

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

IN THE MATTER OF:

PotomacWave Consulting, Inc.,

Appellant,

RE: Stokes Evans Limited

U.S. Coast Guard

RFQ No. HSCG79-14-Q-PBY007

SBA No. EDWOSB-104

Decided: July 8, 2014

APPEARANCES

Steven J. Koprince, Esq., Petefish, Immel, Heeb & Hird LLP, Lawrence, Kansas, for Appellant

Bryan R. King, Esq., Todd R. Overman, Esq., Bass, Berry & Sims PLC, Washington, D.C., for Stokes Evans Limited

Christopher R. Clarke, Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a determination by the Small Business Administration (SBA) Director of Government Contracting (D/GC) denying a protest filed by PotomacWave Consulting, Inc. (Appellant) against Stokes Evans Limited (SEL). In the protest, Appellant alleged SEL is not an Economically Disadvantaged Women-Owned Small Business (EDWOSB) and therefore ineligible for award of the above-captioned procurement, a blanket purchase agreement issued under the General Services Administration's Federal Supply Schedules. Appellant argues on appeal that the D/GC clearly erred in determining that SEL is an eligible

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel for SEL the opportunity to file a request for redactions if desired. Counsel indicated that he did not wish to propose redactions, so OHA now publishes the decision in its entirety.

EDWOSB, so OHA should reverse the determination. For the reasons discussed *infra*, the appeal is denied.

SBA's Office of Hearings and Appeals (OHA) decides EDWOSB appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 127 and 134. Appellant filed its appeal within 10 business days after receiving the eligibility determination, so the appeal is timely. 13 C.F.R. § 134.703. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Protest, and Response

On November 8, 2013, the U.S. Coast Guard (Coast Guard) issued Request for Quotation No. HSCG79-14-Q-PBY007 (RFQ) for complex strategic business consulting services to the Command, Control, Communication, Computers and Information Technology (C4IT) Service Center. The Coast Guard issued the RFQ under the Mission Oriented Business and Integration Services (MOBIS) Schedule, and stated that the RFQ would result in a single-award Blanket Purchase Agreement (BPA) for a period of five years, to include a 12-month base period and four 12-month option periods. The BPA was set aside for an EDWOSB MOBIS Schedule holder with Special Item Numbers (SINs) 874-1 and 874-6. Quotations were due on November 25, 2013. Appellant and SEL submitted timely quotations.

On April 1, 2014, the Coast Guard announced that SEL was the awardee of the BPA. On April 7, 2014, Appellant protested SEL's status as an eligible EDWOSB, arguing that SEL was not controlled by Ms. Gwennyn Chervenik, as SEL represented. Rather, Appellant argued, SEL is controlled by her husband, Mr. Michael Chervenik.

Appellant offered four reasons for this conclusion. First, Appellant alleged that Ms. Chervenik lacks the managerial experience necessary to run a financial and management consulting company like SEL. She has a Bachelor of Arts in film and a Master of Science in Adult and Continuing Education. Her husband, however, has a Master of Business Administration in finance. Appellant's second allegation was that Mr. Chervenik exercises undue control over SEL, as he is SEL's primary point of contact. Third, Mr. Chervenik is one of two directors on SEL's board, so he can exercise actual control over SEL. Ms. Chervenik, then, as the other director, could at a minimum exercise only negative control over SEL. Fourth, Ms. Chervenik has responsibilities outside of SEL that would prevent her from devoting full-time attention to SEL.

On May 1, 2014, Ms. Chervenik responded to the protest. She explained that she formed SEL in 2003 and has been the "sole owner and president ... bearing the full risks of being a small business owner." She has "sole authority over all company finances, banking activities, contracts, and personnel." Protest Response at 1.

Ms. Chervenik also explained that she devotes her full-time attention to SEL and does not engage in any other outside employment. She volunteers between 12 and 15 hours per month to her Parent-Teacher Association, nearly all of which is on evenings and weekends. *Id.* at 2.

Ms. Chervenik then provided a detailed account of her experience. She stated that she “spent nearly three years as a consulting manager with A.D. Little and ICF International, eight years in progressively more responsible management roles within professional associations, and seven years managing complex international film production partnerships, including financing, budgets, logistics, and contracts.” With over 20 years of management experience, she has “developed superior financial management, staff management, project management, contract management, and business strategy skills.” *Id.*

B. Eligibility Determination

On May 22, 2014, the D/GC denied Appellant's protest. The D/GC determined Ms. Chervenik's outside activities do not limit her ability to devote her full-time attention to SEL. The D/GC also determined Ms. Chervenik controls SEL because she is the sole shareholder and president. In addition, the D/GC observed, Ms. Chervenik holds a master's degree and fifteen years of relevant management experience. As for her husband, the D/GC determined that although he “has an active and important role,” his role “is subject to the oversight, authorization and directives of Ms. Chervenik.” Determination at 4.

C. The Appeal

On June 5, 2014, Appellant filed the instant appeal with OHA. Appellant argues the D/GC determination contains two principal errors, and urges OHA to reverse it.

The first error is that the D/GC looked only to the corporate formalities to determine who runs SEL on a day-to-day basis, and did not consider the evidence that Mr. Chervenik controls SEL. Appellant cites OHA decisions pertaining to the control requirement in the 8(a) Business Development (BD) program and Service-Disabled Veteran-Owned Small Business (SDVOSB) program for the proposition that the D/GC must look beyond corporate formalities to determine control. Appeal at 7-9 (citing *Matter of Benetech, LLC*, SBA No. VET-225 (2011); *Matter of Infotech Int'l, Inc.*, SBA No. BDP-205 (2004); *Matter of SAM Facilities Mgmt. Inc.*, No. BDP-194 (2003)).

Second, Appellant contends, the D/GC did not properly evaluate whether Ms. Chervenik possesses sufficient experience to manage SEL, as required under 13 C.F.R. § 127.202(b). Appellant points out that OHA has created a four-part test² in interpreting a similar requirement in the 8(a) BD program. *Matter of V&M Precision Machining & Grinding*, SBA No. SDBA-153

² The four factors for determining whether the disadvantaged individual possessed “managerial or technical experience and competency” to control the applicant concern are “(1) the characteristics of the applicant concern; (2) the disadvantaged individual's education and employment history, including supervisory experience, as opposed to that of the non-disadvantaged individuals involved in the firm's management; (3) the disadvantaged individual's role at the applicant concern; and (4) the extent of non-disadvantaged individuals' involvement in the operations of the applicant concern.” *Matter of V&M Precision Machining & Grinding*, SBA No. SDBA-153 (2002).

(2002); *Matter of Arteaga Constr. Inc.*, SBA No. MSB-584 (1997). Applying the test here, SEL is not an eligible EDWOSB because it is Ms. Chervenik's husband, and not Ms. Chervenik, whose educational and employment background is related to providing financial and management consulting services. *V&M*, SDBA-153 (2002); *Arteaga Constr.*, MSB-584 (1997); *Matter of J. Nowak Constr. Co. Inc.*, SBA No. 524 (1995).

On June 26, 2014, after reviewing the Protest File (PF), Appellant filed a supplement to the appeal. Appellant argues the PF confirms that SBA did not look beyond corporate formalities to determine who runs SEL on a day-to-day basis, nor did SBA meaningfully consider whether Ms. Chervenik has sufficient experience to run SEL.

As for the determination that Ms. Chervenik runs SEL, Appellant argues the PF contains no indication that the D/GC considered the following five questions raised in the protest:

- Why does SEL Evans' website twice provide Mr. Chervenik's email address as the company's sole point of contact?
- Why is Mr. Chervenik listed as the sole point of contact for SEL Evans' GSA MOBIS Schedule?
- Why is the telephone number SEL Evans offers on its “Contact Us” page the direct dial number of Mr. Chervenik?
- Why is Mr. Chervenik's direct dial number listed as the company's sole point of contact for its Seaport-E contract?
- Why does the GSA's website list Mr. Chervenik's email and telephone number as the company's sole point of contact?

PF, Exhs. F, H, and I.

What is more, Appellant argues, SEL admits in its response to the protest that Mr. Chervenik is SEL's primary business generator. PF at 63 (“As the primary business development contact for the company. . .”). This statement, Appellant argues, raises several questions pertinent to the issue of control that SBA did not ask.

Appellant argues SBA also failed to address inconsistent evidence. In the response to the protest, SEL stated Ms. Chervenik is the “contact point for all quality, personnel, and contract issues.” *Id.* However, Appellant's protest made clear that her husband is the sole point of contact for the GSA Schedule and MOBIS contracts. Failure to resolve this contradiction,

Appellant argues, is clear error. *Size Appeal of TPMC-Energy Solutions Envtl. Servs. 2009, LLC*, SBA No. SIZ-5109 (2010).

Appellant then turns to Ms. Chervenik's experience and education, and reiterates that she has no background in complex financial services. Appellant also observes that the PF does not contain the resume for Mr. Chervenik.

D. SEL's Response

On June 27, 2014, SEL responded to the appeal. SEL argues the D/GC determination is correct, and the appeal is “based completely on false information and blatant speculation.” Accordingly, OHA should deny the appeal.

Contrary to Appellant's arguments, SEL contends that SBA went beyond corporate formalities in determining control. SEL points out that SBA requested additional information regarding the day-to-day control of SEL prior to determining SEL was an eligible EDWOSB. PF at 8-68. In addition, SEL provided a narrative response regarding SEL's make-up and operations. *Id.* at 63-64.

SEL argues Appellant's citations do not support the proposition that the D/GC must look beyond mere corporate formalities in determining control. In *Benetech*, the record showed that the corporate documents of the firm did not establish the service-disabled veteran as the highest ranking officer or the managing member. SEL's corporate documents, however, clearly establish Ms. Chervenik's control. Unlike the uncooperative or unresponsive small business owners in *Infotech* and *Sam Facilities*, Ms. Chervenik was very responsive to SBA's requests.

SEL challenges the notion that listing Mr. Chervenik's contact information indicates his control of SEL. SEL explains that Mr. Chervenik is the point of contact for business development, which is his primary role, and complex financial and management advisory services are only some of the management consulting services SEL offers. Because his wife has ultimate managerial and supervisory control, her reliance on him for his technical expertise does not contravene SBA regulations. 13 C.F.R. § 127.702. Besides, the record is replete with instances where Ms. Chervenik is the primary point of contact. PF at 343, 505, 508, 511, 514, 517, 520, and 533.

SEL counters Appellant's assertion that Ms. Chervenik lacks the necessary experience to run SEL. Her resume, SEL argues, demonstrates her skills in finance, contracts, marketing, and general management, all of which are directly applicable to her role as president. PF at 16-17. While working in international film, she managed business activities with many partners, through contracts, and with strict budgets. She also developed financial skills such as strategic planning, budgeting, scenario analysis, compliance with U.S. and international laws, reporting, and financial execution. In addition, she gained critical thinking, problem solving, consensus building, and communications skills. While working as a manager and director in human capital development, Ms. Chervenik gained experience in service development, program management, partner network development, marketing, customer service, and staff management. At A.D. Little and ICF, she managed five distinct initiatives to improve the IRS's ability to service their customer base.

SEL then distinguishes *J. Nowak* from this case. Unlike the 8(a) participant in that case, where the wife had little relevant experience and became the highest ranking officer only months before submitting the 8(a) application, Ms. Chervenik's experience is vast and she has been the exclusive owner and president of SEL since its inception over a decade ago.

E. SBA Response

On June 27, 2014, SBA responded to the appeal. SBA argues the D/GC determination is correct, so OHA should affirm it and deny the appeal.

SBA argues it analyzed a full list of documents, which SEL uploaded to the WOSB Program Repository, to determine SEL's eligibility. PF at 2. These documents include a stock ledger and meeting minutes for the board of directors, both of which state Ms. Chervenik is the sole shareholder of SEL. *Id.* at 206, 261.

SBA argues the D/GC correctly determined that Ms. Chervenik controls the long-term decisionmaking and day-to-day operations of SEL. She makes the long-term decisions because she is the 100% shareholder, and any action of the Board requires her presence and consent. *Id.* at 5, 195. Her resume indicates that she has day-to-day control, too. For example, she “contribute[s] to new business development and proposal efforts, negotiate[s] contracts and sub-contracts, review[s] project plans, and approve[s] pricing and terms for all projects.” *Id.* at 193. Moreover, as sole shareholder, she can appoint or remove any director at any time. *Id.*

SBA contends the D/GC also correctly determined that Ms. Chervenik manages SEL full-time, and Appellant's attention on her volunteerism is misplaced. Volunteering in the community and assisting the local PTA is not a hindrance to participation in the EDWOSB program.

SBA then argues the D/GC correctly determined that Ms. Chervenik holds the highest managerial position and possesses sufficient management experience. As president, she is the “Chief Executive Officer of the corporation and shall, subject to the control of the board of directors, have general supervision, direction and control of the business and the officers of the corporation.” *Id.* at 196. SBA emphasizes that Ms. Chervenik does not need technical expertise to be in control of SEL, only the ultimate managerial and supervisory control over the technical expert. 13 C.F.R. § 127.202(b).

Moreover, SBA argues, she has the managerial experience necessary to run SEL, as 13 C.F.R. § 127.202(b) requires. For the fifteen years prior to joining SEL, she held managerial positions at five companies. PF at 16-17. She graduated magna cum laude from the University of Southern California, was inducted into Phi Beta Kappa Honors Society, and then received a Master's degree in Human Resource Development.

SBA argues the D/GC considered and gave equal weight to the four factors from the 8(a) BD Program's test for determining the sufficiency of managerial experience. SBA emphasizes that the D/GC considered Mr. Chervenik's involvement in SEL and even requested more information as to his role. *Id.* at 5. The D/GC also considered Ms. Chervenik's statement that she is the “sole owner and president of [SEL], [who] continuously manag[es] the firm and bear[s]

full risks of being a small business owner.” *Id.* at 63-64. In the context of the 8(a) BD Program, SBA explains that when determining whether the disadvantaged individual has sufficient managerial experience, it does not merely compare his or her qualifications with the non-disadvantaged individuals. Rather, if SBA determines that the disadvantaged individual can manage the firm, the non-disadvantaged individual's qualifications do not negate that finding.

III. Discussion

A. Standard of Review

The standard of review for EDWOSB appeals is whether the D/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.708; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard which is applicable to size appeals and EDWOSB appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction that the D/GC erred in making a key finding of law or fact.

B. Analysis

This appeal completely lacks merit. Appellant's arguments misapply the law and are plainly contradicted by the PF. For the reasons discussed *infra*, the appeal is denied.

Appellant's arguments regarding Ms. Chervenik's education and experience are unpersuasive. The SBA regulation states:

Managerial position and experience. A woman, or in the case of an EDWOSB an economically disadvantaged woman, must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern. The woman or economically disadvantaged woman manager need not have the technical expertise . . . to be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the . . . technical expertise. . . .

13 C.F.R. § 127.202(b).

The operative inquiries, then, are whether Ms. Chervenik has the managerial experience necessary to manage SEL and whether she has ultimate managerial and supervisory control over her husband. I find she satisfies both requirements.³

As SEL and SBA point out, Ms. Chervenik has sufficient background to manage SEL. She “spent nearly three years as a consulting manager with A.D. Little and ICF International, eight years in progressively more responsible management roles within professional associations, and seven years managing complex international film production partnerships, including

³ I decline to apply the *V&M Precision* test here, and instead rely directly upon the language in the regulation as setting the test SEL must meet.

financing, budgets, logistics, and contracts.” PF at 64. With over 20 years of management experience, she has “developed superior financial management, staff management, project management, contract management, and business strategy skills.” *Id.* Her resume supports these representations. *Id.* at 16-17

Appellant's characterization of Ms. Chervenik as a mere film student lacking the necessary expertise is disingenuous. The record demonstrates that Ms. Chervenik excelled in the business function of the film industry. For example, she represented Jadran Film Studios, a Croatian firm, and promoted the facility to US production companies. This work required her to manage complex production hard-currency budgets, film and licensing agreements, payment schedules, and contract reviews and enforcement. PF at 17. Clearly, then, Ms. Chervenik's career in the film business provided her with skills relevant to her work at SEL.

Appellant focuses on Mr. Chervenik's background and experience to no avail. This line of reasoning fails because the regulation explicitly states that Ms. Chervenik need not have technical expertise, only ultimate managerial and supervisory control. The Restated and Amended Bylaws of SEL are clear that, as president, Ms. Chervenik has “general supervision, direction and control of the business and the officers of the corporation.” *Id.* at 196. Although this control is “subject to the board of directors,” which is made up of her and her husband, as sole shareholder, Ms. Chervenik has the power to remove any director at any time. *Id.* at 193, 196. She therefore has ultimate control of SEL, and any control her husband may have is illusory.

Appellant's focus on Ms. Chervenik's volunteerism is similarly unavailing. SBA regulations provide:

Limitation on outside employment. The woman or economically disadvantaged woman who holds the highest officer position of the concern must manage it on a full-time basis and devote full-time to the business concern during the normal working hours of business concerns in the same or similar line of business. The woman or economically disadvantaged woman who holds the highest officer position may not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

13 C.F.R. § 127.202(c).

First, I note that the regulation is titled “limitation on outside *employment.*” By definition, volunteering is not employment. Second, the broad interpretation Appellant advances is bad policy, as it would chill local involvement by successful businesspeople with much to offer their communities. Third, Appellant's argument crumbles on a practical level, too. Twelve hours per month of volunteer work on nights and weekends is hardly sufficient to prevent someone from devoting sufficient time to a firm's daily operations.

Appellant also argues unconvincingly that the D/GC did not look beyond corporate formalities. Upon closer inspection, the cases Appellant cites for this proposition do not apply

here. Appellant seizes upon the language in *Benetech* that “SBA generally goes beyond mere formalities to establish that the service-disabled veteran actually exercises control over the firm.” In that case, though, the D/GC could not determine from the corporate documents that the service-disabled veteran was the firm's highest officer. As a result of this uncertainty, the D/GC then looked beyond the corporate documents to determine if there was any evidence that the service-disabled veteran was the highest ranking officer of the firm. The same is true in *Matter of Nelco Diversified, Inc.*, SBA No. VET-140 (2008), where the corporate documents did not establish that the veteran in question held the highest officer position. In those cases, then, the reason the D/GC continued the inquiry beyond the corporate documents was because the documents were inconclusive. Here, however, the corporate documents clearly establish that Ms. Chervenik is the president of SEL and controls the day-to-day operations, so the D/GC did not need to conduct a more exhaustive investigation.

Appellant's reliance on *Infotech* and *Sam Facilities* is also misplaced. Those cases pertain to appeals of terminations from SBA's 8(a) BD program, which is a nine-year program in which participants are required to be responsive and cooperate with SBA. *See generally* 13 C.F.R. § 124.303; *Infotech Int'l*, SBA No. BDP-205 (2004), *Sam Facilities*, SBA No. BDP- 194 (2003) (“[Disadvantage individual] failed to meet the fundamental obligation of an 8(a) program participant—to cooperate with SBA.”). In *Infotech*, SBA determined that the disadvantaged individual did not control the firm's daily operations because she avoided dealing with SBA. In *Sam Facilities*, the disadvantaged individual designed the firm to be effectively managed in her absence, did not return phone calls, and refused to meet with SBA personnel. In both decisions, because these disadvantaged individuals were uncooperative with SBA, SBA determined they were not in charge of their firms' day-to-day operations. That is not the case here, where Ms. Chervenik was cooperative and responsive. She provided SBA with all requested documents pertaining to her day-to-day management of SEL, including her resume, a detailed response to the protest, and meeting minutes establishing her role as Chair and Secretary. PF at 16-20 and 63-64. Accordingly, there was no reason for the D/GC to look further into her management of SEL's operations.

Finally, I note that Appellant's focus on phone numbers and contact information is not compelling. By extension, it implies that a receptionist could exercise undue control. Even if the argument was well grounded, the record shows that Ms. Chervenik's phone number is listed as the primary point of contact for SEL in the System for Award Management (PF at 343) and in the Federal Procurement Data System (PF at 505, 508, 511, 514, 517, and 520). In any event, Ms. Chervenik is not required to list herself as the point of contact for every SEL function. As long as she retains ultimate managerial and supervisory control over SEL's operations, it is her prerogative how she delegates responsibilities.

IV. Conclusion

For the above reasons, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.227(b)(4).

CHRISTOPHER HOLLEMAN
Administrative Judge