

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

VSBC Protest of:

New Directions Technologies, Inc.,

Protestor,

Re: LS3, LLC

Solicitation No. N68936-20-R-0120

U.S. Department of Navy

SBA No. VSBC-299-P

Decided: August 9, 2023

APPEARANCES

Ambika J. Briggs, Esq., William L. Walsh, Esq., Andrea I. Mousouris, Esq., Hirschler Fleischer, Tysons, Virginia, for New Directions Technologies, Inc.

Craig A. Holman, Esq., Thomas Pettit, Esq., Arnold & Porter Kaye Scholer, LLP, Washington, D.C., for LS3, LLC.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On April 4, 2023, New Directions Technologies, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of LS3, LLC (LS3), in connection with the U.S. Department of Navy (Navy), Naval Air Warfare Center Weapons Division (NAWCWD), Solicitation No. N68936-20-R-0120. The Contracting Officer (CO) forwarded the protest to the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) for review.

OHA adjudicates SDVOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. part 134 subpart J.<sup>2</sup> Protestor filed its protest within five business days after receiving

---

<sup>1</sup> 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.

<sup>2</sup> Effective August 22, 2022, SBA redesignated the SDVOSB ownership and control regulations, previously found at 13 C.F.R. §§ 125.11 through 125.14, as §§ 125.12 through

notification that LS3 was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, this matter is properly before OHA for decision.

## II. Background

### 1. Solicitation

On May 6, 2022, the Navy NAWCWD in China Lake, California, issued Solicitation No. N68936-20-R-0120 for the procurement of engineering services. The Solicitation was set aside for Service-Disabled Veteran-Owned Small Businesses (SDVOSB) and North American Industry Classification System (NAICS) Code 541330, Engineering Services, Military and Aerospace Equipment and Military Weapons, with a corresponding \$41.5 million annual receipts size standard, was designated as the appropriate code. On June 3, 2022, the CO extended the proposal deadline to June 16, 2022. LS3 and Protestor timely submitted its proposal.

On March 28, 2023, the Navy issued a notice that LS3 was the apparent successful offeror. Protestor timely filed a combined size and SDVOSB Protest, arguing that LS3 was other than small and was not an eligible SDVOSB for this procurement.<sup>3</sup>

### 2. LS3's Case File

LS3 is a mentor-protégé joint venture (JV) between Lukayva, Inc. (Lukayva) the protégé SDVOSB firm, and Systems Applications and Technologies, Inc. (SATI), the mentor firm. Lukayva's sole shareholder and CEO, Wade VanDerWerff, who is also LS3's General Manager, Manager/Member, and employed by SATI. LS3's Joint Venture Agreement (JVA) was executed on June 1, 2021. (JVA, Exh. 8). It identifies Lukayva as SDVOSB and Managing Venturer, while SATI is the other venturer. The JVA notes that SBA has approved a Mentor Protégé Agreement (MPA) between the firms. It sets forth the purpose of the JV, to bid upon the Solicitation issued by the Naval Air Warfare Center. It designates Mr. VanDerWerff, an employee of the Managing Venturer, as the Project Manager. He is responsible for performance of the contract and implementing the instructions of the Project Manager. It designates a bank account for the LS3 at Chase Bank, and all receipts to be deposited in such account and all expenses to be paid from it. It describes the equipment to be provided by each Venturer. It identifies the personnel each venturer will provide. The Project Manager is responsible for negotiating the contract and subsequent negotiations. (*Id.*, at 1-5.)

LS3's Joint Venture Operating Agreement (JVOA) is also dated June 1, 2021. It is between Lukayva, an SDVOSB and small business, and SATI, its Mentor. It identifies this

---

125.15. 87 Fed. Reg. 43731, 43739 (Jul. 22, 2022). Citations in this decision are to the SDVOSB ownership and control regulations as redesignated. While the new regulations became effective as of January 1, 2023 (87 Fed. Reg. 73400 (Nov. 29, 2022)), LS3's certification was made prior to that, so the earlier regulations will apply here.

<sup>3</sup> While Protestor raised size related issues in the Protest, OHA will only consider the SDVOSB status issues.

procurement as the objective of the JV. It provides that the business affairs of LS3 will be managed by the Management Committee, except for those matters expressly specified by the Agreement to be managed by the Managing Member or subject to the unanimous approval of the Members. Lukayva is the Managing Member. (JVOA, Exh. 7, § 5.1.1.) The Committee is described in the definition section of the JVOA as having three members, but the section describing the JVOA specifically states it has four members, two from each firm, each with one vote. (*Id.*, at 3; § 5.1.) The Committee has “exclusive power and authority to manage the business and affairs of the Company.” (*Id.*, § 5.1.2.) A simple majority vote is required to approve any matter before the Committee. (*Id.*, §§ 5.1.5, 5.4.2.)

The Managing Member is to appoint one of its employees to act as Project Manager. The Project Manager shall, subject to the direction and control of the Management Committee, carry out the policy decisions of the Management Committee. (*Id.*, §§ 5.2.1, 5.2.2.) Certain actions require the unanimous approval of the Members. Any withdrawal from the bank account requires the approval of a designee of each Member. (*Id.*, § 9.1.1.)

### 3. Protest

Protestor argues that LS3's joint venture agreement (JVA) does not meet the regulatory requirements, because SATI employs Mr. VanDerWerff as a Program Manager. (Protest at 4-5.) As the Program Manager for the Mentor and the Chief Executive Officer and sole director of the Protégé, Mr. VanDerWerff has critical influence or substantive control over both entities, and therefore, the Protégé and the Mentor are affiliated entities. (*Id.*, at 3.) Protestor also alleges that LS3 is affiliated with Lukayva under the newly organized concern rule. (*Id.*, at 3-4.)

Protestor also asserts there is affiliation between LS3 and Lukayva under identity of interest due to economic dependency. (*Id.*, at 4.) Protestor proffered the following documents:

Exhibit 1 - Lukayva SAM Entity Information

Exhibit 2 - California State Corporation Commission Statement of Information of Protégé

Exhibit 3 - Wade VanDerWerff LinkedIn profile

Exhibit 4 - Wade VanDerWerff Facebook profile

Exhibit 5 - Systems Application & Technologies, Inc. SAM Entity Information

Exhibit 6 - LS3, LLC SAM Entity Information

Exhibit 7 - California State Corporation Commission Statement of Information of LS3

Exhibit 8 - SA-TECH Executive Management Webpage

#### 4. LS3's Response

On May 24, 2023, LS3 responded to the protest. LS3 asserts that it has complied with 13 C.F.R. § 125.18(b)(2)(ii) because its JVA names Mr. VanDerWerff as the Responsible Manager. Mr. VanDerWerff is not becoming a Lukayva employee for the purposes of performing this procurement, has been a Lukayva employee since 2017, and did not find Lukayva for purposes of performance under the JVA. (LS3's Response at 3-4.) LS3 submits with its Response a declaration by Mr. VanDerWerff. In the declaration, Mr. VanDerWerff is a Navy veteran, and an expert in Naval Target Systems Operations. He is also a SATI program manager of one contract involving [XX] of SATI's workforce. He is not and never has been an owner, officer or executive of SATI. He intends to resign from SATI once the award process is complete. (*Id.*, at 4-5.)

LS3 further asserts that while Lukayva and SATI each have two seats on its Management Committee, they do not have equal voting power. LS3 argues the JVOA makes clear the Lukayva members must approve any matter before the Committee. (*Id.*, at 6.)

As for the hours of operation, LS3 refers to documents it submitted to the VA Center for Verification and Eligibility, stating that Lukayva's hours are 9:00 a.m. to 9:00 p.m., and Mr. VanDerWerff is employed by SATI from 6:00 a.m. to 3:00 p.m. He can answer his phone for Lukayva before 3:00 p.m. and follows up on matters from 3:00 p.m. to 9:00 p.m. SATI confirmed that Mr. VanDerWerff has the flexibility to handle telephone and emails for Lukayva during his SATI work hours. (*Id.*, at 8-9.)

LS3 states that Lukayva and SATI entered into a MPA on September 25, 2018, which SBA approved on January 30, 2019. On June 1, 2021, the two concerns formed LS3, with Lukayva having a 51% interest, and SATI a 49% interest. (*Id.*, at 9.)

In addition, LS3 argues that its JVA complies with the regulation because Mr. VanDerWerff is designated as Project Manager, and the actual title of Responsible Manager need not necessarily be used. (*Id.* at 11, citing 85 Fed. Reg. 66146, 66167 (Oct. 16, 2020) stating that the title of the individual is not the important determination, but rather the responsibilities conferred.) He is a named employee of the Managing Venturer. He is not becoming an employee for purposes of performance of the joint venture. SBA's intention with the rule was to require that the individual responsible for performance come from and be controlled by the small business managing venturer. (*Id.* at 12, citing 85 Fed. Reg. at 66167.)

Here, LS3 maintains Lukayva is the Managing Venturer. LS3's Management Committee has two members from each firm, the affirmative vote of Members holding a simple majority of the percentage interests is required to approve any matter coming before the Committee for action. Lukayva's 51% interest in LS3 gives it control of the Committee. That SATI has 2 members on the Committee is permitted by the regulation which permits the minority member of the joint venture to take part in general business decisions of the joint venture as is customary for participants in a joint venture to do. (*Id.*, at 14-15 citing *Strategic Alliance Solutions, LLC*, SBA No. VET-278 at 14 (2023).)

Therefore, LS3 further maintains its JVA meets the other requirements of 13 C.F.R. § 125.18(b)(2). (*Id.*, at 15-20.)

#### 5. Protestor's Supplemental Protest

On May 30, 2023, Protestor filed its Supplemental Protest. Protestor concedes that the JVA designates Lukayva as Managing Venturer, as required by 13 C.F.R. 125.18(b)(2)(ii). However, Protestor maintains the Operating Agreement does not provide Lukayva with the unequivocal control over operations and day-to-day management of LS3, which the regulation requires. Protestor maintains Lukayva has limited control, and it is the Management Committee, made up of members from both Lukayva and SATI, which has exclusive authority to manage LS3. (Supplement Protest, at 3.)

Protestor further argues the regulation requires the JVA designate the SDVOSB as Managing Venturer and give it responsibility to unequivocally control the joint venture's administration and day-to-day management. Pursuant to OHA case law, the mentor firm cannot have negative control, the ability to block action that by the concern's management. (*Id.* at 2, citing *Strategic Alliance Solutions, LLC*, SBA No. VET-278 (2023); *Seventh Dimension, LLC*, SBA No. VET-6057 (2020); *HANA-JV*, SBA No. VET-227 (2012) (same holding).)

More specifically, Protestor argues that while Lukayva is the Managing Member, the Operating Agreement provides the Management Committee, with four members, two members from each member firm, exclusive power and authority to manage LS3's business affairs, including performing the Contract. Each member has one vote, and a majority vote is required to approve any matter coming before the Committee. This means at least one SATI member must approve any action by the Committee, and therefore SATI can block actions of the Committee, which results in negative control by SATI. (*Id.*, at 3, citing JVOA, Art. V; *Size Appeal of Team Waste Gulf Coast, LLC*, SBA No. SIZ-5864 (2017).)

While the Operating Agreement states that certain matters are to be managed by Lukayva as Managing Member, these are limited to appointing the Project Manager, developing the proposal and negotiating the contract, and determining which subcontractors to engage. The Management Committee has all other authority and control, including, budgeting, obtaining loans, hiring and firing, setting compensation, and general contract administration. Further, certain limited major decisions require approval of the Members, as opposed to the Committee; amending the Operating Agreement, admitting new members, making a new tax election, and initiation of litigation. (*Id.*, at 4, citing JVOA § 5.4.2.) These require a majority of percentage interest and so Lukayva may decide them, but they should not be confused with the Management Committee's authority over day-to-day operations.

Protestor asserts LS3's JVA does not meet the requirements under 13 C.F.R. § 125.18(b)(2)(v). The regulation requires a SDVOSB protégé and mentor joint venture must establish a bank account in the name of the joint venture, which requires the signature or consent of all parties to the joint venture for any payments to be made to the members for services performed. Protestor maintains that LS3's Operating Agreement lacks this requirement. (*Id.*, at 5.)

Further, Protestor claims Mr. VanDerWerff, LS3's Responsible Manager, is a SATI employee and will become a Lukayva employee. Protestor revisits its claims that under the regulation, the Responsible Manager cannot be employed by the mentor and become an employee of the SDVOSB for the purposes of performance of the contract. (*Id.*, at 5, citing 13 C.F.R. § 125.18(b)(2)(ii)(B).) Mr. VanDerWerff's primary job is a Program Manager for SATI. While Lukayva's hours are 9:00 a.m. to 9:00 p.m., Mr. VanDerWerff works for SATI from 6:00 a.m. to 3:00 p.m. Protestor describes Mr. VanDerWerff's employment by Lukayva as minimal. The business is “nascent” and consists of one contract with another SATI joint venture. Mr. VanDerWerff is a current employee of the mentor and intends to resign from his position to be full time employee of the protégé, Lukayva. Protestor maintains SBA regulations provide that the individual identified as the project manager cannot be employed by the mentor and become a full-time employee of the protégé for purposes of performance of the joint venture. In support of this, Protestor states “SBA is concerned that such an ‘employee’ of the protégé has no ties to the protégé, is not bound to stay with the protégé after performance of the contract is complete and could easily go back to the mentor at that time.” (*Id.*, at 6, citing 81 Fed. Reg. 48,558, 48566 (July 25, 2016).) The same concerns are present here.

#### 6. LS3's Response to Supplemental Protest

On June 14, 2022, LS3 responded to Protestor's Supplemental Protest. LS3 argues that while Protestor maintains the Operating Agreement does not provide Lukayva with unequivocal control over LS3's operations and day-to-day management, its argument is based upon outdated SBA regulations and Protestor ignores the actual text of the JVA. (LS3 Response to Supplemental Protest, at 5.)

LS3 notes that Protestor argues Lukayva must have “unequivocal control” over LS3's operations and day-to-day management, and Lukayva lacks this authority, citing *Seventh Dimension, LLC*, SBA No. VET-6057 at 14 (2023). LS3 maintains this argument contravenes SBA's revised regulation and OHA and the U.S. Court of Federal Claims (COFC) precedent. SBA's regulations do not require the managing venturer to control all the decisions of an SDVOSB mentor-protégé joint venture. In 2020, SBA revised its regulations to permit joint venture partners other than the managing venturer to participate in the joint venture's business decisions. LS3 points to 13 C.F.R. § 125.18(b)(2)(ii) permitting other partners to the joint venture to participate in all corporate governance activities and decisions as is commercially customary. The other partners are not passive investors. They may meaningfully participate in all other business decisions of the joint venture, including preventing it from taking certain actions (i.e., negative control) so long as the SDVOSB protégé controls day-to-day management and administration. (*Id.*, at 5-6.)

LS3 maintains recent precedents support this view. In *Strategic Alliance Solutions, LLC*, SBA No. VET-278 (2023), OHA held the revised regulations required the managing venturer be responsible for controlling the management and administration of contractual performance of the joint venture, but explicitly provided that the other partners may participate in corporate governance and decisions as is commercially customary. (*Id.* at 6.) The protestor in that case challenged the decision at COFC, which affirmed OHA's decision. (*Id.*, citing *Defense*

*Integrated Solutions, LLC v. U.S.*, 165 Fed. Cl. 352 (2023).) LS3 maintains COFC narrowly interpreted the requirement that the managing venturer be responsible for controlling the management and administration of contract performance of the joint venture. This requirement does not mandate the managing venturer have control over every decision related to contract performance. The question is not whether decisions regarding claims, litigation and settlement somehow generally relate to contract performance, but rather, whether such decisions are part and parcel of day-to-day management and administration of the contractual performance of the joint venture. The phrase “contract performance” means meeting the contract's statement of work, in compliance with the contract's terms and conditions. LS3 argues COFC concluded that the mentor can even be involved in decisions that relate to contract performance, as long as the SDVOSB protégé controls the joint venture's contractual performance. COFC broadly interpreted the regulatory clause providing that the other joint venture partners “may participate in all corporate governance activities and decisions of the joint venture as is commercially customary,” concluding that “participate” means more than the ability to voice a concern but less than plenary power, which “permits the non-managing partner a right to veto decisions.” (*Id.*, at 7-8.) LS3 concludes that Lukayva is not required to have unconditional control over LS3. (*Id.*, at 8.)

Additionally, LS3 asserts that Lukayva is its Managing Venturer, and its JVA and Operating Agreement, both, comply with SBA regulations. The JVA expressly identifies Lukayva as LS3's Managing Venturer, a term of art defined by SBA regulation as the partner responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture. (*Id.*, at 8, citing 13 C.F.R. § 125.18(b)(2)(ii)(A).) Further, the Operating Agreement incorporates SBA regulations by reference and makes the regulations controlling over both, the Operating Agreement and the JVA. The JVA's assignment of responsibilities to Lukayva as LS3 Managing Venturer is consistent with the requirement of Lukayva's control management and administration of the JV's contract performance. (*Id.*) The Operating Agreement requires the Project Manager be responsible for LS3's performance of day-to-day responsibilities under the contract, and that individual serves at Lukayva's pleasure and can be removed at any time with or without cause. The JVA identifies Mr. VanDerWerff as an employee of Lukayva and Project Manager. He is responsible for performance of the contract, overseeing the jobsite, and reporting to and implementing the instructions of the Managing Venturer. This confirms that Lukayva controls the day-to-day management and administration of contractual performance of the joint venture. Further, the JVA states the Managing Venturer will perform program management, that is manage contract performance. (*Id.*, at 9.)

Also, the Management Committee provisions in the Operating Agreement do not negate Lukayva's status as Managing Venturer. Its powers are not as broad as Protestor asserts. It lacks authority over matters to be managed by the Managing Member (§ 5.1.1). LS3 further argues the term “Agreement” encompasses both the JVA and the Operating Agreement, as stated in the Operating Agreement. The two together are an integrated agreement, and if there is a conflict, the text provides that the JVA controls. Further, if there is a conflict between a provision in either agreement and an SBA regulation, the regulation controls. LS3 asserts the JVA identifies Lukayva as Managing Venturer (a defined term in the regulation), designates Lukayva as responsible for Program Management, vests the Project Manager/Responsible Manager with authority over day-to-day management and administration of the contract, and gives Lukayva

control over Project Manager/Responsible Manager. Even if the Operating Agreement's Management Committee provisions could be read as inconsistent with Lukayva's status as Managing Venturer, the terms of the JVA control. (*Id.*, at 10-11.)

LS3 further maintains that both of its Members must consent to withdrawals from the LS3 bank account. Its Operating Agreement provides that withdrawals from the operating Account require the signature of each member. As noted above, LS3 maintains the Operating Agreement and JVA must be read together as an Integrated Agreement. (*Id.*, at 12.)

In response to Protestor's supplemental argument, LS3 asserts that Mr. VanDerWerff's level of involvement in Lukayva does not suffice because he is a full-time SATI employee. LS3 asserts its JVA complies with the Responsible Manager requirement. The JVA complies with the requirement at 13 C.F.R. § 125.18(b)(2)(ii)(B), identifying Mr. VanDerWerff, a Lukayva employee as Project Manager. (*Id.* at 14.) The suggestion that Mr. VanDerWerff lacks sufficient involvement in Lukayva to be considered an employee is groundless. He available for Lukayva throughout the workday and plans to resign from SATI and work full time for Lukayva once this contract is awarded. (*Id.*)

In response to Protestor's argument that Mr. VanDerWerff does not work full time for Lukayva, LS3 notes there is no requirement the Responsible Manager be a full-time employee of the Managing Member. LS3 asserts the Supplemental Protest misquotes the regulatory history, inserting a full-time requirement that was not present in the regulatory text. (*Id.*, at 15-16, quoting 81 Fed. Reg. 48558, 48566 (July 25, 2016).) Further, the rulemaking supports LS3's case because SBA's concern was that an individual who was not employee of the protégé and had no ties to the protégé could go back to the mentor at any time would be the Responsible Manager. Here, Mr. VanDerWerff is Lukayva's principal, and thus will continue to work there. (*Id.*)

LS3 concludes by challenging Protestor's implied issue of Mr. VanDerWerff not being able to work for Lukayva during normal working hours. First, because Protestor did not raise this issue in its initial Protest, it is untimely. Second the regulation at 13 C.F.R. § 125.13(k) is not a full-time work requirement, but a rebuttable presumption, which can be rebutted by showing evidence of control, and Mr. VanDerWerff can establish he devotes extensive time to Lukayva. (*Id.*, at 15-18, citing 83 Fed. Reg. 48908, 48910 (Sep. 28, 2018).)

### III. Discussion

#### A. Standard of Review

As the protested firm, LS3 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 LS3 is part of the record.



## B. Dates to Determine Eligibility

The date for determining eligibility in a status protest is: (1) the date of the bid or initial offer including price. *See* 13 C.F.R. § 134.1003(e)(1). Here, LS3 submitted its initial proposal on June 16, 2022, and so its eligibility must be determined as of that date.

## C. Analysis

The requirements for an SDVO SBC to submit an offer on a contract state that an SDVO SBC may enter into a joint venture agreement with one or more other small business concerns or its mentor for the purpose of performing an SDVO contract. 13 C.F.R. § 125.18(b). Every such joint venture agreement to perform an SDVO contract, including those between a protégé firm that qualifies as an SDVO SBC and its SBA-approved mentor authorized by § 125.9, must contain twelve provisions, itemized as i through xii. 13 C.F.R. § 125.18(b)(2); *see Matter of Gray Venture, LLC*, SBA No. VET-276 (2022).

As of the time of the protest, the regulations state that a VOSB or SDVOSB joint venture may be protested regarding the status of the managing VOSB or SDVOSB joint venture partner or for failure to meet the requirements of § 128.402 of this chapter. These are same requirements which were enumerated at 13 C.F.R. § 125.18(b)(2), the applicable regulation here. If the joint venture is found to be ineligible solely based on failure to meet the requirements of that section, the joint venture will be ineligible for the contract at issue. The finding of ineligibility is limited to that contract and will not affect the underlying eligibility of the VOSB or SDVOSB joint venture partner. 13 C.F.R. § 134.1003(d).<sup>4</sup>

In its initial Protest, Protestor argued that LS3's JVA did not meet the regulatory requirements, because Mr. VanDerWerff was employed as Program Manager. The regulation requires that a named employee of the SDVO SBC managing venturer (here Lukayva) must be the Responsible Manager for the JV with ultimate responsibility for contract performance. 13 C.F.R. § 125.18(b)(2)(ii). Mr. VanDerWerff is an employee of Lukayva; indeed, he is the principal of Lukayva, which appears to meet the regulatory requirement. That his title is not Responsible Manager is irrelevant. The title of the employee in question is not important, but rather the responsibilities of that individual. 85 Fed. Reg. 66,146, 66,167 (Oct. 16, 2020). Here, the JVA designates Mr. VanDerWerff and makes him responsible for performance of the contract, overseeing the jobsite, and implementing the Managing Venturer's (Lukayva) instructions. JVA, ¶ 3.1. LS3 has met those requirements here.

Protestor notes that Mr. VanDerWerff is also employed at SATI as a Program Manager and argues this conflicts with the regulatory requirement that “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.” 13 C.F.R. § 125.18(b)(2)(ii)(B). However, Mr. VanDerWerff is not “becoming” a Lukayva employee for purposes of performance of the joint venture, as he is the principal of the company and called into existence in the first place. Indeed, “SBA is concerned that such an ‘employee’ of the protégé has no ties to

---

<sup>4</sup> 87 Fed. Reg. 73400 (Nov. 29, 2022).

the protégé, is not bound to stay with the protégé after performance of the contract is complete and could easily go back to the mentor at that time.” 81 Fed. Reg. 48,558, 48,566 (July 25, 2016). However, there is no such risk here, because Mr. VanDerWerff is Lukayva's principal, and was employed there prior to LS3's creation.

Protestor takes issue with Mr. VanDerWerff's working hours, which are not full time for Lukayva. Yet, as LS3 points out, the regulation does not require the Responsible Manager be a full-time position. There is a rebuttable presumption that a SDV does not control the SDVO SBC firm when they are not able to work full time for the firm, 13 C.F.R. § 125.14(k), which might raise a question as to Lukayva's eligibility. However, it is clear from the record that Mr. VanDerWerff controls Lukayva, as its sole owner, and thus, the presumption is rebutted.

Nevertheless, in its supplemental protest, Protestor raises another issue concerning the Responsible Manager's control of LS3.<sup>5</sup> The JVOA established a Management Committee of four members, two from Lukayva, and two from SATI, and requires that:

Except for those matter expressly specified by this Agreement to be managed by the Managing Member or subject to the unanimous approval of the Members, the business and affairs of the Company shall be managed by, and under the direction and control of the Management Committee. JVOA, ¶ 5.1.1.

Except for those matters expressly specified by the Agreement to be managed by the Managing Member, the Management Committee shall have exclusive power and authority to manage the business and affairs of the Company, including in performing the Contract. JVOA, ¶ 5.1.2.

A simple majority vote of the Managers shall be required to approve any matter coming before the Management Committee. JVOA, ¶ 5.1.5.

The Project Manager is “subject to the direction and control of the Management Committee” and is to “carry out the policy decisions of the Management Committee.” JVOA, ¶ 5.2.2. Thus, the Management Committee controls the actions of the Project Manager. Contrary to LS3's initial response, there is no provision weighting the votes of the Lukayva members of the Committee above those of SATI's. The record makes it clear that LS3's Management Committee has control over the project management, and consequently, the mentor firm, SATI, has negative control over the Management Committee, when it can block any action by the Lukayva members by causing a tie vote and/or denying a majority. OHA has held that businesses with managing directors from each member, each having equal authority, do not meet the regulatory requirements of being controlled by the SDVOSB concern. *Seventh Dimension, LLC*, SBA No. VET-6057 (2020); *HANA-JV*, SBA No. VET-227 (2012).

LS3's arguments that the revision of the regulation in 2020, as interpreted by COFC, does not require Lukayva and the Responsible Manager have unequivocal control over LS3's

---

<sup>5</sup> The issues raised on its supplemental protest are timely, admissible and properly before OHA, as Protestor did not have prior access to LS3's records, including the JVOA and JVA.

operations and day-to-day management, ultimately fail because the regulations do not give non-SDV members the ability to exert negative control over all the operations of the joint venture. Certainly, the regulation now reads:

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.

13 C.F.R. § 125.18(b)(2)(ii)(B).

LS3 argues the language permitting the non-SDV partner to the joint venture to participate in governance “as is commercially customary,” means more than the ability to voice a concern, but less than plenary power. *Defense Integrated Solutions, LLC v. U.S.*, 165 Fed. Cl. 352 (2023). In that case, the provisions of a joint venture's operating agreement which require unanimous consent of the member for certain actions, including entering into litigation, were found to be in compliance with the regulation, permitting the non-SDV partner to participate in governance activities. However, these provisions did not give the non-SDV partner the ability to exert negative control over all the operations of the joint venture, as SATI has here. COFC recognized that the day-to-day management and administration of the contract had to remain under the control of the Managing Venturer and Responsible Manager, under 13 C.F.R. § 125.18(b)(2)(ii)(A). Here, the Management Committee has control over LS3 and its Responsible Manager, and SATI can exert negative control over the Management Committee. This goes beyond mere participation in corporate governance. Further, contrary to LS3's assertions, I cannot find in the JVA or JVOA any provision which incorporates SBA's regulations into the agreements, so that if there is any conflict with the SBA regulations, the regulations control.

Accordingly, I must conclude that LS3's JVOA and JVA do not comply with the regulation at 13 C.F.R. § 125.18(b)(2)(ii), in that the non-SDV venturer has negative control over the management of the firm, and accordingly, LS3 is not an eligible SDVOSB joint venture for this instant procurement.

#### IV. Conclusion

LS3 has failed to establish by a preponderance of the evidence that it is an eligible SDVOSB joint venture for this instant procurement. The protest is therefore GRANTED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f; 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN  
Administrative Judge