United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Construction Engineering Services, LLC	SBA No. VET-213
Appellant	Decided: March 31, 2011
Solicitation No. N62473-09-R-2628 U.S. Department of the Navy Navy Facilities Engineering Command	

APPEARANCES

Jonathan T. Williams, Esq., Steven J. Koprince, Esq., and Ryan C. Bradel, Esq., Piliero Mazza PLLC, Washington, D.C., for Appellant.

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency.

DECISION

HYDE, Administrative Judge:

I. Background

A. Solicitation and Protest

On October 2, 2009, the Contracting Officer (CO) for the U.S. Department of the Navy, Navy Facilities Engineering Command Southwest issued Solicitation No. N62473-09-R-2628 (RFP) seeking to award multiple contracts for environmental remediation services. The RFP was a total service-disabled veteran-owned small business concern (SDVO SBC) set-aside, and the CO designated North American Industry Classification System (NAICS) code 562910, Environmental Remediation Services, with a corresponding size standard of 500 employees.

Initial proposals were due on November 3, 2009. Final proposals were due on May 11, 2010. On January 12, 2011, the CO protested Appellant's status as an eligible SDVO SBC. The CO questioned whether the joint venture agreement submitted by Appellant meets the requirements of 13 C.F.R. § 125.15.

B. AD/GC Determination

On February 17, 2011, the U.S. Small Business Administration (SBA) Acting Director of the Office of Government Contracting (AD/GC) issued his determination letter finding that Appellant was not unconditionally owned and controlled by a service-disabled veteran at the time it submitted its offer and, therefore, did not meet the SDVO SBC eligibility requirements. The AD/GC first verified that Mr. James W. Emery and Mr. Charles W. Scott, directors on Appellant's board, are both service-disabled veterans, as determined by the U.S. Department of Veterans Affairs (VA), pursuant to 13 C.F.R. § 125.8. The AD/GC next analyzed the issues of ownership and control.

The AD/GC explained that an eligible SDVO SBC must be at least 51% owned by a service-disabled veteran. 13 C.F.R. § 125.9. According to Appellant's operating agreement and a joint venture agreement between J.M. Waller and Associates, Inc. (JMWA) and Engineering/Remediation Resources Group, Inc. (ERRG), Appellant is owned by those two firms. The AD/GC highlighted the clear language in the regulation requiring direct and unconditional ownership of an eligible SDVO SBC by a service-disabled veteran. The AD/GC, citing *Matter of IITS-Nabholz, LLC* , SBA No. VET-114 (2007), noted the requirement of direct ownership applies even where the alleged SDVO SBC is a joint venture formed as a separate legal entity. The AD/GC thus concluded Appellant is not owned by a service-disabled veteran.

The AD/GC next explained that an eligible SDVO SBC must also be controlled by a service disabled veteran. 13 C.F.R. § 125.10. The AD/GC established, based upon Appellant's operating agreement and the joint venture agreement between JMWA and ERRG, that Appellant's decisions are made by a board of three directors. JMWA has the authority to designate two directors. Because the AD/GC found JMWA has the power to control Appellant, he concluded Appellant is not controlled by a service-disabled veteran. Accordingly the AD/GC determined Appellant is not an eligible SDVO SBC and was not eligible to receive a contract under the solicitation at issue.

C. Appeal Petition

On March 4, 2011, Appellant filed the instant appeal of the AD/GC's determination with the SBA Office of Hearings and Appeals (OHA). Appellant contends the AD/GC erred in failing to consider the applicability of 13 C.F.R. § 125.15(b), which governs SDVO SBC joint ventures. Appellant also contends OHA case law on the issue of SDVO SBC joint ventures is flawed and should be reversed.

Appellant acknowledges that it is controlled by JMWA, which also owns 51% of Appellant. Appellant maintains that JMWA is an eligible SDVO SBC. However, Appellant contends the AD/GC erred in focusing on 13 C.F.R. § 125.9 and 13 C.F.R. § 125.10 because 13 C.F.R. § 125.15(b) governs contract eligibility for SDVO SBC joint ventures. Specifically, Appellant argues "[t]he joint venture is considered to be an SDVO SBC, for contracting purposes only, because 13 C.F.R. § 125.15(b) permits the joint venture to 'piggyback' on the SDVO SBC status of the lead joint venture partner when certain conditions are met." (Appeal Petition 4.) Appellant claims an SDVO SBC joint venture is similar to an 8(a) Business Development (BD)

program joint venture in this regard—the joint venture itself is not certified as an 8(a) BD program participant, but rather is eligible for award of 8(a) BD contracts because the lead entity in the joint venture is an 8(a) BD-certified firm. Accordingly, Appellant argues that because JMWA is an eligible SDVO SBC, 13 C.F.R. § 125.15(b) serves to render Appellant, a joint venture in which JMWA is the primary partner, eligible for SDVO SBC contracts.

Appellant goes on to argue that two OHA cases upholding the same approach used by the AD/GC in this case—namely, *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007), and *Matter of Cooper-Glory, LLC*, SBA No. VET-166 (2009)—were wrongly decided. Appellant explains that, in *IITS-Nabholz*, OHA found that an SDVO SBC joint venture formed as a limited liability company was subject to the direct ownership requirement in 13 C.F.R. §125.9 without discussing 13 C.F.R. § 125.15(b). Appellant further notes that, in *Cooper-Glory*, OHA reaffirmed the reasoning of *IITS-Nabholz* and found that 13 C.F.R. § 125.15(b) does not state whether an SDVO SBC joint venture could be a distinct legal entity and still maintain SDVO SBC eligibility. Appellant offers three arguments for determining that these cases were wrongly decided. First, Appellant contends both cases misread the plan language of the applicable regulations. Appellant avers there is nothing in 13 C.F.R. § 125.15(b) to require that a joint venture must meet the requirements of 13 C.F.R. §§ 125.9 and 125.10 or to indicate that an SDVO SBC joint venture that is a separate legal entity should be treated differently than one that is not a separate entity. Appellant contends that in deciding *IITS-Nabholz* and *Cooper-Glory*, OHA departed from the language of the regulations and effectively created a new regulatory requirement for joint ventures based on whether they are or are not distinct legal entities.

Appellant also emphasizes that whereas 13 C.F.R. § 125.9 contains specific language requiring direct ownership by a service-disabled veteran, 13 C.F.R. § 125.15(b) contains no such restrictive language. Appellant contends OHA erroneously read a nonexistent requirement into 13 C.F.R. § 125.15(b) when it should have presumed the SBA acted intentionally in placing ownership restrictions on SDVO SBCs but not on SDVO SBC joint ventures. Appellant also highlights that 13 C.F.R. §§ 125.9 and 125.10 appear in Part 125 Subpart B, which governs eligibility for the SDVO SBC program, whereas 13 C.F.R. § 125.15(b) appears in Subpart C, which governs contracting with SDVO SBCs. According to Appellant, the placement of 13 C.F.R. § 125.15(b) in the contracting subpart "belies the conclusion that certain joint ventures must comply with 13 C.F.R. §§ 125.9 and 125.10." (Appeal Petition 9.)

Second, Appellant asserts OHA precedent is at odds with the application of other similar regulations, such as the regulations governing the 8(a) BD program, the Federal Acquisition Regulation (FAR), and the regulations governing the VA's Veterans First contracting program. Appellant contends the rulemaking history of the SDVO SBC regulations indicates that the SDVO SBC requirements were intended to be similar to those applicable to other SBA programs, specifically the 8(a) BD program. *See* 70 Fed. Reg. 14,524 (March 23, 2005); 69 Fed. Reg. 25,261, 25,264 (May 5, 2004). Appellant thus argues "OHA should have interpreted the SDVO regulations harmoniously with their 8(a) counterparts." (Appeal Petition 11.) Specifically, Appellant contends OHA should have determined that SDVO SBCs are permitted to form joint ventures as separate legal entities, as is permitted under the 8(a) BD regulations.

Appellant also points out that FAR § 19.403 (c) provides that a joint venture is an SDVO SBC when "at least one member of the joint venture is a[n SDVO SBC]" and "meets the requirements of 13 C.F.R. § 125.15(b)." Additionally, the regulations governing the VA's Veterans First contracting program require a joint venture to be a distinct and separate legal entity. 38 C.F.R. § 74.1. According to Appellant, the tension between OHA's interpretation of the SDVO SBC regulations, the FAR, and the VA Veterans First program regulations illustrates that OHA's prior application of 13 C.F.R. §§ 125.9 and 125.10 to SDVO SBC joint ventures is erroneous.

Finally, Appellant argues the decisions in *IITS-Nabholz* and *Cooper-Glory* render 13 C.F.R. § 125.15(b) meaningless. Appellant asserts the assumption that joint venture partners have the option of creating a joint venture that is not a separate legal entity is in fact a fallacy because many jurisdictions automatically deem joint ventures to be distinct entities or legal partnerships. *See, e.g., Tinkers & Chance v. Zowie Intertainment, Inc.*, 15 Fed. App'x. 827, 828 (Fed. Cir. 2001); *KDH Corp. v. United States*, 23 Cl. Ct. 34 (Cl. Ct. 1991); *Enviro Mgmt. & Research, Inc. v. VMAC Corp.*, 2009 WL 111602, at *3 (E.D. Va. Jan. 14, 2009); *Pettinaro Constr. Co., Inc. v. City of Wilmington*, 1979 WL 178481, at *2 (Del. Ch. May 15, 1979); *Hallock v. Holiday Isle Resort & Marina, Inc.*, 885 So.2d 459, 462 (Fla. Dist. Ct. App. 2004); *Accolades Apartments, L.P. v. Fulton County*, 556 S.E.2d 552, 553 (Ga. Ct. App. 2001). Appellant concludes that because *IITS-Nabholz* and *Cooper-Glory* prohibit SDVO SBCs from forming joint ventures as separate legal entities, OHA has effectively prevented SDVO SBCs from joint venturing, which leaves 13 C.F.R. § 125.15(b) without any effect. Appellant also contends that leaving SDVO SBCs without any means to joint venture is contrary to the policies underlying programs benefitting service-disabled veterans, specifically the intent to expand service-disabled veterans' access to federal contracts. *See* 15 U.S.C. § 657b. Appellant concludes OHA should overturn the AD/GC's determination based upon its analysis.

D. Agency Response

On March 15, 2011, the SBA submitted the Protest File and the Agency's response. The SBA submits that the AD/GC's determination was not based on any clear error and should thus be affirmed. The SBA contends the AD/GC correctly applied the applicable regulations and OHA precedent to conclude that Appellant is not an eligible SDVO SBC because it is not directly owned by a service-disabled veteran. The SBA asserts that although 13 C.F.R. § 125.15(b) allows SDVO SBCs to enter into joint venture agreements, all eligibility requirements (including those found at 13 C.F.R. §§ 125.9 and 125.10) must be satisfied for a firm to be eligible to receive an SDVO SBC set-aside contract. The SBA argues that because the SDVO SBC eligibility regulations are clear, and because OHA has already decided in prior cases that a joint venture must still comply with the direct ownership requirement, the AD/GC's determination was not erroneous.

With regard to control, the SBA asserts the AD/GC was correct in finding that a service-disabled veteran does not control Appellant, as required by 13 C.F.R. § 125.10. The SBA emphasizes that Appellant is controlled by a corporation (*i.e.*, JMWA), not by individual service-disabled veterans. The SBA concludes the AD/GC was correct in determining that Appellant is neither directly owned nor controlled by a service-disabled veteran, as required by the applicable

regulations. The SBA urges OHA to affirm the AD/GC's determination.

E. Request for Agency Comments

On March 22, 2011, I issued a request for further Agency comments. Specifically, I requested that the SBA address the following three questions:

1. Were OHA's decisions in *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007), and *Matter of Cooper-Glory, LLC*, SBA No. VET-166 (2009), correctly decided? Should these decisions be understood to mean that an SDVO joint venture may not be structured as an LLC under state law?

2. Is there a meaningful distinction between a joint venture that is a separate legal entity and a joint venture that is not a separate legal entity? If so, how are they distinguished?

3. Should any joint venture that meets the requirements of 13 C.F.R. § 125.15(b), but which is formed as a separate legal entity under state law, also be required to satisfy the various SDVO SBC eligibility requirements set forth in Subpart B of 13 C.F.R. Part 125?

On March 28, 2011, the SBA responded to these questions. The SBA contends *IITS-Nabholz* and *Cooper-Glory* were correctly decided because the regulations require direct and unconditional ownership of an eligible SDVO SBC by a service-disabled veteran. 13 C.F.R. § 125.9. The SBA asserts any exception to this clear rule must appear in the regulations themselves. The SBA claims 13 C.F.R. § 125.15 does not constitute an exception to the direct ownership requirement because that regulation provides that an eligible SDVO SBC may enter into a joint agreement, but "it does not say . . . that an eligible firm may also form a separate formal company with another firm, and still be eligible for SDVO SBC contracts." (Agency Comments 2.)

SBA further argues one must look to 13 C.F.R. Part 121 to find language allowing firms to form joint ventures as separate legal entities. *See* 13 C.F.R. § 121.103(h) ("A joint venture may or may not be in the form of a separate legal entity."). The SBA emphasizes that OHA has repeatedly rejected attempts by litigants to incorporate language from regulations governing one program into regulations governing a completely different program. In fact, SBA highlights that OHA specifically found in *Cooper-Glory* that the definition of a joint venture found at Part 121 is not relevant to the SDVO SBC regulations contained in Part 125. *Cooper-Glory*, SBA No. SIZ-166, at 5. The SBA thus concludes: "Without the benefit of the language for Part 121, the regulations of Part 125 are clear that direct ownership is required. In forming separate formal legal structures, certain joint ventures render themselves ineligible for the SDVO SBC program." (Agency Comments 3.) The SBA asserts it is reasonable to interpret the regulations at Part 125 to require joint ventures to meet the direct ownership requirement if the joint venture partners decide to form the venture as a distinct legal entity.

The SBA next asserts that it does not matter whether there are meaningful distinctions between joint ventures that are separate legal entities and those that are not because what is important is only that a legal distinction can be made between such entities. Nonetheless, the

SBA contends there are meaningful differences. For instance, the SBA points out that if a joint venture is a distinct legal entity, it has its own operating agreement and bylaws separate from those of an eligible SDVO SBC partner. The SBA claims joint ventures formed as formal legal entities may also be treated differently than informal joint ventures for tax and governance purposes. The SBA again emphasizes that the direct ownership requirement in the SDVO SBC regulations is clear, and any type of intervening ownership is not tolerated for companies seeking SDVO SBC contracts. "The truth is that the distinction exists in law, and while there may be many beneficial business reasons for using the various legal structures offered by States, some of the structures are just not suitable for participation in SBA's SDVO SBC contracting program." (Agency Comments 5.)

Finally, SBA submits that a limited liability company owned by two other companies cannot meet the requirements of 13 C.F.R. § 125.15. The SBA explains that regulation allows an SDVO SBC to enter into a joint venture agreement with another small business to perform an SDVO SBC contract, but does not allow the two companies to form a joint venture that is a distinct legal entity for the purposes of performing an SDVO SBC contract. "It is a small distinction, but a meaningful one, because what we are discussing here is granting an exception to SBA's clear rule that ownership must be direct." (Agency Comments 6.) The SBA concludes OHA properly decided in prior cases that 13 C.F.R. § 125.15 does not grant such an exception.

II. Discussion

A. Jurisdiction & Standard of Review

SDVO SBC status appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134. Appellant filed the instant appeal within ten business days of receiving the AD/GC's determination,[1] so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

OHA reviews the AD/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.508; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, the administrative judge may overturn the AD/GC's determination only if Appellant proves that the AD/GC made a patent error based on the record before him.

[1] The appeal petition indicates that although the AD/GC's determination was issued on February 17, 2011, Appellant did not receive it until February 22, 2011, due to a fax machine malfunction. The SBA did not challenge the timeliness of the appeal.

B. Analysis

Appellant is a joint venture that is 51% owned by JMWA, a firm which purportedly is an eligible SDVO SBC. Upon protest from the CO, the AD/GC determined Appellant is not an eligible SDVO SBC because it is owned by two firms, and thus is not directly owned and controlled by a service-disabled veteran, as required by 13 C.F.R. §§ 125.9 and 125.10. Appellant now contends it is not required to meet those requirements (or any other eligibility requirements set forth in Subpart B of Part 125 of SBA's regulations) because 13 C.F.R. § 125.15(b), which governs SDVO joint ventures, exempts Appellant from those restrictions. The SBA disagrees and argues, pursuant to prior OHA case decisions, that SDVO joint ventures formed as "separate legal entities" must meet the explicit eligibility criteria found in Subpart B of Part 125, including direct ownership and control by a service-disabled veteran.

The SDVO joint venture regulation at issue provides: "An SDVO SBC may enter into a joint venture agreement with one or more other SBCs for the purpose of performing an SDVO SBC contract." 13 C.F.R. § 125.15(b). The regulation sets forth certain requirements that must be met so that "[a] joint venture of at least one SDVO SBC and one or more other business concerns may submit an offer as a small business for a competitive SDVO SBC procurement." 13 C.F.R. § 125.15(b)(1)(i). The regulation also specifies requirements for the joint venture agreement between the parties, such as designating an SDVO SBC as the managing venture of the joint venture and mandating that the SDVO SBC will receive at least 51% of the joint venture profits. 13 C.F.R. § 125.15(b)(2)(ii), (iii). The regulation further provides that "[t]he procuring activity will execute an SDVO contract in the name of the joint venture entity or SDVO SBC." 13 C.F.R. § 125.15(b)(4).

1. OHA Precedent

In its previous cases addressing this issue, OHA determined an SDVO joint venture formed as a "separate legal entity" must meet the SDVO SBC eligibility requirements, including direct ownership and control by a service-disabled veteran. The cases suggest that an SDVO joint venture that remains informal in nature need not comply with the eligibility requirements. However, once the SDVO joint venture takes the additional step of creating a "separate legal entity" (such as by establishing a limited liability company), the eligibility requirements are applicable. Implicit in this reasoning is the notion that an SDVO joint venture may choose whether or not it will become a "separate legal entity."

In *Matter of IITS-Nabholz, LLC*, SBA No. VET-114 (2007), OHA affirmed the SBA Acting Associate Administrator of Government Contracting determination that the appellant, a joint venture between an SDVO SBC and another firm, had not satisfied the direct ownership requirement set forth at 13 C.F.R. § 125.9 because it was not directly held by a service-disabled veteran, but owned indirectly through an intervening company. *IITS-Nabholz* at 8-9. OHA considered that "[a]lthough the record includes references to Appellant as a joint venture, Appellant is a separate legal entity, a limited liability company, which filed its articles of organization with the Secretary of State of Arkansas on November 14, 2006." *Id.* OHA did not

discuss the impact of 13 C.F.R. § 125.15(b) in that case.[2]

In *Matter of Cooper-Glory, LLC*, SBA No. VET-166 (2009), OHA again affirmed an AD/GC's finding that the direct ownership requirement of 13 C.F.R. § 125.9 applies to SDVO joint ventures created as "separate legal entities." There, the appellant was also a joint venture between an SDVO SBC and another firm, and OHA concluded that because the appellant was not directly owned by a service-disabled veteran, it could not qualify as an eligible SDVO SBC. OHA did consider 13 C.F.R. § 125.15(b) in *Cooper-Glory*. The appellant argued that the definition of "joint venture" found at 13 C.F.R. § 121.103(h) authorized SDVO joint ventures to be formed as separate legal entities under 13 C.F.R. § 125.15(b). OHA rejected this argument, finding that the definition of joint venture found in Part 121 was not relevant to the regulations in Part 125. OHA determined that because the appellant was a "separate legal entity" owned by two firms, its ownership structure could not meet the direct ownership requirement set forth at 13 C.F.R. § 125.9, and it could not qualify as an eligible SDVO SBC. "Once Cooper and Glory formed Appellant as a separate legal entity with Cooper and Glory as the owners, the joint venture became ineligible for SDVO SBC status." *Cooper-Glory* at 5.

After careful consideration of the *IITS-Nabholz* and *Cooper-Glory* cases, the SBA's comments in this matter, and the Appellant's arguments, I conclude the *IITS-Nabholz* and *Cooper-Glory* decisions do not properly interpret 13 C.F.R. § 125.15(b). The decisions are correct in finding that a joint venture that is structured as a "separate legal entity" cannot meet the eligibility requirements set forth in Subpart B of Part 125—specifically the requirements of direct ownership and control by a service-disabled veteran. Nevertheless, these cases ignore the underlying question of whether such a joint venture should be required to meet these criteria in the first instance. Furthermore, the distinction drawn in case law between a joint venture that is a separate legal entity and one that is not a separate legal entity is not supported by the text of 13 C.F.R. § 125.15(b).

I now conclude that pursuant to 13 C.F.R. § 125.15(b), a joint venture between an eligible SDVO SBC and another small business—regardless of whether the venture is structured as a separate legal entity—need not meet the SDVO eligibility requirements in Subpart B of Part 125 to obtain an SDVO contract, but must only meet the specific requirements governing joint ventures set forth in 13 C.F.R. § 125.15(b). The language and structure of the regulations themselves do not support the conclusion that SDVO joint ventures, whether separate legal entities or not, must meet the eligibility requirements in Subpart B of Part 125. Additionally, Appellant has presented a number of persuasive arguments to support its contention that 13 C.F.R. § 125.15(b) serves to exempt SDVO joint ventures from those eligibility requirements.

[2] There were several other important factors leading to the affirmation of the determination in *IITS-Nabholz*. In particular, the individual claiming SDV status could not be confirmed as a genuine service-disabled veteran. *IITS-Nabholz*, at 7-8. Furthermore, the individual did not control the day-to-day operations of the joint venture because he resided in Maryland, whereas the joint venture was located in Arkansas.

2. Language and Structure of the Applicable Regulations

The language of 13 C.F.R. § 125.15(b) specifically provides that an SDVO SBC may joint venture with another small business "for the purpose of performing an SDVO SBC contract." The SBA maintains that because this language indicates only that an eligible SDVO SBC may "enter into a joint venture agreement" with another small firm, but does not specifically provide that the SDVO SBC may form a new entity with another small firm, formal joint ventures are not permitted to compete for SDVO contracts. Rather, according to the SBA, only informal joint ventures between SDVO SBCs and other small businesses may jointly perform SDVO contracts. Although the SBA urges that 13 C.F.R. § 125.15(b) allows for differing treatment of joint ventures created as distinct legal entities and joint ventures that remain informal, I find no convincing basis in the regulation for such a distinction.

13 C.F.R. § 125.15(b) allows an eligible SDVO SBC to joint venture with another small business on an SDVO contract. The regulation is silent as to whether such a joint venture may be structured as a separate legal entity. Contrary to the SBA's argument, then, it is unnecessary to include the definition of a joint venture from Part 121 into Part 125 to reasonably find that an eligible SDVO SBC is permitted to form a joint venture as a separate legal entity to submit an offer on an SDVO contract. Instead, the plain language of the regulation itself supports such a conclusion.

For instance, the regulation specifies that a joint venture between an SDVO SBC and another small business "may submit an offer as a small business for a competitive SDVO SBC procurement" if both businesses and the procurement in question meet certain requirements. 13 C.F.R. § 125.15(b)(1)(i). If the joint venture itself is permitted to submit an offer "as a small business," it stands to reason that the venture must, at some level, be a distinct legal entity. Otherwise, it would seem that there would be no valid contract. Furthermore, the regulation explicitly indicates that an SDVO contract may be awarded directly to "the joint venture entity" or to the SDVO SBC. 13 C.F.R. § 125.15(b)(4). Presumably, if SBA's intent was that any SDVO joint venture that is a separate legal entity is not eligible to receive an SDVO contract, the SBA would not have phrased the regulation to allow the contract to be awarded directly to "the joint venture entity."

In addition, as Appellant points out, 13 C.F.R. § 125.15 appears in Subpart C of Part 125, which governs contracting with SDVO SBCs, not eligibility for the SDVO SBC program (which is governed by Subpart B of Part 125). The placement of the joint venture regulation in the "contracting" section of the regulation, as opposed to the "eligibility" section of the regulation suggests that an eligible SDVO SBC is allowed to joint venture for a contract without the joint venture having to separately meet the eligibility requirements for the program.

In sum, the plain language and structure of the regulations at issue do not lend themselves to the notion that a joint venture between an eligible SDVO SBC and a small business is required to meet the SDVO program eligibility requirements merely because it is a "separate legal entity." The regulation itself draws no such distinction. In fact, it allows an SDVO contract to be awarded to the joint venture entity itself. 13 C.F.R. § 125.15(b)(4). The regulations are delineated in such a way as to first establish the eligibility of the SDVO SBC, then allow that

eligible SDVO SBC (not just the individual service-disabled veteran) to joint venture for SDVO contracts. The joint venture regulation serves to protect the interests of the SDVO SBC within the joint venture. 13 C.F.R. § 125.15(b)(2). Both from a practical standpoint and considering the SDVO program regulations as a whole, it is more reasonable to conclude that 13 C.F.R. § 125.15(b) serves to exempt an SDVO joint venture from the eligibility requirements in Subpart B of Part 125—regardless of whether the SDVO joint venture is a separate legal entity—than to conclude that an SDVO joint venture is required to meet the SDVO SBC program eligibility requirements if it is established as a "separate legal entity."

3. Other Considerations

Apart from the language and structure of the regulations, Appellant raises a number of other arguments in support of its position that *IITS-Nabholz* and *Cooper-Glory* were incorrectly decided. Several of these arguments are quite persuasive.

First, in the context of the 8(a) BD program, Appellant observes that the 8(a) BD program regulations allow 8(a) BD program participants to joint venture for 8(a) BD contracts without the joint venture entity itself being required to meet the 8(a) BD program eligibility requirements. *See* 13 C.F.R. § 124.513; 63 Fed. Reg. 35,726, 35,735 (June 30, 1998) ("With respect to the statutory requirement that all 8(a) contracts be performed by participant concerns, SBA interprets the [Associate Administrator for] 8(a)BD's acceptance of Participants into the program to extend to approved joint ventures in which the Participant is the lead joint venture partner. In other words, for purposes of contracting, *admission into the program includes both a concern in its own capacity and any approved joint venture in which the concern is the lead entity*. For contracting purposes, SBA will consider the joint venture to be the Participant where the joint venture meets all applicable requirements and is approved by SBA." (emphasis added)). In other words, the joint venture may rely upon the 8(a) BD eligibility of its primary venture partner to become eligible for 8(a) BD contracts; it is unnecessary for the venture itself to be separately eligible. As Appellant points out, the SBA noted upon issuance of the SDVO program regulations that the SDVO joint venture requirements are similar to the 8(a) BD joint venture requirements.[3] Accordingly, I agree with Appellant that the SDVO and 8(a) BD regulations should be interpreted and applied similarly, and an SDVO joint venture should be allowed to rely upon the SDVO SBC eligibility of its primary venture partner to become eligible for SDVO contracts. The 8(a) BD program regulations do not distinguish between formal and informal joint venture entities,[4] and I see no reason to do so within the SDVO program.

[3] 70 Fed. Reg. 14,523, 14,524 (March 23, 2005). Similarly, OHA has recognized that the regulations regarding the 8(a) program can provide guidance in interpreting SDVO regulations. *See Matter of Eason Enters. OKC LLC, et al.*, SBA No. VET-102 (2005).

[4] Indeed, in recent amendments to the 8(a) BD program regulations, the SBA recognized that "a joint venture may or may not be a separate legal entity (e.g., a limited liability company (LLC)." 76 Fed. Reg. 8,222, 8,224 (Feb. 11, 2011).

Finally, I find that requiring an SDVO joint venture to meet the SDVO program eligibility requirements if it is structured as a "separate legal entity" would discourage SDVO SBCs from taking practical measures to protect themselves when joint venturing with other firms. Joint ventures are often structured as limited liability companies specifically to limit the liability of each firm involved. If an eligible SDVO SBC is not permitted to do this for the purpose of obtaining SDVO contracts, the SDVO SBC is exposed to greater risk. For this reason, some government contracting programs require a joint venture to be structured as a separate legal entity to be eligible for contracts. *See* 38 C.F.R. § 74.1 ("For VA contracts, a joint venture must be in the form of a separate legal entity."). Moreover, as Appellant points out, in many jurisdictions it may not even be possible for two firms to avoid forming a "separate legal entity" when they enter into a joint venture agreement. *See, e.g., Accolades Apartments, L.P. v. Fulton County*, 556 S.E.2d 552, 553 (Ga. Ct. App. 2001) (noting the "nomenclature utilized in establishing an entity is not the controlling factor," and an entity formed as a joint venture may still be considered a separate legal entity if it has the attributes of a partnership).

An agency must interpret and apply its regulations according to the plain language therein, in light of existing agency policies and real-world practices, and in a manner allowing the entire regulatory scheme to retain meaning. Based upon the foregoing analysis, I conclude an SDVO joint venture that meets the requirements of 13 C.F.R. § 125.15(b) need not also meet the eligibility requirements—including direct and unconditional ownership and control by a service-disabled veteran—set forth in Subpart B of Part 125. Rather, only the SDVO SBC joint venture partner must meet the program eligibility requirements of Subpart B of Part 125. The joint venture itself must meet the criteria set forth at 13 C.F.R. § 125.15(b). To the extent that the *IITS-Nabholz* and *Cooper-Glory* decisions hold otherwise, those decisions are reversed.

C. Remand

In cases involving SDVO joint ventures, the AD/GC should first examine whether the SDVO SBC joint venture partner meets the SDVO SBC program eligibility requirements set forth in Subpart B of Part 125. The AD/GC must then determine whether the joint venture meets the requirements of 13 C.F.R. § 125.15(b). Accordingly, I remand this matter to the AD/GC to determine whether JMWA is an eligible SDVO SBC and, if so, whether Appellant meets the requirements of 13 C.F.R. § 125.15(b).

III. Conclusion

The AD/GC's determination was based upon an error of law. Accordingly, that determination is VACATED, and this matter is REMANDED to the AD/GC for a new determination.

KENNETH M. HYDE
Administrative Judge