

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

VSBC Protest of:

U.S. Department of Veterans Affairs,

Protestor,

Re: Silotech-Apex JV, LLC

Solicitation No. 36C24523B0002

U.S. Department of Veterans Affairs

SBA No. VSBC-297-P

Decided: August 8, 2023

APPEARANCES

Brandon Parker, Contracting Officer, U.S. Department of Veterans Affairs

Matthew T. Schoonover, Matthew P. Moriarty, John M. Mattox II, Ian P. Patterson,
Timothy J. Laughlin, Schoonover & Moriarty LLC, Olathe, KS, for Silotech-Apex JV, LLC

Antonio R. Franco, Daniel J. Figuenick, III, PilieroMazza PLLC, Washington, DC, for
SanDow Construction, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 25, 2023, Brandon Parker, the Contracting Officer (CO) for the U.S. Department of Veterans Affairs (VA), Network Contracting Office 05 (NCO 05) Construction Team 1 (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Silotech-Apex JV, LLC (Silotech), in connection with VA's Solicitation No. 36C24523B0002, to the U.S. Small Business Administration, Office of Hearings and Appeals (OHA). Protestor alleges that Silotech is not eligible for the subject Service-Disabled Veteran-Owned Small Business (SDVOSB) set aside because its SBA's Mentor Protege Joint Venture agreement does not comply with SBA's regulations at 13 C.F.R. § 128.402. For the reasons discussed *infra*, the protest is GRANTED.

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. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVO SB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J. The CO may file a SDVOSB status protest at any time after the apparent awardee has been identified, so the protest is timely. 13 C.F.R §§ 134.1003(d); 134.1004(a)(2). Accordingly, these matters are properly before OHA for decision.

II. Background

A. Solicitation

On March 23, 2023, the U.S. Department of Veterans Affairs issued Solicitation No. 36C24523B0002, 512A5-20-304, Replace Roofs Patient Buildings at Perry Point VAMC. (Solicitation, at 2.) The solicitation calls for a contractor to “supply all labor, supervision, travel, equipment, tools, materials, inspection/testing services, and legal disposal of waste materials to replace Patient Buildings roofs.” (*Id.*) The CO set the procurement 100% aside for SDVOSBs and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$45 million annual receipts size standard as the appropriate code. (Solicitation, Amendment 0001.) Initial bids had an extended due date of May 23, 2023. (Solicitation, Amendment 0004.)

B. Protest

On June 1, 2023, Protestor filed an amended protest and alleges the joint venture agreement submitted by Silotech fails to meet SBA regulations for JV requirements. (Amended Protest, at 1.) Specifically, Silotech's self-titled Operating Agreement (Operating Agreement) received by Protestor, includes initial capital contributions, but failed to itemize any additional contributions, as required under 13 C.F.R. § 128.402(c)(6). (*Id.*) Second, Silotech's Operating Agreement failed to specify the responsibilities of each party, and break down which individuals would have which responsibilities, as required under 13 C.F.R. § 128.402(c)(7). (*Id.*) Third, Silotech's Operating Agreement did not include a provision that “requisite documents would be submitted to SBA [no] later than 45 days after each operating quarter,” as required by 13 C.F.R. § 128.402(c)(11). (*Id.*) Lastly, Silotech's Operating Agreement did not include a provision that “project-end profit and loss statement[s] will be submitted to SBA no later than 90 days after completion of the contract,” as required by 13 C.F.R. § 128.402(c)(12). (*Id.*)

Accompanying this protest is a copy of Silotech's Operating Agreement. The Operating Agreement was executed April 11, 2023, between Silotech Group Inc. (Silotech Group), a Texas Corporation, and American Contracting Solutions LLC dba Apex Construction Solutions (ACS), a Maryland LLC. (OA, at 1.) Silotech Group holds a 51% ownership interest in Silotech, while ACS holds a 49% ownership interest. (OA, at Exh. 1.)

C. Silotech-Apex JV's Response

On June 16, 2023, Silotech filed a response to the protest and asserts Protestor's allegations address Silotech's Operating Agreement and not its separate Joint Venture Agreement (JV Agreement). (Response at 1.) Silotech maintains the solicitation required documents such as

pricing sheets and bond documents, but a joint venture offeror was not obligated to provide a joint venture agreement to substantiate its joint venture status. (*Id.*, at 2.) Further, Silotech “intended to submit its joint venture agreement . . . [b]ut it inadvertently submitted its operating agreement.” (*Id.*) Silotech asserts its Operating Agreement is “separate and distinct” from its JV Agreement. (*Id.*)

Second, Silotech contends OHA should dismiss this matter for lack of specificity and credible evidence. Silotech asserts Protestor never received its JV Agreement, and thus Protestor's allegations are “disconnect[ed] from the factual substance on which they depend.” (*Id.*) Silotech maintains Protestor's allegations are speculative and lack credible evidence. (*Id.*) Except for the Operating Agreement, Silotech asserts Protestor did not furnish on-point evidence or rationale as to why Silotech's JV Agreement does not comply with SBA regulations. (*Id.*) Silotech acknowledges Protestor's assumption that the provided document was the JV Agreement and asserts Protestor “initially has an apparently acceptable protest,” but additional information shows that allegations are not based on credible evidence. (*Id.*)

Lastly, Silotech maintains its JV Agreement meets SBA requirements. Silotech asserts its SDVOSB partner is certified under the Veteran Certification program. (*Id.*, at 3.) Further, the JV Agreement, executed prior to the submission of bids, met JV requirements. (*Id.*, at 4-6.) The JV Agreement includes as follows: a list of equipment and facilities, as required under 13 C.F.R. § 128.402(c)(6); details of party responsibilities, labor sourcing, and performance, as required under 13 C.F.R. § 128.402(c)(7); a provision regarding its submission of Quarterly Financial Statements, as required under 13 C.F.R. § 128.402(c)(11); and, a provision regarding the submission for project-end profit and loss statements and a statement of final profit distribution, as required under 13 C.F.R. § 128.402(c)(12). (*Id.*)

In response to this instant protest, Silotech provided a copy of its JV Agreement between Silotech Group and ACS. Silotech Group, a SDVOSB, is the managing venturer and ACS is the general venturer. (JVA, at 1.) The JV Agreement was executed on May 11, 2023. (JVA, at 3.) Attached to the JV Agreement is Silotech's equipment list. (*Id.*)

Silotech also provides a Declaration from Tiffany Tremont, the President of Silotech Group, who states Silotech did not submit the JV Agreement with the bid package and “mistakenly submitted” Silotech's Operating Agreement. (*Id.*, at Exh. B.)

D. SanDow Construction's Response

On June 23, 2023, SanDow Construction, Inc. (SanDow), an interested party to this solicitation, filed a response to the instant protest. SanDow asserts the Protestor reasonably determined the Silotech's Operating Agreement was Silotech's JV Agreement. (SanDow Response, at 2.) SanDow contends Silotech “deliberately” provided the Operating Agreement to support its compliance with 13 C.F.R. § 128.402(c). (*Id.*) Citing OHA case law, SanDow asserts Protestor acted with credible evidence when he relied on the Operating Agreement submitted by Silotech. (*Id.*, at 2-3, citing *LB&B Assocs., Inc.*, SBA No. SIZ-4748 (2005) (finding contracting officer has the ability to question an offeror's size for a particular procurement if they receive credible information that would cause them to question their size).) SanDow maintains Protestor

reasonably determined that on the face of Silotech's bid, the JV Agreement also served as the Operating Agreement, a practice that is common. (*Id.*, at 3)

Further, SanDow supports Protestor's arguments and contends the JV Agreement fails to comply with SDVOSB JV requirements. (*Id.*) Specifically, SanDow asserts the Operating Agreement, and referenced Exhibit 3, omits an itemized list of equipment, facilities and resources provided by members of the Operating Agreement for the construction contract. (*Id.*) The solicitation required bidders to provide an itemized list of labor, materials, equipment and other resources, for the required tasks, and thus, it was "practical" for Silotech to list resources from each joint venturer. (*Id.*, at 5-6.) Second, SanDow asserts the JV Agreement fails to enumerate the responsibilities of the joint venturers. (*Id.*, at 6.) SBA regulations require a joint venture agreement to be contract specific, but Section 5.7 of the Operating Agreement did not adhere to this requirement. (*Id.*, at 6-7.) Third, SanDow asserts the Operating Agreement fails to expressly include a statement that the JV will submit both (1) quarterly financial statements to SBA within 45 days; and (2) project-end profit and loss statements to SBA within 90 days after Contract completion. (*Id.*, at 8.)

In addition to Protestor's arguments, SanDow alleges additional violations in the Operating Agreement. (*Id.*, at 8.) First, SanDow contends Section 3.1 of the Operating Agreement fails to provide that profits will be allocated commensurate with work performed, as required under 13 C.F.R. § 128.402(c)(4). (*Id.*, at 8-9.) Second, Exhibit 3 of the Operating Agreement includes generic responsibilities that pertain to vague day to day administrative tasks rather than identify specific tasks to be performed by the joint venturers under the contract. (*Id.*, at 9.) SanDow maintains OHA and SBA regulations require joint venture agreements be contract specific and asserts Silotech fails to meet this standard as required under 13 C.F.R. § 128.402. (*Id.*) Third, Section 11.1 of the Operating Agreement fails to comply with 13 C.F.R. § 128.402(c)(5), "as this provision only provides that signature, not consent, is required, and that Silotech has the ability to make withdrawals under \$10,000 on its own, which could include payments to either joint venture party for services performed." (*Id.*, at 10.) Fourth, the Operating Agreement purports to exist in perpetuity under Section 9, which requires unanimous consent from Members to cease existence. This contradicts the purpose of joint ventures, which are "limited purpose entities" under 13 C.F.R. § 121.103(h). (*Id.*, at 10-11.) Lastly, SanDow asserts the minority member ACS holds "impermissible negative control over the daily management of Silotech, contrary to 13 C.F.R. § 128.402(c)(2)." (*Id.*, at 11-12.) Specifically, many of the action items listed in Exhibit 3 that "ACS has (or will have) control over are of ordinary nature and largely relate to the day-to-day management and administration of a contract by Silotech." (*Id.*) ACS can fire employees, and the ability to terminate employees unilaterally from the joint venture is an "ordinary action essential to operating the company." (*Id.*)

Lastly, SanDow contends that if Silotech executed a separate JV agreement, OHA should evaluate that agreement to ensure it meet SBA regulations for joint ventures. (*Id.*, at 13.)

E. Case File

The Case File establishes that Silotech Group, the SDVOSB, owns 51% of the joint venture and is designated as the managing venturer in the JV Agreement. (Case File (CF), at Exh. 2.)

III. Discussion

A. Burden of Proof and Date of Eligibility

As the protested firm, Silotech 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 Silotech is part of the record.

In a SDVOSB status protest pertaining to a concern's compliance with the joint venture regulations, OHA determines the eligibility of the protested concern's SDVOSB status as of the date of the joint venture's initial offer, including price. 13 C.F.R. § 134.1003(e)(1). For sealed bidding, OHA will determine eligibility as of the date of the final proposal revision for negotiated acquisitions or as of final *bid*. 13 C.F.R. § 134.1003(e)(1). Here final bids were due May 23, 2023 and thus, I must determine Silotech's compliance with the joint venture agreement requirements as May 23, 2023.

B. Analysis

I find Protestor's appeal to be specific and credible. Silotech asserts that OHA should dismiss this appeal as non-specific and lacking credible evidence because Silotech “mistakenly” submitted its Operating Agreement in lieu of its Joint Venture Agreement. Section II.C, *supra*. A proper SDVOSB status protest must include “[s]pecific allegations supported by credible evidence that the [challenged] concern (or joint venture) does not meet the VOSB or SDVOSB eligibility requirements listed in [13 C.F.R.] part 128.” 13 C.F.R. § 134.1005(a)(2); *see also* 13 C.F.R. § 134.1003(b). Here, Protestor's allegations are based on credible information provided by Silotech, albeit mistakenly. Section II.B, *supra*. Although a joint venture agreement was not a requirement under the solicitation, Silotech concedes that it intended to provide a copy of its JV Agreement in its Proposal. Section II.C, *supra*. Thus, I find Protestor reasonably relied on information provided by Silotech to support its allegations the Joint Venture Agreement did not comply with SBA regulations.

Silotech asserts it complies with SBA regulations for joint ventures and proffered its JV Agreement in support of its argument. Section II.C, *supra*. The JV Agreement was executed on May 11, 2023, prior to the date of final bid submission, which was the relevant day for determining Silotech's SDVOSB status. *Id.* Here, the final bids were due on May 25, 2023. Section II.A, *supra*. Thus, I must consider the contents of Silotech's JV Agreement to determine its eligibility as a SDVOSB joint venture.

The issue here is whether Silotech's JV Agreement complies with joint venture eligibility requirements at 13 C.F.R. § 128.402. An SDVO SBC may enter into a joint venture agreement with one or more other small business concerns or its mentor for the purpose of performing an SDVO contract. 13 C.F.R. § 128.402(a). The regulations require that twelve specific provisions be included in each such joint venture agreement. 13 C.F.R. § 128.402(c). I find however, that Silotech's JV Agreement fails to meet all twelve provisions, and thus, I must grant this instant protest.

Silotech's JV Agreement must contain a provision “[s]pecifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance” 13 C.F.R. § 128.402(c)(7). This case is analogous to OHA's decision in *CVE Protest of Patriot Strategies, LLC*, CVE-243-P, at 9 (2022). In that case, OHA reasoned that the JV agreement, although it provided in detail the administrative tasks to be performed by each partner, failed to specifically identify the task each partner would perform as it related to the purpose of the contract. *Patriot Strategies, LLC*, CVE-243-P, at 9.

Here, the purpose of the solicitation is construction, specifically roofing replacement. The solicitation is definite, providing roofing specifics, details on buildings, drawings of the roof, and locations. Section II.A, *supra*. Section 7.0 of the JV Agreement states “[e]ither venture will have the right to visit the contract site to evaluate the contract performance . . . [b]oth venturers will jointly have qualified site representation onsite during construction.” Section II.C, *supra*. Section 7.0 of the JV Agreement further states “the venture” will identify key personnel, with Silotech “taking the lead”; identifies Silotech Group as the responsible member for contract negotiations; and identifies the percentages of work to be performed by each member. *Id.* I find this insufficient to meet the requirements of SBA regulations. It does not specify the responsibilities of the parties as to contract performance, even though the solicitation details the required work to be performed, and thus the parties' separate responsibilities could be detailed here. Like *Patriot Strategies*, Silotech's JV Agreement does not detail the work to be performed on the roofing replacement, the purpose of the solicitation. Section II.C, *supra*. Thus, I find Silotech does not meet SDVOSB joint venture requirements under 13 C.F.R. § 128.402(c)(7).

Further, I find issues of negative control in the Operating Agreement. Negative control exists in instances where “a non-qualifying-veteran has the ability, under the concern's governing documents to prevent a quorum or otherwise block action.” 13 C.F.R. § 128.102; *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 10 (2009). The managing venturer must be responsible for controlling day to day management and administration of contract performance. 13 C.F.R. § 128.402(c)(2)(i). However, here the JV's governing documents permit the partner venturer to have negative control. The terms of a concern's governing documents determine who controls the company's decisions. *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). Here, as argued by SanDow, Exhibit 3 of the Operating Agreement details the responsibilities of each member to the JV. Section II.C, *supra*. Regarding new hires, job boards, terminations, badges, offer letters and other HR like responsibilities, the Operating Agreement states “[e]ach party shall be responsible for this task within their scope of work.” *Id.* Thus, ACS may exercise negative control by controlling the hiring and firing of employees, and other HR actions. ACS could conceivably exercise control by withholding enough employees from

performance of the contract. OHA has repeatedly determined that the ability to hire and fire employees is considered day to day management and can result in negative control. *See Size Appeal of Southern Contracting Solutions III*, SBA No. SIZ-5956, at 11 (2018); *Size Appeal of Crew Training International, Inc.*, SBA No. SIZ-6128, at 21 (2021); *Size Appeal of Team Waste Gulf Coast, LLC*, SBA No. SIZ-5864 (2017); *see also Size Appeal of Team Waste Gulf Coast, LLC*, SBA No. SIZ-5864 (2017); *Carntribe-Clement 8AJV # 1, LLC*, SBA No. SIZ-5357; *DHS Systems, LLC*, SBA No. SIZ-5211 (2011). This prevents Silotech Group from having control of the day-to-day management and administration of contract performance. Consequently, I find Silotech-Apex JV does not comply with the regulation at 13 C.F.R. § 128.402(c)(2).

Therefore, I conclude Silotech has failed to meet its burden of establishing that it meets the regulatory requirements of an SDVOSB joint venture and is therefore not an eligible SDVOSB joint venture.

C. Conclusion

For the above reasons, the protest is 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