

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

CVE Protest of:

First Nation Group, LLC, d/b/a Jordan
Reses Supply Co.,

Protestor,

Re: Avenue Mori Medical Equipment, Inc.

Solicitation No. 36C7911R0009
U.S. Department of Veterans Affairs

SBA No. CVE-185-P

Decided: April 29, 2021

APPEARANCES

Jonathan T. Williams, Esq., Samuel S. Finnerty, Esq., Anna R. Wright, Esq.,
PiliroMazza PLLC, Washington, D.C.. for First Nation Group, LLC, d/b/a Jordan Reses Supply
Co.

David F. Dowd, Esq., Luke Levasseur, Esq., Mayer Brown LLP, Washington, D.C., for
Avenue Mori Medical Equipment, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 29, 2020, First Nation Group, LLC, d/b/a Jordan Reses Supply Co. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Avenue Mori Medical Equipment, Inc. (AMME), in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C79119R0009. Protestor contends that AMME is not controlled by one or more service-disabled veterans, and that due to substantial dependence upon a non-SDVOSB, AMME cannot exercise independent judgment without great economic risk. 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 a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

134 subpart J.² Protestor filed its protest within five business days after receiving notification that AMME was an 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. The RFP

On July 16, 2019, VA issued RFP No. 36C79119R0009 for the provision of “positive airway pressure (PAP) devices and associated accessories/replacement parts, facial interfaces and mask liners” for VA's Prosthetic and Sensory Aids Service. (Case File (CF), Exh. 318 at 6.) The RFP contemplated the award of multiple indefinite-delivery indefinite-quantity (ID/IQ) contracts. (*Id.*) Ten Contract Line Item Numbers (CLINs) were identified in the RFP, each consisting of a different type of product, and that the RFP stated that more than one award might be made for each CLIN. (*Id.* at 6-7.) The RFP contained the following instructions for nonmanufacturer offerors:

If other than the manufacturer, the offeror shall submit, with the offer, a letter indicating that the offeror is an authorized distributor for the products offered. The offeror, if other than the manufacturer, shall submit a letter of commitment from the manufacturer, which assures that the offeror's source of supply is sufficient to satisfy the Government requirements for the duration of the period, to include base and option periods. The letter must be from the manufacturer on company letterhead and noting the commitment by the product name, brand, and origin of the product. It should also provide an overview of how this business relationship will work between the manufacturer/distributor. Offers from manufacturer/distributor that do not submit the letter of commitment with all the information noted above may be excluded from further consideration.

(*Id.* at 84.)

The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 339113, Surgical Appliance and Supplies Manufacturing, with a corresponding size standard of 750 employees. AMME and Protestor submitted timely proposals.

While the protest was ongoing, VA announced that it would undertake corrective action on the source selection. In the interests of judicial economy, OHA therefore stayed proceedings pending the outcome of the corrective action. On February 9, 2021, the CO informed OHA that corrective action had been completed and that AMME remained an apparent awardee. On February 10, 2021, OHA lifted the stay on the proceedings.

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).

B. Mentor-Protégé Agreement

On February 27, 2017, the Director of SBA's All-Small Mentor-Protégé Program (ASMPP) approved a Mentor-Protégé Agreement (MPA) between AMME, as protégé, and its large business mentor, Rotech, Inc. (Rotech). (CF, Exh. 268.) The MPA was effective until February 27, 2020. (*Id.*)

The MPA explains that AMME “provides a full product line of Durable Medical Equipment (DME) and provides services, primarily in the Southern California area,” whereas Rotech “is a corporation with a history of providing DME and related services on a nation-wide basis.” (Exh. 269 at 1.) The purpose of the MPA is to establish a mentor-protégé relationship that “will enhance the capabilities of the Protégé [*i.e.*, AMME], assist the Protégé in meeting goals established in its business plan, and improve the Protégé's ability to successfully compete for contracts.” (*Id.*)

On October 8, 2019, Rotech and AMME entered into an Amendment to the MPA. (AMME Response, Exh. 5.) The stated purpose of the Amendment is to add “Business Development” as an additional type of assistance that Rotech may provide AMME via the MPA. (*Id.* at 1-2.)

C. Proposal

AMME submitted its initial proposal for the instant procurement on December 9, 2019. (CF, Exhs. 316 and 317.) The proposal stated that AMME intended to provide products from Salter Labs, Sleepnet Corporation, and Sunset Healthcare Solutions. (CF, Exh. 316 at 1.) More specifically, AMME proposed to utilize Salter Lab's products for CLINs 6, 8, and 9; Sleepnet Corporation products for CLINs 5 and 6; and Sunset Healthcare Solutions products for CLINs 1, 2, 3A, 3B, 3C, 4, 5, 6, and 8. (*Id.*) The proposal made no mention of Rotech. (CF, Exhs. 316 and 317.)

D. Protest

On July 22, 2020, the CO announced that AMME was one of several apparent successful offerors. On July 29, 2020, Protestor filed the instant protest with the CO, challenging AMME's SDVOSB status. The CO forwarded the protest to SBA's Office of Government Contracting, which subsequently redirected the matter to OHA.

In the protest, Protestor alleged that Mr. Myo Tun, the service-disabled veteran upon whom AMME's status as a verified SDVOSB is based, “does not (and cannot) control AMME as required by SBA's regulations.” (Protest at 4.) More specifically, according to Protestor, Mr. Tun does not control both the long-term decision making and the day-to-day management of AMME's business operations as required by 13 C.F.R. § 125.13. (*Id.*) Mr. Tun does not control AMME on a full-time basis because he “has many other interests that prevent him from devoting sufficient time to controlling” AMME, including holding managerial roles in several other companies. (*Id.* at 5.) Given Mr. Tun's other commitments, Protestor maintains that it is likely that Mr. Tun has ceded control of AMME to Mr. Gordon Mori, who already is “involved in

every aspect of the daily operations.” (*Id.*) Gordon Mori is not a service-disabled veteran. (*Id.*) Alternatively, Protestor posits, “some other” non-service-disabled veteran may control AMME. (*Id.*)

Protestor observes that 13 C.F.R. § 125.13(k) creates a rebuttable presumption that “a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during the normal working hours that businesses in that industry normally work.” (*Id.* at 6.) In the event that Mr. Tun does not work for AMME full-time during normal business hours, the burden should shift to AMME to establish that Mr. Tun controls AMME. (*Id.*)

Moreover, based on Protestor's “conversations with major medical industries suppliers,” Protestor contends that AMME is “heavily reliant upon a non-[service-disabled veteran] owned entity to such an extent that AMME and Mr. Tun cannot exercise independent business judgment.” (*Id.*) Under 13 C.F.R. § 125.13(i)(7), there is a rebuttable presumption that “non-service-disabled veteran individuals or entities control or have the power to control a firm” when “[b]usiness relationships exist with non-service-disabled veteran individuals or entities which cause such dependence that the applicant or concern cannot exercise independent business judgment without great economic risk.” (*Id.*) The presumption applies here because “AMME cannot viably operate in the medical supply industry or perform the subject requirement without depending heavily” upon non-SDVOSBs. (*Id.*) In particular, AMME could not by itself produce letters of supply, as required by the instant RFP. (*Id.* at 6-7.) Instead, Protestor alleges, AMME must rely upon a non-SDVOSB, probably Rotech, to provide the letters. (*Id.* at 7.) Without letters of supply from Rotech or another non-SDVOSB, “AMME would not be able to viably operate its medical supply business.” (*Id.*) According to Protestor, although Rotech is AMME's SBA-approved mentor under the ASMPP, letters of supply likely do not qualify as assistance within the scope of their MPA. (*Id.*)

E. AMME's Response

On August 25, 2020, AMME responded to the protest, requesting that the protest be dismissed or denied. AMME argues, as a preliminary matter, that the protest should be dismissed for lack of standing. (Response at 2.) Because the RFP allows for multiple awardees for each CLIN, “AMME and [Protestor] both could have received awards for the same CLINs if they offered different equipment.” (*Id.*) Protestor has not shown that it lost a competition for any CLIN awarded to AMME, and Protestor thus was not necessarily harmed by the selection of AMME for a particular award. (*Id.*)

Turning to the merits of the protest, AMME insists that it is controlled by Mr. Tun, a service-disabled veteran, who “devotes 35 to 65 hours each week to AMME's management, administration, and operations—and makes all of the short-, mid- and long-term administrative and financial decisions.” (*Id.* at 3, citing Tun Decl. ¶ 4.) AMME denies that Mr. Tun's involvement with other businesses prevents him from devoting sufficient time to controlling AMME's operations. (*Id.*) Rather, Mr. Tun efficiently manages his commitments to ensure that he is “always available to conduct AMME business, *i.e.*, 24 hours per day, seven days a week, if/when necessary.” (*Id.*)

AMME refutes Protestor's "bare allegations" with detailed explanations of Mr. Tun's involvement in other businesses in which he holds an ownership interest. (*Id.* at 4-5.) AMME and Rotech have an SBA-approved mentor-protégé relationship, and have formed three joint ventures to compete in the home oxygen and durable/home medical equipment markets. (*Id.* at 3.) The joint ventures are unpopulated and all of their operations are conducted through AMME. (*Id.*) Hence, all of Mr. Tun's work for these joint ventures is "AMME work." (*Id.* at 4.)

Mr. Tun owns a controlling interest in another SDVOSB healthcare company, Avenue Home Care, Inc. (AHC), but has several employees who help operate that company. (*Id.*) Accordingly, AMME asserts, Mr. Tun's involvement with AHC does not interfere with his ability to control AMME. (*Id.*) Several AHC personnel help manage the daily tasks of Intrepid One Contracting LLC (Intrepid One), so Mr. Tun does not spend a "material amount of his time" focused on the operations of this small company. (*Id.*) Mr. Tun's involvement with Avenue Medical Equipment, Inc. (AMEI), a small company that sells products in conjunction with AHC, also "requires little of Mr. Tun's time or resources." (*Id.*, citing Tun Decl. ¶ 8.) Mr. Tun no longer has any involvement with Novo Nordisk or Veterans Preferred Medical Services (VPMS), and his former involvement with these concerns has no bearing on his ability to control and manage AMME. (*Id.*)

Next, AMME denies Protestor's allegation that it cannot exercise independent business judgment because it is substantially dependent on Rotech, a non-SDVOSB, for letters of supply. (*Id.* at 5.) On the contrary, AMME secured letters of supply from manufacturers declaring their commitment to provide equipment to AMME for the performance of the contract. (*Id.* at 6.) These letters are addressed to AMME and have already been provided to the VA to demonstrate AMME's supply. (*Id.*) AMME urges that the letters demonstrate that AMME will not be dependent on Rotech or any other non-SDVOSB to perform the instant procurement.

Finally, AMME denies affiliation with Rotech. (*Id.*) Further, the Amendment to the MPA "encompasses assistance by Rotech to AMME with regard to relationships with manufacturers." (*Id.*)

F. Case File

The Case File indicates that AMME is a corporation based in the state of California. (CF, Exh. 7.) Mr. Myo Tun owns 51% of AMME and Mr. Gordon Mori owns the remaining 49%. (CF, Exh. 291.) According to Special Meeting Minutes dated May 13, 2019, Mr. Tun and Gordon Mori are the only directors and only shareholders of the concern. (*Id.*) AMME does not have a Shareholders' Agreement. (CF, Exh. 18.) Mr. Tun, who is also President of AMME, is a service-disabled veteran. (CF, Exh. 1.) Gordon Mori is neither a veteran nor a service-disabled veteran. (CF, Exh. 22.)

On January 15, 2016, AMME's Board of Directors, which at that time was comprised of Mr. Tun, Gordon Mori, and Mr. Andrew Mori, elected Mr. Tun as President and Chief Executive Officer, Andrew Mori as Treasurer and Chief Financial Officer, and Gordon Mori as Secretary. (CF, Exh. 29.) In response to inquiries from VA's Center for Verification and Evaluation (CVE)

during the verification process, AMME explained that the only employees of the firm were Gordon Mori, Andrew Mori, and Mr. Tun. (CF, Exh. 152.) AMME had no paid employees because “the company has very little to no profits and the current employees are not taking any income from the company.” (*Id.*)

The Case File includes multiple copies of AMME's Bylaws. The most recent version of the Bylaws in the Case File is dated December 1, 2015 (“the 2015 Bylaws”). (CF, Exh. 9.) The 2015 Bylaws are signed by three Directors: Mr. Tun, Gordon Mori, and Andrew Mori. (*Id.* at 8.) The 2015 Bylaws contain the following provisions pertinent to these proceedings:

ARTICLE II SHAREHOLDERS

...

SECTION 5 QUORUM

A majority of the outstanding shares of the corporation entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If less than a majority of the outstanding shares are represented at a meeting, a majority of the shares so represented may adjourn the meeting from time to time without further notice. At such adjourned meeting at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally notified.

...

SECTION 7 VOTING OF SHARE

Subject to the provisions of Section 9, each outstanding share entitled to vote shall be entitled to one vote upon each matter submitted to a vote at a meeting of shareholders.

...

ARTICLE III BOARD OF DIRECTORS

SECTION 1 GENERAL POWERS

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

SECTION 2 NUMBER, TENURE, AND QUALIFICATIONS

The number of Directors of the corporation shall be at least one but not more than seven. Each director shall hold office until the next annual meeting of

shareholders and until the Director's successor shall have been elected and qualified.

...

SECTION 4 *SPECIAL MEETINGS*

Special meetings of the Board of Directors may be called by or at the request of the President or a Sole Director or any two Directors. The person or persons authorized to call special meetings of the Board of Directors may fix any place either within or without the State of California, as the place for holding any special meeting of the Board of Directors called by them.

...

SECTION 6 *QUORUM*

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

SECTION 7 *MANNER OF ACTING*

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

...

ARTICLE IV OFFICERS

...

SECTION 5 *PRESIDENT*

The President shall be the principal executive officer of the corporation and, subject to the control of the Board of Directors, shall in general supervise and control all of the business and affairs of the corporation. The President shall, when present, preside at all meetings of the shareholders and of the Board of Directors. The President may sign, with the Secretary or any other proper officer the corporation thereunto authorized by the Board of Directors, certificates for shares for the corporation, and in general shall perform all duties incident to the office of President and such other duties as may be prescribed by the Board of Directors from time to time.

...

ARTICLE V CONTRACTS, LOANS, CHECKS AND DEPOSITS

...

SECTION 3 CHECKS, DRAFTS, ETC.

All checks, drafts, or other orders for the payment of money, notes or other evidences of indebtedness issued in the name of the corporation shall be signed by such officer or officers, agent or agents, of the corporation and in such manner as shall from time to time be determined by resolution of the Board of Directors.

...

ARTICLE XI AMENDMENTS

These by-laws may be altered, amended or repealed and new by-laws may be adopted by unanimous vote of the Board of Directors at any regular o[r] special meeting of the Board of Directors, or by affirmative vote of two-thirds of the outstanding shares.

(CF, Exh. 9.)

On November 30, 2016, the CVE initially verified AMME as an SDVOSB and included it in the Vendor Information Pages (VIP) database of eligible firms. (CF, Exh. 76.) CVE re-verified AMME on August 30, 2019. (CF, Exh. 309.) The re-verification letter stated that AMME “is presently, as of the issuance of this notice, in compliance with the regulation.” (*Id.* at 1.) AMME was required to report any changes to the CVE that might adversely affect its eligibility within 30 days of the change. (*Id.*)

G. Supplemental Protest

On September 11, 2020, after reviewing the Case File under the terms of an OHA protective order, Protestor moved to supplement its protest. Protestor argues that the Case File bolsters its original contention that AMME is not controlled by one or more service-disabled veterans, and that AMME is reliant on Rotech, AMME's large business mentor, to perform the instant contract. (Supp. Protest at 1-2.) Protestor asserts that it has standing to pursue the instant protest because it was an offeror for the RFP. (*Id.* at 4, citing 13 C.F.R. § 134.1002(b).)

Protestor contends that the Case File shows that AMME has never met the requirements to be a SDVOSB, and should not have been verified by CVE in 2016. (*Id.*) Mr. Tun improperly held his ownership of AMME through a trust until March 2019. (*Id.* at 5, citing CF, Exhs. 206 and 251.) Andrew Mori and Gordon Mori, who are not service-disabled veterans, were the first signatories of AMME's bank account; historically signed all AMME checks and contracts;

signed AMME's lease; paid for AMME's office space; served as AMME directors and officers; and have provided personal guarantees for the company. (*Id.*, citing CF, Exhs. 7, 19- 20, 31, 45, 115-117, 122, 141, 160, 161-163, 165, 169-170, 173, and 185.) In addition, the Case File exposes a “Rent-A-Vet” arrangement, masquerading as a “SDVOSB Agent Agreement,” whereby AMME provided its SDVOSB status in exchange for a 5% commission for all sales through AMME. (*Id.*, citing CF, Exh. 165.)

Next, Protestor alleges that the Case File demonstrates that AMME misled CVE with regard to its SDVOSB eligibility. (*Id.*) AMME represented to CVE that Mr. Tun signs all contracts and major purchases, but the Case File contains multiple contracts signed by Andrew Mori or Gordon Mori. (*Id.*, citing CF, Exhs. 22, 45, 115, 165, and 169-170.) Although AMME told CVE that it had ended its co-location with Mori Medical Equipment, Inc. (MME) in February 2019, AMME later referred to MME's offices as its “[b]ackup” or “alternate location.” (*Id.*, citing CF, Exhs. 194, 290, and 302.) AMME claimed that Mr. Tun had supplied most of the startup capital for AMME, even though Gordon Mori “was expected to make 'in kind' contributions such as paying for AMME's rent.” (*Id.* at 5-6, citing CF, Exh. 194.) AMME also misled CVE by stating that its “only affiliation” with MME was through ownership by one of AMME's business partners. (*Id.* at 6, citing CF, Exh. 133.) This statement is belied by the Case File's numerous examples of AMME's ongoing relationship with MME and Gordon Mori. (*Id.*, citing CF, Exhs. 115, 290, and 302.)

Protestor contends that AMME's 2015 Bylaws and the “Special Meeting Minutes” dated May 13, 2019 establish that Mr. Tun does not fully control AMME. (*Id.*) The “Special Meeting Minutes” state that the service-disabled veteran, Mr. Tun, owns 51% of the company's shares while a non-service-disabled veteran, Gordon Mori, owns 49%. (*Id.*, citing CF, Exh. 291.) Further, Mr. Tun and Gordon Mori are the only directors of AMME. (*Id.*) Under the 2015 Bylaws, either unanimous consent of the Board or a vote of two-thirds of the outstanding shares is required to amend the Bylaws. (*Id.* at 7, citing CF, Exh. 9.) Additionally, the 2015 Bylaws specify that a “majority” of the directors must be present to convene a quorum for a Board meeting. Given these facts, AMME does not satisfy eligibility requirements under 13 C.F.R. § 125.13(e)(1), because the 2015 Bylaws “contain a supermajority voting requirement to amend the Bylaws (at Art. XI) that [Mr. Tun] alone cannot overcome.” (*Id.* at 7.)

The 2015 Bylaws also fail to meet the requirements of 13 C.F.R. § 125.13(e)(2) because Mr. Tun cannot control the Board of Directors through “actual numbers of voting directors” or through “weighted voting.” (*Id.* at 7-8.) AMME's two-member Board is comprised of one service-disabled veteran (Mr. Tun) and one non-service-disabled veteran (Gordon Mori). (*Id.* at 8.) Accordingly, the 2015 Bylaws “allow the [non-service-disabled veteran] to block quorum because a majority of the directors is required for quorum (and a majority of two is two).” (*Id.*) Protestor observes that pursuant to 13 C.F.R. §§ 125.11 and 125.13(m), SBA regulations do not permit a non-service-disabled veteran to exert negative control by blocking an attempt to amend the bylaws. (*Id.*)

Protestor contends that AMME fails to satisfy the control requirements in 13 C.F.R. § 125.13 due to its “near-total reliance on Rotech to operate.” (*Id.*) The scope of Rotech's assistance to AMME is memorialized in their MPA. (*Id.* at 9, citing CF, Exh. 269.) Protestor

contends that “Rotech provides everything AMME needs to be a functioning business,” including use of Rotech's facilities, patient call center, equipment, employees, and fleet development. (*Id.*) Rotech also agrees to aid AMME with any required licenses in order to operate on a national basis. (*Id.* at 9-10.) Under 13 C.F.R. § 125.13(i)(6), Rotech is “presumed to control AMME because it is providing any critical licenses AMME needs, as well as the specific licenses needed to operate the nationwide fleet of vehicles.” (*Id.* at 10.) The only licenses held by AMME are a general business license and a lapsed California Homed Medical Device Retail License. (*Id.* at 11 citing CF, Exhs. 21, 288, and 243.)

Protestor claims that the MPA was amended in October 2019 because AMME needed assistance to obtain letters of supply from medical equipment manufacturers in order to be considered for the instant procurement. (*Id.* at 10, citing Response Exh. 4.) In December 2019, manufacturers provided the necessary letters of supply that allowed AMME to compete for the RFP. (*Id.*) Therefore, in Protestor's view, Rotech is presumed to control AMME under 13 C.F.R. § 125.13(i)(7) “because AMME is so totally dependent on its relationship with Rotech that it could not exercise independent business judgment without great economic risk.” (*Id.* at 11.) Further, under 13 C.F.R. § 125.13(l), there is a rebuttable presumption that Mr. Tun, who resides in California, does not control AMME because he does not have a “reasonable commute” to Rotech's headquarters in Florida or other Rotech locations throughout the country. (*Id.* at 11-12.) The record does not indicate that Mr. Tun can control a national operation that is “apparently occurring within Rotech facilities around the country.” (*Id.* at 12 citing CF, Exh. 269.)

Finally, Protestor argues that the mere existence of the MPA should not rebut the presumption of control by Rotech. (*Id.* at 12.) Rather, Protestor asserts:

While a valid, SBA-approved MPA is generally a shield to affiliation, affiliation under 13 C.F.R. § 121.103 is not the same as SDVOSB control under 13 C.F.R. § 125.13. Indeed, SBA and OHA have repeatedly noted that the affiliation and veteran control requirements are two different, independent sets of rules, and the affiliation rules and decisions do not govern determinations of [service-disabled veteran] control under 13 C.F.R. § 125.13.

(*Id.*) Protestor points to *Matter of eKCG, LLC*, SBA No. VET-255 (2016) for the proposition that the SBA rules provide “no exception from the SDVOSB control requirements for an SDVOSB that has an SBA-approved mentor.” (*Id.*) Furthermore, like *CS360, LLC v. U.S. Department of Veterans Affairs*, 101 F. Supp. 3d 29 (D.D.C. 2015), no basis exists to rebut the presumption of non-service-disabled veteran control under 13 C.F.R. § 125.13 because “AMME has effectively ceded total control to, and is completely reliant on, Rotech to function as a going concern with the capabilities needed to bid on the Solicitation.” (*Id.* at 13-14.) Protestor urges that OHA should find that AMME does not fulfill the control requirements in 13 C.F.R. § 125.13 and thus is not an eligible SDVOSB. (*Id.* at 14.)

H. Supplemental Response

On September 26, 2020, AMME timely responded to the supplemental protest. AMME contends that Protestor identifies “historical” issues in the Case File that have already been

reviewed and resolved by CVE and have no bearing on AMME's present eligibility for inclusion in the CVE database. (Supp. Response at 2.) AMME also disputes Protestor's allegations that the SBA-approved MPA undermines Mr. Tun's ability to control AMME. (*Id.*)

AMME reiterates its view that Protestor lacks standing to bring this protest, contending that Protestor is not harmed by an award to AMME. (*Id.* at 3.) AMME also highlights that Protestor's original allegations — that Mr. Tun is too busy to manage AMME and that AMME lacks the requisite letters of supply for the instant procurement — were refuted in AMME's Response and have not been rebutted by the Case File or by the supplemental protest. (*Id.* at 3-4.)

Turning to Protestor's new allegations raised in the supplemental protest, AMME maintains that Protestor focuses on “historical eligibility” issues that are no longer in effect. (*Id.* at 4.) AMME's co-location with MME ended more than a year ago, before proposals were due for the instant procurement. (*Id.*, citing CF, Exh. 194.) Similarly, Mr. Tun has not held his stock in AMME through a trust for more than a year. (*Id.*) Instead, the stock was transferred to “Mr. Tun to hold directly to enable AMME to meet the standards in the new SDVOSB ownership requirements.” (*Id.* at 5.) AMME acknowledges that checks “historically” were signed by individuals other than Mr. Tun, but observes that the most recent check for the new lease was signed by Mr. Tun. (*Id.*, citing CF, Exh. 211.) Further, Protestor's “rent-a-vet” allegation is misplaced because it is based on a contract other than the instant procurement. (*Id.*, citing CF, Exh. 165.) AMME argues that OHA should reject all of Protestor's “historical” allegations as irrelevant distractions. (*Id.*)

AMME disputes Protestor's contention that AMME provided “apparently misleading” information to CVE. (*Id.*) This claim is “wholly academic” because Protestor does not establish that CVE actually was misled. (*Id.*) AMME insists that it did not mislead CVE regarding affiliation with MME, and in fact expressly acknowledged such affiliation. (*Id.* at 5-6.) Further, AMME denies that it misled CVE when it informed CVE that its primary location had changed. (*Id.* at 6, citing CF, Exh. 290 at 1-2.)

AMME contends that the only issue that could affect AMME's current eligibility is Protestor's new allegations relating to AMME's 2015 Bylaws. This claim is meritless, though, because the 2015 Bylaws relied upon by Protestor have now been superseded. (*Id.* at 6, citing Exh. A.) Specifically, a new version of the bylaws was adopted in July 2019 (“the 2019 Bylaws”), well before proposals were due for the instant solicitation. (*Id.*) Article VIII of the 2019 Bylaws states that the holder of the “majority of shares” has the power to amend the bylaws. (*Id.*) Here, Mr. Tun, the service-disabled veteran, owns 51% of AMME's shares and thus can change the bylaws without the consent of the minority owner, Gordon Mori. (*Id.* at 6-7.) Mr. Tun also can unilaterally establish a quorum for Board meetings. Protestor's contentions concerning the 2015 Bylaws are therefore rendered moot by the 2019 Bylaws. (*Id.* at 7.) Nevertheless, AMME argues, the 2015 Bylaws still enabled Mr. Tun to “operate the company” and did not preclude him from controlling AMME's daily operations. (*Id.* at 6.)

AMME next argues that Protestor, in effect, requests that OHA second-guess and invalidate the MPA. (*Id.* at 7.) Such a request is improper because a challenge to an MPA is not authorized by SBA regulations, nor does the Protestor cite to any authority. (*Id.*) Rather, an

SBA-approved MPA cannot result in a finding of affiliation or control. (*Id.* at 7-8, citing 13 C.F.R. § 124.520(d)(4).) If OHA were to give credence to Protestor's allegations, OHA would “eviscerate” the mentor-protégé program, as any assistance from a large business mentor “will render a truly small business ineligible to participate” as an SDVOSB. (*Id.* at 7.)

Rotech, AMME's mentor, assists with AMME's growth and expansion, which is the fundamental purpose of an MPA. (*Id.* at 8.) Nevertheless, the record indicates that AMME can operate without assistance from Rotech. (*Id.* at 8-9.) AMME now operates from its own site in California. (*Id.* at 9, citing CF, Exh. 194.) Further, AMME did not rely on Rotech to provide any letters from suppliers for the instant procurement. (*Id.*) Instead, “Mr. Tun arranged for the letters and had the relevant exchanges and communications with the manufacturers.” (*Id.*) Although Protestor complains that Mr. Tun does not reside in proximity to Rotech's headquarters in Florida, Mr. Tun has no need to travel to Rotech's headquarters to ensure the performance of AMME's contracts. (*Id.* at 9-10.)

Accompanying its response to the supplemental protest, AMME offers a copy of the 2019 Bylaws and a second declaration from Mr. Tun affirming that the 2019 Bylaws are “the most recent version of the AMME bylaws.” (Second Tun Decl. ¶ 2.) The 2019 Bylaws include a “Certificate of Adoption,” dated July 10, 2019, signed by Mr. Tun in his role as President and Director of AMME. (2019 Bylaws, at 27.) The Certificate of Adoption states: “The undersigned Director named in the Articles of incorporation, or the duly elected of the above named corporation, hereby adopt the same as the Bylaws of said corporation.” (*Id.*) The 2019 Bylaws differ from the 2015 Bylaws in several respects, including the following:

ARTICLE II DIRECTORS-MANGEMENT

Section 1. RESPONSIBILITY OF BOARD OF DIRECTORS.

Subject to the provisions of the corporation laws of the State of California (the “Corporation Law”) and to any limitations in the Articles of Incorporation of the corporation relating to action required to be “approved by the Service Disabled Veteran Shareholder(s),” as that phrase is defined in Section 153 of the California Corporations Code, or “approved by the outstanding shares,” as that phrase is defined in Section 152 of the California Corporations Code, the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the Service Disabled Veteran Director(s). The Service Disabled Veteran Director(s) may delegate the management of the day-to-day operation of the business of the corporation to a management company or other person, provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the Service Disabled Veteran Director(s).

...

ARTICLE III MEETINGS OF DIRECTORS

...

Section 7. DIRECTORS ACTION WITHOUT MEETING.

Any action required or permitted to be taken by the Board of Directors may be taken without a meeting and with the same force and effect as if taken by a unanimous vote of the Service-Disabled Veteran Directors, if authorized by a writing signed individually or collectively by Service-Disabled Veteran Directors members of the Board. Such consent reflecting the action taken shall be filed with the regular minutes of the Board.

Section 8. QUORUM FOR MEETINGS OF DIRECTORS.

Service-Disabled Veterans Shareholder(s) who control at least 51% of the shares individually or combined shall be necessary to constitute a quorum for the transaction of business. Unless the Articles of Incorporation or Bylaws require a greater number, the action of a majority of the Directors present at any meeting at which there is a quorum, when duly assembled, is valid as a corporate act; provided that a minority of the Directors, in the absence of a quorum, may adjourn from time to time, but may not transact any business. A meeting at which a quorum is initially present may continue to transact business, notwithstanding the withdrawal of Directors, if any action taken is approved by a majority of the required quorum for such meeting.

...

ARTICLE VIII AMENDMENTS TO BYLAWS AND CONSTRUCTION

Section 1. AMENDMENT OF BYLAWS BY SHAREHOLDERS.

Subject to the Corporation Law or the Articles of Incorporation, replacement Bylaws may be adopted or these Bylaws may be amended or repealed by the vote or written consent of holders of a majority of the outstanding shares entitled to vote; provided, however, that if the Articles of Incorporation of the corporation set forth the number of authorized Directors of the corporation, the authorized number of Directors may be changed only by an amendment of the Articles of Incorporation.

After the issuance of shares, a Bylaw specifying or changing a fixed number of Directors or the maximum number or changing from a fixed to a variable number may be adopted by approval of a majority of the outstanding shares. An amendment of the Bylaws to reduce the fixed or minimum number to less than five cannot be adopted if votes cast against the adoption (or not

consenting) are more than 16 2/3 percent of the outstanding shares entitled to vote.

Section 2. AMENDMENT OF BYLAWS BY DIRECTORS.

The President may adopt, amend or repeal any of these Bylaws other than a Bylaw or amendment thereto fixing the authorized number of Directors or changing a quorum or voting requirement for the Board of Directors provided the power to amend the Bylaws is conferred or permitted in the Articles of Incorporation.

(2019 Bylaws at 2, 7, 24.)

I. Motion for Leave to Reply

On October 5, 2020, Protestor requested leave to reply to AMME's Supplemental Response. Protestor explains that the Supplemental Protest, dated September 11, 2020, was based on its review of the Case File, which contains only AMME's 2015 Bylaws. (Motion at 1.) AMME's Supplemental Response introduces "an allegedly newer version of the Bylaws, dated July 10, 2019" which are not in the Case File. (*Id.* at 1-2.) AMME does not claim that it ever submitted the 2019 Bylaws to CVE. (*Id.* at 2.) Moreover, Protestor had no opportunity to review or comment on the 2019 Bylaws before filing the Supplemental Protest. (*Id.*) Having now reviewed the 2019 Bylaws, Protestor seeks leave to file an enclosed Reply. (*Id.*)

In the Reply, Protestor asserts that the 2019 Bylaws are of "questionable veracity," and in any event, do not show that AMME is an eligible SDVOSB. (*Id.* at 5.) In its Supplemental Protest, Protestor observed that AMME's 2015 Bylaws require a "vote of two-thirds of the outstanding shares or unanimous consent of the Directors to amend the Bylaws." (*Id.* at 6, citing Supp. Protest at 6-8.) Under the 2015 Bylaws, Mr. Tun alone could not satisfy these requirements to amend the bylaws, and is thus subject to negative control by non-service-disabled veterans. (*Id.*) Rather than refute Protestor's allegations with regard to the 2015 Bylaws, AMME introduces a new version of the bylaws. (*Id.*) However, the 2019 Bylaws are not in the Case File. Their absence is troubling because AMME should have provided any new version of its bylaws to CVE as part of its most recent re-verification in August 2019. (*Id.* at 6-7, citing CF, Exh. 281.)

Protestor contends that, at the time that AMME submitted its initial proposal, including price, for the instant procurement on December 9, 2019, CVE had reviewed only the 2015 Bylaws. (*Id.* at 7.) In accordance with OHA's Notice and Order, AMME could have objected to the contents of the Case File and requested that the 2019 Bylaws be included. (*Id.* at 8.) AMME did not attempt to add the 2019 Bylaws to the Case File and, as a result, OHA should not base its decision on the 2019 Bylaws. (*Id.*)

Next, Protestor argues that even if the 2019 Bylaws had been appropriately provided to CVE and included in the Case File, AMME still does not satisfy the SDVOSB eligibility requirements. (*Id.*) AMME has not established that the 2019 Bylaws were properly effectuated,

as they were signed solely by Mr. Tun, who holds less than two-thirds of AMME's shares. (*Id.* at 9.) The 2015 Bylaws are clear that an amendment to the bylaws can occur only by a vote of two-thirds of AMME's shares or by unanimous agreement of the directors. (*Id.*) Further, the Case File contains no meeting minutes or corporate resolutions establishing that the 2019 Bylaws were properly adopted. (*Id.*)

AMME's Articles of Incorporation are silent with regard to voting for amendments to bylaws. (*Id.*, citing CF, Exh. 7.) But under California state law, a vote of at least two-thirds of each class of outstanding shares is typically required for an amendment unless “such other vote” is specified in the articles of incorporation. (*Id.*, citing Cal. Corp. Code § 902(f).) Accordingly, Protestor reasons, “even under the July 2019 Bylaws, [Mr. Tun] is still subject to a vote of two-thirds of the outstanding shares or unanimous consent of the Directors to amend the Bylaws.” (*Id.* at 10.) Protestor further maintains that the 2019 Bylaws “give deference to the California code concerning amendments.” (*Id.*, citing 2019 Bylaws, at 24.)

J. Opposition to Motion for Leave to Reply

On October 7, 2020, AMME opposed Protestor's Motion for Leave to Reply. (Opp. at 1.) AMME observes that Protestor waited 12 days after AMME's Supplemental Response to file its Motion, an unacceptable delay which OHA should not abide. (*Id.*)

In any event, Protestor's Motion and the accompanying Reply are wholly meritless. Protestor offers no basis to question Mr. Tun's sworn statement that the 2019 Bylaws were, in fact, adopted in July 2019. Protestor's argument that OHA should not consider the 2019 Bylaws because they are not in the Case File is inconsistent with Protestor's earlier contentions that “OHA should consider whether AMME could submit letters of supply in its proposal and its ability to perform the contract in 2020.” (*Id.* at 2, citing Protest at 6-7.) Logically, under Protestor's own line of reasoning, if “OHA should consider evidence outside of the CVE database to find AMME ineligible, [OHA] should not reasonably be precluded from considering any such evidence that affirms eligibility.” (*Id.*)

Next, AMME argues that, while AMME does not concede that the 2015 Bylaws were deficient, the 2019 Bylaws address the exact issues raised in the Supplemental Protest of whether Mr. Tun, acting unilaterally, could amend the bylaws. (*Id.*) AMME highlights that CVE twice verified AMME as an SDVOSB even under the 2015 Bylaws. (*Id.* n.2.) AMME also argues that the Protestor mischaracterizes California state law regarding the treatment of bylaws. (*Id.* at 3.) Protestor relies upon California Corporate Code § 902, but that provision pertains to amendments of Articles of Incorporation, not bylaws. (*Id.*) Amendments of a corporation's bylaws are addressed in the bylaws themselves, and Protestor has never contended “that bylaw revisions could not be addressed in the bylaws.” (*Id.*) Insofar as Protestor now seeks to argue that California Corporate Code § 902 applies to bylaws as well as Articles of Incorporation, Protestor did not timely raise this issue in either its Protest or its Supplemental Protest. (*Id.*)

K. OHA's Request for Information

On April 1, 2021, OHA issued an Order, pursuant to 13 C.F.R. § 134.1007(g), requesting that AMME produce additional information regarding its bylaws. OHA noted that AMME's 2015 Bylaws, the most recent version of the bylaws in the Case File, “were signed by AMME's three Directors at that time: [Mr.] Tun, Gordon W. Mori, and Andy B. Mori.” (Order at 1, citing CF, Exh. 9.) In response to the Supplemental Protest, AMME introduced a new version of its bylaws, the 2019 Bylaws, which include a “Certificate of Adoption” signed solely by Mr. Tun. (*Id.* at 2, citing 2019 Bylaws, at 27.) AMME also offered a sworn declaration from Mr. Tun affirming that the 2019 Bylaws are “the most recent version of the AMME bylaws.” (*Id.*, citing Second Tun Decl. ¶ 2.) OHA requested that AMME produce any contemporaneous documentation concerning the circumstances under which AMME adopted the 2019 Bylaws; address whether AMME's minority owner and Director, Gordon Mori, also approved the 2019 amendments; and explain whether AMME had provided the 2019 Bylaws to CVE for its review. (*Id.*)

L. AMME's Response to OHA's Order

On April 15, 2021, AMME responded to OHA's Order. AMME asserts that both Mr. Tun and Gordon Mori approved the 2019 Bylaws during a special meeting of AMME's Board and shareholders, which occurred on July 12, 2019. (AMME Response to Order at 2.) As a result, “[t]he 2019 Bylaws thus have been approved by all Directors and shareholders and currently are in effect.” (*Id.*) In support, AMME offers a copy of the minutes from the special meeting, signed by Mr. Tun and Gordon Mori. The minutes indicate that Mr. Tun and Gordon Mori both were present at the meeting during which the following proposal was considered and then approved: “New Amended and Restated By-Laws signed on July 11, 2019 to be adopted.” (Special Meeting Minutes at 1.) AMME also offers a sworn declaration from Mr. Tun in which he avers, “Attached is a true and correct copy of the minutes for the 2019 meeting in which the AMME Board and shareholders approved the 2019 Bylaws. Gordon Mori approved the 2019 amendments as noted in the minutes.” (Third Tun Decl. ¶ 3.)

AMME further explains that, in 2019, AMME mistakenly submitted its 2015 Bylaws, rather than its 2019 Bylaws, to CVE as part of the reverification process. (AMME Response to Order at 2; Third Tun Decl. ¶¶ 4-6.) Upon discovering the error, AMME provided the 2019 Bylaws to CVE on September 8, 2020, and CVE approved the 2019 Bylaws in a determination letter received by AMME on September 24, 2020. (*Id.*) AMME highlights that “[t]he 2019 Bylaws were submitted and approved by CVE prior to the submission of final proposal revisions in the [instant] procurement.” (AMME Response to Order at 2.)

M. Protestor's Response to OHA's Order

On April 15, 2021, Protestor responded to OHA's Order. Protestor contends that OHA should disregard the new information provided with AMME's response to OHA's Order for several reasons. (Protestor's Response to Order at 2.)

Protestor argues, first, that AMME's failure to provide the Special Meeting Minutes or the 2019 Bylaws to CVE in August 2019 during the reverification process is “an independent

basis upon which to conclude that AMME should be removed from the CVE database.” (*Id.*, citing 38 C.F.R. §§ 74.15(b) and 74.21(d)(5), (8).) AMME waited “approximately nine months into this proceeding” to produce the Special Meeting Minutes and to make the claim that the 2019 Bylaws were submitted to CVE. (*Id.*) These documents are not in the Case File, and OHA therefore should consider them to have “limited (if any) probative value.” (*Id.*)

Next, Protestor observes that AMME did not submit the 2019 Bylaws to CVE until September 8, 2020, after the instant protest was filed on July 29, 2020. (*Id.* at 2-3.) Given this chronology, “it would have been difficult for AMME to object to these documents not being in the CVE Case File, when AMME had not yet provided them to CVE.” (*Id.* at 3.) Further, although AMME maintains that Mr. Tun inadvertently uploaded the 2015 Bylaws to CVE in 2019, AMME's explanation requires that Mr. Tun must have made the same error repeatedly, as there are three copies of the 2015 Bylaws in the Case File from the 2019 reverification. (*Id.*, citing CF, Exhs. 240, 241.1, and 241.)

Protestor emphasizes that, in August 2019, CVE instructed AMME to produce its “most recent board minutes, etc.[.]” for the reverification review, yet AMME did not provide its Special Meeting Minutes at that time, and has not explained why it failed to do so. (*Id.* at 3, quoting CF, Exh. 275 (emphasis added by Protestor).) Protestor also questions why AMME did not produce other relevant contemporaneous documentation, like the Special Meeting Minutes, at the same time that it provided the 2019 Bylaws in response to the Supplemental Protest. (*Id.* at 4.)

Protestor disputes the authenticity of the Special Meeting Minutes. (*Id.*) Mr. Tun signed the “Certificate of Adoption” on July 10, 2019; however, the Special Meeting Minutes refer to the 2019 Bylaws having been signed on July 11, 2019. (*Id.*) Moreover, the Special Meeting Minutes indicate that Mr. Tun and Gordon Mori also voted on officer positions, yet other meeting minutes in the Case File indicate that they had previously voted to retain their officer roles at a meeting on May 10, 2019. (*Id.*) Protestor urges OHA to “discount the veracity of the [Special Meeting Minutes]” since the minutes are inconsistent with the Case File and surfaced only in response to OHA's Order. (*Id.*)

None of the meeting minutes in the Case File make reference to the 2019 Bylaws. (*Id.* at 4-5, citing CF, Exhs. 252 and 291.) Further, on August 8, 2019, AMME submitted meeting minutes dated May 10, 2019 to CVE. (*Id.* citing CF Ex. 252.) Protestor points out that, in response to CVE's follow-up request for AMME to submit the most recent meeting minutes reflecting the election of AMME's Directors, AMME then submitted minutes of a special meeting purportedly held on May 13, 2019. (*Id.*, citing CF, Exh. 291.) Protestor argues that this exchange is significant because “it calls into question whether the May 13, 2019 meeting occurred or was contemporaneously documented” as AMME did not originally produce these meeting minutes in response to CVE's request. (*Id.* at 5-6.)

Finally, Protestor argues that, although OHA normally attaches greater evidentiary weight to signed, sworn statements, OHA should not do so here because the new information is inconsistent with the “contemporaneous record.” (*Id.* at 6, citing *Size Appeal of Standard Commc'ns, Inc.*, SBA No. SIZ-5322 (2012), *CVE Appeal of GCBO Sourcing Partners, LLC*, SBA No. CVE-112-A (2019), and *Size Appeal of Nationwide Pharm., LLC*, SBA No. SIZ-6027

(2019).) In Protestor's view, “to hold otherwise would permit an SDVOSB firm to cure defects in its eligibility, in the midst of a protest, by creating a document or submitting a statement to whitewash mistakes in their corporate records from years prior.” (*Id.*) Alternatively, “OHA should further investigate the meeting minutes and documents AMME has submitted in response to the Order.” (*Id.* at 7.) Protestor reiterates that “nothing in the contemporaneous record indicates that AMME submitted the 2019 Bylaws to CVE as part of the August 2019 reverification process or that [AMME] had validly adopted the 2019 Bylaws as of that point.” (*Id.*)

III. Discussion

A. Burden of Proof

As the protested firm, AMME 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(d)(1). Here, AMME submitted its initial proposal including price on December 9, 2019, and the instant protest was filed on July 29, 2020. Sections II.C and II.D, *supra*. Therefore, OHA must examine AMME's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

C. Analysis

1. AMME's Bylaws

A key threshold question presented in this case is whether OHA will consider the newer version of AMME's bylaws, dated July 10, 2019 (the “2019 Bylaws”). The issue is crucial because, as Protestor highlights in its Supplemental Protest, the older version of AMME's bylaws (the “2015 Bylaws”) clearly appears deficient. In particular, the 2015 Bylaws contain a supermajority voting requirement whereby the bylaws may not be amended except by unanimous vote of the Board of Directors, or by affirmative vote of two-thirds of the outstanding shares. Section II.F, *supra*. Mr. Tun, the service-disabled veteran upon whom AMME's eligibility is based, holds only a 51% ownership interest in AMME, and is one of two Directors on AMME's Board. *Id.* Accordingly, Mr. Tun cannot by himself overcome the supermajority voting requirement in the 2015 Bylaws. Further, as one of two Directors of AMME, Mr. Tun alone would be unable to convene a quorum for Board meetings under the 2015 Bylaws. *Id.* As a result of these flaws in the 2015 Bylaws, AMME would be subject to negative control by non-service-disabled veterans, specifically by its minority owner and Director, Mr. Gordon Mori. Further, although a finding of negative control may be overlooked if such control is merely illusory, the 2015 Bylaws also restrict Mr. Tun from removing and replacing other Directors. *Id.* Based on the 2015 Bylaws, then, it does not appear that Gordon Mori's negative control over AMME is illusory.

AMME has the burden of proving its eligibility in these proceedings, but raises no specific defense of the 2015 Bylaws. Section II.H, *supra*. AMME rather contends that the 2015 Bylaws are immaterial because, even if OHA finds them to be deficient, those bylaws have been superseded by the 2019 Bylaws. *Id.* Because the 2019 Bylaws are not in the Case File, though, it is essential to decide whether the 2019 Bylaws can be accepted into the record.

In arguing that OHA should exclude the 2019 Bylaws, Protestor observes that, at the time the 2019 Bylaws apparently were adopted, AMME was in the process of seeking re-verification from CVE. Therefore, Protestor maintains, AMME would have been required to provide any new version of its bylaws to CVE as part of the re-verification process. Section II.I, *supra*. The Case File, though, contains neither the 2019 Bylaws nor other contemporaneous documentation, such as minutes of a Board or shareholder meeting during which AMME may have adopted the 2019 Bylaws. *Id.* Protestor contends that AMME knew, or should have known, that the Case File would not contain the 2019 Bylaws, and AMME thus should have introduced them earlier in these protest proceedings. *Id.* Protestor further maintains that, even if admitted, the 2019 Bylaws are invalid, because they are signed only by Mr. Tun, rather than by all AMME Directors/shareholders (as were the 2015 Bylaws). *Id.*

Due to the importance of the 2019 Bylaws to the resolution of this case, OHA requested that AMME produce additional information concerning the circumstances under which the 2019 Bylaws were adopted. Section II.K, *supra*. In response, AMME offers minutes from a Special Meeting of AMME's Board and shareholders, during which AMME's Board and shareholders voted to approve the 2019 Bylaws. Section II.L, *supra*. Both Mr. Tun and Gordon Mori signed the Special Meeting Minutes. *Id.* AMME also offers an additional sworn declaration from Mr. Tun, in which he asserts that he mistakenly uploaded the 2015 Bylaws, rather than the 2019 Bylaws, to CVE during the 2019 re-verification. *Id.* Upon discovering the error, AMME then submitted the 2019 Bylaws to CVE on September 8, 2020. *Id.* Protestor again objects that the Special Meeting Minutes, like the 2019 Bylaws themselves, are not in the Case File. Section II.M, *supra*. Further, Protestor emphasizes, AMME failed to comply with applicable regulations that require an SDVOSB to promptly apprise CVE of changes that would affect the concern's eligibility. *Id.*, citing 38 C.F.R. §§ 74.15(b) and 74.21(d).

Having considered the parties' arguments and the information in question, I find that OHA may properly accept the 2019 Bylaws. Under OHA's rules of procedure governing CVE Protests, "the record closes the date the final response is due." 13 C.F.R. § 134.1007(f)(1). Accordingly, while it is true, as Protestor observes, that AMME could have introduced the 2019 Bylaws earlier in the protest proceedings, the 2019 Bylaws nevertheless were timely submitted to OHA with AMME's response to the Supplemental Protest. Section II.H, *supra*. AMME's response to OHA's request for additional information likewise was timely, as OHA reopened the record expressly to permit AMME to address OHA's questions. Section II.K, *supra*.

OHA's rules of procedure further state that, although OHA adjudicates CVE Protests based primarily on the Case File, OHA also may consider additional "information provided by the protester, the protested concern, and any other parties." 13 C.F.R. § 134.1007(g). In practice, OHA regularly considers information beyond the Case File — such as affidavits, joint venture

agreements, or proposals — so long as such information does not conflict with the Case File. *See, e.g., CVE Protest of In and Out Valet Co.*, SBA No. CVE-174-P (2020).

In the instant case, the 2019 Bylaws, Special Meeting Minutes, and Tun declarations are not inconsistent with the Case File. Protestor contends that it is implausible that Mr. Tun mistakenly uploaded the 2015 Bylaws, rather than the 2019 Bylaws, to CVE in August of 2019, because if Mr. Tun actually made such an error, he made the same error repeatedly by uploading multiple copies of the 2015 Bylaws. Section II.M, *supra*. Although there are three copies of the 2015 Bylaws in the Case File stemming from the 2019 re-verification, all three copies were uploaded to CVE on the same day — August 8, 2019 — along with numerous other records. CF, Exhs. 240, 241.1, and 241. The fact that Mr. Tun uploaded multiple copies of the 2015 Bylaws, then, does not contradict AMME's explanation that Mr. Tun inadvertently provided the 2015 Bylaws to CVE.

Protestor also complains that the Case File contains neither the 2019 Bylaws nor other contemporaneous documentation showing that AMME formally adopted the 2019 Bylaws. A mere absence of documentation, however, does not establish that the bylaws were not amended, or that an AMME Board or shareholder meeting to approve the amended bylaws did not occur. To support its claim that AMME did formally adopt the 2019 Bylaws, AMME has now produced not only the 2019 Bylaws themselves, but also the minutes from the July 12, 2019 Special Meeting, signed by both Mr. Tun and Gordon Mori, during which AMME's Board and shareholders approved the 2019 Bylaws. Sections II.H and II.L, *supra*. AMME also offers two signed, sworn declarations from Mr. Tun attesting that the 2019 Bylaws are the most recent version of AMME's bylaws. *Id.* Nothing in the Case File directly contradicts such evidence, and under OHA's rules of procedure for CVE Protests, OHA must give weight to “specific, signed, factual evidence,” such as the Special Meeting Minutes and Mr. Tun's sworn statements. 13 C.F.R. § 134.1011.

Protestor also observes that AMME would have been required to provide any new version of its bylaws to CVE as part of re-verification in 2019, yet AMME evidently did not do so. In Protestor's view, OHA should consider this to be “an independent basis” to sustain the protest. Section II.M, *supra*. A concern's failure to provide essential information to CVE may be grounds for CVE to cancel that concern's verified status under 38 C.F.R. §§ 74.15 and 74.21, but is not valid grounds for a CVE Protest brought against the concern by a competitor. *See* 13 C.F.R. § 134.1003. Contrary to Protestor's suggestions, then, any AMME negligence in providing required information to CVE is not relevant in this proceeding.

Similarly, it is immaterial that CVE was not in possession of the 2019 Bylaws at the time AMME submitted its initial proposal including price on December 9, 2019. As noted in Section III.B above, the issue in this case is whether AMME was an eligible SDVOSB as of the date of its bid or initial offer including price, and as of the date the CVE Protest was filed. The evidence proffered by AMME demonstrated that AMME adopted the 2019 Bylaws in July of 2019. Sections II.H and II.L, *supra*. The 2019 Bylaws thus were in effect as of the relevant dates for determining eligibility.

Lastly, contrary to Protestor's contentions, the fact that the 2019 Bylaws are signed only by Mr. Tun is not necessarily problematic. Protestor is correct that, according to the 2015 Bylaws, Mr. Tun could not unilaterally have amended the bylaws; indeed, this was a principal basis behind Protestor's critique of the 2015 Bylaws. The evidence produced by AMME, however, shows that AMME's entire Board and shareholders — including AMME's minority owner and Director, Gordon Mori — voted to approve the 2019 Bylaws. Sections II.H and II.L, *supra*. It is worth noting in this regard that California state law provides that a corporation's “[b]ylaws may be adopted, amended or repealed either by approval of the outstanding shares . . . or by the approval of the board,” but does not require that all individual shareholders or directors also must sign any amended bylaws. Cal. Corp. Code § 211.

For these reasons, the 2019 Bylaws, the Special Meeting Minutes, and Mr. Tun's accompanying statements are ADMITTED into the record, and these documents have been considered in rendering this decision.

2. The Merits

Having found it appropriate to consider AMME's 2019 Bylaws, I also find the instant protest must be denied. The record reflects, and Protestor does not dispute, that AMME is majority-owned by Mr. Tun, a service-disabled veteran. Section II.F, *supra*. Mr. Tun is also a Director of AMME, and holds AMME's highest officer position of President. *Id.*

Protestor alleged in its Supplemental Protest that Mr. Tun does not control AMME's Board, as required by 13 C.F.R. § 125.13(e), due to defects in AMME's 2015 Bylaws. While I agree with Protestor that the 2015 Bylaws were flawed, the problems discussed in the Supplemental Protest are resolved by the newer version of AMME's bylaws. Unlike the 2015 Bylaws, which required a supermajority of the Board or of the outstanding shares to amend the bylaws, the 2019 Bylaws may be amended or repealed by the President unilaterally, or by a simple majority of the outstanding shares. Section II.J, *supra*. Similarly, the 2019 Bylaws no longer require that a majority of the Directors be present in order to establish quorum. Instead, the 2019 Bylaws stipulate that “Service-Disabled Veterans Shareholder(s) who control at least 51% of the shares individually or combined shall be necessary to constitute a quorum” for a Board meeting. *Id.* Consequently, under the 2019 Bylaws, Mr. Tun, as President and the majority owner of AMME, has full power to control AMME's Board.

Protestor's claim that California state law still imposes a requirement of a two-thirds shareholder vote to amend the bylaws is meritless. AMME correctly observes that the provision cited by Protestor — California Corp. Code § 902 — pertains to amendments of articles of incorporation, not to bylaws.

With regard to allegations raised in the initial Protest, AMME has persuasively shown that Mr. Tun, notwithstanding his involvement with certain other businesses, works full-time for AMME. Sections II.E and II.F, *supra*. The presumption at 13 C.F.R. § 125.13(k) therefore does not apply here. Further, AMME is headquartered in California, and AMME has demonstrated that Mr. Tun has no need to commute to Rotech's offices in Florida to perform the instant

contract or to conduct business on AMME's behalf. *Id.* The presumption at 13 C.F.R. § 125.13(l) is, thus, likewise inapposite.

AMME similarly has refuted Protestor's allegations that AMME relied upon its mentor, Rotech, to secure letters of supply for the instant procurement. All letters are dated prior to the date that AMME submitted its initial offer for this procurement, and indicate that the suppliers communicated directly with Mr. Tun, not with Rotech. Section II.E, *supra*. Indeed, Rotech is not mentioned anywhere in AMME's proposal. Section II.C, *supra*. The record thus provides no basis to conclude that AMME relied upon Rotech to win the instant contract, or that AMME must rely upon Rotech to perform the contract. Nor can I conclude that Rotech controls AMME through other assistance that Rotech provides. There is no dispute that Rotech and AMME are an SBA-approved mentor and protégé, and SBA regulations are clear that “[n]o determination of affiliation or control may be found between a protégé firm and its mentor based solely on the [MPA] or any assistance provided pursuant to the [MPA].” 13 C.F.R. § 125.9(d)(4). Protestor has not shown that Rotech provides assistance to AMME beyond the scope of the approved MPA.

Protestor also points to various historical eligibility issues, such as AMME's previous co-location with MME and Mr. Tun's previous holding of his stock in AMME through a trust. AMME reasonably explains, however, that such eligibility issues were not in effect as of December 9, 2019 and July 29, 2020, the relevant dates for determining eligibility. Mr. Tun no longer held his ownership of AMME through a trust after March 2019, and AMME ended its co-location with MME in February 2019. Section II.E, *supra*. The historical eligibility issues therefore do not impact AMME's eligibility as an SDVOSB. *E.g.*, *CVE Protest of Alpha4 Solutions LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P, at 8-9 (2019) (challenged firm's prior ownership structure, which ended before the dates to determine eligibility, was “not relevant” in its assessing eligibility).

IV. Conclusion

AMME 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