

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

CVE PROTEST OF:

Alpha4 Solutions LLC d/b/a Alpha
Transcription,

Protester,

Solicitation No. 36C24218U0057

U.S. Department of Veterans Affairs
Veterans Health Administration

SBA No. CVE-103-P

Decided: February 28, 2019

APPEARANCES

Thomas Bailey, President, Alpha4 Solutions LLC d/b/a Alpha Transcription, Marietta, Georgia

Steven J. Koprince, Esq., Shane J. McCall, Esq., Haley E. Claxton, Esq., Robert D. Kampen, Esq., Koprince Law LLC, Lawrence, Kansas, for Veterans Medical Transcription Services, Inc.

Marshand Boone, Contracting Officer, U.S. Department of Veterans Affairs, Veterans Health Administration, Brooklyn, New York

DECISION¹

I. Introduction and Jurisdiction

On November 3, 2018, Alpha4 Solutions LLC d/b/a Alpha Transcription (Protester) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Veterans Medical Transcription Services, Inc. (VMTS) in connection with U.S. Department of Veterans Affairs (VA) Request for Quotations (RFQ) No. 36C24218U0057. Protester contends that VMTS is not owned and controlled by one or more service-disabled veterans, and that VMTS

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

therefore should be excluded from the VA Center for Verification and Evaluation (CVE) database of eligible SDVOSBs. For the reasons discussed *infra*, the protest is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J.² Protester filed its protest within five business days after receiving notification that VMTS was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, this matter is properly before OHA for decision.

II. Background

A. CVE Verification

On February 27, 2018, CVE informed VMTS that CVE had added VMTS to the Vendor Information Pages database of eligible SDVOSBs, after verifying that VMTS “is presently, as of the issuance of this notice, in compliance with the regulation.” (Case File (CF), Exh. 145, at 1.) The verification was valid until May 2020. (*Id.*) VMTS was required to report any changes that might adversely affect its eligibility within 60 days of the change. (*Id.*)

B. The Solicitation

On September 6, 2018, the VA issued RFQ No. 36C24218U0057 for dictation and transcription services at VA's New York Harbor Healthcare System campuses. (CF, Exh. 243.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 561410, Document Preparation Services, with a corresponding size standard of \$15 million average annual receipts. Quotations were due September 21, 2018. On November 2, 2018, the CO notified unsuccessful offerors, including Protester, that VMTS had been selected for award.

C. Protest

On November 3, 2018, Protester filed the instant protest with the CO, challenging VMTS's size and SDVOSB status. On December 17, 2018, the CO forwarded the status portion of the protest to OHA for review.³

In its protest, Protester maintains that VMTS provided misleading information to CVE, and should never have been classified as an SDVOSB. (Protest at 1.) Protester alleges that, several years ago, VMTS was affiliated with Stone Network, Inc. (Stone) through common ownership. (*Id.* at 2-3.) Specifically, both VMTS and Stone were, at that time, owned and controlled by the same individuals, Mr. Timothy Nicholls and Mr. Sinnappan Mani, through a

² The regulations at 13 C.F.R. part 134 subpart J became effective October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

³ Protester's allegations concerning VMTS's size were directed to SBA's Office of Government Contracting.

company known as Digital Transcription Services, Inc. (DTS). (*Id.* at 3.) Although VMTS has subsequently undergone change of ownership, VMTS and Stone continue to share an address as well as “staff, utilities, intellectual, physical, and informational resources.” (*Id.*) After visiting VMTS's offices, Protester claims that VMTS does not have a separate entrance from Stone's offices. (*Id.* at 4-7.) Protester adds that an analysis of whether VMTS is a proper SDVOSB should include consideration of what constitutes an independent office space, and whether VMTS meets that requirement, as it appears that VMTS operates within office space leased by Stone. (*Id.* at 7.) Protester asserts that VMTS leases office space from a company owned by Mr. Mani, who is still part owner of Stone. (*Id.* at 14.)

Next, Protester highlights that, according to corporate records, Mr. Nicholls was VMTS's Secretary as of the end of 2017. (*Id.* at 9.) Mr. Nicholls also is President of Stone and a former owner of VMTS. According to Protester, these facts show that Stone exerted control over VMTS even after VMTS's ownership change. (*Id.*) Protester further complains that Protester has previously lodged other protests against VMTS, but CVE did not adequately investigate Protester's allegations. One prior CVE determination suggested that VMTS and Stone could permissibly share resources such as a fax machine if this did not create great economic risk. (*Id.* at 10.) Protester disagrees with CVE's reasoning because “[u]sing this logic, two competing companies can literally share every conceivable resource, and as long as no ‘great economic risk’ is created, it is not a violation.” (*Id.*)

Next, Protester contends that [XXXX], who serves as Stone's Transcription Supervisor and Quality Control Supervisor, is related to VMTS's current co-owner, Mr. Steven Rose. (*Id.* at 12.) Therefore, they share an identity of interest under 13 C.F.R. § 121.103(f) and the companies are affiliated. (*Id.*) Additionally, Protester argues that Mr. Mani has represented VMTS in other proceedings as recently as February 2018. This, in Protester's view, further demonstrates that Stone and VMTS are affiliated. (*Id.* at 13.)

Protester posits that, when Messrs. Nicholls and Mani divested their interest in VMTS, provisions may have been included in the sales contract whereby they would continue to control VMTS. (*Id.*) Protester further asserts that VMTS was administratively dissolved by the state of Missouri in February 2018, so it was improper for VMTS to have been awarded a different VA contract in 2018. (*Id.* at 14.)

Protester reiterates its arguments that VMTS and Stone are affiliated through common management, identity of interest, and the newly-organized concern rule. (*Id.* at 15.) In addition, notwithstanding VMTS's change of ownership, CVE should never have found VMTS to be a proper SDVOSB. According to Protester, “a mere change of ownership in no way absolves a company from the sins of the past.” (*Id.*)

D. CO's Response

On January 10, 2019, the CO responded to the protest. The CO explains that “standard responsibility checks” were performed in order to ensure a proper SDVOSB was awarded the contract. (CO's Response at 1.) The CO states that, before quotes were even received, Protester

contacted the CO to warn that Protester intended to file a protest if not selected for award. In the CO's view, this supports the conclusion that the instant protest is frivolous. (*Id.* at 1-2.)

E. VMTS's Response

On January 15, 2019, VMTS responded to the protest.⁴ VMTS argues that the protest is meritless, and essentially repeats allegations previously made by Protester against VMTS, which have been rejected by CVE. VMTS urges OHA to “come to the same conclusion as the VA has many times over,” that VMTS is an eligible SDVOSB. (VMTS's Response at 2.) According to VMTS, Stone and VMTS “simply share neighboring suites in the same building” and have no other connection. (*Id.*)

VMTS first explains that on November 25, 2017, VMTS's then-owner Mr. Rose, a service-disabled veteran, transferred the majority of his interest in VMTS to two other individuals — Mr. Michael Dortch, a service-disabled veteran, and [XXXX], who is not a service-disabled veteran. (*Id.* at 5.) Following this transaction, Mr. Dortch holds a [XX]% ownership interest in VMTS, Mr. Rose owns [XX]%, and [XXXX] owns the remaining [XX]%. (*Id.* at 5-6.) Thus, two service-disabled veterans together own a majority ([XX]%) interest in VMTS. (*Id.* at 9-10.) A CVE determination issued in March 2018 confirmed that VMTS's ownership structure meets CVE's certification requirements. (*Id.* at 6.)

Mr. Dortch and Mr. Rose also unconditionally control VMTS. For shareholder votes, VMTS's Second Amended and Restated By-Laws (By-Laws) require the approval of all service-disabled veteran shareholders, and shareholders that together hold more than 50% of VMTS stock. (*Id.*) The By-Laws further require that all service-disabled veteran shareholders be present in order to establish a quorum for a shareholder vote to take place. (*Id.* at 11.) The By-Laws state that VMTS's business is controlled and managed by its Board of Directors, and Mr. Rose and Mr. Dortch are VMTS's only Directors. (*Id.* at 6, 11.) Further, Mr. Rose, a service-disabled veteran, holds the position of President, VMTS's highest officer position. (*Id.* at 11.) “Given that service-disabled veterans, Mr. Rose and Mr. Dortch, hold a majority of the ownership interests, act as President, and make up the Board of Directors, this means that no action can be taken without the approval of Mr. Rose and Mr. Dortch.” (*Id.*) Thus, VMTS is controlled by service-disabled veterans.

Contrary to Protester's allegations, VMTS insists that it does not share any employees, resources, equipment, or any type of services with Stone, nor is there any business relationship between the companies or their principals that would create such dependence that VMTS could not exercise independent business judgment without great economic risk. (*Id.* at 13, citing 13 C.F.R. § 125.13(i).)

⁴ OHA originally established a close of record for this dispute of January 11, 2019. At the time VMTS's Response would have been due, however, OHA's offices were closed due to a lapse of appropriations. OHA posted a notice on its website suspending all filing deadlines during the lapse of appropriations. OHA resumed normal operations on January 28, 2019, so VMTS's Response is timely.

Turning to Protester's allegation that VMTS and Stone are co-located, VMTS explains that this allegation was previously considered by CVE and found to be meritless. VMTS acknowledges that it is located in the same building as Stone, and that the two companies “share[] a mailing address for practical purposes.” (*Id.* at 15.) However, the offices have separate entrances and working areas.⁵ Most VMTS employees [XXXXXXXX], [and enter VMTS's offices] through a separate and secure area that is accessible only to VMTS employees. (*Id.* at 16.) VMTS directs its mail to Stone's address as a convenience [XXXXXXXX]. (*Id.* at 15-17.) In response to Protester's claim that Mr. Mani owns the concern from which VMTS rents its office space, VMTS asserts that “this does not create any dependence such that VMTS cannot exercise independent business judgment without economic risk.” (*Id.* at 16.) VMTS leases its office space under normal commercial terms, and should the need arise, could obtain similar accommodations elsewhere.

Regarding Protester's claims that VMTS is in violation of size rules and contract-administration requirements, VMTS urges that OHA should not consider these questions. (*Id.* at 19.) These issues, according to VMTS, are beyond OHA's jurisdiction for CVE protests. In the event that OHA does review these matters, however, VMTS insists that it does not share common management with Stone. (*Id.* at 20.) Any reference to Mr. Nicholls being VMTS's Secretary at the end of 2017 was erroneous, as Mr. Nicholls resigned from the position in Spring 2017. (*Id.*) Further, contrary to Protester's allegation, Mr. Mani, not Mr. Nicholls, is Stone's President. (*Id.*)

Next, VMTS disputes the notion that VMTS and Stone are affiliated through identity of interest. VMTS reiterates that this allegation is outside OHA's jurisdiction for CVE protests. In any event, VMTS continues, [XXXXXXXXXXXXX]. (*Id.* at 21-22.) Neither Mr. Nicholls nor Mr. Mani has any ownership interest or investment in VMTS, nor has Protester shown that VMTS receives any revenue from Stone. (*Id.* at 23.) Similarly, Protester has not established that VMTS and Stone are affiliated under the newly-organized concern rule. VMTS was established in 2008 and therefore is not “newly-organized.” Further, Mr. Rose held no prior position at Stone or DTS when he purchased VMTS from DTS, and “Stone has not furnished VMTS with contacts, any kind of assistance, indemnification, or facilities.” (*Id.* at 24.)

Lastly, VMTS argues that Protester's numerous protests against VMTS, none of which have been found to be meritorious, are rooted in bad faith. VMTS asserts that, as the incumbent contractor in many of these protests, Protester is attempting to “simply delay award of the current contract.” (*Id.* at 25.)

F. By-Laws

The record includes VMTS's Second Amended and Restated By-Laws (By-Laws), adopted by VMTS's three shareholders — Mr. Rose, Mr. Dortch, and [XXXX] — on February 16, 2018. (CF, Exh. 137.) An attachment to the By-Laws, labeled “Exhibit A,” states that Mr. Dortch holds a [XX]% ownership interest in VMTS, while [XXXX] has [XX]%, and Mr. Rose

⁵ With its Response, VMTS offers photographs of its office space, in which separate entrances for VMTS and Stone can be seen. (Response, Exh. S.)

the remaining [XX]%. (*Id.*, Exh. A.) According to Exhibit A, Mr. Dortch and Mr. Rose, but not [XXXX], are service-disabled veterans. (*Id.*) Mr. Dortch and Mr. Rose are VMTS's only Directors. (*Id.*)

VMTS's By-Laws state that a quorum for a shareholder vote will not exist if “less than all Service-Disabled Veteran Shareholders are present.” (*Id.*, Article II § 3.) Further, “[a] vote of the Shareholders shall be effective if, and only if: (a) At least 51% of all Ownership Interests are voted in favor; and (2) all Service-Disabled Veteran Shareholders vote in favor.” (*Id.*, Article II § 9.) There are no shareholder votes that “require a unanimous or supermajority vote.” (*Id.*)

VMTS's By-Laws state that “[t]he business, property and affairs of the Corporation shall be controlled and managed by its Board of Directors.” (*Id.*, Article III § 1.) A majority of the Board must be present to establish a quorum, with the caveat that “all Service-Disabled Veteran Directors” must be present. (*Id.*, Article III, § 3.) In addition, for any act of the Board to take effect, “all Service-Disabled Veteran Directors must approve the action.” (*Id.*)

The By-Laws call for three executive positions within VMTS: (i) President; (ii) Secretary; and (iii) Treasurer. (*Id.*, Article IV, § 1.) The President is “the highest officer of the Corporation” and “shall be responsible for managing the Corporation's day-to-day business.” (*Id.*) Further, the President “shall supervise and control the business, property and affairs of the Corporation, subject to the authority hereinabove given to the Board of Directors.” (*Id.*, Article VI, § 1.) The President of VMTS must be a service-disabled veteran. (*Id.*, Article IV, § 1.)

G. Declarations

Accompanying its Response, VMTS offered sworn declarations from Mr. Rose and Mr. Dortch. In his declaration, Mr. Rose avers that he is a service-disabled veteran, holds a [XX]% ownership interest in VMTS, and is a Director of VMTS. (Response, Exh. M ¶ 2.) In addition, Mr. Rose has served as VMTS's President, the highest officer position, since October 2016. (*Id.*) Mr. Rose states that on November 25, 2017, he transferred [XX]% of his ownership interest to Mr. Dortch and [XX]% to [XXXXXXX], while retaining [XX]%. (*Id.* ¶ 4.) Mr. Dortch is also a service-disabled veteran, so between Mr. Rose and Mr. Dortch, service-disabled veterans own [a majority] of VMTS and serve as VMTS's only Directors. (*Id.*) Mr. Rose explains that, as Directors of VMTS, Mr. Rose and Mr. Dortch are in charge of VMTS's day-to-day management, as well as its long-term operations and decision-making. (*Id.* ¶ 6.)

Mr. Rose avers that none of VMTS's three owners is an owner, director, officer, or manager of Stone. (*Id.* ¶ 7.) Nor is any of VMTS's owners a direct relative of any owner, director, officer, or manager of Stone. (*Id.* ¶¶ 7, 16.) VMTS and Stone share no employees, resources, equipment, or any type of services. (*Id.* ¶¶ 8, 12.) Further, VMTS derives no revenues from Stone. (*Id.* ¶ 18.) Mr. Rose explains that VMTS is a transcription service [XXXXXXXXXXXXXXXXX]. (*Id.* ¶ 11.) [VMTS personnel] enter through a separate door and proceed to VMTS's private work space. (*Id.*) VMTS does not share office space, computers, or any office equipment, with Stone. (*Id.* at ¶ 12.) With regard to Mr. Nicholls's relationship with VMTS, Mr. Rose states that Mr. Nicholls resigned as VMTS's President in October 2016 and later resigned as VMTS's Secretary during Spring 2017. (*Id.* ¶ 13.)

In his declaration, Mr. Dortch states that he is a service-disabled veteran, owns [XX]% of VMTS, and is a Director of VMTS. (Response, Exh. N ¶ 2.) As VMTS's only Directors, Mr. Dortch and Mr. Rose are solely responsible for VMTS's day-to-day management and long-term decision-making. (*Id.* ¶ 5.) Mr. Dortch reiterates that no owner, director, officer, or manager of VMTS has any ownership or managerial interest in Stone, nor do Mr. Nicholls or Mr. Mani have any ownership or investment in VMTS. (*Id.* ¶ 6, 12.)

H. Replies

On January 27, 2019, Protester submitted a Reply to VMTS's Response, and on February 5, 2019, Protester submitted a Reply to the CO's Response. VMTS objected to the Replies, and on February 10, 2019, Protester informed OHA that it was withdrawing both Replies. Accordingly, the Replies are EXCLUDED from the record and have not been considered for purposes of this decision. 13 C.F.R. § 134.1007(f)(3).

I. Request for Clarification and Response

On February 8, 2019, OHA requested that VMTS clarify who holds the position of President, VMTS's highest officer position. OHA noted that VMTS's Response had indicated that Mr. Rose, a service-disabled veteran, is VMTS's President. Other documents in the record, however, identify Mr. Dortch as VMTS's President.

On February 15, 2019, VMTS responded to OHA's order. VMTS explains that Mr. Dortch, a service-disabled veteran, is currently VMTS's President, and that he has held this position since November 2017. (Clarification at 1-2.) Mr. Rose was formerly President of VMTS from October 2016 until November 2017. (*Id.* at 2.) According to VMTS, statements in VMTS's Response and the accompanying declarations suggesting that Mr. Rose is still VMTS's President were the result of drafting errors overlooked in preparing those documents. (*Id.*) With its clarification, VMTS offers new declarations from Mr. Dortch and Mr. Rose. Mr. Dortch avers that he is VMTS's President, and that he has held this position since November 2017. (*Id.*, Exh. U ¶ 2.) Mr. Rose states that he was VMTS's President from October 2016 until November 2017, when he was succeeded by Mr. Dortch. (*Id.*, Exh. V ¶¶ 2-3.)

J. Motion to Supplement the Record

On February 20, 2019, Protester moved to supplement the record with additional evidence. Specifically, Protester seeks to introduce five e-mails from 2017, which, according to Protester, “support [Protester's] claims of comingling of staff and demonstrated control by the ownership of [Stone].” (Motion at 1.) VMTS opposes the motion. The record in this case has already closed, and OHA will not accept new evidence filed after the close of record. (Opp. at 2.) Further, all of the new evidence was available to Protester before the close of record, if not before the initial protest, and Protester has not explained why the new evidence was not, or could not have been, submitted at an earlier time. (*Id.* at 3.) In the event that OHA nevertheless grants Protester's motion, VMTS argues that it should be afforded an opportunity to address the substance of the new evidence. (*Id.* at 1 n.1.)

I agree with VMTS that Protester's new evidence cannot be considered. Under OHA's rules of procedure, OHA will not entertain evidence or argument filed after the close of record. 13 C.F.R. §§ 134.225 and 134.1012. The record in the instant case has already closed, and Protester has not established any valid reason to reopen the record. Accordingly, Protester's motion is DENIED and the new evidence has not been considered for purposes of this decision.

III. Discussion

A. Burden of Proof

As the protested firm, VMTS has the burden of proving its eligibility as an SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Dates to Determine Eligibility

In a CVE Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of two dates: (1) the date of the bid or initial offer including price, and (2) the date the CVE Protest was filed. *See* 13 C.F.R. § 134.1003(c)(1). Here, VMTS submitted its quotation including price on September 21, 2018, and the instant protest was filed on November 3, 2018. Sections II.B and II.C, *supra*. Therefore, OHA must examine VMTS's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

As of September 21, 2018, VMTS's eligibility was governed by VA's ownership and control rules for SDVOSBs, set forth at 38 C.F.R. part 74. Effective October 1, 2018, however, SBA issued new ownership and control regulations at 13 C.F.R. part 125, which also apply to SDVOSB procurements conducted by VA. 83 Fed. Reg. 48,908 (Sept. 28, 2018). As of November 3, 2018, then, VMTS's eligibility is determined under the rules for ownership and control in 13 C.F.R. part 125. Accordingly, for purposes of the instant decision, OHA will apply both the eligibility rules previously set forth at 38 C.F.R. part 74, and the eligibility rules currently set forth at 13 C.F.R. part 125.⁶

C. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more service-disabled veterans. 38 C.F.R. § 74.2(a); 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Blue Cord Design and Constr., LLC*, SBA No. CVE-100-P (2018). As discussed below, VMTS has persuasively demonstrated that it meets these requirements. Therefore, this protest must be denied.

Beginning with the question of ownership, an eligible SDVOSB must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. *See* 38 C.F.R. §

⁶ Unless otherwise indicated, all citations to 38 C.F.R. part 74 are to the regulations in effect as of September 21, 2018. Citations to 13 C.F.R. part 125 are to the regulations in effect on November 3, 2018.

74.3; 13 C.F.R. § 125.12. Here, there is no dispute that two of VMTS's three owners — Mr. Dortch and Mr. Rose — are service-disabled veterans. Sections II.F and II.G, *supra*. Further, based on VMTS's By-Laws and the sworn declarations provided, Mr. Dortch owns [XX]% of VMTS, Mr. Rose owns [XX]% of VMTS, and there are no conditions on their ownership. *Id.* Although [XXXX], who is not a service-disabled veteran, owns the remaining [XX]% interest in VMTS, two service-disabled veterans collectively own [a majority] of VMTS. Accordingly, VMTS meets the requirement that it be at least 51% unconditionally and directly owned by one or more service-disabled veterans.

Protester highlights that, at one time, Mr. Nicholls and Mr. Mani owned VMTS through DTS. Section II.C, *supra*. OHA's review, though, focuses on whether VMTS was an eligible SDVOSB as of September 21, 2018 and November 3, 2018. Section III.B, *supra*. Under VMTS's ownership structure that was in effect throughout 2018, Mr. Nicholls, Mr. Mani, and DTS have no ownership interest at all in VMTS. Sections II.F and II.G, *supra*. Any prior ownership stake they might have held in VMTS is not relevant to whether VMTS was an eligible SDVOSB as of September 21, 2018 and November 3, 2018.

Turning to the question of control, to be an eligible SDVOSB, one or more service-disabled veterans must control both the long-term decision-making and the day-to-day management of the concern. 38 C.F.R. § 74.4(a); 13 C.F.R. § 125.13(a). In addition, a service-disabled veteran must hold the highest officer position in the concern, and must have managerial experience of the extent and complexity needed to run the concern. 38 C.F.R. § 74.4(c); 13 C.F.R. § 125.13(b). Further, if the concern is a corporation, one or more service-disabled veterans must control its board of directors. 38 C.F.R. § 74.4(f); 13 C.F.R. § 125.13(e).

VMTS has persuasively demonstrated that it meets all of these requirements. The record reflects that two service-disabled veterans, Mr. Dortch and Mr. Rose, fully control VMTS. As noted above, Mr. Dortch and Mr. Rose together hold a [majority] ownership interest in VMTS. Sections II.F and II.G, *supra*. A quorum for a shareholder vote can occur only if a majority of interests are present and all service-disabled veteran shareholders are present. *Id.* Thus, there can be no quorum for a shareholder vote absent Mr. Dortch and Mr. Rose. Similarly, a majority vote and the vote of “all Service-Disabled Veteran Shareholders” is required for any shareholder action to be taken. *Id.* No shareholder votes require a unanimous or supermajority vote, so [XXXX], who owns [XX]% of VMTS and is not a service-disabled veteran, has no ability to block shareholder actions approved by Mr. Dortch and Mr. Rose. *Id.* VMTS's By-Laws further state that “[t]he business, property and affairs of [VMTS] shall be controlled and managed by its Board of Directors,” and Mr. Dortch and Mr. Rose are VMTS's only two Directors. *Id.* Additionally, under the By-Laws, VMTS's President is its highest officer, and only a service-disabled veteran may hold this position. *Id.* Although VMTS initially informed OHA that Mr. Rose was its President, VMTS subsequently clarified that Mr. Dortch actually serves as VMTS's President, and that he has held this position since November 2017. Section II.I, *supra*. In sum, then, VMTS has shown that service-disabled veterans fully control VMTS, because they control shareholder votes, control VMTS's Board, and serve as VMTS's highest officer.

VA and SBA regulations also identify situations in which non-service-disabled veterans and/or entities may be deemed to control a concern. Under VA regulations, control by non-

service-disabled veterans may arise if a non-service-disabled veteran and/or entity provides critical financial or bonding support or a critical license; through loan arrangements; or through business relationships that cause such dependence that the SDVOSB cannot exercise independent business judgment without great economic risk. 38 C.F.R. § 74.4(i). Similarly, SBA regulations create a rebuttable presumption of control by non-service-disabled individuals and/or entities in these and other situations. 13 C.F.R. § 125.13(i). Under SBA regulations, a non-service-disabled veteran and/or entity is presumed to control the concern “[i]n circumstances where the concern is co-located with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.” *Id.* § 125.13(i)(3). A presumption of control also arises “[i]n circumstances where the concern shares employees, resources, equipment, or any type of services, whether by oral or written agreement with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.” *Id.* § 125.13(i)(4).

In the instant case, VMTS has persuasively shown that none of the above situations are present. According to the sworn declarations of Mr. Dortch and Mr. Rose, VMTS and Stone are not co-located; have no business relationship; and share no employees, resources, equipment, or any type of services. Section II.G, *supra*. Further, the three owners of VMTS includes no one who is an owner, director, officer, or manager of Stone, or a direct relative of an owner, director, officer or manager of Stone. *Id.* Other evidence in the record supports VMTS's sworn statements. Photographs of VMTS offices, for example, offer no indication that VMTS shares offices with Stone, and contradict the notion that VMTS's offices have the same entrance as Stone's offices. Section II.E, *supra*. Conversely, Protester's allegations are not supported by any substantial evidence, and are not sufficient to overcome VMTS's sworn declarations and other evidence in the record. Some of Protester's allegations appear to be wholly speculative, such as its claim that provisions might have been included in the sales agreement whereby Messrs. Nicholls and Mani would continue to control VMTS even after fully divesting their interest. Section II.C, *supra*. Other allegations, even if true, shed no light on VMTS's current eligibility, such as Protester's claim that Mr. Nicholls served as VMTS's Secretary until the end of 2017. VMTS disputes this allegation, but even assuming it to be true, Protester has not explained how this would demonstrate that VMTS was not an eligible SDVOSB as of the pertinent dates for determining eligibility (*i.e.*, September 21, 2018 and November 3, 2018).

Lastly, I agree with VMTS that Protester's size allegations, such as identity of interest and the newly-organized concern rule, are not properly before OHA at this time. OHA has jurisdiction to adjudicate appeals of “[f]ormal size determinations made by an SBA Government Contracting Area Office, under [13 C.F.R.] part 121.” 13 C.F.R. § 134.301(a). Here, though, a formal size determination has not yet been issued, or appealed to OHA.

IV. Conclusion

VMTS has proven its eligibility as an SDVOSB by a preponderance of the evidence. The protest therefore is DENIED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

KENENTH M. HYDE
Administrative Judge