

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

CVE Protest of:

KTS Solutions, Inc.,

Protester,

Re: 28 Trans, LLC

Solicitation No. 36C24819R0207
U.S. Department of Veterans Affairs

SBA No. CVE-146-P

Decided: February 20, 2020

APPEARANCES

Sarah Schauerte Reida, Esq., Legal Meets Practical, LLC, Naperville, Illinois, for
Protester

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Georgia, for 28 Trans, LLC

DECISION¹

I. Introduction and Jurisdiction

On December 31, 2019, KTS Solutions, Inc. (Protester) protested the Service Disabled Veteran-Owned Small Business (SDVOSB) status of joint venture awardee, 28 Trans, LLC (28 Trans) in connection with the U.S. Department of Veterans Affairs (VA) Request for Proposal (RFP) No. 36C24819R0207 of all non-emergency, special mode transportation (SMT) services. Protester alleges that 28 Trans, a joint venture between Red Kite, LLC (Red Kite) and Owl, Inc. (Owl), does not comply with 13 C.F.R. § 125.18(b)(3) because the Joint Venture Agreement (JVA) cannot demonstrate that the SDVOSB partner, Red Kite, will perform 40% of the work performed by the joint venture and therefore, it is an ineligible SDVOSB for purposes of this Solicitation.

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 The decision was originally issued under a protective order. OHA did not receive any requests for redactions from any of the parties. OHA now publishes the full version of the decision for public release.

134 subpart J.² Protester filed its protest within five business days after receiving notification that 28 Trans 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 (CF) maintained by the VA's Center for Verification and Evaluation (CVE), Red Kite is an SDVOSB established on December 3, 2018 and is the majority owner of 28 Trans. (CF, Ex. 6-7, 18, 28.) On December 14, 2018, Owl, the Mentor, and Red Kite, the Protégé, executed a Mentor-Protégé Agreement (MPA) under SBA's All-Small Mentor-Protégé Program (ASMPP). (Response, Ex. B, at 1-6.) On December 21, 2018, SBA approved the MPA. (Response, Ex. C.) On March 21, 2019, 28 Trans was established as a Florida limited liability company (LLC). (CF, Ex. 1-2, 8, 37.)

On July 8, 2019, CVE approved the concern's application for verification of its SDVOSB status, after determining that 28 Trans “is presently, as of the issuance of this notice, in compliance with the regulation.” (CF, Ex. 67, at 1.) The verification is valid for a period of three years. (*Id.*) CVE required 28 Trans to report any changes that might adversely affect its eligibility within 30 days of the change. (*Id.*, at 1-2.)

B. Mentor-Protégé Agreement (MPA)

The MPA explains that the Protégé, Red Kite, will be “specializing in providing [SMT] for special needs passengers, including stretcher, wheelchair, and other ambulatory beneficiaries of the Veterans Administration” under the North American Industry Classification System (NAICS) code 488999, All Other Support Activities for Transportation. (CF, Ex. 10, at 1.) Red Kite requests Owl's mentoring assistance in five areas: Management and Technical Assistance; Financial Assistance; Contracting; Business Development Assistance; and General and/or Administrative Assistance. (*Id.*, at 1-2, 5-6.)

C. Joint Venture Agreement and Operating Agreement

The Case File contains a Joint Venture Agreement (JVA) dated March 21, 2019 for the establishment of 28 Trans, executed by Red Kite and Owl. (CF, Ex. 52.) The JVA states that 28 Trans is an LLC, in which Red Kite owns 51% of 28 Trans and Owl owns the remaining 49%. (*Id.*, at 2, ¶ 1.) Red Kite is the Managing Member of the joint venture, and Owl is a Member. (*Id.*, at 1.)

According to the JVA, the purpose of the joint venture is to bid on, obtain, and perform contracts to provide services. (*Id.*, at 2, ¶ 2.) Here, “services” is defined as “non-emergency transportation for special needs passengers, including stretcher, wheelchair, and other

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).

ambulatory beneficiaries of the Veterans Administration and other local government entities.” (*Id.*, at 1.)

The JVA designates Red Kite as the Managing Member, responsible for daily operations of the joint venture. (*Id.*, at 2, ¶ 4.) Alessandro Janitschek, Red Kite's 100% owner, is the Project Manager for any contracts obtained by the joint venture, is to be employed by the joint venture, and is to “devote sufficient time and attention to the joint venture to successfully manage the joint venture's business.” (*Id.*) Red Kite is entitled to be paid a fee as compensation for the Project Manager's services, commensurate with market rates. (*Id.*) In turn, Dr. Laster B. Walker, President of Owl, will be regularly available for consultation with the Managing Member. These will include discussions with, but not limited to, the Project Manager. (*Id.*) The Managing Member will have final decision-making authority on all operational issues. (*Id.*)

Each of the Members of the joint venture will receive a percentage of profits from the joint venture equal to the percentage of work performed by each Member. (*Id.*, ¶ 7.)

The JVA provides for the establishment and maintenance of a bank account in the name of the joint venture. (*Id.*, ¶ 8.) This account requires the signature of both Members for written checks and withdrawals made. (*Id.*) All monies received by the joint venture for services performed are to be deposited into the joint venture bank account and all expenses incurred by the joint venture are to be paid from such bank account. (*Id.*)

The JVA provides that the joint venture is to purchase the major equipment necessary to perform the contract, identified as vehicles, primarily vans modified to accommodate wheelchairs and stretchers, and also other major equipment necessary for the joint venture to perform under the contracts it obtains when such contracts are obtained. (*Id.*, ¶ 9.) The joint venture is to provide a detailed schedule of the vehicles or the cost or value thereof when it obtains specific contracts. (*Id.*) The joint venture will purchase such equipment with loans obtained from third party financial institutions, which will be guaranteed by both the Members, the Project Manager, and Dr. Walker, individually, as may be required by the lending institution. (*Id.*) All vehicles, equipment, and other assets purchased by the joint venture are to be owned by the joint venture. (*Id.*)

The JVA provides that the joint venture's administrative functions will be performed from offices leased by Owl in Orlando, Florida. (*Id.*, ¶ 10.) Owl is to charge the joint venture \$500.00 a month for use of such facilities. (*Id.*) As the joint venture obtains contracts to provide services, it will lease real property to house its operations in cities where the services are to be provided. (*Id.*)

To specify the responsibilities of each Member, the JVA states “the manner in which the joint venture will perform under contracts it obtains will be determined by the requirements of the contracts the joint venture obtains.” (*Id.*, ¶ 6.) However, Dr. Walker and the Managing Member will conduct bids and negotiate contracts. (*Id.*) The JVA further states that before the awarding of any contract to the joint venture, Owl employees will assist with administrative functions. (*Id.*) Once the joint venture obtains contracts, 28 Trans will hire its own administrative staff. (*Id.*) The JVA further notes that “Notwithstanding anything else stated in this paragraph, at

all times, employees of the Managing Member will be responsible for performing no less than 40% of the non-administrative services to be performed on each contract obtained by the joint venture and no less than 40% of the total work performed by the joint venture.” (*Id.*)

Under the JVA, 28 Trans' management lies with a management committee consisting of the Project Manager, Dr. Walker, and others as the Members may agree, provided that neither Dr. Walker nor any other person who may become part of the management committee shall have voting rights, and the Managing Member, by and through the Project Manager, shall have final decision-making authority on all management issues. (*Id.*, ¶ 5.)

The JVA includes provisions to dissolve the joint venture. (*Id.*, ¶ 15.) If either Member decides to terminate the MPA, each of them agrees that they will remain individually responsible for completing any contract to which the joint venture is party, and to otherwise fulfill any other obligations the joint venture has undertaken. (*Id.*, ¶ 16.) The JVA does not allow the assignment, sale, or transfer of a Member's membership interest without the consent of the other Member. (*Id.*, ¶ 17.) The JVA may not be modified except in writing, signed by both Members. (*Id.*, ¶ 23.)

All original accounting and other administrative records pertaining to the joint venture are to be retained by the Managing Member on its computer systems and where applicable, in its office; Owl is to have access to and/or copies of all such records upon request. (*Id.*, ¶ 18.)

The joint venture will submit quarterly financial statements to the SBA, the VA, and any other government agency as may be required by the terms of any contracts the joint venture may obtain. (*Id.*, ¶ 20.) The reports will be submitted no later than 45 days after the end of each operating quarter of the joint venture. (*Id.*)

Furthermore, the JVA states that for each contract for services obtained and performed by the joint venture, the joint venture will submit a profit and loss statement, including a statement of final profit distribution, to the SBA, the VA, and any other government agency as may be required by the terms of any contracts the joint venture may obtain. (*Id.*, ¶ 21.) The statements will be submitted no later than 90 days after the completion of the contract. (*Id.*)

The JVA recites that both Members are participants in the SBA Mentor-Protégé program and the VA Mentor-Protégé program. (*Id.*, ¶ 11.)

In addition to the JVA, the joint venture executed two operating agreements, the first on March 21, 2019. (CF, Ex. 9.) The operating agreement contained requirements as to the Members' contributions, compensation and disbursement, and distributions, *inter alia*. (*Id.*, 1-4.) The agreement identified the company's agent as the Managing Member, by and through its principal, Alessandro Janitschek, who has the sole authority to bind the joint venture on all matters. (*Id.*, ¶ 4.) The authority of the Managing Member includes the authority to take all lawful actions, provided, however, that the Managing Member must at all times operate in good faith. (*Id.*)

On June 3, 2019, the Members executed an amended operating agreement, indicating that the number of Members that constitutes a quorum for the transaction of business is one, provided

that the Managing Member must be present for there to be a quorum at any meeting, and the Managing Member has the final decision-making authority on all management issues, *inter alia*. (CF, Ex. 46, ¶ 5.)

D. Solicitation

On October 18, 2019, the VA Regional Procurement Office - East, issued Request for Proposal (RFP) No. 36C24819R0207 of all non-emergency SMT services as an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract. (CF, Ex. 69.) The Contracting Officer (CO) set the procurement aside entirely for SDVOSBs and assigned NAICS code 485991, Special Needs Transportation (SNT), with a corresponding \$16.5 million annual receipts size standard. (*Id.*, at 1.) The contractor is to provide all transport vehicles, personnel, management and anything else necessary to successfully furnish non-emergency SMT services in a 13-county area in Florida and Georgia for one base year plus four option years. Services are to be provided on an “as-needed” basis. (*Id.*, at 10, 18.) Initial proposals were due on November 8, 2019. (*Id.*)

On November 4, 2019, the CO issued Amendment 0001 with responses to vendor questions, a revised price and cost schedule, and a removal of an outdated clause. (CF, Ex. 70, at 1.) The amendment extended the deadline to November 12, 2019. (*Id.*) On November 6, 2019, the CO issued Amendment 0002 to further respond to all vendor questions and without a deadline extension. (CF, Ex. 71, at 1.) Subsequently, the CO revised the final proposal deadline to December 2, 2019.

On November 7, 2019, 28 Trans submitted its initial proposal, including price. On December 1, 2019, 28 Trans submitted its final proposal revision. On December 26, 2019, the CO notified unsuccessful offerors, including Protester, that Navarre Corporation and 28 Trans were the apparent successful offerors.

E. Protest

On December 31, 2019, Protester filed the instant protest with the CO, challenging 28 Trans' SDVOSB status. On December 31, 2019, OHA received the status protest. Protester alleges that 28 Trans' JVA fails to conform to SBA regulations. (Protest, at 2.)

Protester alleges that 28 Trans does not qualify as an eligible SDVOSB because the JVA cannot comply with 13 C.F.R. § 125.18(b)(3) when the SDVOSB partner, Red Kite, will not be able to perform 40% of the work performed by the Joint Venture. (*Id.*)

Protester alleges that based on the resources and capabilities of each party to the joint venture, 28 Trans cannot possibly meet the performance of work requirements with respect to the RFP. (*Id.*, at 7.) Protester states that the awardee is required to provide all transport vehicles, personnel, management, supplies, transportation, fuel, equipment, reports, and anything else necessary to successfully furnish non-emergency SMT service to thirteen VA healthcare facilities, for a contract term covering a one year Base Period, plus four additional option years. (*Id.*) Protester asserts Red Kite is a one-employee business that has performed no federal contracts and appears to have no resources at its disposal, while Owl is an established business

that has performed dozens of federal contracts under the applicable NAICS code, including in the geographical region serviced by the contract. (*Id.*) As such, Owl has the resources, personnel, equipment, and licenses at its disposal to perform the services required by the RFP.

Protester also alleges that Owl, while listed as “SDVOSB” in the VetBiz registry, cannot perform under NAICS code 485991 because it has failed to identify this NAICS code as its service code, and therefore, it is not an SDVOSB for purposes of this RFP. (*Id.*)

Protester concludes that the JVA could not have complied with the regulatory content requirements of 13 C.F.R. § 125.18 as of the date of offer, because 28 Trans did not provide an addendum to the JVA, addressing the solicitation at issue and specifying the responsibilities of the joint venture partners. (*Id.*) To support this allegation, Protester cites to *In the Matter of AsirTek Federal Services, LLC*, SBA No. VET-269 (2018), where because a JVA was silent as to the procurement at issue, the joint venture awardee did not comply with the regulatory requirements of 13 C.F.R. § 125.18 and thus, it was not an eligible SDVOSB for purposes of the award. (*Id.*, at 8.) Protester further indicates that OHA has rejected attempts by challenged concerns to cure this defect after the protest is filed and has repeatedly explained that documents created after the self-certification date are not relevant for purposes of determining eligibility. (*Id.* citing *Matter of Cedar Electric, Inc./Pride Enters., Inc.*, JV, SBA No. VET-129, at 4 (2008).

F. 28 Trans' Response to Protest

On January 20, 2020, 28 Trans responded to the instant protest. In this case, 28 Trans argues that Red Kite can demonstrate, as the SDVOSB, it will perform at least 40% of the work performed by the joint venture, and that the protest is not supported by credible evidence. (Response, at 1). Thus, 28 Trans requests that the protest be denied. (*Id.*)

28 Trans explains that on December 8, 2018, Red Kite was verified as an SDVOSB under NAICS code 485991. (*Id.*) On March 21, 2019, Red Kite and Owl entered into an agreement to form the joint venture, 28 Trans, for the purpose of bidding on, obtaining, and performing contracts to provide services. (*Id.*)

28 Trans submitted its proposal for the RFP, offering technical performance plan with location proposal, start-up plan, and hiring practices and procedures, *inter alia*. (*Id.*, Ex. H.) Particularly, 28 Trans proposed to “acquire office space with the capacity to accommodate drivers and 15 vehicles in close proximity to the Gainesville VAMC with access to more vehicles around the North Florida area to accomplish the mission.” (*Id.*, at 12). Based on the number of trips identified in the Solicitation, 28 Trans projected that 15 vehicles will be needed, and has the financial means to purchase additional vehicles if necessary, to accomplish this Solicitation requirements. (*Id.*) The proposal noted that its executives will be in the Gainesville area thirty days prior to contractual start date, conducting interviews, and hiring employees. (*Id.*)

Among other information, the proposal mentioned the joint venture's MPA, and attached the JVA and operating agreement to demonstrate how they will conduct business. (*Id.*, Ex. H, at 11.)

28 Trans argues in response to Protester's claims that the JVA assigned Red Kite to be responsible for performing no less than 40% of the non-administrative services to be performed on each contract obtained by the joint venture and no less than 40% of the total work performed by the joint venture. (Response, at 2.) 28 Trans refers to the JVA to state that prior to the awarding of the contract to the joint venture, Owl employees will assist with administrative functions. (*Id.*) Once the contracts to provide services are obtained, 28 Trans will hire its own administrative staff. (*Id.*)

In its proposal, but not in its JVA, 28 Trans states it will have executives in the Gainesville area 30 days prior to contract start date to employ personnel, holding job fairs with state offices and veterans' organizations. (*Id.* at 3.) 28 Trans will have a main location within a few miles of the VSA Medical Center in Gainesville and acquire more space, for the 15 vehicles and drivers it needs to perform this contract. (*Id.*, at 3-4 Ex. H, at 12-13.)

In response to the claim that Red Kite has only one employee, lacks the resources and capabilities to meet the work requirements, and cannot perform 40% of the work joint venture, 28 Trans explains that at the time it submitted its offer, Red Kite had the capabilities to perform at least 40% of the work, as stated in the JVA. (*Id.*, at 5.) 28 Trans explained that 9,700 trips between two contractors or 5,100 trips with one contractor over 365 days results in approximately thirteen trips per day. (*Id.*) Based on the start-up plan 28 Trans submitted as part of the offer, Red Kite can easily hire drivers and other personnel thirty days before the contract start date and perform 40% or more of the non-administrative services to be performed on the start date of this contract. (*Id.*) 28 Trans further maintains the JVA set out the duties of Red Kite's roles. (*Id.*, at 5-6.)

28 Trans submits the signed, sworn declaration of Alessandro Janitschek. (*Id.*, Ex. J, at 1-2.) Mr. Janitschek declared that he is the sole Member of Red Kite, a limited liability company. (*Id.*) Mr. Janitschek stated that based on the information provided by the Solicitation, he estimated approximately thirteen round trips a day would be required and planned to hire necessary personnel if 28 Trans is awarded this contract. (*Id.*) The company executives would be in the Gainesville area, 30 days prior to the contract start date, conduct interviews with incumbent employees, and fill positions. (*Id.*) Mr. Janitschek affirms that Red Kite has the capability to perform 40% or more of the non-administrative services to be performed on each contract obtained by the joint venture and to perform 40% of more of the total work performed by the joint venture. (*Id.*)

28 Trans asserts the joint venture will purchase 15 vans with loans from third-party financial institutions backed by guarantees from Red Kite, Owl, and Dr. Walker. (Response, at 6.) This fulfills the mission of the Mentor-Protégé program to enhance the capabilities of the protégé firms. (*Id.*)

28 Trans argues that KTS misrepresents facts, such as the joint venture being awarded a contract to provide “all non-emergency, [SMT] services . . . based on the number of counties and geographic size of the North Florida/South Georgia Veteran Health System, and its associated healthcare facilities to the Joint Venture.” (*Id.*, at 6.) 28 Trans clarifies that the award was for

two vendors, Navarre Corporation and 28 Trans, and the geographic size is irrelevant to whether Red Kite can perform at least 40% of the non-administrative services. (*Id.*, at 6-7.)

*8 28 Trans also maintains that KTS's assertions that Red Kite has not performed any federal contract and does not appear to have a website as irrelevant to the issue of performance. (*Id.*, at 7.)

Next, 28 Trans finds KTS's allegations that the awardee would need to be a well-established firm in the industry with substantial resources to include personnel, equipment, space, and financing, are irrelevant, in light of 13 C.F.R. § 125.9(a), where “mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.” (*Id.*) 28 Trans also maintains that mentors may offer financial assistance in the form of equity investments and/or loans. (*Id.*)

Finally, 28 Trans maintains that despite KTS's contention that 28 Trans “was required to execute an addendum to its [JVA] to address the specific Solicitation,” the regulations, specifically, 13 C.F.R. § 125.18(b)(2) only require setting forth the purpose of the joint venture. (*Id.*, at 8.) In addition, 28 Trans contends that *In the Matter of Asirtek Federal Services, LLC*, SBA No. VET-269 is inapposite because the facts are different. (*Id.*) 28 Trans explains that in *Asirtek*, the parties specified in their joint venture agreement that its only purpose was to seek 8(a) contracts. (*Id.*, at 8-9.) One year after the execution of that joint venture agreement, the joint venture added an addendum to their agreement after receiving an SDVOSB set aside, because the joint venture needed to amend the agreement to reflect that its purpose had expanded. (*Id.*) 28 Trans, however, indicates that in this case, Red Kite and Owl had a JVA specifying that they are seeking SDVOSB contracts to provide non-emergency transportation for special needs passengers, including stretcher, wheelchair, and other ambulatory beneficiaries of the VA, and so they meet the requirements of the regulation. (*Id.*)

III. Discussion

A. Burden of Proof

As the protested firm, 28 Trans has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the case file and the information provided by the protester, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protester and 28 Trans is part of the record.

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, 28 Trans submitted its initial offer, including price on November 7, 2019, and the instant protest was filed on December 31, 2019. Therefore, OHA must examine 28 Trans' eligibility as of these dates, using the substantive regulations in effect on each date. Here, these are the same regulations.

As a preliminary matter, I note that as of October 1, 2018, OHA has jurisdiction over all SDVOSB protests pertaining to issues of ownership and control. *See* 13 C.F.R. § 134.102(u). SBA has also issued substantive rules that, among other things, now address the issue of ownership and control for both SDVOSBs that have been certified in the VA's CVE and Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs) that self-certify for procurements other than those issued by the VA. *See* 83 FR 48908 (September 28, 2018), codified at 13 C.F.R. part 125.

C. Analysis

28 Trans is a joint venture between Red Kite, an SDVOSB, and its mentor, Owl, a large firm. An SDVOSB may enter into a joint venture with an SBA-approved mentor for the purpose of performing a SDVOSB contract. 13 C.F.R. § 125.18(b). The regulations clearly require that every joint venture agreement to perform an SDVO contract, including those between a Protégé firm that qualifies as an SDVO SBC and its SBA-approved Mentor, must contain the provisions required by 13 C.F.R. § 125.18(b)(2). These provisions must:

- (i) Set forth the purpose of the joint venture;
- (ii) Designate SDVO SBC as the managing venturer of the joint venture, and an employee of the SDVO SBC managing venturer as the project manager responsible for performance of the contract;
- (iii) State that with respect to a separate legal entity joint venture, the SDVO SBC must own at least 51% of the joint venture entity;
- (iv) State the SDVO SBC(s) must receive profits from the joint venture commensurate with the work performed by the SDVO SBC.
- (v) Provide for the establishment and administration of a special bank account in the name of the joint venture.
- (vi) Itemize 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, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available.
- (vii) Specify the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the SDVO small business partner to the joint venture will meet the performance of work

requirements set forth in paragraph (b)(3) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the SDVO small business partner to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available.

(viii) Obligate all parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member.

(ix) Designate that accounting and other administrative records relating to the joint venture be kept in the office of the SDVO SBC managing venture.

(x) Require that the final original records be retained by the SDVO SBC managing venturer upon completion of the SDVO contract performed by the joint venture.

(xi) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture.

(xii) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

In addition, the SDVO SBC partner must perform at least 40% of the work performed by the joint venture, and that work must be more than administrative or ministerial. 13 C.F.R. § 125.18(b)(3)(ii)(B).

Examining the JVA here, it is clear the JVA was not prepared with 28 Trans' proposal, because it was executed on March 21, 2019, and the subject RFP was issued on October 18, 2019. Joint venture agreements, which are prepared prior to the issuance of the solicitation for which the joint venture is competing, often cannot meet the requirements of the regulation, and thus result in a finding that the joint venture has failed to comply with the regulation. *Size Appeal of Stacqme, LLC*, SBA No. SIZ-5976, at 7 (2018).

Here, the JVA includes no specific information on the subject procurement. The JVA does meet 13 C.F.R. § 125.18(b)(2) requirement (i), setting forth purpose of the joint venture as “to bid on, obtain, and perform contracts.” JVA, at ¶ 2. It meets requirement (ii), designating Red Kite as the Managing Member of the joint venture, and Mr. Janitshcek, Red Kite's Managing

Member, as Project Manager for any contract obtained by the joint venture. *Id.*, at ¶ 4. Red Kite will own 51% of 28 Trans, and so the JVA meets requirement (iii). *Id.*, at ¶ 1. Profits are to be distributed in proportion to the work performed by each member, meeting requirement (iv). *Id.*, at ¶ 7. A special bank account is to be established, meeting requirement (v). *Id.*, at ¶ 8. The parties are obligated to complete performance of any contract, despite the withdrawal of any member, meeting requirement (viii). *Id.*, at ¶ 16. Red Kite will keep the accounting and administrative records, and the final original records, meeting requirements (ix) and (x). *Id.*, at ¶ 18. 28 Trans will submit quarterly financial statements to SBA no later than 45 days after the end of each quarter and will submit a project-end profit and loss statement, no later than 90 days after completion of a contract, meeting requirements (xi) and (xii). *Id.*, at ¶¶ 20, 21. Red Kite will be responsible for performing no less than 40% of the non-administrative services to be performed on each contract, and no less than 40% of the work to be performed by the joint venture, meeting the requirements of 13 C.F.R. § 125.18(b)(3)(ii)(B). *Id.*, at ¶ 6.

However, I find that the JVA is insufficient in that it fails to meet 13 C.F.R. § 125.18(b)(2) requirements (vi) and (vii). The JVA fails to itemize the equipment to be used in performance of the contract. It merely states in general terms that it will “purchase vehicles, primarily vans modified to accommodate wheelchairs and stretchers” and other unspecified equipment. The JVA is clear that until 28 Trans obtains contracts, it cannot determine the number of vehicles it will need. JVA, at ¶ 9. Further, it fails to specify the responsibilities of the parties with respect to the negotiation of the contract, source of labor, and contract performance. The JVA merely states that the principals of Red Kite and Owl will bid for and negotiate any contracts, and that Red Kite will perform 40% of the work. *Id.*, at ¶ 6. Although the subject contract is an ID/IQ contract, and thus only a general description of anticipated major equipment by each party to the joint venture is required, the JVA does not provide even that, failing to meet requirement (vi). Further, the JVA does not give any indication of the tasks that each member of the joint venture will perform the contract, or which employees of each member will perform which functions. While this information may not have been known at the time the JVA was executed, the regulations require that the joint venture must provide it. In failing to include this information in the JVA or an addendum to it, the JVA fails to meet requirement (vii). Had 28 Trans executed an addendum to the JVA at the time it submitted its initial proposal, including the required information as to equipment and the responsibilities of the parties, it could have complied with the regulation, but it failed to do so.

Further, even if 28 Trans had executed an addendum, a review of its Proposal reveals that it still has not clearly delineated the roles each firm will take in contract performance. The Proposal spells out the workflow process to handle each call for service, but it does not state which member will perform which task. Proposal, at 7. Similarly, it states that there will be 15 vehicles, but it fails to state how many vehicles will be Red Kite's, and how many Owl's. *Id.*, at 19. It discusses staffing but fails to state which staff will be Red Kite's, and which will be Owl's. *Id.*, at 12-26. The Proposal, like the JVA, fails to specify the responsibilities of the parties with respect to the source of labor, and contract performance. The Proposal merely speaks of 28 Trans itself obtaining equipment and hiring staff. However, this would make 28 Trans a populated joint venture, an entity with its own employees and equipment, which is excluded from the benefits of the joint venture regulation. 13 C.F.R. § 121.103(h).

Rather, each member of a joint venture is to perform work with its own employees and equipment, and the JVA must identify that equipment, identify which party will provide which equipment, and specify what the respective responsibilities of the parties will be, identifying the work to be performed. While this is an ID/IQ contract, and the precise number of trips cannot be known, the locations which will be serviced are known, and the nature of the work is known, transporting patients in wheelchairs and stretchers. 28 Trans should have been able to include in an addendum to its JVA the equipment which each firm would contribute to the joint venture, to identify the staffing positions each firm would contribute, and, in a general way, to identify the work which each firm will perform. In short, the JVA for an ID/IQ contract should be able to identify the types of tasks to be performed, and which member will furnish and perform what with its own employees. *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 10-11 (2018). 28 Trans' JVA failed to include this information, and it therefore failed to meet the requirements of the regulation. Therefore, 28 Trans' JVA is deficient, and 28 Trans is not an eligible SDVOSB joint venture for this procurement. *CVE Protest of Commonwealth Home Health Care, Inc.*, SBA No. CVE-116-P, at 14-15 (2019).

IV. Conclusion

28 Trans has failed in its burden to establish that it is an eligible joint venture for the instant procurement. I therefore SUSTAIN the protest. 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).

CHRISTOPHER HOLLEMAN
Administrative Judge