

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

IN THE MATTER OF:

Greenwater Marine Sciences Offshore,
Inc.,

Appellant,

SBA No. CVE-212-A

Decided: December 1, 2021

APPEARANCE

George Mark Miller, CEO, for Greenwater Marine Sciences Offshore, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 8, 2021, the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE) issued a Notice of Proposed Cancellation (NOPC) to Greenwater Marine Sciences Offshore, Inc. (Appellant). (Case File, (CF) Ex. 51.) On August 24, 2021, CVE issued a letter cancelling Appellant's inclusion as a verified Service-Disabled Veteran-Owned Small Business (SDVOSB) in the CVE Vendor Information Pages (VIP). (CF, Ex. 75.) On September 8, 2021, Appellant filed an appeal challenging the cancellation to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). For the reasons discussed *infra*, the appeal is denied.

OHA adjudicates SDVOSB appeals under the authority of 38 U.S.C. § 8127, and 13 C.F.R. § 134.102(u).

II. Background

A. CVE's Request for Documentations

On November 20, 2020, CVE verified Appellant as an SDVOSB and added to the VIP Database. (CF, Ex. 38.) The verification was valid for three years from the date of the admission

¹ This decision was originally issued under confidential treatment. Pursuant to 13 C.F.R. § 134.205, OHA afforded Appellant an opportunity to file a request for redactions if desired. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

letter. (*Id.*, at 1.) CVE further notified that Appellant is presently, as of the issuance of this notice, in compliance with the regulation and must inform CVE of any changes or other circumstances that would adversely affect its eligibility.

On June 15, 2021, Appellant requested a change of its business from a limited liability company (LLC) to a corporation. (CF, Exs. 39, 49, at 2.) On June 22, 2021, CVE requested supporting documentations by June 29, 2021. (CF, Ex. 45.) These documentations were: (1) a signed copy of the minutes of the First and Most Recent Stockholder and Board of Director meetings that clearly show elections of officers and directors; (2) a complete copy of the company Bylaws and any amendments, which must be signed by all owners; and (3) signed copies of ALL stock certificates issued to date and a stock ledger or a complete listing, which summarizes all ownership history of the applicant company and verifies the shares including transfers and/or cancellations of shares and the dates of the transfers. (*Id.*)

On June 24, 2021, and June 29, 2021, respectively, CVE made calls and left voicemails in attempts to remind Appellant of the deadline for submission of documents and offering an option for extension of time. (CF, Ex. 80.) Appellant, however, failed to submit the required documents.

B. CVE's NOPC

On July 8, 2021, CVE issued an NOPC. (CF, Ex. 51.) CVE considered Appellant's verification eligibility, citing to the following regulation:

CVE may remove a participant from public listing in the VIP database for good cause upon formal notice to the participant in accordance with § 74.22. Examples of good cause include, but are not limited to, the following:

...

(2) Failure by the participant to maintain its eligibility for program participation;

...

(5) Failure to make required submissions or responses to CVE or its agents, including a failure to make available financial statements, requested tax returns, reports, information requested by CVE or VA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

(*Id.*, at 1-2, citing 38 C.F.R. § 74.21(d).)

CVE noted Appellant's request to change its form of organization from an LLC to a corporation on June 15, 2021. Then, CVE noted its June 22, 2021's request for documentation of

Appellant's change, the corporate minutes, Bylaws, stock ledger, and copies of the stock certificates, which Appellant failed to submit. (CF, Ex. 51, at 2; *see also*, Ex. 45.) Thus, CVE found that it could not reasonably conclude that the requirements of 38 C.F.R. § 74.21(d)(2) and (5) were satisfied.

Further, CVE could not ascertain that Appellant was majority-owned by a service-disabled veteran (SDV). Without Appellant's Bylaws, CVE could not ascertain that Appellant met the dividend distribution requirements of 13 C.F.R. § 125.12(g). Moreover, CVE could not ascertain that an SDV controlled Appellant's Board of Directors as required by 13 C.F.R. § 125.13(e). CVE could also not ascertain whether Appellant's highest officer was an SDV, as required by 13 C.F.R. § 125.13(b). (*Id.*, at 2-3.) Therefore, CVE gave Appellant 30 days to submit the same documentary evidence to establish that it should not be cancelled. (*Id.*, at 4.) This time, the deadline to submit documents was August 7, 2021.

On July 8, 2021, Appellant submitted an unsigned and undated Bylaws (CF, Ex. 56); a letter of explanation (CF, Ex. 57); and a Written Consent of the Board of Directors, dated June 11, 2021 and signed by Mr. Miller only (CF, Ex. 58.). In the letter of explanation, Appellant made the following statement:

GMSO has converted from a LLC to a B corporation. George Mark Miller is still 100% owner of the company at this date. We intend to sell or distribute 20-30% shares of equity in the company in the near future. The intent is that George Mark Miller, a Service-Disabled Veteran, will continue to hold ownership of at least 51% of the company for the foreseeable future.

George Mark Miller is still presently a full-time employee as CEO and will stay so for the foreseeable future.

(CF, Ex. 58.)

On August 8, 2021, Appellant received a notification that CVE's recent document request had expired. (CF, Ex. 59.) At this point, Appellant did not submit (1) the stock ledger and the stock certificates, and (2) a copy of its Bylaws signed by all owners.

On the next day, August 9, 2021, Appellant called CVE, stating that his document request had expired, but he was working to get the documents together. (CF, Ex. 80.) Appellant was instructed to email the cancellation team for further information. (*Id.*) Appellant, thus, emailed CVE and attached the NOPC and a Stock Ledger dated August 8, 2021. (CF, Exs. 60-62.). Appellant made the following statement:

My verification status has expired after our change from an LLC to a corporation. I request an extension to gather up all the required documents. We're a startup who has yet to commence operations, i.e. it's just me right now ... and my lawyer. I have almost all the documentation needed in hand and should have the rest within a week, or two at the latest. Apologies, I have had to deal with some personal affairs for much of the last 2 months in addition to all the things in

flux with the change to corp. I'm back in the office and back to full-time development of the business.

(CF, Ex. 60.)

Appellant's Stock Ledger identified Dennis Weeks and Benno Ammann as minority shareholders with an effective date of issuance of July 14, 2021, and effective date of Board action as of June 30, 2021. (CF, Ex. 62.)

On August 10, 2021, CVE offered Appellant the chance to submit a response to the NOPC. (CF, Ex. 63.) On August 11, 2021, Appellant submitted a Written Consent of Sole Shareholder dated June 11, 2021, attached to the undated and unsigned Bylaws (CF, Ex. 66); a Written Consent of the Board of Directors dated June 11, 2021, appointing Mr. Miller as the Chief Executive Officer (CF, Ex. 67); Mr. Miller's resume (CF, Ex. 68); the Stock ledger dated August 8, 2021, (CF, Ex. 69); and a letter of explanation dated August 11, 2021 (CF, Ex. 70).

In the letter dated August 11, 2021, Appellant stated that it has converted from an LLC to a B corporation. (*Id.*, at 1.) Mr. Miller is still the majority owner of Appellant and intends to sell or distribute 20-30% shares of equity in the company in the near future. (*Id.*) Appellant further intends for Mr. Miller to continue to hold ownership of at least 51% of the company for the foreseeable future. (*Id.*) Appellant stated that Mr. Miller is still a full-time employee as CEO and will stay so for the foreseeable future. As for CVE's request of the current Bylaws signed by all owners of the company, Appellant responded that the Bylaws submitted are undated and have not been signed by all owners of the company. Further, the Bylaws approved at the first shareholder meeting are attached and are not required to be signed by all additional shareholders. (*Id.*) Additionally, the Bylaws do not specify the percentage of distribution of annual profits paid to the owners and no distribution of profits is planned at this moment.

Appellant further noted that no stock certificates have been issued and they are held by Appellant for security. (*Id.*) With respect to the NOPC and changes in ownership structure of the company, identifying all owners and their corresponding roles and responsibilities in the business operations, Appellant made the following remark:

All new "owners" are minority shareholders. We are presently selling 20% equity in the company and the list of shareholders is changing on a regular basis. It is possible that there may be 40+ minority shareholders of this company within the next few months. We can assume none are Service-Disabled Veterans. None will have any roles and responsibilities in business operations.

(*Id.*, at 2.)

When responding to the ownership structure and request for an updated VA Form 0877 with accurate ownership interests held in the company, Appellant stated that Mr. Miller "will remain the CEO and majority shareholder/owner for the foreseeable life of the company. The stock ledger establishes all ownership history of the company. We can assume no others are

veterans. If form 0877 is still required with signatures by all shareholders, I request an extension. Note: if all goes well, I'll be adding people weekly to this list.” (*Id.*)

C. CVE's Cancellation

On August 24, 2021, CVE issued a Notice of Verified Status Cancellation. (CF, Ex. 75.) CVE first stated that Appellant's response to the NOPC dated July 8, 2021 was not adequate to justify overturning all of the findings listed in the NOPC. (*Id.*, at 1.) CVE was unable to conclude that Appellant satisfies the requirements of 38 C.F.R. Part 74.

Particularly, CVE could not reasonably conclude that Appellant has maintained its verification eligibility for program participating when the Bylaws were unsigned and undated and subsequent requests resulted in the concern combining a signed document entitled “Written Consent of the Board of Directors” to the previously submitted unsigned Bylaws. (*Id.*, at 2.) CVE indicated that the Bylaws do not contain a signature page and as indicated in the NOPC, changes to business documents or updated submissions will not be accepted as part of the cancellation process. (*Id.*)

As for the complete stock ledger, CVE noted that Appellant's stock ledger identified two apparent non-veteran owner individuals, Mr. Weeks and Mr. Ammann, each holding 200,000 shares. In two letters of explanation, Appellant stated that it intended to sell or distribute 20-30% shares of equity and expected 40 or more minority shareholders. (*Id.*) Appellant also mentioned that if all goes well, it will be adding people weekly to the list of Appellant's owners. CVE pointed that no additional information regarding Mr. Weeks and Mr. Ammann was provided. (*Id.*, at 2.) Additionally, Appellant did not provide stock certificates because it allegedly did not issue one for security reasons. (*Id.*)

Thus, CVE could not determine the ownership structure of the concern with any specificity. Further, the discrepancy in the documentation provided did not allow CVE to reasonably conclude that Appellant continues to maintain verification eligibility for program participation as required by 38 C.F.R. § 74.21(d)(2) or that the concern has made required submissions within 30 days of the date of request pursuant to 38 C.F.R. § 74.21(d)(2)(5).

Considering the issue of ownership, CVE found that Appellant's new minority owners were not included in the documentation at the time of Appellant's most recent verification. (*Id.*, at 3.) Although Mr. Miller remained the 100% owner of the concern, the provided stock ledger listed two non-SDV minority owners. Appellant's letters of explanation suggested that the company's ownership is in fluctuation on a regular basis, with the possibility of as many as 40 new minority shareholders. (*Id.*) CVE determined that it could not identify the individuals with ownership interests in Appellant or its ownership structure, and thus, could not determine whether Appellant was 51% unconditionally and directly owned by one or more SDVs. (*Id.*)

For dividends, CVE found the Bylaws do not establish the SDV's right to receive at least 51% of annual distributions or profits, and Appellant stated no distribution was planned. (*Id.*) CVE concluded, considering the plan of adding new minority owners, it could not establish the requirements of 13 C.F.R. § 125.12(g) were met.

Finally, CVE considered the issue of control and whether Appellant's Board of Directors was controlled by an SDV. CVE acknowledged that a Written Consent of the Board of Directors designated Mr. Miller, the individual SDV upon whom Appellant's claim of eligibility was based, as Appellant's CEO and sole Director. (*Id.*) However, CVE could not conclude the SDV controlled the Board, given that it could not clearly identify Appellant's ownership structure or the owners of the concern, and given the changes in the stock ledger and the fluctuating state of ownership. (*Id.* at 3-4.)

D. The Appeal

On September 8, 2021, Appellant filed the instant appeal with OHA. Appellant argues CVE's decision is in error because: (a) CVE imposed an erroneous requirement to update documents based on changes occurring after Appellant submitted its change request; (b) CVE rejected the stock ledger and Bylaws that Appellant submitted; and (c) CVE designated after the fact additions of new minority shareholders as problematic. (Appeal at 1.)

Appellant asserts that on June 15, 2021, Mr. Miller, an SDV, owned 100% of the company, and up until that point, it was an LLC. On that date, Appellant submitted a request to change its form to a corporation. On July 14, 2021, new shares were issued to two individuals, totaling a 5% interest in the company. Appellant believes there is confusion between the date it requested the change in its organization and the date CVE requested and received information. Appellant states that it is unclear as to whether, during the change request process, it must constantly update its information with CVE. (*Id.*, at 2.)

Appellant argues that only its status as of the time of its change request is relevant. Only minor changes took place afterwards, and the regulations contemplate that such changes will occur and not affect a concerns eligibility. (*Id.*, citing 13 C.F.R. § 125.12(f).) Mr. Miller still held a 95% interest in Appellant as of July 14, 2021. Appellant maintains CVE should not have considered any information concerning changes that occurred after the change request, and it should have made clear to Appellant that it required additional documentation. Appellant maintains it meets the eligibility requirements for an SDVOSB. (*Id.*)

Further, Appellant admits that while CVE did not receive its share certificates, it deliberately did not issue them, as permitted by Virginia law. (*Id.*, at 3, citing VA Code § 13.1-648.) The absence of certificates increases the SDV's control by preventing minority shareholders from transferring shares without permission.

Appellant takes issue with CVE's implication that Appellant allegedly made misleading claims about stock ownership. On July 8, 2021, Appellant asserted that Mr. Miller owned 100% of its stock, and that was true at that time. Appellant provided CVE with a stock ledger dated August 8, 2021, with July 14, 2021 as the date the two minority shareholders were added. There was no obfuscation by Appellant. (*Id.*)

Appellant states it submitted a copy of its Bylaws to CVE. In response to CVE's request for a signed copy, Appellant submitted an adopting resolution signed by its sole shareholder.

Appellant asserts there was no falsification and no after the fact creation of documents. Appellant argues there is no requirement the Bylaws must be signed. As a normal practice, Bylaws are not signed by anyone. The Bylaws and the resolution were combined into a pdf document, done contemporaneously as a record of their adoption, and not after CVE requested a signed copy. Appellant asserts the VA's website under "Required Documents for Verification" does not state the Bylaws are required to be signed. Mr. Miller signed the resolution adopting the Bylaws titled "Written Consent of Sole Shareholder" when he was the sole incorporator. The Bylaws must be adopted by the incorporator or Board of Directors (VA Code § 13.1-624, 13-1.724) but there is no legal requirement for the Bylaws to be adopted by all shareholders. The Bylaws were adopted before there were any minority shareholders to avoid having to submit them to those shareholders. Appellant argues its submission of its Bylaws is sufficient. (*Id.*, at 4-5.)

Appellant, then, assigns error to CVE's finding that the "state of fluctuation" of its ownership as a reason for cancellation. The regulations permit changes in ownership as long as the firm remains 51% owned by an SDV (13 C.F.R. § 125.12) and Appellant had stated that while future shareholders might be added, they would hold no more than 20% to 30% of the company. Mr. Miller owned 100% of the company prior to July 14, 2021, and 95% afterward. The possible future sale of stock was not relevant. (*Id.*, at 5-6.)

Appellant also assigns error to the fact the Bylaws do not entitle the SDV to receive at least 51% of the annual distribution of profits, where the addition of new minority shareholders is contemplated. Appellant argues that the addition of new shareholders after the change request is irrelevant, so long as the SDV's ownership does not drop below 51%. A company is not required to distribute anything to its shareholders. However, the Bylaws not providing for annual distribution of profits does not mean such distribution are not required to be made according to each shareholder's percentage interest. Appellant has only one class of stock, common voting stock. There is no other class of stock entitled to any other distributions of profit. The fact that its Bylaws do not provide for distribution based on shareholdings is irrelevant because the Virginia Code requires it. (*Id.*, at 7-8, citing VA Code §§ 13.1-640, 13.1-653, 13.1-746.3.)

Appellant also disputes CVE's finding that Mr. Miller does not control the firm. Appellant points out that Mr. Miller was 100% shareholder on July 14, 2021, and 95% shareholder after. Mr. Miller is the majority shareholder at all times, which gives him the ability to elect or remove Directors of the company, and the Bylaws have no supermajority requirements. Therefore, Mr. Miller controls the Board of Directors. (*Id.*, at 9-10.)

III. Discussion

A. Burden of Proof

Appellant has the burden of proving, by a preponderance of the evidence, that CVE's cancellation of Appellant was based on a clear error of fact or law. 13 C.F.R. § 134.1111. OHA's decision is based on evidence in the CVE case file, arguments made on appeal, and any responses thereto. 13 C.F.R. § 134.1112(c).

B. Discussion

The CVE's decision to cancel Appellant's Verified Status in the VIP was based on two grounds: First, upon Appellant's failure to maintain its eligibility with questions as to ownership, control, and payment of dividends, and second, its failure to make required submissions to CVE. Sections II.B and II.C, *supra*; 38 C.F.R. § 74.21(d)(2) and (5).

As to the issue of failure to make required submissions, the VA regulations clearly state CVE may remove a concern from the VIP database if the concern “[f]ail[s] to make required submissions or responses to CVE or its agents, including a failure to make available financial statements, requested tax returns, reports, information requested by CVE or VA's Office of Inspector General, or other requested information or data within 30 days of the date of request.” 38 C.F.R. § 74.21(d)(5). Here, it is undisputed that Appellant failed to produce any of the documents requested in CVE's e-mail correspondence of June 22, 2021. Section II.A, *supra*. Then, CVE requested the materials for a second time in the July 8, 2021's NOPC, and Appellant, again, failed to timely produce all the requested information, including the complete stock ledger. Sections II.A and II.B, *supra*. Thus, I see no basis to conclude CVE erred in removing Appellant from the VIP database. When given the opportunity, Appellant failed to comply with CVE's requests, in contravention of 38 C.F.R. § 74.21(d)(5). *CVE Appeal of GCBO Sourcing Partners, LLC*, SBA No. CVE-112, at 4 (2019).

Appellant's allegations that CVE erroneously required it to update documents based on changes occurring after Appellant submitted its change request is meritless. Appellant cannot point to an authority or regulation barring CVE from conducting an investigation or requesting documents as part of reviewing a concern's continued participation in the VIP Database. The remaining contentions, that Appellant provided sufficient information, including the stock ledger and Bylaws, or that CVE designated after the fact additions of new minority shareholders as problematic, also fail to show CVE erred as a matter of fact or law. Here, Appellant did not adequately respond to CVE's repeated requests for specific information, including signed documents, and Appellant indeed failed meet the deadlines for providing the information. Sections II.A and II.B, *supra*. As the VA regulations state CVE may remove a concern from the VIP database when the concern fails to provide information requested by CVE, 38 C.F.R. § 74.21(d)(5), CVE clearly had the authority to remove Appellant.

Given that it was Appellant's failure to make all the required submissions to CVE and 38 C.F.R. § 74.21(d)(5) is dispositive of this appeal, I need not reach a finding as to the remaining issues of ownership, dividends, and control under 38 C.F.R. § 74.21(d)(2). *Size Appeal of [[Drug Applicant]*, SBA No. SIZ-5362, at 10, fn. 3 (2012) (finding that when an issue is dispositive, OHA need not reach other issues raised in an appeal.)

IV. Conclusion

For the above reasons, the appeal is DENIED. This is the final decision of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(A); 13 C.F.R. §§ 134.1112(d) & (f).

CHRISTOPHER HOLLEMAN
Administrative Judge