

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

CVE Protest of:

HamHed, LLC,

Protestor,

Re: YUFS, Inc.

Petition for Reconsideration of SBA No.  
CVE-180-P

SBA No. CVE-190-P

Decided: May 10, 2021

ORDER DENYING PETITION FOR RECONSIDERATION<sup>12</sup>

I. Background

A. Prior Proceedings

On March 15, 2021, YUFS, Inc. (Petitioner) filed the instant Petition for Reconsideration (PFR) of the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *CVE Protest of HamHed, LLC*, SBA No. CVE-180-P (2021) (“*HamHed I*”). In that decision, OHA sustained a protest filed by HamHed, LLC (HamHed) and concluded that Petitioner does not qualify as a Service-Disabled Veteran-Owned Small Business (SDVOSB).

OHA found that, according to the Case File produced by the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE), Petitioner's sole owner and President, Dr. Akubum Yufanyiabonge, had other full-time employment apart from his work at Petitioner. *HamHed I*, SBA No. CVE-180-P, at 4. Specifically, Petitioner disclosed to CVE that Dr. Yufanyiabonge is employed full-time as [XXXX] with [a Government agency], where he works Monday through Thursday, [XX] a.m. to [XX] p.m. *Id.* Petitioner further stated that Dr.

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<sup>1</sup> OHA issued a protective order in this case on November 4, 2020, which remains in effect for the PFR.

<sup>2</sup> This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

Yufanyabonge works for Petitioner [most weekday evenings], and [XXX] and [XXX] from [XX] a.m. to [XX] p.m.<sup>3</sup> *Id.*

During the course of its review of Petitioner's request for verification as an SDVOSB, CVE also had expressed concern that Federal Acquisition Regulation (FAR) 3.601 generally prohibits the award of federal contracts to business concerns that are owned or controlled by Government employees. *Id.* In a letter to CVE dated July 8, 2020, Petitioner informed CVE that Petitioner was “currently not bidding on Federal contracts.” *Id.* (quoting Case File (CF), Exh. 22).

On December 14, 2020, OHA issued an Order, pursuant to 13 C.F.R. § 134.1007(g), directing that Petitioner produce additional information about Dr. Yufanyabonge's employment. *Id.* at 4-5. The Order explained that 13 C.F.R. § 125.13(k) establishes a rebuttable presumption that a service-disabled veteran does not control a concern 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 (quoting 13 C.F.R. § 125.13(k)).

Petitioner did not offer any substantive response to the Order, and instead maintained that OHA should adhere to procedures governing bid protests. *Id.* at 5. Petitioner did not previously advance any such arguments during the *HamHed I* proceedings. *Id.* at 3-4 (summarizing Petitioner's response to the protest allegations).

Because Petitioner made no substantive response to OHA's Order, OHA drew the inference, under 13 C.F.R. § 134.1011, that the missing information would have shown that Dr. Yufanyabonge does not control Petitioner. *Id.* at 5-6. OHA further found that Petitioner did not rebut the presumption at 13 C.F.R. § 125.13(k), and that Petitioner failed to carry its burden of proving its eligibility as an SDVOSB by a preponderance of the evidence, as required by 13 C.F.R. § 134.1010. *Id.* at 6. For these reasons, OHA sustained the protest.

Having concluded that Petitioner is not an eligible SDVOSB, OHA did not reach the question of whether Petitioner would be unduly reliant upon a non-SDVOSB subcontractor to perform the instant contract, as *HamHed* had alleged in the initial protest. *Id.*

## B. PFR

In its PFR, Petitioner contends that OHA committed four material errors in *HamHed I*. First, OHA made no factual finding as to the normal working hours of businesses in Petitioner's industry. (PFR at 4.) According to Petitioner, in order to properly invoke the presumption at 13 C.F.R. § 125.13(k), OHA first should have concluded that “either 1) Dr. Yufanyabonge's federal employment work hours occurred during the 'normal working hours' for startup federal contracting business concerns; or 2) Dr. Yufanyabonge's [] working hours [at Petitioner] were not normal working hours for startup federal contracting business concerns.” (*Id.* at 5.) *HamHed*

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<sup>3</sup> OHA has redacted Dr. Yufanyabonge's work schedule at Petitioner's request, but for purposes of clarity it is noted that Dr. Yufanyabonge does not work for Petitioner Monday through Friday from 9 a.m. to 5 p.m.

*I* does not reflect that OHA made either of these findings, and OHA therefore erred by assuming that “the normal working hours for a startup federal contracting concern overlap[] with Dr. Yufanyiabonge's federal employment working hours.” (*Id.*)

Next, Petitioner contends that *CVE Protest of Covenant Constr. Servs.*, SBA No. CVE-152-P (2020), cited in *HamHed I*, is distinguishable from the instant case. (*Id.* at 5-6.) Petitioner explains that, in *Covenant*, the challenged firm had two owners, only one of whom was a service-disabled veteran, and OHA reasoned that because the service-disabled veteran owner had other full-time employment, the non-service-disabled veteran owner could control the company. (*Id.* at 6.) Petitioner, though, has only a single owner, Dr. Yufanyiabonge, who is a service-disabled veteran. (*Id.*) As there is no indication that a non-service-disabled veteran owner could control Petitioner, OHA erred in applying the presumption at 13 C.F.R. § 125.13(k). (*Id.*)

Petitioner adds that *Covenant* also is distinguishable because, although OHA apparently concluded in *Covenant* that normal working hours for firms in the construction industry are Monday through Friday from 9 a.m. to 5 p.m., such a schedule is not normal for Petitioner. (*Id.*) Working for Petitioner is Dr. Yufanyiabonge's “second job,” and it is self-evident that “a second job must fit in a time slot different from the primary job of a federal employee.” (*Id.* at 7.) In Petitioner's view, “[t]o hold otherwise would be tantamount to ruling that no full-time federal employee (i.e., Monday through Friday 9 a.m. to 5 p.m.) could ever own or control a startup SDVOSB.” (*Id.*)

Petitioner argues that OHA had sufficient information in *HamHed I* to find that Dr. Yufanyiabonge's working hours with Petitioner were “reasonable under the circumstances” and “consistent with controlling th[e] concern.” (*Id.*) Petitioner maintains that, as of the date of its quotation for the instant procurement, Petitioner “solely operated to bid on contracts.” (*Id.*) Competing for contracts “is purely a matter of researching and submitting bids before a specified deadline,” so OHA should have concluded that Petitioner did not have normal working hours. (*Id.*) Similarly, as of the date of the protest, Petitioner “remained a fledgling company” and there was no contractual requirement that Dr. Yufanyiabonge personally oversee work Monday through Friday 9 a.m. to 5 p.m. (*Id.* at 7-8.)

Third, Petitioner argues that, unless reconsidered, *HamHed I* will lead to “untenable and unworkable legal standards” and generate confusion in future cases. (*Id.* at 2, 8-9.) *HamHed I* implicitly assumes that Dr. Yufanyiabonge is expected to work for Petitioner “Monday through Friday 9 a.m. to 5 p.m.” (*Id.* at 8.) Although OHA may have intended to “define the law regarding normal working hours analysis of a SDVOSB with full-time federal employee owners,” OHA's application of 13 C.F.R. § 125.13(k) in *HamHed I* will be poor precedent for future cases, such as situations where a concern is awarded a federal contract that must be performed in a different time zone. (*Id.* at 8-9.)

Lastly, Petitioner's failure to address the questions posed in OHA's Order should not be fatal to the outcome of this case. At the time of the response, Dr. Yufanyiabonge represented Petitioner *pro se*, and “did not appreciate that OHA had authority to revisit the SDVOSB eligibility as he is untrained in federal procurement litigation.” (*Id.* at 9.) Petitioner's response to OHA's Order therefore was “less than optimal,” as Petitioner provided “a critique of *HamHed*'s

protest and not a substantive response to the Order.” (*Id.* at 9-10.) Nevertheless, Petitioner highlights, the Supreme Court has recognized that documents filed by *pro se* litigants are to be “liberally construed.” (*Id.* at 9, citing *Erickson v. Pardus*, 551 U.S. 89 (2007).) Moreover, the circumstances presented here would satisfy the Supreme Court's standard for “excusable neglect” by a *pro se* litigant. Petitioner maintains that: reconsidering the decision will not prejudice HamHed or any other party; the delay caused by Petitioner's neglect was minimal; the delay stemmed from Dr. Yufanyiabonge's misunderstanding of the nature of the proceedings, due to his inexperience with Government contracting; and Petitioner acted in good faith to respond to OHA's Order. (*Id.* at 10, citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993).)

Petitioner argues, alternatively, that OHA should set aside *HamHed I* and instead explore the protest allegation that Petitioner will be unduly reliant upon its non-SDVOSB subcontractor to perform the instant contract. (*Id.*)

Accompanying the PFR, Petitioner attached bids that Petitioner has submitted for other procurements, in which Petitioner did not propose to utilize the same subcontractor as in *HamHed I*, and a sworn declaration from Dr. Yufanyiabonge explaining, and apologizing for, Petitioner's response to OHA's Order.

## 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 *HamHed 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

The instant PFR is flawed for several reasons. First, the PFR consists almost entirely of arguments that Petitioner could have, but did not, raise during the *HamHed I* proceedings. Petitioner argues at length, for example, that the presumption at 13 C.F.R. § 125.13(k) should not apply to startup businesses, to concerns with only a single owner, or to concerns owned and controlled by federal employees. Section I.B, *supra*. Such arguments, though, could have been advanced during *HamHed I*. Indeed, as Petitioner acknowledges, OHA specifically ordered Petitioner to discuss the presumption at 13 C.F.R. § 125.13(k), yet Petitioner did not provide any substantive response to OHA's Order. Sections I.A and I.B, *supra*. It is well-settled that OHA will not consider arguments raised for the first time in a PFR and which might have been voiced

earlier in the litigation. *E.g.*, *CVE Protest of Covenant Constr. Servs.*, SBA No. CVE-158-P, at 2-3 (2020) (PFR) (explaining that OHA cannot have erred “by failing to address arguments that Petitioner never raised”). Accordingly, Petitioner has not articulated any valid grounds to disturb *HamHed I*.

Second, although Petitioner contends that the presumption at 13 C.F.R. § 125.13(k) is unfair and unreasonable as applied to start-up businesses and other concerns, the text of the regulation does not recognize any such exceptions. In essence, then, Petitioner takes issue with the regulation itself. Such arguments should be directed to SBA policy officials, rather than to OHA. OHA does not have authority to entertain a challenge to the validity of existing regulations.

Third, while Petitioner devotes the bulk of its PFR to attacking the presumption at 13 C.F.R. § 125.13(k), OHA's decision in *HamHed I* was not based solely on that presumption. Instead, as explained in *HamHed I*, because Petitioner made no substantive response to OHA's Order, OHA drew the inference, pursuant to 13 C.F.R. § 134.1011, that the missing information would have shown that Dr. Yufanyabonge does not control Petitioner. Section I.A, *supra*. OHA further found that Petitioner did not carry its burden of proving its eligibility as an SDVOSB by a preponderance of the evidence, as is required by 13 C.F.R. § 134.1010. *Id.*

Petitioner maintains that its failure to respond to the questions posed in OHA's Order, and its failure to prove its eligibility as an SDVOSB, should be excused, because Petitioner's owner, Dr. Yufanyabonge, did not understand that OHA has jurisdiction to adjudicate SDVOSB status protests. Section I.B, *supra*. OHA's jurisdiction over such matters, however, is clearly set forth both in statute and in regulation. *See* 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. §§ 134.1001 *et seq.* Petitioner has not pointed to any authority for the proposition that a party's misunderstanding of the law can constitute “excusable neglect.” Nor does Petitioner identify any ambiguity in the statute or the regulations that might have justified, or contributed to, Dr. Yufanyabonge's confusion. It also is worth noting that, earlier in the *HamHed I* proceedings, Petitioner responded to the merits of HamHed's protest without questioning OHA's jurisdiction. Section I.A, *supra*. Petitioner has not explained why it responded in this manner to the initial protest, if, as Petitioner now asserts, Petitioner genuinely believed that OHA lacked jurisdiction. Accordingly, Petitioner has not shown that its failure to substantively respond to OHA's Order, or its failure to prove its eligibility as an SDVOSB, are excusable.

### 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). Here, Petitioner has not demonstrated any error in *CVE Protest of HamHed, LLC*, SBA No. CVE-180-P (2021). I therefore DENY the PFR and AFFIRM the decision.

KENNETH M. HYDE  
Administrative Judge