

IN THE MATTER OF: SINGLETON ENTERPRISES-GMT MECHANICAL, A JOINT VENTURE, APPELLANT

SBA No. VET-130

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March 27, 2008

Term  Best Section 
SBA No. VET-130, 2008 WL 1971367 (S.B.A.)

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Service-Disabled Veteran Owned Small Business Concern Appeals]

IN THE MATTER OF: SINGLETON ENTERPRISES-GMT MECHANICAL, A JOINT VENTURE, APPELLANT

SBA VET-130

Solicitation No. VA-249-07-IB-0058

Department of Veterans Affairs

Medical Center

Lexington, Kentucky

March 27, 2008

Appearances

Gary Thompson
And
Wayne Singleton
Luthersville, Georgia
For Appellant

Kevin R. Harber, Esq.
Office of General Counsel
Small Business Administration
Washington, D.C.
For the Agency

DECISION

PENDER, Administrative Judge:

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 for Government Contracting for the U.S. Small Business Administration made a clear error of fact or law in determining that GMT Mechanical and Singleton Enterprises-GMT Mechanical, A Joint Venture are ineligible Service-Disabled Veteran-Owned Small Business Concerns. See [13 C.F.R. § 134.508](#).

III. Background

A. Protest and SBA Determination

On August 21, 2007, the U.S. Department of Veterans Affairs (VA) issued invitation for bids (IFB) No. VA-249-07-IB-0058 for the replacement of the main transformers at the VA Medical Center in Lexington, Kentucky. The IFB was issued as a total Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) set-aside. On September 25, 2007, **Singleton Enterprises-GMT Mechanical, A Joint Venture** (Appellant) submitted its bid.

Appellant is a joint venture established on June 11, 2007. Appellant is composed of two sole proprietorships: GMT Mechanical (GMT), an alleged SDVO SBC, and **Singleton Enterprises** (**Singleton**), a non-SDVO SBC. Gary Thompson, a service disabled veteran, is the owner of GMT and Arthur **Singleton**, a non-service disabled veteran, is the owner of **Singleton**. Appellant is fifty-one percent owned by Mr. Thompson and forty-nine percent owned by Mr. **Singleton**.

On January 25, 2008, the VA Contracting Officer (CO) protested Appellant's SDVO SBC status with the Small Business Administration's (SBA) Director for Government Contracting (D/GC). First, the CO argued Appellant's joint venture agreement did not comply with [13 C.F.R. § 125.15\(b\)](#) because it designated Mr. Thompson and/or Mr. Singleton (an employee of a non-SDVO SBC) to be the project manager. The CO also asserted Appellant had submitted at least ten bids/offers for VA projects since August 2007, in violation of [13 C.F.R. § 121.103\(h\)](#), which states that a joint venture cannot submit more than three offers over a two year period. Finally, the CO argued **Singleton**, a non-SDVO SBC concern, managed and controlled Appellant because (1) Appellant and **Singleton** have the same address, phone number, and fax number; (2) Appellant's Central Contractor Registration (CCR) lists Mr. **Singleton** as the government business primary point of contact; and (3) the CO only received communication from Mr. **Singleton** on behalf of Appellant.

On February 4, 2008, Appellant filed its response to the protest with supporting documentation. On February 20, 2008, the D/GC issued a determination finding that both GMT and Appellant failed to meet the SDVO SBC eligibility requirements at the time of offer for the instant solicitation.

The D/GC first examined GMT's SDVO SBC eligibility. The D/GC found GMT complied with [13 C.F.R. §§ 125.8](#) and [125.9](#) as Mr. Thompson is a service-disabled veteran and GMT's owner. However, the D/GC found GMT failed to comply with [13 C.F.R. § 125.10](#) because Mr. Thompson does not control GMT. Specifically, the D/GC found GMT was "wholly reliant upon its joint venture with **Singleton Enterprises** and that firm's principal, Mr. **Singleton**." Determination, at 4. Thus, Mr. Thompson cannot exercise independent business judgment over GMT without great economic risk because a non-service disabled veteran, Mr. **Singleton**, has the power to control GMT. The D/GC found GMT reliant on **Singleton** because (1) Appellant and **Singleton** share office space, a telephone number, and a fax number; (2) Mr. **Singleton** possesses more than thirty years of construction experience while Mr. Thompson possesses no construction experience; (3) GMT does not conduct any business or receive any revenue as an independent concern; and (4) Mr. **Singleton** prepared and submitted all of Appellant's (the joint venture) bids.

The D/GC then examined Appellant's SDVO SBC eligibility as a joint venture. First, the D/GC found Appellant failed to meet the joint venture eligibility requirement imposed by [13 C.F.R. § 121.103\(h\)](#) by submitting more than three offers as a joint venture over a two year period.

The D/GC then found Appellant did not qualify as a joint venture under [13 C.F.R. § 125.15\(b\)](#) because GMT failed to satisfy all the SDVO SBC eligibility requirements and Singleton is admittedly not a SDVO SBC. The D/GC then discussed the requirement in [13 C.F.R. § 125.15\(b\)\(2\)\(h\)](#) that an SDVO SBC serve as the managing venturer and an employee of an SDVO SBC serve as the project manager. Appellant's August 13, 2007 joint venture agreement lists GMT as the managing venturer but lists Mr. Singleton, who is not an employee of GMT, as a potential project manager. Accordingly, the D/GC found Appellant failed to satisfy the joint venture eligibility requirements in [13 C.F.R. § 125.15\(b\)\(2\)\(h\)](#).

Thus, the D/GC found that both GMT and Appellant failed to meet the SDVO SBC requirements established by [13 C.F.R. § 125.8 et seq.](#), and Appellant was ineligible to receive an award under the subject solicitation. Further, the D/GC stated that both GMT and Appellant were prohibited from submitting offers on future SDVO SBC procurements unless the determination is overturned on appeal or relief is granted under [13 C.F.R. § 125.27\(a\)](#).

determination is overturned on appeal or relief is granted under [13 C.F.R. § 125.27\(g\)](#).

B. Appeal Petition

On March 5, 2008, Appellant filed the instant appeal of the D/GC's determination with the SBA Office of Hearings and Appeals (OHA). First, Appellant addressed the eligibility determination of GMT. Appellant asserts that at the time of its offer, GMT and Singleton did not share the same office space, mailing address, or telephone number. Appellant admits GMT and Singleton shared a facsimile number at the time of offer but asserts this fact, in isolation, does not constitute control over GMT by Singleton.

Appellant also alleges error with the D/GC's finding that Mr. Thompson did not possess construction experience sufficient to control GMT's management and daily business operations. Appellant asserts Mr. Thompson has thirty-six years of construction experience working in the plumbing industry. Moreover, Mr. Thompson has managerial experience from managing his plumbing business for fourteen years. Further, Mr. Thompson is GMT's sole proprietor and primary point of contact for GMT's business. Appellant also asserts that GMT is an independent concern with over \$300,000 of capital and does not rely on financial support or assistance from outside parties.

Next, Appellant argues that the language in the D/GC's determination that Appellant is prohibited from submitting offers on future SDVO SBC procurements is a misstatement of the regulations. Appellant argues it is merely prohibited from submitting another offer as an SDVO SBC until it overcomes the reasons for the protest, citing [13 C.F.R. § 125.27\(g\)](#).

Next, Appellant requests it be allowed to supplement the Record with various documents Appellant contends were sent to the D/GC but do not appear to be part of the Protest File. Appellant also asserts it did not receive the exhibits attached to the CO's protest.

Finally, Appellant addresses the D/GC eligibility determination with regard to Appellant (the joint venture). Appellant incorporates by reference all the arguments made in its appeal with regard to GMT. Appellant also asserts that the D/GC did not address its September 12, 2007 joint venture agreement, which complies with [13 C.F.R. § 125.15](#).

C. CO Response

On March 11, 2008, the CO filed a Response. The CO reiterates her protest allegations, specifically that Appellant has submitted ten different bids as a joint venture since August 30, 2007, and that the joint venture agreement listed Mr. Singleton as a project manager. The CO also emphasizes that during the course of the solicitation process, Mr. Singleton, not Mr. Thompson, filed all correspondence. The CO also notes that GMT's CCR registration does not list the applicable NAICS code for the instant solicitation, which is a "very complex electrical project requiring expertise in replacement of high voltage electrical switchgear." CO Response, at 2.

D. SBA Response

On March 14, 2008, SBA filed its Response. SBA asserts the Record demonstrates that non-service disabled veterans and non-SDVO SBCs have the power to control both GMT and Appellant and therefore the D/GC's determination that neither Appellant nor GMT qualifies as an SDVO SBC is not based on a clear error of fact or law.

SBA asserts GMT relies upon its relationship with **←Singleton→** and **←Singleton's→** principal, Mr. **←Singleton→**, for economic viability. This reliance renders GMT incapable of operating as an independent business entity in violation of [13 C.F.R. § 125.10](#). SBA asserts Mr. **←Singleton's→** role in preparing bid submissions on behalf of Appellant and conducting all communications with procuring activities supports the D/GC's conclusion that GMT is unable to exercise independent business judgment. In addition, GMT "conducts no business and generates no revenue whatsoever on its own" and attributes all of its business and revenue to its joint venture with **←Singleton→**. Response, at 6.

Further, Mr. Thompson's résumé does not indicate that he has ever managed a construction project or performed a government contract. In contrast, Mr. **←Singleton→** possesses extensive construction management experience and has performed hundreds of federal construction contracts. As such, SBA asserts the D/GC did not commit clear error in concluding that **←Singleton→** and Mr. **←Singleton→** had the power to control GMT at the time of offer.

The SBA also argues that the D/GC's determination that Appellant's joint venture agreement was invalid under [13 C.F.R. § 121.103\(h\)](#) at the time of its bid submission should be affirmed.

Finally, SBA contends that Appellant's exhibits 5, 6, 7, and 13 should not be admitted as they are new evidence submitted for the first time on appeal and are beyond the written Protest File. [13 C.F.R. § 134.512](#).

IV. Discussion

A. Timeliness and Standard of Review

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](#).

The standard of review for SDVO SBC appeals is whether the D/GC's determination was based on clear error of fact or law. [13 C.F.R. § 134.508](#). In determining whether there is a clear error of fact or law, OHA does not evaluate whether a concern met the eligibility requirements of [13 C.F.R. §§ 125.9](#) and [125.10](#) *de novo*. Rather, OHA reviews the Record to determine whether the D/GC based his decision upon a clear error of fact or law. [13 C.F.R. § 134.508](#); see *Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-4775*, at 10-11 (2006) (discussing the clear error standard that is applicable to size appeals and SDVO SBC appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction the D/GC erred in making a key finding of law or fact.

B. New Evidence

As a threshold matter, Appellant's request to supplement the Record is DENIED. First, the Protest File already contains the following documents: Appellant's Attachments H, I, J, K, L and Exhibit 14. Some of these attachments were submitted as exhibits to the CO's protest [\[FN1\]](#) and others Appellant supplied to the D/GC. The remainder of Appellant's attachments is submitted for the first time on appeal and is excluded. OHA reviews only the evidence in the written Protest File, arguments made in the appeal petition and response(s) filed thereto. [13 C.F.R. § 134.512](#).

C. Merits of Appeal

An SDVO SBC is a concern that is small, at least fifty-one percent owned by one or more service-disabled veterans, and its management and daily business operations are controlled by one or more service-disabled veterans. [13 C.F.R. § 125.8\(g\)](#).

An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO SBC contract. [13 C.F.R. § 125.15\(b\)](#). Appellant is a joint venture composed of GMT and Singleton, an acknowledged non-SDVO SBC. Appellant's eligibility as an SDVO SBC thus hinges on GMT's eligibility as an SDVO SBC.

1. GMT's Compliance with [13 C.F.R. § 125.10](#)

The D/GC found GMT is a small concern at least fifty-one percent owned by a service-disabled veteran, Mr. Thompson. The D/GC, however, found GMT failed to comply with the requirement that its management and daily business operations were controlled by a service-disabled veteran, *i.e.*, Mr. Thompson. Accordingly, the issue on appeal is whether the D/GC committed clear error in determining GMT failed to comply with the control requirement in [13 C.F.R. § 125.10](#).

Control by one or more service-disabled veterans means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more service-disabled veterans. [13 C.F.R. § 125.10\(a\)](#). A service-disabled veteran must hold the highest officer position in the concern, usually president or chief executive officer. [13 C.F.R. § 125.10\(b\)](#). Further, the service-disabled veteran manager "must have managerial experience of the extent and complexity needed to run the concern." *Id.* The service-disabled veteran manager need not have the technical expertise or possess the required license to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise. *Id.*

Here, the D/GC found Mr. Thompson held the highest officer position but lacked the managerial experience and technical expertise to run GMT. In addition, the D/GC found Mr. Thompson cannot exercise independent business judgment over GMT without great economic risk because a non-service disabled veteran, Mr. Singleton, has the power to control GMT. See [Matter of Eason Enterprises OKC LLC, SBA No. SDV-102 \(2005\)](#) (*Eason*).

I find the D/GC did not commit clear error in finding Mr. Thompson does not have the managerial experience of the extent and complexity needed to operate and manage GMT. Mr. Thompson's résumé does not describe any experience as a general contractor or describe experience managing and coordinating subcontractors. Similarly, the Record contains no indication that Mr. Thompson has experience with Government construction contracts of the size and complexity as the one at issue. While Mr. Thompson's résumé shows he operated a plumbing business for approximately thirteen years (1987 - 2000) and thus has some experience bidding and performing plumbing work as a subcontractor, the scope and type of his experience is not detailed. Protest File, at 50. Specifically, there is no indication of how many employees, if any, Mr. Thompson managed in his plumbing business or the complexity of contracts performed.

In contrast, Mr. Singleton, the non-service disabled veteran, managed a commercial general contracting company for over twenty years, holds a bachelors and masters degree in construction, and has prepared over 2500 bid estimates on federal, state, and municipal government projects. Protest File, at 51.

Moreover, GMT was formed in May 2007 and the "only income realized by GMT, for the period ending 31 December 2007, was \$5,007 in prepaid expenses and \$327 in costs in excess of billings on a contract started by [Appellant] the third week of December." Protest File, at 10. Further, GMT's income "will come from 51% of the net profits it receives from SDVO SBC contracts that it performs with [Appellant], a joint venture." Protest File, at 10.

Thus, Appellant's own statements confirm that at the time of Appellant's offer GMT's economic viability was inextricably linked to GMT's joint venture with Singleton. Further, Appellant did not present any evidence of contracts performed independently by GMT or managed by Mr. Thompson independent of Mr. Singleton. GMT's economic dependence on its joint venture, coupled with Mr. Thompson's lack of general construction and managerial experience, supports the D/GC's finding that Mr. Thompson does not control GMT.

Therefore, I find the D/GC did not commit clear error in determining a service-disabled veteran does not control GMT and GMT is an ineligible SDVO SBC. Accordingly, Appellant is also an ineligible SDVO SBC joint venture under [13 C.F.R. § 125.15\(b\)](#) because neither GMT nor Singleton qualifies as an SDVO SBC.

2. Joint Venture Agreements

There are two joint venture agreements (JVA) between GMT and Singleton in the Record. The CO provided the first JVA, dated August 13, 2007, which the D/GC found violated [13 C.F.R. § 125.15\(b\)\(2\)\(h\)](#) because it does not designate an employee of GMT as the project manager. Instead, it provides that either Mr. Thompson or Mr. Singleton will be the project manager. However, I find the D/GC determination on this point is clearly erroneous because Appellant neither included nor incorporated by reference the August 13, 2007 JVA with its bid. Instead, the JVA was on file with the VA as it had been submitted with the award of two other contracts made by two other VA contracting officers. See *Singleton Enterprises-GMT Mechanical, A Joint Venture*, B-310552 (Jan. 10, 2008). Accordingly, the portion of the D/GC's determination addressing the August 13, 2007 JVA is REVERSED.

The second JVA in the Record is dated September 12, 2007. The September 12, 2007 JVA, paragraph 6.02, provides that either Mr. Thompson or an employee of the SDVO SBC will manage the SDVO SBC contracts. Appellant contends the September 12, 2007 JVA was the agreement in place at the time of its bid submission but notes that the CO did not request that it provide a joint venture agreement. Accordingly, I find the September 12, 2007 JVA applies to the procurement at issue and that it complies with [13 C.F.R. § 125.15\(b\)\(2\)\(ii\)](#).

The D/GC also found Appellant is ineligible to receive award of the contract under [13 C.F.R. § 121.103\(h\)](#) because Appellant as a joint venture entity had submitted more than three offers over a two year period. The D/GC's discussion of [13 C.F.R. § 121.103\(h\)](#) is clearly erroneous, because the D/GC lacks jurisdiction to decide issues of compliance with [13 C.F.R. § 121.103\(h\)](#). Specifically, compliance with joint venture rules is a size status issue exclusively within the purview of the responsible SBA Government Contracting Area Director or designee as provided in [13 C.F.R. § 125.11\(b\)](#) and [13 C.F.R. § 121.1002](#). Therefore, the D/GC was obligated to forward this portion of the protest to the responsible Government Contracting Area Director under [13 C.F.R. § 125.11\(b\)](#). Accordingly, this part of the D/GC's determination is REMANDED and the D/GC is ORDERED to refer Appellant's compliance with [13 C.F.R. § 121.103\(h\)](#) to the responsible Government Contracting Area Director.

3. Future SDVO SBC Procurements

SBA regulations unequivocally permit a concern to submit offers on *future* SDVO SBC procurements if it cures the eligibility issues and satisfies the definition of an SDVO SBC. [13 C.F.R. §§ 125.27\(g\), 125.28](#). Contrary to Appellant's arguments, the D/GC clearly referenced this allowance in the determination's conclusion, stating Appellant is "prohibited from submitting offers on future SDVO SBC procurements until such time as this determination is either overturned on appeal *or relief is granted under 13 C.F.R. § 125.27(g)*." Determination, at 5 (emphasis added). Therefore, I do not find any clear error with regard to this portion of the D/GC determination.

V. Conclusion

I hold Appellant has failed to establish any clear error of fact or law in the D/GC's determination concerning the ability of a service-disabled veteran to control GMT and Appellant. Accordingly, I AFFIRM the D/GC's finding that GMT and Appellant are ineligible SDVO SBCs.

However, as discussed above, I find: (1) the D/GC's finding with regard to Appellant's August 13, 2007 Joint Venture Agreement is clearly in error and REVERSE that part of the determination; and (2) the D/GC's discussion of the eligibility of Appellant pursuant to [13 C.F.R. § 121.103\(h\)](#) is clearly in error because it is outside the D/GC's jurisdiction and this part of the D/GC's determination is REMANDED and the D/GC is ORDERED to refer Appellant's compliance with [13 C.F.R. § 121.103\(h\)](#) to the responsible Government Contracting Area Director.

This is the final decision of the Small Business Administration. See [13 C.F.R. § 134.515\(a\)](#).
Thomas B. Pender
Administrative Judge


[FN1](#). With regard to Appellant's assertion it did not receive all of the CO's protest exhibits, I note Appellant attached the majority of these exhibits to its own appeal and the remainder of the CO's exhibits consisted of Appellant's offer on the instant and other VA solicitations. Accordingly, the error is harmless.

SBA No. VET-130, 2008 WL 1971367 (S.B.A.)

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Doc 1 of 16 

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