

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

VSBC Appeal of:

Tree Services, Inc.,

Appellant

SBA No. VSBC-291-A

Decided: July 18, 2023

APPEARANCE

William L. Callahan, Esq., Vice President/General Counsel, Tree Services, Inc.,
Beltsville, Maryland

DECISION

I. Introduction and Jurisdiction

On May 19, 2023, Tree Services, Inc. (Appellant) appealed a decision of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Veteran-Owned Small Business (VOSB). SBA found that Appellant did not demonstrate that it is fully controlled by one or more veterans, due to defects in Appellant's Bylaws. On appeal, Appellant maintains that the denial decision was premature, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is granted, and the matter is remanded to SBA for further review.

OHA adjudicates VOSB status appeals pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K. Appellant timely filed the appeal within 10 business days after receiving the denial notice on May 10, 2023. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

Appellant is a Maryland corporation established in 1996. (Case File (CF), Exh. 36.) In April 2023, Appellant applied for certification as a VOSB and submitted various supporting documents to SBA. Appellant disclosed that, on January 31, 2023, Appellant increased the size of its Board from six to nine directors. (CF, Exh. 25.) Of these nine directors, only Appellant's Chairman and majority owner, Mr. John W. Anna, Jr., is a veteran. (CF, Exh. 38.)

Appellant provided an undated and unsigned copy of its corporate Bylaws. (CF, Exh. 32.) The Bylaws contain the following provisions pertinent to this appeal:

Article III — Board of Directions

Section 1. General Powers

The business and affairs of the corporation shall be managed by its Board of Directors.

Section 2. Number, Tenure, and Qualifications

The number of directors of the corporation shall be one (1). Each director shall hold office until the next annual meeting of shareholders and until his successor shall have been elected and qualified.

...

Section 6. Quorum

A majority of the number of directors fixed by Section 2 of this Article III shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, but if less than such majority is present at a meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

Section 7. Manner of Acting

The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

...

Article XI — Amendments

These Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by the Board of Directors at any regular or special meeting of the Board of Directors.

(*Id.* at 4-5, 10.)

On May 5, 2023, SBA informed Appellant that its Bylaws likely would render Appellant ineligible for VOSB certification because (1) there appears to be only one veteran among Appellant's nine-member Board and (2) the quorum and voting provisions in the Bylaws would enable non-veteran directors to block corporate decisions. (CF, Exh. 46.) SBA instructed that Appellant should amend its Bylaws to address these issues. (*Id.*) Appellant responded that previously was verified by the U.S. Department of Veterans Affairs, and expressed skepticism as

to whether “it's worth it” to revise the Bylaws. (CF, Exh. 45.) On May 5, 2023, at 2:42 p.m. EST, SBA reiterated that Appellant “will need to” amend its Bylaws in order to potentially be eligible for VOSB certification. (*Id.*) Shortly thereafter, SBA issued Appellant a formal document request stating that “Amendments to Bylaws” were due by May 12, 2023 at midnight, in order to “avoid any further delays in processing [Appellant's] application.” (CF, Exh. 44.)

B. Denial

On May 10, 2023, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for certification as a VOSB, based on defects in Appellant's Bylaws. (CF, Exh. 23.) The D/GC explained that because “it appears that there are more Directors than authorized by the Bylaws and only one Veteran individual [*i.e.*, Mr. Anna] holds a Director position, it cannot be determined that the Veteran is able to meet the Board of Director quorum and voting requirements set forth in the Bylaws.” (*Id.*)

C. Appeal

On May 19, 2023, Appellant appealed the D/GC's decision to OHA. Appellant does not attempt to argue that the D/GC misinterpreted Appellant's Bylaws. Appellant observes, however, that although the D/GC stated that Appellant would have until May 12, 2023 to amend its Bylaws, the D/GC nevertheless denied Appellant's application on May 10, 2023. (Appeal at 1.) Because the D/GC issued his decision prior to expiration of the deadline, the denial was premature. (*Id.*)

III. Discussion

When a concern seeks certification as a VOSB or SDVOSB, SBA regulations provide that “SBA, in its sole discretion, may request additional documentation at any time in the eligibility determination process.” 13 C.F.R. § 128.302(c). SBA must, however, “take into account any clarifications made by an Applicant in response to” an SBA request for information, and must “consider” all information provided by the concern in deciding whether the concern qualifies as a VOSB or SDVOSB. 13 C.F.R. §§ 128.300 and 128.302(b).

Here, the record reflects that the D/GC established a deadline of midnight on May 12, 2023 for Appellant to amend to its Bylaws, but the D/GC denied Appellant's application before that deadline had passed. Sections II.A and II.B, *supra*. It follows, then, that the D/GC could not have fully considered any amendments or other information that Appellant may have intended to provide. The D/GC's denial therefore was premature.

On the other hand, although Appellant has shown that the D/GC improperly denied Appellant's application on May 10, 2023, Appellant has not demonstrated that it is an eligible VOSB. Notably, Appellant does not dispute that its original Bylaws were deficient, nor does Appellant offer any indication that its Bylaws have, in fact, been amended. Section II.C, *supra*. Additional review therefore is warranted.

IV. Conclusion

For the above reasons, the appeal is GRANTED; the D/GC's decision of May 10, 2023 is VACATED; and the matter is REMANDED to the D/GC for further review.

KENNETH M. HYDE
Administrative Judge