

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

CVE Appeal of:

The Spartan Group, Inc.

Appellant,

SBA No. CVE-128-A

Decided: July 16, 2019

APPEARANCES

Matthew P. Moriarty, Esq., John M. Mattox, II, Esq., Koprince Law, LLC, Lawrence, Kansas, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On April 22, 2019, The Spartan Group, Inc. (Appellant) appealed the decision of the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) denying Appellant's application for inclusion in VA's 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 or remand. 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.² Appellant timely filed the appeal within ten business days of receiving the denial notice. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

¹ Appellant requested confidential treatment of this appeal under 13 C.F.R. § 134.205(f). After reviewing the original decision, Appellant requested no redactions. Therefore, I now issue 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. Appellant's Application

In January 2019, Appellant applied for verification in the VIP database, and submitted various supporting documents. (Case File (CF), Exhs. 1, 3, 4, 7, 8.) As part of its application, Appellant provided an executed VA Form 0877 indicating that Mr. Kyle C. Muller, a service-disabled veteran, is Appellant's sole owner. (CF, Exh. 13.) Mr. Muller also is Appellant's President and Secretary, while Mr. Ray Douaire is Appellant's Treasurer. (CF, Exh. 3.) Mr. Muller and Mr. Douaire are Appellant's two Directors. (CF, Exhs. 3, 22.)

The application indicated that Appellant is a corporation based in the state of Maryland, founded in September 2018. (CF, Exh. 3.) Appellant's primary North American Industrial Classification System (NAICS) code is 236210, Industrial Building Construction. (CF, Exh. 17.)

Appellant included Mr. Muller's resume with its application. (CF, Exh. 11.) The resume stated that, from 2018 to the present, Mr. Muller has served as Director of Sales/Project Manager at Trusted Solutions Group, Inc. (TSG), where he oversaw a roofing contract "in partnership with Clark Construction," developed an office buildout division, and collaborated with other firms to procure contracts on behalf of TSG. (*Id.*) Prior to this position, Mr. Muller was District Sales Manager for a dental supply company where he managed a territory, executed direct sales, and oversaw a network of distributors. (*Id.*) In addition, Mr. Muller earlier worked as a warehouse manager at a large retail company and served as an officer in the U.S. Navy. (*Id.*) Mr. Muller holds a bachelor's degree in criminal justice. (*Id.*)

CVE requested that Appellant clarify whether Mr. Muller remains employed at TSG.

In response, Appellant stated that Mr. Muller now works exclusively for Appellant and no longer is employed by TSG. (CF, Exhs. 34, 44.) Appellant provided an updated version of Mr. Muller's resume indicating that his employment with TSG ended in 2019. (CF, Exh. 26.)

With its application, Appellant submitted a "Business License Declaration" averring that Appellant "is not required to obtain any permits, licenses or charters in order to operate the business at the state, county or city level." (CF, Exh. 31.) Asked for clarification on this point, Appellant responded that it "plan[s] to initially focus on contracting projects in the state of Pennsylvania" because that state "has no licensure or certification requirements for most construction contractors (or their employees)." (CF, Exh. 42.)

B. PRF and Response

On March 26, 2019, CVE issued a Post-Review Findings (PRF) notice, stating that CVE had identified issues that would likely prevent Appellant from being verified as an SDVOSB. (CF, Exh. 46.) Specifically, Appellant's primary industry is in NAICS code 236210, Industrial Building Construction, but "it would appear [Mr. Muller] does not have experience in [this] line of work." (*Id.* at 4.) As a result, CVE could not conclude that Mr. Muller had sufficient managerial experience to demonstrate control over Appellant under 13 C.F.R. § 125.13(b). (*Id.*)

CVE directed Appellant to respond within two business days if it chose to participate in the PRF process, or Appellant instead could withdraw its application and reapply at any time. If Appellant did not cure the defects described in the PRF and was issued a denial letter, Appellant would be ineligible to submit a new application for six months. Appellant elected to participate in the PRF process. (CF, Exh. 49.)

Appellant responded to the PRF with a letter of explanation. (CF, Exh. 52.) Appellant stated that Mr. Douaire, owner and CEO of TSG, “took [Mr. Muller] under his wing and trained [Mr. Muller] to become a CEO.” (*Id.* at 1.) Mr. Douaire “continues to act as a mentor” to Mr. Muller, and assisted him in establishing Appellant. (*Id.*) Appellant highlighted that Mr. Muller was tasked to “oversee/Project Manage several contracts” for TSG, where he oversaw a roofing project as well as two electrical installations on office buildings. (*Id.* at 1-2.) In addition, Appellant stated, in conjunction with Merlino Construction Group, Mr. Muller currently oversees a roofing contract and is in the “introductory phases” of a building renovation. (*Id.* at 2.) Further, Mr. Muller is working with potential subcontractors to prepare a bid for a flooring contract. (*Id.*)

CVE responded to Appellant's letter of explanation, informing Appellant that it considered Appellant's explanation inadequate. (CF, Exh. 53.) The response to the PRF confirmed that, until 2018, Mr. Muller “did not hold any position or perform[] any work related to the Industrial Building Construction industry.” (*Id.* at 3.) Further, the response did not demonstrate that Mr. Muller has ultimate supervisory control over those with technical expertise. According to CVE, “[i]n order to have ‘supervisory control’ the [service-disabled veteran] must be able to show that he is able to observe and direct an industrial building project. Without at least 2 years of experience in an industry such as Industrial Building Construction, with a steep learning curve, CVE is not able to conclude that the [service-disabled veteran] has the experience of the extent and complexity need to run the concern.” (*Id.* at 4.)

C. Denial

On April 8, 2019, CVE denied Appellant's application for inclusion in the VIP database. CVE found that Appellant's owner and President, Mr. Muller, is a service-disabled veteran, but was unable to conclude that Appellant satisfied the control requirements for inclusion in the VIP database as set forth in 38 C.F.R. part 74 and 13 C.F.R. part 125. (CF, Exh. 56, at 1.) CVE specifically based its decision on Appellant's non-compliance with 13 C.F.R. § 125.13(b). (*Id.*)

CVE reiterated its finding from the PRF that, based on his resume, Mr. Muller has no experience in Industrial Building Construction, Appellant's primary industry. (*Id.* at 2.) Rather, Mr. Muller's work experience includes one year as Director of Sales/Project Manager, four years as a District Sales Manager, and one year as a Warehouse Manager. (*Id.*) Similarly, Appellant's response to the PRF indicated that Mr. Muller did not have any construction-related experience until at least 2018. (*Id.*) Nor could CVE conclude that Mr. Muller has ultimate managerial and supervisory control over those who possess the technical expertise. To demonstrate such supervisory control, Appellant “must be able to show that [Mr. Muller] is able to observe and direct an industrial building project,” and “[w]ithout at least 2 years of experience in an industry such as Industrial Building Construction, with a steep learning curve, CVE is not able to

conclude [Mr. Muller] has the experience of the extent and complexity needed to run the concern.” (*Id.*)

D. Appeal

On April 22, 2019, Appellant filed the instant appeal. Appellant maintains that CVE's decision is premised on “clear, fundamental errors” and should be reversed or remanded. (Appeal at 1.)

Appellant asserts that CVE erred because, instead of applying the “plain, but flexible” terms of 13 C.F.R. § 125.13(b), CVE “layered the regulation with extraneous, rigid, and arbitrary requirements—specifically, that Mr. Muller was required to have managerial experience in NAICS code 236210 for [a] two-year period before [Appellant] could be included in the database.” (*Id.*) Appellant contends that CVE should have utilized “the four-factor analytical framework” described in OHA case law to assess whether Mr. Muller had the requisite managerial experience. (*Id.*)

Appellant highlights that Appellant is entirely owned and operated by Mr. Muller, who “alone manages the whole enterprise.” (*Id.* at 2.) Appellant has no other employees or officers. (*Id.*) Since its founding in September 2018, Appellant has completed “multiple projects in the construction management field,” which Mr. Muller managed. (*Id.*) In addition, Mr. Muller gained experience managing construction contracts during his tenure at TSG. (*Id.*)

Appellant maintains that CVE deviated from the plain language of 13 C.F.R. § 125.13(b) by arbitrarily requiring that Mr. Muller have at least two years' experience in NAICS code 236210. (*Id.* at 4-5.) The underlying regulation, however, requires only that a service-disabled veteran have “managerial experience of the extent and complexity needed to run the concern,” and further provides that the service-disabled veteran need not have technical expertise to be found to control the concern so long as he or she has ultimate managerial and supervisory control over those who possess the technical expertise. (*Id.* at 5, quoting 13 C.F.R. § 125.13(b).) Contrary to CVE's reasoning, 13 C.F.R. § 125.13(b) does not require that a service-disabled veteran have managerial experience in the applicant's primary NAICS code, or that the service-disabled veteran complete “a two-year probationary term” in that primary NAICS code. (*Id.* at 6.) Appellant posits that the two-year experience condition either was ““derived from thin air,” or was improperly imported from 8(a) program regulations inapplicable to the instant case. (*Id.* at 9 n.6.)

Appellant argues that 13 C.F.R. § 125.13(b) is “broad and flexible” and logically permits a service-disabled veteran to transfer experience from previous managerial positions to the applicant, regardless of whether the applicant is in the same industry. (*Id.* at 7, citing *Matter of PotomacWave Consulting, Inc.*, SBA No. EDWOSB-104 (2014) and *Matter of Michael Ogden Pratt*, SBA No. VET-200 (2010).) Instead of imposing a “fabricated, arbitrary standard,” CVE should have considered four factors identified in OHA case law: 1) the characteristics of the applicant concern; 2) the qualifying individual's education and employment history including supervisory experience; 3) the qualifying individual's role at the applicant concern; and 4) the extent of other individuals' involvement in the operations of the applicant concern. (*Id.* at 9-10,

citing *Matter of C&E Indus. Serv., Inc.*, SBA No. WOSB-112, at 8 (2019).) In Appellant's view, such an analysis focuses on the qualifications of the qualifying individual relative to other individuals at the applicant firm, so as to prevent other individuals from usurping the qualifying individual's control over the business. (*Id.* at 10.)

Appellant asserts that it is “a construction management business,” and that Mr. Muller has managerial experience in “both construction and non-construction spheres.” (*Id.*) At TSG, Mr. Muller managed several construction projects, including a roofing project. (*Id.* at 10-11.) Since founding Appellant, Mr. Muller has accumulated additional experience managing a business and managing construction projects, including overseeing Appellant's involvement in a contract for electrical installation in office buildings, managing the introductory phase of a renovation project, and managing Appellant's role in a roofing contract. (*Id.* at 11.) Further, Mr. Muller has significant experience in other industries, such as sales. (*Id.* at 12.)

Appellant observes that Mr. Muller is Appellant's sole owner and only employee, so there is no other person who could potentially threaten Mr. Muller's control over Appellant. (*Id.* at 12.) Rather, Mr. Muller controls and performs every aspect of Appellant's business. (*Id.*) Appellant concludes that Mr. Muller has the experience needed to run Appellant, and has actual control as required by the regulation. (*Id.* at 13.)

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

CVE in this case denied Appellant's application because it found no indication that Appellant's principal, Mr. Muller, had experience in Appellant's line of work. Specifically, Appellant represented to CVE that Appellant's primary industry is in NAICS code 236210, Industrial Building Construction. Section II.A, *supra*. “Industrial Building Construction” falls within NAICS subsector 236, “Construction of Buildings,” and refers to the construction of industrial facilities such as steel mills, factories, and chemical plants. *NAICS Manual*³ at 126. Mr. Muller's resume, though, made no mention of experience in constructing industrial buildings, or in designing or managing the construction of industrial buildings. Section II.A, *supra*. Likewise, in response to the PRF, Appellant did not argue that Mr. Muller had experience constructing industrial buildings (or, indeed, experience constructing any type of buildings). Section II.B, *supra*. Further, based on his resume, Mr. Muller appeared to have no formal

³ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System — United States (2017)*, available at <https://www.census.gov>.

training in the construction industry, and Appellant informed CVE that neither Appellant nor Mr. Muller was licensed to perform construction work. Section II.A, *supra*.

On appeal, Appellant highlights that Mr. Muller's resume did state that he had supervised a roofing contract while at TSG. Section II.A, *supra*. In addition, Appellant's response to the PRF indicated that Mr. Muller oversaw other contracts while at TSG, and made reference to supervising two electrical installations at office buildings. Section II.B, *supra*. As the applicant seeking verification in the VIP database, though, Appellant was responsible for establishing its status as an SDVOSB. Section III.A, *supra*. Here, both Mr. Muller's resume and the response to the PRF offered only vague descriptions of Mr. Muller's prior experience, without supporting facts or explanation. Mr. Muller's resume stated that he held the position of "Director of Sales/Project Manager" during his year at TSG, and commented that, among other duties, he had overseen a roofing contract "in partnership with Clark Construction." Section II.A, *supra*. Thus, the resume did not clearly define Mr. Muller's role on the roofing project, or explain the duration of the project or how much time Mr. Muller devoted to it. Similarly, Appellant's response to the PRF asserted that Mr. Muller was tasked to "oversee/Project Manage several contracts" for TSG, but did not describe the nature of Mr. Muller's work, how many contracts he managed, the magnitude of the efforts, or even whether the contracts involved construction. Section II.B, *supra*. Although Appellant's response to the PRF also briefly alluded to additional work, such as overseeing a second roofing project and two electrical installations, Appellant provided little detail about these projects, and offered no explanation as to how this work would have equipped Mr. Muller with managerial experience of the extent and complexity necessary to run a concern engaged in industrial building construction. *Id.*

On this record, then, CVE reasonably concluded that Appellant did not demonstrate that Mr. Muller has managerial experience of the extent and complexity needed to run Appellant. Mr. Muller's resume and Appellant's response to the PRF contained no indication that Mr. Muller has any experience, or training, in industrial building construction, Appellant's primary industry. While Mr. Muller apparently has some experience managing specialty trade contractors such as roofing and electrical installers, Appellant did not provide enough supporting detail or explanation to persuasively show that this experience is of the extent and complexity needed to run a concern engaged in industrial building construction.

Appellant also argues on appeal that CVE should have analyzed Mr. Muller's experience using the four-factor test outlined in *Matter of C&E Indus. Serv., Inc.*, SBA No. WOSB-112, at 8 (2019). I find it unnecessary to decide this question, because Appellant has not established that an analysis utilizing this test might have altered the result of CVE's decision. While Appellant suggests that such an analysis would have focused on the qualifications of the service-disabled veteran, Mr. Muller, vis-à-vis other individuals at the applicant firm, this is, in actuality, only one of the factors in the test. Further, contrary to Appellant's suggestions on appeal, it does not appear that Mr. Muller is the only individual involved in Appellant's operations, as Appellant informed CVE during the application process that Mr. Douaire is an officer of Appellant and that he "continues to act as a mentor" to Mr. Muller. Sections II.A and II.B, *supra*.

IV. Conclusion

For the above reasons, the appeal 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).

KENNETH M. HYDE
Administrative Judge