United States Small Business Administration
Office of Hearings and Appeals

CVE Protest of: Covenant Construction Services, Protester, Re: Concord Construction, LLC Petition for Reconsideration of CVE-152-P	SBA No. CVE-158-P Decided: July 23, 2020

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

On June 8, 2020, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) issued its decision in *CVE Protest of Covenant Construction Services*, SBA No. CVE-152-P (2020) ("*Covenant Construction I*"), sustaining a status protest filed by Covenant Construction Services (Covenant) against Concord Construction, LLC (Petitioner). In the protest, Covenant had alleged that Paul Hutton, Petitioner's service-disabled veteran majority owner and Managing Member, is a full-time employee of another company, Core & Main. *Covenant Construction I* at 2. Petitioner acknowledged that Paul Hutton does work full-time for Core & Main during normal business hours, and OHA found that Petitioner did not rebut the presumption at 13 C.F.R. § 125.13(k), which states that SBA will presume 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." *Id.* at 4.

In reaching its decision, OHA noted that Petitioner had remained "silent as to the respective roles and responsibilities of Paul Hutton and Dan Hutton, [Petitioner's] minority owner who is not a service-disabled veteran." *Id.* at 4-5. Further, Dan Hutton's resume was in the record, and the resume indicated that "Dan Hutton works only for [Petitioner] and has no other employment." *Id.* at 2. It therefore appeared that Dan Hutton could control Petitioner during normal business hours, in Paul Hutton's absence. *Id.* at 5.

On June 12, 2020, Petitioner filed a Petition for Reconsideration (PFR) of *Covenant Construction I*. Petitioner contends that *Covenant Construction I* is flawed because OHA attached "substantial weight" to Dan Hutton's resume. PFR at 2. The resume originally was produced by Petitioner itself as part of Petitioner's application for verification, and Petitioner allows that the resume "leaves the impression [Dan Hutton] works solely for [Petitioner]". *Id.* at 2, 6. Petitioner maintains, however, that Dan Hutton's resume is "out-of-date," as Dan Hutton

"now spends the overwhelming majority of his time working for HCMD Investments," not for Petitioner. *Id.* at 5-6. Petitioner does not explain why its arguments concerning Dan Hutton's employment and resume were not, or could not have been, raised during *Covenant Construction I*.

On July 1, 2020, Covenant responded to the PFR. Covenant argues that Petitioner has not shown that OHA committed any error of fact or law. Rather, in Covenant's view, OHA properly considered the evidence in the record, including Dan Hutton's resume, in arriving at its decision. Response at 2-3. Further, Petitioner improperly bases its PFR on arguments that Petitioner could have, but did not, raise in the course of the initial protest. *Id.*

II. Discussion

A. Jurisdiction and Standard of Review

A party seeking reconsideration of an OHA decision on a CVE Protest must file its PFR within twenty calendar days after issuance of the decision. 13 C.F.R. § 134.1013(a). Petitioner filed the instant PFR within twenty calendar days after issuance of *Covenant Construction I*, so the PFR is timely.

To prevail on a PFR, a petitioner "must clearly show an error of fact or law material to the decision." *Id.* This is a rigorous standard. A PFR must be based upon manifest error of law or mistake of fact, and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *CVE Protest of Alpha4 Solutions LLC d/b/a Alpha Transcription*, SBA No. CVE-137-P (2019) (PFR).

B. Analysis

I agree with Covenant that the instant PFR has no merit, because the PFR consists entirely of arguments that Petitioner could have, but did not, raise during the initial protest. Specifically, although Petitioner contends in the PFR that, notwithstanding his resume, Dan Hutton does not actually work solely for Petitioner, such arguments could have been presented during the *Covenant Construction I* proceedings.

Based on Covenant's protest, Petitioner would have been well aware that the employment of Petitioner's principals would be a major issue in this case. Further, Petitioner had ample opportunities to argue, or to introduce evidence, concerning Dan Hutton's employment and/or resume, yet chose not to do so. In the PFR, Petitioner offers no explanation as to why its arguments concerning Dan Hutton's employment and resume were not, or could not have been, raised during *Covenant Construction I*. Petitioner's silence on such matters during *Covenant Construction I* is particularly inexcusable given that, as the challenged firm, Petitioner was responsible for proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. I therefore find that Petitioner waived its arguments concerning Dan Hutton's employment and/or resume, because Petitioner could have, but did not, raise these arguments during *Covenant Construction I. See, e.g., Matter of SDVE, LLC*, SBA No. VET-284, at 4 (2020) (PFR) (declining

to consider issues raised for the first time in a PFR and which might have been voiced earlier in the litigation).

III. Conclusion

To prevail on a PFR, a petitioner must "clearly show an error of fact or law material to the decision." 13 C.F.R. § 134.1013(a). In the instant case, Petitioner made no arguments concerning Dan Hutton's employment and/or resume during the *Covenant Construction I* proceedings, and OHA did not err by failing to address arguments that Petitioner never raised. I therefore DENY the PFR and AFFIRM the decision in *CVE Protest of Covenant Construction, LLC*, SBA No. CVE-152-P (2020).

KENNETH M. HYDE
Administrative Judge