

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

REDACTED DECISION FOR PUBLIC RELEASE

IN THE MATTER OF:

BKM Global Corporation, Inc.,

Appellant,

Solicitation No. W911S0-18-R-0001

U.S. Army Mission and Installation
Command
Fort Eustis, Virginia

SBA No. VET-270

Decided: June 25, 2018

APPEARANCES

Ryan C. Bradel, Esq., James Minor, Esq., Ward & Berry PLLC, Washington, D.C., for BKM Global Corporation, Inc.

J. Dale Gipson, Esq., Jon D. Levin, Esq., J. Andrew Watson, III, Esq., Katherine E. McGuire, Esq., Maynard, Cooper & Gale, P.C., Huntsville, Alabama, for Beshenich Muir & Associates, LLC

Edmund M. Bender, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Acting Director of Government Contracting (AD/GC) that BKM Global Corporation, Inc. (Appellant) is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant proposed various redactions to protect its confidential information. Having considered these suggestions, OHA now issues this redacted decision for public release.

SBC). More specifically, the AD/GC found that Appellant's highest officer position is not held by a Service-Disabled Veteran (SDV). Appellant contends that the AD/GC's determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is granted, and the AD/GC's determination is affirmed in part and remanded in part.

OHA decides appeals of SDVO SBC status determinations under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. Appellant filed the appeal within 10 business days of receiving the AD/GC's determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On February 12, 2018, the U.S. Army Mission and Installation Command (Army), at Fort Eustis, Virginia, issued Request for Proposals (RFP) No. W911S0-18-R-0001 for Intelligence Surveillance Reconnaissance Mobile Advisory Team (ISRMA) Support. (Protest File (PF)² at 000574-000576.) The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs, and assigned North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, with a corresponding size standard of \$15 million average annual receipts. (*Id.* at 000614, 000633.) Proposals were due March 13, 2018. (*Id.* at 000578.) Appellant and Beshenich Muir & Associates, LLC (BMA) submitted timely offers. (*Id.* at 000576.)

On April 6, 2018, the CO announced that Appellant was the apparent awardee. (*Id.*) On April 12, 2018, BMA filed a protest challenging Appellant's SDVO SBC status. (*Id.* at A000003-A000030.) BMA alleged that Appellant's owner, Mr. Richard Bizzell, is not an SDV, and that he does not control Appellant because he does not hold the highest officer position, which instead is held by [Individual 1]. (*Id.* at A000005.) To support this allegation, BMA provided Appellant's corporate filings from the Wyoming Secretary of State's office dated June 27 and 28, 2017, identifying [Individual 1] as Appellant's President, and also [Individual 1]'s LinkedIn profile showing he is Appellant's President. (*Id.* at A000016, A000017, A000023.) BMA further contended that Mr. Bizzell is not qualified to run the daily operations of Appellant, which primarily performs intelligence work, because he has no intelligence background. (*Id.* at A000006.) The CO forwarded the protest to the AD/GC for review. (*Id.* at 000574-000576.)

On April 16, 2018, the AD/GC notified Appellant of the protest and requested various documents and a response to the protest allegations. (*Id.* at 000568-000572.) On April 25, 2018, Appellant submitted the requested material. (*Id.* at 000528-000529.) Among other documents, Appellant provided the June 1, 2017 Purchase Agreement by which Mr. Bizzell acquired Appellant; June 27, 2017 Resolutions Adopted by Sole Director and Shareholder (the Resolutions); Appellant's By-Laws; and Mr. Bizzell's resume. (*Id.* at 000045-000075.)

² SBA filed the PF in two parts, the first on June 7, 2018 and the second on June 12, 2018. Citations to the second part contain the letter "A" before the six-digit Bates number.

The Resolutions stated, in pertinent part:

The undersigned, Richard Bizzell, being the sole Director and Shareholder hereby adopts the following resolution:

RESOLVED, that the form of Bylaws submitted to this meeting be, and they are hereby adopted as the Bylaws of the Corporation.

RESOLVED, that the following person(s) are elected to the office(s) set opposite his/her name, to assume the duties and responsibilities fixed by the Bylaws or by the undersigned as the Sole Director of the Corporation:

Chief Executive Officer:	Richard Bizzell
President:	[Individual 1]
Vice President:	[Individual 2]
Secretary:	Richard Bizzell
Treasurer:	Richard Bizzell

(*Id.* at 000052.)

The By-Laws stated, in pertinent part:

ARTICLE III DIRECTORS

...

2 4. The Director/s shall have the general management and control of the business and affairs of the corporation and shall exercise all of the powers that may be exercised or performed by the corporation, under the statutes, the Articles of Incorporation, and the By-Laws. Such management will be by equal vote of each Director with each Board member having an equal vote.

ARTICLE IV OFFICERS

2 1. The Officers of this corporation shall consist of: a CEO, a President, one or more Vice Presidents, Secretary, Treasurer, and such other officers as shall, from time to time, be elected or appointed by the Director or Board of Directors.

2 2. The PRESIDENT shall preside at all meetings of the Directors and the shareholders and shall have general charge and control over the affairs of the corporation subject to the Director or Board of Directors. He shall sign or

countersign all certificates, contracts and other instruments of the corporation as authorized by the Director or Board of Directors and shall perform all such other duties as are incident to his office or are required of him by the Board of Directors.

...

2 8. Each of such officers shall serve for a term of one (1) year or until their successors are chosen and qualified. Officers may be re- elected or appointed for successive annual terms.

...

3 10. Any Officer or Agent elected or appointed by the Director may be removed by the Director whenever in their judgment the best interests of the corporation would be served thereby, but such removal shall be without prejudice to the contract rights, if any, of the person so removed.

3 11. A vacancy in any office because of death, resignation, removal, disqualification or otherwise, may be filled by the Director for the unexpired portion of the term.

(*Id.* at 000056-000059.) The By-Laws do not describe the position or functions of the CEO.

Mr. Bizzell's resume described his current responsibilities as follows:

Serving as [Appellant's] Chief Executive Officer (CEO) supporting all aspects of corporate operations including strategic planning, Human Resources, fiduciary, Subject Matter Expertise in Intelligence, Security and Special Operations, Business Development, and Corporate Security. Generally, all aspects of a small business day-to-day operations.

(*Id.* at 000069.)

On April 30, 2018, SBA sent eight follow-up questions to Appellant. (*Id.* at 000540-000542.) In Question 1, SBA stated that it had requested a detailed resume for all officers, but received only Mr. Bizzell's resume from Appellant. (*Id.* at 000540-000541.) SBA noted that the Resolutions indicated that Appellant has other officers. (*Id.* at 000541.) In Question 2, SBA stated that it had requested IRS Forms W-2 for all officers, but received only Mr. Bizzell's W-2 from Appellant. (*Id.*)

Appellant, through Mr. Bizzell, responded to SBA's questions on May 1, 2018. (*Id.* at 000563-000564.) To Question 1, he responded:

I am currently the sole director and officer of the company but the public and internal information (meeting minutes) has not been updated to date as I planned to have our annual meeting and reporting in June.

(*Id.* at 000564.) To Question 2, he responded:

See response to above question. [Individual 2] is 1099 recruiter at [Appellant] and [Individual 1] has never worked for [Appellant] or been compensated. They will not have W-2's.

(*Id.*) On May 2, 2018, SBA asked Mr. Bizzell:

I have one follow-up question on your response to Q#1. Were you the sole officer of [Appellant] when the firm submitted an offer on the subject solicitation? Do you have any documents indicating that [Individual 1] and [Individual 2] resigned from the officer positions?

(*Id.* at 000554.) Mr. Bizzell responded:

I was the sole officer and I don't have resignation letters for either of them. As noted, I planned to take care of the internal and external documentation at the June annual meeting-minutes.

(*Id.*)

B. AD/GC's Determination

On May 15, 2018, the AD/GC issued his determination concluding that Appellant is not an SDVO SBC. The AD/GC found that Mr. Bizzell is an SDV and that he unconditionally owns Appellant. (*Id.* at 000035-000036.) With regard to control, however, the AD/GC found that Mr. Bizzell does not hold Appellant's highest officer position as required by 13 C.F.R. § 125.13 and that, therefore, he does not control Appellant. (*Id.* at 000036.) The AD/GC explained:

[Appellant's] Bylaws clearly state that the firm's highest officer position is the office of the President, “[t]he President shall have general charge and control over the affairs of the corporation. . . .” (Bylaws, Article IV, Paragraph 2). The record shows that [in the Resolutions] [Individual 1] was selected by [Appellant's] Director and sole shareholder to serve as the firm's President. In response to the SBA's request for clarification regarding this issue of what is the firm's highest officer, and who held what officer positions, [Appellant] stated that Mr. Bizzell was elected as the CEO and was the only officer of the firm at the time of [Appellant's] initial offer for the instant solicitation. [Appellant's] statement, however, is not supported by the record on file. First, [the Resolutions] indicate [] that three individuals were elected as officers. They include Mr. Bizzell, CEO, and [Individual 1], President. [Appellant] did not submit to SBA any documents to show that Mr. Bizzell was elected as the President. In its response, [Appellant]

stated that [Individual 1] has never served as the President but it did not provide any documents demonstrating that [Individual 1] resigned or was removed from the President position. As such, the officer elections made [in the Resolutions] were still in effect when [Appellant] submitted its initial offer for the instant solicitation. Second, although [Appellant's] bylaws reference a CEO position, they do not grant power to the position. Instead, the bylaws assign the duties associated with the highest officer position of the firm to the President. Furthermore, as noted above, [Appellant's] board of directors elected [Individual 1] as the President. Absent any documents demonstrating that Mr. Bizzell or another SDV was elected as the President, SBA must conclude that an SDV did not hold the highest officer position within [Appellant]. As such, [Appellant] failed to satisfy the requirement that an SDV occupy the highest officer position of the firm.

(*Id.*)

The AD/GC noted that Mr. Bizzell is Appellant's sole director and thus controls Appellant's board of directors. (*Id.* at 000037.) The AD/GC did not address whether Mr. Bizzell has managerial experience of the extent and complexity needed to run Appellant, or whether Mr. Bizzell is responsible for conducting the day-to-day management and administration of Appellant's business operations. (*Id.*)

C. Appeal

On May 29, 2018, Appellant appealed the AD/GC's determination to OHA. Appellant contends that the AD/GC misconstrued Appellant's By-Laws and misapplied SBA regulations to the By-Laws to erroneously conclude that Mr. Bizzell did not hold the highest officer position and thus did not control Appellant at the time of self-certification. (Appeal at 4.)

Appellant highlights that the AD/GC quoted only part of By-Laws Article IV ¶ 2. The full text of the provision states that the President's authority is "subject to the Director or Board of Directors". (*Id.* at 5.) Further, another provision in the By-Laws states: "The Director/s shall have the general management and control of the business and affairs of the corporation and shall exercise all of the powers that may be exercised or performed by the corporation." (*Id.*, quoting By-Laws Article III ¶ 4.) Thus, Appellant argues, "the President's authority is ultimately subordinate to the Director, which, according to the By-Laws, is given an officer-like role of having 'general management and control of the business affairs of the corporation.'" (*Id.*) Appellant allows that the By-Laws are "contrary to what is typical" in that they provide the Director with a direct role in day-to-day management. (*Id.*)

Appellant contends that the CEO, not the President, is Appellant's highest officer position, and that the AD/GC's decision "glosses over" the evidence on this point. (*Id.* at 6.) This evidence includes the fact that the Resolutions "clearly lay[] out the officer positions in descending order of authority and place[] the CEO position at the top." (*Id.*) In addition, Appellant asserts, "it is generally recognized that 'CEO' is a title that implies the authority of the highest officer." (*Id.* at 6 & n.2, citing *Mgmt. Techs., Inc., v. Morris*, 961 F. Supp. 640, 651

(S.D.N.Y. 1997).) Appellant maintains that, although the AD/GC correctly noted that the By-Laws reference a CEO position, he incorrectly found that the By-Laws do not grant significant power to the CEO. (*Id.* at 7.) In support, Appellant points to provisions in the By-Laws requiring the CEO's approval for issuing stock and notice to the CEO if a director resigns. (*Id.*, citing By-Laws Article II ¶ 1 and Article III ¶ 8.)

In further support of its position that the CEO outranks the President, Appellant looks to OHA's decision in *Matter of VetPride Services, Inc.*, SBA No. VET-250 (2015). There, an SDV was the CEO, his wife was the President, and the Company Agreement (the organizational document) did not specifically state which was the higher position. (*Id.* at 7-8, citing *VetPride*, VET-250, at 8.) OHA decided that issue by looking at other facts in the record, found the SDV was the “sole manager” who also had the ability to appoint officers and received the higher salary. (*Id.*) Appellant contends an analogous situation is present here, where Mr. Bizzell, as sole Director, alone has the power to appoint officers, and is paid more than [Individual 1], who is not paid at all. (*Id.* at 8-9.) Mr. Bizzell, as sole shareholder and sole Director, has total power to appoint and remove officers, including the President, [Individual 1], who serves at Mr. Bizzell's pleasure. (*Id.* at 9-10.)

With its appeal, Appellant moved to introduce a declaration from [Individual 1], dated May 24, 2018. In his declaration, [Individual 1] asserts that he became Appellant's President on June 27, 2017, but resigned from that position on November 28, 2017. ([Individual 1] Decl. at 1.)

D. SBA's Response

On June 7, 2018, SBA responded to the appeal. SBA maintains that the AD/GC correctly determined that, at the time of its self-certification, an SDV did not hold Appellant's highest officer position and, thus, Appellant is not an eligible SDVO SBC. Appellant's By-Laws state that its President, not its CEO, controls Appellant's affairs, and the Resolutions indicate that [Individual 1] was appointed President on June 27, 2017. (SBA Response at 4-5.) Further, although the By-Laws created the position of CEO, they assigned no significant responsibilities to the CEO. (*Id.* at 5-6.) Even the two specific CEO duties highlighted by Appellant (approval of stock issuances and acceptance of director resignations), are not solely his, as one is shared with the Secretary and the other shared with both the Secretary and the President. (*Id.* at 5-6.)

SBA counters Appellant's reliance on *Mgmt. Techs.* and *VetPride*, both of which, SBA asserts, do not apply where, as here, there are clear By-Laws governing the issue of who is the highest officer of a company. (*Id.* at 6-7.) Finally, SBA insists that the SDV's control of the board of directors and his position as highest officer are two separate requirements under the regulatory scheme, and that “[t]he duties of Director cannot be imputed to the CEO simply because the same person hold both positions.” (*Id.* at 7.)

SBA opposes Appellant's motion to admit the [Individual 1] Declaration, because Appellant did not provide it to the AD/GC in response to the protest, and because SBA regulations preclude OHA from considering additional evidence beyond the Protest File.

E. BMA's Response

On June 7, 2018, BMA responded to the appeal. BMA contends that the appeal confuses and conflates the roles of Director and CEO. According to BMA, SBA regulations requiring that an SDV must control of the Board of Directors and must hold the highest officer position “are two separate and distinct requirements that must be independently satisfied.” (BMA Response at 3, 7-8.) Thus, Mr. Bizzell's role as Director has no bearing on whether he holds the highest officer position. (*Id.*) BMA disputes the notion that the Director is actually the officer ultimately in control of Appellant. In BMA's view, boards of directors routinely have the power to manage and oversee the affairs of their companies, and to elect officers, and Wyoming law codifies these concepts. (*Id.* at 8, citing Wyo. Stat. §§ 17-16-801 and 17-16-840.)

BMA maintains that the By-Laws contradict the appeal by bestowing general authority upon the President, while granting only extremely narrow duties upon the CEO. (*Id.* at 4-5.) BMA also argues that, under Wyoming law, if a corporation does not adopt bylaws, the only required officers are President, Secretary, and Treasurer; if a corporation establishes different officers, their authority must be stated in the bylaws. (*Id.* at 5-6, citing Wyo. Stat. §§ 17-16-206 and 17-16-841.) Thus, Appellant's By-Laws control, and *VetPride* is inapposite. (*Id.* at 6.)

BMA joins SBA in opposing Appellant's motion to introduce new evidence.

III. Discussion

A. Standard of Review

OHA reviews the AD/GC's decision to determine whether it is “based on clear error of fact or law.” 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the AD/GC's determination only if Appellant proves that the AD/GC made a patent error based on the record before him.

B. Analysis

SBA regulations require that, in order for a concern to qualify as SDVO SBC, an SDV must hold the concern's highest officer position, which is “usually President or Chief Executive Officer.” 13 C.F.R. § 125.13(b). In the instant case, the AD/GC found that an SDV, Mr. Bizzell, is Appellant's CEO as well as its sole owner and sole Director, but that he did not hold Appellant's highest officer position of President. I agree with Appellant that the record does not fully support the AD/GC's decision. Therefore, it is appropriate to remand this case for further review.

As an initial matter, I find no clear error in the AD/GC's determination that the President, rather than the CEO, is Appellant's highest officer position based on Appellant's By-Laws. As the AD/GC observed, Appellant's By-Laws stated that the President “shall have general charge and control over the affairs of the corporation. . . .” Sections II.A and II.B, *supra*. The By-Laws also established a position of CEO, but assigned no significant duties or responsibilities to that

position. *Id.* On appeal, Appellant emphasizes that the By-Laws restricted the President's authority by making clear that he may act only “as authorized by the Director” (*i.e.*, Mr. Bizzell). Section II.A, *supra*. In addition, the By-Laws permitted the Director to unilaterally remove and replace any officer, including the President, at any time and for any reason. *Id.* Nevertheless, while it may be true, as Appellant suggests, that the President is subordinate to the Director and has little if any independent authority, the fact remains that the Director is not an officer according to Appellant's By-Laws, and there is no other officer position that has greater authority than the President. *Id.* Appellant also argues that the Resolutions imply that the CEO outranks the President, but the Resolutions stated that Appellant's officers have “the duties and responsibilities fixed by the Bylaws.” *Id.* As a result, Appellant's By-Laws are controlling, and the AD/GC did not clearly err in finding that the President is Appellant's highest officer position, based on Appellant's By-Laws.

Appellant's stronger argument is that, during the course of the AD/GC's review, Appellant repeatedly informed the AD/GC that Mr. Bizzell was Appellant's only officer as of the date of self-certification. Section II.A, *supra*. The AD/GC declined to credit Appellant's representations, apparently because Appellant did not produce a formal resignation letter from [Individual 1], the individual named as Appellant's President. Section II.B, *supra*. Appellant's By-Laws, however, do not require that an officer's resignation be in writing, nor did the AD/GC cite any provision in SBA regulations or Wyoming corporate law to support this proposition. Further, apart from the absence of a resignation letter, the AD/GC did not point to evidence in the record that would contradict Appellant's assertions. If anything, the record appears to support Appellant's claim that Mr. Bizzell was Appellant's only officer as of the date of self-certification. Thus, Mr. Bizzell's resume, which is in the record, stated that, as Appellant's CEO, he was responsible for “all aspects of [Appellant's] day-to-day operations”. Section II.A, *supra*.

Accordingly, it is unclear from the record whether Appellant actually had any other officers besides Mr. Bizzell as of the date of self-certification. On remand, the AD/GC should re-examine this question. If the AD/GC finds that Mr. Bizzell was Appellant's only officer as of the date of self-certification, the AD/GC also should address BMA's remaining protest allegations concerning control, which AD/GC did not reach in the instant determination.

IV. Conclusion

For these reasons, the appeal is GRANTED in part, and the issue of whether Mr. Bizzell controls Appellant is REMANDED to the AD/GC for further review. The AD/GC's determination is otherwise AFFIRMED. In light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *Matter of JHC Firestop, Inc.*, SBA No. VET-193, at 3 (2010).

KENNETH M. HYDE
Administrative Judge