

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

VSBC Protest of:

Billet Industries,

Protestor,

Re: Veteran Military Contracting

Solicitation Nos. SPE7L323U1929,
SPE4A623T550W

The Defense Logistics Agency
Consolidated

SBA No. VSBC-295-P

Decided: July 27, 2023

APPEARANCES

Maria L. Panichelli, Esq., McCarter & English LLP, Philadelphia, PA, for Billet Industries

Carlos J. Rivera, Senior Partner, Veteran Military Contracting, Spring Grove, PA.

DECISION¹

I. Introduction and Jurisdiction

On May 11, 2023, the Contracting Officer (CO) for the Defense Logistics Agency (DLA) Aviation (DLA Aviation) forwarded to the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) a status protest filed by Billet Industries (Protestor) against Veteran Military Contracting (VMC) in connection with the DLA Aviation Request for Proposal (RFQ) Solicitation No. SPE4A623T550W. Additionally on May 11, 2023, the CO for DLA Land and Maritime, Land Supplier Opns Vehicle Spt (DLA Land and Maritime) forwarded to OHA a status protest filed by Protestor against VMC in connection with DLA Land and Maritime RFQ Solicitation No. SPE7L323U1929. Protestor alleges that VMC is not eligible for the Service-Disabled Veteran-Owned Small Business (SDVOSB) set aside solicitations because it is not

¹ This decision was originally 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. After reviewing the decision, VMC informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

controlled by a service-disabled veteran. For the reasons discussed infra, the protests are GRANTED.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J. Protester filed protests within five business days of receiving notification that VMC was the apparent awardee, so the protests are timely.² 13 C.F.R. § 134.1004(a)(3). Accordingly, these matters are properly before OHA for decision.

II. Background

A. Solicitations

On January 19, 2023, DLA Aviation issued RFQ No. SPE4A623T550W for bearing half, sleeve acquisitions. (SPE4A623T550W RFQ, at 8.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 332991, Ball and Roller Bearing Manufacturing, with a corresponding 1,250 employee size standard. (*Id.*) On January 24, 2023, the CO announced VMC was the awardee.

On April 18, 2023, DLA Land and Maritime issued Unilateral Simplified Indefinite-Delivery Contract (SIDC) Request for Quotations (RFQ) No. SPE7L323U1929 for housing, cylinder, pneumatic, actuator acquisitions. (SPE7L3-23U1929 RFQ, at 8.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 333613, Mechanical Power Transmission Equipment Manufacturing, with a corresponding 750 employee size standard. (*Id.*) On May 5, 2023, the CO announced VMC was the awardee.

B. Protests

On January 25, 2023, Protestor filed a protest with the CO for DLA Aviation; and on May 9, 2023, Protestor filed a protest with the CO for DLA Land and Maritime. (DLA Aviation Protest, at 1; DLA Land and Maritime Protest, at 1.) Protestor alleges similar arguments in both protests detailed together.

Protestor asserts VMC is not controlled by a SDVOSB and alleges a VMC employee, Benjamin Breneman, is involved in the day-to-day management and decision making of VMC. Protestor asserts Mr. Breneman “exert[s] a substantial amount of control over” VMC. (*Id.*, at 2-3.; *Id.*, at 2-3.) Further, Protestor alleges publicly available information does not identify Mr.

² According to the CO for DLA Aviation, Protector received notification of the apparent successful offeror on January 24, 2023. Protestor submitted its protest to the DLA Aviation CO on January 25, 2023, and thus is timely. Likewise, according to the CO for DLA Land and Maritime, Protestor received notification of the apparent successful offeror on May 5, 2023. Protestor submitted its protest to the DLA Land and Maritime CO on May 9, 2023, and thus is timely.

Breneman as a veteran. (*Id.*, at 3; *Id.*, at 3.) Protestor alleges that Carlos J. Rivera, the SDVOSB upon whom VMC's claim of eligibility is based, does not have the background or managerial experience needed to run VMC nor to perform manufacturing contracts. (*Id.*, at 6; *Id.*, at 6.) Lastly, Protestor proffers size protest allegations that are not at issue here and out of the scope of this SDVOSB status protest.

C. Case File

On May 25, 2023, VetCert informed OHA that there are no records from the former Center for Verification and Evaluation, nor the SBA VetCert, pertaining to VMC. VMC self-certified its status as an SDVOSB. Thus, OHA issued an Order to VMC requesting that VMC produce, inter alia, corporate documents for the record.

VMC provided its Partnership Agreement (the Agreement), executed December 5, 2017. VMC is a “distributor of spare and replacement parts for the United States Military,” established as a partnership in the state of Pennsylvania. (Partnership Agreement, at 1.) The Agreement is between Mr. Carlos Rivera, who owns a 51% majority partnership and Mr. Benjamin Breneman, who owns a 49% minority partnership. (*Id.*) The Agreement contains the following provision pertinent to these protests:

7. MANGEMENT DUTIES AND RESTRICTIONS. The partners shall have equal rights in management of the partnership business. Without the consent of the other partner neither partner shall on behalf of the partnership borrow or lend money, or make, deliver, or accept commercial paper, or execute any mortgage, security agreement, bond or lease, or purchase or contract to purchase, or sell or contract to sell any property for or of the partnership other than the type of property bought and sold in the regular course of its business.

(*Id.*, at 2.)

D. Protestor's Supplemental Protest

On June 20, 2023, Protestor filed a supplemental protest and alleges VMC failed to provide a substantive response to rebut the allegations asserted in Protestor's protest. Specifically, VMC failed to provide evidence to “demonstrate that Mr. Rivera has either the managerial position or experience required by 13 CFR § 128.203(b) . . . [n]or has there been any evidence submitted concerning the actual manufacturing capabilities of VMC. . . .” (Supplemental Protest, at 2.)

Further, Protestor asserts, VMC's Agreement “demonstrates that Mr. Rivera does not have unconditional control of the company as required by 13 C.F.R. § 128.203(c).” Specifically, the Agreement grants Mr. Breneman “equal control over the company.” (*Id.*) Protestor argues the Agreement allows Mr. Breneman the ability to block Mr. Rivera from making decisions regarding VMC and thus, Mr. Rivera is unable to exercise unconditional control of VMC. (*Id.*)

Protestor lastly asserts that Mr. Rivera is unable to devote full-time to VMC during normal hours of operation and fails to provide evidence to rebut this claim. (*Id.*, at 3.)

E. VMC's Response to Supplemental Protest

On June 23, 2023, VMC filed a response to Protestor's supplemental protest and asserts that Mr. Rivera is a service-disabled veteran (SDV) and owns 51% of VMC. (Response to Supp. Protest, at 1.)

VMC further alleges that Mr. Rivera has performed the day-to-day operations of the company for the last 6 years; and has six years of managerial experience. (*Id.*, at 2.) Mr. Rivera asserts that VMC has flexible working hours, and he devotes 10 to 20 hours per month to VMC “due to the fact that VMC has minimal contracts.” (*Id.*, at 2-3.) Mr. Rivera maintains that “[a]t no point has [his] employment prohibited or prevented [him] from fulfilling” job responsibilities with VMC. (*Id.*)

Lastly, VMC asserts that the purpose of Paragraph 7 of the Agreement was to “provide equal rights specifically for matters that could cause significant financial burdens.” (*Id.*, at 3.) Referencing the last two lines of Paragraph 7, VMC maintains that “day to day business does not fall under the equal rights” mentioned in the paragraph. (*Id.*)

F. Additional Pleadings

On July 5, 2023 at 6:49 pm, VMC filed an additional response to Appellant's supplemental protest. Appellant contends that it amended Paragraph 7 of its Partnership Agreement (the Amendment). (Email from VMC (July 7, 2023).) This amendment was executed on July 5, 2023. (VMC Partnership Amendment.) The Amendment contains the following provision pertinent to these protests:

Amendment 1. Section 7 - MANAGEMENT DUTIES AND RESTRICTIONS
Remove all verbiage in section 7 and replace with the following: The 51 % Majority Partner (General Partner) Carlos J. Rivera shall have full, exclusive and complete discretion to manage and control the businesses and affairs of the Partnership, to make all decisions affecting the businesses and affairs of the Partnership and to take all such actions as it deems necessary or appropriate to accomplish the purpose of the Partnership as set forth herein. The 49% Minority Partner (Limited Partner) Benjamin M. Breneman, shall have no authority, right or power to bind the Partnership or to manage or control, or to participate in the management or control of, the businesses and affairs of the Partnership in any manner whatsoever.

(*Id.*, at 1-2.)

On July 13, 2023, Protestor filed a Motion to Strike VMC's July 6, 2023 Filing. (Motion to Strike, at 1.) Protestor asserts VMC has “no right” to file a second response to Protestor's Supplemental Protest under 13 CFR 134.1007(f)(1). (*Id.*, at 1-2.) Even if OHA considers VMC's second response, the Amendment is late and irrelevant to the outcome of the instant protest. (*Id.*,

at 2.) Specifically, the date to determine eligibility is the date of initial offers, including price under 13 CFR 134.1003(e)(1). (*Id.*) Protestor asserts that the July 6, 2023 amendment is “too late to effect the outcome of the instant case.” (*Id.*)

On July 13, 2023, VMC filed a response to Protestor's Motion to Strike and asserts that “both of VMC's responses were in the 15-day response window required.” (Email from VMC (July 13, 2023).)

III. Discussion

A. Burden of Proof

As the protested firm, VMC has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the case file and the information provided by the protester, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestor and VMC is part of the record.

B. Date to Determine Eligibility and Motion to Strike

In a VSBC Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of the date of initial offers or response, including price. See 13 C.F.R. § 134.1003(e)(1). Here, VMC submitted its initial proposal for DLA Aviation SPE4A623T550W on January 20, 2023 and submitted its initial proposal for DLA Land and Maritime RFQ No. SPE7L323U1929 on April 26, 2023. Sections II.A, *supra*. Therefore, OHA must examine VMC's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

I conclude that I must GRANT Protestor's Motion to Strike. Protestor alleges that VMC's July 5 response was untimely. Sections II.F, *supra*. The protested concern may file a response no later than 15 days from the date the supplemental protest was filed. 13 C.F.R. § 134.1007(f)(1). As provided in the Notice & Order, a filing received by OHA after 5 p.m. eastern time (EST) is considered filed on the next day. 13 C.F.R. § 134.204(b)(2). Here, responses to the supplemental protest were due July 5 by 5 p.m. EST. VMC filed its July 5 response to the supplemental protest at 6:49 pm, resulting in a July 6 filing date. Thus, I find VMC's July 15 response to the supplemental protest untimely.

C. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more SDVs. 13 C.F.R. § 128.200(b)(2); *VSBC Protest of MicroTech*, SBA No. VSBC-286-P (2023). The control requirements for SDVOSBs are found at 13 C.F.R. part 128. In reviewing the protests, supplemental protest, the record, and VMC's responses, I find VMC has not persuasively demonstrated that it meets these requirements. Therefore, I must grant the protests.

In the context of a partnership, “one or more qualifying veterans must serve as general partners, with control over all partnership decisions.” 13 C.F.R. § 128.203(c). Further, a concern's day to day management and daily business operations must be controlled by one or more SDVs. 13 C.F.R. § 128.203(a). Control means the SDV(s) controls both the long-term decision-making and day to day operations. *Id.* The SDV must also hold the position of the highest officer in the concern. 13 C.F.R. § 128.203(b). Further, a non-SDV may not exert negative control over the challenged concern. Negative control exists in instances where “a nonqualifying-veteran has the ability, under the concern's governing documents to prevent a quorum or otherwise block action.” 13 C.F.R. § 128.102. The terms of the concern's governing documents determine who controls the decisions of the company. See *CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15 (2021), citing *XOtech LLC v. United States*, 950 F.3d 1376, 1380 (Fed. Cir. 2020).

In the present case, it is not in dispute that Mr. Rivera is a SDV with 51% majority ownership of VMC. Section II.C, *supra*. However, in order for a concern to qualify as an SDVOSB, one or more qualifying veterans must serve as a general partner, with control over all partnership decisions. 13 C.F.R. § 128.203(c). I must consider whether Mr. Rivers is in control of VMC as of the date of the firm's submission of its initial offers, including price. VMC's Partnership Agreement in effect at that time establishes that Mr. Rivera does not have control over VMC. *Id.* The Agreement affords “the partners” - which would mean both partners - “equal rights in the management of the partnership.” *Id.* It is thus clear from the Agreement that Mr. Breneman has equal control of VMC with Mr. Rivera. *Id.* The Agreement goes on to enumerate a number of day-to-day business activities, such as execution of a mortgage, security agreement, bond or lease, which require “consent” from both partners. *Id.* This establishes negative control by Mr. Breneman, because it gives him the ability to block VMC from taking these important business actions. *Id.* The fact the Agreement gives both partners equal rights in management of the partnership also establishes that Mr. Rivera is unable to control the long-term decision-making and day to day operations of the partnership without the consent of Mr. Breneman, a non-SDV. *Id.*

VMC asserts that Mr. Rivera maintains control of the day-to-day operations of VMC. Nevertheless, VMC fails to provide documentary evidence of Mr. Rivera's control. VMC's governing partnership documents do not give Mr. Rivera control over VMC, as discussed *supra*. Thus, I conclude that VMC is unable to establish that Mr. Rivera has control over VMC.

VMC further asserts that it amended the Agreement to provide Mr. Rivera “full, exclusive and complete discretion to manage and control the businesses and affairs of the Partnership.” Section II.F, *supra*. The Amendment, however, was executed on July 5, 2023, after the date of initial offers, which was the relevant day for determining VMC's SDVOSB status. *Id.* For a SDVOSB protest concerning a procurement, OHA may only determine SDVOSB eligibility as of the date of the concern's initial offers including price. 13 C.F.R. § 134.1003(e)(1). The Amendment did not exist at the time of the date for initial offers on RFQ No. SPE4A623T550W, nor at the time the date for initial offers on RFQ No. SPE7L323U1929, and was submitted for the first time in these protests proceedings as an attachment on July 5, 2023. Sections II.A & II.F, *supra*. Further, as previously discussed, the July 5, 2023 response to

the supplemental protest was untimely. Section III.B, *supra*. Thus, I cannot consider this Amendment in adjudicating the instant protests.

Lastly, VMC suggests that OHA consider Size Determination No. 02-2023-030 issued by Area II before OHA rendered its decision on the status protest. It is well-settled law that prior size determinations, unless appealed to OHA, have no precedential effect. *CVE Protest of Land Shark Shredding, LLC*, SBA No. CVE-203-P, at 7 (2021); *see also Size Appeal of The MayaTech Corp.*, SBA No. SIZ-5269, at 7 (2011); *Size Appeal of Miltope Corp.*, SBA No. SIZ-5066, at 6 (2009). Thus, Size Determination No. 02-2023-030, has no binding effect on this decision.

IV. Conclusion

VMC's governing partnership documents do not give control of the concern to Mr. Rivera, the SDV upon whom its claim of eligibility is based. Therefore, the protests are GRANTED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN
Administrative Judge