

CHRISTOPHER HOLLEMAN
Administrative Judge