United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: CriterEOM, LLC, Appellant Solicitation No. FA6703-14-R-0001	SBA No. VET-245 Decided: January 8, 2014

APPEARANCES

Mark E. Baker, Esq., Baker Law, PLC Reston, Virginia, 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 CriterEOM, LLC (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 March 21, 2014, the Department of the Air Force issued Solicitation No. FA6703-14-R-0001 for Base Operating Support Services. The Contracting Officer (CO) set the procurement entirely aside for SDVO SBCs. On September 22, 2014 CriterEOM, LLC (Appellant) was identified as the apparent successful offeror. On October 3, 2014, M&E Technical Services, LLC (M&E) filed a protest, alleging Appellant was not an eligible SDVO SBC. Appellant is a Limited Liability Company (LLC) with two owners. Criterion Corporation (Criterion) holds a 51%

interest and EAST OM LLC (EOM) has a 49% interest. M&E alleged Scott Schulz, the individual upon whom Appellant's claim of SDVO SBC eligibility is based, works full time for another firm as a general manager, and therefore Appellant was not controlled and managed by a service-disabled veteran (SDV). On October 14, 2014, the Small Business Administration (SBA) Acting Assistant Director, Office of Contract Assistance notified Appellant of the protest and required the submission of an extensive list of documentation to establish that Appellant was 51% unconditionally and directly owned and controlled by one or more SDVs. On October 28, 2014, Appellant submitted its response.

B. D/GC Determination

On November 21, 2014, SBA's D/GC determined that Appellant was not an eligible SDVO SBC. First, the D/GC rejected Appellant's claim that it is a joint venture and found that it is an LLC, an independent entity. Appellant submitted a Joint Venture Agreement dated April 10, 2014, and an Operating Agreement forming an LLC dated April 25, 2014. The Operating Agreement includes a provision stating that it is the entire agreement among the members and replaces and supersedes all prior agreements. The D/GC interpreted this as disavowing and superseding the Joint Venture Agreement. Further, the Operating Agreement provides Appellant may conduct any lawful business for which Michigan LLCs may be organized and the D/GC concluded that this is not a limited joint venture. The D/GC examined Appellant's eligibility under 13 C.F.R. § 125.9, which provides that one or more SDVs must directly own and control at least 51% of an SDVO SBC. The D/GC concluded Appellant is not eligible because it is owned by two firms and not an individual SDV.

The D/GC further examined whether Appellant would be eligible if treated as a joint venture. The D/GC determined that Criterion is an eligible SDVO SBC. However, the Joint Venture Agreement provides that overall management and control of the joint venture shall vest equally in the parties. Therefore, Criterion could not serve as managing venturer and Appellant could not meet the requirement that an SDVO SBC serve as the managing venturer. The D/GC also found the Joint Venture Agreement did not meet the regulatory requirement that the agreement state with specificity the responsibilities of the parties as to contract performance. Citing *Matter of SOF Associates-JV*, SBA No. VET-254 (2013), the D/GC stated that a joint venture agreement must specifically identify the responsibilities of each venture as to contract negotiation, labor sources, and performance. Finally, the D/GC found he could not conclude Appellant met the requirement that the SDVO SBC managing venturer retain the final original records upon completion of contract performance because the agreement provided the parties would select an accountant who would keep the records.

C. Appeal

On December 8, 2014, Appellant filed an appeal of the D/GC's decision with SBA's Office of Hearings and Appeals (OHA). Appellant insists that the determination is clearly erroneous and should be reversed.

First, Appellant argues the D/GC's determination violates due process, because SBA did not notify Appellant there were concerns about Appellant's SDVO SBC status due to the

Operating Agreement being executed after the Joint Venture Agreement. Appellant argues SBA should have given notice of its concerns with Appellant's existence as a joint venture. Appellant could have provided additional documentation and explanations. SBA denied Appellant the opportunity to be heard, a fundamental requirement of due process.

Appellant further argues the Operating Agreement does not supersede the Joint Venture Agreement. The D/GC ignored the parties' intent under Michigan law which governs the agreements. The parties entered two agreements just days apart in April 2014. The Joint Venture Agreement established a joint venture under Michigan law. When the parties entered into the Joint Venture Agreement, they contemplated an LLC through which the joint venture would operate. It is a common practice for joint venturers to form a distinct legal entity to carry out the purpose of the venture. This does not change the relationship of the venturers. SBA has recognized that a joint venture between an eligible SDVO SBC and another small business may be structured as a legal entity like an LLC. Here, the parties' manifest intent was to form a joint venture and use the LLC to affect its purpose. The Joint Venture Agreement names the LLC and provides that the parties will execute such other documents as may be necessary to carry out the purposes of the agreement. This demonstrated their intent to operate through an LLC. The sole purpose of the Operating Agreement was to provide for governance of the LLC and specify the members' rights and obligations.

The Operating Agreement supersedes prior written and oral understandings "with respect to the subject matter of this Agreement." Operating Agreement, Article 10.2. Appellant asserts the subject matter was governance of the LLC. Under Michigan law, when a valid agreement is integrated it supersedes inconsistent or prior terms to the extent that it is inconsistent with them. Appellant argues, here, the two agreements are complementary and not inconsistent.

Appellant further argues that Criterion is the managing venturer with control over management and day-to-day operations. SBA erred in failing to give the language of section 13 its plain meaning. After the provisions quoted by the D/GC, the agreement states "provided, however" and thus negates the overall grant of joint management authority. Joint Venture Agreement, § 13 (emphasis in original). The agreement specifies that Criterion has sole management authority in circumstances affecting the underlying contract and the joint venture's overall business. Criterion is responsible for contract administration, hiring of labor, and other aspect of running the business. Criterion is also to have control over day-to-day decisions.

Appellant argues that it has in fact clearly set out the responsibilities of both parties to the joint venture. Appellant maintains that *SOF Associates* is inapposite because in that case there were multiple venturers and questions as to identity and qualifications of the project manager. Here, there are only two parties and their responsibilities are clearly set out. Criterion will administer the contract, hire labor, and be responsible for day-to-day operations. Mr. Schulz, Criterion's president and sole shareholder, will be project manager. The regulation, 13 C.F.R. § 125.15(b)(2)(iv), does not require any specific level of detail as to the joint venturers' respective obligation. The agreements here set forth the parties' obligations with reasonable clarity. Appellant was to be a "populated" joint venture, i.e., one that would employ its own workers). Therefore, the roles of the parties in overall management of the business were delineated while performance would be by Appellant's own employees.

Finally, Appellant argues it satisfied the record retention requirement. Appellant argues there is no inconsistency between section 7 of the Joint Venture Agreement and Article 5.1 of the Operating Agreement. An accountant can easily maintain books of account at Appellant's principal executive office. Further, SBA overlooked section 18 of the Joint Venture Agreement, which provides the managing venture shall maintain final records upon completion of awarded contracts.

D. SBA's Response

On December 17, 2014, 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.

First, SBA argues the letter notifying Appellant of the protest clearly stated SBA would be reviewing all eligibility criteria, and "would be examining all areas of CriterEOM as part of this protest." Protest File, Ex. 5 (Letter from Acting Assistant Director, Office of Contract Assistance, to Scott Schulz, Managing Partner, CriterEOM, LLC (Oct. 14, 2014)). Further, SBA contacted Appellant about its eligibility and documents regarding this issue. SBA asserts Appellant had notice its eligibility would be reviewed.

Second, SBA asserts the D/GC properly treated Appellant as an independent limited liability company and applied the requirements of 13 C.F.R. § 125.9. Because an SDV did not own at least 51% of all stock outstanding and at least 51% of each class of voting stock, the D/GC found Appellant ineligible. SBA argues Appellant seeks to have SBA ignore clear language of the Operating Agreement. SBA argues the two agreements were executed over two weeks apart, and have different provisions for management, record retention, and dissolution. The entity created by the Joint Venture Agreement is not the same as the Operating Agreement. SBA would need to ignore various provisions throughout the two agreements in order to find Appellant in compliance. Further, the Operating Agreement states that parties' relationship is solely governed by it and previous agreements are to be ignored.

Third, SBA argues the D/GC correctly concluded Criterion was not the managing venture. There was a general grant of authority to both parties to control the firm. The next sentence of the provision does carve out an exclusive control right for Criterion in managing day-to-day operations, but this does not negate the overall granting of general control to both parties. Citing *Matter of Hana-JV*, SBA No. VET-227 (2012), SBA asserts under this arrangement Criterion does not control Appellant.

SBA further asserts the agreements only mention Criterion's role generally, managing the joint venture rather than contract performance. The fact that the joint venture is populated does not negate the requirements of the regulation. The Joint Venture Agreement does not provide any specifics about the roles and responsibilities of the joint venturers and so the D/GC properly decided that this requirement had not been met.

Finally, SBA argues a paragraph in the Joint Venture Agreement titled "Books and Records" provides that the parties will appoint an accountant to maintain all necessary books and accounts. SBA maintains the clear language states the books and records are to be in accountant's possession. SBA maintains this means the records are to be kept with the accountant and there is no language to contradict this. SBA argues the language Appellant relies upon is a paragraph entitled "Intellectual Property Developed During the Joint Venture," and this does not necessarily apply to the books and records. The joint venture agreements must have clear and unambiguous statements regarding who will retain all final records and Appellant's agreement does not do this.

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.

B. Analysis

First, I must conclude Appellant's claim that its due process rights were violated is meritless. SBA's letter informing Appellant of the protest clearly stated that SBA would be reviewing all eligibility criteria and "would be examining all areas of CriterEOM as part of this protest." Protest File, Ex. 5 (Letter from Acting Assistant Director, Office of Contract Assistance, to Scott Schulz, Managing Partner, CriterEOM, LLC (Oct. 14, 2014)). Further, SBA requested a wide range of documents, not merely an answer to the question of whether Mr. Schulz had other employment. Accordingly, Appellant had notice that all aspects of its eligibility were at issue before the D/GC.

Second, I consider the question of whether Appellant should be reviewed as a joint venture between Criterion and EOM, or an independent LLC. The Joint Venture Agreement was executed on April 10, 2014. This Joint Venture Agreement purports to fulfill all the requirements of an SDVO SBC joint venture, as laid out in 13 C.F.R. § 125.15 (b). The Joint Venture Agreement specifically states its business purpose is performance of the Base Operating Support Services contract.

The Operating Agreement creating the LLC was executed on April 25, 2014. The Operating Agreement provides:

> The purpose of the Company is to conduct any lawful business for which limited liability companies may be organized under the laws of the state of Michigan.

Operating Agreement, ¶ A, at 1.

> 10.2 Entire Agreement, Amendment. This Agreement along with the Articles of Organization (together, the "Organizational Documents"), constitute the entire agreement among the Members and replace and supersede all prior written and oral understandings and agreements with respect to the subject matter of this Agreement, except as otherwise required by the Michigan Limited Liability Company Act. There are no representations, agreements, arrangements, or undertakings, oral or written, between or among the Members relating to the subject matter of this Agreement that are not fully expressed in the Organizational Documents. This Agreement may not be modified or amended in any respect, except in a writing signed by all of the Members, except as otherwise required or permitted by the Michigan Limited Liability Company Act.

Operating Agreement, Article 10.2, at 11.

The Operating Agreement thus clearly and explicitly states in sweeping language that it is the entire agreement, and supersedes any previous agreements. There is no reference whatever to the Joint Venture Agreement. Rather than focus on the instant procurement, the LLC can conduct any lawful business. However, the regulation refers to an SDVO SBC joint venture as formed "for the purpose of performing *an* SDVO contract." 13 C.F.R. § 125.15(b) (emphasis supplied). Therefore, this LLC does not have as its purpose one SDVO contract, as the regulation contemplates. There is a reference to Articles of Organization, but this is merely a one-page form. Had the Operating Agreement explicitly incorporated or even referenced in some way the Joint Venture Agreement, then the two agreements would have to be read together, mandating the conclusion Appellant was a joint venture organized as an LLC. However, Appellant's documents do not mandate that this reading be done. While it is true that joint ventures often are constituted as LLCs, it is also true that some business arrangements can be completely rethought and rewritten over a two-week period.

The D/GC should not have to speculate as to the intentions and meanings of the documents presented. They must be sufficiently clear as to leave no real doubt as to what the parties have done. The addition of one sentence incorporating the Joint Venture Agreement to Article 10.2 of the Operating Agreement would have resolved this question in Appellant's favor, and made it clear that the two documents were both effective and needed to be read together. However, Appellant failed to do this. Rather, Article 10.2 of the Operating Agreement provides that it is the entire agreement and supersedes all other agreements, written or oral. The Operating Agreement creates Appellant as an LLC, and Appellant is the awardee of the subject contract. The Operating Agreement does not contain the provisions 13 C.F.R. § 125.15(b) requires be included in a joint venture agreement. These provisions are in the Joint Venture Agreement, which the Operating Agreement supersedes.

I therefore conclude that it was not clear error for the D/GC to review Appellant's eligibility as an independent LLC. The sweeping language of Article 10.2 supports his conclusion and belies Appellant's argument that Article 10.2 applies only to the issue of the LLC governance.

Therefore, the D/GC was correct to apply the requirement of 13 C.F.R. § 125.9(a) & (c); in an SDVO SBC which is an LLC at least 51% of each class of member interest must be owned by one or more SDVs and this ownership must be direct. Here, Appellant is owned 51% by Criterion and 49% by EOM, not by Mr. Schulz. Accordingly, Appellant does not meet the regulation's direct ownership requirement and the D/GC was not in error to rule Appellant ineligible.

Further, even if Appellant were not found to meet the direct ownership requirement, Appellant has failed to meet the requirement that its joint venture agreement specify 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 Operating Agreement does not speak to this question. The Joint Venture Agreement, even if we assume that it is not totally superseded by the Operating Agreement, provides:

> The managing venturer shall be responsible for contract administration, hiring of labor, and other aspects of running the business. Both venturers shall be responsible for completing performance of awarded contracts.

Joint Venture Agreement, ¶ 13, at 5.

This provision says nothing about the roles of the two parties with regard to contract performance, source of labor, or negotiating the contract. Criterion is to hire labor (from where, one or both parties?) and administer the contract. EOM's role is unmentioned, except that it shall be involved in contract performance. However, just what each party shall do in contract performance is left unmentioned. A Joint Venture Agreement must specifically address these issues to be found in compliance with the regulation. *Matter of SOF Associates-JV*, SBA No. VET-235 (2013). Appellant's argument that *SOF Associates* is inapposite is meritless. The decision's holding on specificity did not rest on the fact that there were multiple parties to that joint venture agreement, but on the regulatory requirement that the joint venture agreement specify the parties' roles and responsibilities. Appellant has failed to do so here. The fact that the joint venture will be “populated” also does not eliminate the requirement of specifying the parties' responsibilities. The Joint Venture Agreement states Criterion and EOM are to be involved in contract performance, and does not address how. This is a fatal defect, because it is a failure to comply with the regulation.[1]

Accordingly, I conclude Appellant has failed to meet its burden of establishing the D/GC's decision was based on clear error. I therefore affirm the decision and deny the appeal.

[1] Given these conclusions, I need not address the D/GC's other grounds for finding Appellant ineligible.

V. Conclusion

For the above reasons, I DENY the appeal and AFFIRM 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