

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

CVE Protest of:

Reliable Vets, LLC,

Protestor,

Re: American Access Inc.

Solicitation No. 36C77621R0018

U.S. Department of Veterans Affairs

SBA No. CVE-226-P

Decided: April 13, 2022

APPEARANCES

Frank V. Reilly, Esq., Law Office of Frank V. Reilly, Oakland Park, Florida, for Reliable Vets, LLC

Richard J.R. Raleigh, Jr., Esq., Jerome S. Gabig, Esq., Christopher L. Lockwood, Esq., Wilmer & Lee, P.A., Huntsville, Alabama, for American Access Inc.

DECISION¹

I. Introduction and Jurisdiction

On February 17, 2022, the Contracting Officer (CO) for the subject procurement forwarded to the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) a status protest filed by Reliable Vets, LLC (Protestor) against American Access Inc. (American Access) in connection with the U.S. Department of Veterans Affairs (VA) Request for Proposal (RFP) No. 36C77621R0018. Protestor alleges that American Access is not eligible for the subject Service-Disabled Veteran-Owned Small Business (SDVOSB) set aside because it is not controlled by a service-disabled veteran. 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 counsel an opportunity to file a request for redactions if desired. Counsel for both parties informed OHA that it does not intend to make any redaction requests. Therefore, I now issue the entire decision for public release.

134 subpart J. Protester filed its protest within five business days of receiving notification that American Access was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, this matter is properly before OHA for decision.

II. Background

A. CVE Verification

On October 14, 2020, Department of Veterans Affairs, Center for Verification and Evaluation (CVE) informed American Access that its application for reverification of its SDVOSB status was approved after determining that it “is presently, as of the issuance of this notice, in compliance with the regulation.” (Case File (CF), Exh. 231 at 1.) The verification is valid for a period of three years. (*Id.*) American Access was required to report any changes that might adversely affect its eligibility within 30 days of the change. (*Id.*, at 2.)

B. Solicitation

On July 7, 2021, the VA issued RFP No. 36C77621R0018 for the Provision of Aluminum Modular Ramps and Associated Services. (RFP, at 1.) 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 750 employee size standard. (*Id.*) The CO amended the Solicitation to extend the proposal due date to November 4, 2021. (Amendment A00006, at 1.) Protestor and American Access submitted timely offers. On February 17, 2022, the CO announced that American Access was the awardee.

C. Protest

On February 17, 2022, Protestor filed the instant appeal with the CO, challenging American Access' SDVOSB status. (Protest, at 1.) First, Protestor alleges American Access is majority owned by Barry Clark, but controlled by Brian Clark, Paul Clark, David Clark, and Next Day Access, LLC (Next Day Access), who do not hold veteran status. (*Id.*, at 12.)

Protestor supports its allegations with public business records and information available to the public on a social media platform. (*Id.*, at 2-4.) Specifically, Protestor provides images of Brian, Paul, and David Clark's LinkedIn, where they list themselves as members of the Board of Directors (Board) for American Access, Vice President of American Access, and Chief Financial Officer (CFO) of American Access, respectively. (*Id.*, at 4.) Protestor further provides public business records that list Next Day Access' principal address and American Access' company contact address as the same location in Bartlett, Tennessee. (*Id.*, at 5-7.) Protestor suggests that Next Day Access, which is owned by Brian, Paul, and David Clark, is associated with American Access because the firms are “affiliated with the same location.” (*Id.*, at 5.) Further, Sam.gov and other public business records cite Brian Clark as the point of contact and Barry Clark as the alternative point of contact. (*Id.*) Protestor concludes that although Barry Clark is listed as President, this is “only as a nominal title with no actual functional role as President in (sic) the company.” (*Id.*, at 12).

Protestor further contends that although Barry Clark is a service-disabled veteran, who owns 51% shares of American Access, he lacks independent control of the concern. (*Id.*) Protestor provides arguments to support its claim as follows:

First, the awardee's management, ownership, financing and facilities appear to have come from a time when the SDV appears to have had no control over the awardee because the SDV was retired. At that time, American Access was not itself eligible to compete for SDVOSB set asides. Second, the awardee likely maintained the large majority of its workforce that was previously controlled by the non SDV majority owners. Third, the awardee's non SDV management team previously controlled the awardee completely and appears to still do so. Fourth, the SDV appears to lack relevant experience, and is obliged to rely on its more experienced non SDV owners to operate and control the awardee.

(*Id.*) Protestor further argues that Barry Clark lacks the capability to run the day-to-day management and suggest that the continued involvement of the other owners “means they will be exercising control over the business's daily operations.” (*Id.*, at 13.) Protestor concludes that despite his majority ownership percentage, Barry Clark “cannot exercise independent business judgment without great economic risk and that the service-disabled veteran cannot control and does not have the power to control the awardee pursuant to 13 CFR § 125.13 (i)(7).” (*Id.*)

D. American Access Inc.'s Response

On March 7, 2022, American Access responded in the instant protest. (Response, at 1.) American Access proffers background and states that it was created by Brian, Paul, and David Clark in 1997. (*Id.*, at 9.) Brian, Paul, and David Clark “withdrew in 2017 to work on another business, Next Day Access.” (*Id.*, at 8.) Also in 2017, Barry Clark, a service-disabled veteran, became majority shareholder, President and Chief Executive Officer (CEO) of American Access; and David, Brian, and Paul Clark assumed minor roles and became minority shareholders. (*Id.*, at 4.) Paul Clark serves as the Chief Financial Officer of American Access and is a member of the Board. (*Id.*) Brian, and David Clark also serve on the Board for American Access but assume larger roles in Next Day Access. (*Id.*)

American Access contends that Barry Clark controls the concern. (*Id.*, 13.) Barry Clark's control is evidenced in American Access' Amended and Restated Bylaws (Bylaws) and Articles of Incorporation, which cites Barry Clark as the majority shareholder, President, and CEO. (*Id.*) American Access maintains that Barry Clark controls the day-to-day operations as follows:

Barry Clark: (1) is involved in the management of the SDVOSB, (2) is a current employee of the SDVOSB, (3) receives compensation from the SDVOSB, (4) is the SDVOSB's highest-ranking officer (CEO and President), (5) has an office at the business, (6) has employees that report to him, (7) holds a majority interest in the SDVOSB, (8) is signed on the financing, (9) uses his independent business judgment in making decisions, (10) works for the business during normal working

hours, and (11) is located within a reasonable commute of the SDVOSB's headquarters and job-sites locations.

(*Id.*, 14.) American Access also provides a sworn declaration from Barry Clark, where he supports his testimony with copies of his resume and Identification Card from the VA. (Barry Clark Del., at 10-11, 15.) Barry Clark's resume details his background, experience and education in accounting, business administration, and finance; as well as his experience as CEO of American Access since 2017. (*Id.*, at 10-11.)

American Access further asserts that more than 51% of its ownership is unconditionally and directly owned by Barry Clark. (*Id.*, at 2.) American Access explains that Barry Clark “purchased the majority of the shares of the business and became the majority shareholder of American Access in 2017. . . .” (*Id.*, at 4.) American Access maintains that its “Bylaws contain no supermajority voting requirements,” neither do its Articles of Organization. Therefore, Barry Clark's 51% share of voting stock meets SBA requirements under 13 C.F.R. § 125.12(d). (*Id.*, 17.) Barry Clark's Declaration includes American Access' Stock Ledger, which records that Barry Clark holds 51% of the voting stock (510 shares), while the remaining shareholders each hold 16.3163% of the voting stock (163 shares) as of 2017. (*Id.*) The Bylaws do not include any provisions for supermajority voting. (See *Id.*, at 9-22.) A majority of shares shall constitute a quorum. (*Id.*, at 20.) Any corporate action to be taken shall be authorized by a majority vote of shareholders. (*Id.*) American Access concludes that Barry Clark controls the Board because he “holds more than 51% of the stock, sufficient to meet any voting requirements.” (Response, at 17.)

E. Case File

According to documentation in the Case File, American Access is incorporated in Tennessee. (CF, Exh. 18.) Barry, Brian, Paul, and David Clark are the shareholders and members of the Board of American Access, with Barry Clark as the Chairman. (See CF, Exhs. 16, 17, 18, 257.) As of 2017, Barry Clark owns 51% (510 shares) of American Access; and Brian, Paul, and David Clark each own 16.3163% (330 shares), respectively. (CF, Exh. 23.)

Barry Clark is a service-disabled veteran; he is CEO and President of American Access. He is also the highest paid employee as of 2022; and he works Monday to Friday on an average of 7.25 hours a day, 4 days a week. (See CF, Exhs. 7, 210, 245, 257.)

Brian Clark was President of American Access until 2017; now he is the Chief Operating Officer of Next Day Access. (See CF, Exhs. 37, 38, 257.) Paul Clark is the CFO of American Access and reports financial data to Barry Clark. (CF, Exh. 257.) David Clark was the Vice President of American Access until 2017, when he became the President of Next Day Access. (CF, Exh. 197.)

On December 20, 2017, CVE verified American Access as a SDVOSB. (CF, Exh. 94.) On October 14, 2020, CVE reverified American Access as a SDVOSB. (CF, Exh. 231.)

F. Supplemental Pleadings

On March 21, 2022, American Access filed a Supplementation of the Record. (AA Supp., at 1.) This filing included sworn declarations and attachments from Kent Buckner, its Executive Vice President as well as Barry, Brian, Paul, and David Clark. (*Id.*) Mr. Buckner declares that Barry Clark is a “hands-on” manager, who lives near the office, and is the first person in every day. Brian, Paul and David Clark do not take an active role in the day-to-day operations of the business. (Buckner Declaration, at 1-3.) Paul Clark declares that while he is American Access's CFO, Barry Clark is the primary manager of the concern's finances, which leaves him relegated to bookkeeping. (Paul Clark Declaration, at 1-3.) Brian Clark states that while is the founder of American Access, Barry Clark now runs the concern. His position as point of contact is merely a ministerial one. Brain Clark is only a minority shareholder and member of the Board. (Brian Clark Declaration at 1-5.) Davis Clark asserts he works at American Access only once a week, and that Barry Clark runs the concern. (Dave Clark Declaration, at 1-3.)

On March 29, 2022, Protestor filed Protestor's Supplemental Allegations. (Pro. Supp., at 1.) Upon review of the Case File, Protestor argues that there is an undistinguishable affiliation between American Access and Next Day Access as well as Barry Clark and the other brothers. (*Id.*, at 2.) Protestor asserts Next Day Access submits bids in American Access's name, using Next Day's address. (*Id.*) Protestor makes a number of allegations concerning American Access's connections to Next Day Access, including subcontracting between the firms, handling of invoices, and similar matters. (*Id.*, at 2-3.) Protestor cites to 13 C.F.R 121.103(f) regarding affiliation based on identity of interest and maintains “no clear fracture has been established.” (*Id.*) Protestor further argues that “CVE has not received sufficient clarifying documentation addressing the role and involvement of non-SDVs in the management and control of the concern.” (*Id.*)

On April 8, 2022, American Access filed Response to Protestor's Supplemental Allegations. (AA Resp., at 1.) American Access argues that Protestor's supplemental allegations should be dismissed because the arguments were not presented in the original appeal. (*Id.*, at 4.) Specifically, American Access contends that Protestor's arguments regarding affiliation constitute an untimely size protest that relies on documents not presented in the Case File nor in the record of this instant appeal, and therefore has no merit. (*Id.*, at 4-9.) Further, American Access disregards Protestor's supplemental allegations regarding insufficient documentation and reiterates that CVE reviewed and verified Barry Clark's control in 2017 and 2020. (*Id.*, at 9.)

III. Discussion

A. Burden of Proof

As the protested firm, American Access 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 Protestor and American Access is part of the record.

B. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more SDVs. 38 C.F.R. §§ 74.2(a); 74.4; 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Blue Cord Design and Constr., LLC*, SBA No. CVE-100-P (2018). As discussed further below, American Access has persuasively demonstrated that it meets these requirements. In reviewing the protest, the record, and American Access' responses, I find Protestor's allegations to be speculative and without a legal or factual basis. Therefore, I must deny this protest.

In a CVE protest concerning a procurement, the dates for determining the eligibility of the protested concern are (1) the date of the bid or initial offer that included price, and (2) the date the CVE protest was filed. 13 C.F.R. § 134.1003(d)(1); *CVE Protest of Alpha4 Solutions, LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019). The relevant dates are November 4, 2021, the date bids were submitted; and February 17, 2022, the date the protest was filed. Section II.E, *supra*. The record reflects no change in American Access' status in the intervening time. *Id.*

In the context of a corporation, at least 51% of the aggregate of all stock and of each class of voting stock outstanding must be unconditionally owned by one or more service-disabled veterans. 13 C.F.R. § 125.12(d). The control requirement means that both long-term decision-making and “the day-to-day management and administration of the business operations” must be conducted by one or more service-disabled veterans. 13 C.F.R. § 125.13(a). The service-disabled veteran must hold the position of the highest officer in the concern. 13 C.F.R. § 125.13(b). If the service-disabled veteran is not the most highly compensated officer of the firm, there is a rebuttable presumption that they do not control it. 13 C.F.R. § 125.13(i)(2). If the concern is a corporation, the service-disabled veteran must control the Board of Directors. 13 C.F.R. § 125.13(e). If the service-disabled veteran owns at least 51% of the concern's stock, has a seat on the Board, and there are no supermajority voting requirements, the service-disabled veteran is deemed to control the Board. 13 C.F.R. § 125.13(e)(1)(ii). The terms of the concern's governing documents determine who controls the decisions of the company. *See CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15 (2021), citing *XOtech LLC v. United States*, 950 F.3d 1376, 1380 (Fed. Cir. 2020).

The record reflects Barry Clark's 51% stock ownership in American Access as required under 13 C.F.R. § 125.12(d). Sections II.D and II.E, *supra*. This issue is not in dispute.

Protestor's arguments raised in its supplemental allegations asserting an identity of interest leading to finding of affiliation are inapposite here. These are issues raised in determining a concern's size. The relevant regulation (13 C.F.R. 121.103(f)) is part of SBA's size regulations. If Protestor wished to question American Access' size, it would have had to file a size protest within five business days of learning of the award to American Access. 13 C.F.R. § 121.1004(a). To raise these issues now is to make an untimely size protest. The issue of identity of interest is irrelevant here.

The remaining issues in dispute are control over the corporation and whether there are supermajority voting requirements which could affect the SDV's control of the concern under 13 C.F.R. §§ 125.13(e) & (f).

Protestor alleges that Barry Clark does not make long-term decisions nor control the day-to-day management of American Access, as required by 13 C.F.R. § 125.13(a). Section II.C, *supra*. To support its claim, Protestor provides social media profiles and business records. *Id.* Protestor speculates that American Access depends on its non-veteran owners who serve as President, Vice President, and on the Board. *Id.* These allegations are contradicted by sworn declarations of the Clarks and Mr. Buckner and other evidence in the record. Sections II. D and II.E, *supra*. OHA must give greater weight to sworn declaration over mere assertions and speculations. 13 C.F.R. § 134.1011; *CVE Protest of Veterans Command, LLC*, SBA No. CVE-191-P, at 4 (2021). Sworn statements from Kent Buckner, Barry, Brian, Paul, and David Clark give first-hand evidence that Barry Clark is the sole President and CEO that controls both, the long-term decision making and day-to-day operations of American Access, and thus, controls the concern. 13 C.F.R. § 125.13(a).

In response to the protest, American Access proffers evidence that Barry Clark controls the day-to-day operations of the concern. Section II.D, *supra*. Specifically, Barry Clark, is the highest-ranking officer, he has subordinates, he signs governing documents, he works daily hours and is within a reasonable commute from American Access' principal place of business. *Id.* American Access' response to this instant appeal and response to Protestor's supplemental allegations is further supported by the Case File. Section II.E and II.F *supra*. Barry Clark is identified as president on governing business documents including, American Access' Shareholders Agreement, Bylaws, and Amended and Restated Charter. *Id.* Barry Clark also receives the highest salary, his hours are documented as 7.25 hours, 4 days a week, and his resume lists extensive experience in finance and business management. *Id.* These factors hold considerable weight; thus, I find that American Access has established that Barry Clark manages day to day operations. 13 C.F.R. § 125.13(a).

Further, American Access maintains that Barry Clark's ability to own and control the concern is not limited by a supermajority vote provision in the Bylaws. Section II.D, *supra*. In reviewing the Bylaws, considering Barry Clark's position as CEO, and his majority share of American Access, it is clear that there is no supermajority vote required in its Bylaws, nor is any required under Tennessee law. See Sections II.D and II.E, *supra*; Tenn. Code Ann. § 48-58-205. American Access maintains that Barry Clark's 51% stock ownership establishes his control. Section II.D, *supra*. According to the Bylaws, a quorum constitutes a majority of the outstanding shares, and Barry Clark owns a majority of the shares. *Id.* Thus, it is clear that Barry Clark has the majority of American Access' stock, he is the chairman of the Board, and there is no supermajority voting requirement. *Id.* Accordingly, American Access meets the regulatory requirement for control of the Board by Barry Clark. 13 C.F.R § 125.13(e)(1)(ii).

Having found no clauses in American Access' Bylaws which require supermajority voting or which limit the majority shareholder's control, the record reflects, and Protestor does not dispute, that American Access is majority-owned by Barry Clark. Section II.E, *supra*. The record, including American Access' own corporate documents and sworn declarations of the

shareholders and Executive Vice President, reflects that, contrary to the assertions of the Protestor based Internet postings and speculation, Barry Clark is also the sole President of American Access, controls the board, and manages day to day operation of the concern. *Id.* Accordingly, I find the Protestor's allegations are meritless, and that American Access is owned and controlled by Barry Clark, a service-disabled veteran.

IV. Conclusion

For the above reasons, the protest 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).

CHRISTOPHER HOLLEMAN
Administrative Judge