

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

CVE PROTEST OF:

Williams Building Company, Inc.,

Protester,

RE: Monument Construction, LLC

Solicitation No. 36E77618R0062
U.S. Department of Veterans Affairs
Veterans Health Administration

SBA No. CVE-105-P

Decided: March 19, 2019

APPEARANCES

Kevin M. Cox, Esq., Camardo Law Firm, P.C., Auburn, New York, for Williams Building Company, Inc.

Matthew T. Schoonover, Esq., Shane J. McCall, Esq., Haley E. Claxton, Esq., Koprince Law, LLC, Lawrence, Kansas, for Monument Construction, LLC

DECISION¹

I. Introduction and Jurisdiction

On December 20, 2018, Williams Building Company, Inc. (Protester) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Monument Construction, LLC (Monument) in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36E77618R0062. Protester alleges that Monument is not owned and controlled by a service-disabled veteran, and that Monument 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

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

134 subpart J.² Protester filed its protest within five business days after receiving notification that Monument 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 May 8, 2018, CVE informed Monument that CVE had approved Monument's application for reverification of its SDVOSB status, after determining that Monument "is presently, as of the issuance of this notice, in compliance with the regulation." (Case File (CF), Exh. 222, at 1.) The verification was valid for a period of three years. (*Id.*) Monument was required to report any changes that might adversely affect its eligibility within 60 days of the change. (*Id.*)

B. Solicitation

On June 15, 2018, the VA issued RFP No. 36E77618R0062 for a construction project at the Jamaica Plain VA Medical Center in Jamaica Plain, Massachusetts. The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$36.5 million average annual receipts. Proposals were due July 16, 2018.

C. Protest

On December 13, 2018, the CO announced that Monument was the apparent awardee. On December 20, 2018, Protester, an unsuccessful offeror, filed the instant protest, challenging Monument's size and SDVOSB status. The CO forwarded the status portion of the protest to OHA for review.³

In its protest, Protester alleges that Monument is not controlled by Mr. Daniel J. Proulx, Jr., the service-disabled veteran upon whom Monument's SDVOSB status is based. (Protest at 6.) More specifically, Protester alleges that, according to public records, [Member #1] is a member, manager, and officer of Monument. (*Id.*) Protester argues that "[i]f [Member #1] handles the 'day-to-day management operations' of Monument, then Mr. Proulx would lack the control over the SDVOSB required by the Regulations." (*Id.*, citing 13 C.F.R. § 125.13(a).)

Next, Protester observes that Mr. Proulx was employed as a Locomotive Engineer for the Massachusetts Bay Commuter Railroad (MBCR) as recently as 2014. (*Id.*) Further, Mr. Proulx

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 Monument's size were directed to SBA's Office of Government Contracting.

was running Monument from 2008 to 2014. If Mr. Proulx still is working for MBCR, and another individual is responsible for the day-to-day operations of Monument, Mr. Proulx may lack the requisite control over Monument. (*Id.*)

Lastly, Protester argues that Mr. Proulx may not control Monument due to possible affiliation with A.J. & Sons, Inc. (AJSI). Protester asserts that [Member #2] is President and/or Director of AJSI. [Member #2] also has served as a manager of Monument. (*Id.* at 4, 6.) Protester contends that if [Member #2] is not a service-disabled veteran, and if he has the ability to control Monument, this arrangement may contravene 13 C.F.R. § 125.13. (*Id.* at 6.)

D. Monument's Response

On February 19, 2019, Monument responded to the protest. Monument urges OHA to deny the protest because Monument is an eligible SDVOSB under both VA and SBA regulations. (Response at 2.) Monument highlights that Mr. Proulx is a service-disabled veteran who unconditionally controls Monument and holds 81% ownership of the company. Further, Mr. Proulx is devoted to Monument full-time and is not otherwise employed. (*Id.*)

Monument maintains it is an eligible SDVOSB because it meets all requirements under both VA and SBA regulations. (*Id.* at 3.) “In fact, through four separate CVE visits and a recent SDVOSB status protest, the CVE has confirmed Monument's eligibility for participation in the SDVOSB program.” (*Id.* at 3-4.) Mr. Proulx is a veteran who served with the Marine Corps from January 17, 1990 to March 6, 1994, and has a service-connected disability. (*Id.* at 5.) Mr. Proulx formed Monument in 2008, and owns 81% of the company. (*Id.*) The remaining 19% ownership interest is held by [Member #1] ([XX]%) and [Member #2] ([XX]%). (*Id.*)

Mr. Proulx controls Monument in all its daily and long-term aspects. (*Id.*) Mr. Proulx is Monument's only Member-Manager, and Monument's Operating Agreement states that “[t]he ordinary and usual decisions concerning the business affairs of the Company shall be made by the Managers, each of whom shall be a Member-Manager.” (*Id.* at 7, quoting Operating Agreement Article VII § 1.) Further, as the only Member-Manager, Mr. Proulx alone can do “all things necessary or convenient to carry out the business and affairs of the Company,” which includes: bringing and defending lawsuits, purchasing property, selling or mortgaging property, entering into contracts, lending money, conducting the company's business, appointing employees, and paying compensation. (*Id.*, quoting Operating Agreement Article VII § 3.)

Monument maintains that Mr. Proulx works for Monument 60 hours a week Monday through Friday during the company's normal business hours, and frequently works Saturdays. (*Id.* at 8.) Mr. Proulx, as Member-Manager, is “the only person allowed under the operating agreement to make all ‘big picture’ strategic decisions for the company.” (*Id.*) Mr. Proulx has the management experience to run Monument, having controlled all aspects of the company since 2009. (*Id.*) Specifically, Mr. Proulx has made important strategic decisions such as identifying business opportunities, negotiating with subcontractors and prime contractors, and hiring employees. (*Id.* at 8-9.) With respect to day-to-day activities, Mr. Proulx conducts daily meetings about finance, project management, bids, and marketing; reviews contracts and modifications;

meets with banks, bonding companies, healthcare providers, and other administrative service providers; visits project sites; and conducts pre-construction meetings with clients. (*Id.* at 9.)

Monument employs approximately 60 people, and given the volume of work Monument performs, Mr. Proulx has delegated some responsibilities to other employees. [Member #1] is Monument's Vice President of Operations and is responsible for certain operational aspects of Monument including "administration, quality control, HR, and technology-based matters." (*Id.*) These tasks are completed with Mr. Proulx's oversight, however, and anything more than minor decisions must be approved by Mr. Proulx. (*Id.*)

Monument disputes the notion that Mr. Proulx does not fully control Monument, and maintains that Protester's allegations are without merit. (*Id.*) Although Protester is correct that [Member #1] and [Member #2] are Members of Monument, they are not Member-Managers as defined by Monument's Operating Agreement. (*Id.* at 10.) Rather, Mr. Proulx is the only Member-Manager and exercises full control over Monument. (*Id.*)

Monument argues that Mr. Proulx's prior employment as a Locomotive Engineer does not undermine his current control over Monument. Mr. Proulx has not been employed by MBCR since 2014. Likewise, Mr. Proulx was a Locomotive Engineer with Keolis Commuter Service (KCS), which operates the same commuter line as MBCR, but resigned in September 2015. (*Id.*) Further, even while Mr. Proulx was employed with MBCR and KCS, he worked only on nights and weekends and thus "was able to devote himself full-time to Monument." (*Id.* at 11, fn. 6.) As a result, Protester's allegation that Mr. Proulx cannot exercise the requisite control over Monument due to other employment is "entirely false." (*Id.* at 10.) Monument observes that it submitted its offer for the instant procurement in 2018, long after Mr. Proulx ended his employment with KCS and MBCR. (*Id.* at 11.) Thus, Mr. Proulx's previous employment "cannot possibly jeopardize his control over Monument." (*Id.*)

In response to Protester's allegation that Monument may be affiliated with AJSI, Monument notes that affiliation is a size issue, not an SDVOSB status or control-related issue. (*Id.*) Further, an SBA area office recently issued a size determination finding that Monument is not affiliated with AJSI. (*Id.*) In any event, [Member #2], who owns [XX]% of Monument, works only a few hours each month for Monument and has no managerial role. (*Id.*) Further, AJSI provides no critical financing, bonding or licenses to Monument, and the companies have no business relationship. (*Id.* at 12.)

E. Operating Agreement

The record includes Monument's First Amended and Restated Operating Agreement (Operating Agreement), adopted December 11, 2012. (CF, Exh. 77.) An attachment to the Operating Agreement, labeled "Exhibit A," states that Mr. Proulx holds an 81% ownership interest in Monument, while [Member #1] owns [XX]% and [Member #2] [XX]%. (*Id.*, Exh. A.) According to Exhibit A, [Member #1] and [Member #2] are Members of Monument, and Mr. Proulx is Monument's only Member-Manager. (*Id.*) The Operating Agreement states that Mr. Proulx is a service-disabled veteran. (*Id.*, Article VII § 7.) Mr. Proulx "may freely and

unconditionally transfer his [] interest in the Company to anyone, and at any time, without restriction of any kind.” (*Id.*, Article XII § 1.)

The Operating Agreement states that “[t]he ordinary and usual decisions concerning the business affairs of the Company shall be made by the Managers, each of whom shall be a Member-Manager.” (*Id.*, Article VII § 1.) Only Member-Managers may bind the company whereas ordinary Members cannot. (*Id.*, Article VII §§ 3, 4.) A Member-Manager is empowered “to do all things necessary or convenient to carry out the business and affairs of the Company,” including: bringing and defending lawsuits; purchasing, selling, and leasing personal and real property; entering into contracts; lending money; “conduct[ing] the Company's business”; and appointing employees and officers, defining their duties, and establishing their compensation. (*Id.*, Article VII § 3.) A Member-Manager may be removed by “the Majority of the Members.” (*Id.*, Article VII § 7.) A “Majority of the Members” is defined as “Members having Membership Interests in excess of one-half of the Membership Interests of all the Members.” (*Id.*, Article II.)

F. Declaration

With its Response, Monument offered a sworn declaration from Mr. Proulx. (Response, Exh. B.) In his declaration, Mr. Proulx avers that he is 81% owner and the sole Member-Manager of Monument. (*Id.* ¶¶ 2, 4.) As the only Member-Manager, Mr. Proulx is “responsible for making all ‘big picture’ strategic decisions for Monument [and] for the day-to-day decision-making of the company.” (*Id.* ¶ 4.) Mr. Proulx “work[s] at least 60 hours per week at Monument,” including full-time “during the company's normal business hours Monday thru Friday.” (*Id.* ¶ 7.)

Mr. Proulx states that [Member #1] is Monument's Vice President of Operations, and that [Member #1] is responsible, under Mr. Proulx's supervision and oversight, for certain operations matters “including administration, quality control, HR and technology.” (*Id.* ¶ 12.) However, Mr. Proulx must “approve anything other than minor decisions of [Member #1].” (*Id.*) With regard to AJSI, Mr. Proulx acknowledges that [Member #2] holds ownership interests in both AJSI and Monument. (*Id.* ¶ 10.) Beyond this connection, though, “[Monument] and [AJSI] are two separate entities and have no business relationship.” (*Id.*)

G. Resume

The record includes a copy of Mr. Proulx's resume. (CF, Exh. 193.) The resume describes Mr. Proulx as a service-disabled veteran with “over 20 plus years of general construction, electrical construction and engineering” experience. (*Id.*) Mr. Proulx currently is employed as Member-Manager at Monument. (*Id.*) From 2003 to 2014, Mr. Proulx worked at MBCR as a “Locomotive Engineer (nights and weekends).” (*Id.*) From 2014 to 2015, Mr. Proulx worked at KCS as a “Locomotive Engineer (nights).” (*Id.*)

III. Discussion

A. Burden of Proof

As the protested firm, Monument 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, Monument submitted its proposal including price on July 16, 2018, and the instant protest was filed on December 20, 2018. Sections II.B and II.C, *supra*. Therefore, OHA must examine Monument's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

As of July 16, 2018, Monument'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 December 20, 2018, then, Monument's eligibility is determined under the rules for ownership and control in 13 C.F.R. part 125. Accordingly, for purposes of this 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 125.⁴

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, Monument 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. § 74.3; 13 C.F.R. § 125.12. In the instant case, Mr. Proulx, a service-disabled veteran, owns 81% of Monument, and there are no restrictions on his ownership. Sections II.E and II.F, *supra*. Accordingly, Monument meets the requirement that it be at least 51% unconditionally and directly owned by one or more service-disabled veterans.

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

⁴ Unless otherwise indicated, all citations to 38 C.F.R. part 74 are to the regulations in effect as of July 16, 2018. Citations to 13 C.F.R. part 125 are to the regulations in effect on December 20, 2018.

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). If the concern is a limited liability company, one or more service-disabled veterans must serve as its managing members. 38 C.F.R. § 74.4(e); 13 C.F.R. § 125.13(d).

Monument has established that it meets all of these requirements. According to Monument's Operating Agreement, business decisions are made by the Member-Managers, and Mr. Proulx is Monument's only Member-Manager. Section II.E, *supra*. Although Monument also has two ordinary Members who are not service-disabled veterans, ordinary Members cannot legally bind the company. *Id.* Nor does the Operating Agreement give ordinary Members any ability to interfere with Mr. Proulx's control over Monument. *Id.* Thus, Mr. Proulx fully controls Monument in both its daily and long-term aspects.

In challenging Mr. Proulx's control over Monument, Protester raises two principal arguments. Section II.C, *supra*. First, Mr. Proulx may not control Monument insofar as he still is employed by MBCR. Second, Mr. Proulx may not control Monument if the two ordinary Members — [Member #1] and [Member #2] — control the day-to-day operations of Monument. As discussed below, both of these contentions are meritless.

Monument explains that Mr. Proulx worked on nights and weekends for MBCR, and then for KCS, until September 2015, when he resigned. Section II.G, *supra*. Further, Mr. Proulx no longer is employed by MBCR or KCS, and instead currently “work[s] at least 60 hours per week at Monument,” including full-time “during [Monument's] normal business hours Monday thru Friday.” Section II.F, *supra*. Accordingly, I see no basis to conclude that Mr. Proulx cannot effectively operate Monument due to outside employment.

With regard to [Member #1] and [Member #2], the record establishes that both are ordinary Members of Monument and have no power to control Monument. Section II.E, *supra*. [Member #1] also serves as Monument's Vice President of Operations, but this position is subordinate to Mr. Proulx and subject to Mr. Proulx's close supervision. Section II.F, *supra*. [Member #2] holds an ownership stake in AJSI in addition to his minority interest in Monument. *Id.* However, [Member #2] is not an officer of Monument, and AJSI and Monument conduct no business with one another. *Id.* On these facts, Protester has not identified any plausible basis to find that [Member #1] or [Member #2] controls Monument.

IV. Conclusion

Monument 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).

KENNETH M. HYDE
Administrative Judge