United States Small Business Administration
Office of Hearings and Appeals

[SH NOTE: Golden Key's attorney (i) has represented to me that the company has since corrected this administrative issue and now qualifies as an SDVOSB and (ii) has requested me to include this note to avoid any confusion when its current or future teaming partners search for information concerning the company on the internet. I have no personal knowledge of the company's status**]**

IN THE MATTER OF:	
Golden Key Group, LLC,	SBA No. VET-236
Appellant,	Decided: July 29, 2013
Solicitation No. HQ0034-13-R-0010	

APPEARANCES

Steven J. Koprince, Esq., Petefish, Immel, Heeb & Hird LLP, Lawrence, Kansas, for Appellant

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

DECISION[1]

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 125 and 134.

II. Issue

Whether the Director of Government Contracting (D/GC) for the U.S. Small Business Administration (SBA) made a clear error of fact or law in determining that Golden Key Group,

[1] This decision was initially issued under a protective order on July 29, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to file a request for redactions if it desired to have any information withheld from the published decision. Appellant responded that it did not wish to propose redactions, and OHA now publishes the decision in its entirety.

LLC (Appellant) does not meet the Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) eligibility requirements. *See* 13 C.F.R. § 134.508.

III. Background

A. Solicitation and Protest

On January 24, 2013, the U.S. Department of Defense (DoD), Washington Headquarters Services, issued Request for Quotations (RFQ) number HQ0034-13-R-0010 for technical, analytical and administrative support services. The RFQ stated that DoD planned to award multiple blanket purchase agreements (BPAs) through the U.S. General Services Administration (GSA) Federal Supply Schedules (FSS). The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs. Appellant submitted its proposal on February 14, 2013.

On March 29, 2013, the CO announced that Appellant had been awarded a BPA. On April 5, 2013, Insignia Technology Services, LLC (Insignia), a disappointed offeror, filed a protest challenging Appellant's status as an SDVO SBC. Insignia alleged that Ms. Gretchen McCracken is Appellant's highest ranking officer, and that she has no military experience. Thus, Insignia reasoned, Appellant is not controlled by a service-disabled veteran and is ineligible for award. On April 15, 2013, the CO forwarded the protest to the D/GC. The CO also included a cover letter recommending that Insignia's protest be dismissed as untimely. Specifically, the CO stated:

> The competition here was for the award of blanket purchase agreements off of Federal Supply Schedule contracts. [Appellant] certified itself as a SDVOSB back when it competed for its Federal Supply Schedule contract. The RFQ for the instant BPA competition did not require the vendors to recertify their size or SDVOSB status. Thus, in order to be timely, a protest challenging [Appellant's] SDVOSB status needed to have been filed at time of Federal Supply Schedule award. [Appellant] was awarded its FSS contract in July 2011. Therefore, Insignia's protest of April 5, 2013 is untimely.

(Protest File, Tab M, at 429.)

B. D/GC Determination

On May 24, 2013, the D/GC issued his determination sustaining Insignia's protest. The D/GC did not address the CO's contention that Insignia's protest was untimely. The D/GC concluded that Appellant is not controlled by one or more service-disabled veterans, as 13 C.F.R. § 125.10 requires.

The D/GC first explained that Appellant is a limited liability company (LLC) owned by four individuals: Ms. Gretchen McCracken (27%), Ms. Valerie Langstaff (26%), Mr. Larry McCracken (25%), and Mr. Bruce Tarpinian (22%). Ms. Langstaff and Mr. McCracken are service-disabled veterans, whereas Ms. McCracken and Mr. Tarpinian are not. The D/GC found that Ms. Langstaff and Mr. McCracken together own 51% of Appellant. Further, according to

Appellant's operating agreement, profit and loss distributions are made in accordance with the members' ownership interests, and there are no restrictions on the ownership interests of Ms. Langstaff or Mr. McCracken. Therefore, because service-disabled veterans unconditionally own a majority interest in Appellant, the D/GC determined that Appellant satisfies the ownership requirement for SDVO SBC eligibility. (Determination at 4.)

The D/GC next explained that to be an eligible SDVO SBC, one or more service-disabled veterans also must control the concern's management and daily operations. 13 C.F.R. § 125.10(a). When the concern is an LLC, one or more service-disabled veterans must serve as managing members, with control over all decisions. *Id.* § 125.10(d). In this case, the D/GC observed, Appellant's Operating Agreement states that "Management of the Company shall be vested in all of the Members who shall also serve as Operating Managers of the Company." (Determination at 5, citing Operating Agreement § 5.1.) Further, the "Company shall be managed by the Operating Managers and the conduct of the Company's business shall be controlled and conducted solely and exclusively by the Operating Managers." (*Id.*, citing Operating Agreement § 5.4.) The minutes from Appellant's annual meeting identify Ms. McCracken, Mr. Tarpinian, and Ms. Langstaff—but not Mr. McCracken—as "unanimously elected managers." The D/GC concluded that "given the language of the Operating Agreement, [I] must conclude that [Appellant] currently has three Operating Managers: [Ms.] McCracken, [Mr.] Tarpinian, and [Ms.] Langstaff." (*Id.*)

The D/GC found that, of Appellant's three Operating Managers, Ms. Langstaff is the only service-disabled veteran. Further, Appellant's Operating Agreement stipulates that "Operating Managers shall vote in proportion to their Membership Interests in the Company." (*Id.*, citing Operating Agreement § 5.1) The D/GC reasoned that, because Operating Managers vote according to their membership interests and Ms. Langstaff owns only 26% of Appellant, Ms. Langstaff lacks the power to control Appellant. The D/GC also noted that Ms. McCracken is identified as Appellant's CEO/President in company documents. The D/GC stated that "it appears from the information contained in the record that the management and daily business operations of [Appellant] are the responsibility of Ms. McCracken, who [is not] a service-disabled veteran." (*Id.*) The D/GC then concluded that Appellant is not controlled by one or more service-disabled veterans, and is not an eligible SDVO SBC.

C. Appeal

On June 7, 2013, Appellant filed an appeal of the D/GC's decision with SBA's Office of Hearings and Appeals (OHA).[2] Appellant insists that the determination is clearly erroneous and should be reversed.

Appellant asserts that it is in fact controlled by service-disabled veterans, specifically Ms. Langstaff and Mr. McCracken. First, contrary to the D/GC's determination, Appellant argues there are four—not three—Operating Managers, with Mr. McCracken as the fourth Operating Manager. To support this argument, Appellant points to Appellant's Operating Agreement, which

[2] Appellant filed the appeal within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503.

indicates that "Management of the Company shall be vested in all of the Members who shall also serve as Operating Managers of the Company." (Appeal at 9, citing Operating Agreement § 5.1 (emphasis added by Appellant).) Appellant contends this language makes plain that all four of Appellant's owners are Operating Managers.

Appellant then argues that the D/GC erroneously relied on the minutes from Appellant's annual meeting, which Mr. McCracken did not attend, in concluding there were only three Operating Managers. "At that meeting," Appellant explains, "the three other Members unanimously reaffirmed their commitment to serve as Operating Managers." (*Id.* at 10.) Appellant highlights section 5.2 of the Operating Agreement, which provides that "[t]he Operating Managers shall hold office for the term for which elected and until a successor has been elected and qualified." Appellant maintains that, because Mr. McCracken was designated an Operating Manager by section 5.1 of the Operating Agreement, "he continued to hold that position pursuant to the express terms of the Operating Agreement." (*Id.*) It is immaterial, in Appellant's view, that Mr. McCracken was absent from the annual meeting.

Appellant goes on to explain that Mr. McCracken took a temporary leave of absence from Appellant for family reasons. On February 5, 2013, Mr. McCracken executed a proxy statement assigning his voting interest to Ms. Langstaff. (*Id.* at 6-7.) Through this proxy, in addition to her own 26% interest, Ms. Langstaff also controlled Mr. McCracken's 25% interest. Thus, Appellant maintains, Ms. Langstaff, a service-disabled veteran with a 51% voting interest, controlled Appellant as of the date Appellant submitted its proposal. (*Id.* at 10.)

Appellant asserts that the proxy statement is not in the record before OHA because the D/GC never requested it. However, had the D/GC obtained the document, he "would have learned that Mr. McCracken's absence from meetings was due to family reasons and that [Mr. McCracken] had given his proxy to Ms. Langstaff." (*Id.* at 12.) Appellant further contends that Insignia's protest alleged that Ms. McCracken is not a service-disabled veteran, but was silent with respect to Mr. McCracken. Therefore, by exploring Mr. McCracken's role in Appellant without informing Appellant of the change in focus of the investigation or offering Appellant the opportunity to refute the allegation, the D/GC denied Appellant due process. *See, e.g.*, *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069 (2009).

Appellant concedes that the proxy may not now be admitted into the record as new evidence, because the D/GC did not previously review the document. (Appeal at 2 n.2, citing 13 C.F.R. § 134.512.) However, should OHA determine that the outcome of this case hinges on the terms of the proxy, Appellant requests that OHA remand the matter to the D/GC for further consideration in light of the proxy. (*Id.*)

Appellant next argues that, even if OHA were to conclude that Mr. McCracken is not an Operating Manager, Ms. Langstaff and Mr. McCracken, the service-disabled veterans, still control Appellant based on their combined majority ownership interest. (*Id.* at 11.) Appellant reasons that, if the non-service-disabled veteran managers (Mr. Tarpinian and Ms. McCracken) attempted to thwart the wishes of the service-disabled veterans, the service-disabled veterans could choose to remove them. Therefore, Appellant asserts, any appearance of control by the non-service-disabled veterans is illusory. *Size Appeal of Envt'l Quality Mgmt., Inc.*, SBA No.

SIZ-5429 (2012).

Lastly, Appellant takes issue with the D/GC's statement that "it appears from the information contained in the record that the management and daily business operations of [Appellant] are the responsibility of Ms. McCracken." (Appeal at 13, quoting D/GC's Determination at 5.) Appellant argues that this aspect of the determination is impermissibly vague, because the D/GC did not specify which information he was referencing. As a result, Appellant can only speculate as to how the D/GC reached this conclusion. Appellant argues to the contrary that the record contains ample evidence that Appellant's daily operations are controlled by Ms. Langstaff and Mr. McCracken. Ms. Langstaff's resume states that her "responsibilities include Daily management of day to day administrative activities" and that she "[o]verses the daily operation of corporate office administrative functions." (Appeal at 14-15.) Mr. McCracken's resume likewise shows he performs managerial activities. Appellant acknowledges that Appellant has "allowed [Ms.] McCracken to use the title 'CEO' for marketing purposes," but maintains that this title alone does not accurately reflect her actual level of authority. (*Id.* at 14.)

D. SBA's Response

On June 18, 2013, SBA submitted the Protest File (PF) and SBA's response to the appeal. SBA contends that the D/GC correctly found that Appellant is not fully controlled by service-disabled veterans; thus, OHA should affirm the determination.

SBA argues that OHA should not consider the proxy statement discussed in the appeal because this document was not before the D/GC. Furthermore, the proxy statement was in existence at the time Appellant responded to the protest, and therefore could have been submitted to the D/GC.

Next, SBA argues that the D/GC did not err in determining that Appellant was not controlled by service-disabled veterans. SBA argues that, under Appellant's Operating Agreement, for a Member to be an Operating Manager, the Member must be designated as an Operating Manager; a Member is not automatically an Operating Manager by virtue of the fact that he or she is a Member. (SBA Response at 6-7.)

SBA contends that the D/GC correctly interpreted section 5.1 of the Operating Agreement. The section in question reads, in pertinent part: "Management of the Company shall be vested in all of the Members who shall also serve as Operating Managers of the Company." SBA explains that the D/GC understood this sentence as requiring that only those Members who also serve as Operating Managers will have the right to manage Appellant. Appellant, on the other hand, construes this sentence to mean that all Members automatically serve as Operating Managers. Of the two interpretations, SBA argues the D/GC's is correct, because there is no comma before the phrase "who shall also serve as Operating Managers of the Company." Thus, in SBA's view, a Member is an Operating Manager only if he or she is designated as such. SBA emphasizes that the minutes from Appellant's annual meeting stated that Ms. Langstaff, Mr. Tarpinian, and Ms. McCracken were selected as Operating Managers. Mr. McCracken did not attend the meeting, and "[t]he record contains no documentation demonstrating that [Mr.]

McCracken had ever been designated, or acted in the capacity of, an Operating Manager for [Appellant].” (*Id.* at 7.)

SBA then argues that, even assuming Appellant's reading of section 5.1 were correct, Appellant still does not qualify as an SDVO SBC, because Appellant would then have had four Operating Managers with equal power. In that situation, contends SBA, service-disabled veterans would constitute only two of the four Operating Managers, which is insufficient to give them control over Appellant's decisions.

SBA disputes Appellant's assertion that Appellant was denied due process of law. SBA observes that the letter notifying Appellant of the protest made plain that Appellant was required to produce evidence demonstrating that Appellant was controlled by one or more service-disabled veterans. Further, the letter specifically instructed Appellant to submit proxy statements and shareholder agreements, if applicable. (PF, Tab H, at 409-10.) Thus, Appellant was, or should have been, aware that it needed to submit Mr. McCracken's proxy statement to the D/GC. (SBA Response at 8.)

SBA then addresses Appellant's argument that Ms. McCracken does not control Appellant's daily operations. SBA argues the record is replete with references to Ms. McCracken being primarily responsible for managing Appellant's day-to-day operations. (PF, Tab G, at 254-58, 318-19.) Thus, OHA should affirm the determination that Appellant is not controlled by one or more service-disabled veterans.

E. Reply

On June 29, 2013, 11 days after the close of record, Appellant moved to reply to SBA's response. Appellant explains that the reply “serves to correct the SBA's inaccurate factual statements and legal arguments,” and does not merely repeat arguments already made in the appeal petition. (Motion at 1.) Accordingly, for good cause shown, Appellant's motion is GRANTED and the reply is ADMITTED into the record. *E.g., Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 9 (2012) (permitting reply to refute alleged “errors and inconsistencies” in the response.)

In its reply, Appellant argues that the record does in fact establish that Mr. McCracken is an Operating Manager. To this end, Appellant highlights the minutes from a March 2006 special meeting, which occurred shortly after Mr. McCracken became a Member of Appellant. The minutes provide:

> The addition of [Mr.] McCracken as a new partner into the organization shall necessitate a change in the ownership (percentage) had by the managing partners (final % TBD). Now that the partnership recognizes two SDVOSBs [sic], their minimal ownership will be no less than 51%, the two WOs [sic] will be no less than 51%. Further, for voting purposes, their ownership is combined and counts as a single, majority vote on all company matters. In addition, both members must be actively engaged in the daily operations of the organization to include the

> ability to make management and binding decisions on behalf of the organization regardless of the position and/or title held.

(PF, Tab D, at 26.) Appellant also points to a document entitled "Listing of Managers" dated January 16, 2007. (*Id.* at 28.) This list consists of the four people Appellant argues are Operating Managers. Appellant emphasizes Mr. McCracken's name and signature are clearly evident on the third signature line.

Appellant goes on to argue that, even if the record did not demonstrate that Mr. McCracken is an Operating Manager, the D/GC's reading of section 5.1 contravenes the principle that conflicts or ambiguities in a document "should be harmonized, if possible, so as to give maximum effect to each provision while avoiding any anomalous results in application." *Size Appeal of Evans Cooperage Co.*, SBA No. SIZ-2812, at 30 (1988) (Phillips, J., dissenting). Appellant argues that the D/GC's analysis narrowly focused on whether a single sentence contained a non-restrictive clause and ignored the broader context. Appellant emphasizes that section 5.1 also provides that "Operating Managers shall vote in proportion to their Membership Interest in the Company. Except as otherwise provided in this Agreement, all decisions of the Operating Managers shall be by a majority in interest of the Members." Appellant argues these provisions make clear that, under the Operating Agreement, "status as a Member and Operating Manager are one and the same because voting among the Operating Managers is tied to Membership Interests." (Reply at 5.) Appellant asserts that "[w]ere Members not to serve as Operating Managers, managerial decisions would be impossible to make whenever Members holding less than 51% of the Membership Interests did not serve as Operating Managers." (*Id.*)

Next, Appellant criticizes SBA's suggestion that "if all four members of [[Appellant] are Operating Managers with equal powers as Appellant argues," Appellant would still be ineligible. Appellant contends it never made such an argument, and section 5.1 of the Operating Agreement contradicts this conclusion. That section provides, "The Operating Managers shall vote in proportion to their Membership Interests in the Company." Further, the minutes from the March 2006 special meeting, specifying that Mr. McCracken and Ms. Langstaff have a 51% combined vote, also contradict SBA's statement.

Appellant argues the proxy agreement is unnecessary to find Appellant an eligible SDVO SBC, because the record demonstrates that Mr. McCracken is an Operating Manager and that he and Ms. Langstaff, together, can control Appellant. Thus, because service-disabled veterans control Appellant, it is irrelevant whether Ms. Langstaff has the power to vote a 26% interest or a 51% interest.

Appellant then maintains that Ms. McCracken does not run Appellant's operations, and that SBA has not disputed Appellant's argument that any control wielded by Mr. Tarpinian and Ms. McCracken is illusory.

F. Request for Comments

Because the CO's letter of April 15, 2013 raised a threshold jurisdictional question that was not addressed either by Appellant or by SBA, OHA requested comments as to whether

Appellant certified its SDVO SBC eligibility for the instant procurement, and whether Insignia's protest was timely filed. In the request for comments, OHA noted that the appeal petition stated that Appellant "self-certified as a SDVOSB for this solicitation." (Appeal at 10.) The statement that Appellant self-certified for the instant procurement appears to be at odds with the CO's assertion that Appellant most recently certified as an eligible SDVO SBC in July 2011.

On July 11, 2013, Appellant responded to the request for comments. Appellant argues that the D/GC lacked authority to issue his determination because Insignia's protest was untimely. Appellant urges OHA to vacate the determination.

Appellant argues that it is unclear whether, under SBA's regulations, Appellant self-certified as an eligible SDVO SBC at the time it submitted its proposal. Appellant acknowledges that it referred to itself in its proposal as a "Service Disabled Veteran Owned Small Business (SDVOSB) Headquartered in Reston, Virginia." (PF, Tab G, at 184.) Appellant further "attest[ed] that all information contained in the Government's [System for Award Management] database is current and accurate." (*Id.* at 234.) Nevertheless, Appellant argues, it is immaterial whether these representations constitute a formal self-certification within the meaning of SBA's regulations, because the CO did not request recertification of SDVO SBC eligibility for this particular procurement. To support its argument, Appellant relies upon 13 C.F.R. § 121.404, a regulation pertaining to the time for determining size.

Appellant argues that, in the context of determining size, "[a] concern that qualified as a small business at the time it receives a contract is considered a small business throughout the life of that contract." 13 C.F.R. § 121.404(g); *Size Appeal of Quantum Prof'l Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR) (size protest of task order award was untimely because size was governed by certification on underlying multiple award contract). An exception to this rule occurs "[w]here the contracting officer explicitly requires concerns to recertify their size status in response to a solicitation for an order." 13 C.F.R. § 121.404(g)(3)(v). In such a case, "SBA will determine size as of the date the concern submits its self-representation as part of a response to the solicitation for the order." *Id.* Appellant concedes that 13 C.F.R. § 121.404 applies specifically to size, and there is no comparable provision in 13 C.F.R. Part 125, which governs SDVO SBC eligibility. Appellant asserts, however, that "[n]othing in SBA's regulations suggest that the rule is any different for SDVOSB status," and points out that, like size, SDVO SBC eligibility is determined as of the date the concern submits its initial offer which includes price. (Response at 3, citing 13 C.F.R. § 125.15(a).)

In this case, Appellant argues, the CO limited the procurement to SDVO SBCs, but did not request that offerors recertify SDVO SBC status. Therefore, SDVO SBC eligibility should be determined as of the date Appellant made its offer on the underlying FSS contract, not as of the date Appellant submitted its offer for the BPA. (*Id.* at 4.) Accordingly, Insignia's eligibility protest filed on April 5, 2013 is nearly two years late, and therefore untimely.

Lastly, Appellant argues that even if its protest is deemed untimely, the D/GC lacked authority to issue the determination because Insignia protested Appellant's eligibility in connection with award of a BPA. According to 13 C.F.R. § 121.404(g)(3)(vi), "[a] Blanket Purchase Agreement (BPA) is not a contract. Goods and services are acquired under a BPA

when an order is issued. Thus, a concern's size may not be determined based on its size at the time of a response to a solicitation for a BPA." Appellant argues that, although the regulation again refers to size and not SDVO SBC eligibility, "nothing in SBA's regulation or case law suggest that a BPA should be treated any differently for purposes of determining SDVOSB status." (*Id.* at 6.)

Responses to Appellant's comments were due July 19, 2013. OHA did not receive any response from SBA, the CO, or Insignia.

IV. 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. OHA reviews the D/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 D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

B. Analysis

For the reasons discussed *infra*, I find that Insignia's protest was timely, and that the D/GC did not err in determining that Appellant is not controlled by one or more service-disabled veterans. As a result, the appeal must be denied.

1. Protest Timeliness

The regulations governing protests of an SDVO SBC's status provide that "[f]or negotiated acquisitions, an interested party must submit its protest by close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror." 13 C.F.R. § 125.25(d)(1); *see also* 48 C.F.R. § 19.307(d). Here, Insignia lodged its protest within five business days of learning that Appellant had been awarded a BPA. *See* Section III.A, *supra*. Therefore, Insignia's protest was timely. The fact that the CO did not request recertification of SDVO SBC eligibility for this particular procurement is of no consequence, since the applicable regulations permit protests on "negotiated acquisitions" and do not indicate that a protest may be pursued only if recertification were sought.[3] Similarly, while it

[3] It is worth noting that the Federal Acquisition Regulation (FAR) requires that "[a]t the time that a service-disabled veteran-owned small business concern submits its offer, it must represent to the contracting officer that it is a . . . [s]ervice-disabled veteran-owned small business concern." 48 C.F.R. § 19.1403(b)(1). Thus, unlike size certifications for task orders under long-term contracts, offerors on a procurement set aside for SDVO SBCs must represent their status each time they submit an offer, regardless of whether the CO requested recertification. *Cf.*, 13 C.F.R. § 121.404(g)(3)(v).

may be argued that a BPA is not a binding contract, a BPA nevertheless can be considered a type of "negotiated acquisition," such that a protester may challenge the SDVO SBC status of an apparent awardee of a BPA that is set aside for SDVO SBCs. It is therefore immaterial that the instant procurement involved the award of BPAs as opposed to contracts or orders.

Appellant correctly observes that SBA's size regulations discuss the time at which size is determined for purposes of Federal Supply Schedules and other long term contracts. 13 C.F.R. § 121.404(g)(3). Appellant maintains that these size regulations should be applied by analogy to SDVO SBC eligibility protests. OHA has recognized, however, that it is improper to transplant rules from one portion of SBA's regulations to another. *Matter of A1 Procurement LLC/JVS*, SBA No. VET-223, at 5 (2011) (finding no authority "to import a specific provision that is not found in the SDVO SBC regulations"). Moreover, in its commentary accompanying the current iteration of 13 C.F.R. § 121.404(g)(3), SBA made clear that the regulation "only addresses size certifications," and is not intended to apply in conjunction with SDVO SBC eligibility representations. Specifically, SBA remarked:

> Several commenters asked SBA to clarify the effect of re-certification on other small business programs, *i.e.*, SDB, SDVOSBC, HUBZone, and 8(a) BD. Commenters requested clarification on whether firms would have to also recertify their SDB, HUBZone, 8(a) BD, SDVOSBC, or other status. Those issues are beyond the scope of this rulemaking action. The proposed rule addressed size for the purposes of specific contracts, including small business, HUBZone, 8(a), and SDVOSBC set-aside contracts, but only addresses size certifications.

71 Fed. Reg. 66,434, 66,437 (Nov. 15, 2006). In short, then, the regulatory history confirms that SBA intended for 13 C.F.R. § 121.404(g)(3) to apply only to size certifications. Accordingly, I decline to apply the regulation found at 13 C.F.R. § 121.404(g)(3) to SDVO SBC status protests.

2. The Merits

Turning to the merits of the appeal, I find that the D/GC reasonably determined that only one of Appellant's three Operating Managers is a service-disabled veteran. Appellant's Operating Agreement makes clear that "[t]he Company shall be managed by the Operating Managers and the conduct of the Company's business shall be controlled and conducted solely by the Operating Managers." (Operating Agreement § 5.4.) Thus, because Appellant is managed and controlled predominantly by non-service-disabled veterans, Appellant is not an eligible SDVO SBC.

In attempting to refute the D/GC's determination, Appellant contends that each of Appellant's four Members is automatically designated an Operating Manager, such that Appellant actually has four Operating Managers, not three. Appellant's argument rests on section 5.1 of the Operating Agreement, which states, in pertinent part, that "Management of the Company shall be vested in all of the Members who shall also serve as Operating Managers of the Company." (*Id.* § 5.1.)

The notion that Appellant's Members are automatically designated Operating Managers, though, is undermined by other provisions in Appellant's Operating Agreement. Specifically, the

Operating Agreement explains that "Operating Managers shall mean the Member or Members selected by the Members at a meeting of Members duly called and held for such purpose to serve as Operating Manager or Operating Managers of the Company." (*Id.* § 1.1.F.) Logically, if Appellant's Members were automatically Operating Managers, there would be no need for the Members to "select" Operating Managers at a meeting.

Similarly, the Operating Agreement states that "Operating Managers shall hold office for the term for which elected and until a successor has been elected and qualified." (*Id.* § 5.2). This provision again suggests that Operating Managers are "elected" for a particular term in office, and do not become Operating Managers merely by virtue of their memberships.

In addition, the Operating Agreement permits that "[a]ny Operating Manager may resign at any time. . . ." (*Id.* § 5.3.) If all Members were, by definition, Operating Managers, an Operating Manager could not resign without first divesting his or her membership interest. Thus, by permitting resignations "at any time", the Operating Agreement implicitly recognizes that Members are not necessarily Operating Managers.

Contrary to Appellant's arguments, then, it is clear from a review of the Operating Agreement as a whole that Appellant's Members are not automatically Operating Managers; rather, Operating Managers are chosen by Appellant's Members for a specific term in office. In this case, the D/GC found—and the record confirms—that Ms. Langstaff, Ms. McCracken, and Mr. Tarpinian were selected as Operating Managers at Appellant's most recent annual meeting. *See* Section III.B, *supra*. Further, the Operating Agreement stipulates that "[t]he Operating Managers shall vote in proportion to Membership Interests in the Company." (Operating Agreement § 5.1.) Here, Ms. Langstaff, the only service-disabled veteran among Appellant's Operating Managers, has a 26% interest in Appellant and therefore a 26% vote. The remaining two Operating Managers, Mr. Tarpinian and Ms. McCracken, are not service-disabled veterans. Together, they own 49% of Appellant. Accordingly, the D/GC did not err in determining that only one of Appellant's three Operating Managers is a service-disabled veteran, and the service-disabled veteran lacks a sufficient voting interest to control Appellant. *See generally, Matter of United Med. Design Builders, LLC,* SBA No. VET-197, at 10 (2010) (finding a service-disabled veteran lacked a majority voting interest and therefore did not control the challenged firm).

Appellant argues unpersuasively that the control wielded by Ms. McCracken and Mr. Tarpinian is illusory because the service-disabled veterans could remove them. Appellant, though, cites no provision in the Operating Agreement—and the Operating Agreement contains no such provision—allowing Operating Managers to be removed without cause by Members who are service-disabled veterans. On the contrary, the Operating Agreement states that "Operating Managers shall hold office for the term for which elected and until a successor has been elected and qualified." (*Id.* § 5.2.) Thus, I cannot conclude that Ms. McCracken and Mr. Tarpinian have only the illusory appearance of control.

Appellant also argues that Mr. McCracken assigned his voting interest to Ms. Langstaff through a proxy statement shortly before Appellant submitted its proposal for the instant procurement. This argument fails for two reasons. First, Appellant itself concedes that the proxy

statement was not presented to the D/GC during the course of his review. Accordingly, the document is not properly before OHA, and may be given no weight in these proceedings. 13 C.F.R. § 134.512; *Matter of Apex Ventures, LLC,* SBA No. VET-219, at 5-6 (2011); *Matter of DAV Prime/Vantex Serv. Joint Venture,* SBA No. VET-138, at 4 (2008) (excluding new evidence proffered for the first time on appeal because it was available at the time of response to the protest). Second, the record establishes that Mr. McCracken is not, in any event, one of Appellant's three Operating Managers. Thus, because Mr. McCracken had no powers as an Operating Manager which might have been delegated or transferred to Ms. Langstaff, the proxy statement would not alter the analysis of the issue of control.

Lastly, in its Reply, Appellant argues to no avail that all Members must be Operating Managers because "[w]ere Members not to serve as Operating Managers, managerial decisions would be impossible to make whenever Members holding less than 51% of the Membership Interests did not serve as Operating Managers." (Reply at 5.) This argument lacks merit because it appears, based on the Operating Agreement, that voting among the Operating Managers is conducted by considering only the votes of those Members who have been elected as Operating Managers.

V. Conclusion

For the above reasons, I DENY the appeal and AFFIRM the D/GC's determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.515(a).

KENNETH M. HYDE
Administrative Judge