

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

IN THE MATTER OF:

Redhorse Corporation,

Appellant,

Petition for Reconsideration of SBA No.
VET-261

SBA No. VET-263

Decided: May 8, 2017

APPEARANCES

Jody J. Venkatesan, President and CEO, Platinum Business Services, LLC, Laurel, Maryland

Richard B. Oliver, Esq., Pillsbury Winthrop Shaw Pittman, LLP, Los Angeles, California, for Redhorse Corporation

ORDER DISMISSING PETITION FOR RECONSIDERATION¹

I. Background

A. Prior Proceedings

On April 9, 2017, Platinum Business Services, 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 *Matter of Redhorse Corporation*, SBA No. VET-261 (2017) (“*Redhorse I*”). In *Redhorse I*, OHA determined that Petitioner's status protest against Redhorse Corporation (Redhorse) should have been dismissed as untimely. OHA explained that Redhorse self-certified as a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) when Redhorse was initially awarded its U.S. General Services Administration (GSA) Professional Services Schedule contract, and most recently recertified its status in 2014 when GSA exercised an option to extend that contract. As a result, according to SBA regulations, Redhorse is “considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order.” *Redhorse I*, SBA No. VET-261, at 5 (quoting 13 C.F.R. § 125.18(e)). It is undisputed that the Contracting

¹ OHA issued a protective order in this case on January 24, 2017, which remains in effect for the PFR. This decision, though, does not contain any confidential or proprietary information. Accordingly, this decision is not issued under the protective order and is intended for public release.

Officer (CO) for the instant task order did not request recertification of size or status. Therefore, “[b]ecause [Redhorse] did not self-certify as an SDVO SBC for the task order, [Redhorse] was entitled to rely on its 2014 certification at the GSA Schedule contract level, and no mechanism exists for [Petitioner] to protest [Redhorse’s] SDVO SBC status for this order.” *Id.* at 6.

B. PFR and Supplement

Petitioner contends that *Redhorse I* is in error because 13 C.F.R. § 125.18(e)(1)(iii) creates an “exception” to SBA’s recertification rules. (PFR at 1.) Under this exception, Petitioner asserts, recertification rules are “inapplicable” if a status protest is filed, so “Redhorse’s status can be contested via the protest process, regardless of whether a recertification was requested by the CO.” (*Id.* at 1-2.) In addition, Petitioner maintains, dismissing Petitioner’s protest as untimely produces “a completely untenable result, wherein status determinations are virtually beyond the reach of a proper protest.” (*Id.* at 2.)

Petitioner argues that, contrary to OHA’s reasoning in *Redhorse I*, Redhorse was required to recertify its SDVO SBC status for the instant task order due to the recent decision of the Supreme Court in *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (2016). (*Id.*) According to Petitioner, *Kingdomware* establishes that “any new order off of a multiple award contract . . . is an independent contract in and of itself” and, consequently, requires recertification pursuant to 13 C.F.R. § 125.18(a). (*Id.*) While SBA regulations have “not caught up to the *Kingdomware* holding,” OHA nevertheless must implement the ruling of the Supreme Court. (*Id.*)

On April 26, 2017, the date of the close of record, Petitioner supplemented its PFR and attached a letter from a veterans advocacy organization. (PFR Supp. at 1.) Petitioner predicts that, if not overturned, *Redhorse I* will undermine efforts to police fraud in the SDVO SBC program. (*Id.* at 2.) “Uncontrolled SDVO businesses could use [*Redhorse I*] to circumvent well understood SBA SDVO regulations and defraud legitimately controlled SDVO businesses.” (*Id.*)

C. Redhorse’s Response

On April 26, 2017, Redhorse responded to the PFR and the supplement. Redhorse contends that Petitioner has not shown any error in *Redhorse I*, and that Petitioner improperly attempts to raise new arguments that were not at issue in *Redhorse I*. Therefore, OHA should deny or dismiss the PFR.

Redhorse maintains that Petitioner could have, but did not, raise its *Kingdomware* arguments during the *Redhorse I* proceedings. In deciding *Redhorse I*, OHA directed the parties to comment on whether Petitioner’s status protest was timely filed, and Petitioner had raised arguments concerning *Kingdomware* several months earlier with regard to a size protest on the same task order that was dismissed as untimely. (Response at 5, citing *Size Appeal of Platinum Business Services, LLC*, SBA No. SIZ-5800 (2016).) Because Petitioner failed to address *Kingdomware* during the *Redhorse I* proceedings, Petitioner’s “argument regarding *Kingdomware* in its PFR is late, is waived, and should not be considered by OHA.” (*Id.*)

Even if considered, Petitioner's *Kingdomware* arguments have no merit. According to Redhorse, *Kingdomware* has no bearing here because the Supreme Court only addressed the question of whether a task order is a contract for purposes of the statutory "Rule of Two". (*Id.* at 6.) *Kingdomware* did not discuss protests against task orders or recertification issues, and Petitioner has offered no authority for extending the Court's holding to such unrelated matters. (*Id.*) In addition, Redhorse argues, Petitioner's interpretation of *Kingdomware* would invalidate SBA's recertification regulations, as there would be no reason for a CO to request recertification for a task order if recertification already were required for all task orders in all instances. (*Id.* at 7-8.)

Redhorse argues that Petitioner likewise has waived its arguments with respect to 13 C.F.R. § 125.18(e)(1)(iii), because Petitioner did not raise this issue during the *Redhorse I* proceedings. (*Id.* at 9.) Redhorse observes that, in response to OHA's order for comments, Redhorse extensively discussed the recertification regulation at § 125.18(e), but Petitioner did not mention the rule and did not request an opportunity to reply to Redhorse's comments. (*Id.*)

In any event, Redhorse contends, Petitioner's interpretation of § 125.18(e)(1)(iii) is faulty and misconstrues the plain language of the regulation. (*Id.*) According to Redhorse, SBA regulations are clear that an SDVO SBC will retain its status for the duration of a GSA Schedule contract and for each order thereafter, unless the CO requests recertification for a particular order. (*Id.* at 9-10.) Section 125.18(e)(1)(iii) addresses the effects of a timely status protest on contract award and contract performance, but does not create an "exception" to the recertification rules whenever a protest is filed. (*Id.* at 10.) Petitioner's interpretation of § 125.18(e)(1)(iii) would permit a status protest against any task order, regardless of whether or not the CO requested recertification, and thus is directly contrary to SBA's recertification regulations. (*Id.* at 10-11.)

Redhorse urges OHA to disregard the supplement to the PFR and the accompanying letter. (*Id.* at 11.) The letter has no probative value because it apparently is based entirely on Petitioner's unreasonable characterization of *Redhorse I*. Further, the letter offers only tepid and conditional support for the PFR. (*Id.* at 12.)

Lastly, Redhorse highlights that it has not stipulated that Petitioner had standing to bring the underlying status protest, and OHA did not reach this question in *Redhorse I*. (*Id.* at 11.) As a result, "should OHA reconsider its ruling that [Petitioner's] SDVO SBC protest was untimely, [Petitioner's] status as an interested party would then require consideration by OHA." (*Id.*)

II. Discussion

A. Jurisdiction and Standard of Review

OHA decides SDVO SBC status appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. Petitioner filed its PFR within twenty calendar days of service of *Matter of Redhorse Corporation*, SBA No. VET-261 (2017), so the PFR is timely. 13 C.F.R. §§ 134.227(c) and 134.515(b).

SBA's regulations provide that OHA may grant a PFR upon a “clear showing of 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. *Matter of KRR Partners Joint Venture*, SBA No. VET-241 (2013) (PFR); *Matter of KDV, Inc.*, SBA No. VET-212 (2011) (PFR).

B. Analysis

In its PFR, Petitioner maintains that *Redhorse I* is flawed for two reasons. First, Petitioner argues that OHA failed to consider an “exception” to the recertification rules found at 13 C.F.R. § 125.18(e)(1)(iii). Second, in Petitioner's view, *Redhorse I* is at odds with the Supreme Court's decision in *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (2016). As *Redhorse* correctly observes, though, Petitioner did not make either of these arguments during the *Redhorse I* proceedings, notwithstanding that OHA issued an order directing the parties to submit comments on the timeliness of Petitioner's status protest. *Redhorse I*, SBA No. VET-261, at 3. Nor has Petitioner attempted to explain why the arguments advanced in the PFR were not, or could not have been, raised during *Redhorse I*. It is settled law that OHA will not entertain arguments which are raised for the first time in a PFR, and which might have been voiced earlier in the litigation. *E.g.*, *Matter of Four Points Tech., LLC*, SBA No. VET-120, at 7 (2007) (PFR) (“OHA does not permit parties to make arguments [in a PFR] concerning matters they failed to address previously, unless there was no way they could have anticipated the matter would be at issue.”). Accordingly, because Petitioner's arguments could have been, but were not, raised during *Redhorse I*, Petitioner has waived these arguments and the PFR must be dismissed.

Apart from its procedural defects, the PFR is also devoid of any merit. Petitioner's reliance on 13 C.F.R. § 125.18(e)(1)(iii) is misplaced. The regulation states, in pertinent part:

(e) *Recertification.* (1) . . . Where a concern [after contract award] fails to qualify as an SDVO SBC, the procuring agency may exercise options and still count the award as an award to an SDVO SBC. However, the following exceptions apply:

(i) Where an SDVO contract is novated to another business concern [that is not an SDVO SBC]. . . , the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.

(ii) Where a concern that is performing an SDVO SBC contract acquires, is acquired by, or merges with another concern and [the resulting entity is not an SDVO SBC] . . . , the agency can no longer count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals. . . .

(iii) Where there has been an SDVO SBC status protest on the solicitation or contract, *see* §125.27(e) for the effect of the status determination on the contract award.

13 C.F.R. § 125.18(e)(1). Viewed in context, then, § 125.18(e)(1)(iii) is one of three exceptions to a procuring agency's ability to “exercise options and still count the award” towards its SDVO SBC contracting goals. *Id.* This is confirmed by review of the other two exceptions under § 125.18(e)(1), which describe the effects of a post-award novation or merger on whether the procuring agency may “count the options or orders issued pursuant to the contract, from that point forward, towards its SDVO goals.” *Id.* Accordingly, contrary to Petitioner's suggestions, § 125.18(e)(1)(iii) does not mean that recertification regulations are inapplicable whenever a status protest is filed, but instead merely cautions that there may be limits on exercising options or counting awards in the event of a status protest. As a result, § 125.18(e)(1)(iii) provides no basis to overturn *Redhorse I*.

Petitioner's *Kingdomware* argument is equally unfounded. OHA has explained that, because *Kingdomware* decided the narrow question of whether task orders must be set aside for veteran-owned small businesses pursuant to 38 U.S.C. § 8127(d), *Kingdomware* does not affect SBA's existing regulations pertaining to protests against task orders and recertification under long-term, multiple award contracts. *Size Appeal of Platinum Bus. Servs., LLC*, SBA No. SIZ-5800, at 6 (2016) (“The holding [in *Kingdomware*] that a task order off a Federal Supply Schedule is a contract does nothing to disturb SBA's regulatory scheme for establishing the times at which size protests may be placed against awards for long term contracts.”). *Kingdomware*, then, is not inconsistent with the regulation at issue here, 13 C.F.R. § 125.18(e)(1), which states that “if an SDVO SBC is qualified at the time of initial offer for a Multiple Award Contract, then it will be considered an SDVO SBC for each order issued against the contract, unless a contracting officer requests a new SDVO SBC certification in connection with a specific order.” The CO did not request recertification for the instant task order, so *Redhorse* remains an SDVO SBC for this task order based on its earlier certification at the GSA Schedule contract level.

Lastly, I find no merit to Petitioner's claim that *Redhorse I* will undermine oversight of the SDVO SBC program. While it is true that *Redhorse I* found Petitioner's status protest against *Redhorse* to be untimely, SBA regulations make clear that there is no time limit on a status protest brought by the CO or by SBA itself. 13 C.F.R. § 125.28(d)(3). Thus, Petitioner, or any private party that is unable to bring its own status protest, may prevail upon the CO or SBA to adopt an otherwise untimely protest, or to initiate a new protest. *E.g.*, *Matter of Chevron Constr. Servs., LLC*, SBA No. VET-183 (2010) (untimely status protest adopted by CO); *Matter of VetIndy, LLC*, SBA No. VET-175 (2010) (untimely status protest adopted by SBA).

III. Conclusion

For the above reasons, I DISMISS the PFR and AFFIRM the decision in *Matter of Redhorse Corporation*, SBA No. VET-261 (2017).

KENNETH M. HYDE
Administrative Judge