

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

VSBC Appeal of:

B.E. Scaife Plumbing Company, Inc.,
d/b/a TamCo Services, Inc,

Appellant,

SBA No. VSBC-273-A

Decided: March 30, 2023

ORDER DISMISSING APPEAL¹

I. Background

On March 8, 2023, B.E. Scaife Plumbing Company, Inc. d/b/a TamCo Services, Inc. (Appellant) filed an appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA), seeking to challenge an e-mail from SBA's Office of Government Contracting & Business Development (GCBD). The e-mail stated, in relevant part:

We have reviewed the materials that you provided, but they still seem to reflect that [a non-service-disabled veteran] is [Appellant's] highest compensated [employee] for each of the requested years up to the present. If you are saying [Mr. Bryant Ephom Scaife, Sr.] has realized income from [Appellant] beyond that shown on his W-2s, that should be reflected in 1099s. If 1099s were not issued, then the dividends or other amounts should be reflected on Mr. Scaife's Tax Returns. As the protest of this matter has been completed and there was no appeal, we have no further action with regards to the status of [Appellant].

...

In accordance with SBA's December 13, 2022 determination [sustaining a status protest against Appellant], SBA found [Appellant] was not controlled by [Mr. Scaife, a service-disabled veteran]. As no appeal was taken, SBA's determination is final. Within two (2) days of this email, please remove the Service-Disabled Veteran-Owned Small Business [(SDVOSB)] and Veteran-owned Small Business [(VOSB)] representations and certifications from [Appellant's] SAM

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. §§ 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K.

profile. Unless the certifications and representations are removed within two (2) days, SBA will have them removed.

(E-mail to B. Scaife (Feb. 22, 2023).)

In the appeal, Appellant maintains that the GCBD e-mail should be understood as a “Supplemental Determination.” (Appeal at 1, 7 (citing *Size Appeal of ROH, Inc.*, SBA No. SIZ-4040 (1995)).) Appellant further claims that “[n]othing in the [December 13, 2022 protest decision] alluded to or discussed jeopardy to [Appellant's] SDVOSB status.” (*Id.* at 5 (emphasis Appellant's).)

On March 9, 2023, OHA ordered Appellant to show cause why the appeal should not be dismissed as untimely. OHA explained that, according to information provided with the appeal, the Director of SBA's Office of Government Contracting (D/GC) issued a decision on December 13, 2022, concluding that Appellant is not an eligible SDVOSB. (Order at 2.) More specifically, the D/GC drew an adverse inference, due to Appellant's failure to produce requested payroll records, that the missing information would have shown that Mr. Scaife - the service-disabled veteran upon whom Appellant's eligibility as an SDVOSB is based - is not Appellant's highest-compensated employee, and as a result found that Mr. Scaife does not fully control Appellant. (*Id.*) In addition, because Appellant proposed to rely heavily upon a non-SDVOSB subcontractor to perform the requirements of a U.S. Environmental Protection Agency (EPA) contract, the D/GC found that Appellant is not eligible for that award. (*Id.*) OHA noted that the D/GC's decision of December 13, 2022 advised Appellant of its right to appeal to OHA. (*Id.*) Appellant did not, however, file a timely appeal of the December 13, 2022 decision, and instant appeal appears to be “an untimely attempt to challenge the D/GC's decision of December 13, 2022.” (*Id.*)

In response to OHA's Order, Appellant reiterates its view that the February 22, 2023 e-mail constitutes a new or “supplemental” determination. (Response at 1.) In support, Appellant claims that “nowhere” in the December 13, 2022 decision did the D/GC “express[ly] determine” or direct that [Appellant] should lose its SDVOSB status.” (*Id.* at 2.) Rather, according to Appellant, the D/GC's decision “only applied to the [EPA] contract.” (*Id.*) Appellant further asserts that, after the D/GC's decision was issued, GCBD invited Appellant, “both orally and in writing,” to proffer additional information. (*Id.*) Appellant maintains that the D/GC's decision was “labeled as a [d]raft,” thereby creating uncertainty as to the D/GC's “intentions at that time.” (*Id.* at 2, fn. 1.)

Next, Appellant argues that, in the February 22, 2023 e-mail, GCBD rendered a “new adverse determination” based on “new information SBA sought,” and issued a “new directive” regarding Appellant's SAM profile. (*Id.* at 3.) Even assuming that the instant appeal is an untimely effort to challenge the D/GC's December 13, 2022 decision, Appellant maintains that the appeal “provided exhaustive evidence of the SBA's ‘extra-regulatory’ proceeding and engagement with [Appellant] following the issuance of the [December 13, 2022 decision].” (*Id.* at 4-5.) Appellant highlights that GCBD “repeatedly engag[ed]” with Appellant via phone calls, e-mails, and requests for additional documentation “over [a] roughly seven[-]week period,” which ultimately culminated in the “February 22, 2023, email Supplemental Determination on

the merits of [Appellant's] SDVOSB status.” (*Id.* at 2, 5.) Appellant adds that “[t]he Supplemental Determination may not have the trappings of an official SBA determination, possibly by design, but it certainly was a new adverse determination for [Appellant] based on new information requested by SBA and provided by [Appellant] after December 13, 202[2].” (*Id.* at 5.) Appellant lastly asserts that it will be denied due process if not permitted to challenge the e-mail. (Mat 4.)

II. Appellant's Exhibits

Accompanying its appeal, Appellant attached 57 exhibits, including a copy of the D/GC's December 13, 2022 decision, and copies of multiple communications between Appellant and GCBD. (Appeal, Exhs. A-R.)

The D/GC's December 13, 2022 decision addresses whether Mr. Scaife is Appellant's highest-compensated employee. (Exh. B, at 6-8.) With regard to this issue, the D/GC found that:

Although [Appellant] satisfies many elements of control, the failure to provide any payroll documentation whatsoever has resulted in an adverse inference that providing the information would support a finding that Mr. Scaife, as the highest-ranking officer of [Appellant], is not the highest compensated individual. Accordingly, SBA determines that [Appellant] does not fully satisfy all control requirements, in accordance with 13 C.F.R. § 125.14.

(*Id.* at 8.) The D/GC additionally determined that Appellant will be heavily reliant upon a non-SDVOSB subcontractor perform the EPA contract. (*Id.* at 8-18.) The D/GC concluded “that one or more [service-disabled veterans] do not control [Appellant] and that [Appellant's] relationship with [its subcontractor] violates the ostensible contractor rule.” (*Id.* at 18.) The D/GC informed Appellant of its right to appeal to OHA, cautioning that “[t]his determination is effective immediately and represents SBA's final decision on the matter unless overturned on appeal.”² (*Id.* at 19.)

After the D/GC's decision was issued, Appellant's counsel contacted GCBD with the following questions:

1. In reviewing the SBA's recent determination, we interpret the determination to apply only to the instant, protested [EPA] contract and not to any other existing contracts or future contracts. The basis of this interpretation is that the SBA stated that it applied to the protested contract but did not mention or discuss in its determination that it would apply more broadly. Is this consistent with SBA's position?

² At the time the D/GC's decision was issued, SBA regulations permitted that the D/GC's decision on a SDVOSB status protest could be appealed to OHA within 10 business days after issuance of the decision. 13 C.F.R. §§ 125.31 and 134.503 (2022). Effective January 1, 2023, SBA amended these regulations such that all VOSB and SDVOSB status protests are adjudicated directly by OHA, and may not be further appealed. 87 Fed. Reg. 73,400 (Nov. 29, 2022).

2. What evidence of control does the SBA want to see to overcome the SBA's presumption in the determination? Would the payroll records for the entire company suffice? If so, for what period of time? What else would the SBA want to see?

(*Id.*, Exh. L.) A GCBD representative responded that “You can give me a call when you are free to discuss your issues.” (*Id.*)

III. Discussion

The record reflects that, on December 13, 2022, the D/GC sustained a status protest against Appellant, and concluded that Appellant does not qualify as an SDVOSB. *See* Sections I and II, *supra*. More specifically, the D/GC found that Appellant failed to produce evidence to show that Mr. Scaife, the service-disabled veteran upon whom Appellant's eligibility as an SDVOSB was based, is Appellant's highest-paid employee. Section II, *supra*. The D/GC therefore drew an adverse inference that the missing information would have shown that Mr. Scaife does not fully control Appellant. *Id.* The D/GC's decision repeatedly stated that Appellant is not an eligible SDVOSB, and warned that the decision was final unless overturned by OHA on appeal. *Id.* Appellant filed no timely appeal of the December 13, 2022 decision. Section I, *supra*.

Accordingly, the instant appeal is untimely and must be dismissed. As explained in the D/GC's decision, any appeal must have been filed within 10 business days after issuance of the decision, and Appellant acknowledges that it did not do so. Sections I and II, *supra*. In response to OHA's Order to Show Cause, Appellant suggests that it may have been confused as to whether the D/GC's decision was merely a “draft,” or by whether the D/GC had determined Appellant ineligible solely on contract-specific grounds, but these arguments are meritless. In communications with GCBD shortly after the decision was issued, Appellant characterized the decision as “SBA's recent determination” - *i.e.*, not a draft - and further recognized that the D/GC had applied a “presumption” that Mr. Scaife does not control Appellant, based on missing “payroll records.” Section II, *supra*. It thus is clear that Appellant knew, or should have known, that the D/GC had made a formal adverse determination against Appellant, on grounds that were not related specifically to the EPA contract.

In arguing that its appeal is timely, Appellant also contends that the GCBD e-mail of February 22, 2023 may be considered a new, or “supplemental,” determination, thereby extending the deadline for Appellant to appeal. Section I, *supra*. The e-mail in question, though, was not signed by the D/GC, or indeed by any GCBD official, and contained no appeal rights. *Id.* The e-mail thus does not constitute a proper decertification notice, which may be appealed to OHA. *See generally* 13 C.F.R. § 128.310. Moreover, the e-mail did not, in substance, supplement the D/GC's decision of December 13, 2022, nor alter that decision in any way. Section I, *supra*. Rather, the e-mail reiterated that, because Appellant was decertified as a result of the D/GC's December 13, 2022 decision, which Appellant did not appeal, GCBD could take “no further action” at that time. *Id.* SBA regulations instead stipulate that a concern decertified through a status protest must wait at least 90 calendar days before it may reapply for certification. 13 C.F.R. § 128.309(c).

IV. Conclusion

Appellant knew, or should have known, that on December 13, 2022, the D/GC rendered a decision sustaining a status protest against Appellant and concluding that Appellant is not an eligible SDVOSB. Appellant did not appeal the determination, and by failing to do so, waived its right to contest that decision. Appellant's attempt to challenge the D/GC's findings several months later is, thus, plainly untimely. Accordingly, the appeal is DISMISSED. This is the final decision of the U.S. Small Business Administration. 13 C.F.R. § 134.1112(d).

KENNETH M. HYDE
Administrative Judge