

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

VET APPEAL OF:

Seventh Dimension, LLC,

Appellant,

Solicitation No. H92239-19-R-0002

SBA No. VET-6057

Decided: June 11, 2020

APPEARANCES

Craig A. Holman, Stuart W. Turner, Trevor Schmitt, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Appellant

Andrew Shipley, Philip E. Beshara, Jessica S. Aldrich, Wilmer Cutler Picking Hale & Dore, Washington, D.C., for Aquila Alliance, LLC

DECISION¹

I. Introduction and Jurisdiction

On April 3, 2020, the Director of the Office of Government Contracting (D/GC) of the Small Business Administration (SBA) denied the protest of Seventh Dimension LLC. (Appellant) for U.S. Army Special Operations Command Solicitation Number H92239-19-R-0002 (the Solicitation). The D/GC found that Advanced Computer Learning Corporation (ACLC) is an eligible Service-Disabled Veteran-Owned Small Business Concern (SDVO SBC) and that Aquila Alliance LLC. (Aquila), a mentor-protégé joint venture between ACLC and General Dynamics Information Technology, Inc. (GDIT), is an eligible SDVO SBC Joint Venture (JV). On April 16, 2020, Appellant, filed the instant appeal with the SBA Office of Hearings and Appeals (OHA) requesting reversal or remand. Aquila supports the D/GC's status determination for reasons cited by the SBA. For the reasons discussed *infra*, the status determination is REVERSED.

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 requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OHA decides SDVO SBC appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 125 and 134. Appellant timely filed its appeal. 13 C.F.R. § 134.503. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On March 13, 2019, the U.S. Army Special Operations Command (USSOC), issued Request for Proposal (RFP) No. H92239-19-R-0002 seeking support for the United States Army Special Warfare Center and School and 1st Special Warfare Training Group (1SWTG). (Amendment of Solicitation, at 1.) The Contracting Officer (CO) set the procurement aside entirely for SDVO SBCs and designated North American Industry Classification System (NAICS) code 611519, Other Technical and Trade Schools, with a corresponding \$15 million annual receipts size standard. (*Id.*) This Indefinite Delivery Indefinite Quantity (IDIQ) contract is for a contractor to provide Army Special Operations Forces Training Support (ARSOF) to include “exercise management, role player, subject matter expertise and training support for assessment, selection, and training conducted by 1st Special Warfare Training Group.” (*Id.*, at 5.) The period of performance includes a 30-day phase-in period, an 11-month base period, and four additional ordering periods. (*Id.*, at 2.) All training will take place around and on the bases of Camp Mackall and Fort Bragg in central North Carolina. (*Id.*, at 8.)

The Contractor shall provide a Program Manager (PM) who will be responsible for the performance of the work under the contract. (*Id.*, at 76.) The name of the PM and an Alternative Program Manager should be designated in writing to the CO at the post-award conference. (*Id.*) The PM or APM will have “full authority to act for the Contractor on all contract matters related to the daily operation of the contract.” (*Id.*) Any changes to the working status of the Key Personnel (PM and APM) should be given to the CO within ten (10) workdays of the proposed change. (*Id.*)

On April 19, 2019, Aquila submitted its initial proposal, including price. (Aquila Protest Response, at 2.) On January 28, 2020, the CO notified all offerors that Aquila was selected for the award. (Status Protest Letter, at 4.) On February 3, two unsuccessful offerors, Appellant and Telum, filed status protests for the instant procurement. (CO Letter to SBA, at 1.) Appellant's protest was based on the following four allegations. (Status Determination, at 2.) First, Aquila's sole SDVOSB member, ACLC, is unusually reliant upon its subcontractor Defense Government Contracting International Corporation (DGCI). Next, due to its reliance on DGCI, ACLC is unable to exercise independent business judgment without great economic risk. Third, at the time it was submitted, the JVA did not comply with SBA regulations. Finally, ACLC is not controlled by its service-disabled veteran owner. (*Id.*)

The CO forwarded the Protest File to the D/GC to make a status determination. (CO Protest Email to SBA, at 1.) In addition to the status protest, Appellant filed a Size Protest with the SBA Office of Government Contracting, Area III (Area Office) on February 3, 2020 for the instant procurement. (Protest Response Cover Letter, at 2.) On March 24, 2020, the Area Office issued Size Determination No. 3-2020-038 finding that Aquila is not a small business for the

instant procurement. (*Size Appeal of Aquila Alliance, LLC*, SBA No. SIZ-6052, at 1 (2020).) On April 8, 2020, Aquila appealed the SBA's decision to OHA. On April 30, SBA moved to remand the size appeal to the Area Office. (*Id.*) On May 7, 2020, OHA vacated the size determination and remanded the case to the Area Office for a new size determination. (*Id.*, at 2.)

B. Mentor-Protégé Agreement (MPA)

The Mentor-Protégé Agreement (MPA), dated January 5, 2018, states that the proposed Protégé, ACLC, is “seeking a mentor-protégé under a secondary NAICS code due to its intent to focus business development and protégé company growth in the area of training and education with GDIT mentorship” under the NAICS code 61170, Education Support Services. (Mentor-Protégé Agreement, at 1.) The MPA provides that ACLC will specialize in providing “state of the art instructor led, distributed, mobile, virtual, and blended learning Training & Education (T&E) solutions for customers to include Special Operations Forces, the Nuclear Regulatory Commission, and the U.S. Coast Guard.” (*Id.*) GDIT, the mentor, has a history of providing “program management across core competencies to include C4ISR, Mission Support, and Logistics” and has experience supporting Department of Defense programs including “training and education, cyber security, knowledge management, IT service operations, linguistics/translator support, plans and strategy, supply chain management, warehouse operations, and special procurement tactics.” (*Id.*) On February 6, 2018, the Small Business Administration approved the MPA. (SBA Mentor-Protégé Approved Letter, at 1.)

C. Joint Venture Agreement and Operating Agreement

On December 6, 2018, ACLC and GDIT created Aquila as a Delaware Limited Liability Company. (Aquila Operating Agreement, at 6.) Aquila's Operating Agreement served as the joint venture agreement (JVA). (*Id.*, at 1.) The JVA states the purpose of the joint venture is to develop and submit proposals and to negotiate, enter, and perform contracts. (*Id.*, at 8.) Aquila is owned [majority %] by ACLC, the protégé, and [minority %] by GDIT, the mentor. (Operating Agreement Exhibit B.)

The JVA designates specific roles and duties to the Managing Member, Member, and Members' Committee. (Aquila Operating Agreement, at 13.) ACLC is the managing member and is responsible for the daily operations of the joint venture while GDIT is designated as a member of the joint venture. (*Id.*) The JVA provides that, “except as otherwise expressly limited in this Agreement, the Members' Committee shall (i) exercise complete and exclusive control over the management of the Company's business, including controlling the performance of the Contracts, and (ii) have the right, power and authority on behalf of the Company and its name to exercise the rights, powers and authority of the Company under DLLCA.” (*Id.*) The Members Committee shall be comprised of two representatives from ACLC and one representative from GDIT. (*Id.*) The JVA allows the Members' Committee to appoint one or more non-voting advisors to serve at the pleasure of the Members' Committee. (*Id.*) JVA Section 3.3 explains that the “officers (and employees, if any) of the Company shall serve at the pleasure of the Members' Committee, except for those officers who are specified in Article IX as serving at the pleasure of ACLC as the Managing Member or GDIT, as applicable.” (*Id.*, at 7.) At the date of the Agreement, the

Members intend that Aquila will be “unpopulated” and managed by the officers in Article IX. (*Id.*, at 7.)

Article VIII, Section 8.1, Unanimous Requirements, enumerates the actions that require unanimous consent by each member of the Members' Committee to decide on behalf of the JV. (*Id.*, at 15.) These include: adoption of any Project Exhibit other than Exhibit C-1, the final approval and submission of any proposal; entry into any contract with a customer, and any modification of a contract; entry into any subcontract of work in excess of \$500,000; approval of the annual budget; hiring an individual to serve as an employee of the company, incurrence of any indebtedness, other than trade payables, or any lease, any action to incur any lien, security interest or mortgage on the company's property; any issuance of new Membership interests; any amendment of the Certificate of Formation; voluntary bankruptcy; settlement of litigation; incurrence of any expenditure of 5% or more in excess of budget; material change of accounting or tax policies; allocating any costs in excess of \$100,000 individually or \$500,000 in the aggregate that are not expected to be allowable; transfer of all or substantially all of the property of the company; any merger or reorganization; making any loan or capital contribution to another person; and entry by the company into a contract with any Member or its affiliates. (*Id.*, at 15-17.)

Article XII provides that profits will be allocated among the Members in accordance with their respective work shares for any particular contract. (*Id.*, at 24.) The company's books and records will be maintained by ACLC. (*Id.*, at 25, Ex. C-1)

In Article V, Section 5.1 Project Exhibits; Proposals, and Contracts, the JVA provides that the Company should submit a Project Exhibit which describes “the scope of work that each Member agrees to perform, an itemization of all major equipment, facilities and other resources to be furnished by each Member and a detailed schedule of the cost or value of each item, in each case, in a manner and to a degree of detail compliant with applicable SBA regulations, including 13 C.F.R. § 125.8(b)(2)(vi) and (vii).” (*Id.*, at 10.) Each project exhibit shall also specify the respective responsibilities of the Members, source of labor and contract performance, including ways that the Members will ensure compliance with the performance of work requirements. (*Id.*, at 19.)

In addition, Section 5.1 explains that Exhibit C-1 will be the initial project exhibit and that it “shall be deemed to be delivered and duly approved concurrently with the execution and delivery of this Agreement.” (*Id.*) Exhibit C-1: Initial Project Exhibit describes the XXXXXXXXXX contract. (Exhibit C-1., at 1.) This is a different contract from the subject procurement, the ARSOF contract, which is described in Exhibit C-2. (*See* Exhibit C-2, at 1.) Exhibit C-1 explains that the “XXXXXXX is a single-award IDIQ contract where the effort and scope is not yet known” but “ultimately, the project manager is responsible for all deliverables and performance within budget for the entire XXXXXXXXXX Contract.” (*Id.*) For this contract, a unanimous decision by the Members' Committee will be required for decisions regarding the negotiation of the contract, source of labor, and contract performance. (*Id.*)

The Contract Description in Exhibit C-2 states that the ARSOF contract is a single-award IDIQ SDVOSB set-aside with a maximum value of \$200 million. (*Id.*, at 1.) The Statement of

Work explains that Aquila will perform at least XX% of the work under the ARSOF contract and that [minority %] of that work will be performed by ACLC. (*Id.*) This section provides that the Program Manager will be “responsible for all deliverables and performance within budget for the entire ARSOF contract (together with all subcontracts.)” (*Id.*) The Personnel Performance section explains that [Individual 2], an employee of ACLC, has been designated the Program Manager responsible for performance of the contract. (*Id.*) This section states that unanimous consent is required by the Members' Committee to enter a subcontract valued at more than \$500,000 or when hiring an individual to serve as an employee of Aquila. (*Id.*) The Work Share section states that Aquila intends to distribute [majority %] of the work to ACLC and [minority %] to GDIT. (*Id.*)

The Equipment and Facilities section explains that at the time of execution of the JVA, ARSOF is a single-award IDIQ contract where the “level of effort and scope of work are not specifically known.” (*Id.*) In compliance with C.F.R. § 125.8(b)(2)(vi), ACLC will provide office space to the program management at the ACLC headquarters building in Fayetteville, North Carolina at no additional cost. (*Id.*, at 3.) Any additional office requirements will be shared by members at the current work share percentages of [majority %] (ACLC) and [minority %] (GDIT). (*Id.*)

D. Protested Concern's Response

On March 16, 2020, Aquila submitted its response dated February 26, 2020 regarding the status protests of Seventh Dimension and Telum. (Protest Response Cover Letter, at 1.) In its response package, Aquila submitted a Response Statement to the Status Protests, SBA Form 355, JVA, MPA, ARSOF Addendum to the JVA (Exhibit C-2), Aquila Proposal for XXXXXXXXXXXXX, and other supporting records. (*Id.*, at 10.) Aquila denied all allegations and made three principal arguments regarding Appellant's Protest. (Response at 1.) First, ACLC will not be unusually reliant upon DGCI because ACLC does not lack past performance, experience, or expertise. (*Id.*, at 10-11.) Moreover, DGCI will perform no more than [minority %] of the ARSOF effort. (*Id.*, at 12.) ACLC has signed commitment letters for all the key personnel positions. (*Id.*, at 10.)

Next, Aquila identified a specific ACLC employee, [Individual 2], to serve as the Program Manager for the ARSOF contract and submitted his signed commitment letter with the proposal. (*Id.*, at 17.) Finally, ACLC is controlled by a bona fide service-disabled veteran, [Individual 1], who serves as ACLC's highest ranking officer and controls its operations. (*Id.*, at 18.) Moreover, [Individual 2], ACLC's CEO, is also a service-disabled veteran. (*Id.*, at 19.) Based on these arguments and the supporting documentation, Aquila requested that the D/GC deny the Status Protests in their entirety. (*Id.*, at 25.)

E. D/GC Status Determination

On April 3, 2020, the D/GC issued a Status Determination finding that ACLC is an eligible SDVOSB and that Aquila, a JVA between ACLC and GDIT, meets the SDVO SBC joint venture eligibility requirements at the time of the solicitation. (Status Determination, at 1.) First, the D/GC found that ACLC is a SDVO SBC. (*Id.*, at 4, 5.) Based on the VA determination letters

of [Individual 1], the Founder of ACLC, and [Individual 2], the CEO of ACLC, the D/GC concluded that both men are service-disabled veterans pursuant to the eligibility requirements of 13 C.F.R. § 125.11. (*Id.*, at 3.) According to the ACLC's articles of incorporation, operating agreement, and tax returns, the DG/C found that [Individual 1] owns at least [majority %] of ACLC as required by 13 C.F.R. § 125.12. (*Id.*) DG/C concluded that the Operating Agreement provides that [Individual 1] is the sole member and manager of the limited liability company and that he has the power to conduct the business and affairs of the company in accordance with 13 C.F.R. § 125.13(d). (*Id.*, at 4.)

The D/GC addressed Appellant's allegations that ACLC is ineligible for the instant procurement because [Individual 2], the CEO of ACLC, holds the highest officer position and does not have SDVO status. (*Id.*) The D/GC found that the operating agreement designates the highest position to the owner/chairman — [Individual 1]. (*Id.*) Furthermore, the D/GC determined that [Individual 1] has the expertise in project management, business development, and training development needed to run the concern in accordance with 13 C.F.R. § 125.13. (*Id.*)

The D/GC analyzed Aquila's eligibility as an SDVO JV to determine that it met all the requirements of 13 C.F.R. § 125.18(b)(2). (*Id.*, at 6.) Specifically, the D/GC found that the JVA describes the purpose of the JV, ACLC, a SDVO SBC does serve as the managing venturer, and has two of three positions on the members committee. An ACLC employee will serve as Project Manager. The JVA and the proposal provide adequate support that the SDVO SBC will perform at least [minority %] of the work. The JVA adequately specifies the responsibilities of each party and ACLC will not unduly rely on GDIT for labor responsibilities. The JVA provides that profits will be apportioned between the Members based on work performed The JVA obligates all parties to ensure performance of the contract, and the JVA contains a provision requiring that the final original records be retained by ACLC upon completion of the contract. (*Id.*, 5-7.)

The D/GC addressed Appellant's allegation that the JVA is not valid under 13 C.F.R. § 125.18(b)(2) because the program manager was not named at the time of the offer. (*Id.*, at 7.) The D/GC found that the JVA does not name a project manager, but explains that Aquila still meets the requirement for specifying a program manager because an addendum to the JVA, Exhibit C, states that [Individual 2] will act as the Program Manager responsible for managing the contract. (*Id.*, at 6.) Furthermore, the D/GC was satisfied that all employees serving in leadership positions, including [Individual 2], signed commitment letters submitted with the proposal. (*Id.*)

The D/GC also reviewed Appellant's allegation that “ACLC does not currently employ any personnel capable of performing the contract” and that “ACLC is currently recruiting for every single one of these jobs.” (*Id.*, at 6.) The D/GC found this allegation not supported by the record because Aquila's JVA adequately specifies the responsibilities of each party, including the work share for each partner, total hours, and leadership positions with signed commitments and resumes. (*Id.*, at 7.) Moreover, the D/GC determined that ACLC will not unduly rely on GDIT for labor responsibilities. (*Id.*) Therefore, the D/GC determined that in accordance with 13 C.F.R. § 125.18(b)(2)(vii), the JVA specified the responsibilities of the parties regarding contract performance, source of labor, and negotiation of the SDVO contract. (*Id.*, at 7.)

In conclusion, the DG/C decided that ACLC is an eligible SDVO SBC and that Aquila has met the joint venture requirements of 13 C.F.R. § 125.18 making Aquila an eligible SDVO SBC JV for the instant procurement. (*Id.*, at 9.)

F. Appeal

On April 16, 2020, Appellant, filed the instant appeal. (Appeal, at 2.) Appellant argues that the DG/C determination was materially flawed and failed to address material issues raised in its protest to the SBA. (*Id.*, at 7.) In its April 16th filing, Appellant made the following arguments. First, the D/GC overstepped its jurisdiction by determining Aquila's size status. (Appeal, at 1.) The D/GC formed the basis of its review on Aquila's "Proposal for XXXXXXXXXXXXXXXX," a purportedly entirely separate procurement, rather than the ARSOF procurement. (*Id.*) Next, the Aquila proposal failed to comply with regulations permitting a mentor-protégé JV to apply for SDVO SBC opportunities. Appellant argues Aquila is not a small business. (*Id.*, at 9.) Finally, the JVA did not include significant information, including identification of key personnel, provision of facilities and equipment, and enforceable commitments to compliant workshare between the JV partners. (*Id.*, at 6.) Appellant argues the JVA is deficient because it failed to identify an ACLC employee as Project Manager at the time of submission. (*Id.*, at 13-31.) The JVA also failed to specify the responsibilities of the parties and itemize equipment. (*Id.*)

G. Protest File

The SBA served the Protest File on April 30, 2020. The Protest File contained the Protest Determination Letter, Protest Checklist with Contracting Officer Response, Initial Protest Notification Letter, Email Correspondence, Firm Response with Supporting Documentation, and Second Response with Supporting Documentation. Also, multiple documents listed in the Vaughn Index were withheld in full accordance with OHA's protective order issued on April 20, 2020.

H. Appellant's Supplemental Appeal Petition

On May 5, 2020, based on its review of the Protest File, the Appellant submitted a Supplemental Petition with the following new arguments and additional support for the arguments in the Appeal. First, SDVO SBC members do not control the Aquila JV in accordance with 13 C.F.R. § 125.18(b)(2)(ii) because the JVA states that multiple ordinary decisions of the JV require unanimous consent. (*Id.*, at 2.) Rather, Appellant contends that the large business minority member, GDIT, has "negative control" over the JVA. (*Id.*, at 9; *See Hana-JV*, SBA No. VET-227 (2012).) Neither ACLC nor its Program Manager can hire, fire, incur expenses above a certain threshold, or make "determinations as to the negotiation of the contract, the source of labor, and contract performance" without the permission of GDIT. (*Id.*, at 12.) OHA has held that having veto power over all significant decisions of the JVA renders a SDVO SBC JV noncompliant with SBA regulations. *Hana-JV*, (2012). The control of the SDVO SBC "must be unequivocal." *SOF Assocs., F JV*, SBA No VET-234 (2013).

Second, Appellant argues that the D/GC should not have upheld the Aquila JV under 13 C.F.R. § 125.18(b)(2)(vii) because the JVA does not provide the required detail specifying how the individual members of the JVA would provide labor and resources for contract performance. (*Id.*, at 7.) Like the RFP in *KTS Solutions, Inc.*, SBA No. CVE-146-P (2020), the ARSOF RFP required detailed information for dates, times, the number of personnel required by specific labor category, and a description of the required training activity. (*Id.*, at 15.) Appellant contends that the Proposal does not comply because it does not give any indication of which JV partner will staff these categories. (*Id.*, at 11.) Rather, Aquila is a “populated” JV hiring its employees to perform the contract rather than hiring employees of each JV member. (*Id.*, at 11.) According to Appellant, although Aquila states that it will perform [minority %] of the work, this cannot be the case if Aquila is hiring more than [majority %] of the employees. (*Id.*, at 15.)

Third, Appellant states that the JV is not eligible for the procurement because ARMA Global Corporation (ARMA), a large business, is a third participant in the JV. (*Id.*) ARMA is a separate company from GDIT and is not ACLC's mentor. (*Id.*, at 7.) However, [Individual 3], a member of Aquila's Members' Committee, is employed by ARMA. According to Appellant, there is no exception for ARMA, a non-SDVO SBC, to participate in the joint venture under 13 C.F.R. § 125.18(b)(1)(ii) because ARMA is not a member of the JV. (*Id.*, at 16.) A protégé firm may have only one mentor at a time, and ARMA, although a subsidiary of GDIT, is a separate company, and thus not an SBA-approved mentor of ACLC. ARMA and GDIT cannot bind each other to contracts and are not liable for each other's obligations. (*Id.*, at 18.) OHA has held that a parent corporation may not appear on behalf of its subsidiary, and that a subsidiary may not appear on behalf of a parent. (*Id.*, citing *Size Appeal of Conrad Shipyards, LLC*, SBA No. SIZ-5873 (2017).)

Fourth, Appellant avers that GDIT never executed the ARSOF-specific JV addendum containing the terms for Aquila's planned performance of ARSOF. (*Id.*) OHA case law states that for a “JV agreement to be valid at the time of self-certification, both parties must have signed the addendum.” *Aristek Fed. Servs.*, *supra*. Aquila submitted a signed Joint Venture Certificate of Compliance and an unsigned Exhibit C-2 (JV Addendum). (*Id.*, at 20.) However, the Certificate of Compliance does not refer to or incorporate any JV addendum and states that performance of the ARSOF contract will be governed by the master JV. (*Id.*) Because the addendum was never executed, Appellant states that it was improper for the D/GC to rely on it in making its determination. (*Id.*)

Fifth, Appellant claims that the Protest File confirms that ACLC is improperly dependent on DGCI for critical assets, including providing the training facility, land, and zoning approval required by the Solicitation. (*Id.*, at 22.) DGCI will be a subcontractor and is a non-SDVO SBC. (*Id.*) Appellant asserts that the facts are akin to *Eason Enterprises OKC LLC & Advanced Env'tl. Sols., Inc.*, SBA No. SDV-102 (2005), OHA upheld a decision disqualifying a SDVO SBC from a hazardous waste disposal contract because the SDVO SBC depended on a non-veteran entity for the use of a needed truck and certain critical facilities. (*Id.*)

Sixth, Appellant argues that the Protest file confirms that the D/GC did not consider all facts regarding key personnel, including the Program Manager. (*Id.*, at 4.) Based on a review of ACLC's website, they are currently recruiting for every position that was listed in the Proposal,

including the Program Manager position. (*Id.*, at 23.) This shows that Aquila does not intend for [Individual 2] to be the Program Manager. (*Id.*)

Finally, Appellant concludes that the D/GC's Determination references a different procurement, the XXXXXXXX, not the ARSOF procurement. (*Id.*, at 8.) This is a completely different procurement. (*Id.* at 25.) For these reasons, Appellant requests that OHA grant the Appeal and Supplemental Appeal, overturn the status determination, and declare Aquila not an eligible SDVO SBC for the instant procurement. (*Id.*, at 26.)

I. Protested Concern Response

On May 14, 2020, Aquila submitted a response to the Appellant's Status Appeal and Supplemental Status Petition arguing that Seventh Dimension has failed to identify any clear error of fact or law in the Status Determination. (Intervenor Response at 1.) Aquila contends that the Supplemental Petition presents only two new arguments based on the Protest File, neither of which have any merit. (*Id.*, at 2.)

First, Aquila avers that the Appellant is incorrect in its assertion that the JVA, through Exhibit C-2 addendum, “improperly restricts ACLC's unequivocal control of the Aquila JV” because it requires “unanimous consent” for four specific decisions. (*Id.*) Aquila asserts that Seventh Dimension mischaracterizes these instances as endowing GDIT with day-to-day control over Aquila's ordinary operations. (*Id.*, at 12.) Rather, Aquila points to OHA case law that recognizes that “the power to veto extraordinary corporate actions in order to protect a minority shareholder's investment does *not* create affiliation through negative control.” (*Id.*, at 33; citing *Team Waste Gulf Coast, LLC.*, SBA No. SIZ-5864 (2017).) Moreover, given their “inherent impact on the large business's investment in the JV,” Aquila points to OHA case law finding that supermajority provisions were crafted to protect a minority partner's investment. (*Id.*; citing *EA Eng'g, Sci., & Tech., Inc.*, SBA No. SIZ-4973 (2008).)

Furthermore, Aquila contends that the facts in the instant status appeal can be distinguished from the cases cited by Appellant. (*Id.*, at 36, 37; referencing *Hana-JV*, SBA No. VET-227 (2012); *SOF Assocs. F JV*, SBA No. VET-234 (2013).) Unlike in *Hana-JV*, where the JV did not designate a managing venture or project manager, and did not define responsibilities regarding contract performance, source of labor, and negotiation of the contract, the Aquila JVA satisfied all of these requirements. (*Id.*, at 36.) Here, the JVA designated its SDVOSB partner as its managing venturer empowered with two-thirds majority vote over daily business operations of the JV, designates the project manager by name, and describes the members' respective responsibilities regarding contract performance, source of labor, and negotiation of the contract. (*Id.*) Next, unlike in *SOF*, where the JVA required a super-majority vote of the Board to approve all motions regarding “tactical and strategic business issues” the Aquila JVA the requirement for unanimous consent only applies to “four key decisions that would materially affect the JV's status and/or GDIT's rights as the minority shareholder.” (*Id.*, at 37-38.)

Second, Aquila explains that Seventh Dimension incorrectly asserts that Exhibit C-2 is not a valid addendum to the JVA. (*Id.*, at 33.) Instead, Aquila declares that the Aquila JVA was not created with a specific procurement in mind, but rather, for the purpose of pursuing multiple

opportunities. (*Id.*, at 38.) Thus, Aquila states that Appellant is incorrect in its assertion that the parties could not have “executed” Exhibit C-2 because the master JVA was executed prior to the issuance of the ARSOF RFP. (*Id.*, at 39.) Even without the parties signatures on Exhibit C-2, Aquila maintains that the executed Certificate of Compliance, included with Exhibit C-2 and the ARSOF Proposal, was executed by both JV members on April 11, 2019 in which the members attested that “they would perform the ARSOF contract in conformance with the JVA and *in compliance with* the SBA's performance work requirements.” (*Id.*, at 40.) Furthermore, the “certification” required by 13 CFR § 125.18(b)(4) is directed at the JVA's compliance with 13 CFR § 125.18(b)(2), as well as the parties' performance of the contract's work requirements set forth in 13 CFR § 125.18(b)(3). (*Id.*)

Aquila denies all of the Appellant's other arguments raised in the Appeal and Supplemental Petition by making the following assertions: First, in the context of an IDIQ contract with an unknown statement of work/level of effort, Aquila did specify the responsibilities of the parties with respect to the facilities, equipment, and personnel in accordance with 13 C.F.R § 125.18(b)(2)(vi). (*Id.*, at 2.) Next, the D/GC did not rely on the wrong proposal in making its status determination; rather, the D/GC specifically referred to Exhibit C-2 (ARSOF Addendum) in making its status determination. (*Id.*) Third, ARMA, a wholly owned subsidiary of GDIT, is not “improperly involved in the Aquila JV” because GDIT is a member of the JVA. (*Id.*) Fourth, Aquila is an unpopulated joint venture staffed by its members which allows [Individual 2] to serve as ACLC's CEO, Aquila's President, and the ARSOF Program Manager. (*Id.*) Fifth, the D/GC did not overstep its bounds in addressing some issues also addressed in the size determination because the Appellant raised many of the same arguments in both cases. (*Id.*, at 3.) For these reasons, Aquila requested that D/GC's determination be upheld. (*Id.*)

J. Agency Response to the Supplemental Appeal Petition

On May 14, 2020, the SBA submitted a response to the Supplemental Appeal Petition filed by Appellant. (Agency Response at 1.) SBA asserts that the D/GC made no error in law or fact and correctly concluded that Aquila is an eligible SDVO SBC. SBA asks OHA to affirm its determination on appeal. (*Id.*)

In its Response, the SBA presents six arguments asserting that the Appellant's Supplemental Appeal fails to show that the D/GC improperly found Aquila to be eligible for the instant procurement. (*Id.*, at 4-18.) First, the SBA contends that the D/GC properly based its eligibility review on the ARSOF procurement, not the XXXXXXXXXX procurement, and that this review was adequately specific based on the sensitive information provided. (*Id.*, at 4.) The Protest File includes both the ARSOF and XXXXXXXXXX proposals, but the Appellant is correct that the D/GC only references the XXXXXXXXXX proposal. This was a “regrettable oversight,” but was not material to the decision as there are “indications throughout the determination letter that D/GC reviewed the JV agreement, JV addendum, and proposal for the ARSOF solicitation.” (*Id.*, at 4, 5.) The D/GC specifically references the addendum to the ARSOF Proposal discussing [Individual 2] as the Program Manager in Exhibit C to the JV Agreement. (*Id.*, at 5.) [Individual 2] was not the Program Manager for the XXXXXXXXXX proposal. (*Id.*) Furthermore, the

alleged lack of specificity in the size determination is explained by the SBA SDVOSB internal policy to limit the disclosure of protected information. (*Id.*)

Second, the SBA argues that the D/GC properly found that in accordance with 13 C.F.R. § 125.15 (b)(2)(ii) the sole managing member, ACLC, has control over the JV. (*Id.*, at 6.) The SBA avers that the facts of the Appeal can be distinguished from the cases relied on by Appellant, *Hana-JV*, SBA No. VET-227 (2012) and *SOF Assocs. F JV*, SBA No. VET-234 (2013). Unlike *Hana-JV*, where there were two equal managing venturers with control over all actions, the Aquila JV does not give GDIT control over all decisions and the SDVO SBC is the sole managing member. (*Id.*) Moreover, the Aquila JV can be distinguished from *SOF Assocs.* where a provision in the joint venture requiring a supermajority vote was deemed to give a “wide latitude for the non-SDVO SBC firms to exercise negative control over any issue it deemed ‘tactical and strategic.’” (*Id.*, at 8; citing *SOF Assocs.* at 7.) The JV is only limited by Section 8.1(a) for “extraordinary corporate actions” requiring unanimous consent by the Members Committee. (*Id.*) In all other circumstances, the Aquila JV gives ACLC the power to develop each proposal, lead negotiations for the subsequent contract, and manage the contract performance through the Project Manager, [Individual 2]. (*Id.*)

Third, the ARSOF Addendum, Exhibit C-2, is valid and enforceable on ACLC and GDIT, because it was incorporated into the JV agreement and submitted with the ARSOF proposal. (*Id.*, at 10.) The facts in the Appeal can be distinguished from *Asirtek Fed. Servs.*, LLC, SBA No. VET-269 (2018) where OHA excluded an unsigned addendum to the joint venture because it was executed after the date of the offer. (*Id.*, at 9.) Instead, the ARSOF JV Addendum (Exhibit C-2) was created in anticipation of the subject solicitation and submitted with the JVA to the CO. (*Id.*, at 10.) Although it was unsigned by both firms, Exhibit C-2 was incorporated by reference into the signed JVA by Section 5.1(b) of the JVA. (*Id.*)

Fourth, though the Area Office incorrectly labeled Exhibit C-2 as Exhibit C, the ARSOF Addendum in Exhibit C-2 properly identified [Individual 2] as the Project Manager at the time of the offer. (*Id.*) Aquila provided adequate evidence, including naming [Individual 2] as the Project Manager in Exhibit C-2, the Organizational Chart, and the Letter of Commitment, to prove the veracity of [Individual 2] role. (*Id.*, at 11.) While Appellant questions the truthfulness of these statements, it is reasonable and not material error for the D/GC to have relied on these responses given the substantial penalties incurred for false statements made to the government. (*Id.*)

Fifth, in accordance with 13 C.F.R. § 125.18 (b)(2)(vi), the JVA adequately specified major equipment and facilities. (*Id.*, at 12.) Because ARSOF is a services contract for specialized training, the alleged lack of specificity in the size determination is not clear error. (*Id.*) In accordance with 13 C.F.R. § 125.18 (b)(vii), the D/GC properly determined that the resources itemized in Exhibit C-2, met the eligibility requirements for listing a “general description” of the anticipated major equipment, facilities, and other resources for an IDIQ personal services contract where the “level of effort or scope of work is not known.” (*Id.*, at 13.)

Finally, the JV Addendum (Exhibit C-2) provided a general description of the specified negotiation, source of labor, and contract performance satisfying 13 C.F.R § 125.18 (b)(vii). (*Id.*, at 14.) The JVA meets the required specificity for an IDIQ and can be distinguished from the

JVA in *KTS Solutions, Inc.*, which did not have an addendum with its initial proposal including the required information for the equipment and responsibilities of the parties. (*Id.*) Rather, Aquila submitted a contract-specific addendum (Exhibit C-2) with the ARSOF proposal that explains the duties of the Program Manager and duties of the officers responsible for the day-to-day business, a statement of work confirming that Aquila would perform XX % of the work and that ACLC will perform at least [minority %], and information about the work share and hiring of subcontractors. (*Id.*, at 15.) Moreover, the proposal states that the Managing Member will lead the negotiations for the resulting contract. (*Id.*, at 14.) The D/GC correctly reviewed the proposal to verify information in the JVA and found, unlike *KTS Solutions*, that the proposal supports the information in the JVA. (*Id.*, at 17.)

The Agency asks OHA to affirm the D/GC determination because Aquila is an eligible SDVO SBC. (*Id.*)

III. Discussion

A. Standard of Review

In SDVO SBC status appeals 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 both in size appeals and SDVO SBC appeals). Thus, OHA may overturn the D/GC's decision only if Appellant proves the D/GC made a patent error based on the record before him.

SBA claims either the attorney-client or deliberative process privilege for a number of documents in the Administrative Record. SBA submitted these documents for *in camera* inspection. I have approved these documents, and approve SBA's claim of privilege, and exclude them from the Administrative Record.

B. Analysis

After a careful review of the filings submitted by the Appellant, Agency, and Protested Concern as well as the Protest File and SBA regulations, I find that I must reverse the D/GC's status determination.

SBA regulations provide that a joint venture may be considered eligible to bid on an SDVO SBC contract if the joint venture is composed 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's regulations at 13 C.F.R. § 125.18(b)(2).

In its Appeal and Supplemental Appeal Petition, Appellant alleged several deficiencies in the validity of Aquila's JVA and ARSOF Addendum (Exhibit C-2) to illustrate that that the addendum was not properly executed; the SDVO SBC does not control the JVA; and that the JVA lacks specificity regarding labor, resources, major equipment, and facilities.

I find that the ARSOF Addendum, Exhibit C-2, was properly executed and is incorporated into the JVA. Aquila explains that the JVA was not created with this procurement in mind, but for the purpose of pursuing multiple opportunities. Section II. I, *supra*. It follows that subsequent addendums would need to be incorporated for each new proposal. Unlike in *Matter of Asirtek Fed. Servs., LLC*, SBA No. VET-269 (2018) cited by Appellant, which did not address the procurement in question at all, the ARSOF Addendum was created in anticipation of the instant procurement and submitted with the JVA to the CO at the time of the solicitation. Section II.J, *supra*. It is not material that the ARSOF Addendum was not signed by both firms because it was incorporated by reference into the signed JVA by Section 5.1 (b). (*Id.*) Furthermore, the Certificate of Compliance, signed by both firms, was submitted with the ARSOF Addendum and the original JVA Agreement on April 11, 2019. Section II.I, *supra*. I further find that the D/GC properly based the eligibility review on the ARSOF procurement. The D/GC's determination specifically references the JVA's provision in Aquila's project manager (Status Determination, at 6.), and it specifically references the ARSOF addendum by referring to [Individual 2], the Program Manager for that contract.

The JVA has descriptions with the required specificity for both the major equipment and facilities as required by 13 C.F.R. § 125.18 (b)(2)(vi) and for the specified negotiation, source of labor, and contract performance as required by 13 C.F.R § 125.18 (b)(2)(vii). Section II. J, *supra*. The ARSOF procurement is an IDIQ services contract for specialized training where the “level of effort or scope of work” is not known, so only a “general description” of the anticipated major equipment, facilities, and other resources is required. *See Id.* In the case of services contracts, JV agreements comply with the regulation even when they specify very little major equipment or facilities. *Size Appeal of Alpine First/Preston JV II, LLC*, SBA No. SIZ-5822 (2017). Here, the D/GC correctly determined that the ARSOF Addendum to the JVA (Exhibit C-2) properly identified this required information. (*Id.*) Aquila submitted a contract-specific addendum (Exhibit C-2) with the ARSOF proposal that explains the duties of the Program Manager and duties of the officers responsible for the day-to-day business, a statement of work confirming that Aquila would perform XX% of the work and ACLC will perform at least [minority %], information about the work share and hiring of subcontractors, and a statement that the Managing Member will lead the negotiation for the resulting contract. (*Id.*) Appellant's reliance on *Size Appeal of KTS Solutions, Inc.*, SBA No. SIZ-6049 is misplaced. There, the challenged concern had not executed an addendum to its JVA when it submitted its proposal; here, Aquila had executed the addendum at the time of the proposal. Furthermore, per Article IX of the JVA, the JV is not “populated;” rather, it will be staffed by its members which allows [Individual 2] to serve in the roles of ACLC's CEO, Aquila's President, and the ARSOF Program Manager. (*Id.*; Section II.E.)

Nevertheless, the SDVO SBC must be the managing venturer of the joint venture, and an employee of the SDVO SBC must be the project manager responsible for performance of the contract. 13 C.F.R. § 125.18(b)(2)(ii). This means the SDVO SBC must control the decision-making of the joint venture. A concern with one managing director from each concern, both having equal authority, thus giving the non-SDVO SBC veto power, did not meet the regulatory requirements. *Matter of Hana-JV*, SBA No. VET-227 (2012). A provision requiring a supermajority for the “tactical and strategic” business decisions also rendered a joint venture

ineligible. *Matter of SOF Associates, JV*, SBA No. VET-234 (2013). “The SDVO SBC's control must unequivocal.” *Id.*, at 7.

Here, the JVA's Article VIII enumerates a number of actions, not merely four, by Aquila which require the unanimous consent of the Members' Committee. These include submission of proposals, entry into any contracts, or modifications of contracts, and the adoption of additional Project Exhibits after Exhibit C-1. It is true that, in reviewing size cases, OHA has held that provisions requiring a supermajority for certain extraordinary actions which are meant to protect a minority shareholder's interest do not create negative control on behalf of that minority shareholder. *Size Appeal of EA Engineering, Science and Technology, Inc.*, SBA No. SIZ-4973 (2008). However, the actions for which Aquila's JVA requires unanimous consent are not merely extraordinary actions such as the issuance of additional stock and filing bankruptcy, but essential actions of the day-to-day running of the business. The very purpose of the Aquila joint venture was to compete for and perform contracts. The requirement of unanimous consent gives GDIT veto power, and thus negative control over all decisions concerning the competition for and performance of contracts, the essential functions of any business. Further, GDIT has veto power, and thus negative control, over the approval of the budget and the incurrence of any indebtedness, which have been held to be actions vital to ordinary daily business operations. *Size Appeal of Team Waste Gulf Coast*, SBA No. SIZ-5864 (2017); *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303 (2011). Accordingly, I find that ACLC is not the manager of Aquila, because GDIT's representative on the Members' Committee has veto power, and thus negative control, over the ordinary actions essential to the running of the company. Aquila has therefore failed to comply with regulation at 13 C.F.R. § 125.18(b)(2)(ii) and is not an eligible SDVO SBC.

Therefore, I find that Appellant has established that the D/GC's decision was based upon a clear error of fact or law. 13 C.F.R. § 134.508. Accordingly, I GRANT the appeal, and REVERSE the D/GC's status determination.

IV. Conclusion

Appellant has established that the status determination is clearly erroneous. Accordingly, I GRANT the instant appeal, and REVERSE the D/GC's status determination. Aquila is not an eligible SDVO SBC. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge