United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: Benetech, LLC, Appellant, Solicitation No. W912WJ-11-R-00005 U.S. Army Corps of Engineers	SBA No. VET-225 Decided: November 3, 2011

APPEARANCES

David C. Clement, Esq., and Lara J. Jensen, Esq., Clement Gates & May, New Orleans, Louisiana, For Appellant

Laura M. Foster, Esq., Office of General Counsel, Washington, D.C., For the Small Business Administration

DECISION

I. Background

A. Solicitation and Protest

On March 25, 2011, the U.S. Army Corps of Engineers (Army) issued Solicitation No. W912WJ-11-R-0005 (RFP) for the design and construction of a parking garage in Jamaica Plain, Massachusetts. The Contracting Officer (CO) set the procurement aside for service-disabled veteran-owned small business concerns (SDVO SBCs) and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of $33.5 million in average annual receipts.

On April 11, 2011, Benetech, LLC (Appellant) submitted its offer, certifying that it is an eligible SDVO SBC. On September 1, 2011, the Army notified offerors that Appellant was the apparently successful offeror. On September 8, 2011, Williams Building Company, Inc. (Williams), a disappointed offeror, filed a protest of Appellant's status as an eligible SDVO SBC. Williams asserted that Appellant is not an eligible SDVO SBC because it is not controlled by a service-disabled veteran.

B. AD/GC Determination

On September 29, 2011, the U.S. Small Business Administration (SBA) Acting Director of the Office of Government Contracting (AD/GC) issued his determination finding that

Appellant is not an eligible SDVO SBC. The AD/GC verified that Mr. William J. Bennett (William Bennett), Appellant's majority owner, is a service-disabled veteran based on documentation from the U.S. Department of Veterans Affairs (VA). The AD/GC also confirmed that William Bennett unconditionally owns 51% of Appellant, as required by 13 C.F.R. § 125.9. William Bennett's son, Mr. William Aaron Bennett (Aaron Bennett), owns the remaining 49%.

The AD/GC next explained that an eligible SDVO SBC must also be controlled by a service-disabled veteran, as governed by 13 C.F.R. § 125.10. In the case of a limited liability company such as Appellant, the service-disabled veteran must be the managing member of the firm. 13 C.F.R. § 125.10(d). The AD/GC noted that SBA generally goes beyond mere formalities to establish that the service-disabled veteran actually exercises control over the firm. *Matter of Markon, Inc.*, SBA No. VET-158, at 5 (2009). The AD/GC also pointed out that the control requirement has been interpreted to necessitate independent control over all the firm's decisions. *Matter of Apex Ventures, LLC*, SBA No. VET-219, at 6 (2011).

The AD/GC then asserted that Appellant's operating agreement fails to name either William Bennett or Aaron Bennett as managing member. Additionally, neither the operating agreement nor any of the documentation Appellant submitted in response to the protest indicates whether William Bennett, as Appellant's president, has appointed any officers of the firm. Nonetheless, the proposal submitted to the Army in response to the RFP lists Aaron Bennett as Appellant's chief executive officer (CEO), and several corporate resolutions display Aaron Bennett's signature as Appellant's CEO. Additionally, an affidavit submitted with the protest and executed by one of Appellant's subcontractors explains that the subcontractor never met or communicated with William Bennett. Based upon these facts, the AD/GC was unable to conclude that William Bennett serves as Appellant's managing member.

The AD/GC next notes that Appellant's articles of organization indicate that Aaron Bennett is authorized to act on behalf of Appellant on various matters, including establishing membership in the company, establishing the authenticity of records, and establishing the authority of persons to act on Appellant's behalf. Furthermore, Appellant's State of Louisiana Initial Report lists Aaron Bennett as the sole member/manager. The operating agreement also bestows authority upon Appellant's members to act for the company in all matters. The AD/GC reasoned that because both William and Aaron Bennett are members of Appellant, both individuals retain the authority to act on Appellant's behalf in all matters. Consequently, the AD/GC determined that William Bennett does not maintain control over all Appellant's decisions. The AD/GC concluded that Aaron Bennett, not William Bennett, controls Appellant, and Appellant is not an eligible SDVO SBC.

C. Appeal Petition

On October 14, 2011, Appellant filed the instant appeal. Appellant first argues that William Bennett does hold Appellant's highest officer position. Appellant explains that its operating agreement specifically permits the firm's members great flexibility in electing officers and delegating authority. (Operating Agreement ¶ 10.2.) Appellant contends that pursuant to that provision in the operating agreement, William Bennett was designated as Appellant's highest officer, as demonstrated by Appellant's organizational chart and management plan. According to

Appellant, Aaron Bennett has served only in a subordinate position. Appellant also notes that William Bennett is the qualifying individual for Appellant's construction license, so he has the experience and skills necessary to operate Appellant's business.

Appellant argues the AD/GC improperly analyzed Appellant's structure according to traditional corporate formalities, even though the AD/GC recognized that Appellant is a limited liability company. Appellant contends the AD/GC placed too much weight on the corporate resolutions that listed William Bennett as Appellant's chairman and Aaron Bennett as Appellant's CEO.[1] Appellant claims that under Louisiana law, because it is a limited liability company, the firm's members may choose how to structure Appellant and its management without regard to corporate formalities. Appellant contends the AD/GC improperly regarded the flexibility afforded to Louisiana limited liability companies in concluding that Appellant failed to identify its officer positions or the precise titles of William and Aaron Bennett. Appellant concludes the AD/GC committed an error of fact and law in concluding that William Bennett does not hold Appellant's highest officer position and is not a managing member of Appellant.

Appellant next contends its operating agreement effectively grants control over the firm to William Bennett. Appellant points out that the operating agreement provides that a majority of equity interests constitutes a quorum at a meeting of the members. (Operating Agreement ¶ 6.4.) The operating agreement also indicates that any act of a majority of members where a quorum is present is an act of the members, and voting is based on percentage equity ownership in the company. (Operating Agreement ¶ 6.7.1.) Appellant asserts the language of the operating agreement grants William Bennett complete control over Appellant because he alone would constitute a quorum at any meeting, and any decisions he makes are binding on the firm because he is the majority owner.

Finally, Appellant claims the AD/GC failed to complete a thorough review of the record. Appellant claims it submitted additional evidence to the VA regarding William Bennett's ability to control Appellant, and the AD/GC should have considered it. Appellant explains that it submitted to the VA, in connection with the VA's veteran-owned small business verification program, payroll records and checks signed by William Bennett on Appellant's behalf. William Bennett also completed an interview with the VA during this process. Appellant contends the VA should have submitted all the documentation to the SBA for review pursuant to the Veterans Affairs Acquisition Regulation (VAAR). *See* 48 C.F.R. §§ 819.602-3, 819.307. Appellant attaches this documentation to its appeal petition, as well as an affidavit executed by William Bennett that confirms these facts. Based on the foregoing information and analysis, Appellant requests that OHA reverse the AD/GC's determination.

D. Agency Response

On October 25, 2011, SBA responded to the appeal. SBA first contends the documents submitted with the appeal petition are inadmissible, pursuant to 13 C.F.R. § 134.512, because they were not part of the record before the AD/GC. SBA rejects Appellant's claim that the VA

[1] The record evidences some confusion as to what specific position each individual occupies, which will be discussed further in Part II.C, *infra*.

should have submitted the documentation to SBA and argues the regulations cited by Appellant do not support such a claim because they relate solely to certificate of competency determinations.

SBA also asserts the AD/GC's determination was correct and should be upheld. After citing the applicable regulations and case law, SBA notes that "evaluating the form of a concern and the function of how that concern operates is essential in determining a firm's eligibility." (SBA Response 6.) Specifically, SBA challenges Appellant's argument that the AD/GC improperly applied corporate formalities when it examined Appellant's organizational structure. SBA cites to various Louisiana statutes in asserting that "[u]nder Louisiana law, absent any provisions restricting or enlarging the management rights of specific members, the organization is managed by its members." (SBA Response 7 (citing La. R.S. §§ 1311, 1312, 1317).) Because Appellant's operating agreement fails to enlarge or restrict the rights of either William Bennett or Aaron Bennett, SBA contends the two share management authority. *See Matter of United Med. Design Builders, LLC*, SBA No. VET-197 (2010). SBA concludes the AD/GC reasonably determined that William Bennett is not Appellant's managing member.

SBA also contends the record does not support Appellant's claim that William Bennett holds Appellant's highest officer position. According to SBA, Appellant merely argues that whatever position William Bennett holds is Appellant's highest officer position. SBA disputes Appellant's contentions that Article 10.2 of Appellant's operating agreement permits such a management structure, that the AD/GC acknowledged Appellant's alleged flexible structure by quoting Article 10.2, and that Article 10.2 somehow supports the contention that Appellant's members elected to give William Bennett complete control of Appellant. SBA also challenges Appellant's reliance on Article VI of the operating agreement. SBA asserts Article VI governs meetings of the firm and does not confer any specific authority on William Bennett. Furthermore, Appellant failed to submit any other documentation to support its claim that Appellant's members elected William Bennett to Appellant's highest officer position.

SBA asserts the operating agreement and the corporate resolutions submitted to the AD/GC indicate that Aaron Bennett serves as Appellant's president and CEO. SBA also notes that, contrary to Appellant's claims, the management plan submitted with Appellant's proposal do not support the contention that William Bennett is Appellant's president, whereas Aaron Bennett is vice president. SBA emphasizes that the regulations require that a service-disabled veteran hold the firm's highest *officer* position (usually president or CEO), and the AD/GC may not stray from the regulations. 13 C.F.R. § 125.10(b). SBA submits the record does not reflect the flexible managerial structure Appellant claims on appeal, and the AD/GC made no error in determining that William Bennett does not hold Appellant's highest officer position.

Finally, SBA supports the AD/GC's determination that William Bennett does not control Appellant's management and daily business operations. SBA highlights that the protest included an affidavit from one of Appellant's subcontractors that indicated Aaron Bennett manages the firm's daily business. SBA also emphasizes that a service-disabled veteran must control all of the decisions of an eligible SDVO SBC. SBA contends the operating agreement provides that all members have authority to act for the company in all matters, so William Bennett does not have

control over all of Appellant's decisions. (Operating Agreement ¶ 10.1.) SBA concludes the record supports the AD/GC's determinations, and the appeal should be denied.

E. Williams Building Company Response

On October 25, 2011, Williams submitted its response to the appeal. Williams cites the applicable regulations and reiterates its argument that Appellant is not controlled by a service-disabled veteran. Williams contends it is Aaron Bennett who actually controls the firm, as evidenced by the fact that Aaron Bennett organized the firm and was the sole manager until 2004. Williams asserts that management of Appellant is at least shared between William Bennett and Aaron Bennett, if not conducted exclusively by Aaron Bennett. Williams attaches numerous exhibits, including company documents and news reports, to support its allegations. Nearly all of these documents were submitted with the original protest. Williams also maintains that none of Appellant's arguments on appeal can excuse Appellant's noncompliance with SDVO SBC program regulations.

II. Discussion

A. Jurisdiction and 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, 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 (2006) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). OHA will overturn the AD/GC's determination only if Appellant proves that the AD/GC made a patent error based on the record before him.

B. New Evidence

Appellant attempts to admit two exhibits with its appeal petition. The first exhibit is the set of documents Appellant indicates it sent to VA in conjunction with the veteran-owned small business verification program. The second exhibit is a sworn statement of William Bennett explaining the steps he took to comply with VA's verification process.

Appellant claims VA should have submitted the documentation contained in the first exhibit to the AD/GC for consideration. Appellant asserts the VAAR requires the VA Office of Small and Disadvantaged Business Utilization (OSDBU) "to cooperate with SBA on matters relating to SDVO SBCs." (Appeal Petition 13.) In support of this statement, Appellant cites VAAR 819.602-3, which relates to certificates of competency and determinations of responsibility and is entitled "Resolving Differences Between VA and the Small Business Administration." The provision states: "The Director, OSDBU, is the VA liaison with the SBA. Information copies of correspondence sent to the SBA seeking a certificate of competency

determination must be concurrently provided to the Director, OSDBU. Before appealing a certificate of competency, the [Head of Contracting Activity] must seek concurrence from the Director, OSDBU." 48 C.F.R. § 819.602-3. This regulation pertains solely to the SBA certificate of competency program, and it is unrelated to the SBA's SDVO SBC status protest process. Moreover, it requires the SBA to send correspondence to VA, not vice versa. This regulation cannot support Appellant's argument that VA was required to forward documents related to the verification process to the SBA in conjunction with an SDVO SBC status protest.

Appellant also cites VAAR 819.307, which does pertain to SBA SDVO SBC status protests. Appellant asserts this provision "subjects any protests not arising under a VA bid solicitation to the jurisdiction of the SBA." (Appeal Petition 13.) "According to these regulations," Appellant continues, "the VA should have suspended Appellant's SDV status review and forwarded all relevant material to the SBA for review." *Id.*

VAAR 819.307 indicates that, upon execution of an agreement between VA and SBA, SDVO status protests filed in conjunction with acquisitions conducted under VAAR 819.70[2] should be forwarded to the SBA for decision. 48 C.F.R. § 819.307(a). The solicitation at issue was not conducted pursuant to VAAR 819.70; it is not even a VA solicitation. The VAAR only applies to VA procurements, and this regulation does not apply here. *See Matter of Mission Essentials, LLC*, SBA No. VET-222, at 4 (2011). Additionally, the regulation provides that VA must forward such protests to the AD/GC only after the execution agreement between VA and SBA. This agreement is not yet in place. *See generally Matter of Reese Goel JV*, SBA No. VET-199 (2010). Furthermore, no SDVO status protest was filed with the VA. Rather, the VA was conducting its own veteran-owned small business verification process.

Appellant's assertion that VA should have suspended its review process and forwarded all documentation to SBA is completely without support. VA's veteran-owned small business verification program is unrelated to SBA's SDVO SBC eligibility protest process. The Veterans Small Business Verification Act requires VA to verify the status of veteran owned businesses listed in VA's www.vetbiz.gov vendor information pages (VIP). 38 U.S.C. § 8127(f); Veterans' Benefits Act of 2010, Pub. L. 111-275 § 104, 124 Stat. 2864, 2867 (2010). The VIP is a database of firms eligible to participate in VA's veteran-owned small business contracting program. 38 C.F.R. § 74.1. In order to be eligible for a contract issued under VA's veteran-owned small business contracting program, a business must be listed in the database. The VA must obtain documentation from each firm listed in the database to verify that it is a veteran-owned business, and every business in the database must satisfy the requirements of the verification process. The process is regulated by Title 38 of the C.F.R., Part 74.

In contrast, under the regulations governing SBA's SDVO SBC contracting program, a protest challenging a firm's SDVO SBC status can be initiated in conjunction with any federal procurement set aside for SDVO SBCs, not only procurements within the VA's contracting

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[2] "This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502." 48 C.F.R. § 819.7002.

program. The process is regulated by 13 C.F.R. Part 125. All firms submitting offers on SDVO SBC set aside contracts must meet the eligibility requirements set forth in those regulations. Although the processes may pose similar questions relating to ownership and control, the two programs are employed by two separate federal agencies, and they are ultimately unrelated. *See Matter of SDV Solutions, Inc.*, SBA No. VET-185 (2010) ("[B]ecause the VA's verification program is administered by the VA, it is not something SBA has to consider and to my knowledge has never been considered by SBA to date."). Whereas the verification process relates to VA's own database and VA's own contracting program, the SDVO SBC protest process is government-wide. The VA is free to regulate its own contracting program, and Appellant has cited no regulation to support the argument that VA should have suspended its own verification process while the SBA protest was pending.

I conclude Appellant's argument that VA was required to forward documentation relating to its own verification process to SBA is without merit. Thus, the exhibits attached to the appeal petition are simply new evidence. Evidence beyond the written protest file may not be considered in SDVO SBC appeals. 13 C.F.R. § 134.512; *Matter of Markon, Inc.*, SBA No. VET-158 (2009). This is especially true when the evidence has been in Appellant's possession all along, and yet it failed to submit it to the AD/GC. *See Matter of DAV Prime/Vantex Serv. Joint Venture*, SBA No. VET-138, at 4 (2008). Here, the information Appellant submitted on appeal was in its possession at the time the firm responded to the protest, but Appellant did not submit it. The exhibits Appellant submits with its appeal are thus EXCLUDED from consideration here.

Additionally, two of the exhibits submitted with Williams' response to the appeal were not submitted with the protest. Specifically, Exhibit B-3, an article from the New Orleans Times-Picayune, and Exhibit C-2, two payment bonds executed by Aaron Bennett, were not part of the protest file. Therefore, those exhibits are also EXCLUDED from the record.

C. Analysis

For a small business concern to qualify as an eligible SDVO SBC, a service-disabled veteran must own and control the firm. 13 C.F.R. §§ 125.8, 125.9, 125.10. Specifically, the service-disabled veteran must control both the long-term decision-making and the day-to-day management of the firm. 13 C.F.R. § 125.10(a). The service-disabled veteran must also hold the highest officer position in the firm and must have sufficient managerial experience to run the firm. 13 C.F.R. § 125.10(b). In the case of a limited liability company such as Appellant, the service-disabled veteran must serve as a managing member, with control over all of the firm's decisions. 13 C.F.R. § 125.10(d).

Here, it is undisputed that William Bennett is a service-disabled veteran and owns a majority share of Appellant. The only issue is whether William Bennett controls Appellant. OHA has previously determined that the control contemplated by the regulations requires that the service-disabled veteran have independent control over all decisions of the firm. *Matter of Valor Contracting, LLC*, SBA No. VET-194, at 6 (2010); *Matter of Heritage of Am., LLC*, SBA No. VET-142, at 8 (2008) ("OHA has consistently interpreted the 'all decisions' language of the regulation strictly in accordance with its plain meaning."). Based upon the record before him, the AD/GC was unable to conclude that William Bennett holds Appellant's highest officer position,

acts as Appellant's managing member, and exercises control over all of Appellant's decisions.

Appellant first argues that William Bennett does hold Appellant's highest officer position. Appellant cites the management plan and the organizational chart submitted with its proposal for support, as well as the resumes of William and Aaron Bennett. The management plan explains Appellant will lead a team effort with an engineering design firm to complete the project at issue. The plan sets forth the credentials of five of Appellant's employees who will manage the project and seven employees of its partner firm who will participate in design and construction. At the end of this list of credentials and experience, the management plan indicates that "senior executive authority" for the project rests with Appellant's Director of Construction, who "reports to [Appellant's] principals, William Bennett, Aaron Bennett, and Frank White." The organizational chart depicts William Bennett, Chairman, at the top, with Aaron Bennett, CEO, directly beneath him. (Proposal Vol. I, Factor 2A.) William Bennett's resume, submitted in response to the protest, lists his position as Appellant's president. Aaron Bennett's resume lists his position as Appellant's vice president. As the AD/GC noted in his determination, a corporate resolution dated June 23, 2010 is signed by William Bennett as Appellant's Chairman and by Aaron Bennett as Appellant's CEO. A second corporate resolution dated June 29, 2010, is signed by Aaron Bennett as Appellant's president and CEO. Appellant's commercial lease, dated June 16, 2010, also depicts Aaron Bennett's signature as Appellant's CEO.

As discussed by the AD/GC, Appellant's operating agreement fails to designate any officers. Appellant argues its operating agreement "makes William J. Bennett the highest serving member and/or manager" of Appellant. (Appeal Petition 9.) Appellant cites Article 10.2 of the operating agreement, which provides in pertinent part:

> The Company may, at the discretion of the Members, have officers including, without limitation, a Secretary to record the minutes of the Members and to attest the signature of 'the Presiding Member or the Executive Officer', and a Treasurer to account for the financial transactions of the Company. These other officers need not be selected from among the Members. One person may hold two or more offices.

(Operating Agreement ¶ 10.2.)

Appellant claims this provision gives Appellant's members liberal authority to elect any person to any office and to delegate any authority to any person or office as they deem fit. Further, Appellant argues the evidence in the record consistently indicates that William Bennett serves in Appellant's highest position, as either chairman or president or both, as permitted by Article 10.2, with Aaron Bennett always in a subordinate position. Thus, Appellant concludes William Bennett holds Appellant's highest officer position, as required by 13 C.F.R. § 125.10(b).

The problem with Appellant's argument is that it is not clear from the record that William Bennett serves in Appellant's highest officer position. Article 10.2 itself plainly does not name William Bennett as Appellant's highest officer. From the documents in the record described above, it is entirely impossible to determine what position is held by William Bennett (chairman or president or both) and what position is held by Aaron Bennett (CEO, president, vice president,

or some combination thereof), let alone what position is Appellant's highest officer position.

The organizational chart does depict William Bennett as chairman above Aaron Bennett as CEO. The resumes do list William Bennett as president and Aaron Bennett as vice president, but those documents were submitted in response to the protest, and they list completely different positions than the documents that predate the protest—nowhere else in the record is Aaron Bennett identified as vice president. Moreover, resumes and organizational charts may be illustrative, but they are not legally binding documents. They do not amount to a formal designation by Appellant's members of William Bennett as the managing member with control over all decisions. 13 C.F.R. § 125.10(d). There is no formal designation by Appellant anywhere of William Bennett as the managing member. Given this lack of a formal designation, and the complete lack of consistency in the record with regard to what position is held by each of Appellant's owners, I cannot say that the AD/GC made any clear error when he determined he could not conclude that William Bennett holds Appellant's highest officer position.

Appellant also argues the AD/GC improperly analyzed Appellant's structure when it determined William Bennett is not a managing member. Appellant asserts that under Louisiana law, the traditional definitions of corporate titles do not apply to Appellant because Appellant is a limited liability company. Appellant cites two Louisiana statutes to support its argument. The first provides: "Except as otherwise provided in the articles of organization, the business of the limited liability company shall be managed by the members, subject to any provision in a written operating agreement restricting or enlarging the management rights and duties of any member or group or class of members." La. Rev. Stat. Ann. § 12:1311. The second regulation cited by Appellant governs the voting rights of members. Generally, "[u]nless otherwise provided in the articles of organization or a written operating agreement," each member gets one vote, and decisions of the members must be made by a majority vote. *Id.* § 12:1318(a). "Unless otherwise provided in the articles of organization or a written operating agreement," a majority of members is required to approve certain company actions, such as dissolution and merger, regardless of who manages the firm. *Id.* § 12:1318(b). A contract between a limited liability company and a member or manager cannot be voided solely for that reason, provided some conditions are met. *Id.* § 12:1318(c). Finally, "[t]he articles of organization or a written operating agreement may provide for any other voting rights of members not inconsistent with Subsection C of this Section." *Id.* § 12:1318(d). Appellant apparently cites these regulations to support its contention that the firm's members may choose how to structure Appellant's management and business operations, and Appellant's "members may designate a member to manage the company without regard to corporate formalities." (Appeal Petition 10.)

SBA, on the other hand, stresses that the first regulation cited by Appellant provide that a limited liability company is managed by its members "subject to any provision in a written operating agreement restricting or enlarging the management rights and duties of any member." La. Rev. Stat. Ann. § 12:1311. SBA also emphasizes that the statute governing agency power of manager or members provides: "Each member, if management is reserved to the members ... is a mandatory of the limited liability company for all matters in the ordinary course of its business ... unless such mandate is restricted or enlarged in the articles of organization." *Id.* § 12:1317(a). SBA contends that because there is no language in Appellant's operating agreement that restricts the management rights of Aaron Bennett, he, as a member, has

the same authority to bind Appellant as does William Bennett.

I agree with SBA. The Louisiana statutes discussed by the parties explicitly provide that a limited liability company shall be managed by the members unless otherwise stated in the firm's articles of organization, and subject to any operating agreement provision restricting or enlarging the management rights of any member. *Id.* § 12:1311. Nowhere in Appellant's organizing documents is anything but that Appellant should be managed by its members "otherwise stated."

Appellant's articles of organization in the record explicitly state: "The Company shall be managed by its members absent amendment of these articles and/or the adoption of an operating agreement." (Articles of Organization, Article VI.) The articles also provide that "unless and until these Articles of Organization are amended to provide otherwise, the company shall have no operating agreement and all questions concerning its status and operations ... shall, unless otherwise provided herein, be governed by the law of the State of Louisiana." (Articles of Organization, Article V.) Based on that provision, and because there is no evidence of any amendment to the articles in the record, there is some question as to whether Appellant's operating agreement is valid.

Even if the operating agreement is valid, it too supports the conclusion that Appellant is managed equally by its members. The agreement provides: "Except as may be provided otherwise in this agreement, the business of the company shall be conducted under the exclusive management of the Members who shall have authority to act for the Company in all matters." (Operating Agreement ¶ 10.1.) The agreement lists both William and Aaron Bennett as members, but does not designate a managing member. (Operating Agreement ¶ 3.1.) The operating agreement thus does not provide for any alternative management structure, but rather explicitly holds to the traditional management structure of a limited liability company, whereby the firm is managed by its members.

Although Appellant argues strenuously that it was permitted by statute to structure its management in any manner its members preferred, Appellant failed to present any evidence that it ever provided for any management structure other than the default management structure—management by the firm's members. Appellant seems to believe that article 10.2 of its operating agreement, quoted above, is sufficient to indicate that Appellant preferred some alternative management structure. However, the ability of Appellant's members to choose whether to elect officers is unrelated to the question of who has management control over Appellant. If anything, this provision reinforces the conclusion that it is Appellant's members who hold ultimate managerial authority because they are the ones authorized to elect officers.

The operating agreement likewise fails to restrict or enlarge the management rights and duties of any particular member, and, in such a case, state law also indicates that a limited liability company is "managed by the members." La. Rev. Stat. Ann. § 12:1311. Although Appellant had the authority to designate a managing member with control over all decisions of the company, it has failed to do so. There is no formal designation of William Bennett as managing member. Where all members of a limited liability company have the authority to bind the firm under state law, and where the operating agreement fails to designate a managing member, the firm has not complied with 13 C.F.R. § 125.10(d). *Matter of United Med. Design*

Builders, LLC, SBA No. VET-197, at 10 (2010).

I agree with Appellant that Louisiana state law allows for some flexibility in the management structure of a limited liability company. However, Appellant never took advantage of that flexibility. Appellant's organizing documents specify that Appellant should be managed by its members, in accordance with the default management structure dictated by Louisiana state law. Accordingly, I conclude Aaron Bennett has the same management authority over Appellant as William Bennett, and I find the AD/GC committed no error in determining that he was unable to conclude that William Bennett is Appellant's managing member.

Finally, Appellant contends Article VI of its operating agreement effectively grants complete control of Appellant to William Bennett. Article VI governs meetings and provides that a majority of equity interests constitutes a quorum at a meeting of the members. (Operating Agreement ¶ 6.4.) The operating agreement also indicates that any act of a majority of members where a quorum is present constitutes an act of the members. (Operating Agreement ¶ 6.7.1.) Appellant thus argues William Bennett alone would constitute a quorum at any meeting, and any decisions he makes are binding on the firm because he is the majority equity owner. SBA points out that Article VI does not confer any specific authority on William Bennett.

These provisions lend some support to Appellant's argument that William Bennett could take unilateral action on behalf of the company. However, as SBA noted, OHA may evaluate both the form and function of a firm's business operations in determining its SDVO SBC eligibility. *See Matter of Markon, Inc.*, SBA No. VET-158, at 5 (2009) ("SBA will go behind the corporate formalities to establish that a service-disabled veteran actually controls the firm.").

The Article VI provisions cited by Appellant cannot change the fact that Aaron Bennett shares management authority with William Bennett, as per the organizational documents in the record. The record also reflects that Aaron Bennett actively exercises his management authority on behalf of the company. He has signed corporate resolutions and Appellant's lease as the firm's CEO. Moreover, the articles of organization specifically authorize Aaron Bennett to establish membership in Appellant, establish the authenticity of records, and establish the authority of any person to act on Appellant's behalf. (Articles of Organization, Article VIII.)

The affidavit from Appellant's subcontractor further supports the finding that William Bennett does not have control over all Appellant's decisions. The subcontractor asserts that during 2008 and 2009 when he was doing business with Appellant, he never met William Bennett or had any communications with him. Instead, all business was conducted through Aaron Bennett. If William Bennett were controlling Appellant's day-to-day business, it appears likely he would have interacted with the subcontractor at some time, rather than leaving Aaron Bennett to control all contact with the subcontractor. In any case, Appellant failed to offer any explanation in its appeal petition of the circumstances described in the affidavit. I find the AD/GC committed no error when he determined that William Bennett does not actually control all of Appellant's decisions.

The record supports the determination that William Bennett does not hold Appellant's highest officer position, is not Appellant's managing member, and does not exercise control over

all of Appellant's decisions. Consequently, Appellant failed to prove the AD/GC committed any clear error of fact or law in its determination.

III. Conclusion

Based on the foregoing, the AD/GC's determination that Benetech, LLC, is not an eligible SDVO SBC was not based upon clear error. The AD/GC's determination is AFFIRMED, and the appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

CHRISTOPHER HOLLEMAN
Administrative Judge