



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

VIA EMAIL

OCT 22 2013

Mr. Jason Harris
Battalion, LLC
2010 Kinvara Road
Pittsburgh, PA 15237

Re: Service-Disabled Veteran-Owned Small Business Status Protest Under Solicitation FA6712-13-R-0012

Dear Mr. Harris:

This letter is to notify you that based on the information provided to me in a protest filed by Douglas P. Fleming, LLC (DPF) in connection with Solicitation Number FA6712-13-R-0012) and your response to the protest, I have determined that Battalion, LLC (BATTALION) is not a service-disabled veteran-owned small business concern (SDVO SBC). As such, BATTALION is ineligible to bid for or perform SDVO SBC contracts. This determination will be effective immediately and is final unless overturned on appeal or unless relief is granted under 13 C.F.R. § 125.27(g). The following sets forth the basis for my decision.

BACKGROUND

1. **Pertinent Statutes and Regulations**

15 U.S.C. § 632(q) defines an SDVO SBC as a small business concern of which not less than 51% is owned by one or more service-disabled veterans and the management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

In accordance with SBA regulations, a service-disabled veteran's ownership interest in a small business concern must be held directly by her or him rather than being held through the means of an intervening entity. Additionally, when a concern takes the form of a limited liability company, "at least 51% of each class of member interest must be unconditionally owned by one or more service-disabled veterans." 13 C.F.R. § 125.9(c).

SBA regulations further state that the management and daily business operations of an SDVO SBC must be controlled by one or more service-disabled veterans or a

veteran's spouse or permanent caregiver in cases of permanent and severe disability. 13 C.F.R. § 125.10 Moreover, 13 C.F.R. § 125.10(b) stipulates that a service-disabled veteran must hold the highest officer position in the concern and must possess managerial experience of the extent and complexity needed to run the concern.

Where a concern takes the form of a limited liability company, SBA's regulations specify that one or more service-disabled veterans or a veteran's spouse or permanent caregiver in cases of permanent and severe disability must also "serve as managing members, with control over all decisions of the limited liability company." 13 C.F.R. § 125.10(d).

2. Protest Allegations and Requests for Information

As authorized by 13 C.F.R. § 125.25, DPF filed its protest alleging that BATTALION is not unconditionally owned, managed and controlled by a disabled veteran. DPF's protest claims that BATTALION is ineligible for award under the terms of the solicitation and applicable Federal regulations because the firm is intricately connected to Sota Construction Services, Inc. (SCS). According to DPF, BATTALION is "misrepresenting their firm (1) as a Service Disabled Veteran "Controlled" Small Business concern and as (2) being affiliated with Sota Construction Services working as one of their full time employee[s]..." DPF alleged that the Service-Disabled Veteran (SDV) owner of BATTALION, Jason Harris, aka Jay Harris, is a full time employee of SCS. DPF alleged that Jay Harris represented himself on April 29, 2013, as an employee of SCS, with an SCS address and telephone number. DPF alleged that BATTALION's address at 2010 Kinvara Road, Pittsburgh, PA is owned by Green Development, Inc. of 80 Union Avenue, Pittsburgh, PA, whose President and Treasurer is Ernest J. Sota, the 49% owner of BATTALION. DPF alleged that because BATTALION and SCS are intricately connected through location and ownership, BATTALION is not an eligible SDVO SBC.

SBA therefore requested that BATTALION provide supporting documentation demonstrating that the company is in fact owned and controlled by one or more service-disabled veterans. In response to the protest, BATTALION submitted the following information:

1. Copy of a cover letter addressed to the attention of Ms. Judith Roussel, Director, Office of Government Contracting, dated September 6, 2013;
2. Copy of a letter from the Department of Veterans Affairs (VA), dated March 23, 2012;
3. Copy of a letter from the VA, Center for Veterans Enterprise (CVE), dated March 1, 2013;
4. Copies of rent check payments for property located at 165 Royal Oak Drive, White Oak, PA, dated 4/27/12, 6/1/12, and 7/1/12;

5. Copy of bank account registration and agreement for BATTALION, dated May 8, 2012;
6. Copy of Commonwealth of Pennsylvania Department of State, Subsistence Certificate for BATALLION, dated June 29, 2012;
7. Copy of Pennsylvania Department of State, Corporation Bureau Certificate of Organization for BATTALION, dated April 19, 2012;
8. Copy of City of Pittsburgh, Department of Finance, Office of City Treasurer, contractor's license, dated May 14, 2012;
9. Copy of City of Pittsburgh, Bureau of Building Inspection, General Contractor Registration, dated June 6, 2012;
10. Copy of Department of the Treasury, Employer Identification Number notice for BATTALION, dated April 26, 2012;
11. Copy of 2012 Federal tax returns for BATTALION;
12. Copy of Operating Agreement of BATTALION, dated April 19, 2012;
13. Resumes for Jay Harris and Kenneth Finney;
14. Copy of Lease Agreement for office space located at 2010 Kinvara Drive, Pittsburgh, PA, dated June 25, 2013;
15. Copy of BATTALION's proposal in connection with Solicitation Number FA6712-13-R-0012, which included a resume for Ernest J. Sota;
16. Copy of a BATALLION letter responding to "questions asked under Section 1 of the Additional Document Request" dated June 29, 2012;
17. Copy of a second BATALLION letter responding to "questions asked under Section 1 of the Additional Document Request" dated June 29, 2012,;
18. Copy of an email communication chain between SBA and BATALLION last dated September 26, 2013;
19. Copies of BATALLION response letters dated September 12 and September 26, 2013;
20. Copy of BATALLION checking account statement dated August 30, 2013; and,
21. Copies of 2011 and 2012 W-2's for Jason L. Harris.

ELIGIBILITY DETERMINATION

1. Service-Disabled Veteran Status

Pursuant to 13 C.F.R. 125.8, a firm's SDVO SBC eligibility is predicated upon its ownership and control by one or more veterans who possess disabilities that are service related. In response to the protest, BATTALION has submitted a copy of a letter from the Department of Veterans Affairs (VA). This document attests to your service-connected disability. I must therefore conclude that you are a service-disabled veteran as that term is defined by 15 U.S.C. § 632(q) and 13 C.F.R. § 125.8. As such, BATTALION has satisfied this element of eligibility.

2. Ownership

BATTALION is a limited liability corporation organized under the laws of the State of Pennsylvania. In accordance with 13 C.F.R. § 125.9(c), one or more service-disabled veterans must directly and unconditionally own at least 51% of each class of member interest in an SDVO SBC. The Operating Agreement for BATTALION demonstrates that you, Mr. Harris, directly own 51% of the firm's Class A membership units and that the remaining 49% is owned by Ernest J. Sota. BATTALION reports no capital contributions to the firm from you, Mr. Harris, or Mr. Sota. It appears that a service-disabled veteran directly owns at least 51% of each class of membership interest in BATTALION. I must therefore conclude that a service-disabled veteran directly owns at least 51% of BATTALION as required by 13 C.F.R. §125.9. As such, BATTALION has satisfied this element of eligibility.

3. Control

SBA regulations require that a service-disabled veteran control the firm. 13 C.F.R. § 125.10. Specifically, 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). The SBA Office of Hearings and Appeals (OHA) has stated that, "[t]he general requirement that the service-disabled veteran actually control the company is important, and SBA will go behind the corporate formalities to establish that a service-disabled veteran actually controls the firm." *Matter of Markon, Inc.*, SBA No. Vet. 158 at p. 5 (2009). SBA regulations also state that:

A service-disabled veteran (or in the case of a service-disabled veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and complexity needed to run the concern. The service-disabled veteran manager (or in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran) need not have the technical expertise or possess the required license to be found 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.
13 C.F.R. § 125.10(b).

In order to control a SDVO SBC, a service-disabled veteran must “hold the highest officer position in the concern (usually Chief Executive Officer or President).” 13 C.F.R. § 125.10(b). Section 8.1 of BATTALION’s Operating Agreement states, “[t]o the extent that the Class A Members have elected to delegate responsibility of certain aspects of the Company’s business to officers of the Company in accordance with Section 7.1 hereof, the provisions of Section 8.2 and the following provisions of this Section 8.1 shall apply:...(a) Number and Election, (b) Term of Office, (c) Managing Member, (d) Vice Presidents, (e) Secretary, (f) Treasurer, (g) Assistant Officers.” The Operating Agreement is silent as to who the officers of BATTALION are. Additionally, the information provided to the SBA does not show that any officers have been appointed. BATTALION has not submitted meeting minutes evidencing that votes were taken to appoint officers. The only document submitted that evidences the roles and responsibilities of BATTALION’s officers and management by members is the Operating Agreement. Therefore, there is no evidence to indicate that you hold the highest officer position in the firm as required by SBA regulations.

BATTALION’s Operating Agreement allows voting by an “Act of the Members.” Section 9.1 of the Operating Agreement provides that an “Act of the Members” consists of a majority vote of the Class A Membership Units present at a properly called meeting of the Class A Members, or when a quorum is present, or written action without a meeting. Special meetings of Class A Members may be called for any purpose by the Managing Member, or by one or more Class A Members owning at least 10% of the Membership Units. Additionally, Section 9.9 states that an Action Without a Meeting allows written action to be taken by fewer than all Class A Members. Section 15.1 requires that any amendment to the Operating Agreement must be approved unanimously by all Members.

Furthermore, it is typical for the officers of a company to be employed by that firm. Here, there is no evidence that you are actually employed by BATTALION. In fact, BATTALION has no employees at all. Your resume shows that you formed BATTALION in 2012, but the W-2’s submitted do not evidence you being an employee of BATTALION. In fact, your W-2’s were issued by SCS. You claim to be BATTALION’s majority Managing Member, and in charge of all decisions of the firm, while not being employed by the company.

SBA regulations also require that a service-disabled veteran control “both the long-term decision making and the day-to-day management and administration of the business operations.” 13 C.F.R. § 125.10(a). BATTALION’s Operating Agreement indicates that you are the 51% owner of the firm and your resume indicates that you formed BATTALION in 2012. Your resume also indicates that you were employed as a project manager and business development manager with SCS from 2011-2012. You have stated that you currently provide consulting services to SCS as needed and the record shows that you have been identified as a representative of SCS within the last five

months at a public housing forum. As a current representative of SCS, you are subordinate to the officers of that firm. Moreover, BATTALION's Operating Agreement allows actions to be taken with the presence of fewer than all Class A Members, and it requires unanimous approval by all Members to amend the Operating Agreement. For these reasons, I have determined that you are not in charge of the long-term decision making and the day-to-day management of BATTALION.

SBA's Office of Hearings and Appeals has recognized that the 8(a) Business Development ("BD") and Small Disadvantaged Business ("SDB") regulations may be used to interpret requirements of the SDVO SBC program. *See, e.g., Matter of Eason Enterprises OKC LLC*, SBA No. VET-102 (2005). SBA regulations state:

Non-disadvantaged individuals may be involved in the management of an applicant or Participant, and may be stockholders, partners, limited liability members, officers, and/or directors of the applicant or Participant. However, no such non-disadvantaged individual or immediate family member may... (2) Be a former employer or a principal of a former employer of any disadvantaged owner of the applicant or Participant, unless it is determined by the AA/BD that the relationship between the former employer or principal and the disadvantaged individual or applicant concern does not give the former employer control or the potential to control the applicant or Participant and such relationship is in the best interests of the 8(a) BD firm. 13 C.F.R. § 124.106 (e)(2).

Here, Mr. Sota, the owner of SCS, has a 49% ownership interest in BATTALION. As stated above, you have indicated that you currently represent SCS as needed as a project manager. The facts in this case show that you, as recently as five months ago, have publically connected your name with SCS and made available an address, email address and phone number for you at SCS. SCS is not only your former, but current employer. As a current employee of SCS, you are subordinate to the officers of that firm. For this reason, I have found that SCS and its officers either have control or the potential to control BATTALION.

SBA regulations also state that a non-disadvantaged entity may be found to control a company if the non-disadvantaged entity "provides critical financial or bonding support... which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant." 13 C.F.R. § 124.106 (g)(2). The ownership interests by you, Mr. Harris, and Mr. Sota, were obtained with no financial obligations; no ownership capital contributions are on record as having been funded by either party. BATTALION has provided a recent bank statement showing funds available to begin the proposed work, but offers no evidence of the source of the funding. Mr. Sota has provided the bid bonding for BATTALION for the offer in connection with Solicitation Number FA6712-13-R-0012. SCS has provided BATTALION with critical financial support; there is no evidence of any other source of critical financing. Therefore, I have determined that Mr. Sota, by way of SCS, has the ability to significantly influence BATTALION's operations.

SBA may find that a non-disadvantaged entity has control over a firm if “Business relationships exist with non-disadvantaged individuals or entities which cause such dependence that the applicant or Participant cannot exercise independent business judgment without great economic risk.” 13 C.F.R. § 124.106 (g)(4). Here, SCS has significant business relationships with BATTALION that have caused BATTALION to become dependent on SCS.

BATTALION is dependent on Mr. Sota for office facilities. BATTALION leases office space located at 2010 Kinvara Road, Pittsburgh, PA from One80 Real Estate Services, a firm that, according to public documents, is owned by SCS. Although a lease agreement was provided, BATTALION has failed to provide SBA with evidence to account for actual rent payments for the leased space. While SCS, by way of BATTALION’s 49% owner, has contributed critical office facilities to BATTALION, your member contribution cannot be substantiated by the facts provided, other than your industry experience and knowledge as listed in your resume.

This information has led me to conclude that Mr. Sota, and not you, controls BATTALION. For these reasons, I must conclude that a service-disabled veteran does not control BATTALION as required by 13 C.F.R. §§ 125.10 and 124.106. As such, BATTALION has not met this required element of eligibility.

CONCLUSION

Based upon the information contained in the record before me, I have determined that a service-disabled veteran did not control the firm at the time of offer. Therefore, BATTALION does not meet the eligibility requirements of a SDVO SBC as established by 13 C.F.R. §§ 125.10 and 124.106.

BATTALION was thus ineligible to receive an award under the subject solicitation and effective immediately BATTALION is prohibited from submitting offers on future SDVO SBC procurements. This determination is effective immediately and represents the final SBA decision on this matter unless it is overturned on appeal or relief is granted pursuant to 13 C.F.R. § 125.27(g).

Furthermore, because SBA has sustained this protest, BATTALION must immediately update its System for Award Management, or SAM.gov entry to reflect the fact the firm is no longer entitled to claim that it is an SDVO SBC for purposes of federal procurement opportunities.

Please be advised that the Small Business Act provides severe criminal, civil, and administrative remedies/penalties for misrepresentations of SDVO SBC status. 15 U.S.C. §§ 657f(d), 637(m)(5), and 645(d). As such, please correct your SAM.gov profile immediately.

APPEAL RIGHTS

BATALION, the contracting officer (CO), or DPF may appeal this decision pursuant to 13 C.F.R. § 125.28. All appeals must be submitted to OHA in writing or email within 10 business days of the date of receipt of this letter. An appeal petition may be sent via U.S. mail, hand-delivery, or facsimile. OHA accepts filings Monday through Friday between the hours of 8:30 a.m. and 5:00 p.m. Eastern Time at the following address: Docketing Clerk, OHA, U.S. Small Business Administration, 409 3rd Street, SW, 8th Floor, Washington, DC 20416-0005; by facsimile at (202) 205-7059, or by e-mail to: OHAFilings@SBA.gov. OHA's telephone number is (202) 401-8200. SBA will dismiss any appeal received after the 10-day filing period has expired.

Recent changes to the Office of Hearings and Appeals (OHA) procedure regulations now allow emailing as an additional method of filing or service. When email filings are received by OHA, at OHAFilings@sba.gov, the party should receive a notice of receipt. Some filings emailed to OHA have not been successfully transmitted due to the size or content of the email. In accordance with 13 C.F.R. § 134.204(a), "The sender is responsible for ensuring that e-mail software and file formats are compatible with the recipient and for a successful, virus-free transmission." We encourage a party to call OHA, (202) 401-8200, to confirm receipt of a filing, especially in the case of an appeal petition which must be received by OHA before the filing deadline.

Pursuant to 13 C.F.R. § 134.505(b)(1), any party appealing this determination must also provide a copy of its appeal petition to each of the following: (1) the Director for Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205-6390; (2) the Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205-6873; (3) the CO responsible for the procurement affected by this determination; and (4) the protested concern or the protester, as appropriate.

If you believe your small business has been the subject of excessive or unfair regulatory enforcement or compliance actions as a result of this decision, you have the right under the Small Business Regulatory Enforcement Fairness Act to file a complaint or comment with SBA's National Ombudsman at:


Office of the National Ombudsman
U.S. Small Business Administration
409 Third St. SW
Washington, DC 20416
PH: 1-888-734-3247
FX: 1-202-481-5719
EM: ombudsman@sba.gov

The right to file a complaint or comment with SBA's National Ombudsman is independent of any other rights you may have to contest this decision. The National

Ombudsman may not change, stop, or delay a Federal agency's enforcement action or impede any administrative or criminal process.

If you have any questions concerning this determination, please contact Amy Garcia at amy.garcia@sba.gov or 202/205-6842.

Sincerely,

A handwritten signature in black ink, appearing to read "Judith A. Roussel". The signature is stylized and includes a large flourish at the end.

Judith A. Roussel, Director
Office of Government Contracting

Enclosure

cc (via facsimile):

Daniel Lucci, Contracting Officer
Department of the Air Force

Douglas P. Fleming
Douglas P. Fleming, LLC

Center for Veterans Enterprise
Department of Veterans Affairs