

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

CVE Protest of:

Veterans Care Medical Equipment, LLC,

Protestor,

Re: Mid-Cities Home Medical Delivery
Service, LLC, d/b/a Mid-Cities Medical

Solicitation No. 36C26221R0082

U.S. Department of Veterans Affairs

SBA No. CVE-241-P

Decided August 29, 2022

APPEARANCES

David F. Dowd, Esq., Potomac Law Group, PLLC, Washington, D.C., for Veterans Care Medical Equipment, LLC

Peter B. Ford, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Mid-Cities Home Medical Delivery Service, LLC d/b/a Mid-Cities Medical

DECISION¹

I. Introduction and Jurisdiction

On May 2, 2022, Veterans Care Medical Equipment, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Mid-Cities Home Medical Delivery Service, LLC d/b/a Mid-Cities Medical (Mid-Cities Medical), in connection with U.S. Department of Veterans Affairs (VA) Request for Proposal (RFP) No. 36C26221R0082. Protestor alleges that Mid-Cities Medical will be unduly reliant upon a non-SDVOSB subcontractor, [Subcontractor], to perform the contract, and that Mid-Cities Medical is not fully controlled by Mr. Tracy M. Reep, its service-disabled veteran Chief Executive Officer (CEO) and Managing Member. For the reasons discussed *infra*, the protest is denied.

¹ This decision was originally issued under a protective order. After receiving and considering redactions proposed by Mid-Cities Medical, and Protestor's objections thereto, OHA now issues this redacted decision for public release.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part 134 subpart J.² Protestor filed its protest within five business days after receiving notification that Mid-Cities Medical 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. The Procurement

On May 8, 2021, VA issued Request for Proposals (RFP) No. 36C26221R0082 for in-home oxygen and ventilator services for VA patients in Arizona. (Amended Case File (Amended CF), Exh. 346, at 1, 3.)³ More specifically, according to the RFP's Performance Work Statement (PWS):

The contractor shall provide the labor, facilities, transportation, and management necessary to perform in-home oxygen and in-home ventilator services for the following healthcare systems: Phoenix VA Health Care System (PVAHCS) and Northern Arizona VA Health Care System (NAVAHCS) . . . PVAHCS currently serves an estimated 1900 patients with in-home oxygen and 15 patients with in-home ventilator services. NAVAHCS currently serves an estimated 1600 patients with in-home oxygen and 5 patients with in-home ventilator services. This includes storage and management of Government-owned oxygen and ventilator equipment, delivery, set-up, instruction and maintenance of equipment for VA beneficiaries.

(*Id.* at 13.)

The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 621610, Home Health Care Services, with a corresponding size standard of \$16.5 million average annual receipts. (*Id.* at 1.) The RFP incorporated the full text of VA Acquisition Regulation (VAAR) clause 852.219-74, Limitations on Subcontracting — Monitoring and Compliance (JUL 2018), stipulating that “any contract resulting from this solicitation is subject to the limitation on subcontracting requirements in 13 CFR 125.6.” (*Id.* at 44-45.) Proposals initially were due June 9, 2021. (*Id.* at 1.) Final proposal revisions were due November 1, 2021. (Amended CF, Exh. 419, at 1.) Mid-Cities Medical and Protestor submitted timely proposals.

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).

³ CVE originally submitted the Case File to OHA on May 25, 2022, and subsequently transmitted an Amended Case File on August 1, 2022. *See* Sections II.F and II.K, *infra*. Unless otherwise indicated, citations are to the Amended Case File.

B. Proposal

Mid-Cities Medical's proposal states that it will provide in-home oxygen and ventilator services for beneficiaries of PVAHCS and NAVAHCS. (Proposal, Vol. II at 3.)⁴ Mr. Reep signed the proposal on behalf of Mid-Cities Medical. (*Id.* at 1.)

The proposal identifies Mid-Cities Medical as the proposed prime contractor, and [Subcontractor] as the sole proposed subcontractor. (*Id.* at 3.) Mid-Cities Medical “currently [is] servicing the needs of 4,102 Veterans on Home Oxygen and another 36 Veterans on Ventilators,” and has “solidified a subcontract relationship” with [Subcontractor] to “further augment [its] experience, capabilities, and breadth of service area.” (*Id.*)

The proposal does not specifically delineate how work on the instant procurement would be divided between Mid-Cities Medical and [Subcontractor]. According to the proposal, the preponderance of contract dollar value is associated with the PVAHCS portion of the contract. (Proposal, Vol. III, Price Worksheet.)

C. Protest

On April 25, 2022, the CO informed Protestor that Mid-Cities Medical had been selected for award. Protestor filed the instant status protest on May 2, 2022, and the CO forwarded the protest to OHA for review. Accompanying its protest, Protestor offered a declaration from Ms. Dania Vega, Director of Quality Improvement for Rotech Healthcare, Inc. (Rotech); e-mail correspondence between Ms. Vega and Mr. Reep, purporting to show a change in Mr. Reep's title at Mid-Cities Medical; and screenshot printouts from Mid-Cities Medical's website, describing its branch locations. (Protest, Exhs. A-E.)

In the protest, Protestor alleges that Mid-Cities Medical will be unusually reliant upon a non-SDVOSB subcontractor to perform the instant contract. (Protest at 5-7.) Mid-Cities Medical “lacks a physical footprint” in the Phoenix and Prescott areas of Arizona, so “[t]here is every reason to conclude” that Mid-Cities Medical must rely upon a subcontractor to perform the required work. (*Id.* at 6.) Moreover, according to Protestor, Mid-Cities Medical already is heavily reliant upon a subcontractor to perform a contract for similar services in California. (*Id.* at 5 and Exh. B.) Protestor contends that Mid-Cities Medical “is not even supervising all transition calls among [VA], the incumbent contractor [Rotech], and [Mid-Cities Medical's subcontractor]” for the California contract. (*Id.*) In Protestor's view, such an approach suggests that Mid-Cities Medical “may have little or no role in administration of the contract effort.” (*Id.*)

Protestor also alleges that Mid-Cities Medical is not fully controlled by Mr. Reep. (*Id.* at 5-6.) In support, Protestor highlights that, during November 2021, Mr. Reep's title changed from CEO to “President/Project Manager.” (*Id.* at 5 and Exhs. C-D.) As a result, it is possible that Mr. Reep may “no longer ha[ve] overall responsibility for [Mid-Cities Medical] as he is not the chief ranking officer.” (*Id.* at 6.) Protestor argues that Mr. Reep's lack of control over Mid-Cities

⁴ Citations are to Mid-Cities Medical's final revised proposal submitted on November 1, 2021.

Medical is further demonstrated by his statement that Mid-Cities Medical and [Subcontractor] jointly “would be willing to negotiate prices for transitioned equipment” from Rotech. (*Id.*) Protestor additionally observes that Mid-Cities Medical has been characterized on the internet as a “joint venture,” which may indicate that Mid-Cities Medical has undergone a restructuring or reorganization. (*Id.*)

D. Teaming Agreement

On May 19, 2022, Mid-Cities Medical responded to the protest. Accompanying its Response, Mid-Cities Medical offered a sworn declaration from Mr. Reep; a Teaming Agreement between Mid-Cities Medical and [Subcontractor], dated March 13, 2021; excerpts from Mid-Cities Medical's proposal for the instant procurement; and a breakdown of proposed costs for Contract Line Item Numbers (CLINs) pertaining to services. (Response, Exhs. A-D.)

The Teaming Agreement defines Mid-Cities Medical as the “Prime Contractor” and [Subcontractor] as the “Subcontractor.” (Teaming Agreement at 1.) “Client” is identified as VA. (*Id.*) The Teaming Agreement states, in pertinent part:

1.01 Project Proposal

1.01.1 Prime Contractor shall prepare and submit a proposal for the Project to the Client with the objective of selection of Prime Contractor for award of the Prime Contract. Prime Contractor shall be responsible for and have express and exclusive control over the preparation and submission of the proposal to the Client, including, without limitation, strategic and tactical decisions concerning development and execution of the proposal, which shall be the final decision of Prime Contractor. For this reason, and consistent with SBA regulations, Prime Contractor shall have the sole right to decide the form and content of all documents submitted to the Client. The responsibility for preparing and submitting the proposal to the Client shall be with Prime Contractor. Prime Contractor will use its discretion to incorporate data and other relevant information furnished by Subcontractor into the proposal. Prime Contractor shall use reasonable efforts to secure approval of Subcontractor from the Client, insofar as such approval is required.

1.01.2 Subcontractor shall at all times use its best efforts, under Prime Contractor's exclusive direction, to assist Prime Contractor in preparing and submitting those portions of the proposal that relate to its anticipated work under Attachment A, including, but not limited to, preparing and/or providing: (i) the substantive content of its area of the proposal and other data; (ii) pricing information (including detailed supporting schedules and sufficient source data for the Client to evaluate Subcontractor's bid rates), certificate of current cost and pricing data; (iii) letters from Subcontractor and/or its employees demonstrating their commitment to the Project; and (iv) procurement integrity certificate and other required representations and certifications. The format of Subcontractor's cost and technical information shall be as specified by Prime Contractor.

(*Id.* at 1-2.)

Attachment A to the Teaming Agreement indicates that [Subcontractor] will receive “no more than 49% of the amount paid by the government to Prime Contractor” for services under the instant procurement. (*Id.* at 17.) Attachment A continues:

2. Prime Contractor and Subcontractor shall perform the following tasks, as more fully described in the RFP's Statement of Work and the proposal: [Mid-Cities Medical] will perform the [PVAHCS]. [Subcontractor] will perform the [NAVAHCS]. Additionally, [Subcontractor] will serve as a supply vendor to [Mid-Cities Medical] for oxygen refills, tank rentals (as needed) and liquid oxygen services. [Mid-Cities Medical] will be responsible for ensuring that it performs a minimum of 51% of the overall total value of the [contract].

...

4. It is understood that allocation of work to Subcontractor noted above is dependent and subject to change based on: (i) Prime Contractor's compliance with [Federal Acquisition Regulation (FAR) clause] 52.219-14, Limitations on Subcontracting; (ii) Subcontractor's satisfactory performance of all pre-award and subcontracted work pursuant to the terms of any resultant subcontract; (iii) Subcontractor's provision of a competitive cost structure that is consistent with Prime Contractor's price to win proposal strategy for the RFP; and (iv) the amount of work that is actually ordered by the Client in the work area(s) allocated to Subcontractor.

(*Id.*)

E. Mid-Cities Medical's Response

In response to the protest, Mid-Cities Medical first argues that Protestor bases its allegations of unusual reliance primarily on an “entirely unrelated procurement,” which is completely “irrelevant” to the instant RFP. (Response at 3.) Protestor's allegations are unfounded in any event, as Mid-Cities Medical is “in full control” of the California contract. (*Id.*, citing Reep Decl. ¶ 4.)

Mid-Cities Medical denies that there has been any recent change in Mr. Reep's control over Mid-Cities Medical. (*Id.* at 3.) Mr. Reep is the Managing Member and CEO, and as such is Mid-Cities Medical's highest-ranking officer. (*Id.* at 4.) Mid-Cities Medical explains that Mr. Reep's title as reflected in the e-mail cited by Protestor was incorrect, stemming from the fact that Mr. Reep sent the e-mail in question from his cell phone. (*Id.*) Mid-Cities Medical insists that “[t]here have been no changes to [Mid-Cities Medical's] corporate documents or structure since [it] was last reverified as an SDVOSB in June 2020.” (*Id.*)

Next, Mid-Cities Medical claims that its Teaming Agreement with [Subcontractor], and its proposal for the instant procurement, “entirely refute” Protestor's allegation that Mid-Cities Medical will be unusually reliant upon [Subcontractor] to perform the contract. (*Id.* at 4-5.) Attachment A to the Teaming Agreement makes clear that Mid-Cities Medical, the prime contractor, will perform the PVAHCS portion of the contract, whereas [Subcontractor], the subcontractor, will perform the NAVAHCS portion. (*Id.* at 5, citing Teaming Agreement at 17.) Additionally, pointing to its estimated cost breakdown for services and its proposal, Mid-Cities Medical contends that it will comply with limitations on subcontracting, because it will self-perform a majority of contract services (60.95%), while subcontracting only approximately 39.05% to [Subcontractor]. As Mid-Cities Medical will comply with limitations on subcontracting, it is not reliant upon a non-SDVOSB subcontractor. (*Id.* at 4-5, citing 13 C.F.R. § 125.18(f)(2) and *CVE Protest of Welch Constr., Inc.*, SBA No. CVE-210-P (2021).) Mid-Cities Medical maintains that although the RFP calls for both supplies and services, the CO assigned a services NAICS code, so Mid-Cities Medical need only comply with the subcontracting limitations provisions relating to services. (*Id.* at 6-7, citing 13 C.F.R. § 125.6 and 81 Fed. Reg. 34,243 (Jun. 30, 2016).)

F. Case File

On May 25, 2022, VA's Center for Verification and Evaluation (CVE) transmitted the Case File, comprised of 125 exhibits, to OHA. The Case File contains a joint venture agreement (JVA) for Mid-Cities Medical, signed by representatives of Wounded Troops Up, LLC (WTU) and [XXXXXX] on March 12, 2013. (Case File (CF), Exh. 30.) The JVA indicates that WTU, a verified SDVOSB, owns 51% of the joint venture, and is its Managing Venturer. (*Id.* at 2-3.) [LX] owns the remaining 49%. (*Id.* at 3.) According to the JVA, Mr. Reep, an employee of WTU, is Project Manager for the joint venture. (*Id.* at 2.) Subject to the control of WTU, Mr. Reep will “carry out the policy decisions” and oversee “the day-to-day responsibilities of performing [VA] Contracts.” (*Id.*)

The Case File contains Restated and Amended Articles of Organization (Articles of Organization) for Mid-Cities Medical, dated October 16, 2007. (CF, Exh. 36.) The Articles of Organization indicate that Mid-Cities Medical is a limited liability company based in the state of Texas. (*Id.* at 1-2.) WTU is identified as the sole manager of Mid-Cities Medical. (*Id.* at 3.) According to Mid-Cities Medical's Amended and Restated Operating Agreement, executed on March 12, 2013, WTU owns 51% of Mid-Cities Medical, and [XXXXXX] owns the remaining 49%. (CF, Exh. 31 at 3.) WTU is the Managing Venturer of Mid-Cities Medical, and Mr. Reep, an employee of WTU and a service-disabled veteran, is the Project Manager. (*Id.* at 2.)

G. Mid-Cities Medical's Objection to the Case File

On June 1, 2022, Mid-Cities Medical objected to the Case File as incomplete, and moved to supplement the record with 13 additional exhibits. (Objection at 2.) Mid-Cities Medical explains that, although it originally was formed as a joint venture, it underwent a change of ownership in 2016 whereby Mr. Reep, in his individual capacity, acquired 51% ownership of Mid-Cities Medical, and Mid-Cities Medical was “converted to a standalone entity.” (*Id.* at 3.) Mid-Cities Medical states that it previously provided these and other documents to CVE, but

they are omitted from the Case File. Mid-Cities Medical requests that the following exhibits be added to the Case File:

1. A “Second Amended and Restated Operating Agreement,” dated October 31, 2016 (Exh. B);
2. A “First Amendment to the Second Amended and Restated Operating Agreement,” dated March 6, 2020 (Exh. C);
3. A “Restated Certificate of Formation” dated October 26, 2016 (Exh. D);
4. Mid-Cities Medical's response, dated June 27, 2017, to a CVE notice, which had expressed concerns about the business relationship between Mid-Cities Medical and [XXXXXX] (Exh. E);
5. Payroll and accounting records from 2020 and 2021 (Exhs. F-L); and
6. Minutes of an annual meeting held May 5, 2021 (Exh. M).

Mid-Cities Medical also moves to admit a printout listing dozens of documents that were reportedly uploaded to CVE during 2020 and 2021. (*Id.*, Exh. A.)

Mid-Cities Medical argues that its “Second Amended and Restated Operating Agreement,” and the “First Amendment” to this document, confirm that Mr. Reep, a service-disabled veteran, is the Managing Member, CEO, and highest-ranking officer of Mid-Cities Medical. (*Id.* at 3.) The “Restated Certificate of Formation” shows that Mid-Cities Medical is now majority-owned by Mr. Reep, as an individual. (*Id.*) Mid-Cities Medical states that it provided the payroll information and meeting minutes to CVE following a site visit in July 2021. (*Id.* at 4.)

H. Supplemental Protest

On June 10, 2022, after its counsel reviewed the Case File under the terms of an OHA protective order, Protestor moved to supplement its protest. Protestor highlights that, according to the Case File, WTU is the majority owner and Managing Member of Mid-Cities Medical, a joint venture. (Supp. Protest at 2.) WTU, however, does not currently exist under Texas law and is not itself a verified SDVOSB. (*Id.*) Based on the Case File, OHA must conclude that Mid-Cities Medical is not eligible SDVOSB. (*Id.*)

Pointing to the “Restated Certificate of Formation” reflecting a change of ownership from WTU to Mr. Reep, proffered as part of Mid-Cities Medical's objections to the Case File, Protestor contends that any such change of ownership would not alter WTU's rights under the Operating Agreement. (*Id.*) Protestor complains that Mid-Cities Medical “does not state when or how” the purported change of ownership was reported to CVE, nor has Mid-Cities provided sufficient documentation evincing such a change. (*Id.*) Protestor further observes that the signed VA Form 0877s in the Case File all pre-date the purported change of ownership. (*Id.*)

Protestor alleges that the documents proffered as part of Mid-Cities Medical's objections to the Case File indicate that [XXXXXX], the 49% owner of Mid-Cities Medical, [XXXXX XXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 3.) In Protestor's view, "some part of Mid-Cities [Medical's] need to rely on [Subcontractor] may stem from [XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXX]." (*Id.*)

Protestor concludes that OHA should decline to consider the additional exhibits offered by Mid-Cities Medical, because such exhibits, if valid and genuine, should long since have been provided to CVE and therefore would be included in the Case File. (*Id.*) In transmitting the Case File to OHA, the CVE Director certified that the Case File was a "true and correct" copy of the information available to CVE. (*Id.* at 1.) Further, OHA has no way to verify whether Mid-Cities Medical has now produced all relevant information. Protestor notes that "Exhibit A to Mid-Cities [Medical's] Objection to the Case File lists numerous documents that Mid-Cities [Medical] has not tendered and which are not otherwise included in the Case File." (*Id.* at 3-4.)

I. Reply

On June 10, 2022, Protestor requested leave to reply to Mid-Cities Medical's Response, and submitted its proposed Reply. Protestor argues that a Reply is appropriate to address new information submitted by Mid-Cities Medical, such as the Teaming Agreement, absent from the Case File. (Motion at 1.) Accordingly, for good cause shown, Protestor's motion to reply is GRANTED.

In the Reply, Protestor highlights that Mid-Cities Medical has now teamed with [Subcontractor] to perform a "second" procurement. (Reply at 1.) While Mid-Cities Medical contends that the first procurement is irrelevant, "repeated reliance on another party to sustain the business base is undue reliance." (*Id.* at 2.) As such, Protestor claims, Mid-Cities Medical "misses the bigger picture." (*Id.* at 1.)

Next, Protestor asserts that Mid-Cities Medical cannot meet limitations on subcontracting requirements because the Teaming Agreement reflects that [Subcontractor] will serve as a supply vendor for oxygen refills, tank rentals, and liquid oxygen services "in addition to" performing the NAVAHCS portion of the services. (*Id.* at 2.) Protestor claims that this suggests that [Subcontractor] "will be performing services beyond the identified [CLINs]." (*Id.*)

In addition, Protestor argues that the Teaming Agreement states that "the work to be performed by the parties is to be described more fully in the RFP and "the proposal", but the full proposal is not in the record, thus Mid-Cities Medical has not provided a "complete picture of what actual services will be." (*Id.* at 3.) Protestor further asserts that Mid-Cities Medical may be reliant upon [Subcontractor] to finance and obtain the supplies for the contract because it lacks "the capacity to finance the effort" due to [XXXXXXXXXXXXXXXXXXXX]. (*Id.* at 3 n.1.)

Protestor avers that the Teaming Agreement "presents a scenario where the proposed subcontractor will perform 40% of the services and also provide all of the required supplies." (*Id.*, emphasis Protestor's.) Even if Mid-Cities Medical can comply with the limitations on

subcontracting, Mid-Cities Medical still will be heavily reliant upon [Subcontractor], which is not an SDVOSB, to perform the instant contract.

J. Supplemental Response

On June 27, 2022, Mid-Cities Medical responded to the supplemental protest. Mid-Cities Medical contends that Protestor bases its supplemental allegations on “outdated documents” in the Case File. (Supp. Response at 3.) More specifically, although Mid-Cities Medical originally was formed as a joint venture between WTU and [XXXXXX], it subsequently underwent a change of ownership, and now is “an ongoing business enterprise with perpetual duration” majority-owned by Mr. Reep. (*Id.*) Mid-Cities Medical previously has provided documentation to CVE regarding the ownership change, and to show that Mid-Cities Medical is controlled by Mr. Reep, but such information “appear[s] to not have been included in the CVE [C]ase [F]ile by mistake.” (*Id.*)

Mid-Cities insists that, through its objections to the Case File, it has provided all evidence necessary to establish its eligibility as an SDVOSB. OHA should conclude that Mr. Reep is “the controlling owner and manager” of Mid-Cities Medical, and that Mid-Cities Medical is “in no way reliant” on [Subcontractor]. (*Id.* at 4.)

K. Amended Case File

On August 1, 2022, CVE submitted an amended version of the Case File (the Amended Case File), comprised of 426 exhibits, to OHA. CVE explained that records inadvertently were omitted from the original Case File, due to clerical error. On August 2, 2022, OHA reopened the record to permit the parties to address new information in the Amended Case File, and to supplement their prior protest allegations or responses. No additional submissions were received.

The Amended Case File contains a copy of Mid-Cities Medical's “Second Amended and Restated Operating Agreement” (Operating Agreement), dated October 31, 2016, and the “First Amendment” to this document, dated March 6, 2020. (Amended CF, Exhs. 255-56.) The Operating Agreement indicates that Mid-Cities Medical “has undergone a corporate restructuring for good and valid business reasons” and that the Members, Mr. Reep and [XXXXXX], wish to amend an earlier iteration of the agreement. (*Id.*, Exh. 256 at 1.) According to the Operating Agreement, Mr. Reep, a service-disabled veteran, “directly and unconditionally” owns 51% of Mid-Cities Medical. (*Id.* at 4.) [XXXXXX] owns the remaining 49%. (*Id.*) Mr. Reep is the Managing Member of Mid-Cities Medical, and also “shall serve as [Mid-Cities Medical's] Chief Executive Officer (“CEO”), its highest-ranking officer.” (*Id.* at 2, 7-8.) With respect to the Managing Member's powers and control, the Operating Agreement states:

ARTICLE IX — MANAGEMENT OF THE COMPANY; MEMBERS

1. Management by Managing Member. Subject to any limitations and restrictions expressly set forth in this Agreement, (i) the Members shall conduct the activities and affairs of the Company through the Managing Member, and (ii) all powers of the Company, except those specifically reserved to the Members by

[Texas state law] or this Agreement, are hereby granted to and vested in, the Managing Member. Subject to such limitations and restrictions, the responsibility for and control of the management and conduct of the Company's day-to-day activities and operations shall be vested in the Managing Member, and no Member shall be authorized to take actions to exercise such control or responsibility, except through the Managing Member or as otherwise expressly permitted hereunder. The Managing Member may adopt such rules and regulations for the management of the Company not inconsistent with this Agreement or [Texas state law]. Unless expressly delegated specific power and authority by the Managing Member, no Member (other than the Managing Member), individually, shall have any power or authority to act for or on behalf, or to bind, the Company. The Managing Member is [Mr.] Reep.

2. Authority of the Managing Member. The Managing Member shall have all powers necessary to manage and control the day-to-day activities and operations of the Company.

(*Id.* at 6-7.) The Operating Agreement “supersedes all prior agreements and understandings by and among” Mid-Cities Medical and its Members. (*Id.* at 17.)

III. Discussion

A. Burden of Proof

As the protested firm, Mid-Cities Medical 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, Mid-Cities Medical submitted its initial proposal for the instant procurement on June 9, 2021, and the protest was filed on May 2, 2022. Sections II.A and II.C, *supra*. Therefore, OHA must examine Mid-Cities Medical's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

C. Analysis

Pursuant to SBA regulations, an eligible SDVOSB must be at least 51% owned by one or more service-disabled veterans. *See* 13 C.F.R. § 125.12. Here, the record reflects that Mr. Reep, a service-disabled veteran, owns 51% of Mid-Cities Medical, and there are no restrictions on his ownership. Section II.K, *supra*. SBA regulations also require that one or more service-disabled veterans must fully control the SDVOSB. *See* 13 C.F.R. § 125.13. According to the current version of Mid-Cities Medical's Operating Agreement, Mr. Reep is the Managing Member, vested with complete “control of the management and conduct of [Mid-Cities Medical's] day-to-

day activities and operations.” Section II.K, *supra*. Mr. Reep also holds the position of CEO, the highest officer position. *Id.* Thus, Mr. Reep fully controls Mid-Cities Medical in both its daily and long-term aspects. In its initial protest, Protestor observed that, during November 2021, Mr. Reep's title apparently changed from CEO to “President/Project Manager.” Section II.C, *supra*. Mid-Cities Medical reasonably explains, however, that at all relevant times Mr. Reep has held the position of CEO, and that the e-mail referenced by Protestor was in error. Section II.E, *supra*. Mid-Cities Medical also offers a sworn declaration from Mr. Reep to this effect. *Id.* On these facts, Mid-Cities Medical has persuasively shown that it meets the requisite ownership and control requirements.

In its supplemental protest, Protestor alleged that Mid-Cities Medical is a joint venture majority-owned by WTU, which is not a verified SDVOSB. Section II.H, *supra*. This argument, though, was premised on documents in the original Case File. Section II.F, *supra*. Mid-Cities Medical objected to the original Case File as outdated and incomplete, and CVE subsequently filed an amended version of the Case File with hundreds of additional exhibits. Sections II.G and II.K, *supra*. The Amended Case File confirms that, although Mid-Cities Medical previously was structured as a joint venture, it is now a stand-alone business majority-owned, and fully controlled, by Mr. Reep. *Id.* WTU no longer holds any interest or position within Mid-Cities Medical following its restructuring. *Id.* This ownership and business structure remained unchanged during the pertinent dates for determining eligibility. *Id.* Based on the Amended Case File, then, I see no basis to conclude that WTU controls Mid-Cities Medical.

Protestor's remaining argument is that Mid-Cities Medical will be unusually reliant upon a non-SDVOSB subcontractor, [Subcontractor], to perform the instant contract. Sections II.C and II.H, *supra*. This argument fails because SBA regulations provide that:

SBA will find that a prime SDVO contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontract[or]s where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

13 C.F.R. § 125.18(f)(2); *see also CVE Protest of Welch Constr., Inc.*, SBA No. CVE-210-P (2021); *CVE Protest of In and Out Valet Co.*, SBA No. CVE-174-P (2020); *CVE Protest of U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P (2020).

Here, the instant contract calls for both supplies and services and thus is considered a “mixed” contract under 13 C.F.R. § 125.6(b). According to the regulation, in such situations, the NAICS code assigned to the contract is “determinative” in deciding whether the contract is primarily for services or primarily for supplies. Here, a services NAICS code, 621610, Home Health Care Services, was assigned to the RFP. Section II.A, *supra*. Because the instant procurement is deemed to be primarily for services, Mid-Cities Medical need only comply with the “Limitations on Subcontracting” provisions relating to services at § 125.6(a)(1). That regulation, in turn, stipulates that a prime contractor may not subcontract more than 50% of services to entities that are not similarly situated. The prime contractor is not restricted, however,

from subcontracting any or all of the supply components of the procurement. *U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P, at 5.

In the instant case, although Mid-Cities Medical's proposal did not specifically delineate how work would be divided between Mid-Cities Medical and [Subcontractor], Mid-Cities Medical has explained how it will meet limitations on subcontracting restrictions, with supporting evidence. In particular, Mid-Cities Medical will subcontract only a minority of contract services (the NAVAHCS portion of the contract, approximately 39.05%) to [Subcontractor], and will self-perform a majority of contract services (the PVAHCS portion of the contract, approximately 60.95%). Section II.E, *supra*. Such representations are consistent with the underlying proposal and Teaming Agreement. Sections II.B and II.D, *supra*. Mid-Cities Medical thus is compliant with § 125.6, and as a result, is not unusually reliant upon its non-SDVOSB subcontractor pursuant to § 125.18(f). *E.g.*, *Welch Constr.*, SBA No. CVE-210-P, at 4; *U.S. Dep't of Veterans Affairs*, SBA No. CVE-154-P, at 5. Additionally, although Protestor posits that Mid-Cities Medical may need to rely upon [Subcontractor] due to Mid-Cities Medical's purported lack of a pre-existing footprint in Arizona and [XXXXXXXXXXXXXXXX], Protestor has not demonstrated how such factors would prevent Mid-Cities Medical from meeting subcontracting limitations.

IV. Conclusion

Mid-Cities Medical has shown that it is an eligible SDVOSB. 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