United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF: Strategic Alliance Solutions LLC, Appellant, Solicitation No. HQ0858-21-R-0010 Department of the Defense Missile Defense Agency	SBA No. VET-277 Decided: September 22, 2022

APPEARANCES

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DECISION[1]

I. Introduction

This appeal arises from a status determination by the U.S. Small Business Administration (SBA) Deputy Director for the Office of Government Contracting and Business Development (DD/GC) concluding that Strategic Alliance Solutions, LLC (Appellant), a joint venture comprised of Strategic Alliance Business Group LLC (SABG), a Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC), and BCF Solutions, Inc. (BCF), SABG's SBA-approved mentor, is not an eligible SDVO SBC joint venture for Solicitation No. HQ0858-21-R-0010. For the reasons discussed infra, I AFFIRM the DD/GC's status determination and DENY the appeal.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

SBA Office of Hearings and Appeals (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 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. Solicitation and Protest

On March 15, 2021, the Department of Defense (DOD), Missile Defense Agency (MDA) Contracting Office at Redstone Arsenal in Alabama, issued a Request for Proposal (RFP) under Solicitation No. HQ0858-21-R-0010 (solicitation). (Solicitation, at 1.) The purpose of this solicitation was "to provide the Missile Defense Agency with advisory and assistance services supporting facilities sustainment and operations." (TEAMS Next Statement of Work, at 3.) The Contracting Officer (CO) set-aside the acquisition entirely for SDVO SBCs and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services, with a corresponding $41.5 million annual receipts size standard. (Solicitation, at 119.) Final proposal revisions were due on March 31, 2022. Appellant and Defense Integrated Solutions, LLC (DIS) submitted timely offers.

On June 8, 2022, the CO informed DIS that Appellant was the apparent successful awardee. (Protest File (PF), at 34.) On June 15, 2022, DIS filed a SDVO SBC protest challenging Appellant's status. (Id., at 28-33.) DIS alleged that Appellant was other than small and ineligible as an SDVO SBC because its amended joint venture agreement did not comply with the applicable regulation at 13 C.F.R. § 125.18(b)(2). (Id.)

On June 28, 2021, SBA's Office of Government Contracting (D/GC) informed Appellant of the protest and requested Appellant respond with documentation. (Id., at 294-298.) Appellant provided a response with accompanying documentation. (Id., at 299-474.)

B. Appellant's Amended and Restated Operating Agreement

The record before OHA includes a copy of Appellant's Amended and Restated [Joint] Operating Agreement (JVOA), which Appellant provided to the D/GC in response to DIS's status protest. (PF, at 407-474.) Appellant's JVOA was established between SABG (Protégé) and BCF (Mentor). BCF holds [minority] membership/ownership interest, and SABG holds the remaining [majority] interest. (Id., at 470.) Actions under Article V, Section 5.4 of the JVOA require "unanimous approval of the Members" and are as follows:

> 5.4.1. Any amendment, modification, supplement, or repeal, in whole or in part, of the Company's Articles of Organization or this Agreement.
>
> 5.4.2. Admitting new or additional Members, including admitting any Transferee or Interest Holder as a Member;

> 5.4.3. Capital Contributions to, and contracts or agreements of any kind or nature with (i) Members, (ii) Affiliates of Members, or (iii) Affiliates or family members of Managers, the Project Manager, or officers, directors, partners, members, or controlling shareholders of Members.
>
> 5.4.4. A Transfer of any Interest except as provided in Article VII;
>
> 5.4.5. Electing to be taxed as a corporation rather than a partnership for federal income tax purposes;
>
> 5.4.6. Initiation of any claim or litigation under the Contracts and any final decision to continue prosecution of or settle such litigation or claim;
>
> 5.4.7. Settle or otherwise compromise any dispute with the Internal Revenue Service;
>
> 5.4.8. Withdrawal of a Member as provided in Article VI; or
>
> 5.4.9. Taking an action (including, but not limited to, entering into an agreement, or performing or complying with an agreement) which constitutes an actual or perceived Organizational Conflict of Interest, as defined in Part 9 of the FAR (a situation in which either Venturer has an interest or relationship or unequal access to information which could adversely affect that Venturer's ability to perform under any Contract contemplated under this Agreement).

(PF, at 455-456.)

C. DD/GC's Determination

On July 29, 2022, SBA's DD/GC determined that Appellant, a joint venture (JV) between SABG and BCF, did not meet SDVO SBC joint venture eligibility requirements and thus, ineligible for the solicitation. (PF, at 1-27.)

First, the DD/GC addressed the issue of whether Appellant qualified as a SDVO SBC. (Id., at 5-9.) The DD/GC determined that Appellant's managing member, Ms. Keri Mungo, is a Service-Disabled Veteran (SDV) as defined by 13 C.F.R. § 125.11; and Appellant is [majority] unconditionally and directly owned by a SDV as defined by 13 C.F.R. § 125.12. (Id., at 5-6.) However, the DD/GC determined Ms. Mungo does not control all decisions and thus, does not meet the control requirements of 13 C.F.R. § 125.13. (Id., at 7-9.) Specifically, the DD/GC reasoned that although Ms. Mungo is the managing member of the Appellant, she does not have the power and authority to negotiate and sign contract modifications, subcontract modifications and teaming agreements. (Id.) According to the JVOA, two other individuals are assigned power and authority to negotiate and sign contracts. (Id., at 8-9.) Thus, Appellant does not meet the requirement that a SDV control all decisions per 13 C.F.R. § 125.13. (Id.)

Second, the DD/GC addressed the issue of whether Appellant's JVOA complied with SBA regulation 13 C.F.R. § 125.18(b)(2), and considered whether the JVOA included the twelve elements the regulation requires for it to be compliant. (Id., at 9-24.) The DD/GC determined that Appellant's JVOA was compliant with six of the twelve requirements. The DD/GC determined the following: (1) JVOA provided the purpose of a venture; (2) JVOA included provisions for a Special Bank Account; (3) JVOA itemized all major equipment, facilities and other resources, meeting the itemization of resources requirement; (4) JVOA included a provision that ensured completion of the contract; (5) JVOA included a provision for financial statements; and (6) JVOA included a provision for year-end profit and loss statements. (Id., citing 13 C.F.R. § 125.18(b)(2)(i), (v), (vi), (viii), (xi), & (xii).)

The DD/GC determined, however, that Appellant's JVOA failed to meet the remaining six of the twelve requirements per 13 C.F.R. § 125.13(b)(2) and thus, failed to comply with the regulation. (Id., at 9-24.) A JVOA must include a provision that designates the SDVO SBC as the managing venturer and responsible manager of the JV, the SDVO SBC must also have control over the decision-making process. (Id., at 10-11.) DD/GC determined that Appellant failed to meet this requirement because Ms. Mungo, the SDV, is not an acceptable candidate to serve as the responsible manager, since the DD/GC determined Appellant does not qualify as a SDVO SBC. (Id., at 11.) Further, the JVOA provided BCF negative control over matters beyond the extraordinary circumstances identified at 13 C.F.R. § 125.11. (Id.) Thus, Appellant failed to meet Managing Venturer and Responsible Manager requirement per 13 C.F.R. § 125.18(b)(2)(ii).

The DD/GC also determined Appellant failed to meet Percentage Ownership requirements per 13 C.F.R. § 125.18(b)(2)(iii) due to DD/GC's first determination that Appellant did not qualify as a SDVO SBC. (Id., at 13-15.) Further, SABG holds [majority] ownership interest in Appellant; however, Article VII, Paragraph 7.4 restricts how, when, and the manner SABG can sell its interest in Appellant. (Id.) Thus, DD/GC determined the JVOA failed to meet this requirement due to the restrictions on SABG's ability to sell its interest in the Appellant.

Finally, the DD/GC determined Appellant failed to meet the Profit Distribution requirement per 13 C.F.R. § 125.18(b)(2)(iv), the Responsibilities of Parties requirement per 13 C.F.R. § 125.18(b)(2)(vii), the Record Maintenance requirement per 13 C.F.R. § 125.18(b)(2)(ix), and the Final Original Records requirement per 13 C.F.R. § 125.18(b)(2)(x). (Id., at 16-22). As reasoning, DD/GC cited to its initial decision that SABG does not qualify as a SDVO SBC and thus, the JVOA fails to meet these requirements. (Id.)

In summary, the DD/GC determined that since a SDV does not control SABG, the SDVO SBC joint venture partner of Appellant, the JVOA failed to meet joint venture requirements per 13 CFR § 125.18(b)(2). (Id., at 24.) Further, Appellant's JVOA fails to meet the twelve requirements under 13 CFR § 125.18(b)(2) and is thus, ineligible for the contract. (Id., at 24.)

D. Appeal

On August 15, 2022, Appellant filed the instant appeal. Appellant argued that the DD/GC made a clear error of fact and law when she determined that Appellant was not eligible for the SDVO SBC status, and when she determined the JVOA did not satisfy the joint venture (JV)

requirements of 13 C.F.R. § 125.18(b)(2). (Appeal, at 5.) First, Appellant argues the DD/GC did not have grounds to review SABG's SDVO SBC eligibility because DIS's allegations pertain to Appellant and its compliance under 13 C.F.R. § 125.18. (Id., at 3-4.) DIS's allegations did not contain specific allegations pertaining SABG's SDVO SBC eligibility, nor did DD/GC initiate its own status protest or make allegations against SABG. (Id.)

Appellant further argues the DD/GC failed to provide SABG notice that it questioned Ms. Mungo's control based on the authority to sign and negotiate contracts. (Id., at 4.) According to Appellant, the DD/GC erred when it determined Ms. Mungo lacked control over contract negotiations and signing. (Id., at 4-5.) Appellant argues that Ms. Mungo delegated authority to a Contracts Director and a Senior Contracts Manager; however, this does not mean the individuals control those functions. (Id., at 5.) Appellant cites to the DD/GC's determination to support its argument. Specifically, the DD/GC determined Ms. Mungo is the highest compensated officer and managing member of SABG, who has managed business operations for eight years. (Id.) Appellant notes that the DD/GC did not raise concerns regarding negative control by the minority owner, finding that Ms. Mungo controls quorum and voting requirements, as well as the ability to make amendments to SABG's JVOA. (Id.) Appellant contends the DD/GC "should have stopped there because the demonstrated control by Ms. Mungo over all company decisions is dispositive of her control over contract negotiations and signing." (Id.)

Citing OHA precedent, Appellant argues that Ms. Mungo, as the CEO, has the authority to "delegate responsibilities to other officers of the concern" but this does not grant subordinate officers control over the firm as a whole. (Id., citing Ave. Mori Med. Equip., LLC, SBA No. CVE-192 (2021); Superior Optical Labs, Inc., SBA No. CVE-157 (2020).) Further, SBA regulation does not mandate the SDV to sign all contracts or agreements. (Id., citing 13 C.F.R. § 125.13.) Appellant concludes "SABG's governing documents are clear that Ms. Mungo controls all decisions as required by 13 C.F.R. § 125.13 and that any subordinate officials operate under her supervision and control and cannot control SABG." (Id., at 6.)

Secondly, Appellant contends the DD/GC made a clear error of fact and law when she determined the JVOA did not satisfy joint venture requirements of 13 C.F.R. § 125.18. (Id.) Appellant argues that the DD/GC erred when it determined BCF held negative control beyond extraordinary circumstances. (Id.) OHA has determined that control requirements under 13 C.F.R. § 125.13 do not apply to SDVO SBC joint ventures. (Id., citing Commonwealth Home Healthcare, Inc., SBA No. CVE-116-P (2019).) Appellant contends the DD/GC's conclusion that the actions described at Section 5.4 of Appellant's agreement are not extraordinary actions under 13 C.F.R. § 125.11 is erroneous; and if the DD/GC relied on 13 C.F.R. § 125.18(b)(2)(ii), it would determine that Section 5.4 provides extraordinary actions that create reasonable protections for SABG and BCF. (Id., at 7-8.)

Specifically, Appellant argues that OHA has determined actions such as amending articles or the operating agreement, as cited under Section 5.4.1, to be an extraordinary circumstance. (Id., at 9-10, citing Southern Contracting Sols. III, LLC, SBA No. SIZ-5956, at 12 (2018); Swift & Staley, Inc., SBA No. SIZ-6125 (2021).) Further, OHA has determined that actions cited under Section 5.4.2, admitting members, Section 5.4.4, transfers of interest and Section 5.4.8, withdrawal of members are extraordinary actions that require unanimity and do

not prevent SABG from being a managing venturer. (Id., at 11, citing Southern Contracting, supra; Carntribe-Clement 8AJV #1, LLC, SBA No. SIZ-5357 (2012); Swift & Staley, supra.) Section 5.4.3 regards capital contributions meant to prohibit self-dealing and Section 5.4.9 prevents Organizational Conflict of Interest that affects contract performance. (Id., at 11.) Relying upon OHA precedent Appellant concludes that these provisions "are designed to protect both parties from a breach of a fiduciary duty by the other party or an action that could create a compliance issue for the joint venture." (Id., citing Southern Contracting, supra.) Section 5.4.5 is an extraordinary circumstance because it requires an amendment to the JVOA, and OHA has determined that amendments are extraordinary. Lastly, Section 5.4.6 initiating litigation and Section 5.4.7 settling disputes with the IRS are "reasonable protections against significant risks to both parties." (Id., at 12.) Citing OHA precedent, Appellant argues that "initiating or settling a claim or litigation on the joint venture's contracts is a momentous decision for the joint venture and its members, carrying significant risk for both parties." (Id., citing Southern Contracting, supra; Swift & Staley, supra.) Appellant makes no distinction between initiating litigation, submitting an arbitration claim, or a confession of judgment. (Id.) Appellant asserts that the forum for a claim "does not alter the risk or need for protection to both parties," and initiating a lawsuit creates a similar "risk of having to pay a potentially large sum" as a confession of judgment. (Id.)

In the alternative, Appellant argues that the unanimity requirements under Section 5.4 are commercially customary protections for the minority owner. (Id., at 14.) Appellant interprets 13 C.F.R. § 125.18(b)(2)(ii)(A) to include an exception that permits the minority joint venture partner "to participate in any corporate governance activity or joint venture decision." (Id., at 15.) Appellant concludes that if some actions in Section 5.4 are essential day to day management, then they are commercially customary protections that do not provide negative control. (Id.)

Further, Appellant asserts that the DD/GC erred when she determined SABG does not hold [majority] ownership interest in Appellant. (Id.) Appellant rejects the DD/GC unconditional ownership argument and asserts that this is not a requirement under 13 C.F.R. § 125.18(b)(2)(iii). Appellant contends that the right of first refusal under Section 7.4 does not create negative control, but is meant to protect both parties. (Id.) Further, Appellant contends that the sale of ownership interest is similar to the withdrawal or admission of a member, and OHA has determined this to be an extraordinary action. (Id., citing Southern Contracting, supra; Carntribe-Clement, supra; and Swift & Staley, supra.)

Appellant concludes by arguing the DD/GC's remaining findings under 13 C.F.R. § 125.18(b)(2) are moot under the initial error that SABG is not a SDVO SBC. (Id., at 16-17.)

E. DIS's Response

On August 25, 2022, DIS responded to the appeal. First, DIS asserts the DD/GC correctly determined that Appellant does not have the required control over SABG. (DIS Response, at 2.) DIS argues that Appellant's supporting cases are distinguishable and misplaced. (Id.) Specifically, OHA case law has permitted delegation of limited responsibility of signing documents to employees, but does not "condone the broad delegations of power and authority"

that Appellant argues in this instant appeal. (Id., at 3, citing Ave Mori Med. Equip., LLC, SBA No. CVE-192 (2021).) Further, the DD/GC based her decision on Appellant's delegation of "power and authority to negotiate and sign contracts"; her decision was not based on whether the SDV signs all documents. (Id.)

Second, DIS asserts the DD/GC correctly determined BCF holds negative control beyond customary protection. (Id., at 3.) DIS notes sections of the JVOA that suggest negative control by BCF. According to DIS, Section 5.4.3 requires unanimous consent for contracts, which may restrict SABG's ability to enter subcontract agreements with the joint venture, or may allow BCF the ability to block SABG from entering a contract with SAS that would otherwise be permissible under SBA regulation. (Id., at 4.) DIS cites to OHA precedent, where OHA has determined that "entering in contracts" is essential to day-to-day management. (Id., citing Seventh Dimension, LLC, VET-6057, at 15; Southern Contracting Sols. III, LLC, SBA No. SIZ-5956, at 12.)

Further, Section 5.4.6 requires unanimous consent to initiate litigation, which contradicts OHA precedent; and DIS asserts this section may block SABG's ability to file contract claims, which impedes ordinary business operations. (Id., at 4-5.) DIS cites to OHA precedent, where OHA has determined that initiating litigation is day to day management. (Id., citing Southern Contracting Sols. III, LLC, SBA No. SIZ-5956 at 12; Swift & Staley, Inc., SBA No. SIZ-6125, at 9.) Also, Section 5.4.9 of the JVOA permits BCF to block SABG from subcontracting or consulting agreements, meaning an organizational conflict of interest does not have to occur for BCF to prevent ordinary day to day business operations of the joint venture. (Id., at 5.) DIS concludes that these provisions "go well beyond participation and provides BCF the ability to block daily business actions." (Id., at 6.)

Lastly, DIS argues the DD/GC correctly determined that SABG's [majority] ownership is not unconditional because the JVOA has restrictions on how SABG may sell its interest. (Id., at 6.) DIS argues that Appellant has mischaracterized the DD/GC's findings and rejects Appellant's argument that 13 C.F.R § 125.11 & § 125.13 do not apply. (Id.) DIS concludes that Appellant "cannot show why it was 'clear error' for the DD/GC to look to the definition of ownership set out in 13 C.F.R. § 125.18(b)(2)(iii) in her analysis." (Id.)

F. Appellant's Reply to DIS's Response

On September 2, 2022, Appellant filed a motion for leave to file a reply to DIS's response. Appellant rejects DIS's argument that Section 5.4.3 of the JVOA allows BCF to prevent SABG from entering specific contracts. Appellant contends this argument mischaracterizes Section 5.4.3 because this section does not mandate unanimous consent for "SAS to enter into any contract." (Appellant Reply, at 1.) Appellant further contends that DIS ignores other areas in the JVOA that allow SAS to make decisions on administrative duties; specifically, SAS and its Responsible Manager are permitted under the JVOA to control these decisions. (Id., at 2.) In further support, Appellant cites to the addendum of the JVOA that describes the work and performance obligations of the workshares. (Id.) According to Appellant, SABG's Responsible Manager is responsible for contract performance, administrative or ministerial functions, and must perform at least 40% of the work. Citing OHA precedent,

Appellant adds that "unanimity requirements for amendments to the JVOA do not create impermissible negative control." (Id., at 2, citing Southern Contracting Sols. III, LLC, SBA No. SIZ-5956, at 11-12; Swift & Staley, Inc., SBA No. SIZ-6125 at 13.) Appellant concludes that a separate subcontract is unnecessary because SABG's role in controlling contract performance is established in the JVOA. (Id., at 2.) Appellant concludes Section 5.4.3 is "commercially customary and appropriate because it addresses the extraordinary circumstance of potential self-dealing by the Members in contravention of their fiduciary duties to the joint venture." (Id.)

Secondly, Appellant contends that DIS's interpretation that Section 5.4.9 requires unanimous consent to enter contracts regarding conflict of interest is mischaracterized. (Id.) According to Appellant, Section 5.4.9 is "designed to prevent any action that could cause and Organizational Conflict of Interest [OCI]" because it requires unanimous consent for actions that may adversely affect performance of joint venture contracts. (Id., at 3-4.) Citing OHA precedent, Appellant adds that OHA has determined a "unanimous consent requirement to commit any act in contravention of the JVOA does not create impermissible negative control." (Id., at 4, citing Southern Contracting, supra (citing Size Appeal of McLendon Acres, Inc., SBA No. SIZ-5222 (2011)).) Appellant reasons that a member's attempt to take an action that creates OCI and prevents Appellant from performing contracts would be "in contravention of the JVOA," and thus Section 5.4.9 "serves as a reasonable warning" to prevent such action. (Id., at 4.) Providing a scenario, Appellant contends that DIS's argument is flawed because SABG is not prevented from taking unilateral action in a scenario where OCI affects the joint venture's contract performance. (Id.) Further, Appellant finds this type of action to be an extraordinary circumstance, and therefore customary to include an unanimity requirement for occurrences under Section 5.4.9. (Id.)

G. DIS's Surreply

On September 16, 2022, DIS filed an opposition to Appellant's motion and a sur-reply. DIS argues that OHA should deny Appellant's motion for leave to file a reply to DIS's response because OHA did not request Appellant file a reply, nor did Appellant show good cause for OHA to consider the reply. (DIS Opposition and Sur-Reply, at 1-3.) According to DIS, the issues on this matter have been thoroughly discussed on the record, and the cases Appellant relied on in its motion are "unfitting." (Id., at 2.)

DIS asserts that if OHA grants Appellant's motion, then OHA must consider DIS's sur-reply "for fairness." (Id., at 3.) In response to Appellant's motion, DIS contends that Appellant's arguments do not "cure the underlying negative control issue within [Sections] 5.4.3, 5.4.6, and 5.4.9." (Id., at 4.) Specifically, DIS argues that Section 5.4.3 lends to self-dealing, and Appellant's argument provides "no reasonable response other than to obfuscate the issue by pointing to other sections of the agreement." (Id.)

Further, Appellant offers "no substantive reply" to DIS's argument that Section 5.4.6 is ordinary day to day activity. (Id., at 5.) Finally, DIS argues that Section 5.4.9 "allows BCF to block an ordinary contract" by raising a meritless OCI issue; and contends Appellant's argument relies on other sections of the agreement to suggest intent instead of the plain language of the

Section. (Id.) DIS concludes the DD/GC did not commit clear error of fact or law and OHA should affirm the status determination. (Id., at 6.)

III. Discussion

A. Standard of Review

OHA reviews the DD/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 DD/GC's decision only if Appellant proves the DD/GC made a patent error based on the record before him or her.

In the interest of a complete record and a full discussion of the issues I ADMIT both Appellant's Reply and DIS's Surreply into the record.

B. Analysis

SBA regulations provide that a joint venture may be considered eligible to bid on an SDVO SBC contract if the joint venture is comprised of an SDVO SBC and its SBA-approved mentor. 13 C.F.R. § 125.18(b). The contents of the joint venture agreement must comply with the standard set in SBA regulations at 13 C.F.R. § 125.18(b)(2). The first issue here is whether the DD/GC erred in her determination Appellant was not an eligible SDVO SBC.

An SDVO SBC is a concern which is both owned and controlled by a service-disabled veteran. 15 U.S.C. § 632(q)(2). SBA has promulgated separate regulations pertaining to ownership (13 C.F.R. § 125.12) and control (13 C.F.R. § 125.13) of an SDVO SBC. A concern must be at least 51% unconditionally and directly owned by one or more SDVs to be an eligible SDVO SBC. 13 C.F.R. § 125.12. Further, a concern's management and daily business operations must be controlled by one or more SDVs to be an eligible SDVO SBC. 13 C.F.R. § 125.13(a). Control means that both the long-term decision making, and the day-to-day management and administration of the business operations are conducted by an SDV. 13 C.F.R. § 125.13(a). An SDV must also hold the highest officer position, be the highest compensated officer and have managerial experience of the extent and complexity needed to run the concern. 13 C.F.R. § 125.13. OHA has determined that an SDV has the authority as managing member to "delegate responsibilities to other officers of the concern." Ave. Mori Med. Equip., LLC, SBA No. CVE-192 (2021).

Here, it is not in dispute that Ms. Mungo is a service-disabled veteran. She established [XXXX], which owns a [majority] interest in SABG. Section II.C., supra. The JVOA explicitly designates SABG as holding a [majority] ownership interest in Appellant. Id. The JVOA also explicitly designates Ms. Mungo as the Managing Member and Company's Chief Executive Officer. Id. The JVOA further states "[a]ny other officer position that may be utilized by the Company shall be subordinate to, and serve at the pleasure of, the Managing Member and CEO." Id. Ms. Mungo is the highest-ranking officer, and SABG's 2019 payroll identifies her as the highest compensated member. Id.

Ms. Mungo delegated authority to negotiate and sign contract modifications, subcontract modifications and teaming agreements to a Contracts Director and a Contracts Manager. Id. It is clear from the JVOA that Ms. Mungo, in her authority as CEO and Managing Member, delegated responsibilities to other officers of the concern. Id. These positions are subordinate to Ms. Mungo. Id. The DD/GC reasoned that SABG does not have control of all of Appellant's decision-making because Ms. Mungo delegated this authority. Section II.C., supra. However, as argued by Appellant, OHA's precedent holds that an SDV may delegate responsibilities to subordinate officers, and this delegation does not restrict the SDV's control. Ave. Mori Med. Equip., LLC, SBA No. CVE-192 (2021) (holding that an SDV may delegate the signing of contracts to a subordinate without losing control of the concern). Section II.D., supra. Similarly, The DD/GC's finding that the right of first refusal at Paragraph 7.4 of the JVOA compromises SBAG's unconditional ownership is based on applying the inapposite standard of unconditional ownership for the SDVO SBC to the joint venture. Section II.C., supra. The standard for the joint venture is not unconditional ownership, and the DD/GC's finding here was in error. Thus, I conclude the DD/GC erred in finding that SABG is not a SDVO SBC because it lacked all the elements of control, and I find Ms. Mungo holds ownership and control over SABG, and so SABG is an SDVO SBC.

The second issue is whether the DD/GC erred when she determined Appellant did not comply with joint venture eligibility requirements at 13 C.F.R. § 125.18(b)(2). Section II.C., supra. An SDVO SBC may enter into a joint venture agreement with one or more other small business concerns or its mentor for the purpose of performing an SDVO contract. 13 C.F.R. § 125.18(b). The regulations require that twelve specific provisions be included in each such joint venture agreement. 13 C.F.R. § 125.18(b)(2). As previously discussed, the DD/GC clearly erred in determining SABG was not a SDVO SBC. The DD/GC's finding that the agreement did not meet the regulatory requirements for four provisions was based upon that erroneous finding. I therefore conclude that the DD/GC erred in finding that Appellant's JVOA failed to meet the following requirements of § 125.18(b)(2): (iv) profit distribution, (vii) responsibilities of parties, (ix) record maintenance; and (x) final original record.

Further, I do not find that the definition of “unconditional ownership” under 13 C.F.R. § 125.12 applies to joint ventures, as suggested by DD/GC. Section II.C., supra. OHA has determined that “a joint venture between an eligible SDVO SBC and another [concern] need not meet the SDVO eligibility requirements in Subpart B of Part 124 to obtain an SDVO contract, but must only meet the specific requirements governing joint ventures.” In the Matter of Constr. Eng'g Servs., LLC, SBA No. VET-213, at 8 (2011); see also CVE Protest of Commonwealth Home Health CareNext Term, Inc., SBA No. CVE-116-P, at 12 (2019). As argued by Appellant, the governing SBA regulation is 13 C.F.R. § 125.18(b)(2)(iii), which specifically requires that the SDVO SBC own 51% ownership interest of the joint venture. Section II.D., supra. It is not in dispute that SABG holds [majority] ownership in the Appellant. Section II.C., supra. Thus, I conclude the DD/GC erred in finding that Appellant's JVOA failed to meet the percentage ownership requirement at 13 C.F.R. § 125.18(b)(iii).

The remaining issue is whether Section 5.4 of the JVOA failed to meet provision at § 125.18(b)(2)(ii) requiring the SDVO SBC be designated as managing venturer with control of

the day-to-day management and administration by granting BCF negative control. Negative control exists when a minority owner can block ordinary actions essential to operating the company. Size Appeal Eagle Pharmaceuticals, Inc., SBA No. SIZ-5023, at 10 (2009).

A party with a minority interest in a concern may have negative control over that concern if the concern's JVOA gives that party the power to block action by the concern's management or majority members. 13 C.F.R. § 121.103(a)(3). However, OHA has held that a concern giving minority owners the ability to block certain extraordinary actions of the concern has not provided negative control to the minority members, if those supermajority provisions are crafted to protect the investment of the minority shareholders, and not to impede the majority's ability to control the concern's operations or to conduct the concern's business as it chooses. Size Appeal EA Eng'g., Sci. and Tech., Inc., SBA No. SIZ-4973, at 8-9 (2008), Size Appeal of Carntribe-Clement 8AJV # 1, LLC, SBA No. SIZ-5357 (2012).

The regulation enumerates a list of extraordinary circumstances at 13 C.F.R. § 125.11. These are: adding a new equity stakeholder, dissolution of the company, sale or merger of the company, or declaring bankruptcy. SBA will not find a lack of control by the SDV exists where the SDV does not have the unilateral power to make decision in these circumstances. 13 C.F.R. § 125.13(m). However, it is clear from the text of the regulation that this applies to the control by an individual SDV of an SDVO SBC, not the control as managing member by the SDVO SBC of a joint venture. I therefore am not convinced that the limited list of extraordinary circumstances under 13 C.F.R. § 125.11 applies to joint ventures, as suggested by DD/GC. The regulation at 13 C.F.R. § 125.11 pertains to SDV's control and does not apply to SDVO SBC joint ventures. In the Matter of Constr. Eng'g Servs., LLC, supra. Thus, I reject the DD/GC's exclusive reliance on 13 C.F.R. § 125.11. Rather, the regulation requires that the managing venturer be responsible for day-to-day management and administration of the contractual performance of the joint venture, but the other partners may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. 13 C.F.R. § 125.18(b)(2)(ii)(A).

In considering the issue of negative control in size cases, OHA has held that there are a number of extraordinary actions which a minority member may be given the power to block, without resulting in a finding of negative control. Adding new members and dissolving the concern has been found to be an extraordinary action. Carntribe-Clement 8AJV # 1, LLC, SBA No. SIZ-5357, at 15. A minority member's power to approve the addition of any new members or the withdrawal of any old members, to increase or decrease the size of the Board, to increase or decrease the number of authorized interests, or to reclassify interests is designed to protect a minority owner's investment and does not establish negative control. See Size Appeal of DHS Systems, LLC, SBA No. SIZ-5211 (2011). Also, selling or otherwise disposing of the firm's assets, admitting new members, amending the JVOA in any manner that materially alters the rights of existing members, or filing for bankruptcy all constitute extraordinary actions that may require the minority shareholder's input, but do not create negative control. See Size Appeal of Dooleymack Government Contracting, LLC, SBA No. SIZ-5086 (2009).

Conversely, OHA has characterized a number of actions as essential to the daily operation of the company, and therefore granting a minority owner the power to block such actions does in fact constitute negative control. A minority member who has control over the

budget, has the power to hire and fire officers, and sets employee compensation, has control over the daily operations of a concern. See Size Appeal of Team Waste Gulf Coast, LLC, SBA No. SIZ-5864 (2017); see also Carntribe-Clement 8AJV # 1, LLC, SBA No. SIZ-5357; DHS Systems, LLC, SBA No. SIZ-5211 (2011). OHA has characterized "bringing lawsuits" as "essential to daily operations of any company." Southern Contracting Sols. III, LLC, SBA No. SIZ-5956, at 11-12; see also Seventh Dimension, LLC, SBA No. VET-6057 (2020).

However, while most of the actions enumerated at Section 5.4 of the JVOA as requiring unanimous approval have been characterized by OHA as extraordinary actions. Section II.B., supra. Section 5.4.6 requires unanimity for initiation of any claim or litigation under the contracts Appellant will undertake. Id. Although not specifically defined, JVOA confirms the purpose of the joint venture is for Appellant to compete and perform contracts issued by the Missile Defense Agency and similar federal agencies as a SDVO SBC and other set-aside procurements, "collectively Contracts." Id. Therefore, initiating litigation, specifically litigation regarding contracts under the joint venture, is essential to day-to-day operation and thus, a unanimous requirement may create negative control. Appellant argues that initiating a lawsuit and a confession of judgment are extraordinary decisions that create significant risk in a joint venture. Section II.D., supra. Initiating and settling litigation are ordinary actions essential to the day-to-day conduct of a business and granting a minority owner veto power over them support a finding of negative control. Size Appeal of Swift & Staley, Inc., SBA No. SIZ-6125, at 15 (2021); Seventh Dimension, LLC, SBA No. VET-6057, at 3, 15 (2020). OHA has explicitly distinguished initiating or settling a lawsuit from a confession of judgment or arbitration claim, reasoning these latter actions are extraordinary actions, where the concern is conceding the dispute and agreeing to pay a judgement against it that may lead to paying potentially large sums. These are extraordinary actions. Southern Contracting, SBA No. SIZ-5956, at 12 (2018). Here, however unanimous consent is required even to initiate litigation, which is an unfortunately common occurrence in government contracting. Appellant does not provide a compelling reason to deviate from OHA precedent. Therefore, I find that the JVOA gives negative control to BCF on this matter, important to the day-to-day operation of the company. I therefore must conclude that the JVOA does not meet the standard at 13 C.F.R. § 125.18(b)(2)(ii)(A) in that that SABG does not completely control the day-to-day operations of the company.

Therefore, I conclude that DD/GC did not err in finding that Appellant's JVOA had failed to comply with the regulatory requirements at 13 C.F.R. § 125.18(b)(2)(ii) because initiating litigation for "Contracts" under Section 5.4.6 requires unanimous approval, allowing BCF negative control beyond extraordinary circumstances. Section II.B., supra. Accordingly, Appellant has failed to establish the DD/GC's determination was based on a clear error of fact or law, and I must deny this appeal.

IV. Conclusion

The DD/GC's determination was not based upon clear error. Thus, the instant appeal is DENIED, and the DD/GC's status determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge