

UNITED STATES SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

IN THE MATTER OF:)

MED Trends, Inc.)

Appellant)

Solicitation No. DOL110-RP-20830)

Department of Labor)

Procurement Services Center)

Washington, D.C.)

Docket No. VET-2010-06-24-17

AGENCY RESPONSE

The Small Business Administration (SBA or Agency), by and through its representative Christopher R. Clarke, hereby submits its Response to the Appeal Petition filed by MED Trends, Inc. (MED or Petitioner) seeking reversal of the Agency's determination that Petitioner is ineligible to represent itself as a Service-Disabled Veteran Owned Small Business Concern (SDVO SBC) as that term is defined by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8(g).

Facts

Solicitation No. DOL110-RP-20830 was issued as a 100% SDVO SBC set-aside by the Department of Labor (DOL) on October 30, 2010. Petitioner was the successful offeror and on April 15, 2010 all unsuccessful offerors were notified by email. [Protest File Exh. 9] On April 19, 2010, Addx, Inc. submitted a protest to the contracting officer (CO) challenging the SDVO SBC status of MED. [Protest File Exh. 10 at p. 1]. On April 20, 2010 LongView Evolvent Solutions, Inc., also submitted a protest to the contracting officer. [Protest File Exh. 10 at p.

149]. On May 20, 2010, SBA notified Petitioner of the protest and request for information. [Protest File Exh. 6]. On May 26, 2010, Petitioner responded. [Protest File Exh. 5]. Based on information contained in the protests and the information being provided by Petitioner, SBA requested additional information from MED and in each instance MED responded. [Protest File Exh. 2, 3, 4]. On June 15, 2010, Karen Hontz, Director, Office of Government Contracting (Director), issued her decision that Petitioner was not an eligible SDVO SBC. The Director stated the following in her decision letter;

Given the information provided, there is insufficient evidence to support a conclusion that Mr. Spivey is in control of firm as required by SBA regulations. By MTI's own account Mr. Spivey does little more on a day-to-day basis than answer emails and telephone calls from his home. Further, he has previously certified to SBA as part of his JTI's participation in the 8(a) BD Program that he devotes himself full-time to managing and conducting the business affairs of that company. While there is not full-time devotion requirement to be an eligible SDVO SBC, there is a requirement that a service disabled veteran be actively involved and in control of the firm. That control means both the long term decision making and conducting the day-to-day management of the firm. MTI has not demonstrated that Mr. Spivey controls the firm. [Protest File Exh. 1 at p. 5-6].

On June 24, 2010, Petitioner filed the current Appeal. [Appeal Petition].

Petitioner's Argument

Petitioner argues that the Director's decision that it was not an eligible SDVO SBC at the time of its offer is in error. Petitioner argues that Mr. Kervin Spivey (Mr. Spivey) does control the firm. Petitioner argues that he controls both the long term decision making and day-to-day operations of the firm. [Appeal Petition at p. 9-10]. Petitioner argues that the fact that Mr. Spivey is the owner, President, and Chief Executive Officer of another firm, Jen-esis Communications, Inc. (JCI), is not relevant. [Appeal Petition at p. 10]. Petitioner argues that the fact the JEN is a participant in SBA's 8(a) Business Development (BD) Program and that Mr.

Spivey has obligations and has made certifications and representations to SBA under that program is irrelevant to whether he controls MED. [Appeal Petition at p. 11].

Petitioner argues, citing *Matter of DooleyMack Government Contracting, LLC*, SBA No. VET 159 at 5-6, that SBA erroneously went beyond the regulations in 13 C.F.R. 125.10 in rendering its decision. [Appeal Petition at p. 12, 14, 15] Petitioner further argues that there is no requirement for the SDVO SBC program that Mr. Spivey not have outside employment. [13.] Petitioner argues that Mr. Spivey is actively involved in the firm's operation based on the statements made by Mr. Spivey. [Appeal Petition at p. 13-14]. Petitioner argues that there is no need for Mr. Spivey to be involved with the day-to-day affairs of how contracts are performed, because this industry is different than construction. [Id. at p. 14]. Petitioner argues that SBA's decision did not give enough deference to the statements made by Mr. Spivey. [Id. at p. 16].

Petitioner also argues, citing 13 C.F.R. § 125.13, that SBA regulations support a finding that Mr. Spivey controls MED because the rule states that 8(a) program participants may also qualify as SDVO SBCs. [Id. at p. 16].

Standard of Review

OHA may not overturn an Agency decision regarding the SDVO SBC program unless that decision was based on a clear error of fact or law. 13 C.F.R. § 134.508; *Matter of Eason Enterprises OKC LLC and Advanced Environmental Solutions, Inc.*, SBA No. SDV-102 (2005). In applying this standard of review, one Federal court has stated that the fact "that reasonable minds may differ on the wisdom of" a particular decision "does not mean that the decision is clearly erroneous or contrary to law." *Human Electronics, Inc. v. International Electronics, Inc.*, slip op. at 1, (N.D.N.Y. May 19, 2005) (No. 5:03-CV-1318).

Moreover, as OHA itself has declared in the context of appeals of SDVO SBC protest determinations:

The standard of review for SDVO SBC appeals is whether the [Director's] determination was based on a clear error of fact or law... In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility concerns of 13 C.F.R. §§ 125.9 and 125.10 *de novo*. Rather, OHA reviews the record to determine whether the [Director] based his decision upon a clear error of fact or law... Consequently, I will disturb the [Director's] determination only if I have a definite and firm conviction the [Director] erred in making a key finding of law or fact.

Matter of Cedar Electric, Inc./Pride Enterprises, Inc., JV SBA No. VET-129 at p. 4 (2008) (hereinafter Matter of CEI/PEI JV).

Furthermore, in assessing whether the Agency's decision in an SDVO SBC protest was based on an error of fact or law, the "Judge may not admit evidence beyond the written protest file nor permit any form of discovery." 13 C.F.R. §134.512. Appeals of SDVO SBC protests must instead "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." *Id.*

Agency's Argument

I.

THE DIRECTOR'S DETERMINATION THAT PETITIONER IS NOT CONTROLLED BY A SERVICE-DISABLED VETERAN IS CORRECT AND IS NOT CLEARLY ERRONEOUS OR CONTRARY TO LAW

The Director's determination that MED is not controlled by a service-disabled veteran is correct. SBA regulations require that a service-disabled veteran control the firm. 13 C.F.R. § 125.10. SBA's regulations require that the management and daily business operations of an

SDVO SBC must be controlled by one or more service-disabled veterans. 13 C.F.R. § 125.10(a).

For purposes of the SDVO SBC program in order to control a concern, the service-disabled veteran must hold the highest officer position in the concern. 13 C.F.R. § 125.10(b). The service-disabled veteran must also possess managerial experience of the extent and complexity needed to run the concern. *Id.* Additionally, when the concern takes the form of a corporation one or more service disabled veterans must control the Board of Directors. 13 C.F.R. §

125.10(e). In order to control the Board of Directors SBA regulations require that;

- (1) One or more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or (2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting. *Id.*

In order to be an eligible SDVO SBC a concern must meet all the above requirements.

The Director found that MED did not meet these requirements and therefore sustained the protest. In her decision letter the Director stated,

Given the information provided, there is insufficient evidence to support a conclusion that Mr. Spivey is in control of firm as required by SBA regulations. By MTI's own account Mr. Spivey does little more on a day-to-day basis than answer emails and telephone calls from his home. Further, he has previously certified to SBA as part of his JTI's participation in the 8(a) BD Program that he devotes himself full-time to managing and conducting the business affairs of that company. While there is not full-time devotion requirement to be an eligible SDVO SBC, there is a requirement that a service disabled veteran be actively involved and in control of the firm. That control means both the long term decision making and conducting the day-to-day management of the firm. MTI has not demonstrated that Mr. Spivey controls the firm.

The protests alleged that Mr. Spivey did not control Petitioner because there was evidence he was the owner of an 8(a) participant, JCI. The Director concluded that Mr. Spivey was in fact the owner, CEO and President of that firm. The Director stated the following in her letter;

There is evidence that Mr. Spivey is the owner, President and CEO, of JTI; a participant in SBA's 8(a) BD Program. As a participant in 8(a) BD Program Mr.

Spivey is required to "devote full-time to the business during the normal working hours of firms in the same or similar line of business." Further, "[a]ny disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA." There is no evidence that Mr. Spivey notified SBA of his position at MTI. [Protest File Exh. 1 at p. 5].

On appeal Petitioner argues that, the Director committed legal error when she relied on previous declarations that Mr. Spivey has made as the owner and CEO of JTI, an 8(a) BD Participant. [Appeal Petition at p. 15]. Petitioner argues that whether or not Mr. Spivey complied with the regulations in 13 C.F.R. Part 124 is irrelevant to the determination of whether Petitioner is an eligible SDVO SBC. [Appeal Petition at p. 15]. In this case, Mr. Spivey has represented and certified to the Federal Government that he is devoting himself full-time to running JTI. SBA cannot ignore this, and SBA cannot assume that Mr. Spivey is not complying with the previous representations and certifications he has made. Therefore, it is reasonable to conclude that given his past representations and certifications, Mr. Spivey works full-time managing the affairs of JTI.

Further, on Appeal Petitioner argues that that SBA regulations support a finding that Mr. Spivey controls MED because the rule states that 8(a) program participants may also qualify as SDVO SBCs. [Appeal Petition at p. 16]. This argument misstates that clear meaning of SBA regulations. SBA regulations state that an 8(a) Participant may also be an eligible SDVO SBC. In this case, the 8(a) participant is JTI, not Mr. Spivey, or the Petitioner.

Given that Mr. Spivey has previously stated that he is devoting himself full-time to managing another firm, SBA sought additional information that might demonstrate that Petitioner was an eligible SDVO SBC. It is Petitioner's responsibility to provide the evidence necessary to demonstrate that it meets all the requirements and it is an eligible SDVO SBC. See *Matter of United Medical Design Builders, LLC*, SBA No. Vet 197 at p. 10 (2010). In this case

SBA looked to the requirements of the program for which Mr. Spivey had stated he would be devoting himself full-time to the management of JTI; the 8(a) BD Program. As noted in her Decision letter SBA's 8(a) BD rules specify that, "[a]ny disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain the prior written approval of SBA." 13 C.F.R. § 124.106(a)(4). If Petitioner had been able to provide evidence that Mr. Spivey had sought and been given approval to perform work for the Petitioner in addition to working full-time for JTI; that would have been evidence that supported a conclusion that he was in control of Petitioner. There is no evidence that Mr. Spivey attempted to get, or was given approval to work for Petitioner, by SBA. This inquiry is not irrelevant. Petitioner must supply SBA with sufficient evidence to support a conclusion that a service-disabled veteran controls the firm. In this case the Director has concluded that Petitioner has not.

The only evidence provided by MED demonstrating that Mr. Spivey was in control of the day-to-day management of the firm is the statement from Mr. Spivey himself. However, this claim is not supported by any of the other information provided to SBA. Petitioner claims that SBA lacked the documentation to support its decision that Mr. Spivey was not in control. [Appeal Petitioner at pp 9-10]. SBA did seek to find some documentation or evidence to support the claims of Mr. Spivey. SBA requested Petitioner's proposal, unemployment tax filings, W-2's, and any other evidence that Petitioner could provide to demonstrate that a service-disabled veteran controls the firm. The information provided by Petitioner however did not support its claim that Mr. Spivey does in fact control the firm. The unemployment tax records provided and the W-2's created and provided by Petitioner both show that Mr. Spivey is not one of the higher paid employees of the firm. [Protest File Exh. 4 at p. 7-24]. While there is no requirement that

Mr. Spivey be the highest paid; evidence that showed how much he worked and how much he was compensated could have shown that he was controlling the day-to-day operations of the firm. However, there was little if any independent documentation presented to support a decision that Mr. Spivey controlled the firm. There is evidence that Mr. Spivey works full-time for another firm, and the evidence provided by Petitioner shows that as an employee of MED he is not one of the highest paid employees working for the firm. It was reasonable for the Director to conclude that this evidence did not support Petitioner's assertion that Mr. Spivey was in control of the firm.

SBA also sought a copy of Petitioner's proposal for the solicitation at issue in order to find evidence of Mr. Spivey's control. As the Director noted the proposal for this contract lacked any information showing that Mr. Spivey would be involved in the performance of this contract in any way. "A review of MTI's proposal on this solicitation also shows that according to MTI, Mr. Spivey is not a key employee for this solicitation and is not part the management team responsible for overseeing the performance of the contract." [Protest File Exh. 1 at p. 5]. The Director concluded that the proposal provided no evidence that Mr. Spivey is involved with the firm's day-to-day management in any meaningful way.

Petitioner argues, without providing any evidence to support this claim in either the documents submitted before the Director's decision or now, that the business that MED is in, "involves a less supervision intense business enterprise (here it is information technology support services)..." [Appeal Petition at p. 13]. Petitioner also states that,

the Service-Disabled Veteran conducts the firm's financial and administrative affairs, manages the firm remotely, and that the Contract at issue is a contract which, unlike a construction Contract, concerns highly-technical work delivered on site by professional employees who themselves conduct on-site interaction with the government's representatives. [Id.]

There are several issues with Petitioner's argument here. The first being the unsubstantiated claim that somehow the work being provided on this contract is in such a capacity different from construction that it requires little to no supervision. Petitioner has provided no evidence for why this contract should be treated differently. Petitioner has provided its own conclusion and suppositions only. Petitioner has just stated that "IT" is different without explaining why or how. Construction contracts, as opposed to say a contract for janitorial services, do in fact concern highly technical work delivered on site by professional employees. Constructing a building requires the work of highly skilled individuals in many capacities, it requires architects, engineers, plumbers, electricians, iron workers, etc. All of this work requires highly skilled employees with many hours, if not years of experience. This work is provided on site by professional employees during the performance of construction project. SBA regulations require an active management role. Petitioner's argument for remote supervision and complete delegation of management responsibility has no support in either SBA regulations or the decisions by OHA. The same arguments that email contact, phone calls, and that highly skilled managers hired by the service-disabled veterans that would oversee projects as evidence of control were made in the context of the construction contracts. As stated by OHA in one case the Appellant argued;

Challenges guidance to the AA/GC, in the Remand Order, that "a company in CA cannot control a project in Ohio" (Appeal Petition at 3), because Eric Ballew can control an on-site supervisor, his subordinate, as many construction concerns do throughout the United States. *Matter of First Capital Interiors, Inc.*, SBA No. VET-112 at p. 5 (2006).

In that case OHA stated,

Rather, I hold it is not clearly erroneous for the Area Office to conclude that Eric Ballew cannot manage Appellant's day-to-day business operations as required by 13 C.F.R. § 125.10(a), which would consist largely of construction contracts

being performed in Ohio, via telephone or e-mail (especially at night), from three time zones away. *Id.* at p. 8.

Petitioner in this case is making the same case for absentee control and abdication of supervisory management that was made by the Appellant in the previous case. The only difference is the solicitation at issue is not a construction project. Petitioner argues that the requirement that the service-disabled veteran be actively involved in the supervision and performance of the contract only applies to construction contracts. [Appeal Petition at p. 13-14]. OHA has stated that there may be some industries that do not require as much supervision as the construction industry. See *Matter of First Capital Interiors, Inc.*, SBA No. VET-112, at 8 (2007); *Matter of IITS-Nadholz, LLC*, SBA No. VET-114 at p. 9 (2007). However, OHA has never stated that this only applies to construction contracts.

It is reasonable for SBA to require an SDVO SBC to provide information and evidence to support any conclusion that a particular industry requires less supervision and management than other industries. In this case, there was no independent evidence or information to support a conclusion that this contract required no managerial supervision by the service-disabled veteran. Based on the information provided by Petitioner, there is no reason to treat this contract any differently than a construction contract. The evidence shows that it is a highly technically project, that requires the management team to directly communicate with both the Government and subcontractors. Rather than being a hands-off type enterprise, like some manufacturing enterprises or low skilled services like janitor services, both construction and the services rendered by Petitioner on this information technology contract require the management of highly skilled professionals from multiple disciplines and often constant contact with the Government client.

Further, the case cited by Petitioner, in support of its claim that Mr. Spivey's lack of participation in the daily work of his firm, states the following, "SES's main office and Mr. Shepard are both located in the same place, not distant from each other, this is not a construction contract, and the distance to the worksite is short enough to permit frequent visits." *Matter of E2Si-SaLUT Joint Venture*, SBA No. VET-126 at p. 6 (2008). In that case, there was some other evidence other than it just "not being a construction contract" provided by the firm demonstrating that the service-disabled veteran controlled firm, including evidence that the service-disabled veteran was actively involved in supervising his employees, and made frequent trips to the site where the work was being performed. In this case, the proposal of Petitioner shows that there is a large amount of supervision being done on this contract. The proposal itself lists no fewer than five managerial positions. [Protest File Exh. 3]. There is day to management and supervision being done; it is just not being done by Mr. Spivey. There is no evidence that Mr. Spivey will be traveling or visiting the site where services will be rendered as there was in the case cited. There is no evidence that Mr. Spivey will be involved at all in supervising the performance of this contract. In fact, Petitioner even states that most if not all interaction with the Government, will be handled not by Mr. Spivey but by the other managers, "who themselves conduct on-site interaction with the government's representatives." [Appeal Petition at p. 14]. It cannot be the case that an absentee owner can abdicate all responsibility for supervision to subordinates just because it is "not a construction contract." SBA regulations clearly require a more active management role in order to demonstrate control than the one presented by Petitioner. [See Id.]

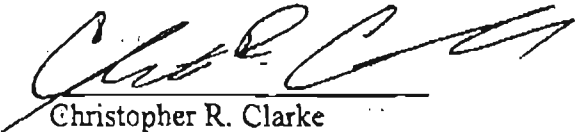
In this case there is evidence that Mr. Spivey works full time for another firm and does not control the Petitioner. Further, the Director concluded that Petitioner failed to provide

sufficient evidence to establish that MED was controlled by service-disabled veteran. Therefore, the Director's decision that Petitioner was not an eligible SDVO SBC at the time of offer is correct and should be affirmed on Appeal.

Conclusion

The Director decided that Petitioner was not an eligible SDVO SBC. The Director concluded that Petitioner had failed to provide sufficient evidence to demonstrate that a service-disabled veteran controlled the firm. The Director found that the service-disabled veteran worked full-time for another firm, was not the highest paid employee of Petitioner, and that there was no evidence that Mr. Spivey would have any active managerial or supervisory role in the daily performance of the contract at issue. As such, the Director concluded that a service-disabled veteran did not control both the long term decision making and the day-to-day management of Petitioner. The Director's decision is correct and therefore should be affirmed on appeal.

Respectfully submitted,



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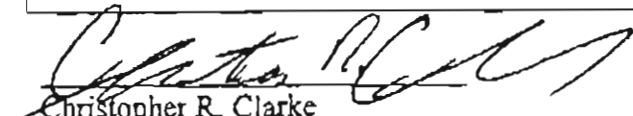
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2010, a copy of the Protest File in the foregoing matter was sent to Petitioner's counsel via first class mail. In addition, a true copy of the Agency's Response in the foregoing matter was sent via facsimile, e-mail, or U.S. Mail to the following parties:

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