

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

CVE Appeal of:

Veterans 1st Architecture, LLC,

Appellant,

CVE Notice of Denial

SBA No. CVE-122-A

Decided: June 6, 2019

APPEARANCE

John T. Gallagher, Esq., Hendrick, Phillips, Salzman & Siegel, P.C., Atlanta, Georgia, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On February 14, 2019, Veterans 1st Architecture, LLC (Appellant) appealed the decision of the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) denying Appellant's application for re-verification in the Vendor Information Pages (VIP) database of eligible Service-Disabled Veteran-Owned Small Businesses (SDVOSBs). Appellant maintains that the denial is clearly erroneous and requests that the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

OHA adjudicates CVE appeals pursuant to 38 U.S.C. § 8127(f)(8)(A) and 13 C.F.R. part 134 subpart K.² Appellant timely filed the appeal within ten business days of receiving the denial decision. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, OHA now issues the entire decision for public release.

² The regulations at 13 C.F.R. part 134 subpart K became effective October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

II. Background

A. Facts

Appellant was established as a Georgia Limited Liability Company on December 11, 2014. (Case File (CF), Exh. 12.) Appellant's Operating Agreement, dated January 15, 2015, states:

Article 3 - Business of Company. The business of the Company shall be to submit bids, negotiate and enter into appropriate contracts and perform all work required under such contracts in connection with architectural services provided for construction projects for which the Company qualifies to submit bids and to perform work under applicable government set-aside programs and otherwise and to engage in any lawful activity. In furtherance thereof, the Company may exercise all powers necessary to or reasonably connected with the Company's business which may be legally exercised by limited liability companies under the Georgia Act, and may engage in all activities necessary, customary, convenient, or incident to any of the foregoing.

(CF, Exh. 10.) A service-disabled veteran, Mr. David A. Nacci, is Appellant's majority owner and Managing Member. (*Id.* §§ 1.19 and 5.1, and Exh. A.) Appellant's 2016 Federal income tax form lists as Appellant's business activity code, 541310, Architectural Services. (CF, Exh. 99, at 7.) Appellant's Georgia state income tax form similarly identifies Appellant's North American Industry Classification System (NAICS) code as 541310, Architectural Services, and its "Kind of Business" as "Architectural." (*Id.* at 40.) The Case File contains two Architect-Engineer contracts that Appellant has previously been awarded. These are Contract Nos. VA247-16-C-0162 and VA247-17-C-0164. (CF, Exhs. 86 and 102.)

B. Procedural History

On or about February 17, 2015, Appellant applied for verification as an SDVOSB. (CF, Exhs. 1-3.) Appellant characterized itself as "an architectural firm." (*E.g.*, CF, Exh. 49, at 1.) On September 3, 2015, CVE verified Appellant as an SDVOSB. (CF, Exh. 73.) On or about July 25, 2018, Appellant applied to CVE for re-verification. (CF, Exhs. 91-97.)

On December 13, 2018, after several rounds of additional submissions, CVE sent Appellant its Post Review Findings (PRF) Notice. (CF, Exh. 153.) CVE noted its adverse findings concerning control pursuant to 13 C.F.R. § 125.13(a), (i)(6), and (i)(7). The three findings all were based on the fact that Appellant is an architectural firm and that Mr. Nacci, the service-disabled veteran upon whom Appellant's application was based, is not a Georgia-registered architect while Mr. Louis P. Batson III, a non-veteran in the firm, is. (*Id.* at 1-3.) CVE cited Georgia Code §§ 43-4-1(15) and 43-4-10 for the proposition that the individual who is the Georgia-registered architect controls a Georgia architectural firm. (*Id.*)

On December 27, 2018, Appellant responded to the PRF Notice. (CF, Exh. 156.) Regarding non-veteran control of Appellant's daily business operations, Appellant cited Georgia

Code § 43-4-1(11) and Georgia Administrative Code Rule 50-3-.02(b) to argue that Georgia law does not require Mr. Nacci to hold an architectural license, but that he must employ a Georgia-registered architect in order for Appellant to provide statutorily-defined architectural services. (*Id.* at 2-3.) Appellant further stated that Mr. Nacci intended to hire a second architect to reduce any dependence on Mr. Batson. (*Id.* at 3.)

With respect to non-veteran control through a critical license, Appellant again contended that Mr. Batson's license only gives him authority over architectural decisions and does not result in his overall control of Appellant. (*Id.* at 4.) Further, his license is not critical because Mr. Nacci has the authority to hire another architect. (*Id.*) Regarding non-veteran control through a business relationship, Appellant argues that Mr. Batson's extensive architectural experience does not make Appellant dependent on him to the level that it cannot exercise independent judgment, because Mr. Nacci himself has knowledge and experience in the industry to allow him to independently evaluate all business and operational decisions. (*Id.* at 4-5.)

On January 31, 2019, after reviewing Appellant's response to the PRF Notice, the Director of the CVE (D/CVE) issued his decision denying Appellant's application for re-verification. (CF, Exh. 163.) The D/CVE provided three reasons for the denial, all related to control by a non-veteran. (*Id.* at 1-6.)

First, the D/CVE “is unable to reasonably conclude” that Mr. Nacci “has full control over the daily business operations” of Appellant, as required by 13 C.F.R. § 125.13(a). (*Id.* at 2.) In support, the D/CVE cited Georgia Code § 43-4-1(11), defining the practice of architecture to include, among other duties, “the architectural administering of construction contracts”; and § 43-4-10, requiring the practice of architecture by a limited liability company to be under the “responsible control” of a Georgia-registered architect who is also a member of the limited liability company. (*Id.*) The D/CVE also cited Georgia Code § 43-4-1(15) and Georgia Administrative Code Rule 50-3-.02(b), defining “responsible control,” and quoted Georgia Code § 43-4-1(2) setting out the “architectural construction contract administration services” that must be carried out by a Georgia-registered architect. (*Id.* at 2-3.) These include regular site visits to see that the work is proceeding according to plan, and processing shop drawings and other required submissions. (*Id.* at 3.) From this, the D/CVE determined, “the responsible architect must have control over the administration of the construction contracts which falls within the daily business operations of [Appellant].” (*Id.*) Because Mr. Batson, “as the licensed architect is charged with the responsible control of the administration of [Appellant]'s contracts,” the D/CVE concluded, Mr. Nacci lacks full control of [Appellant's] daily business operations. (*Id.* at 3.) Further, even if Appellant were to hire another architect, that person and not Mr. Nacci would have control over Appellant's contract administration, and hence its daily business operations. (*Id.*)

Second, the CVE “is unable to reasonably conclude” that Mr. Batson, “the required license holder and 24% owner, does not have the power to control” Appellant, as required by 13 C.F.R. § 125.13(i)(6). (*Id.*) Here, the D/CVE highlighted that Appellant's NAICS code is 541310, Architectural Services, “a highly technical industry,” and that it requires a license in Georgia, citing the same Georgia Code and Administrative Code sections. (*Id.* at 3-4.) After noting Appellant's argument that Georgia law requires only that a registered architect make the

firm's architectural decisions, and not all of its day-to-day and long-term decisions, the D/CVE pointed out that, because “the responsible architect must have control over the administration of the construction contracts which falls within the daily business operations” of Appellant, Mr. Batson, not Mr. Nacci, “controls an aspect of [Appellant's] daily business operations or day-to-day business operations.” (*Id.* at 4-5.) Thus, the architect's license is a critical license, and it is in the hands of a non-veteran. (*Id.* at 5.) The D/CVE continued, “Furthermore, Mr. Batson [] holds an equity interest. Because he holds the required license and because he is an owner, [he] has leverage to control [Appellant]. Therefore, based on the foregoing, CVE cannot reasonably conclude that the control requirements of 13 C.F.R. § 125.13(i)(6) have been satisfied.” (*Id.*)

Third, based on the fact that Mr. Nacci is not an architect, and that Mr. Batson has been an architect for almost 25 years, the CVE determined “it is not clear whether [Appellant] would be able to operate as a viable independent business entity without the support, experience, and technical licensing provided by [Mr. Batson].” (*Id.* at 5-6.) Despite Appellant's assertions in its response to the PRF Notice that Mr. Nacci is knowledgeable about the industry as a general contractor, that he can hire licensed architects, and that he can operate the aspects of Appellant's business that are not the practice of architecture, the fact is that the licensed architect is in “responsible control” over the administration of Appellant's construction contracts, and that Appellant cannot operate without Mr. Batson's license. (*Id.* at 6.) Thus, the requirements of 13 C.F.R. § 125.13(i)(7) have not been met.

C. Appeal

On February 14, 2019, Appellant appealed the D/CVE's denial to OHA. Appellant maintains that CVE “undeniably misconstrued Georgia law” and “relied exclusively upon one and only one fact — that Mr. Nacci is not a Georgia-registered architect.” (Appeal at 2, emphasis Appellant's.) Appellant requests that OHA reverse the denial of Appellant's re-verification application. (*Id.*)

Appellant's main assignment of error, affecting all three findings of control by a non-veteran, is that CVE misinterpreted the term of art “architectural administering of construction contracts,” over which Georgia law requires a registered architect to have “responsible control.” (*Id.*) In Appellant's view, the CVE incorrectly assumed that this term means “the architect's management of its contracts with its own clients” and thus constitutes a daily business operation. (*Id.* at 2-3.) Further, in contrast to CVE's findings, Georgia law permits non-architects to have control over limited liability companies that provide architectural services so long as the firm's “practice of architecture” is under the “responsible control” of a registered architect, as those terms are defined under the applicable statutes and regulations. (*Id.* at 3-4.)

Citing industry and legal sources, Appellant refers to the two phases of an architect's services as the “design phase” and the “construction phase,” during the latter of which the architect ensures his or her client, the owner of the project, “that the contractor is performing the construction work in accordance with the design intent.” (*Id.* at 4.) Construction phase work includes site visits, interpretation of plans and specifications, reviewing contractor submittals, and other technical tasks required to administer the contract between owner and contractor. (*Id.* at 5-6.) These tasks, the “architectural administering of construction contracts,” occur during the

construction phase and are part of the “practice of architecture” which Georgia law entrusts to the “responsible control” of a registered architect. (*Id.* at 6.) The D/CVE mistook “architectural administering of construction contracts,” part of the “practice of architecture,” to mean “the administration and management of [an architect's own] contracts,” and wrongly concluded that Mr. Batson controls all “contract administration” and thus the “daily business operations” of Appellant. (*Id.* at 7-8.) The D/CVE carries this error to all three findings in the denial decision.

Appellant emphasizes that Georgia law requires only that registered architects perform certain statutorily-defined tasks. Georgia law does not bar non-architects from controlling other tasks, such as the long-term and day-to-day decisions of a limited liability company that do not involve the statutorily-defined tasks. (*Id.* at 6-7.) Accordingly, under Georgia law, a non-architect can have control over the limited liability company's long-term decision making and day-to-day and overall business operations as long as the company has registered architects who are responsible for the architectural decisions made on the company's projects. (*Id.*)

Addressing “control” under 13 C.F.R. part 125, Appellant contends that the regulations do not require Mr. Nacci to be licensed to be found in control of his company. (*Id.* at 10-12.) Appellant points to 13 C.F.R. § 125.13(a), requiring “both the long-term decision[] making and the day-to-day management and administration of the business operations” to be conducted by a service-disabled veteran; and 13 C.F.R. § 125.11, which defines “daily business operations” to include “the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, and the implementation of policies.” (*Id.* at 10.) Further, the service-disabled veteran need not have the technical expertise or the required license to be found in control of the firm if he can demonstrate ultimate managerial and supervisory control over the license holder. (*Id.* at 10-11, citing 13 C.F.R. § 125.13(b).) Appellant also points to *Matter of AI Procurement LLC/JVS*, SBA No. VET-223 (2011), where OHA found the service-disabled veterans in control of their firm because they had the required control over any necessary license holders. (*Id.* at 11.)

Appellant also observes that the second and third grounds of control are based on rebuttable presumptions that a non-veteran has control of the firm, and asserts that in both instances, the D/CVE failed to analyze whether the presumption of control by the non-veteran license holder has been rebutted. (*Id.* at 12-14.) Appellant lists facts suggesting rebuttal, noting that Mr. Nacci is Appellant's majority owner and sole Managing Member, and referencing provisions in Appellant's Operating Agreement. (*Id.* at 15-16.) Finally, Appellant notes that Mr. Nacci has run Appellant for four years during which he “has gained significant experience in the management of an architectural firm.” (*Id.* at 18-19.)

D. Motion to Admit New Evidence

With its appeal, Appellant moved to introduce new evidence, and provided the proposed new evidence. The new evidence is a consent action by Appellant, dated February 14, 2019. This consent action states that minority interest holder Kenneth D. Coleman “has recently transferred 24% interest” in Appellant with 4% transferred to Mr. Batson and 20% transferred to Ms. JaMia Dees. (Motion, Exh. A.) As a result of this transaction, the ownership interest in Appellant now is as follows: Mr. Nacci 52%; Mr. Batson 28%; and Ms. Dees 20%. (*Id.*)

Appellant seeks admission of this new evidence as it “is clear evidence of Mr. Nacci's control pursuant to 13 C.F.R. § 125.13.” (Motion at 1.) Appellant states Ms. Dees is an architect registered in Georgia who is employed by Appellant and who acquired a 20% ownership interest in Appellant on February 14, 2019. (*Id.*) Referring to several exhibits in the Case File, Appellant states that the addition of Ms. Dees fulfills part of its long-term plan to reduce its reliance on Mr. Batson's license. (*Id.* at 1-2.)

Under OHA's rules of procedure, evidence beyond the CVE Case File will not be admitted, except for good cause shown. 13 C.F.R. § 134.1110. Here, the proposed new evidence not only is beyond the Case File, it describes events that occurred after the January 31, 2019 issuance of the D/CVE's denial letter. Appellant has not established any valid reason for admitting the proposed evidence. Accordingly, Appellant's motion is DENIED and the new evidence has not been considered for purposes of this decision.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, that the denial of re-verification was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

B. Analysis

The issue presented here is whether CVE properly determined that Mr. Nacci does not control Appellant. CVE cited three grounds for this conclusion, but all revolve around the same central set of facts: (1) Appellant is a Georgia-based LLC engaged in architecture; (2) Mr. Nacci, the service-disabled veteran who otherwise controls Appellant, is not a Georgia-registered architect; (3) at the time of its application for re-verification, Appellant employed one Georgia-registered architect, Mr. Batson, who is not a service-disabled veteran; (4) Georgia state law requires that the “practice of architecture” be under the “responsible control” of a Georgia-registered architect; and (5) under Georgia law, the “practice of architecture” includes the “architectural administration of construction contracts.” Section II.B, *supra*. Based on these facts, CVE determined that Mr. Nacci does not control Appellant's daily business operations. *Id.* In addition, CVE found, Appellant did not rebut the presumptions that Mr. Nacci lacks control over Appellant because Mr. Batson holds a critical license, and because Appellant's relationship with Mr. Batson prevents Mr. Nacci from exercising independent business judgment. *Id.*

Appellant counters that CVE misunderstood the requirements of Georgia law. Although Georgia law does provide that the “practice of architecture” must be under the “responsible control” of a Georgia-registered architect, the “practice of architecture” is defined in Georgia law as including only particular architecture-related services. Section II.C, *supra*. Thus, Georgia law permits a non-architect to have control over a firm that performs architectural services so long as the firm's “practice of architecture” remains under the “responsible control” of a registered architect. *Id.* Further, contrary to CVE's view, “the architectural administration of construction contracts” is not all of Appellant's daily business operations, but merely one aspect of the

practice of architecture. In particular, during the construction phase of a building project, a registered architect must perform architectural-related work, such as visiting a construction site to ensure that a building is being constructed in accordance with architectural plans. *Id.* This does not connote, however, that Georgia law requires a registered architect to control all contract administration, or all of a firm's daily business operations, and thus does not undermine a non-architect's control over the firm.

I find Appellant's arguments persuasive. As Appellant observes, the D/CVE focused on one aspect of Georgia architectural practice — “the architectural administering of construction contracts” — and broadly interpreted it as referring to Appellant's entire daily business operations. This interpretation is not supported by Georgia law, which describes “[a]rchitectural construction contract administration services” more narrowly as meaning architectural services performed during the construction phase of a project. *See* Georgia Code § 43-4-1(2). Moreover, under SBA regulations, “daily business operations” are defined to “include, but are not limited to, the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, and the implementation of policies.” 13 C.F.R. § 125.11. The D/CVE overlooked Appellant's other, non-architectural activities such as bid preparation and submission, marketing, production, sales, administrative functions of the firm, the supervision of the executive team, and the implementation of policies, and incorrectly determined that only a registered architect can control Appellant's daily business operations.

The D/CVE also applied the presumptions at 13 C.F.R. § 125.13(i)(6) and (i)(7). Section II.B, *supra*. These presumptions formed the bases for the D/CVE's second and third grounds for denial of Appellant's application for re-verification.

Regarding the second ground for denial, critical license, the D/CVE was “unable to reasonably conclude” that Mr. Batson, the holder of the required license, does not have the power to control Appellant, as required by 13 C.F.R. § 125.13(i)(6). *Id.* In support, the D/CVE noted Appellant's NAICS code is 541310, Architectural Services, “a highly technical industry,” and observed that this industry requires a license in the state of Georgia. *Id.* Because “the responsible architect must have control over the administration of the construction contracts which falls within the daily business operations” of Appellant, that is, “an aspect of [Appellant's] daily business operations or day-to-day business operations,” the D/CVE concluded that Mr. Batson controls Appellant. *Id.*

I agree with Appellant that D/CVE incorrectly applied the presumption. The record reflects that Mr. Nacci is Appellant's majority owner and sole Managing Member. Section II.A, *supra*. Although Mr. Nacci is not a registered architect, Appellant has established that Georgia law does not bar a non-architect from controlling the major functions of a limited liability company, including the long-term and day-to-day decisions, that do not involve the statutorily-defined “practice of architecture.” In addition, under SBA regulations, a service-disabled veteran need not have the technical expertise or the required license to be found in control of the firm, if the service-disabled veteran has ultimate managerial and supervisory control over the holder of the technical expertise or required license. 13 C.F.R. § 125.13(b). The D/CVE did not offer any explanation for concluding that Mr. Nacci lacks ultimate managerial and supervisory control

over Mr. Batson. Accordingly, Appellant has shown that Mr. Nacci fully controls Appellant, and thus has rebutted the presumption at 13 C.F.R. § 125.13(i)(6).

Regarding the third ground for denial, business relationships, the D/CVE again noted that Mr. Nacci is not an architect while Mr. Batson has been one for nearly 25 years. Section II.B, *supra*. The D/CVE then concluded “it is not clear whether [Appellant] would be able to operate as a viable independent business entity” without Mr. Batson's support, experience, and technical license. *Id.* Appellant argues that the D/CVE ignored that the presumption at 13 C.F.R. § 125.13(i)(7) is rebuttable. I agree with Appellant. As discussed above, Appellant has shown that Mr. Nacci fully controls Appellant. The presumption is further undermined here because Mr. Nacci has run Appellant for four years, and in that time Appellant has been awarded at least two Architect-Engineer contracts. Section II.A, *supra*. Mr. Nacci thus has gained experience in managing an architectural firm - which is exactly his role in Appellant. While it is true that a registered architect must perform the “practice of architecture” under Georgia law, Mr. Nacci is free to hire the architect, and that architect need not be Mr. Batson or one as experienced as he is. Thus, the CVE's “business relationships” ground for denial boils down to the fact that Mr. Nacci is not himself a registered architect, exactly the same scenario that D/CVE presented in his first ground for denial, and which has been rejected, *supra*.

IV. Conclusion

For the above reasons, the appeal is GRANTED and the decision of the D/CVE is REVERSED. 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).

KENNETH M. HYDE
Administrative Judge