

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

CVE Appeal of :

Barry Capital Projects, Inc.,

Appellant,

SBA No. CVE-106-A

Decided: April 8, 2019

APPEARANCE

Mark Barry, President, Barry Capital Projects, Inc., Saint Paul, Minnesota, for Appellant

DECISION

I. Introduction and Jurisdiction

On January 4, 2019, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a letter denying Barry Capital Projects, Inc. (Appellant) inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP). On January 9, 2019, Appellant appealed the denial to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA).

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB appeals under the authority of 38 U.S.C. § 8127, and 13 C.F.R. § 134.102(u).¹

II. Background

a. Appellant's CVE Verification History

On August 23, 2013, VA CVE notified Appellant it was verified and added to VIP, effective for two years. (Case File (CF), Ex. 75.) Appellant was instructed to inform CVE of any changes or circumstances that might affect eligibility to participate in the VIP program. (*Id.*) On August 10, 2015, VA informed Appellant its application for renewal was approved and Appellant remained eligible to participate in Veterans First Contract opportunities with VA as an SDVOSB for two years following the notice. (CF, Ex. 120.) Appellant was instructed it could

¹ On October 1, 2018, 13 C.F.R. § 134.102(u) took effect, establishing OHA's jurisdiction over protests of eligibility for inclusion in the Department of Veterans Affairs Center for Verification and Evaluation (CVE) database. 83 Fed. Reg. 13626, 13628 (Mar. 30, 2018).

reapply 120 days prior to the new expiration date and given a link to a logo to use in marketing materials. (*Id.*) Appellant was once again instructed to inform CVE of any changes that would affect eligibility. (*Id.*) On April 12, 2018, CVE informed Appellant its three-year eligibility period would expire in 120 days and required Appellant to apply for reverification.² (CF, Ex. 121.) CVE followed up with a 90-day expiration notice letter and a 30-day expiration notice letter in May and July, respectively. (CF, Ex. 122, 123.)

b. Instant CVE Application for Recertification

On August 1, 2018, Mark Barry, Appellant's president, submitted a Form 0877. CVE requires each stockholder of a company seeking application to VIP submit this form to allow CVE personnel access to company records. (CF, Ex. 135.) Mr. Barry identified himself as Appellant's 65% owner and a Service-Disabled Veteran (SDV). (*Id.*) Mr. Barry also submitted his resume identifying himself as Appellant's President and describing his duties and responsibilities. (CF, Ex. 134.) Linda Barry submitted a resume identifying herself as Appellant's Secretary/Treasurer. (CF, Ex. 136.) Ms. Barry also submitted a Form 0877 on August 1, 2018 which identified her as a 10% owner of Appellant and a non-veteran for purposes of the CVE program. (CF, Ex. 137.) John Barry submitted a resume, listing himself as Appellant's Vice President of Operations. (CF, Ex. 138.) On August 18, 2018, John Barry submitted a Form 0877 showing he owns 25% and is not a veteran (non-SDV) for purposes of CVE. (CF, Ex. 139.) Along with these forms and resumes, Appellant submitted 2015, 2016, and 2017 IRS and Minnesota State tax forms and returns for the company, Linda and Mark Barry's IRS and state tax returns, four proposals and signed contracts between Appellant and customers, and a Residential Building Contractor license for Appellant (valid through March 2020). (CF Exs. 124-133.) Appellant is listed in the VIP system as "an SDVOSB specializing in residential construction and remodeling." On the System for Award Management (SAM) Appellant identified North American Industrial Classification System Code 236118, Residential Remodelers as its primary code. On August 19, 2005, Appellant incorporated in the State of Minnesota. (CF, Ex. 142.) On August 1, 2018, CVE informed Appellant via automated message its reverification has been submitted. (CF, Ex. 141.) Appellant elected to participate in CVE's Post-Review Findings (PRF) Program. (CF, Ex. 155.)³

² The eligibility period was extended from two years to three years, effective July 17, 2017. 82 FR 32137, 32138 (July 17, 2017); 38 C.F.R. § 74.15(a).

³ CVE implements the PRF program to reduce denials. PRF allows applicants to address and correct issues with their application before the decision is made. When an issue is identified during an assessment, CVE reaches out to the applicant and allows the applicant five days to address the issue. The applicant can then withdraw and reapply or accept an official denial letter and submit a Request for Reconsideration.
https://www.va.gov/osdbu/verification/you_asked_we_listened.asp)

c. CVE's Review

When CVE during its review checked Appellant's VIP database it showed no outstanding financial obligations. (CF, Ex. 158, at page 12.) The SAM profile indicated Appellant has a "Debt Subject to Offset." (*Id.*) When CVE contacted Appellant regarding this issue, Appellant responded it was "unaware of any debt." (*Id.*, at 13.)

CVE also found that based on its research, Appellant was in good standing on the Minnesota Secretary of State's Website. (*Id.*, at 16.) CVE noted Appellant's Business License Declaration, a form CVE applicants are required to submit, was signed by Mark Barry on August 17, 2018. (*Id.*) This Declaration instructs applicants to check a box if their business "is not required to obtain any permits, licenses, or charters" in order to operate. (CF, Ex. 147.) The box attesting a business is not required to obtain permits was left unchecked by Appellant. (*Id.*) CVE verified Appellant had the Residential Building Contractor License in Minnesota but noted on Minnesota Department of Labor and Industry's site, John Barry was the individual listed on the site as responsible for the permit. (*Id.*)

d. PRF Notice and Appellant's Response to Notice

CVE sent its initial PRF e-mail to Appellant on December 11, 2018 identifying the issues uncovered during its review. Appellant responded to the issues with a Detailed Letter of Explanation (DLOE)/Notice Response on December 18, 2018. (CF, Ex. 156.) First, Appellant addressed the debt on its System for Award Management (SAM) profile indicating Appellant owed a penalty for the late submission of Q3 2016 payroll taxes. (*Id.*) Appellant stated the penalty and interest were paid by check on December 14, 2018. (*Id.*)

Appellant next addressed CVE's finding regarding the day to day management and administration of the company. (*Id.*) Appellant maintained Mr. Berry, as president, was "in control of all decisions related to what business is to be perused [sic]⁴ and create and approve all contracts for work to be performed." (*Id.*) Appellant described John Barry as a "primary lead that coordinates most projects." (*Id.*) Appellant asserts Mr. Barry reviews project financials at the completion of each project. (*Id.*) Appellant also explains that Mr. Barry works 20-100 hours per week because residential remodeling, Appellant's main source of business, is cyclical with high demand from March to October and limited demand from November to February. (*Id.*)

Appellant went on to address why its Minnesota Residential Building Contractor License identifies John Barry, rather than Mark Barry, as the Qualified Business Individual for Appellant. (*Id.*) Appellant maintains that it can have as many licensed employees as it chooses, and Appellant need not be licensed to be in business, and the license merely allows the holder to "pull building permits" and some projects do not require permits at all. (*Id.*) Appellant also argues it employs other licensed carpenters and hires subcontractors with license in their trades. (*Id.*) Appellant described the need for a Veteran to hold a professional certification "an unrealistic expectation." (*Id.*)

⁴ I suspect Appellant meant "pursued."

e. CVE Determination Letter

After receiving the final PRF Notice, Appellant chose to accept a determination letter and indicate it understood it could submit an appeal with OHA or wait six months before a new application would be processed. (CF, Ex. 157.)

On January 4, 2019, CVE issued its Determination Letter, denying Appellant's application for inclusion as an SDVOSB in VA's VIP system. (Determination, at 1.) CVE confirmed Mr. Barry met the definition of a Service-Disabled Veteran under 38 C.F.R. § 74.1 and 13 C.F.R. Part 125, but CVE was unable to conclude that Appellant as a company met the requirements set forth in 38 C.F.R. Parts 74 and 125 based on four counts of non-compliance. (*Id.*)

First, CVE found Appellant had not satisfied the requirements of 38 C.F.R. § 74.2(d), which states, “neither an applicant firm nor any of its eligible individuals that fails to pay significant financial obligations, including unresolved tax liens and defaults on Federal loans or State or other government assisted financing, owed to the federal government. . . is eligible for VIP Verification.” (*Id.*) CVE determined the flag within SAM was a penalty related to late payroll taxes from 2016. Appellant informed CVE on December 18, 2018 it had paid the penalty and interest by check on December 14, 2018. (*Id.*, at 2.) Notwithstanding this assertion from Appellant, CVE held that it could not conclude 38 C.F.R. § 74.2(d) was satisfied because Appellant did not submit official documentation establishing the debt was satisfied, such as a cancelled check or letter from the entity to whom the debt was owed. (*Id.*)

Next, CVE held it was unable to “reasonably conclude that Mr. Mark Barry (Service-Disabled Veteran) conducts daily business operations” as required by 13 C.F.R. § 125.13(a). Under 13 C.F.R. § 125.13(a), a business is only an eligible SDVO Small Business Concern if management and daily business operations of the concern are controlled by one or more service-disabled veterans. Appellant represented to CVE that day to day management and administration was controlled by Mark Barry, the SDV, during all hours of company operation, which varied from 20 to 100 hours per week due to the cyclical/seasonal nature of the residential remodeling business in Minnesota. (*Id.*) CVE found Appellant's explanation was insufficient because Appellant did not supply a work schedule for Mr. Barry, including the days of the week and hours of the day he worked. (*Id.*, at 3.) Management can be delegated, CVE explains, but without a work schedule CVE could not conclude Mr. Barry as the SDV is present at the business during its hours of operation. (*Id.*)

CVE also concluded Appellant had not met the requirements of 13 C.F.R. § 125.13(b) which states the SDV upon whom a concern's claim of eligibility is based “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.” CVE was unable to conclude Mr. Barry, as the SDV, has the supervisory control over those individuals who possess required licenses. (*Id.*) Appellant's explanation that Mr. Barry need not be licensed to be in business did not persuade CVE. CVE explained in order to have “supervisory control” as

anticipated by the regulation, the SDV must be able to show he is able to direct licensed employees in performing work. (*Id.*, at 4.) CVE pointed out Minnesota Statute § 326B.805 requires residential building contractors be licensed. (*Id.*) Mr. Barry, the SDV, is not the qualifying party on Appellant's residential building contractor license, his son John Barry, a nonveteran is. (*Id.*) CVE concluded Mr. Barry could not supervise John Barry and thus does not have supervisory control over the non-Veteran, therefore Appellant did not meet the control requirements of 13 C.F.R. § 125.13(b). (*Id.*)

CVE countered Appellant's assertion that some projects do not require a license by noting 13 C.F.R. § 125.13(i)(6) defines a critical license as one normally required by firms in a field or industry, regardless of whether it is required by a specific contract. (*Id.*, at 5.) CVE reasoned Appellant is a residential building contractor and as such is required to be licensed in Minnesota. Only the 25% owner, John Barry, a non-Veteran, is the qualifying party on the license, and holds equity interest. (*Id.*) CVE concluded Appellant failed to demonstrate how John Barry's position as an owner and qualifying party on the license does not give him control over the company. (*Id.*)

CVE further found it was unable to reasonably discount that business relationships with non-SDV individuals or entities which could cause dependence or prevent an SDV from exercising independent judgment without great economic risk existed. (*Id.*) Mr. Barry alleged he makes all decisions regarding business development and contracts, negotiates contracts and determines profitability upon completing: John Barry, the non-Veteran and VP of Operations coordinates and oversees projects. (*Id.*) Once again, CVE pointed out Appellant did not provide Mr. Barry's complete work schedule. (*Id.*) CVE found it was unclear whether Mr. Barry could operate the business viably without John Barry's support, thus CVE found Appellant did not comply with the requirements of 13 C.F.R. § 125.13(i)(7). (*Id.*)

CVE denied Appellant's application based on the totality of the circumstances under 38 C.F.R. § 74.11(d). Appellant was instructed its options were to appeal the decision, or wait an additional six months and reapply.

f. Appeal

On January 9, 2019, Appellant filed the instant appeal. Appellant first addressed the issue of the unpaid debt. Appellant alleges the check for penalties related to unpaid payroll taxes cleared Appellant's bank account on December 20, 2018, and the flag was cleared from SAM's website by January 5, 2019. Since Appellant's certification was set to expire in February 2019, Appellant maintains CVE should have waited to "see what happens" before issuing its final notice. (Appeal, at 2.)

Appellant argues the CVE reviewer was incorrect because Mr. Barry controls the board, the majority of shares, and managerial responsibilities. (*Id.*) Appellant describes Mr. Barry as senior management whose role is to "make sure the company pipeline of work continues." (*Id.*) Appellant alleges John Barry "performs the tactical work of project management," including coordination of labor and materials, but John Barry "does not negotiate prices or milestones for contracts." (*Id.*) Appellant disagrees with CVE's finding that it could not

conclude Mr. Barry controlled the company because Appellant did not submit a description of Mr. Barry's weekly hours. (*Id.*) Appellant insists Mr. Barry works “as needed” from 20 to 10 hours a week based on the fluctuating needs of residential remodeling work in Minnesota, and while reporting a 40 hour a week schedule would satisfy the CVE process, it chose “not to lie.” (*Id.*) Appellant argues the fact it could not condense Mr. Barry's responsibilities to a forty-hour workweek does not indicate “someone else is in charge of strategic level management.” (*Id.*, at 3.)

Appellant next addresses CVE's findings regarding John Barry's holding the residential building contractor license. Appellant argues his managerial control trumps John Barry's tactical operation supervision. (*Id.*, at 3.) Appellant maintains 13 C.F.R. § 125.13(g) does not require the qualifying veteran personally hold a permit or license. (*Id.*) Appellant asserts it holds the license and the license is of no value to John Barry if he leaves the company. If John Barry were to leave, Appellant has 15 days to notify the licensing agency and replace John Barry. Appellant notes it subcontracts with other licensed vendors such as plumbers and electricians for work, without holding licenses for those specialties. (*Id.*) The subcontractors can “pull permits for all the work Appellant needed done. (*Id.*)

Appellant points out John Barry is not on the Board of Directors, is a minority shareholder and is under the direction of the President, working under a license owned by the company. (*Id.*) Appellant argues CVE's findings “stretch the truth to the breaking point. If this type of logic is allowed to persist than [sic]⁵ no company could ever qualify for certification.” (*Id.*, at 4.) Appellant then notes Mr. Barry started Appellant after a 30-year career as a civil servant, mostly as an IT manager, and holds a BA in Business and an MBA. (*Id.*) Appellant notes it is “insulting some GS-5 clerk can jump down a rabbit hole and go on this trip saying in any way that [Mr. Barry is] subordinate to John Barry.”

Appellant describes CVE's final holding that it could not determine whether Mr. Barry could operate the business viably without the support of John Barry as “made up assumption of how [the] company should operate,” and “absurd.” (*Id.*) Appellant requested the reviewer be sanctioned. (*Id.*) Appellant insisted Mr. Barry was of sound mind and capable of “making a decision without direction from John Barry or anyone else.” (*Id.*)

Appellant requested CVE's findings be invalidated and its SDVOSB certification restored with no break from Appellant's initial certification date. (*Id.*)

Appellant also requested VA change its policy for various VA-administered programs that provide adaptive housing for Veterans. (*Id.*, at 5.) Appellant also takes issue with the number of reviewers used by CVE, that CVE took issue with things that it had not before, and that PRF notice letters are sent out undated, unsigned, and as PDF attachments. (*Id.*, at 1.)

⁵ I suspect Appellant meant “then.”

III. Discussion

A. Burden of Proof

Appellant has the burden of proving CVE's denial or cancellation was based on a clear error of fact or law by a preponderance of the evidence. 13 C.F.R. § 134.1111. OHA's decision is generally based on evidence in the CVE case file, arguments made on appeal, and any responses thereto. 13 C.F.R. § 134.1112(c).

B. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more service-disabled veterans. 38 C.F.R. § 74.2(a); 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Alpha4 Solutions, LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019); *CVE Protest of Blue Cord Design and Constr., LLC*, SBA No. CVE-100-P (2018).

CVE analyses control based on SBA's SDBVO SBC regulation found at 13 C.F.R. Part 125. (Determinations on eligibility prior to October 1, 2018 are based upon the VA's regulations at 38 C.F.R. § 74.4.) One of the factors which determines whether the SDV controls the subject concern focuses on whether the SDV possesses the licenses required to maintain the business, and if not, whether the SDV has control over those who do. The SDV manager “need not have the technical expertise or possess the required license to be found to control the concern if the [SDV] can demonstrate that he or she has the ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.” 13 C.F.R. § 125.13(b). There is a rebuttable presumption that a non-SDV controls or has the power to control a concern when “a critical license is held by a non-service-disabled individual.” 13 C.F.R. § 125.13(i)(6). A critical license is any license normally required of firms in the field or in the industry, despite the need for a license on a specific contract. (*Id.*)

Rather than rebut CVE's conclusions regarding the SDV's managerial control over a non-SDV who holds the required license, Appellant made several other arguments about the residential license. Appellant argues first that a residential remodeling license is not required for the business, and that although the license lists John Barry, a non-SDV, as the qualifying person,⁶ the license is owned by Appellant company, and Mr. Barry, an SDV, has ultimate control. A license, however, is required based on the state where Appellant works and is incorporated. Minnesota requires “a person who meets the definition of a residential remodeler be licensed by the state.” MINN. STAT. § 326B.805. Minnesota statutes define “residential remodeler” as one “in the business of contracting or offering to contract with an owner to improve existing residential real estate by proving two or more special skills.” MINN. STAT. § 326B.802. Thus, it is the residential remodeler license which is the critical license for entities operating in the field of residential remodeling, and as such an SDVOSB in that industry must

⁶ A qualifying person, for purposes of Minnesota's permitting statutes, is defined as “the individual who fulfils the examination and education requirements for licensure on behalf of the licensee.” MINN. STAT. § 326B.802.

possess such a license to be eligible for inclusion in CVE's VIP database. The question, then, is whether Mr. Barry, as the SDV, has managerial and supervisory control over non-SDV, John Barry, who is listed as the qualifying person on the license. If the non-SDV left the company, Appellant would not be allowed to perform its work in Minnesota, based on Minnesota's statutes regarding residential remodelers. Along those lines, Appellant argues, without any supporting information, the qualifying person could be replaced within a fifteen-day window, and thus Appellant would maintain the license even if John Barry left the company.

Appellant finally insists the regulations do not require the SDV hold the required license. CVE conceded that point, but noted the regulation requires the SDV to maintain managerial control over a non-SDV who is the qualifying person on a required license. Instead of detailing how the SDV maintained managerial control, Appellant made unnecessary arguments regarding the licensing regulation. The burden was on Appellant to rebut the presumption, which Appellant failed to do during the review process or in its Appeal before OHA. CVE reasonably concluded it could not determine a non-SDV did not have significant control over the daily operations, based on the non-SDV being the qualifying person on the critical license.

Regarding the lack of description of work hours, Appellant misinterprets CVE's request for a detailed work hours summary. Based on CVE's PRF narrative and denial, CVE has not taken issue with the range of hours Mr. Barry works, rather CVE requested, but did not receive, a detailed description of Mr. Barry's weekly schedule, which was not simply a request that Mr. Barry work a set number of hours every week. (*Id.*) The lack of information led CVE to deny Applicant's inclusion in the database, because it could not determine whether the SDV exerted daily managerial and administrative control over the entity. I find the CVE did not err, because it made an adverse inference due to not having relevant information available for its analysis. It is understandable, as Appellant points out, that based on the seasonal nature of residential remodeling in Minnesota, that Mr. Barry's hours would fluctuate based on demand and the ability to complete tasks. Appellant did not indicate that it would be impossible to submit a sample weekly schedule to CVE, rather Appellant focused on the varying nature of the business to excuse its failure to submit any schedule at all. A sample schedule, with an explanation regarding the cyclical nature of the business, would have given CVE some basis to make a thorough analysis of control. Without one, CVE's refusal to conclude the SDV controlled the day to day managerial and administrative functions, was reasonable and not in error.

CVE applicants are required to submit "supplemental documentation as CVE requires." 38 C.F.R. § 74.12. The onus is on Appellant to submit information regarding its suitability for the CVE VIP database, and how the CVE's decision to exclude the entity was in error. 13 C.F.R. § 134.1111. Appellant did not offer check stubs, bank statements, or a letter from the debtor to indicate the debt which was identified by a SAM alert had been satisfied to be in compliance with 38 C.F.R. § 74.2(d) during the application process, or in the period following the post review notice. Applicants are given five days to respond to issues presented by CVE. Applicant submitted a letter of explanation, without supporting documentation on December 18th, well after it received notice. Further, Appellant's assertion CVE should have waited "to see what happens" to the SAM notification is misguided. Again, Appellant bears the burden of indicating it is eligible for the CVE database. I find no error in CVE's conclusion.

Finally, OHA will not consider issues raised in the appeal regarding the number of reviewers used, the transmittal of PRF notices by CVE, or Appellant's suggestions regarding VA construction programs, as OHA has no jurisdiction over the evaluation process nor special programs run by VA. *In the Matter of Progressive X-Ray, Inc.*, SBA No. CVE-101 (2019).

IV. Conclusion

Appellant has not proven CVE's denial was based on a clear error of fact or law. 13 C.F.R. § 134.1111. I must therefore DENY the Appeal. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(A); 13 C.F.R. § 134.1112(d).

Christopher Holleman
Administrative Judge