

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

IN THE MATTER OF:

Veterans Contracting Group, Inc.,

Appellant,

Solicitation No. W912DS-16-B-0017  
U.S. Army Corps of Engineers  
New York District  
New York, N.Y.

SBA No. VET-265

Decided: August 31, 2017

APPEARANCES

Joseph A. Whitcomb, Esq., Whitcomb, Selinsky, McAuliffe, PC, Denver, Colorado, for Appellant Veterans Contracting Group, Inc.

John Manfredonia, Esq., Sarah C. Schauerte, Esq., Manfredonia Law Offices, LLC, Cresskill, New Jersey, for Williams Building Company, Inc.

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

DECISION<sup>1</sup>

I. Introduction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) concluding that Veterans Contracting Group, Inc. (Appellant), is not an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC). Williams Building Company, Inc. (WBC), protested Appellant's status as an SDVO SBC. For the reasons discussed *infra*, I am affirming the determination and denying the appeal.

OHA decides appeals of SDVO SBC status determinations under 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 appeal

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<sup>1</sup> I originally issued this Decision under a Protective Order. *See* 13 C.F.R. § 134.205. After reviewing the original Decision, the parties informed OHA they had no requested redactions. Therefore, I now issue the entire Decision for public release.

within 10 business days of receiving the determination, so the appeal is timely. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Protest and Initial SDVO SBC Status Determination

On December 1, 2016, the U.S. Army Corps of Engineers issued Invitation for Bids (IFB) No. W912DS-16-B-0017 for the removal of hazardous materials and demolition of buildings at the St. Albans Community Living Center in Jamaica, New York. The Contracting Officer (CO) set aside the procurement entirely for SDVO SBCs, and assigned North American Industry Classification System (NAICS) code 238910, Site Preparation Contractors, with a corresponding \$15 million average annual receipts size standard. Bids were due January 5, 2017. (IFB, Amendment 0002.) Appellant and WBC submitted timely bids, self-certifying as SDVO SBCs.

On January 5, 2017, the CO opened bids and announced Appellant was the lowest bidder. On January 11, 2017, WBC filed protests with the CO challenging Appellant's size and status as an SDVO SBC. The CO referred the size protest to SBA's Office of Government Contracting, Area I (Area Office), and the status protest to the D/GC.

On February 2, 2017, the Area Office issued Size Determination No. 1-SD-2017-17, concluding that Appellant is affiliated with Agency Construction Corporation (ACC) through common management and the totality of the circumstances. (Size Determination at 6-7.) However, because the combined receipts of Appellant and ACC do not exceed the size standard, Appellant is a small business. On February 16, 2017, the D/GC denied WBC's SDVO SBC status protest.

On February 28, 2017, WBC appealed the D/GC's determination to OHA. On March 30, 2017, SBA requested that OHA remand the D/GC's determination for further review and investigation. On April 3, 2017, OHA remanded the matter to the D/GC. *Matter of Williams Building Co.*, SBA No. VET-262 (2017).

### B. SDVO SBC Status Determination on Remand

On July 18, 2017, the D/GC issued his determination that Appellant is not an eligible SDVO SBC. The D/GC did find that Ronald Montano, the individual upon whom Appellant's claim of eligibility is based, is a Service-Disabled Veteran (SDV), and that he does own a 51% interest in Appellant. (D/GC Determination at 5.) The other 49% is owned by Gregory Masone, who also owns Agency Construction Corp. (ACC), Appellant's landlord. (*Id.* at 3.)

Nevertheless, the D/GC concluded that Appellant does not meet the requirement that it be 51% unconditionally owned by an SDV. This is because the Shareholders Agreement (Agreement) places impermissible conditions on Mr. Montano's ownership interest. The Agreement states that upon shareholder death, incompetency, or insolvency, all of his or her shares must be purchased by Appellant at the Certificate Value. (*Id.*, citing Agreement, Arts. 9.01-9.03.) If the SDV dies or becomes bankrupt, the shares are forced out of his estate at a

predetermined price, not even their present fair value. (*Id.*) Thus, the SDV is deprived of his ability to dispose of his shares as he sees fit, and at the full value of his ownership interest. These are significant restrictions on the ability of Mr. Montano and his heirs to convey their stock in Appellant. (*Id.* at 5-6.)

The D/GC quoted the definition of unconditional ownership articulated in OHA's precedent:

In the context of 13 C.F.R. § 125.9, unconditional necessarily means there are no conditions or limitation upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

(*Matter of The Wexford Group Int'l, Inc.*, SBA No. SDV-105, at 5 (2006) ( *Wexford* ).)

Based on this definition, the D/GC concluded that Mr. Montano's ownership of Appellant is not unconditional and unencumbered. (D/GC Determination at 6.)

As for control, the D/GC determined that Mr. Montano holds Appellant's highest officer position and has the requisite managerial experience to run the firm. (*Id.*) The D/GC also concluded that Appellant's lease with ACC does not impact Mr. Mantano's control over Appellant. (*Id.*)

Nevertheless, the D/GC further determined that Mr. Montano does not control Appellant's Board of Directors, as required by 13 C.F.R. § 125.13(e). (*Id.* at 6-8.) Mr. Montano is Appellant's sole director. However, Appellant's Shareholder Agreement provides:

So long as the parties are Shareholders of [Appellant], they each agree to be employed by [Appellant] as Officers. Each Officer shall have the powers and duties defined in certain resolutions of [Appellant] as may be adopted by the Board of Directors from time to time. The Board of Directors hereby agrees to vote to elect and continue in office the following offices [sic] set forth next to their names:

Ronald V. Montano	President
Ronald V. Montano	Vice President
Gregory C. Masone	Secretary
Gregory C. Masone	Treasurer

(*Id.* at 7-8, quoting Agreement, Art. 1.01.)

Therefore, the Agreement selects Appellant's officers, the Board of Directors does not, and Mr. Montano has no control over the appointment of individuals to these offices. Only by amending Article 1.01 of the Shareholder Agreement could Mr. Montano select different officers for the corporation. This requires the unanimous consent of the Shareholders. (D/GC Determination, citing Agreement, Art. 15.01.) Therefore, Mr. Montano is unable to appoint Appellant's corporate officers without minority consent. This is a supermajority requirement because it means more than a simple majority of shares is required to select corporate officers. (D/GC Determination at 7-8.)

The D/GC turned to SBA's Business Development regulations for guidance in determining when supermajority requirements may affect an SDV's ability to control a concern. (*Id.* at 7, citing *Matter of Eason Enterprises OKC, LLC*, SBA No. VET-102 (2005).) These regulations require that the eligible individual must own at least 51% of the voting stock and must be on the Board of Directors. If there are supermajority voting requirements, the eligible individual must own at least the percentage of voting stock necessary to overcome the requirements. (D/GC Determination, citing 13 C.F.R. § 124.106(d)(1)(ii).)

The D/GC then found that because the selection of new officers requires modification of the Shareholder Agreement, and such modification requires a unanimous vote, and Mr. Montano is not Appellant's sole shareholder, that Mr. Montano lacks the ability to overcome a supermajority voting requirement, and therefore does not control Appellant's Board of Directors. (D/GC Determination at 8.)

Accordingly, the D/GC concluded, because Appellant's Shareholder Agreement contains provisions impairing the disposition of Mr. Montano's equity, he does not unconditionally own at least 51% of Appellant. Further, because there is a supermajority voting requirement that Mr. Montano cannot overcome, he does not control Appellant's Board of Directors. Accordingly, the D/GC found Appellant is not an eligible SDVO SBC. (*Id.*)

### C. Appeal Petition

On August 3, 2017, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant contends the D/GC clearly erred in finding Mr. Montano's ownership is conditional, and in finding he lacks control over Appellant's Board of Directors.

First, regarding ownership, Appellant argues the D/GC clearly erred in determining that the provisions in the Agreement requiring the sale of a shareholder's interest to Appellant "at a predetermined price" upon death, incapacity, or insolvency render Mr. Montano's ownership conditional. Rather, the Agreement provides that should such an event occur, the shares will pass to Appellant at its most recent Certificate Value. (Appeal at 3, citing Agreement Arts. 9 & 10.) Appellant's Certificate Value is regularly prepared by its accountant to meet its construction bonding requirements. (Appeal at 3.) Thus, the Certificate Value is not arbitrary, but an objective assessment of Appellant's net value at the time of preparation, and it does not encumber Mr. Montano's present or future ownership rights in violation of 13 C.F.R. § 125.12. (*Id.* at 3-4.)

Noting the D/GC requested the most recent Certificate Value but not clarification as to how often the Certificate Value is prepared, Appellant presents with its appeal a July 26, 2017 letter from its accountant. (*Id.* at 3.)

Appellant further argues the D/GC's determination, based on *Wexford*, was legally erroneous because that decision, issued in 2006, relied on an obsolete regulation. Appellant maintains that the regulation, then at 13 C.F.R. § 125.9, has since been replaced with regulations concerning the Mentor/Protégé program. (*Id.* at 4.)

Appellant also points to two Court of Federal Claims decisions that, Appellant asserts, undercut the D/GC's reasoning. The first is *Miles Construction, LLC v. U.S.*, 108 Fed. Cl. 792 (2013) (*Miles*). Appellant asserts the Court found that an operating agreement which provides surviving members of a limited liability company the right of first refusal to the membership interest of another member who has died or become incapacitated is not a basis for finding that an SDV does not possess the requisite ownership rights for eligibility as a Service-Disabled Veteran-Owned Small Business (SDVOSB) under the Department of Veterans Affairs (DVA) program. The Court characterized a right of first refusal as a “standard provision used in normal commercial dealings, and does not burden the veteran's ownership interest unless he or she chooses to sell some of his or her stake.” (Appeal at 4, quoting *Miles*, 108 Fed. Cl. at 803.) Therefore, it was arbitrary and capricious to conclude that such a provision affects a veteran's unconditional ownership. (Appeal at 4-5.)

Appellant also relies upon *AmBuild Co., LLC, v. U.S.*, 119 Fed. Cl. 10 (2014) (*AmBuild*), another SDVOSB case arising from the DVA program. Appellant asserts in that case an operating agreement which provided for the involuntary removal of a member upon personal bankruptcy was a standard commercial arrangement, because the member would lose his or her interest in bankruptcy in any event. (Appeal at 5, citing *AmBuild*, 119 Fed. Cl. at 25.) Therefore, to find this provision a burden on the veteran's ownership stake was arbitrary and capricious. (Appeal at 5.) Appellant prays that OHA find the executory clauses in Article 9 of the Agreement do not encumber Mr. Montano's ownership of Appellant, because they are standard commercial arrangements and are not presently executory. (*Id.* at 6.)

Regarding control of the Board of Directors, Appellant asserts its Agreement does not contain a supermajority provision, and the D/GC erred in finding that it did. First, Appellant maintains the D/GC does not identify where the supermajority requirement is found. While the original Shareholder Agreement required a 75% vote to approve any action, that provision was removed in 2012. Appellant does concede that Article 15.01, requiring unanimous consent to amend the Shareholder Agreement does contain a supermajority provision. (*Id.* at 6-7.)

Appellant maintains Mr. Montano retains the right to appoint corporate officers. Article 1.02 of the Second Amendment to the Shareholder Agreement lists Mr. Montano as Appellant's sole Director and grants him “full power and authority to appoint one or more officer(s)” of Appellant. (*Id.* at 8.) This plain language grants Mr. Montano the power to appoint officers unilaterally as Appellant's sole Director. The D/GC's determination to the contrary was clearly erroneous. (*Id.* at 8-9.)

#### D. WBC's Response

On August 13, 2017, WBC responded to the appeal. WBC argues that because Mr. Montano must sell his shares to Appellant at the Certificate Value in the event of his death, incompetency or insolvency, he does not unconditionally own his shares under the *Wexford* standard. The provisions of Article 9 of the Agreement strip Mr. Montano of his unconditional ownership, and run afoul of the requirement that he or his heirs may freely transfer his stock. (WBC Response at 2-3, citing 13 C.F.R. § 125.12.)

WBC further asserts Appellant's argument that *Wexford* cites 13 C.F.R. § 125.9, which now governs SBA's Mentor-Protégé program is immaterial, because this reflects nothing more than a renumbering of SBA regulations. The regulation on the ownership requirements for an SDVO SBC (13 C.F.R. § 125.12) has not substantively changed since *Wexford*. (WBC Response at 3-4.) The Agreement's requirement that Mr. Montano must sell his shares to Appellant at the Certificate Value upon his death, insolvency or incapacity means he does not unconditionally own his shares. (*Id.* at 10-11.)

WBC further asserts Appellant's reliance upon *Miles* and *AmBuild* is misplaced. These cases dealt with the definition of unconditional ownership of SDVOSBs in the DVA regulations at 38 C.F.R. Part 74. This definition is different from that in the SBA regulations. Therefore, the “normal commercial practices” exception is not applicable here. (*Id.* at 3-5.)

WBC maintains Mr. Montano lacks control of Appellant because Article 1.01 of the Agreement strips the Board, and thus him, of the power to appoint and remove corporate officers. While the Second Amendment to the Agreement gives the Board the power to appoint and remove Directors, it does not eliminate the more specific requirements of Article 1.01. WBC further argues that the need for unanimous consent to amend the Agreement means that Mr. Montano does not control Appellant's Board of Directors. He does not have the ability to make changes in the structure of the corporation. (*Id.* at 8-9.)

WBC requests that OHA affirm the D/GC's Determination on both the ownership and control grounds. In addition, WBC raises a number of new issues on appeal, arguing that there are other provisions of the Agreement, beyond those identified by the D/GC, which deprive Mr. Montano of control. (*Id.* at 5-8, 10.)

#### E. SBA's Response

On August 14, 2017, SBA responded to the appeal. SBA contends the D/GC's determination was not based on a clear error of fact or law and should be upheld.

SBA contends the D/GC properly relied on the *Wexford* standard (Section II.B, *supra*) in determining that Mr. Montano does not have unconditional ownership of Appellant. The Agreement clearly provides that if Mr. Montano becomes insolvent, or seriously ill, even if the cause of his illness is his service-connected disability, his ability to sell his shares at fair market value is taken. If Mr. Montano dies, his ability, or that of his estate, to sell his shares at fair

market value is taken. The D/GC concluded that these are clear conditions on ownership. (SBA Response at 3-5.)

SBA points out that Appellant argues that SBA should apply the DVA regulations. Specifically, in *Miles* and *AmBuild*, the Court of Federal Claims found some restrictions on unconditional ownership to be commercially reasonable. These cases were interpreting DVA regulations, which are different from SBA's. Appellant requests SBA to adopt wholesale changes to its SDVO SBC regulations to conform to DVA's SDVOSB regulations, a request that can be accomplished only by rulemaking. (*Id.* at 5.)

SBA asserts its SDVO SBC regulations are concerned not merely with current eligibility but also with ensuring that program benefits are not diverted from SDV owners. Under Appellant's rationale a concern could become successful based on the benefits of the SDVO SBC program, and in the future that value could be usurped by minority owners by triggering certain conditions that would divert the benefits from the SDV. SBA ensures there can be no diversion of future benefits by requiring the SDV's ownership to be unconditional, and that there can be no restriction on the SDV's ownership interest. (*Id.* at 5-6.)

Regarding the control issue, SBA argues that the D/GC's determination that Mr. Montano does not control Appellant is correct. SBA points to Article 1.01 of the Agreement (Section II.B, *supra*), which provides that Mr. Montano will be President and Vice President and Mr. Masone will be Secretary and Treasurer. The power to elect and remove officers is a key component of the ability of a Board to control a corporation. The Agreement stipulates that the Board is not authorized to select Appellant's corporate officers. The only way to change Appellant's officers is to amend the Agreement, which requires unanimous consent of the shareholders. Mr. Montano thus does not control the Board. (*Id.* at 6-8.)

SBA further maintains it did not ignore the amendments to the Agreement; however, Appellant's amendments did not remove Article 1.01. Mr. Montano still cannot change the corporate officers without the minority shareholder's consent, and he thus does not control Appellant's Board of Directors. (*Id.* at 8.)

#### F. Additional Pleadings

On August 14, 2017, Appellant moved for Leave to Reply to the Responses of SBA and WBC. On August 15, 2017, SBA opposed Appellant's Motion. On August 16, 2017, WBC also opposed Appellant's Motion.

### III. Discussion

#### A. New Evidence, Reply, and Standard of Review

Appellant submits on appeal new evidence in the form of a letter from its accountant. OHA's governing regulations provide: "The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal

petition and response(s) filed thereto.” 13 C.F.R. § 134.512. I have no discretion to admit any new material. *Matter of Veterans Construction Services, Inc.*, SBA No. VET-167, at 4 (2009). Accordingly, the accountant's letter is EXCLUDED from consideration here.

Appellant moves to submit a reply to the Responses of SBA and WBC. SBA and WBC oppose Appellant's Motion. Under the regulations, a Reply is not permitted unless the Judge orders it. 13 C.F.R. § 134.206(e). I find Appellant's Reply merely rehashes its previous arguments and, thus, I EXCLUDE it from the record on appeal.

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 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, I may overturn the D/GC's decision only if Appellant proves the D/GC made a patent error based on the record before him.

## B. Analysis

### 1. Ownership

To be eligible as an SDVO SBC, a corporation “must be at least 51% unconditionally and directly owned by one or more service-disabled veterans.” 13 C.F.R. § 125.12(a), (d). In *Wexford*, OHA interpreted unconditional ownership to mean that SDVs must own the stock “immediately and fully,” that they must be able to convey the stock “whenever and to whomever they choose,” and that they must still own the stock and be able to dispose of it “as they choose” in the event of departure, resignation, retirement or death. *Wexford* at 6.<sup>2</sup>

Appellant's Agreement places conditions on Mr. Montano's ownership interest. In the event of a shareholder's death, they are deemed to have offered all of their shares to the corporation at the Certificate Value as of the date of their death, and the offer is deemed accepted. Agreement, Article 9.01. The Certificate Value is the value of the corporation as determined by its accountant in his or her reasonable discretion. *Id.*, Article 10.01. It is therefore clear that in event of Mr. Montano's death, he is not able to dispose of his stock as he pleases, but rather, his estate must sell it to the corporation at the corporation's price.

Further, if a shareholder is adjudged to be incompetent, then their shares are deemed to have been offered to the corporation at Certificate Value, and the corporation shall purchase the shares. *Id.*, Article 9.02. If a shareholder becomes insolvent, they shall be deemed to have offered their shares to the corporation at Certificate Value, and the corporation shall purchase the shares. *Id.*, Article 9.03.

It is therefore clear that Appellant's Agreement places conditions on Mr. Montano's ownership and these conditions fail to meet the *Wexford* standard. He cannot dispose of his

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<sup>2</sup> In 2016, the regulation on ownership of an SDVO SBC, formerly at 13 C.F.R. § 125.9, was redesignated to § 125.12. 81 Fed. Reg. 48585 (July 25, 2016). However, the text of the regulation remains unchanged.

shares as he wishes in the event of his death, incapacity or insolvency. They must be purchased by Appellant at a price set by Appellant's accountant. His shares cannot be left as part of his estate to anyone he chooses, or passed to someone of his (or his trustee's) choice in the event of his being adjudged incompetent. On the question of insolvency, Appellant is correct that Bankruptcy or other insolvency proceedings would impose legal constraints on any disposition of a shareholder's property, such that will override the terms of the Agreement. The filing of a bankruptcy petition creates an estate composed of the debtor's property. 11 U.S.C. § 541. The trustee may use, sell or lease this property. 11 U.S.C. § 363. Indeed, the possibility of insolvency, and its attendant loss of property, exists for all businesses. This possibility does not render conditional the ownership of any business, nor does a provision of the Agreement designed to deal with that eventuality render Mr. Montano's ownership conditional. I therefore find that Article 9.03 does not fail to comply with the *Wexford* standard. However, Articles 9.01 and 9.02 most certainly do, and unacceptably limit a shareholder's unconditional ownership of his or her shares.

Appellant's argument that the Agreement does not provide that the shares be sold at a predetermined price is meritless here. The point is, the shareholder has no control over the price. It will be set by Appellant's accountant. The shareholder has no ability to bargain or to refuse to sell. If a shareholder dies or becomes incapacitated the shares must be sold at a price determined by the accountant. The shareholder's ownership, thus, is not unconditional.

Appellant relies on *Miles* and *AmBuild* to support its contention that its ownership structure meets the regulatory requirements. However, these cases both dealt with DVA's Service-Disabled Veteran-Owned Small Business program, the Vets First Contracting Program. The Court considered the issue of ownership under DVA's regulation, 38 C.F.R. § 74.3. This is a different program from SBA's Service-Disabled Veteran-Owned Small Business Concern program. The DVA's program was established under § 8127 of the Veterans Benefits, Health Care, and Information Technology Act of 2006, is limited to procurements by DVA, and requires DVA's Center for Verification and Evaluation (CVE) to maintain a database of eligible firms. Its regulations are found at 38 C.F.R. Part 74. SBA's program is authorized under § 36 of the Small Business Act, covers procurements government-wide, and has no required verification program, relying instead on the System for Award Management (SAM). Its regulations are found at 13 C.F.R. §§ 125.11-125.33. Therefore, SBA's SDVO SBC program is a separate and distinct program for DVA's SDVOSB program. *Miles* and *AmBuild* were construing a program different from the program Appellant seeks benefits from here, and a regulation not applicable to the case at hand. The question here is whether Mr. Montano unconditionally owns at least 51% of Appellant under 13 C.F.R. § 125.12.

The Court of Federal Claims in *Miles* and *AmBuild* was construing a regulation which provided that pledges or other encumbrances of stock which follow "normal commercial practices" do not affect the unconditional nature of a shareholder's ownership. 38 C.F.R. § 74.3(b). The Court found in both cases that the restrictions on ownership in question met the standards of "normal commercial practices" and were thus not limits on the unconditional nature of the shareholder's ownership. The Court in *Miles* specifically considered the *Wexford* standard, but did not adopt it, because it was construing 38 C.F.R. § 74.3, a different regulation than the one at issue in *Wexford*. *Miles*, slip op. at 11. That regulation in *Miles*, unlike § 125.12, contains

an extended definition of unconditional ownership which includes an exception for “normal commercial practices”. SBA's regulation contains no such exception. The SBA regulation at § 125.12 requires that the SDV's ownership be unconditional, without condition or limitation upon the individual's right to exercise full ownership and control of the concern.

As the Court stated in *Miles*:

In this instance, a different regulation, 38 C.F.R. § 74.3, is at issue. Unlike 13 C.F.R. § 125.9, Section 74.3 contains an extended definition of unconditional ownership. . . . [T]he regulation notes that provisions causing benefits to go to another “after death or incapacity” do not affect the unconditional nature of ownership. . . . In the same vein, “[t]he pledge or encumbrance of stock . . . as collateral, . . . does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.”

*Miles*, slip op. at 11 (quoting 38 C.F.R. § 74.3.).

I therefore conclude that *Miles* and *AmBuild* are inapposite to the instant case because they are construing 38 C.F.R. § 74.3, a different regulation governing a different program, and with different standards, than 13 C.F.R. § 125.12, the regulation at issue here.

The DVA regulation contains a specific exception for ownership restrictions which are found to be included in “normal commercial practices”. The SBA regulation contains no such provision, and the *Wexford* standard does not allow for it. Appellant would have OHA write a “normal commercial practices” exception into SBA's regulation, but OHA does not have the authority to rewrite regulations. The *Wexford* standard has been in place and consistently followed for eleven years, and SBA has taken no step to disturb it or to revise the regulation to allow for “normal commercial practices” of the type permitted by the DVA regulation. SBA has determined that it will instead keep the stringent definition of unconditional ownership in the regulation, in order to ensure that the benefits of ownership accrue to the SDV. The D/GC did not err in applying the established *Wexford* standard for determining whether Mr. Montano's ownership of Appellant is unconditional.

## 2. Control

An SDVO SBC must be controlled by one or more SDVs. 13 C.F.R. § 125.13. The management and daily business operations must controlled by one or more SDVs. 13 C.F.R. § 125.13(a). An SDV must hold the highest officer position, and have managerial experience of the extent and complexity needed to run the concern. 13 C.F.R. § 125.13(b). The D/GC found that Appellant meets these requirements.

The D/GC found that Appellant does not meet the third requirement for control. The regulation provides, in the case of a corporation:

One or more service-disabled veterans . . . must control the Board of Directors of the concern. Service-disabled veterans are considered to control the Board of Directors when either:

- (1) One or more service-disabled veterans own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or
- (2) Service-disabled veterans comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

13 C.F.R. § 125.13(e).

This regulation is disjunctive; that is, it provides two scenarios either of which allows the concern to meet the test for SDV control of the Board of Directors. A concern which meets either test may qualify. *Matter of Reese Services, Inc.*, SBA No. VET-231, at 3 (2013).

Here, the D/GC found Appellant failed to meet the first test, because Article 1.01 of the Agreement requires that two particular individuals be the corporate officers, and the Agreement may be changed only by a unanimous vote of the shareholders, which the non-SDV minority shareholder could block.

Appellant challenges this finding, but fails to consider that it does meet the second, alternative standard for establishing control. As sole Director, Mr. Montano comprises the majority of directors under any calculation. Accordingly, Appellant meets the standard under 13 C.F.R. § 125.13(e)(2).

The D/GC ignored this provision, as does Appellant, as does SBA in its Response. However, it is very clear in the regulation that there are two ways in which an SDV may be considered to control a concern's Board of Directors, and one does not mention supermajority voting requirements, but merely requires that service-disabled veterans comprise a majority of the Board. Appellant unquestionably meets this test.

Instead, the D/GC relied upon SBA's Business Development regulations for guidance in determining whether supermajority requirements affect an SDV's ability to control a board of directors. These regulations provide three scenarios where eligible individuals are deemed to control a corporation's board of directors. These are: where the eligible individual owns 100% of a concern's voting stock (13 C.F.R. § 124.106(d)(1)(i)); where that individual owns at least 51% of the voting stock, is on the board, and if there are supermajority voting requirements, the individual owns enough voting stock to overcome them (13 C.F.R. § 124.106(d)(1)(ii)); there are two or more eligible individuals, each is on the board, and if there are supermajority voting requirements, they together own enough voting stock to overcome them. (13 C.F.R. § 124.106(d)(1)(iii)).

The D/GC relied upon 13 C.F.R. § 124.106(d)(1)(ii) for guidance in determining Mr. Montano lacks the ability to control Appellant's Board. It is true that the 8(a) Business Development regulations can provide guidance interpreting the control requirement for SDVO SBC eligibility. *Matter of Artis Builders, Inc.*, SBA No. VET-214, at 4 (2011). However, that a regulation for another program provides guidance does not mean that it can override or add a new requirement to a clear provision in the applicable regulation. The SDVO SBC regulations clearly provide that when SDVs are a majority of a board's voting directors, SDVs control the board. The plain language of the regulation does not permit the D/GC to add to this provision with "guidance" from another regulation.

Accordingly, I find that the D/GC did err in finding that Mr. Montano does not control Appellant's Board of Directors, and I find that Appellant does meet the requirements of 13 C.F.R. § 125.13(e).

WBC claims that there are other provisions of the Agreement, beyond those identified by the D/GC, which deprive Mr. Montano of control. However, these are new issues raised on appeal, and do not go to the question of whether the D/GC erred in finding that Mr. Montano does not unconditionally own and control Appellant. Therefore, I will not consider them here. *See Matter of Fidelis Design Construction, LLC*, SBA No. VET-221 (2011).

In summary, I conclude that the D/GC erred in finding Mr. Montano does not control Appellant's Board of Directors. I further conclude that the D/GC erred in finding that Article 9.03 of Appellant's Shareholder Agreement rendered Mr. Montano's ownership conditional. Nevertheless, I also conclude that the D/GC did not err in finding that the Mr. Montano's ownership of Appellant is not unconditional because of the provisions of Articles 9.01 and 9.02 of Appellant's Shareholder Agreement, which provides that in event of a shareholder's death or incapacity, they must sell their shares to the corporation at the Certificate Value.

Therefore, Appellant has failed to establish that the D/GC's determination was based on a clear error of fact or law, and I must affirm the determination and deny the appeal. 13 C.F.R. § 134.508.

#### IV. Conclusion

Accordingly, the D/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