

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

IN THE MATTER OF:

SDVE, LLC,

Appellant,

Petition for Reconsideration of SBA No.
VET-283

SBA No. VET-284

Decided: April 2, 2020

APPEARANCES

Rebecca L. Chambliss, Esq., Chambliss Consulting, Montgomery, Alabama, for
Petitioner

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

DECISION

I. Background

A. Prior Proceedings

On February 26, 2020, SDVE, 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 SDVE, LLC*, SBA No. VET-283 (2020) (“*SDVE I*”). In *SDVE I*, OHA determined that SBA’s Director of Government Contracting (D/GC) correctly concluded that Petitioner is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC).

OHA agreed with the D/GC that Petitioner is not fully controlled by service-disabled veterans, as is required by 13 C.F.R. § 125.13, because Article VI of Petitioner’s Operating Agreement, dated June 28, 2007, “granted equal powers to all of [Petitioner’s] Members, including Members who are not service-disabled veterans, and enabled Members who are not service-disabled veterans to override, or circumvent, decisions of service-disabled veteran Members.” *SDVE I*, SBA No. VET-283, at 9. In reaching this conclusion, OHA rejected the notion that a document dated February 19, 2019 amended the Operating Agreement, because that document pertained instead to Petitioner’s Articles of Organization and “made no mention of Operating Agreement.” *Id.* at 9-10.

OHA further agreed with the D/GC that Petitioner did not establish that it is at least 51% owned by service-disabled veterans, as required by 13 C.F.R. § 125.12. Specifically, Petitioner did not produce evidence that the 51% ownership interest previously held by Mr. Vernell Craig had been properly conveyed to a new owner, Mr. Christopher S. Salter. *Id.* at 10. Lastly, OHA found no clear error in the D/GC's conclusion that Mr. Salter lacks managerial experience of the extent and complexity needed to run a firm engaged in large-scale construction projects, based on Mr. Salter's resume and the other information Petitioner submitted during the course of the D/GC's review. *Id.* at 10-11.

B. Petition for Reconsideration

Petitioner contends that *SDVE I* is flawed for several reasons. First, SBA regulations permit that “[a] concern may change its ownership or business structure so long as one or more service-disabled veterans own and control it after the change.” (PFR at 2, quoting 13 C.F.R. § 125.12(f) (emphasis added by Petitioner).) Here, although Mr. Craig previously owned 51% of Petitioner, the record as a whole establishes that Mr. Salter held that interest as of April 9, 2019, the date of Petitioner's self-certification for the instant procurement. (*Id.* at 4-5.) Petitioner asserts that OHA further erred in determining that Petitioner's Operating Agreement differs from its Articles of Organization. (*Id.* at 3.) According to Petitioner, Alabama state law draws no distinction between such documents. (*Id.*, citing Ala. Code § 10A-5A-1.02.)

Next, Petitioner maintains that Mr. Salter does possess the managerial experience needed to run Petitioner. (*Id.* at 5.) In particular, the decision in *SDVE I* “gave insufficient weight to Mr. Salter's military experience.” (*Id.*) Petitioner offers additional details concerning Mr. Salter's military record and his subsequent employment at Coca-Cola. (*Id.* at 5-7.)

Petitioner discusses several recent OHA decisions which, in Petitioner's view, are inconsistent with *SDVE I*. (*Id.* at 7-11.) Petitioner urges that *CVE Protest of Williams Building Co., Inc.*, SBA No. CVE-105-P (2019) is analogous to the situation presented here because, in *Williams Building*, the challenged firm's Operating Agreement provided that “business decisions are made by Member-Managers, and [a service-disabled veteran] is the only Member-Manager.” (*Id.* at 7, quoting *Williams Building*, SBA No. CVE-105-P, at 6.) The same would be true here if OHA had interpreted the February 19, 2019 document as amending Petitioner's Operating Agreement.

In *Matter of BKM Global Corp., Inc.*, SBA No. VET-270 (2018), OHA remanded a determination because SBA had not explained why it declined to credit the challenged firm's assertions and evidence. (*Id.* at 9.) Petitioner argues that, similarly, the D/GC here had no valid reason to doubt that Mr. Salter owns 51% of Petitioner. (*Id.*)

In *CVE Protest of Alpha4 Solutions LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019), OHA observed that the challenged firm's eligibility is assessed as of the date of its self-certification, and that the challenged firm's ownership structure prior to this date was immaterial. (*Id.* at 10.) The D/GC and OHA thus erred in considering whether Petitioner had properly repurchased and transferred the 51% interest previously held by Mr. Craig, because these events occurred before Petitioner self-certified for the instant procurement. (*Id.*)

In *CVE Appeal of Veterans 1st Architecture, LLC*, SBA No. CVE-122-A (2019), OHA granted an appeal after concluding that the U.S. Department of Veterans Affairs misinterpreted the requirements of Georgia state law. (*Id.*) Petitioner argues that, in the current case, the D/GC misunderstood Alabama law pertaining to limited liability companies. (*Id.* at 10-11.)

Lastly, Petitioner argues that the D/GC could not properly have explored issues beyond those raised in the initial status protest. (*Id.* at 11.) The D/GC is not an “interested party” with standing to protest under 13 C.F.R. § 125.27(b). (*Id.*) Further, the status protest against Petitioner contained no allegations relating specifically to Mr. Salter. (*Id.*) As such, the D/GC exceeded his authority by unilaterally considering new issues not raised in the protest. (*Id.*)

Petitioner cites *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792 (2013) and *Systems Plus, Inc. v. United States*, 69 Fed. Cl. 757 (2006) for the proposition that a firm's due process rights are violated when an agency considers issues outside the scope of the original protest and does not afford the firm adequate notice and an opportunity to refute the new allegations. (*Id.* at 12-13.)

C. SBA's Response

On March 13, 2020, SBA responded to the PFR. SBA argues, first, that the purpose of a PFR is to address material errors in a decision, not to revisit matters that have already been adjudicated. (Response at 2, citing *Matter of Teamus Construction Co., Inc.*, SBA No. VET-148 (2009) (PFR) and 13 C.F.R. § 134.515(b).) Petitioner's arguments concerning Mr. Salter's experience are not properly raised in a PFR, as Petitioner merely seeks to reargue issues OHA has already decided. (*Id.* at 2-3.)

Next, SBA contends that the D/GC and OHA correctly concluded that the February 19, 2019 document did not amend Petitioner's Operating Agreement. (*Id.* at 3.) Contrary to Petitioner's suggestions, Alabama state law establishes that “the articles of organization and operating agreement are two separate and distinct legal documents.” (*Id.* at 3-4.) While Alabama revised its law governing limited liability companies (LLCs) in 2014, Alabama law continues to provide that the “Certificate of Formation” (formerly known as the “Articles of Organization”) creates the LLC, whereas the “Limited Liability Agreement” (formerly known as the “Operating Agreement”) governs the affairs of the LLC. (*Id.* at 4.) Thus, a change in Petitioner's Articles of Organization, such as occurred in the February 19, 2019 document, did not alter any provisions in Petitioner's Operating Agreement. (*Id.* at 4-5.)

Third, SBA insists that the D/GC is an interested party to initiate a status protest, and that there has been no violation of Petitioner's due process rights. (*Id.*) SBA regulations previously included a provision identifying SBA as an “interested party” for protest purposes, but this language was removed in 2018 in an effort to streamline the regulations. (*Id.* at 6.) Nevertheless, the D/GC remains an interested party to bring a status protest. (*Id.*) SBA highlights that one or more SBA officials always have standing to protest in every SBA program. (*Id.*)

SBA adds that the underlying protest in this case alleged that Petitioner is not owned and controlled by service-disabled veterans. (*Id.*) Thus, the D/GC did not, in any event, raise new protest issues. Further, the D/GC's office repeatedly communicated with Petitioner, and requested supporting documentation and explanation, while the protest was under review. (*Id.*) As a result, Petitioner had ample notice of the protest allegations. (*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 after service of *Matter of SDVE, LLC*, SBA No. VET-283 (2020), 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

A major flaw in this PFR is that it consists largely of arguments that Petitioner could have, but did not, raise in its initial appeal petition. Specifically, Petitioner argues at length in the PFR that the D/GC exceeded his authority by considering issues beyond those presented in the underlying protest, yet Petitioner did not challenge the D/GC's decision on this basis in its appeal petition. *SDVE I*, SBA No. VET-283, at 6-7 (summarizing appeal arguments). Nor did Petitioner contend in its appeal petition that the D/GC had deprived Petitioner of due process. *Id.* Similarly, Petitioner argues in the PFR that Alabama state law does not distinguish between an Operating Agreement and Articles of Organization, yet Petitioner again failed to raise that issue during the *SDVE I* proceedings. *Id.* It is well-settled 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.” *Matter of Redhorse Corp.*, SBA No. VET-263, at 4 (2017) (PFR); *see also Matter of Four Points Tech., LLC*, SBA No. VET-120, at 6 (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 many of Petitioner's arguments could have been, but were not, raised during *SDVE I*, these arguments fail as Petitioner has waived such arguments.

Even apart from the procedural defects in the PFR, though, Petitioner has not demonstrated any material error of fact or law in *SDVE I*, as would be necessary for Petitioner to prevail on a PFR. With regard to Petitioner's due process contentions, the record reflects extensive communications between Petitioner and the D/GC's office regarding the ownership and control of Petitioner. (Protest File at 67-71, 470-71, 941-42.) As a result, I must agree with SBA

that Petitioner had ample notice of the issues the D/GC would be examining. Further, as SBA emphasizes in its response to the PFR, the original protest alleged that, after the death of Mr. Craig — the service-disabled veteran upon whom Petitioner's eligibility had been based — Petitioner was owned and controlled by individuals who are not service-disabled veterans. *SDVE I*, SBA No. VET-283, at 2 (summarizing protest). The original protest, then, did specifically raise questions of whether Petitioner is owned and controlled by service-disabled veterans, thus contradicting Petitioner's claim that the D/GC unilaterally chose to explore these matters on his own initiative. Petitioner also is incorrect in suggesting that the D/GC would have lacked authority to initiate his own status protest. Although it is true that 13 C.F.R. § 125.27(b) no longer identifies SBA as an “interested party” for protest purposes, the regulations elsewhere make clear that SBA retains standing to pursue a status protest on any SDVO procurement. *See* 13 C.F.R. § 125.28(c) and (d)(3).

Petitioner's arguments concerning Alabama state law are equally unfounded. As SBA observes in its response to the PFR, while the terminology used by the state was revised in 2014, Alabama law continues to distinguish between the document which creates an LLC, and the document which governs the affairs of the LLC. Ala. Code §§ 10A-5A-1.02(n)(3), 10A-5A-1.08, and 10A-5A-2.01. As a result, Petitioner has not shown that the D/GC and OHA erred in concluding that the February 19, 2019 amendment of Petitioner's Articles of Organization did not alter, or revise, Petitioner's Operating Agreement. It is also worth noting in this regard that the February 19, 2019 document was completely silent with respect to Petitioner's Operating Agreement. *SDVE I*, SBA No. VET-283, at 3-4, 10. Accordingly, even if the February 19, 2019 document could be construed as having amended the Operating Agreement, there would be no basis to conclude that the February 19, 2019 document revised the particular provisions in the Operating Agreement that the D/GC found to be problematic.

Petitioner also argues that the D/GC should have accepted Petitioner's representations that Petitioner was 51% owned by Mr. Salter as of the date of its self-certification, citing OHA's decisions in *Matter of BKM Global Corp., Inc.*, SBA No. VET-270 (2018) and *CVE Protest of Alpha4 Solutions LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019). Unlike the situations presented in *BKM* and *Alpha4 Solutions*, however, the D/GC here had reason to question the validity of Mr. Salter's ownership interest, given the unusual circumstances through which Mr. Salter purportedly acquired the ownership interest previously held by Mr. Craig. *SDVE I*, SBA No. VET-283, at 4. Petitioner has not shown that the D/GC erred by seeking additional explanation of those circumstances.

Lastly, Petitioner contends that Mr. Salter does have managerial experience of the extent and complexity needed to run Petitioner, and in particular that the D/GC and OHA failed to give sufficient weight to Mr. Salter's military service. As discussed in *SDVE I*, though, the D/GC acknowledged Mr. Salter's military record but found that Petitioner did not “explain how this military experience is relevant to the construction industry.” *SDVE I*, SBA No. VET-283, at 5. Insofar as Petitioner now seeks to offer additional information, not already contained in the Protest File, concerning Mr. Salter's experience, OHA is unable to consider such information at this late stage of the proceedings. 13 C.F.R. § 134.512.

III. Conclusion

Petitioner has not shown a clear error of fact or law material to the decision. I therefore DENY the PFR and AFFIRM the decision in *Matter of SDVE, LLC*, SBA No. VET-283 (2020). 13 C.F.R. §§ 134.227(c) and 134.515(b).

KENNETH M. HYDE
Administrative Judge