

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

CVE Appeal of:

Valor Construction, Inc.

Appellant,

SBA No. CVE-121-A

Decided: June 3, 2019

APPEARANCE

Robert A. Bunker, President, Valor Construction, Inc., Henderson, Nevada

DECISION

I. Introduction and Jurisdiction

On April 1, 2019, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a letter denying the application of Valor Construction, Inc. (Appellant) for inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP) database. On April 8, 2019, Appellant appealed the denial to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). For the reasons discussed *infra*, the appeal is denied.

OHA adjudicates CVE appeals pursuant to 38 U.S.C. § 8127(f)(8)(A) and 13 C.F.R. part 134 subpart K.¹ Appellant timely filed the instant appeal within ten business days of receiving the denial letter. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Application

On September 30, 2018, Appellant applied for verification as an SDVOSB. (Case File (CF), Exh. 111.) According to the documentation Appellant provided with its application, Appellant is a corporation based in the state of Nevada. (CF, Exh. 119.) Appellant is 51% owned

¹ The regulations at 13 C.F.R. part 134 subpart K became effective October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

by Robert A. Bunker, a service-disabled veteran. (CF, Exh. 112.) Gregory H. Bunker owns 25% of Appellant and Shane D. Haycock owns 24%. (*Id.*) Gregory Bunker and Shane Haycock are not veterans or service-disabled veterans. (*Id.*) Appellant's Board is comprised of three Directors: Robert Bunker, Gregory Bunker, and Shane Haycock. (CF, Exh. 138.) Robert Bunker is Appellant's President and Chairman of Appellant's Board of Directors. (*Id.*)

While its application was pending, Appellant submitted its Amended By-Laws (By-Laws), dated November 27, 2018. (CF, Exh. 137.) The By-Laws indicate that Appellant is governed by its Board of Directors, which “is vested with [] complete and unrestrained authority in the management of all the affairs in the company.” (*Id.*, Art. II, § 10.) Each Director normally has “voting rights equal to their ownership of the company,” but the By-Laws stipulated that “in the fixing of salaries of the officers of the corporation, the unanimous action of all of the Directors shall be required.” (*Id.*, Art. II, § 5.)

Appellant provided CVE the resumes of Robert Bunker, Gregory Bunker, and Shane Haycock. Robert Bunker's resume does not mention any work experience or training in the construction industry, except for serving as Appellant's President. (CF, Exh. 122.) Shane Haycock's resume states that he has “30 plus years experience in the heavy civil construction market,” and describes him as being “[i]n charge of all project estimating, project management, equipment, materials and subcontractor negotiations and relations” for Appellant. (CF, Exh. 123.)

Appellant's contractor license issued by the state of Nevada identifies Shane Haycock as the Qualifying Individual. (CF, Exh. 71.) Appellant informed CVE that a contractor license is necessary for Appellant to lawfully perform construction work in the state of Nevada. (CF, Exh. 79.)

During the course of its review, CVE asked Appellant to clarify whether Robert Bunker had other employment apart from working for Appellant. Appellant responded:

Since [Appellant] is a startup company, ALL owners have full-time outside employment in order to support their families. . . . Robert Bunker currently has outside employment with Golden Entertainment. He works 40 hours per week with this company.

(CF, Exh. 128 (emphasis Appellant's).) Appellant added that Appellant's “normal operating hours are 8am — 5pm Monday through Friday,” but that “since [Appellant] is in the startup phase, most business is conducted by Robert, over the phone.” (*Id.*) In response to a follow-up inquiry from CVE, Appellant stated:

Robert Bunker currently works two jobs. 1) President, [Appellant]. And 2) Director of Revenue Management for Golden Entertainment. Robert's schedule with Golden varies, but mostly it is from 10am to 6pm, or 40 hours per week Robert has the flexibility at Golden Entertainment to attend to [Appellant's] matters if they arise during his time there.

(CF, Exh. 130.)

B. Denial

On April 1, 2019, CVE denied Appellant's application for verification as an SDVOSB. (CF, Exh. 154.) CVE explained that it had confirmed that Appellant's President and majority owner, Robert Bunker, is a service-disabled veteran. (*Id.* at 1.) CVE was “unable to conclude,” however, that Appellant met other eligibility requirements at 38 C.F.R. part 74 and 13 C.F.R. part 125. (*Id.*) CVE identified four particular deficiencies, all pertaining to control.

First, CVE found that Shane Haycock, who is not a service-disabled veteran, is the Qualifying Individual on Appellant's contractor license. (*Id.* at 3.) The law of the state of Nevada, where Appellant is incorporated, requires the Qualifying Individual “to make technical and administrative decisions, as well as supervise and direct employees.” (*Id.* at 2, citing Nev. Rev. Stat. § 624.260(2).) Because these functions are not being performed by a service-disabled veteran, Appellant is not in compliance with 13 C.F.R. § 125.13(a), which mandates that service-disabled veterans control the day-to-day management and administration of the concern.

Next, CVE found that Robert Bunker did not demonstrate managerial experience of the extent and complexity needed to run Appellant, as required by 13 C.F.R. § 125.13(b). Appellant's primary industry is construction, but based on his resume, “there is no indication [Robert Bunker] has any actual prior construction experience.” (*Id.* at 3.) Further, the resume contained “no information demonstrating [Robert Bunker] would be able to manage and supervise” construction. (*Id.*) Conversely, Appellant's other two owners, Gregory Bunker and Shane Haycock, each has more than 20 years' experience in the construction industry. (*Id.*)

Third, CVE determined that service-disabled veterans do not fully control Appellant's Board of Directors. Specifically, according to Appellant's By-Laws, the unanimous approval of Appellant's Directors is required to set the salaries of Appellant's officers. (*Id.*, citing By-Laws, Art. II, § 5.) Although Robert Bunker is a service-disabled veteran, Appellant's other Directors — Gregory Bunker and Shane Haycock — are not. (*Id.*) As a result, the service-disabled veteran, Robert Bunker, cannot overcome the super-majority provision in Appellant's By-Laws, in contravention of 13 C.F.R. § 125.13(e) and (f). (*Id.* at 3-4.)

Lastly, CVE found that Robert Bunker “holds outside employment with Golden Entertainment, Inc., for which [he] usually works from 10:00 AM to 6:00 PM.” (*Id.* at 4.) Appellant's normal hours of operation are Monday through Friday from 8:00 AM to 5:00 PM. Because “[Appellant's] hours of operation overlap with the hours [Robert Bunker] is dedicating to his outside employment,” CVE applied the presumption that Robert Bunker does not control Appellant pursuant to 13 C.F.R. § 125.13(k). (*Id.*) CVE noted that, although Appellant had asserted that Robert Bunker's outside employment is “flexible” such that “he is able to address the needs of [Appellant] while he is at his outside employer,” Appellant offered no documentation from the outside employer to support this claim. (*Id.*)

C. Appeal

On April 8, 2019, Appellant filed the instant appeal. Appellant maintains that the CVE decision is erroneous and should be reversed.

Appellant acknowledges that Shane Haycock is “the technical and administrative decision maker for his department — construction operations.” (Appeal at 1.) However, Appellant argues, construction is “only one of the multitude of departments within the company.” (*Id.* (emphasis Appellant's).) Further, SBA regulations indicate that a service-disabled veteran need not have technical expertise to be found to control a concern if the service-disabled veteran has ultimate managerial and supervisory control over those who possess the required technical expertise. Here, Robert Bunker — as Appellant's President, majority owner, and Chairman of the Board — “has ultimate managerial and supervisory control over all operations and persons, including those who control the technical expertise.” (*Id.* at 3 (emphasis Appellant's).)

Appellant disputes the notion that Robert Bunker lacks managerial experience of the extent and complexity needed to run Appellant. In addition to his 25 years of service in the military, Robert Bunker “has worked as an Executive in business operations for more than 13 years.” (*Id.* at 2.)

With regard to the issue of officers' salaries, Appellant highlights that Robert Bunker, as Chairman of the Board and majority owner, must agree for any changes to become effective. “The only difference is that the other two directors must agree as well.” (*Id.* at 3.) CVE's reasoning is flawed, Appellant maintains, because “[t]here is no ‘super-majority’ that can override [Robert Bunker's] vote even if the other two directors vote contrary to him.” (*Id.*)

Appellant also asserts that, as a start-up business established in 2017, Appellant presently has “obtained no work contracts or revenues.” (*Id.* at 5.) Appellant “does not have any ‘normal working hours’ as it has no business,” so CVE should have concluded that Robert Bunker's outside employment poses no conflict. (*Id.*) According to Appellant, “[o]nce [Appellant] has business, then Robert, as well as his partners will work full-time for [Appellant] and quit their current jobs.” (*Id.*)

III. Discussion

A. Standard of Review

Under VA regulations, an applicant seeking inclusion in the VIP database bears the burden to establish its status as an SDVOSB. 38 C.F.R. § 74.11(d). On appeal to OHA, Appellant has the burden of proving, by a preponderance of the evidence, that the denial was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

B. Analysis

Having reviewed the record and the arguments presented, I agree with Appellant that CVE's first rationale for denying Appellant's application is unclear. CVE found that Robert Bunker — the service-disabled veteran who is Appellant's majority owner, President, and Chairman — does not fully control Appellant because Shane Haycock, who is not a service-disabled veteran, is the Qualifying Individual on Appellant's contractor license. Section II.B, *supra*. As Appellant emphasizes in its appeal, though, SBA regulations state that a service-disabled 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. § 125.13(b). Here, while it is true that Robert Bunker is not himself the Qualifying Individual, this does not necessarily prevent him from controlling Appellant, and CVE did not offer any explanation for concluding that Robert Bunker lacks ultimate managerial and supervisory control over Shane Haycock.

Nevertheless, CVE cited three other independent grounds for denying Appellant's application, each of which is fully supported by the record. CVE found that Robert Bunker lacks managerial experience of the extent and complexity needed to run Appellant, as required by 13 C.F.R. § 125.13(b). Section II.B, *supra*. Robert Bunker's resume is in the record, and confirms that he has no experience or training in the construction industry, beyond serving as Appellant's President. Section II.A, *supra*. Further, Robert Bunker's role as Appellant's President could not meaningfully have enhanced his managerial experience, as Appellant concedes on appeal that Appellant has “obtained no work contracts or revenues” and therefore “has no business.” Section II.C, *supra*. Accordingly, CVE reasonably concluded that Appellant did not demonstrate that Robert Bunker has managerial experience of the extent and complexity needed to run Appellant.

CVE also found that a provision in Appellant's By-Laws requiring the “unanimous action of all of the Directors” to set officers' salaries undermines Robert Bunker's control over Appellant. Sections II.A and II.B, *supra*. Again, CVE's determination was proper. SBA regulations make clear that service-disabled veterans must have the ability to overcome any super-majority voting requirements. 13 C.F.R. § 125.13(e) and (f). On appeal, Appellant argues that its By-Laws do not contain a super-majority requirement, because Appellant's other Directors cannot determine officers' salaries over the objection of Robert Bunker, the service-disabled veteran. Section II.C, *supra*. While Appellant is correct that the other Directors cannot overrule Robert Bunker, the provision requiring unanimous approval of all the Directors also means that Robert Bunker cannot, by himself, set officers' salaries. As a result, CVE appropriately found that service-disabled veterans do not fully control Appellant. *E.g.*, *Matter of Piedmont Contracting & Design, Inc.*, SBA No. VET-169 (2009) (service-disabled veteran did not exclusively control a concern when operating agreement contained unanimous voting requirements).

Lastly, CVE also reasonably concluded that Robert Bunker does not control Appellant due to his outside employment. SBA regulations state that:

There is a rebuttable presumption that a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work. This may include, but is not limited to, other full-time or part-time employment, being a full-time or part-time student, or any other activity or obligation that prevents the service-disabled veteran from actively working for the firm during normal business operating hours.

13 C.F.R. § 125.13(k). Here, Appellant represented to CVE that Robert Bunker “currently works two jobs”: (1) he is Appellant's President, and (2) he is employed full-time at Golden Entertainment from 10:00 a.m. to 6:00 p.m. Section II.A, *supra*. Appellant further stated that its own normal hours of operation are Monday through Friday from 8:00 AM to 5:00 PM. *Id.* On these facts, then, CVE appropriately applied the presumption at 13 C.F.R. § 125.13(k). Although this presumption can be rebutted, Appellant failed to offer any persuasive basis to conclude that the presumption was overcome in the instant case. As CVE observed in its decision, Appellant asserted that Robert Bunker's employment with Golden Entertainment was “flexible” such that he could simultaneously hold both positions, but Appellant did not provide CVE with any evidence to support this claim. *Id.*

IV. Conclusion

Appellant has not shown reversible error in CVE's determination. The appeal therefore is DENIED. 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); 38 C.F.R. § 74.22(e).

KENNETH M. HYDE
Administrative Judge