

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

CVE Protest of:

Commonwealth Home Health Care, Inc.

Protester,

Re: Veterans Care Medical Equipment,
LLC

RFP No. 36C24618R0507

U.S. Department of Veterans Affairs

Network Contracting Office 6

SBA No. CVE-116-P

Decided: May 16, 2019

APPEARANCES

Sarah Reida, Esq., Legal Meets Practical, LLC, Naperville, Illinois, for Commonwealth Home Health Care, Inc.

Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Shane J. McCall, Esq., Haley E. Claxton, Esq., Koprince Law LLC, Lawrence, Kansas, for Veterans Care Medical Equipment, LLC

DECISION¹

I. Introduction and Jurisdiction

On March 18, 2019, Commonwealth Home Health Care, Inc. (Protester) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Veterans Care Medical Equipment, LLC (VCME) in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C24618R0507. VCME is a joint venture between Avenue Mori Medical Equipment, Inc. (AMME) and its mentor, Rotech Healthcare, Inc. (Rotech). For the reasons discussed *infra*, the protest is sustained.

¹ OHA originally issued this decision under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

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 VCME 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

According to the Case File, VCME's majority owner, AMME, is an SDVOSB established on December 1, 2015. AMME is 51% owned by [Person 1], a service-disabled veteran, and 49% owned by [Other Owner]. (Case File (CF), Exh. 9.) On February 17, 2017, AMME and Rotech executed a Mentor-Protégé Agreement (MPA) under SBA's All-Small Mentor-Protégé Program (ASMPP). (CF, Exh. 20.) SBA subsequently approved the MPA. On June 7, 2017, VCME was established as a Delaware LLC. (CF, Exh. 29 ¶ 2.1 and Exh. 30.)

On October 16, 2017, the VA's Center for Verification and Evaluation (CVE) informed VCME that CVE had approved VCME's application for verification of its SDVOSB status, after determining that VCME “is presently, as of the issuance of this notice, in compliance with the regulation.” (CF, Exh. 51, at 1.) The verification was valid for a period of three years. (*Id.*) VCME was required to report any changes that might adversely affect its eligibility within 60 days of the change. (*Id.* at 1-2.)

B. Mentor-Protégé Agreement (MPA)

The MPA explains that “AMME provides a full product line of Durable Medical Equipment (DME) and provides services, primarily in the Southern California area.” (CF, Exh. 20, at 1.) AMME requests Rotech's assistance in five areas: Management and Technical Assistance; Financial Assistance; Contracting; Business Development; and General and/or Administrative Assistance. (*Id.* at 2-6.)

For Management and Technical Assistance, AMME needs: (1) assistance in developing [xxx]; (2) [xxx]; (3) management training for hiring and supervising a larger workforce; and (4) [xxx]. (*Id.* at 2-4.) To assist, Rotech will, first, work with AMME within a set timeline to [xxx]. (*Id.* at 2-3.) Second, Rotech will assist AMME by allowing [xxx] in servicing joint contracts. (*Id.* at 3.) Third, Rotech will assist during contract transition through the use of its internal recruiters and longstanding relationships with recruiting agencies. (*Id.*) Fourth, Rotech will allow AMME to use [xxx] on joint contracts. (*Id.* at 4.)

For Financial Assistance, AMME states it lacks working capital for the oxygen, PAP, ventilator and other equipment, and the vehicle fleet needed to service a large contract. (*Id.* at 4.)

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

Rotech will assist by allowing AMME [xxx]. (*Id.*) Also, Rotech will share access to its [xxx], and will assist AMME with fleet management, routing tools, and procedures for safe delivery of equipment and services. (*Id.*)

In the area of Contracting Assistance, AMME specifically needs “(1) assistance in identifying potential opportunities for bid; (2) training in writing more effective proposals, particularly for larger contract opportunities.” (*Id.* at 5.) Rotech will assist AMME in “successfully identifying, proposing, and performing larger VA contracts” and, on joint bids that are not accepted by VA, will participate in the debriefing to provide feedback on the strengths and weaknesses of the proposal. (*Id.*)

For Business Development, the MPA states that AMME wants to expand its current business from [xxx] to nationwide. (*Id.*) Rotech will provide “[xxx], experiential knowledge and support to setup operational processes to service large VA contracts,” specifically focusing on “location coverage, the oxygen, PAP, ventilator and DME equipment required to service the contract, [and] employee and fleet development.” (*Id.*) For General and/or Administrative Assistance, AMME needs assistance with obtaining business licenses and registration in other states. (*Id.* at 6.) Rotech will assist AMME in understanding licensure rules and obtaining required licenses, during contract transition. (*Id.*)

C. 2017 Joint Venture Agreement

The Case File contains a Joint Venture Agreement (JVA) for VCME, executed by AMME and Rotech on September 7, 2017. (CF, Exh. 31.) The JVA states that VCME is [xxx] organized as a Delaware LLC. (*Id.* ¶ 6.0.) AMME owns 51% of VCME, and Rotech owns the remaining 49%. (*Id.*) The JVA identifies AMME as Managing Venturer and Rotech as Partner Venturer. (*Id.* ¶ 4.1.)

According to the JVA, VCME is governed by a Management Board whose purpose is “specifying overall policy, objectives, and control of the Joint Venture.” (*Id.* ¶ 4.2.) The Management Board also settles any disputes relating to contract performance. (*Id.*) The Management Board consists of three representatives: two selected by AMME (one of whom is Managing Director), and one by Rotech. (*Id.*) Each representative has one vote, and two representatives are needed for quorum. (*Id.*) Action requires majority vote, and in the event of a tie, the Managing Director makes the final decision. (*Id.* ¶ 4.6.) [Person 1] is the Managing Director of VCME. (*Id.* ¶ 4.3.1.)

The JVA provides that the Project Manager on a contract will be determined at the time of proposal and will be an AMME employee. (*Id.* ¶ 5.0.) “The Project Manager will have primary responsibility for Contract negotiations, as well as the negotiation of all proposals for task or delivery orders to be awarded under the Contract.” (*Id.* ¶ 7.1.) During proposal evaluation, AMME will be the primary point of contact with the customer. (*Id.*)

The JVA does not address the instant procurement, noting that “[t]he Contract is currently unspecified.” (*Id.* ¶ 7.2.) However, the JVA does contain a “Proposal Addendum” at

Exhibit A, with blank areas for insertion of information pertaining to a particular procurement. (*Id.* at 16-17.) With regard to Source of Labor, the JVA instructs:

Once a definitive scope of work is made publicly available, the Venturers will jointly review the scope and consider each Venturer's unique capabilities and skillsets, in order to determine a division of the source of labor best suited to meet the Client's needs in an efficient and effective manner. The Venturers shall then execute a written addendum to this Agreement setting forth their specific responsibilities regarding scope of labor. The form of this addendum is attached to this Agreement as Exhibit A.

(*Id.* ¶ 7.2.) The JVA contains similar instructions for Contract Performance and Major Equipment, Facilities, and other Resources. (*See id.* ¶¶ 7.3 and 11.1.) Regarding Performance of Work, the JVA adds:

AMME, the small business Partner to the Joint Venture, shall perform at least 40 percent of the work performed by the Joint Venture. The work performed by AMME shall be more than administrative or ministerial functions so that AMME will gain substantial experience.

(*Id.* ¶ 16.1.)

Concerning amendments to the JVA, the JVA states: “Any amendments or changes to this Agreement must be in writing, executed by both Venturers, and, if required by regulation, must be approved by the SBA.” (*Id.* ¶ 18.1.) Regarding addendums, the JVA states: “If the Joint Venture pursues additional contracts, the Venturers shall execute an addendum to this Agreement, setting forth the performance requirements on those additional contracts. All addendums to this Agreement must be in writing, executed by both Venturers, and, if required by regulation, must be approved by the SBA.” (*Id.* ¶ 18.2.)

Finally, the JVA states:

This Agreement, together with any Joint Venture Operating Agreement that the Joint Venture may adopt, is an integrated agreement and embodies the complete agreement and understanding among the Venturers In the event of a conflict between a provision in this Agreement and a provision in the Joint Venture Operating Agreement, the provision in this Agreement shall control. In the event of a conflict between a provision in this Agreement and SBA's regulations, SBA's regulations shall control.

(*Id.* ¶ 28.)

D. Joint Venture Operating Agreement

The Case File contains VCME's Joint Venture Operating Agreement (JVOA), executed on September 8, 2017. (CF, Exh. 29). The JVOA “supplements [VCME's] Joint Venture

Agreement, which was previously executed by the Parties,” but “does not supersede or nullify any portion of the Joint Venture Agreement.” (*Id.* at 2.) The JVOA specifically references the September 7, 2017 JVA. (*Id.* at 3.)

After providing a more detailed description of VCME's Management Board, the JVOA sets forth provisions for decisions at the level of the Members. (*Id.* ¶ 5.3.) These decisions are:

5.3.1. Any amendment, modification, supplement, or repeal, in whole or in part, of the Company's Certificate of Organization or this Agreement;

5.3.2. Admitting new or additional Members, including admitting any Transferee or Interest Holder as a Member; or

5.3.3. Withdrawal of a Member except as specifically allowed in this Agreement[.]

(*Id.* ¶ 5.3.) At a meeting of Members, “[t]he affirmative vote of Members holding a simple majority of the Percentage Interests shall be required to approve any matter coming before the Members.” (*Id.* ¶ 5.4.2.) The JVOA reiterates that AMME holds 51% interest in VCME, and Rotech holds 49%. (*Id.* at 3.)

E. Solicitation

On July 9, 2018, the VA issued RFP No. 36C24618R0507 for home oxygen in Virginia and North Carolina, with possible, infrequent service in neighboring states. (CF, Exh. 123.) The Contracting Officer (CO) originally set aside the procurement for SDVOSBs, and the RFP included VA Acquisition Regulation (VAAR) clause 852.219-10 “VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (JUL 2016) (Deviation).” (*Id.* at 108-09.) Amendment 1, issued July 19, 2018, revised the RFP to establish a tiered evaluation scheme, with SDVOSBs enjoying first consideration. (CF, Exh. 124.) Offers were due August 3, 2018. On March 14, 2019, the CO informed Protester, a Veteran-Owned Small Businesses (VOSB) as well as the incumbent contractor, that an award selection had been made at the SDVOSB tier and that Protester had received no consideration for award. (Protest, Exh. A.) The CO subsequently identified VCME as the apparent awardee. (Protest at 2, 5.)

F. Protest

On March 18, 2019, Protester filed the instant protest with the CO, challenging VCME's SDVOSB status. (*Id.* at 2-3.) Protester alleges that VCME is ineligible because AMME, the protégé member of the joint venture, lacks experience under relevant NAICS codes, lacks the necessary equipment and personnel, and lacks presence in the geographical area of performance. (*Id.*) Further, only Rotech, the mentor, is registered to do business in both Virginia and North Carolina, where the RFP requires performance. (*Id.*)

Protester asserts, based on its experience as incumbent, that the RFP requires “significant resources . . . including startup costs that may be as much as six million dollars.” (*Id.* at 4.) According to Protester's online research, AMME and Rotech have [xxx]. (*Id.* at 6.) The USASpending.gov website shows that AMME has performed only four contracts across the five NAICS codes, with the highest valued at \$33,000, while Rotech has performed 3,500 contracts in those five NAICS codes including 2,300 contracts under NAICS code 532283. (*Id.* at 6-7.) Also, AMME has two employees while Rotech has at least 1,630 employees, as well as some \$400 million in annual revenues. Thus, Rotech has “tremendous resources at its disposal.” (*Id.* at 7.) Protester then alleges five protest grounds, any one of which, it contends, is sufficient to sustain the protest.

First, Protester maintains that VCME is not an eligible SDVOSB because AMME is unduly reliant on the past performance and expertise of Rotech, compromising AMME's ability to control the joint venture. (*Id.* at 8.) AMME has little experience on Federal contracts, while Rotech has over 20 years, and this experience gives Rotech leverage to select the contracts to pursue and otherwise to control VCME. (*Id.* at 8-9.) The instant RFP required 10 years' experience in providing home oxygen, which AMME lacks. Thus, AMME cannot exercise independent business judgment without great economic risk, contrary to 13 C.F.R. § 125.13(i)(7). (*Id.* at 9.)

Second, Protester contends, AMME is unduly reliant on Rotech's tremendous financial, physical, and personnel resources, again compromising AMME's ability to control VCME under 13 C.F.R. § 125.13. (*Id.* at 9-11.) In support, Protester points to the personnel disparity between the venturers; the equipment, physical space, and other resources Rotech must have in order to have performed 3,500 contracts; and the substantial financial capacity Rotech has with \$400 million annual revenue. (*Id.* at 9-10.) Protester alleges the level of resources needed from Rotech go beyond those permitted under a mentor-protégé agreement, and prevents AMME from exercising independent judgment for fear of their loss. (*Id.* at 11.)

Third, Protester asserts that Rotech controls VCME because neither AMME nor the joint venture itself has the required licenses to operate in Virginia and North Carolina, whereas Rotech is licensed in both. Thus Rotech, a large non-veteran business, holds the critical licenses, and controls the joint venture pursuant to 13 C.F.R. § 125.13(i)(6). (*Id.* at 11-12.)

Fourth, Protester contends that VCME is ineligible as an SDVOSB because AMME's veteran owners lack the required technical and managerial experience, contrary to 13 C.F.R. § 125.13(b). (*Id.* at 12-13.) Rotech's webpage notes that AMME's owners and officers, [Person 1] and [Person 2], are [xxx]. (*Id.* at 12-13.) AMME itself has a total of 30 NAICS codes listed in VetBiz, but 25 of those are different than those used by VCME, as opposed to Rotech's over 20 years' experience in VCME's five NAICS codes. (*Id.*) “Accordingly, it is doubtful the veteran owner(s)” of AMME have the necessary managerial experience to run the joint venture. (*Id.*)

Fifth, Protester alleges that VCME's JVA fails to comply with 13 C.F.R. § 125.18. (*Id.* at 13-14.) This allegation is based on the fact that VCME was verified in October 2017 yet the RFP was not issued until July 2018. Thus, CVE could not have examined any addendum to the JVA for compliance with 13 C.F.R. § 125.18(b)(2)(vi) and (vii). (*Id.*)

Finally, if this protest is sustained, Protester submits that [xxx], although Protester acknowledges that it lacks standing to challenge those other joint ventures at this time. (*Id.* at 14.)

The CO forwarded the protest to OHA for review.

G. VCME's Response

On April 8, 2019, VCME responded to the protest and provided various supporting documents. VCME maintains that all assistance Rotech provides to AMME is covered in the MPA, that VCME is in full compliance with joint venture regulations, and that Protester's "unduly reliant" allegations are based on affiliation principles not applicable to joint ventures. (Response at 5, citing *Size Appeal SES-TECH Global Solutions*, SBA No. SIZ-4951, at 5 (2008).) Insofar as the protest is a back-door challenge to VCME's responsibility, VCME has received a Certificate of Competency (COC), and a COC "is conclusive as to responsibility." (*Id.*, quoting 13 C.F.R. § 125.5(m).) VCME requests that OHA deny the protest and determine that VCME is eligible for award. (*Id.*)

VCME avers that AMME is a certified SDVOSB and that AMME's service-disabled veteran majority owner and president, [Person 1], has extensive management and technical skills in the medical device industry, has held [xxx]. (*Id.* at 2, citing Exh. A ¶¶ 2-3.) [Person 1] founded AMME in 2015, and has final decision-making authority over all AMME's actions. *6 In its response to the protest, VCME contends that all of Rotech's assistance to AMME is within the scope of the SBA-approved MPA, and that this mentorship assistance does not undermine AMME's control of VCME or VCME's eligibility for the instant contract. (*Id.* at 5-11.) Because its members are participants in the ASMPP, VCME is exempt from adverse affiliation and control findings between its members based on their MPA and assistance provided through it. (*Id.* at 6.) Also, VCME's members may pool their past performance experiences and share resources. (*Id.*)

Regarding Protester's first allegation, that AMME is unduly reliant on the past performance and expertise of Rotech, compromising AMME's ability to control the joint venture, VCME highlights that, under SBA regulations, a procuring activity must consider the experience of each joint venture partner. (*Id.* at 6-7, citing 13 C.F.R. § 125.18(b)(5).) Further, the MPA envisioned that Rotech would assist AMME in "successfully identifying, proposing, and performing large VA contracts." (*Id.* at 7, quoting MPA at 5.) Thus, Protester's argument should fail.

VCME contends Protester's second allegation, that AMME is unduly reliant on Rotech's financial, physical, and personnel resources, and thus cannot control VCME, is meritless, because this assistance also is provided for in the SBA-approved MPA. (*Id.* at 7-8.)

As for Protester's third allegation, that Rotech controls VCME because neither AMME nor VCME is licensed in Virginia and North Carolina, while Rotech is licensed in both, VCME responds that Protester incorrectly grounds its argument on 13 C.F.R. § 125.13, which applies to

SDVOSB firms and not to joint ventures. (*Id.* at 8.) VCME cites *Matter of Construction Engineering Services, LLC*, SBA No. VET-213 (2011) for the proposition that SDVOSB ownership and control rules do not apply to SDVOSB joint ventures. The regulation governing joint ventures contains no rule on who must hold required licenses. (*Id.*, citing 13 C.F.R. § 125.18(b).) Further, the MPA includes Rotech's assistance to AMME in obtaining licenses during the transition period of a contract. (*Id.* at 9, citing MPA at 6.)

Regarding Protester's fourth allegation, that [Person 1] lacks the required technical and managerial experience to run the joint venture in contravention of 13 C.F.R. § 125.13(b), VCME responds that Protester again incorrectly grounds its argument on a rule that applies to SDVOSB firms but not to joint ventures. (*Id.* at 10.) VCME disputes the notion that [Person 1] does have the requisite experience, but even if Protester were correct on this point, the MPA provides for assistance with policies and management training materials with respect to the implementation of large federal contracts. (*Id.* at 11.)

In response to Protester's fifth allegation, VCME explains that AMME and Rotech prepared an Addendum to the JVA to address the instant procurement, and that the Addendum complies with 13 C.F.R. § 125.18(b)(2)(vi) and (vii) notwithstanding that CVE never examined the Addendum. (*Id.* at 11-13.) VCME points out that the SDVOSB regulations do not require pre-approval of joint venture agreement addendums. (*Id.* at 12.) VCME also summarizes the Addendum, noting that AMME will provide a majority of the labor to perform substantive requirements. (*Id.* at 12-13.)

VCME declined to address Protester's last point, regarding [xxx], because these entities, by Protester's own admission, are not properly before OHA. (*Id.* at 4, n.1.)

VCME concludes that it is a fully compliant SDVOSB joint venture eligible for award of this RFP. AMME is not "unduly reliant" on Rotech due to their approved MPA. In addition, VCME is in no way controlled by Rotech. VCME's JVA is up-to-date and meets all regulatory requirements. Thus, OHA should dismiss or deny the protest. (*Id.* at 14.)

With its Response, VCME provided a new version of its JVA, dated and executed on [xxx] (the 2018 JVA). (Response, Exh. E.) The 2018 JVA is substantively identical to the 2017 JVA, except that it includes a separately-executed Proposal Addendum with information pertaining to the instant procurement. (*Compare* Response, Exh. E *with* CF, Exh. 31.)

The Proposal Addendum specifies that an AMME employee, [Person 3], will serve as Project Manager for this procurement. (Response, Exh. E, Proposal Addendum at ¶ 2.) AMME will provide a majority of the contract labor, including [xxx]. (*Id.* at ¶ 3.) Rotech will provide [xxx]. (*Id.*) The Proposal Addendum discusses the respective responsibilities of AMME and Rotech during contract performance. (*Id.* at ¶ 4.) In addition, the Proposal Addendum outlines the major equipment, facilities, and other resources to be provided by each party. (*Id.* ¶ 5.)

H. Supplemental Protest

On April 9, 2019, after reviewing the Case File under the terms of an OHA protective order, Protester filed a Supplemental Protest. Protester asserts three deficiencies in the JVA and JVOA which preclude VCME's eligibility both for listing as an SDVOSB and for the instant RFP. (Supplemental Protest at 1-2.)

First, the JVA requires unanimity for enacting amendments, violating the SDVOSB control requirements both at the time of offer on the instant RFP (38 C.F.R. § 74.4(e), (g)(1)), and at the time of award (13 C.F.R. §§ 125.13 and 125.11). (*Id.* at 2-3.) Protester maintains that amending the JVA is not among the “extraordinary actions” that a veteran need not have unilateral authority to undertake. (*Id.* at 2.)

Second, the JVA failed to name a Project Manager who is an employee of AMME at the time of proposal submission, as required by 13 C.F.R. § 125.18(b)(2)(ii). (*Id.* at 3-4.) The JVA contemplates that a Project Manager “shall be determined at the time of proposal and will be indicated on the specific proposal addendum.” (*Id.*, quoting JVA ¶ 5.0.) Protester notes neither the JVA nor the Proposal Addendum contained this individual's name as of August 3, 2018, when VCME submitted its proposal on the instant RFP. (*Id.* at 3-4.)

Third, the JVA's provisions governing the Management Board violate the SDVOSB control requirements both at the time of offer on the instant RFP (38 C.F.R. § 74.4(e), (g)(1)), and at the time of award (13 C.F.R. §§ 125.13 and 125.11). (*Id.* at 4.) Protester contends that in the event only one of AMME's two Representatives attends a Management Board meeting and Rotech's sole Representative attends, thereby establishing a quorum, the Rotech Representative could block action, at least temporarily, by refusing to vote. (*Id.*) This is because the Managing Director, who is an AMME Representative, may step in and make the binding decision himself only when a tie vote occurs. (*Id.*, citing MPA at ¶ 4.6.)

I. Supplemental Protest Addendum

On April 11, 2019, Protester moved to file an addendum to its Supplemental Protest, and also filed the proposed Supplemental Protest Addendum. Protester's counsel avers that she received the 2018 JVA, which includes the completed Proposal Addendum for the instant RFP, with VCME's Response on April 8, 2019. (Motion at 1.) Counsel also avers that she did not previously have access to this document which, she believes, is dispositive of this case. (*Id.* at 2.) Counsel notes the proposed Supplemental Protest Addendum addresses only the Proposal Addendum.

In the Supplemental Protest Addendum, Protester highlights that the Proposal Addendum [xxx] for the RFP. (Supp. Protest Add. at 1.) Therefore, Protester contends, the JVA cannot comply with the SDVOSB regulation at 13 C.F.R. § 125.18, and VCME is ineligible for award. (*Id.*) Without the Proposal Addendum, the JVA does not name a Project Manager; does not itemize equipment, facilities, and other resources to be contributed by each partner; and does not specify the respective responsibilities of AMME and Rotech regarding the source of labor and contract performance. (*Id.* at 2-3.) Thus, the JVA cannot comply with the regulations and VCME

is therefore not an eligible SDVOSB for contract award. (*Id.* at 2-3, citing 13 C.F.R. § 125.18(b)(2)(ii), (vi), and (vii).)

J. Supplemental Response

On April 23, 2019, VCME responded to the Supplemental Protest and to the Supplemental Protest Addendum.³ VCME urges OHA to find the Supplemental Protest Addendum untimely because it was filed after close of record. OHA's procedures for CVE Protests allow a protester to supplement protest allegations only as related to “documents in the CVE case file” viewed for the first time under a protective order, and thus do not permit supplemental protests pertaining to any other documents. (Supp. Response at 2, citing 13 C.F.R. § 134.1007(f)(1).) The [xxx] Proposal Addendum was not part of the CVE case file, and Protester's proposed Supplemental Protest Addendum, VCME maintains, is nothing more than a belated attempt to reply to VCME's Response. (*Id.* at 3.)

In the event that OHA nevertheless does accept the Supplemental Protest Addendum, VCME argues that all of Protester's allegations are flawed because they are based on a misunderstanding of which regulations apply to joint ventures and which apply to SDVOSB concerns. (*Id.*) VCME asserts that there are separate rules for joint ventures, and that only the rules at 13 C.F.R. § 125.18(b) apply to joint ventures, although the SDVOSB member of the joint venture must itself conform to the rules at 13 C.F.R. § 125.13. (*Id.*, citing *Matter of Construction Engineering Services, LLC*, SBA No. VET-213 (2011)). VCME further maintains that its JVA is fully compliant with the joint venture regulations at 13 C.F.R. § 125.18(b).

VCME responds to each of Protester's alleged deficiencies in the JVA. First, VCME argues, the JVA's requirement for unanimity in amending the JVA is permissible because it does not violate 13 C.F.R. § 125.18(b). (*Id.* at 4.) The regulations Protester cites (38 C.F.R. § 74.4 and 13 C.F.R. § 125.13) apply only to the control of SDVOSB concerns, and not to control of joint ventures, and thus offer no basis upon which to sustain the allegation.

Second, VCME contends that the JVA's Management Board quorum and voting provisions are permissible, again because they do not violate 13 C.F.R. § 125.18(b). (*Id.* at 5-6.) Again, the regulations Protester cites in support of its allegation (38 C.F.R. § 74.4 and 13 C.F.R. § 125.13) are inapplicable to joint ventures. (*Id.*) VCME also characterizes Protester's hypothetical scenario as unlikely. (*Id.*)

Third, VCME argues that Protester's allegations regarding the [xxx] Proposal Addendum “elevate[] form over substance.” (*Id.* at 6.) VCME avers that all of the information required by 13 C.F.R. § 125.18(b) was agreed to and in writing prior to its August 3, 2018 offer date. (*Id.*) With regard to the three proposal-specific requirements Protester complained of — 13 C.F.R. § 125.18(b)(2)(ii), (vi), and (vii) — VCME discusses an e-mail exchange occurring on July 30-31, 2018, in which AMME and Rotech essentially agreed on how to fulfill all three of these requirements. (*Id.* at 6-7.)

³ VCME timely submitted its Supplemental Response within 15 days after filing of the Supplemental Protest and the Supplemental Protest Addendum. 13 C.F.R. § 134.1007(f)(1).

VCME attached three exhibits to its Supplemental Response. Exhibit G is the Second Declaration of [Person 1], dated April 22, 2019, in which he discusses the July 30-31, 2018 e-mail exchange and setting out what was agreed upon. [Person 1] states:

4. On July 30, 2018, Rotech emailed me the final breakdown of major equipment, facilities, and other resources, and source of labor and contract performance responsibilities to be included in the proposal based on our previous discussions and agreements. Attached to the July 30 email were a combined summary of AMME's and Rotech's equipment, facilities, resources, source of labor, and contract performance responsibilities for all seven facilities (we called each facility [a] Tree) bid under the Solicitation (the "Attachment"). In preparing the Attachment, it was mistakenly indicated that AMME would perform [xxx] services, but we had previously discussed and agreed that Rotech would perform these requirements. Also attached to this email were exhibits detailing the breakdown of contract performance responsibilities for each of the seven facilities.

5. I agreed to the contents of the Attachment on July 31, 2018 via email, requesting one minor change to the travel budget. I also clarified that [Person 3], one of AMME's employees, would serve as the Project Manager.

6. On August 3, 2018, VCME submitted our proposal for the Solicitation, which reflected all agreements we had reached with Rotech and named [Person 3] as Project Manager. In particular, the proposal listed the key personnel as follows:

If awarded the contract, please find the names of the professional and administrative key personnel to be utilized in the performance of this contract:

- Project Manager — [Person 3]

...

(Exh. G ¶¶ 4-6.) Exhibit H is the Declaration of [Person 4], dated April 22, 2019, in which [Person 4], discusses the July 30-31, 2018 e-mail exchange and sets out what was agreed upon.

Exhibit I consists of the two e-mails, dated July 30 and 31, 2018. The first e-mail, from [Person 5] to [Person 1] of AMME, states: "Attached are the individual 'Trees' for the seven facilities + the Consolidated one for the single bid contract." The second e-mail, from [Person 1] to [Person 4], with a copy to [Person 5], states: "The only change I have is the travel cost I mentioned on the phone yesterday. I would like to add [. . .] to the travel budget." Attached to this e-mail are 24 spreadsheets purporting to show the breakdown, between AMME and Rotech, of equipment, labor, and contract responsibilities, including cost calculations. Both the e-mails and the spreadsheets filed with OHA include redacted portions. Each of the spreadsheets is marked with a legend stating "DRAFT — For Discussion Purposes Only."

VCME offers Exhibits G-I to support its argument that, as of July 31, 2018 — several days in advance of VCME's proposal submission on the instant RFP — AMME and Rotech had agreed in writing to the terms later set out in the Proposal Addendum. (*Id.* at 7-8.) Thus, the JVA is in compliance with all requirements of 13 C.F.R. § 125.18, and OHA should reject Protester's allegations to the contrary.

III. Discussion

A. Burden of Proof

As the protested firm, VCME has the burden of proving its eligibility 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, VCME submitted its offer including price on August 3, 2018, and the instant protest was filed on March 18, 2019. Sections II.E and II.F, *supra*. Therefore, OHA must examine VCME's eligibility as of these dates, using the substantive regulations in effect on each date.

As of August 3, 2018, VCME's eligibility was governed by VA's rules. With regard to joint ventures competing for VA procurements, VA regulations stipulated that a joint venture must meet SBA's requirements for joint ventures as set forth in 13 C.F.R. part 125. *See* 48 C.F.R. § 819.7003(c) (2018). Effective October 1, 2018, SBA issued new eligibility 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 March 18, 2019, then, VCME's eligibility is determined under the current regulations in 13 C.F.R. part 125.

C. Analysis

The bulk of Protester's allegations in this case are based on the notion that VCME does not meet the ownership and control requirements for SDVOSBs as set forth at 13 C.F.R. § 125.13. Protester contends, for example, that Rotech, which is not an SDVOSB, holds critical licenses needed for VCME to perform the instant contract, and thus controls VCME in contravention of 13 C.F.R. § 125.13(i)(6). Section II.F, *supra*. Similarly, Protester maintains that, due to the disparity in resources and experience between the joint venturers, Rotech in effect controls VCME under 13 C.F.R. § 125.13(i)(7). *Id.*

As VCME emphasizes in its Response, however, Protester overlooks that VCME is a joint venture, rather than a stand-alone SDVOSB. In *Matter of Construction Engineering Services, LLC*, SBA No. VET-213 (2011), OHA explained that “a joint venture between an eligible SDVO SBC and another [business] . . . need not meet the SDVO eligibility requirements in Subpart B of Part 125 to obtain an SDVO contract, but must only meet the specific requirements governing joint ventures[.]” *Constr. Eng'g*, SBA No. VET-213, at 8. Because “only

the SDVO SBC joint venture partner must meet the program eligibility requirements of Subpart B of Part 125,” a joint venture is not itself bound by the ownership and control requirements for SDVOSBs. *Id.* at 11.

In the instant case, because VCME is a joint venture, VCME is not required to comply with the ownership and control requirements applicable to SDVOSBs at 13 C.F.R. § 125.13. Instead, VCME is governed by the joint venture regulations at 13 C.F.R. § 125.18(b). The joint venture regulations do not require that the SDVOSB member(s) of a joint venture possess the critical licenses needed for the joint venture to perform a contract. *See* 13 C.F.R. § 125.18(b) (containing no rules on licenses). Although a critical license requirement is found in the ownership and control provisions for SDVOSBs at 13 C.F.R. § 125.13(i)(6), those requirements are not applicable to joint ventures. *Constr. Eng'g*, SBA No. VET-213, at 8. I therefore see no merit to Protester's claim that AMME alone must possess any licenses necessary for VCME to perform the contract.

Similarly, the joint venture regulations do not contain provisions for finding one joint venturer inordinately reliant upon another joint venturer, and the requirements of 13 C.F.R. § 125.13(i)(7) are not applicable to joint ventures. The fact that AMME and Rotech are an SBA-approved mentor and protégé, and that the MPA authorizes a wide variety of assistance that Rotech may provide AMME, further undermines the notion that AMME is excessively dependent upon Rotech. *See* 13 C.F.R. § 125.9(d)(4) (“No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement.”). Accordingly, Protester's allegation that AMME is excessively reliant upon Rotech to perform the instant contract must fail.

Construction Engineering involved SBA regulations, but VA regulations in effect on August 3, 2018, the date of VCME's self-certification, adopted essentially the same approach as seen in *Construction Engineering*. Thus, VA regulations stated that:

- (c) A joint venture may be considered an SDVOSB or VOSB concern if
 - (1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;
 - (2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;
 - (3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and
 - (4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

48 C.F.R. § 819.7003(c) (2018). Accordingly, under VA's rules in effect on August 3, 2018, a joint venture was not itself required to meet VA's ownership and control provisions for SDVOSBs at 38 C.F.R. part 74. Rather, only the SDVOSB member(s) of the joint venture must meet those requirements. To be eligible for award, though, the joint venture must comply with SBA's requirements for joint ventures as set forth in 13 C.F.R. part 125.⁴

The central question presented here, then, is whether VCME meets the requirements applicable to joint ventures. In this regard, Protester highlights that, although VCME did have a JVA in place as of the date of its self-certification, that JVA was silent with regard to the instant procurement. Section II.C, *supra*. Consequently, as of the date of self-certification, the JVA did not “[i]temiz[e] all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each,” nor did the JVA “[s]pecify[] the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance.” 13 C.F.R. § 125.18(b)(2)(vi) and (vii). In addition, the JVA did not identify a particular AMME employee as Project Manager. *Id.* § 125.18(b)(2)(ii). Protester acknowledges that AMME and Rotech later prepared a Proposal Addendum which provided this information, but the Proposal Addendum was [xxx]. Sections II.E and II.G, *supra*. Thus, Protester contends, the JVA did not comply with 13 C.F.R. § 125.18(b)(2) as of the date of self-certification. Sections II.F, II.H, and II.I, *supra*.

In its Supplemental Response, VCME maintains that Protester's allegations are untimely because Protester discusses these allegations in greatest detail in the Supplemental Protest Addendum, filed April 11, 2019. I find no merit to VCME's argument. Contrary to VCME's suggestions, Protester challenged whether VCME's JVA complied with 13 C.F.R. § 125.18(b)(2) in its initial protest, and merely expounded upon its allegations in the Supplemental Protest Addendum. Sections II.F and II.I, *supra*. Thus, Protester's allegations are timely.

VCME also contends that AMME and Rotech had reached an agreement in principle with regard to contract-specific matters in late July 2018, prior to the date of self-certification. Section II.J, *supra*. Much of the evidence VCME offers to support this claim, however, is marked “DRAFT — For Discussion Purposes Only” and thus does not persuasively establish that an agreement in principle had in fact been reached. *Id.* Moreover, the regulations in effect at the time of self-certification required that contract-specific details be set forth in the JVA itself. *See* 13 C.F.R. § 125.18(b) (2018). VCME's JVA likewise stated that AMME and Rotech would prepare a contract-specific addendum for each procurement, and indicated that such an addendum must be “executed by both Venturers.” Section II.C, *supra*. It is undisputed that no such jointly-executed addendum existed here as of the date of self-certification. I therefore cannot conclude that any agreement in principle in late July 2018 was sufficient to meet the requirement that VCME's JVA contain contract-specific information about the instant procurement.

⁴ SBA joint venture requirements were previously found at 13 C.F.R. § 125.15(b), but have since been redesignated and are now located at 13 C.F.R. § 125.18(b). *See* 81 Fed. Reg. 48,558, 48,585 (July 25, 2016).

In sum, at the time of its self-certification, VCME's eligibility was governed by VA's rules. Section III.B, *supra*. Those regulations made clear that a joint venture must meet the SBA joint venture requirements at 13 C.F.R. part 125 in order for the joint venture to be considered eligible. 48 C.F.R. § 819.7003(c)(4) (2018). Similarly, the instant RFP included the full text of VAAR clause 852.219-10, “VA Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside (JUL 2016) (Deviation),” which pertinently stated that “A joint venture may be considered a service-disabled Veteran owned small business concern if the joint venture complies with the requirements in 13 CFR 125.15.” Section II.E, *supra*. It therefore is evident that VCME was required to comply with SBA joint venture regulations at 13 C.F.R. § 125.18(b) (2018) as of the date of self-certification. Because the Proposal Addendum was not in effect as of the date of self-certification, and because VCME's JVA was otherwise silent with regard to the instant procurement, VCME's JVA was deficient.

IV. Conclusion

VCME has not established that it is an eligible joint venture for the instant procurement. The protest therefore is SUSTAINED. 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