Cite as: *Matter of Strategic Alliance Solutions LLC*, SBA No. VET-278 (2023)

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 Defense Missile Defense Agency	SBA No. VET-278 Decided: January 12, 2023

APPEARANCES

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DECISION ON REMAND[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.

On September 22, 2022, U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) issued its decision in *Matter of Strategic Alliance Solutions*, SBA No. VET -

[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.

277 (2022) (*SAS I*) affirming the SBA Deputy Director for Government Contracting (DD/GC)'s finding that Strategic Alliance Solutions (Appellant) does not meet the SDVO SBC eligibility requirements for Missile Defense Agency Solicitation No. HQ0858-21-R-0010. On October 20, 2022, Appellant filed a bid protest in the United States Court of Federal Claims (the Court), challenging the decision. *Strategic Alliance Solutions, Inc. v. United States*, Court of Federal Claims Docket No. 22-1562C. On November 22, 2022, the Court remanded the matter to OHA for a new decision.

For the reasons discussed infra, I REVERSE the DD/GC's status determination and GRANT the appeal.

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

The full background in this case can be found in *SAS I*. In summary, 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 DD/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. The DD/GC's Determination and the Appeal

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, was ineligible for the solicitation. (PF, at 1-27.)

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, DD/GC determined Appellant's JVOA failed to meet the

twelve requirements under 13 CFR § 125.18(b)(2) and is thus, ineligible for the contract. (*Id.*, at 24.)

On August 15, 2022, Appellant filed the instant appeal. On September 22, 2022, OHA issued *SAS I*. OHA found that SABG was an eligible SDVO SB, owned and controlled by a service-disabled veteran; and OHA found that Appellant's JVOA was largely compliant with regulation, but failed to comply with 13 C.F.R. § 125.18(b)(2)(ii). Specifically, the requirement for unanimous consent of the venturers to initiate litigation at § 5.4.6 was a disqualifying factor.

> 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.[sic] Section II.B., supra. Subsection 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.
>
> *SAS I*, at 13.

On October 20, 2022, Appellant filed a bid protest in the United States Court of Federal Claims (the Court), challenging the decision. *Strategic Alliance Solutions, Inc. v. United States*, Court of Federal Claims Docket No. 22-1562C. On November 22, 2022, the Court remanded the matter to OHA for a new decision. The Court ordered:

1. OHA shall reconsider its September 22, 2022, decision and issue a new decision.

2. OHA's reconsideration shall be limited to OHA's conclusion that Section 5.4.6 of SAS's joint venture and operating agreement (the "SAS JVOA") runs afoul of [1]3 C.F.R. § 125.18(b)(2)(ii)(A) and shall leave intact its determination that the SBA Deputy Director for the Office of Government Contracting and Business Development ("DD/GC") had erred with regard to each of the other conclusions upon which the DD/GC had determined that SAS was not an eligible SDVO SBC joint venture for the solicitation at issue.

3. OHA, in reconsidering its decision, may:

(a) Reopen the record for the limited purpose of reconsidering whether Section 5.4.6 of the SAS JVOA is permissible under 13 C.F.R. § 125.18(b)(2)(ii)(A), considering the government's position (developed in consultation with SBA) that "Section 5.4.6 is permissible under 13 C.F.R. § 125.18(b)(2)(ii)(A) and that *SAS I*s an eligible SDVO SBC joint venture for the solicitation" at issue, ECF No. 29 at 2, and potential comments by SBA and supplemental briefs by SAS and [Defense Integrated Solutions, LLC (DIS)];

(b) Invite the SBA to comment on how 13 C.F.R. § 125.18(b)(2)(ii)(A) should be interpreted and applied to Section 5.4.6 of the SAS JVOA, particularly given that the government (in consultation with SBA) has agreed with SAS that "Section 5.4.6 is permissible under 13 C.F.R. § 125.18(b)(2)(ii)(A) and that *SAS I*s an eligible SDVO SBC joint venture for the solicitation" at issue, ECF No. 29 at 2; and

(c) Permit SAS and DIS to file supplemental briefs on that topic, with an opportunity for SAS and DIS to respond to SBA's comments (if filed) and to each other's briefs.

(Remand Order, at 3-4.)

D. The Pleadings on Remand

1. SBA's Comment

On December 9, 2022, SBA's Office of General Counsel (OGC) filed its comment. The regulation requires that the managing venturer of an SDVO SBC joint venture be "responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary." (SBA OGC Comment at 1, citing 13 C.F.R. § 125.18(b)(2)(ii)(A).)

SBA OGC believes that initiating or settling contract litigation are activities that fall outside the field of daily management and administration of contract performance. (*Id.*, at 2.) SBA points out that in 2020, SBA amended the joint venture requirements at 13 C.F.R. §

125.18(b)(2)(ii) to expand the ability of a non-SDVO SBC partner to participate in commercially customary decisions unrelated to contractual performance. (*Id.*, citing 85 Fed. Reg. 66146 (October 16, 2020).) While the rule clarified that the SDVO SBC partner must control the day-to-day management and administration of the joint venture, the final rule added an exception for decisions that are commercially customary, providing that "other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary." (*Id.*, citing 13 C.F.R. § 125.18(b)(2)(ii)(A).)

SBA OGC expressed the opinion that initiating contract litigation is outside the scope of the management of daily contractual performance and instead represents a decision that reasonably falls into the exception that allows other joint venture partners to participate in commercially customary decisions. (*Id.*) A joint venture is a mutual agreement between the venturers to combine resources for a specific contract or contracts, and sometimes litigation is necessary to protect those resources. Litigation on behalf of the joint venture is a decision that carries significant risk for both partners, and thus it is reasonable and within the bounds of customary commercial practices to allow other partners to approve the litigation. (*Id.*) SBA OGC's opinion is that the regulation, as revised in 2020, does not preclude joint venture agreements from requiring unanimous consent for initiating or settling litigation. (*Id.*, at 3.)

SBA OGC further notes that rules governing joint ventures are separate and distinct from the rules governing affiliation. (*Id.*) The affiliation rules under 13 C.F.R. § 121.103 find affiliation based upon negative control, which would include requiring unanimous consent for ordinary business decisions, such as initiating litigation. However, the joint venture rules at § 125.18 do not contain such a provision because the very nature of a joint venture requires the parties to work collaboratively. (*Id.*)

2. DIS's Response

Also on December 9, 2022, DIS filed a Response to the Remand Order. First, DIS highlights that OHA has held bringing lawsuits is essential to the operation of any business and that a minority member's power to block such an action would give negative control to that minority member. (DIS Response at 2, citing *Size Appeal of Southern Contracting Solutions, III, Inc.,* SBA No. SIZ-5956, at 11-12 (2018).) OHA reaffirmed this decision just last year in *Size Appeal of Swift & Staley, Inc*., SBA No. SIZ-6125, at 14 (2021), and the Court of Claims affirmed that decision in *Swift & Staley, Inc. v. U.S.*, 159 Fed. Cl. 494, 504 n.8 (2022).

DIS rejects Appellant's argument that bringing litigation creates risks for a partner venturer in the form of counterclaims and False Claims Act liability, and maintains that these risks are not sufficient to allow a minority venturer negative control over performance. (DIS Response at 3.) If there are counterclaims to be raised, they would be raised whether or not a concern initiates litigation. (*Id.*) DIS points out that the JVOA has other protections for the minority member, SABG has duties of good care, good faith, and loyalty to both Appellant and BCF. The JVOA limits liability for actions taken in compliance with those duties, and in the best interest of the company and the members. (*Id.*, at 3-4.) If SABG and BCF were to disagree about the scope of their performance obligations, SABG lacks the ability to "hold BCF's feet to the fire." (*Id.*, at 5.) There could be no dispute about BCF's performance without BCF's consent. As managing venturer, SABG must have the ability to control Appellant's performance, including the ability to bring claims and disputes. (*Id.*)

DIS further maintains that, even as amended in 2020, the regulation does not allow a mentor to control contract performance. (*Id.*) Appellant argues the rule now explicitly includes an exception to the requirement the managing venturer control day-to-day management and administration of the contract, and the joint venture itself when it is commercially customary to permit the minority joint venture partner to participate in any corporate governance activity or joint venture decision. (*Id.*) DIS argues this misreads the regulation. The regulation requires that the small business protégé control the joint venture. (*Id.*, at 6.) Because compliance with the regulations can change throughout the proposal process, SBA will review a joint venture agreement as of the date of final proposal revisions. (*Id.*, citing 13 C.F.R. § 121.404(d) and 85 Fed. Reg. 66146, 66153, 66164 (October 16, 2020.))

DIS argues § 125.18(b)(2)(ii) distinguishes between acts of contract management, which the managing venturer must control, and acts of corporate governance, in which the partner venturer can participate. (*Id.*, at 7.) The first part of the regulation sets out the general rule that the managing venturer must control day to day management and administration of the contract, and then after the "but" all venturers participate in corporate governance, to the extent it is commercially customary. (*Id.*) It does not include an exception to the requirement the managing venturer control the management and administration of the contract. The rule still requires the managing venturer to control contract performance. As written, § 5.4.6 allows BCF to control the management and administration of Appellant's contracts, and this violates the regulations. (*Id.*, at 6-7.)

DIS maintains the 2020 amendments to SBA's regulations does not allow the non-managing venturer the right to control the joint venture's contractual performance. (*Id.*, at 7.) DIS argues that when SBA proposed the rule, it neither modified the managing venturer's control requirement nor requested public comment on it. (*Id.*, at 7, citing 84 Fed. Reg, 60846, 60862, 60879 (November 8, 2019).) DIS notes the American Bar Association Public Contract Law Section filed a comment urging that the final rule provide guidance on the allocation of management responsibilities in the joint venture, and that it allow other venturers to "fully and equally participate" in all corporate governance. (*Id.*, citing ABA Comments on proposed rule (Jan. 26, 2020).) SBA did not include this suggested "fully and equally" language in the final rule, but simply allows non-veteran venturers to participate in management. (*Id.*, at 7-8.)

Further, the fact that SBA adopted the new language without comments shows that it did not change the prior regulatory scheme. (*Id.*, at 8.) Indeed, the Administrative Procedure Act requires that if an agency is to change its rules through rulemaking, the change must be obvious. (*Id.*, at 9.) Here, there was a change between the proposed and final rules, with no discussion of the change in the preambles to the rule, and no suggestion to overturned prior OHA decisions. (*Id.*)

DIS argues OHA should interpret § 125.28(b)(2)(ii)(A) as it has in the past. The managing venturer (here, SABG) must control the joint venture's day-to-day actions, and the partner venturer may help guide in extraordinary actions, as these impact the venturers' respective interests. (*Id.* at 10, citing *VET Appeal of Seventh Dimension, LLC*. SBA No. VET - 6057, at 15 (2020).) DIS argues that JVOA § 5.4.6 prevents SABG from initiating a claim or litigation under the contract without first securing BCF's approval. (*Id.*, at 10.) A limited liability company member has an interest in whether the concern sues another party, but that does not rise

to the level of protecting its ownership interest in the company itself. Litigation is a relatively routine occurrence, but as worded, Appellant would not be able to pursue a change in performance schedule, adjust deliverable, file a claim, or even request a routine wage adjustment under FAR 52.222-43 without BCF's consent. (*Id.*) Even litigation against a potential subcontractor for deficient or untimely work would require BCF's permission. (*Id.*)

3. Appellant's Response

On December 9, 2022, Appellant filed a Response. Appellant first argues that SBA's interpretation of 13 C.F.R. § 125.28(b)(2)(ii)(A) permits the unanimity requirement of § 5.4.6 of the JVOA, and OHA should grant deference to SBA's interpretation. (Appellant's Response, at 3.)

Appellant argues this interpretation is correct because: (1) nothing in the rule expressly addresses, let alone prohibits, this unanimity requirement; and (2) the rule states that the non-SDVO SBC partner in an SDVO SBC joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. (*Id.*, at 4.)

Appellant argues that interpretation of § 125.18(b)(2)(ii)(A) must begin with its place in the regulation. (*Id.*, at 5.) The provision is part of § 125.18(b)(2)(ii) which requires a JVOA to designate an SDVO SBC as the managing venturer of the joint venture and an employee of the SDVO SBC as the person with ultimate responsibility for contract performance. (*Id.*) The overarching requirement is contract performance. (*Id.*)

Appellant notes that § 125.18(b)(2)(ii) was revised in October 2020 to add subsections (A)-(C) which explain the roles of the venturers. (*Id.*, at 5, citing 85 Fed. Reg. 66146, 66196 (October 26, 2020).)) Appellant speculates that these sections were added in response to the *Seventh Dimension* case which was "troubling" because it found an SDVO SBC joint venture ineligible due to unanimity requirements. (*Id.*) Appellant argues these provisions were added to distinguish between contract performance and corporate governance activities. (*Id.*)

Appellant argues that the first part of the regulation focuses on contract performance, narrowing the responsibilities of the managing venturer to the management and administration functions of contract performance. (*Id.*, at 5.) Appellant interprets the second part of the regulation after "but" as an exception to the first provision, concerned with corporate governance; and interprets the word "participate" as to take part in or share in something, meaning the non-SDVO SBC is meant to share in corporate governance. (*Id.*, 5-6.) Appellant argues the regulation permits the non-SDVO SBC partner to participate in joint venture decisions as is commercially customary, and does not qualify the type of decisions, so it includes those involving day-to-day contractual performance if it is commercially customary to permit the non-SDVO SBC's participation in the decision. (*Id.*, at 6.) This interpretation is further supported by the provision SBA added at subsection (C), which permits the non-SDVO SBC partner to control contractual performance of certain task orders as long as the individuals responsible for task orders report to and are supervised by the SDVO SBC's responsible manager. (*Id.*)

Appellant further asserts that § 125.18(b)(2)(ii)(A) does not expressly address, let alone prohibit, § 5.4.6 of the JVOA. Nothing in it addresses the question of an unanimity requirement in joint venture agreements. (*Id.*, at 7.) SBA could have prohibited an unanimity requirement if

that was the intent. (*Id.*) Instead, SBA revised the rule in 2020 to add language, broadly stating the joint venture partner "may participate in all corporate governance activities and decisions as is commercially customary." (*Id.*)

Appellant further argues the decisions in § 5.4.6 do not pertain to and could not impede SABG's control of day-to-day performance. (*Id.*, at 8.) Litigation is not part of day-to-day management and administration of the joint venture. (*Id.*) Here, the provision of advisory and assistance services is the purpose of the contract, and managing the provision of these services is the management and administration of the contract, and as managing venturer, SABG will control the day-to-day management and administration. (*Id.*)

Appellant asserts SABG, as Managing Venturer, will be controlling contract performance here, overseeing the extensive work required by the contract, providing the advisory and assistance services to MDA. (*Id.*, at 8.) Initiating claims or litigation is not part of contract performance. Indeed, Appellant asserts these are rare occurrences, and are not part of day-to-day management. (*Id.*, at 9.) Further, the decisions covered by § 5.4.6 could not impede contract performance. (*Id.*) The contract incorporates FAR 52.233-1, which requires continued contract performance even if there is a claim. BCF could not use § 5.4.6 to exert influence over SABG's day-to-day management and administration of the contract. (*Id.*, at 10.)

Appellant maintains the decisions covered by § 5.4.6 are corporate governance activities and unanimity requirements for these is commercially customary. (*Id.*) The section covers corporate governance activity for Appellant as a business entity, rather than daily contract performance, because they address unknown future disputes. (*Id.*, at 10-11.) These unknowns carry significant future risks and thus the unanimity requirement is necessary to protect all parties' interests. (*Id.*)

Finally, Appellant argues there is no OHA precedent that addresses the unanimity requirement under § 125.18(b)(2)(ii)(A). (*Id.*, at 11.) Appellant maintains existing OHA precedent is not applicable. The cases cited in *SAS I* all predated the 2020 revision of the regulation, and so are inapposite here. Specifically, *VET Appeal of Seventh Dimension, LLC*, SBA No. VET-6057 (2020), did not address initiating or settling claims in litigation in the discussion section of the case, although it did in the background. (*Id.*, at 5.) Appellant characterizes the case as turning on other unanimity requirements. (*Id.*) Further, Appellant characterizes *Size Appeal of Southern Contracting Solutions III*, SBA No. SIZ-5956 (2018) as turning on several unanimity requirements, not merely one. (*Id.*) This is also true of *Size Appeal of Swift & Staley, Inc.*, SBA No. SIZ-6125 (2021). These cases did not consider unanimity requirements in light of the current rule requiring the managing venturer to control day-to-day administration of contract performance, which is narrower than control of the business. Appellant criticizes the cases as not explaining why unanimity requirements are important for day-to-day administration of the business. (*Id.*) Appellant maintains none of these cases are on point here.

4. DIS's Reply

On December 15, 2022, DIS filed its Reply. DIS emphasizes that the standard of review here is that the DD/GC's decision must be shown to be clearly erroneous. (DIS Reply, at 1.) DIS asserts Appellant is stating the DD/GC's decision is in error based on a new interpretation of the

regulation Appellant urges OHA to adopt. But Appellant's argument for what the rules should be must give way to what the rules actually are. If Appellant cannot show clear error by SBA, the DD/GC should be affirmed again. (DIS Reply, at 1-3.)

JVOA § 5.4.6 which requires that both SABG and BCF agree before Appellant initiates any claim or litigation under the contracts, should not be acceptable, because OHA has held that bringing lawsuits is essential to the daily operations of any company, and an SDVO SBC must have unequivocal control over a joint venture's daily business operations. (*Id.*, at 3-4.)

DIS maintains that initiating litigation under the contracts is an ordinary business action to be controlled by the managing venturer. If either venturer or subcontractor fails to perform, or Appellant needs to file a claim, SABG must have BCF's permission. Further, this permission is needed only for litigation under the contract, not for any other lawsuit Appellant might wish to bring. This is the reverse of what SBA's regulations permit. (*Id.*, at 4-5.) According to DIS, Appellant's interpretation would expand the regulation into what it expressly prohibits. It would allow a partner venturer to control performance, even though the regulation requires the opposite. A partner venturer can have a part in decisions but it cannot control them. (*Id.*) The characterization of litigation under the contracts as an extraordinary measure is contrary to the Virginia Liability Company Act, which describes the first power of an organization as that of suing and being sued. (*Id.* at 6-7, citing Va. Code Ann. § 13.1-1009.)

DIS asserts Appellant's interpretation is inconsistent with text of the JVOA. (*Id.*, at 8.) Appellant asserts the Managing Venturer is responsible for workload allocation, but the JVOA gives BCF veto power over this. (*Id.*)

DIS also argues Appellant is wrong in arguing the 2020 amendments to the regulation were a great change in compliance requirements. (*Id.*, at 9.) Appellant argues the rule was changed in response to OHA's Seventh Dimension decision. However, SBA did not inform the public about a change in the rule, and the Administrative Procedure Act requires providing the public an opportunity to comment on proposed changes, and to clarify its intent to make a change. SBA's rulemaking did not do so. (*Id.*, at 9-10.)

5. Appellant's Reply

On December 15, 2022, Appellant filed its Reply to the December 9th pleadings. Appellant asserts that, after reviewing SBA OGC's comments, one must conclude that, as to 13 C.F.R. § 125.18(b)(2)(ii)(A), the first part of the regulation was intended to clarify that the SDVO SBC managing venturer must control daily contract performance; the second part of the regulation after "but" creates an exception to the first part to expand the ability of the non-SDVO SBC partner to participate in commercially customary decisions unrelated to contract performance; and third, the exception permits unanimity requirements like § 5.4.6 that are outside the scope of daily contractual performance. (Appellant's Reply, at 3.)

Appellant argues the plain language of the regulation supports SBA's interpretation. The overarching requirement of the rule was focused on contract performance, and the 2020 amendments confirmed this by providing that the managing venturer was responsible for controlling day to day management of contract performance. (*Id.*, at 4.) SBA further explained it revised the regulation to expand the ability of the non-SDVO SBC partner to participate in

decisions which are commercially customary but are unrelated to contract performance. (*Id.*) These interpretations are supported by the plain language of the regulation, the word "but" signals unambiguously that what follows is an exception to the requirement that the managing venturer must control day-to-day management and administration of contract performance. (*Id.*) The plain meaning of "participate" means to share in, and the only way to give effect to the rule is for "participate" to mean the joint venture partner can share in control of decisions unrelated to contract performance. (*Id.*)

Appellant further asserts SBA's interpretation of the regulation is entitled to deference. It is not inconsistent with the regulatory history or SBA's prior interpretations. (*Id.*, at 5.) Further, the unanimity requirement does not address or impede SABG's control of management and administration of contract performance. (*Id.*, at 6.) The requirement of unanimity for litigation decisions is commercially customary because it carries a significant risk for both partners, and so it is within the bounds of normal commercial practices to allow other partners to approve litigation. (*Id.*, at 7-8.) SBA's interpretation is not clearly erroneous, and OHA should grant it deference. (*Id.*)

Appellant maintains DIS fails to offer a cogent rationale explaining how § 5.4.6 could impede SABG's control of day-to-day performance. (*Id.*, at 8-9.) DIS offers only a conclusory assertion that the section allows BCF to control the management and administration of Appellant's contracts, without explaining how it would do so. (*Id.*) Its discussion of the risks attendant in litigation do not address how this would affect contract performance. This section applies only to disputes under the contract, and thus would not concern disputes between SABG and BCF. (*Id.*) In the event of a dispute between the venturers, the parties must continue performance under § 12.4.3 of the JVOA. (*Id.*, at 9.) Any dispute between the venturers must be handled under § 12.4 of the JVOA, and BCF could not block a resolution. (*Id.*, at 10.) The routine disputes DIS identify may be blocked are usually resolved with methods short of litigation. (*Id.*)

Appellant further asserts DIS's arguments criticizing SBA's rulemaking process are beyond the scope of this proceeding and are without merit. (*Id.*, at 11.) SBA followed the Administrative Procedure Act in promulgating the rule. (*Id.*, at 12.) The rule was proposed, comments were solicited, many of the comments were adopted, and the final rule was published with an explanatory preamble. (*Id.*) The government contracting community was on notice from the beginning that SBA was seeking comment on and considering revisions to the regulations on, among other issues, control of a joint venture. (*Id.*) Appellant further urges OHA to ignore DIS's speculations as to SBA's motives in revising the regulations, because the preambles to the proposed and final rules explain SBA's regulatory intent. (*Id.*, at 12-13.)

Appellant further states DIS's interpretation of "participate" is unreasonable. (*Id.*, at 13.) DIS states "participate" to mean the partner venturer may help guide the joint venture's decisions. (*Id.*) Appellant rejects that argument and maintains if "participate" does not mean shared control, i.e., permitting unanimity requirements, the exception following "but" in the regulation would be meaningless. (*Id.*) Unanimity requirements have been allowed for other decisions and should also be permitted here. (*Id.*, at 13-14.)

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 her.

B. The Regulation

SBA's regulations provide that an SDVO SBC and its SBA-approved mentor or one or more other small businesses may enter into a joint venture agreement for the purposes of performing an SDVO contract, provided it meets the requirements of the regulation. 13 C.F.R. § 125.18(b).[2] The regulation itemizes a number of provisions every joint venture agreement must include. 13 C.F.R. § 125.18(b)(2). Prior to October 2020, one of the provisions was 13 C.F.R. § 125.18(b)(2)(ii), which required every joint venture agreement to include a provision:

> Designating an SDVO SBC as the managing venturer of the joint venture, and an employee of the SDVO SBC managing venturer as the project manager responsible for performance of the contract.

In 2020, (85 Fed. Reg. 66146, 66196 (October 16, 2020).) SBA amended this provision to read:

> Designating an SDVO SBC as the managing venturer of the joint venture, and designating a named employee of the SDVO SBC managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager")
>
> (A) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.
>
> (B) The individual identified as the Responsible Manager of the joint venture need not be an employee of the SDVO SBC at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the SDVO SBC if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the SDVO SBC for purposes of performance under the joint venture.

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[2] The citations are to the regulations in effect at the time Appellant submitted its offer. This section has been removed, effective January 1, 2023. See 87 FR 73400, 73412 (Nov. 29, 2022).

(C) Although the joint venture manager responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager.

13 C.F.R. § 125.18(b)(2)(ii).

C. Analysis

In determining whether a joint venture has complied with the regulation, OHA looks to whether the joint venture agreement under review has designated the SDVO SBC as the managing venturer and granted it the authority necessary to control the day-to-day management and administration of the contract without the possibility of negative control. 13 C.F.R. § 125.18(b)(2). SBA has defined negative control the ability, granted by a concern's organizing instruments, of a party with a minority interest in the concern to block action by that concern's management or minority members. 13 C.F.R. § 121.103(a)(3).

In *SAS I*, OHA discussed several cases where the authority to initiate litigation was an issue in determining whether providing a minority member the authority to approve a firm's commencement of litigation represented negative control over a joint venture. Specifically, in *VET Appeal of Seventh Dimension, LLC*, SBA No. VET-6057 (2020), a case under the older version of the regulation, OHA considered a case where unanimous approval by an LLC's members was required for a number of actions which OHA held were actions essential to the day-to-day operation of the business, one of which was "settlement of litigation*.*" *Seventh Dimension, LLC*, SBA No. VET-6057, at 3. OHA held that this joint venture's agreement did not comply with the regulation, because it gave the minority member negative control by requiring unanimous consent for these actions. *Id.* at 13-15. Further, in *Size Appeal of Southern Contracting Solutions, III*, SBA No. SIZ-5956 (2018), a size case, under different regulations than § 125.18(b)(2)(ii)(A), a joint venture required unanimous consent for certain actions, including a confession of judgment*. Southern Contracting Solutions, III*, SBA No. SIZ-5956, at 12. OHA found this to be an extraordinary action, because it makes a company liable for the amount confessed, and thus was not a factor leading to a finding of negative control, but was a provision meant to protect the interests of minority shareholders. *Id.* Lastly, in Size Appeal of Swift & Staley, Inc. SBA No. SIZ-6125 (2021), a size appeal, OHA found the members of a joint venture affiliated due to negative control by the minority member. *Swift & Staley, Inc*. SBA No. SIZ-6125 at 15. One of a number of factors leading to the finding of negative control was the requirement for written approval by both members for any commencement of litigation, which OHA found to be an ordinary action essential to operating the concern. *Id.*, aff'd *Swift & Staley, Inc. v. U.S.,* 139 Fed. Cl. 494, 504, fn. 8 (2022).

The aforementioned OHA precedent were decisions issued prior to the 2020 amendment to 13 C.F.R. § 125.18(b)(2)(ii). Contrary to Appellant's speculations, there is nothing in the preamble to either the proposed (84 Fed. Reg. 60846, 60861 (Nov. 8, 2019)) or final rule which references the decision in *Seventh Dimension, LLC*, SBA No. VET-6057 (2020); therefore, it cannot be said the change in the regulation was impelled by a desire to nullify that decision or any other decision. However, the additional language in the 2020 amendment means the analyses are inherently different. Thus, the issue here is whether Appellant offers an argument substantial

enough for OHA to determine the additional language in § 125.18(b)(2)(ii) warrants a different interpretation. I find this to be true.

In the present case, Appellant's joint venture agreement must comply with the revised regulation, which requires that the managing venturer be responsible for controlling the management and administration of contractual performance of the joint venture, but also explicitly provides that the other partners to the joint venture may participate in corporate governance and decisions "as is commercially customary." 13 C.F.R. § 125.18(b)(2). This regulation thus contemplates that while the SDVO SBC member of a joint venture controls contract administration and performance, the other member takes part in general business decisions of the joint venture, as is customary for participants in a joint venture to do. This JVOA gives SABG control of the decisions of the concern except for those decisions enumerated in Section 5.4, which require unanimous approval. Section II.B., *supra*. All the aforementioned decisions but one, are clearly the type of decision OHA has found to be an extraordinary action, for which a joint venture agreement may require unanimous consent, in order to protect a minority member's interest.

The one action remaining, at § 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" has not previously been found to be such an extraordinary action. Section II.B., supra. As noted above, OHA precedent has found litigation to be an ordinary action essential to operation of a business concern. However, *Swift & Staley* and *Southern Contracting* were size cases, to which the language of § 125.18(b)(2)(ii)(A) was not applicable. *Southern Contracting Solutions, III*, SBA No. SIZ-5956 at 12; *Swift & Staley, Inc*. SBA No. SIZ-6125 at 15. In those cases, there was no applicable explicit regulatory provision that the other partners to the joint venture in question may participate in corporate decisions. Those cases thus are, upon reflection, not apposite to the situation here. Further, *Seventh Dimension* was decided under an earlier version of the regulation, which lacked the phrase explicitly providing that the joint venture's minority members could participate in corporate governance. *Seventh Dimension, LLC*, SBA No. VET - 6057, at 13-15. It is thus inapposite here.

The regulation now emphasizes that the managing venturer is responsible for day-to-day management and administration of contract performance. Section III.B., *supra*. It is in this field of the overseeing and controlling the joint venture's performance of the contracts secured for the concern that the managing venturer must have control. Litigation regarding the contracts is not part of the day-to-day management of contract performance. Rather, it is more properly seen as part of corporate governance and is thus an area where the other partners to the joint venture may participate. Litigation on behalf of the joint venture can have results which might impair the interests of the venturers, and thus it is not inappropriate that BCF have the right to approve contract litigation. BCF's right to do so does not impair SABG's right to manage and administer day-to-day contract performance. Accordingly, under the revised version of § 125.18(b)(2)(ii)(A), § 5.4.6 is compliant with the regulation, because it does not impair SABG's management and administration of performance of the contracts, but permits BCF to participate in corporate governance.

Accordingly, I conclude that, upon further reflection, that the finding in *SAS I* that § 5.4.6 of the JVOA failed to comply with the regulation at 13 C.F.R. § 125.18(b)(2)(ii)(A) was in error. Rather, the inclusion in the JVOA of a requirement that there be unanimous consent of the

venturers for decisions on litigation concerning the contracts the joint venture is pursuing does not deprive SABG of its control of day-to-day management and administration of contract performance. Therefore, the decision of SBA's DD/GC that Appellant's JVOA did not comply with the regulation was in error, and I must REVERSE the DD/GC's determination and GRANT the instant appeal.

IV. Conclusion

The DD/GC's determination that Appellant Strategic Alliance Solutions, LLC did not meet the SDVO SBC joint venture requirements and was thus not eligible for the subject solicitation was based upon clear error of law, and I therefore REVERSE the determination and GRANT the instant appeal.

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

CHRISTOPHER HOLLEMAN
Administrative Judge