

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

CVE Protest of:

Patriot Strategies, LLC,

Protestor,

Re: Titus JV, LLC,

Solicitation No. 36C24622B0020

U.S. Department of Veterans Affairs

SBA No. CVE-243-P

Decided: October 5, 2022

APPEARANCES

Mathew T. Schoonover, Mathew P. Moriarty, John M. Mattox II, Ian P. Patterson,
Schoonover & Moriarty LLC, Olathe, Kansas, for Patriot Strategies, LLC

Patrick B. Kernan, Whitcomb, Selinsky, P.C., Denver, Colorado, for Titus JV, LLC

DECISION¹

I. Introduction and Jurisdiction

On July 26, 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 Patriot Strategies, LLC (Protestor) against Titus JV, LLC (Titus JV) in connection with the U.S. Department of Veterans Affairs (VA) Invitation for a Sealed Bid (IFB) Solicitation No. 36C24622B0020. Protestor alleges that Titus JV 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 (SDV). In the alternative, Protestor alleges that Titus JV, a joint venture comprised of Titus Elevators, LLC (Titus Elevators), a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC), and Armstrong Elevator Company (Armstrong), a Small Business Concern (SBC), is not an eligible SDVO SBC Joint Venture. For the reasons discussed *infra*, the protest is GRANTED.

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. OHA received no requests for redactions. Therefore, I now issue the entire 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. Protester filed its protest within five business days of receiving notification that Titus JV 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 February 1, 2021, Department of Veterans Affairs, Center for Verification and Evaluation (CVE) informed Titus JV 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. 82 at 1.) The verification is valid for a period of three years. (*Id.*) Titus JV was required to report any changes that might adversely affect its eligibility within 30 days of the change. (*Id.*, at 2.)

B. Solicitation

On June 14, 2022, the VA issued IFB Solicitation No. 36C24622B0020 for “a general contractor to provide all labor, materials, equipment, and supervision to complete work associated with upgrade elevators . . .” in Buildings 2 and 2A at the VA Medical Center in Salem, Virginia. (Solicitation, at 1.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 238290, Other Building Equipment Contractors, with a corresponding \$16.5 million annual receipts size standard. (*Id.*) Bids were due July 14, 2022 and the Sealed Bid opening occurred on July 15, 2022. (*Id.*) Protestor and Titus JV submitted timely bids. Titus JV submitted its bid on July 14, 2022. (CF, Exh. 117.) On July 15, 2022, the CO announced that Titus JV was the awardee.

C. Protest

On July 21, 2022, Protestor filed the instant protest with the CO, challenging Titus JV's SDVOSB status. (Protest, at 1.) Protestor asserts that Titus JV is an “irregular entity” that is either a business concern comprised of two owners, Stephen Fronckowiak and Roy Armstrong, or a joint venture comprised of two companies, Titus Elevators and Armstrong. (*Id.*)

First, Protestor contends that if Titus JV is comprised of two owners, then it does not qualify a SDVOSB because the SDV does not meet control requirements enumerated at C.F.R. § 125.14.² (*Id.*, at 1.) Protestor maintains that Mr. Fronckowiak, the SDV, is not located within a reasonable commute to Titus JV's jobsite, and Titus JV thus has failed to rebut the presumption at 13 C.F.R. § 125.14(l). (*Id.*, at 4.) In support, Protestor cites to public records, where Mr. Fronckowiak's residence is listed in the State of Washington, and Google maps, illustrating a 15-

² 13 C.F.R. § 125.13 was redesignated to 13 C.F.R. § 125.14. 87 Fed. Reg. 43731, 43739 (July 22, 2022) (effective Aug. 22, 2022).

hour distance from Titus JV's location in Wyoming. (*Id.*, Exhs. 12, 13.) Mr. Fronckowiak's ability to oversee work virtually, is insufficient to “overcome the regulation's presumption of non-veteran control.” (*Id.*, citing CVE Protest of Blue Cord Dev. Grp., LLC, SBA No. CVE-179-P (2021).) Further, the ability to communicate remotely and delegate responsibility “is not by itself a reasonable rebuttal.” (*Id.*, citing 13 C.F.R. § 125.14(l).)

In further support, Protestor maintains that Mr. Fronckowiak lacks control over the decisions of Titus JV, and Mr. Fronckowiak's reliance on Mr. Armstrong is so extensive that Mr. Fronckowiak cannot exercise independent business judgment without great economic risk. (*Id.* at 5, citing 13 C.F.R. § 125.14(i)(7).) In support, Protestor provides sworn declaration from Nicholas Fitzgerald, where Mr. Fitzgerald asserts that while employed with Andros Contracting, his job placement correspondence and workplace management was conducted by Armstrong. (*Id.*, at 5, citing Exh. 14.) Referencing Mr. Fitzgerald's declaration, Protestor maintains that “Armstrong obtains Titus JV's contracts, he directs the employees, he pays them, and he otherwise manages Titus JV's operations.” (*Id.*, at 5-6.)

Protestor further contends that Mr. Fronckowiak relies on a non-SDVOSB concern to perform the contract's primary and vital requirements. (*Id.*, at 6.) Citing the solicitation, Protestor asserts that the procurement's requirements are definite and unambiguous, which includes “general construction, demolition, civil, structural, architectural, medical, gas, fire alarm, fire protection, plumbing, mechanical, electrical and telecommunications.” (*Id.*, citing Solicitation at 1.) According to Protestor, Titus JV has one employee, Mr. Fronckowiak, who is not a certified licensed elevator technician and who is located over 1,800 miles from the performance site, and not authorized to work in Virginia. (*Id.*) Protestor alleges, Titus JV “has no intention of self-performing any work.” (*Id.*, at 7.)

Protestor contends that if Titus JV is alternatively a joint venture, then it fails to meet the joint venture requirements per 13 C.F.R. § 125.18(b) and fails to provide a proper joint venture agreement (JVA). (*Id.*) Specifically, Titus JV's JVA does not “‘itemize all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each’ under § 125.18(b)(2)(vi) . . . [n]or does it specify ‘the responsibilities of the parties with regard to the negotiation of the contract, source of labor, and contract performance’ under § 125.18(b)(2)(vii).” (*Id.* at 7-8, citing 13 C.F.R. § 125.18(b)(2)(vi); § 125.18(b)(2)(vii).)

Protestor further asserts that Titus JV is incapable of performing “‘at least 40% of the work performed by the joint venture.’” (*Id.* at 8, citing 13 C.F.R. § 125.18(b)(3)(ii).) According to Protestor, Titus JV lacks equipment, personnel, and other resources to perform the contract; whereas, Armstrong has “documented dominance at the company through, among other things, directing all employees, paying their wages, and touring jobsites.” (*Id.*, at 8.) The JVA also neglects to discuss Titus Elevator's 40% work performance. (*Id.*) Protestor concludes “Titus JV does not meet the regulatory requirements to qualify as an SDVOSB joint venture.” (*Id.*)

D. Titus JV's Response

On August 30, 2022, Titus JV responded to the instant protest. Titus JV asserts Mr. Fronckowiak, the sole member and President of Titus Elevators, is an SDV. (Response, at 2.) Titus JV maintains a JVA between Titus Elevators and Armstrong, of which Titus Elevators holds 51% ownership and Armstrong holds 49%. (*Id.* at 2, citing CF, Exh. 73.) Citing Titus JV's Joint Venture Operating Agreement (JVOA), Titus JV asserts that Mr. Fronckowiak holds “full control of the operations of Titus JV” with no limit to his control. (*Id.*, at 2.)

Titus JV also provides a sworn declaration from Mr. Fronckowiak, detailing his experience in “sophisticated technical work” and maintained role as program manager for Titus JV on projects for the federal government related to elevator maintenance, upgrades, and repairs. (*Id.*) Mr. Fronckowiak maintains a residence in Wyoming, Titus JV's headquarters, but intends to relocate the office to Washington. (*Id.*, at 3.) Despite Armstrong providing technical support and other administrative support, Titus JV maintains that Mr. Fronckowiak controls the concern for all projects, “Mr. Fronckowiak has been either on site full time serving a dual role as the project manager and overseeing quality assurance or acting as project manager remotely and conducting quality assurance through on-site inspections.” (*Id.*, citing Fronckowiak Decl.)

Further, Titus Elevators, owned by Mr. Fronckowiak, holds at least 51% ownership of Titus JV with no restrictions, and the JVOA prohibits Armstrong's ability to interfere with control. (*Id.*) Mr. Fronckowiak maintains experience and control over Titus JV; specifically, Mr. Fronckowiak “has over five years of experience supervising elevator projects for the federal government.” (*Id.*) Titus JV maintains that it is evident from Mr. Fronckowiak's declaration and resume that he holds years of elevator maintenance experience and managerial responsibilities. (*Id.* at 4, citing 13 C.F.R. § 125.14(b).) Citing OHA precedent, Titus JV further argues that an SDV is not required to have technical expertise if the SDV demonstrates “ultimate managerial and supervisory control over those who possess such expertise.” (*Id.*, citing *CVE Protest of Crosstown Courier Service, Inc.*, SBA No. CVE-239-P, at 16 (2022); *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P, at 20 (2021).) Titus JV maintains that Mr. Fronckowiak “fully controls [Titus JV] daily and long-term decision-making” and therefore “holds ultimate managerial and supervisory control over any Titus JV personnel who may possess greater technical expertise.” (*Id.*, at 4.)

Titus JV further argues that Mr. Fronckowiak can manage this project remotely with periodic site visits because elevator maintenance requires technical skill and experience, so most projects are spot hiring of highly experience technicians who work independently and can handle repairs without onsite supervision. (*Id.*, at 4-5.) Titus JV compares this work structure to In the *Matter of Command Languages, Inc.*, SBA No. VET-149 (2009), where OHA determined that when assessing day to day management, geography proximity was a lesser factor to recruiting the proper personnel to perform the contract. (*Id.*, citing *Command Languages, Inc.*, SBA No. VET-149, at 5.) Titus JV concludes by rejecting Protestor's argument that the JVA fails to comply with SBA's joint venture requirements. (*Id.*, at 5.) Titus JV asserts that Protestor's allegations on noncompliance regards SBA regulations on size cases and is incorrectly raised in this matter. (*Id.*)

E. Case File

On November 10, 2017, Mr. Fronckowiak of Titus Elevators and Mr. Armstrong of Armstrong entered into a JVA establishing Titus JV as a limited liability company, incorporated in the State of Washington. (CF, Exhs. 18,73.) Titus Elevators holds 51% ownership interest in Titus JV, while Armstrong holds 49% ownership interest. (*Id.*)

On January 5, 2021, Titus JV submitted an JVA, which contains the following provisions pertinent to these proceedings:

Article 3. Management of the Joint Venture. 13 CFR 125.18(b)(2)(ii)

A. The managing venturer of this joint venture is Titus Elevators, LLC, a SDVO SBC as certified by CVE as a SDVOSB. Titus Elevators, LLC is listed on the Vendor Information Pages database. The Responsible Manager for this joint venture is, by name, Stephen Alexander Fronckowiak, CEO of Titus Elevators, LLC responsible for the performance of the contract in accordance with 13 CFR 125.18(b)(2)(ii).

...

Article 6. Major Equipment and Other Resources Furnished. 13 CFR 125.18(b)(2)(vi)

A. It is impractical to provide a detailed schedule of cost or value pertaining to the itemization of all major equipment, facilities and other resources due to the nature of the contract. In general each partner brings to the contract: Titus Elevators, LLC: Management and Onsite Oversight Experience and know-how to include detailed project management to ensure all aspects of the contract are fulfilled. Titus Elevators, LLC will also be responsible for furnishing its share of employees, manpower, and equipment (either in the form of owned or leased equipment at job side). Armstrong Elevator will provide its share of manpower and equipment as required by the operating agreement of the joint venture and this joint venture agreement. In general major equipment needed to complete the contract is leased from local area providers. All employee used smaller tools, safety equipment, site resources are property of their respective employers (either Titus Elevators, LLC or Armstrong Elevator).

...

Article 7. Responsibilities of Titus Elevators and Armstrong Elevator. 13 CFR 125.18(b)(2)(vii)

A. Initial Registration Titus Elevators, as the Managing Venturer, shall be responsible for:

- i. Filing Articles of Organization with the State of Washington
- ii. Registering the Joint Venture with Center for Verification and Evaluation (CVE) for certification as a qualified Service Disabled Small Business Concern.
- iii. Registering the Joint Venture with Dunn and Bradstreet as required by item iv below.
- iv. Registering the Joint Venture in the System for Award Management (SAM).
- v. Completing Representations and Certifications for the Joint Venture through SAM.

B. Bid/Proposal Preparation.

- i. Each venturer shall be responsible for their own expenses relating to the development and submission of the proposal(s) to the government.
- ii. Both parties to the Joint Venture will furnish to each other all appropriate technical and business data and information applicable to provide a comprehensive response to the requirements of the solicitation and will work in good faith to provide a fully responsive proposal in the name of the Joint Venture. The parties shall make available appropriate personnel to provide reasonable assistance in the preparation of the proposal and subsequent performance of the contract, if awarded to the Joint Venture.
- iii. Titus Elevators as the managing venturer, shall have the responsibility of submitting the resulting proposal to the government and shall have final decision authority for the content.

C. Site Visits. Each venturer has the right to visit the contract site to evaluate contract performance.

D. Contract Performance Responsibilities

- i. Titus Elevators shall be responsible for the overall management of the joint Venture's contract performance including administrative functions, budgeting, scheduling, and contract negotiation. Titus Elevators shall be responsible for the selection, management, and coordination of employees and possible subcontractors, as required, for the performance of the ensuing work.

ii. The Responsible Manager is responsible for the Joint Venture's day to day operations, supervision, management and control overall all aspects of the contract performance, supervising labor, overseeing the job site, reporting to and implementing the instructions of the VA or government Project Manager, preparing a daily written log detailing all developments and aspects of the job, and submitting such log to the VA or government Project Manager and Contracting Officer upon request.

iii. The Responsible Manager, Titus Elevators, LLC, will be responsible for the direct negotiation with the Department of Veterans Affairs or other governmental agency, should negotiation be required, of the contract and any subsequent changes thereto. Both parties agree to provide all necessary supporting documentation to Titus Elevators, LLC as required to support such negotiations.

iv. Sources of Labor. It is anticipated that both parties to the Joint Venture will draw upon their incumbent staff and qualified local hires to perform contract requirements. The Joint Venture confirms that any additional staff to be hired may be employed by either the venturers, consistent with their respective portion of the contract performance.

(CF, Exh. 67.)

F. Supplemental Protest

On August 30, 2022, Protestor filed a supplemental protest. Protestor asserts that Titus JV fails to adhere to SBA's joint venture requirements under 13 C.F.R. § 125.18(b). (Supplemental, at 1.) Specifically, the JV fails to include an itemization of resources, such as all major equipment and facilities furnished by each party, and a provision with the specific responsibilities of each party to the joint agreement. (*Id.* at 2, citing 13 C.F.R. § 125.18(b)(2)(vi); § 125.18(b)(2)(vii).) Protestor asserts Titus JV's joint agreement is "devoid of mandatory details" because it fails to itemize equipment, facilities, and other resources cost or value. (*Id.*, at 2.) Protestor further asserts that Titus JV fails to provide demarcation of performance on the contract and is not specific enough on sources of labor. (*Id.*) Further, the JV fails to identify and ensure Titus JV will perform 40% of the work as require by SBA regulation. Protestor concludes that Titus JV "leaves holes where the regulations require detailed content." (*Id.*, at 3.)

Second, Protestor contends Titus JV is not the managing venturer and does not control day to day management and administration of contractual performance. (*Id.*) Protestor asserts that 13 C.F.R. § 125.18(b)(2)(ii)(A) requires the managing venturer maintain a presence at the joint venture's headquarters, but Titus Elevators fails to maintain a physical presence at its Wyoming office. (*Id.*, at 3-4). According to Protestor, the Wyoming office is merely a mail-forwarding service and virtual office space. (*Id.*, at 4.) Further, Protestor asserts Titus JV fails to qualify as a managing venturer because Titus Elevators, whose sole owner and employee is Mr. Fronckowiak, has no institutional experience or competence as an elevator mechanic and lacks experience in the elevator industry generally. (*Id.*) Referencing its Protest, Protestor maintains

that Armstrong is the dominant venturer because of its role in staffing decisions, payroll, and work performance. (*Id.*)

III. Discussion

A. Burden of Proof and Date of Eligibility

As the protested firm, Titus JV 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 Titus JV is part of the record.

I must determine Titus JV's eligibility as an SDVO SBC as of the date of its bid July 14, 2022, and as of the date of the Protest, July 21, 2022. The same regulations were in effect for both dates, and same JVA on both dates.

B. Analysis

Titus JV, a SDVOSB certified by CVE, is a joint venture between Titus Elevators, an SDVO SBC, and Armstrong, an SBC. An SDVO SBC may enter into a joint venture with an SBC so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement or sale. 13 C.F.R. § 125.18(b)(1)(i). SBA regulations also require that every joint venture agreement to perform an SDVO SBC contract contain the provisions enumerated at 13 C.F.R. § 125.18(b)(2).

Protestor attempts to argue that the distance of Mr. Fronckowiak's residence from the job site and Titus JV's Headquarters disqualifies Titus JV as a SDVO SBC. However, the question of close proximity applies to the issue of whether an SDVO SBC is controlled by the SDV. 13 C.F.R. § 125.13(l). Here, the issues are whether the joint venture qualifies as an SDVO SBC joint venture, and whether the joint venture meets the requirements for such a joint venture at 13 C.F.R. § 125.18(b). OHA has determined that “a joint venture between an eligible SDVO SBC and another [concern] need not meet the SDVO eligibility requirements in Subpart B of Part 124 to obtain an SDVO contract but must only meet the specific requirements governing joint ventures.” *In the Matter of Constr. Eng'g Servs., LLC*, SBA No. VET-213, at 8 (2011); *see also CVE Protest of Commonwealth Home Health CareNext Term, Inc.*, SBA No. CVE-116-P, at 12 (2019).

SBA's regulation requires the managing venturer be responsible for day-to-day management and administration of the contractual performance of the joint venture, but the other partners may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. 13 C.F.R. § 125.18(b)(2)(ii)(A). According to the JVOA, Mr. Fronckowiak, the sole owner of the SDVO SBC, holds 51% ownership interest of Titus JV and is identified as its President. Section II.E, *supra*. Further, under Article 3, Management of the Joint Venture, Titus JV identified the managing venturer as Titus Elevators, LLC, a SDVO SBC certified by CVE, and Mr. Fronckowiak as the responsible manager. *Id.* Further, Titus JV

provided a sworn declaration, where Mr. Fronckowiak states he is onsite as project manager or offsite with routine visits for all Titus JV contracts. Section II.D, *supra*. OHA gives greater weight to sworn declarations over mere assertions and speculations. *Size Appeal of Standard Communications, Inc.*, SBA No. SIZ-5322 at 4 (2012). On these facts, Titus JV has persuasively shown that it meets the responsible manager requirement of § 125.18(b)(2)(ii).

However, I find that Titus JV's JVA does not meet other regulatory requirements. Specifically, the JVA does not “[i]temiz[e] all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each,” as is required by 13 C.F.R. § 125.18(b)(2)(vi). Section II.E, *supra*. The regulation calls for itemization of equipment; however, if the contract is indefinite, such as an indefinite quantity contract or a multiple award contract, the JV need only provide a general description of anticipated major equipment without a detailed schedule of cost. *Id.* This, however, is not the case in this instant procurement. The solicitation is definite and calls for a contractor to provide general construction, demolition, civil, structural, architectural, medical, gas, fire alarm, fire protection, plumbing, mechanical, electrical and telecommunications service on two outdated elevators at a specific location, Buildings 2 and 2A of the VA Medical Center in Salem, Virginia. Section II.B, *supra*. It is thus clear the nature of the work is known, the location to be serviced is known, and even the specific elevators to be serviced are known. *Id.* Thus, it was possible for Titus JV to identify the equipment necessary to perform the maintenance, and which firm would supply which items of this equipment. The JVA failed to do this. There is no listing of the equipment to be used, as required by the regulation, even though the equipment to be serviced is identified and knowable at the time of proposal preparation. *CVE Protest of KTS Solutions*, SBA No. CVE-146-P, at 11 (2020); *Size Appeal of IEI-Cityside, JV*, SBA No. SIZ-5664, at 11 (2015); *Size Appeal of Kisan-Pike*, SBA No. SIZ-5618, at 9-10 (2014).

Further, the JVA does not “[s]pecify[] the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance,” as required by 13 C.F.R. § 125.18(b)(2)(vii). Section II.E, *supra*. Specifically, the JVA does not demonstrate that Titus Elevators, the SDVO SBC member of Titus JV, will perform at least 40% of the work, and that such work will consist of more than administrative or ministerial functions, as required by 13 C.F.R. § 125.18(b)(3)(ii). *Id.* This regulation requires that the work performed by the joint venture partner be more than administrative or ministerial and constitute at least 40% of the work to be performed. 13 C.F.R. § 125.18(b)(3)(ii)(A). Here, the JVA provides the administrative duties of each party. Indeed, the administrative tasks which Titus Elevator will perform are laid out at length and in some detail. Section II.E, *supra*. However, the JVA fails to provide any indication of the tasks that each member of the joint venture will perform as it relates to the nature of the work on the elevators, which is the purpose of this contract. *Id.* The JVA fails to delineate the percentage of work performance from each party and fails to identify which employees of each member will perform which functions beyond administrative duties. *Id.* While Titus Elevators' administrative duties are discussed in detail, it is unknown what work it will perform as to the primary purpose of the contract, and whether that will be at least 40% of the contract effort. *Id.* The JVA thus does not meet the explicit requirement of the regulation that the SDBO SBC's described duties not be merely administrative or ministerial. *KTS Solutions*, SBA No. CVE-146-P, at 11. The JVA does not meet the requirement of 13 C.F.R. § 125.18(b)(2)(vii).

Thus, I find that the JVA is insufficient in that it fails to meet 13 C.F.R. § 125.18(b)(2) requirements (vi) and (vii). I therefore further find Titus JV has not shown that it is an eligible joint venture for the instant procurement.

IV. Conclusion

For the above reasons, the protest is AFFIRMED. 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