

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

IN THE MATTER OF:

SDVE, LLC,

Appellant,

Solicitation No. FA301019RA007

U.S. Air Force

Keesler Air Force Base

Mississippi

SBA No. VET-281

Decided: September 18, 2019

APPEARANCES

Christopher S. Salter, President, SDVE, LLC, Andalusia, Alabama

Farrell Thomas, President, Chiefs Construction Company, LLC, D'Iberville, Mississippi

Edmund M. Bender, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) concluding that SDVE, LLC (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). The D/GC specifically found that service-disabled veterans do not control the daily and long-term operations of Appellant, and that there is insufficient documentation to prove that service-disabled veterans directly and unconditionally own at least 51% of Appellant. On appeal, Appellant contends that the D/GC's determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied and the D/GC's determination is affirmed.

The Office of Hearings and Appeals (OHA) decides appeals of SDVO SBC status determinations under 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 appeal within 10 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.

II. Background

A. Solicitation and Protest

On April 8, 2019, the U.S. Department of the Air Force issued Request for Proposals (RFP) No. FA301019RA007 for a construction project at Keesler Air Force Base, Mississippi. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction. Proposals were due June 6, 2019. Appellant and Chiefs Construction Company, LLC (CCC) submitted timely offers.

On July 15, 2019, the CO announced that Appellant was the apparent awardee. On July 16, 2019, CCC filed a protest challenging Appellant's SDVO SBC status. CCC noted that Mr. Vernell Craig, the service-disabled veteran upon whom Appellant's SDVO SBC status was based, died September 10, 2018. (Protest at 1.) Therefore, CCC alleged, Appellant is no longer an eligible SDVO SBC. (*Id.*) The CO forwarded the protest to the D/GC for review.

B. D/GC's Investigation

On July 24, 2019, the D/GC notified Appellant of the protest and requested a response to the protest allegations and various supporting documents. In response, Appellant represented that it is now 51% owned by Mr. Christopher S. Salter, who is a service-disabled veteran. (Protest File (PF), Exh. 4, Items 1, 3, and 4.) Mr. William J. McClain and Ms. Angie K. McClain each own 24.5% of Appellant. (PF, Exh. 4, Items 3 and 4.) Appellant provided a document entitled "Minutes of Stockholder Special Meeting," which described a February 19, 2019 meeting called by Mr. Salter, as President, in which he announced that "he had purchased 51% of [Appellant's] stock," and requested that Mr. McClain remain as Vice President and that Ms. McClain remain as Secretary/Treasurer. (PF, Exh. 4, Item 6.)

In response to the D/GC's request for copies of stock certificates, Appellant asserted that "[s]tock certificates are not utilized at [Appellant]." (PF, Exh. 4 at 2.) Appellant declined to produce copies of any transfer of ownership agreements, stating that "[a] buy/sell agreement is not utilized at [Appellant]." (*Id.*)

The D/GC requested the resumes of all officers, directors, managing partners, and/or managers of Appellant. In response, Appellant provided the resumes of Mr. Salter, Mr. McClain and Ms. McClain. Mr. Salter's resume lists his current position as President of Appellant where he began working in February 2019. (PF, Exh. 4, Item 13.) According to his resume, Mr. Salter also has been employed as a fleet mechanic at Coca-Cola from February 2008 to the present. (*Id.*) From June 2006 to February 2008, Mr. Salter worked for the Alabama Army National Guard as a mechanic. (*Id.*) From March 2004 to June 2006, Mr. Salter "owned and operated a tire and mechanic shop." (*Id.*) From March 2003 to March 2004, he served as a heavy equipment mechanic while deployed in the Middle East, and from March 1997 to October 2002, he worked for Diamond Offshore as a motorman/mechanic. (*Id.*) The "Summary" portion of Mr. Salter's resume stated: "Five years with Diamond Offshore as motorman and work over mechanic. Twenty six years with the Alabama National Guard as a heavy wheel/equipment mechanic." (*Id.*)

C. D/GC's Determination

On August 15, 2019, the D/GC issued his decision sustaining CCC's protest. Based on the documentation Appellant provided, the D/GC found that Mr. Salter is a service-disabled veteran. (PF, Exh. 1, at 2.) However, although Appellant indicated that Mr. Salter acquired 51% of Appellant's stock upon the death of Mr. Craig, "there is no documentation or proof of the transfer." (*Id.* at 3.) As a result, the D/GC could not determine that Appellant is at least 51% directly and unconditionally owned by one or more service-disabled veterans.

With regard to the issue of control, the D/GC found that Mr. Salter's resume shows "significant experience as a mechanic." (*Id.*) The resume does not, however, reflect that Mr. Salter has any experience or training in construction, Appellant's primary industry. (*Id.*) Nor does the resume show that Mr. Salter has experience with "revenue-generating activities like [preparing] a contract proposal." (*Id.*)

The D/GC observed that, in contrast to Mr. Salter, Mr. McClain is a licensed Professional Engineer with "fifty years of experience as an engineer on construction projects." (*Id.*) Meanwhile, Ms. McClain is Appellant's office manager and handles all of Appellant's financial and administrative matters. (*Id.*)

The D/GC concluded that Appellant did not show that Mr. Salter has managerial experience of the extent and complexity needed to run the concern. (*Id.*, citing 13 C.F.R. § 125.13(b).) Appellant therefore is not fully controlled by service-disabled veterans.

D. Appeal

On August 21, 2019, Appellant appealed the D/GC's determination to OHA. Appellant contends that the D/GC's rationale is "weak at best" and should not be the basis for concluding that Appellant is ineligible for the instant award. (Appeal at 1.)

Appellant maintains that, contrary to the D/GC's decision, Mr. Salter has an "extensive background in construction," in addition to experience as the owner of a company and military experience managing personnel in high-pressure situations. (*Id.*) However, to address the D/GC's concerns, Appellant has now "completely revised and updated [Mr. Salter's] resume for this appeal to help clarify any questions about [his] experience or qualifications." (*Id.* at 2.) Even based on the previously-submitted resume, though, the D/GC should have understood that Mr. Salter has 26 years of experience with the Alabama National Guard, and has previously owned a company. (*Id.*)

Appellant also highlights that it provided the D/GC with the document entitled "Minutes of Stockholder Special Meeting," which, in Appellant's view, "should be in itself more than suffic[ient] for the 'purchase agreement.'" (*Id.*) Appellant adds that it "do[es] have a transfer of ownership document [] which [Appellant is] attaching to this appeal response that should again, more than answer any clarification on who, where, or how, the transfer was conducted." (*Id.*)

Accompanying its appeal, Appellant offers two documents purporting to show that Mr. Salter acquired a 51% interest in Appellant with an initial capital contribution of \$51 paid on February 19, 2019. Appellant also attaches an updated resume for Mr. Salter; business licenses issued to “Salter Contraction” and “Salter Construction”; and a letter of reference describing construction work performed by Mr. Salter beginning in June 2014.

E. CCC's Response

On September 2, 2019, CCC responded to the appeal. CCC contends that after Mr. Craig died on September 10, 2018, his ownership interest presumably passed to his estate. Appellant has not explained how Mr. Craig's shares then were transferred from his estate to Appellant or to Mr. Salter. (CCC's Response at 1.) CCC also questions how Mr. Salter acquired 51% of Appellant, “a multi-million dollar construction company,” for \$51. (*Id.*)

CCC alleges that Appellant's minority owners, Mr. McClain and Ms. McClain, “are married to the principal owners of McClain Contracting Company, Inc.,” which also shares offices and employees with Appellant. (*Id.*) In CCC's view, Mr. Salter does not control Appellant, rather “McClain Contracting is more in control of [Appellant].” (*Id.* at 2.)

F. SBA's Response

On September 5, 2019, SBA responded to the appeal. SBA argues, first, that the documents attached to the appeal petition are not admissible, because Appellant did not provide these materials to the D/GC. (SBA Response at 3-4, citing 13 C.F.R. § 134.512.) OHA therefore cannot consider these documents on appeal.

Turning to the merits of the case, SBA maintains that the D/GC correctly determined that Mr. Salter lacks the experience necessary to run Appellant. The D/GC reviewed the resumes Appellant submitted and found that Mr. Salter had “no experience in construction or management of a construction company.” (*Id.* at 5.) Indeed, the only mention of Mr. Salter holding any construction-related position was as President of Appellant, beginning in February 2019. (*Id.*) The D/GC properly contrasted Mr. Salter's experience with that of Mr. McClain, an engineer with decades of experience in the construction industry. Additionally, Mr. Salter has no experience managing office operations; rather Ms. McClain apparently handles such tasks for Appellant. (*Id.* at 5-6.)

With regard to the question of ownership, SBA maintains that Appellant did not produce documentation showing that Mr. Craig's interest in Appellant was purchased by Mr. Salter. Absent such documentation, the D/GC could not conclude that Appellant is at least 51% directly and unconditionally owned by service-disabled veterans. (*Id.* at 7.)

III. Discussion

A. Standard of Review

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. New Evidence

OHA's rules of procedure provide that, in an appeal of an SDVO SBC status determination, OHA “may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals [of SDVO SBC status determinations] 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.” 13 C.F.R. § 134.512. Here, the documents Appellant attached to its appeal petition are not in the Protest File, and thus are new evidence on appeal. OHA has no discretion to consider such information. *E.g., Matter of Veterans Contracting Group, Inc.*, SBA No. VET-265, at 7 (2017); *Matter of Apex Ventures, LLC*, SBA No. VET-219, at 5 (2011). Further, Appellant has not attempted to explain why this new evidence was not, or could not have been, provided to the D/GC during his review. Accordingly, the documents accompanying the appeal petition are EXCLUDED from the record and have not been considered in reaching this decision.

C. Analysis

Appellant has not proven clear error in the D/GC's determination. As a result, this appeal must be denied.

Appellant first argues that the D/GC incorrectly concluded that Appellant did not show that its President, Mr. Salter, has managerial experience of the extent and complexity needed to run Appellant, as is required by 13 C.F.R. § 125.13(b). The D/GC specifically found that Appellant is primarily engaged in construction, but Appellant provided no documentation to establish that Mr. Salter has experience or training in that industry. Section II.C, *supra*. In addition, the D/GC determined, Appellant did not show that Mr. Salter has experience with “revenue-generating activities like a contract proposal.” *Id.*

The D/GC's decision was fully justified based on the record before him. Appellant provided the D/GC a resume for Mr. Salter, highlighting Mr. Salter's experience as a mechanic with various organizations, such as Coca Cola and the Alabama Army National Guard. Section II.B, *supra*. Neither the resume nor any other document in the Protest File, though, indicated that Mr. Salter had experience or training in construction or construction management. Although Appellant now seeks to introduce new evidence showing that Mr. Salter does, in fact, have a background in construction, these materials were not made available to the D/GC and therefore cannot be considered on appeal. Section III.B, *supra*. Appellant also complains that the D/GC

gave insufficient weight to Mr. Salter's military service, but Mr. Salter's resume stated that his military service was as a "heavy wheel/equipment mechanic," and thus does not suggest that Mr. Salter has the experience necessary to manage a construction business. *Matter of Corners Constr.*, SBA No. VET-190 at 6 (2010) (denying appeal because "[i]f [the service-disabled veteran] obtained specific management, supervisory, or construction experience during her time in the military, she should have listed clearly those relevant experiences in her response to the protest."). Accordingly, the D/GC did not err in concluding that, based on the information Appellant submitted, Mr. Salter lacks managerial experience of the extent and complexity needed to run Appellant.

Appellant also disputes the D/GC's finding that Appellant did not show that Appellant is at least 51% directly and unconditionally owned by service-disabled veterans. Appellant represented to the D/GC that Mr. Salter became Appellant's majority owner in February 2019 after purchasing 51% of Appellant's stock. Section II.B, *supra*. However, Appellant declined to produce documentation such as stock certificates or a purchase agreement to substantiate this transaction, asserting that such materials are "not utilized" by Appellant. *Id.*

On appeal, Appellant argues that its February 19, 2019 "Minutes of Stockholder Special Meeting" should suffice as proof of purchase. These minutes, though, demonstrate only that change of ownership was discussed during the meeting, not that the underlying transaction actually occurred. Indeed, Appellant itself acknowledges in its appeal that the minutes do not shed light on specific details, such as "who, where, or how, the transfer was conducted." Section II.D, *supra*. Further, SBA regulations require that ownership be both direct and unconditional, and such matters are not addressed at all in the minutes. 13 C.F.R. § 125.12. The D/GC thus did not err in concluding that Appellant did not provide enough evidence to determine whether Appellant is at least 51% directly and unconditionally owned by one or more service-disabled veterans.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge