

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

CVE Protest of:

Land Shark Shredding, LLC,

Protestor,

Re: Griffin Resources LLC

Petition for Reconsideration of  
SBA No. CVE-195-P

SBA No. CVE-203-P

Decided: September 15, 2021

ORDER DENYING PETITION FOR RECONSIDERATION<sup>1</sup>

I. Background

A. Prior Proceedings

On June 17, 2021, Griffin Resources LLC (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 Land Shark Shredding, LLC*, SBA No. CVE-195-P (2021) (“*Land Shark I*”). In that decision, OHA sustained a protest filed by Land Shark Shredding, LLC (Land Shark), and concluded that Petitioner does not qualify as an eligible Service-Disabled Veteran-Owned Small Business (SDVOSB) for the subject procurement.

In *Land Shark I*, OHA noted that Land Shark had protested both Petitioner's size and its status as an SDVOSB. *Land Shark I*, SBA No. CVE-195-P, at 2. Only the status portion of the protest was before OHA. *Id.* With regard to Petitioner's SDVOSB status, Land Shark alleged that Petitioner has only a single employee, and no apparent experience with secure document destruction, the subject matter of the procurement. *Id.* Therefore, Land Shark maintained, Petitioner must rely upon a subcontractor — likely a non-SDVOSB subcontractor — to perform the instant contract, in contravention of 13 C.F.R. §§ 125.18(f) and 134.1003(c). *Id.* Petitioner did not respond to the status protest, and thus raised no arguments in its own defense. *Id.* at 3-4. However, Petitioner's quotation for the procurement was in the record, and OHA found that the quotation supported Land Shark's allegations that a non-SDVOSB subcontractor would perform the bulk of the contract, including the on-site document destruction. *Id.* Because Petitioner failed

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<sup>1</sup> OHA adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J.

to respond to the status protest, and Land Shark's allegations were credible, Petitioner did not 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.*

### B. PFR

In its PFR, Petitioner contends that OHA erred by accepting jurisdiction over Land Shark's status protest. Specifically, the status protest was based on OHA's rules of procedure at 13 C.F.R. § 134.1003(c), which in Petitioner's view, "grants authority to [SBA area offices], not OHA, to decide issues of unusual reliance." (PFR at 4.) In support, Petitioner highlights that, whereas other paragraphs of § 134.1003 outline types of matters that may be considered by an OHA judge, paragraph (c) instead indicates that "SBA" will review such issues. (*Id.* at 12-13.) Although § 134.1003 does not define "SBA," Petitioner urges that the language contemplates an office other than OHA, such as an area office. (*Id.* at 4-7.) Because OHA has "jurisdiction and authority to decide all [SDVOSB status] issues **except** issues related to 'unusual reliance'" under paragraph (c), OHA should have dismissed the instant status protest for lack of jurisdiction. (*Id.* at 6-7, emphasis Petitioner's.)

Petitioner contends that OHA's decision in *CVE Protest of Crosstown Courier Service, Inc.*, SBA No. CVE-119-P (2019) supports the conclusion that alleged violations of § 134.1003(c) are beyond OHA's jurisdiction. (*Id.* at 5.) In *Crosstown*, OHA dismissed a status protest after noting that the protest did not allege any violation of § 134.1003(a) or (b), and without mentioning paragraph (c). (*Id.*) According to Petitioner, OHA thus implicitly recognized that OHA would lack jurisdiction over alleged violations of § 134.1003(c). (*Id.*)

Petitioner maintains, alternatively, that even if OHA did have jurisdiction over this status protest, OHA should have ensured that its decision was consistent with Size Determination No. 06-2021-043. Petitioner observes that, for the instant procurement, Land Shark challenged both Petitioner's size and Petitioner's status as an SDVOSB. (*Id.* at 2.) The size allegations were directed to SBA's Office of Government Contracting — Area VI. (*Id.*) Petitioner offered a detailed rebuttal to the size allegations, and on April 1, 2021, Area VI issued Size Determination No. 06-2021-043, concluding that Petitioner is small and is not affiliated with its subcontractor through the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(2). (*Id.* at 3, 7-9, 11.) Land Shark did not appeal Size Determination No. 06-2021-043 to OHA, and the deadline for Land Shark to do so has now expired. (*Id.* at 5-6.)

Petitioner argues that, as part of the ostensible subcontractor analysis, Area VI examined whether Petitioner would be unusually reliant upon its subcontractor to perform the instant contract, largely the same question that was before OHA in *Land Shark I*. (*Id.* at 6-7.) OHA thus erred by issuing a decision inconsistent with Size Determination No. 06-2021-043. Petitioner reiterates its view that § 134.1003(c) "expressly direct[s] allegations of unusual reliance only to the SBA," rather than to OHA. (*Id.* at 4, 6.) Further, the underlying factual circumstances, such as the solicitation and Petitioner's quotation, would have been identical for both the size and the status protests, so it was irrational that OHA reached a different result than Area VI. (*Id.* at 6, 14.)

Petitioner contends that OHA also erred by concluding that Petitioner did not respond to the status protest. Because OHA has no jurisdiction over alleged violations of § 134.1003(c), Petitioner did, in effect, respond to the status protest when it submitted its rebuttal to the size protest to Area VI. (*Id.* at 9-10.) OHA therefore erred by failing to consider the information Petitioner provided to Area VI. (*Id.* at 10-11.) Further, Petitioner was unaware of any requirement that it should respond to the status protest, when Petitioner already had submitted a response to the size protest. (*Id.* at 7.) Petitioner highlights that, although *Land Shark I* cited prior OHA decisions in which status protests have been sustained based on the challenged firm's failure to respond, those cases did not involve alleged violations of § 134.1003(c). (*Id.* at 13.)

Petitioner lastly argues that, after Size Determination No. 06-2021-043 was issued, Land Shark should have withdrawn its status protest, or at a minimum, should have provided a copy of Size Determination No. 06-2021-043 to OHA. (*Id.* at 14.) Land Shark thus is at fault for the inconsistent decisions presented here.

Accompanying its PFR, Petitioner attached a copy of Land Shark's protests; a letter from Area VI inviting Petitioner to respond to the size allegations; a copy of Size Determination No. 06-2021-043 and the accompanying cover letter; and a declaration from Petitioner's Managing Member, Mr. Chris Lamont. (*Id.* at 14. and Attachs. A-E.)

## II. Discussion

### A. Timeliness and Standard of Review

A party seeking reconsideration of an OHA decision on an SDVOSB status 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 *Land Shark 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 HamHed, LLC*, SBA No. CVE-190-P (2021) (PFR); *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 entirely of arguments that Petitioner could have, but did not, raise during the *Land Shark I* proceedings. Petitioner argues at length, in particular, that OHA should have dismissed Land Shark's status protest for lack of jurisdiction. Section I.B, *supra*. Such arguments, though, could have been advanced during *Land Shark I*. Indeed, OHA's rules of procedure require that a response to a status protest is due within fifteen days after the protest is filed, at which point the record will close. 13 C.F.R. § 134.1007(f)(1). Further, although OHA's rules do permit a party to submit a motion to dismiss after the close of record, any such motion must in any event be filed “before a

decision is issued.” 13 C.F.R. § 134.211(e). Here, Petitioner did not respond to Land Shark's status protest, nor did Petitioner move to dismiss the status protest prior to OHA's decision in *Land Shark I*. Section I.A, *supra*. Rather, Petitioner waited to raise its jurisdictional objections for the first time in the PFR. It is well-settled that OHA will not entertain arguments raised for the first time in a PFR and which might have been voiced earlier in the litigation. *E.g.*, *HamHed*, SBA No. CVE-190-P, at 4; *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 valid grounds to disturb *Land Shark I*.

Apart from being procedurally improper, Petitioner's jurisdictional arguments are meritless. It is true, as Petitioner observes, that excessive reliance upon a subcontractor was, historically, an issue addressed only in SBA's size regulations. *See generally* 13 C.F.R. § 121.103(h)(2). In late 2019, however, SBA amended its rules to also expressly allow status protests challenging a prime contractor's reliance upon a subcontractor that does not share the same status. 84 Fed. Reg. 65,647 (Nov. 29, 2019). Concurrently with these changes, SBA added to the SDVOSB ownership and control regulations new language prohibiting excessive reliance on a non-SDVOSB subcontractor. *Id.* at 65,664 (now codified at 13 C.F.R. § 125.18(f).) In introducing these changes, SBA explained the size protest process alone might not fully address all situations of excessive subcontracting, because a prime contractor could, for example, be heavily reliant upon a subcontractor that is small but lacks the appropriate status to have been eligible for a given contract award. *Id.* at 65,654. Accordingly, the fundamental premise of Petitioner's arguments here — that questions of excessive reliance on a subcontractor are examined solely in the context of SBA size rules — is simply incorrect under current law. Rather, excessive reliance on a non-SDVOSB subcontractor is also valid grounds for a status protest under 13 C.F.R. §§ 125.18(f) and 134.1003(c).

By statute, OHA alone adjudicates SDVOSB status protests for procurements conducted by the U.S. Department of Veterans Affairs (VA), and OHA's decision on these protests constitutes the final decision of the SBA. 38 U.S.C. § 8127(f)(8)(B). Further, OHA's rules of procedure require that all such SDVOSB status protests, regardless of the particular issues raised in the protest, are directed solely to OHA. 13 C.F.R. § 134.1004(b)(2). It follows, then, that for a VA procurement, only OHA may adjudicate an SDVOSB status protest alleging unusual reliance upon a non-SDVOSB subcontractor. Notably, Petitioner points to no authority that would enable, let alone require, an SBA area office to render a decision on an SDVOSB status protest. As a result, concluding that OHA lacks jurisdiction to consider a prime contractor's excessive reliance upon a non-SDVOSB subcontractor would effectively mean that no office, either within SBA or VA, could make a decision on such allegations, a plainly illogical and absurd result.

In its PFR, Petitioner observes that 13 C.F.R. § 134.1003(c) states that “SBA” will consider a status protest alleging unusual reliance upon a non-SDVOSB subcontractor, whereas other paragraphs in § 134.1003 identify the OHA “Judge” as decision-maker. This argument overlooks that OHA, itself, is an office of the SBA. *See* 15 U.S.C. § 634(i). Indeed, OHA is the very office that renders the final decision of the SBA on SDVOSB protests pertaining to VA procurements. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i). Further, OHA's rules of procedure elsewhere define “SBA” as meaning the agency as a whole, and the term “SBA” thus

encompasses OHA. 13 C.F.R. § 134.101. Contrary to Petitioner's contentions, then, in the context of § 134.1003(c), the statement that "SBA" will consider questions of excessive reliance upon a non-SDVOSB subcontractor clearly means only that OHA will review such allegations. Nor is there anything in the regulatory history to suggest that, when SBA added paragraph (c) to § 134.1003 in late 2019, SBA intended that allegations under that particular paragraph would not be adjudicated by OHA but instead would be directed to a different, unidentified office within the agency. 84 Fed. Reg. 65,647 (Nov. 29, 2019).

Petitioner also maintains that, in *CVE Protest of Crosstown Courier Service, Inc.*, SBA No. CVE-119-P (2019), OHA implicitly recognized that alleged violations of § 134.1003(c) are beyond its jurisdiction. This argument fails because *Crosstown* was decided in May 2019, well before SBA introduced the new provisions at §§ 125.18(f) and 134.1003(c), which became effective December 30, 2019. *See* 84 Fed. Reg. at 65,647. Accordingly, *Crosstown* did not make, and could not have made, any ruling as to whether a status protest alleging excessive reliance on a non-SDVOSB subcontractor is within OHA's jurisdiction. Notably, subsequent to the *Crosstown* decision, OHA has in fact accepted jurisdiction over SDVOSB status protests alleging violation of §§ 125.18(f) and 134.1003(c). *E.g.*, *CVE Protest of U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P (2020).

Petitioner alternatively argues that, even if OHA did have jurisdiction over Land Shark's status protest, OHA should have reached the same conclusion as did Area VI in Size Determination No. 06-2021-043. Petitioner maintains in particular that the case before OHA involved largely the same legal questions considered by Area VI, and that the factual circumstances of the two cases also were fundamentally similar, in that both pertained to the same underlying procurement and quotation. Section I.B, *supra*. Petitioner, though, has not persuasively shown that either the factual circumstances of the two cases, or the legal issues presented, were in fact identical. The factual records of the two cases were very different because, as Petitioner acknowledges in its PFR, Petitioner provided a detailed response with supporting evidence to rebut the size protest, yet failed to make any response whatsoever to the status protest. Thus, the record before OHA did not contain any of the argument or evidence, such as cost breakdowns, that Petitioner reportedly provided to Area VI.<sup>2</sup> The legal issues presented in the two cases likewise were not identical. Whereas the focus of OHA's inquiry was whether Petitioner qualified as an eligible SDVOSB under 13 C.F.R. part 125, Area VI addressed whether Petitioner was a small business under 13 C.F.R. part 121. These are separate legal questions governed by different bodies of law. *E.g.*, 83 Fed. Reg. 48,908, 48,909 (Sept. 28, 2018) (OHA size appeal decisions do not necessarily apply to questions of SDVOSB eligibility).

Petitioner also argues that it harbored the subjective belief that it need not have responded to the status protest, because Petitioner had previously provided a response to the size protest. Section I.B, *supra*. The applicable regulations, however, make clear that in a status protest proceeding before OHA, the challenged firm bears the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. Further, when, as here, a protestor files both a size protest and a status protest against the same concern, the protests will be processed

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<sup>2</sup> Even with its PFR, Petitioner has not provided a copy of its response to the size allegations to OHA. *See* Section I.B, *supra*.

concurrently by the SBA offices that are, respectively, responsible for handling such matters. 13 C.F.R. § 134.1001(c). Accordingly, rather than simply assuming that its response to the size protest might somehow be communicated to OHA, it would have been prudent for Petitioner to have transmitted a copy of that response to OHA, and to have verified that OHA actually was in receipt of that response. Similarly, Petitioner could have provided a copy of Size Determination No. 06-2021-043 to OHA. Given that Petitioner neglected to take even these basic steps, Petitioner has not shown that its failure to respond to the status protest was excusable. Notably, Petitioner has repeatedly been the subject of prior size and status protests at SBA. *E.g.*, *CVE Protest of Security Operations Group Int'l, LLC*, SBA No. CVE-171-P (2020). It therefore is not plausible to believe that Petitioner was wholly ignorant of SBA protest procedures.

Lastly, contrary to Petitioner's suggestions, it is immaterial that Area VI issued Size Determination No. 06-2021-043 before OHA rendered its decision on the status protest. As explained above, the size and status protests involved different legal questions, as well as fundamentally different factual records. Further, it is well-settled law that prior size determinations, unless appealed to OHA, have no precedential effect. *E.g.*, *Size Appeal of The MayaTech Corp.*, SBA No. SIZ-5269, at 7 (2011); *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 6 (2009). Thus, even supposing that Petitioner had notified OHA of Size Determination No. 06-2021-043, that determination would not have been binding on OHA.

### 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 Land Shark Shredding, LLC*, SBA No. CVE-195-P (2021). I therefore DENY the PFR and AFFIRM the decision.

KENNETH M. HYDE  
Administrative Judge