

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

VSBC Protest of:

M Wilkinson Construction Company,

Protestor,

Re: Ben-Cor Construction, Inc.

Solicitation No. 36C24223B0013

U.S. Department of Veterans Affairs

SBA No. VSBC-322-P

Decided: December 11, 2023

APPEARANCES

Michael Wilkinson, President, M Wilkinson Construction Company, Maple Shade, New Jersey

Robert Hedinger, Esq., Hedinger & Lawless, L.L.C., Florham Park, New Jersey, for Ben-Cor Construction, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 17, 2023, M Wilkinson Construction Company (Protestor) protested the Veteran-Owned Small Business (VOSB) status of Ben-Cor Construction, Inc. (Ben-Cor), in connection with U.S. Department of Veterans Affairs (VA) Invitation for Bids (IFB) No. 36C24223B0013. Protestor contends that Ben-Cor is neither majority-owned nor fully controlled by one or more veterans. For the reasons discussed *infra*, the protest is DENIED.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates VOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J. Protestor filed its protest within five business days after bid opening, so the protest is timely. 13 C.F.R. § 134.1004(a)(4). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. OHA afforded Ben-Cor an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The IFB

On March 16, 2023, VA issued IFB No. 36C24223B0013 for a construction project at the VA New Jersey Health Care System in East Orange, New Jersey. (IFB, SF 1442.) The Contracting Officer (CO) set aside the procurement entirely for VOSBs, and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding size standard of \$39.5 million average annual receipts. (*Id.*) Ben-Cor and Protestor submitted timely bids. On May 12, 2023, bids were opened and the CO announced that Ben-Cor was the apparent awardee.

B. Protest

On May 17, 2023, Protestor filed the instant protest with the CO. Protestor observed that Ben-Cor was founded in August 2022 and was certified by SBA as a Service-Disabled Veteran-Owned Small Business (SDVOSB) shortly before the IFB was issued. (Protest at 1.) Ben-Cor has no apparent experience with federal government contracts. (*Id.*)

Protestor alleged that Mr. Samuel A. Cortez, the individual upon whom Ben-Cor relies for its VOSB and SDVOSB status, is not listed on Ben-Cor's Certificate of Incorporation. (*Id.*) Rather, a Mr. John Bennet is. (*Id.*) In addition, according to public records, Ben-Cor shares an address with Bradley Hill Construction Corp., a company owned by John Bennett. (*Id.* at 1-2.)

Protestor claimed that, during a conversation between Mr. Cortez and Protestor's subcontractor, Mr. Cortez revealed that he does not own Ben-Cor. (*Id.* at 2.) Furthermore, Mr. Cortez also owns another business, Sam Cortez Inc., and resides in North Carolina whereas Ben-Cor is headquartered in New York. (*Id.*)

The CO forwarded the protest to OHA for review.

C. Ben-Cor's Response

On September 7, 2023, Ben-Cor responded to the protest. Ben-Cor insists that the protest “lacks substance, relies upon uncertified hearsay, and is supported by tenuous inuendo/inferences.” (Response at 2.)

Ben-Cor offers a copy of its stock ledger reflecting that Mr. Cortez owns 51% of Ben-Cor while John Bennett and Frank Bennett (collectively, the “Bennetts”) each own 24.5%. (*Id.* at 2-3.) A corporate resolution further identifies Mr. Cortez as President of Ben-Cor. (*Id.* at 3.) After successfully collaborating on prior projects, the three owners established Ben-Cor to draw upon their construction experience and compete for VOSB and SDVOSB set-aside contracts. (*Id.* at 2.) While Ben-Cor has not been awarded such contracts, Ben-Cor has bid on several SDVOSB procurements. (*Id.* at 3.) Ben-Cor argues that it would be poor public policy to disqualify a concern from award merely because it was recently certified or because it has yet to win an award. (*Id.* at 4.)

Ben-Cor concedes that Mr. Cortez resides in North Carolina while its offices are in New York. (*Id.* at 4.) However, Ben-Cor is not limited to performing work in New York and has bid on construction projects across the country, including two in Florida. (*Id.*) Ben-Cor denies that Mr. Cortez engaged in any conversation in which he disavowed his ownership of Ben-Cor. (*Id.* at 5.)

D. Supplemental Protest

On September 21, 2023, Protestor supplemented its protest with additional argument. Protestor reiterates its doubts that Mr. Cortez remotely controls Ben-Cor from North Carolina. (Supp. Protest at 2.) Protestor further questions the evidence submitted by Ben-Cor, noting allegedly inaccurate metadata, lack of corporate seals, and differences in signatures. (*Id.* at 2-3.) Protestor maintains that Ben-Cor should have provided other documents to demonstrate Mr. Cortez's ownership and control. (*Id.* at 4.)

In further support of its contentions, Protestor highlights that Mr. Cortez has a preexisting business relationship with the Bennetts. (*Id.* at 5-6.) Ben-Cor operates from the same address as, and may share employees with, concerns owned by the Bennetts. (*Id.* at 6.) These entities, Bradley Hill Construction Corp. and Frank Bennett Electric NY Corp., are in the same line of business as Ben-Cor. (*Id.*) Protestor speculates that Ben-Cor is unduly reliant on the Bennetts either through critical financing or some other business relationship. (*Id.*) Protestor posits that Ben-Cor may have been created to evade the requirements of SBA's All-Small Mentor-Protégé Program. (*Id.* at 7.)

E. Case File

The Case File indicates that Mr. Cortez, a service-disabled veteran, owns 51% of Ben-Cor. (Case File (CF), Exhs. 25 and 30.) Frank Bennett and John Bennett, who are neither veterans nor service-disabled veterans, each own 24.5%. (*Id.*) Mr. Cortez is also President of Ben-Cor. (CF, Exh. 37.) Ben-Cor's Bylaws provide that the President “has general supervision, direction, and control of the day-to-day business and affairs of the corporation.” (CF, Exh. 39, at 6.)

Ben-Cor's principal address is at 560 Bradley Hill Road, Blauvet, New York. (CF, Exh. 73.) According to a letter of explanation Ben-Cor provided to SBA, John Bennett, or an entity identified as “560 Bradley Corp.,” owns this property, and permits Ben-Cor to utilize the space “without any lease, rent or rent-value exchange.” (CF, Exh. 26.) Ben-Cor represented that none of its three owners have any other businesses nor act as directors or officers of any other business. (CF, Exhs. 77-79.)

Ben-Cor's Board of Directors consists of Mr. Cortez and the Bennetts. (CF, Exhs. 27 and 37.) When asked whether the Bennetts “have unrestricted permission to manage [Ben-Cor's] funds and make withdrawals as [they] see fit,” Ben-Cor responded “Yes” for both of the Bennetts. (CF, Exhs. 57 and 62.) In a letter to SBA, Mr. Cortez stated that he “delegate[s] authority to John Bennett and Frank Bennett, co-owners of [Ben-Cor,] to have unrestricted

permission to manage funds and make withdrawals.” (CF, Exh. 23.) Mr. Cortez stated that the Bennetts “will seek approval” from him for certain matters but added that the three co-owners “will equally share the day-to-day responsibilities of [Ben-Cor] and will develop a system of checks and balances with one another.” (*Id.*)

F. Request for Additional Information

On October 2, 2023, OHA ordered that Ben-Cor further address certain issues raised in the protest and found in the CF, particularly related to whether Ben-Cor's owners have interests in other companies and whether Mr. Cortez fully controls Ben-Cor under 13 C.F.R. § 128.203. On October 13, 2023, Ben-Cor responded to OHA's Order with supporting declarations from Mr. Cortez and John Bennett.

Ben-Cor maintains that it is fully controlled by Mr. Cortez. (Response to Order at 1.) Mr. Cortez is deemed to control Ben-Cor because he owns 51% of Ben-Cor and is on the Board of Directors, and the Bylaws have no supermajority voting provisions. (*Id.* at 1-2, citing 13 C.F.R. § 128.203(e)(1)(ii).) As President, Mr. Cortez controls the day-to-day and long-term operations of Ben-Cor. (*Id.* at 2.) Mr. Cortez delegates to the Bennetts “the ability to manage funds and make withdrawals in furtherance of Ben-Cor's business.” (*Id.* at 3.)

In Mr. Cortez's declaration, he acknowledges owning Samuel Cortez, Inc. (Cortez Decl., at ¶ 9.) Samuel Cortez, Inc. worked on several projects in the New Jersey area with The Bennett Company, Inc., an entity owned by the Bennetts. (*Id.*) Through this relationship, Mr. Cortez and the Bennetts decided to start Ben-Cor to build upon their collective experience and compete for SDVOSB set-asides. (*Id.*) Ben-Cor has yet to be awarded one of these contracts, but Mr. Cortez plans to wind down Samuel Cortez Inc. once Ben-Cor becomes financially viable. (*Id.* at ¶ 10(c).) Mr. Cortez maintains that he controls Ben-Cor while living in North Carolina. (*Id.* at ¶ 10(a).)

In John Bennett's declaration, he explains that The Bennett Company, Inc. is not an SDVOSB. (Bennett Decl. at ¶ 3.) John Bennett attests that Mr. Cortez controls Ben-Cor and will lead all construction projects. (*Id.* at ¶ 9(a).) John Bennett and Frank Bennett assist with Ben-Cor's financial management “as would any CFO.” (*Id.*) John Bennett is also part owner of 560 Bradley Corp. (*Id.* at ¶ 9(b).) This organization currently provides rent-free office space to Ben-Cor, and Mr. Cortez alone will decide whether to continue the arrangement. (*Id.*) John Bennett claims that Bradley Hill Construction Corp. is no longer in operation. (*Id.* at ¶ 10.)

III. Discussion

A. Burden of Proof

As the protested firm, Ben-Cor has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Date of Eligibility

In a VOSB status protest pertaining to a procurement, OHA determinates the eligibility of the protested concern as of the date of its initial offer or response which includes price. 13 C.F.R. § 134.1003(e)(1). Here, bid opening occurred on May 12, 2023. Section II.A, *supra*. Therefore, OHA will examine Ben-Cor's VOSB eligibility as of this date, using the substantive ownership and control regulations in effect on that date.

C. Analysis

Pursuant to SBA regulations, an eligible VOSB must be at least 51% owned by one or more veterans. *See* 13 C.F.R. § 128.202. Here, the record reflects that Mr. Cortez, who is both a veteran and service-disabled veteran, owns 51% of Ben-Cor, and there are no restrictions on his ownership. Section II.E, *supra*. SBA regulations also require that one or more veterans fully control the VOSB. *See* 13 C.F.R. § 128.203. In the instant case, because Mr. Cortez is a Director of Ben-Cor as well as its majority owner, he is deemed to control Ben-Cor's Board under 13 C.F.R. § 128.203(e)(1)(ii). Furthermore, Mr. Cortez is Ben-Cor's President, and under Ben-Cor's Bylaws exercises “general supervision, direction, and control of the day-to-day business and affairs of the corporation.” Section II.E, *supra*. Accordingly, Ben-Cor has persuasively shown that it meets the requisite ownership and control requirements to qualify as a VOSB.

In its protest, Protestor suggests that Mr. Cortez does not control Ben-Cor because he resides in North Carolina whereas the company is located in New York. Sections II.B and II.D, *supra*. SBA regulations previously established a rebuttable presumption that a veteran does not control a concern “if that individual is not located within a reasonable commute to [the] firm's headquarters and/or job-sites locations.” *See* 13 C.F.R. § 125.14(l) (2022). SBA has since eliminated this presumption, however, and the presumption was no longer in effect at the time Ben-Cor submitted its bid for the instant procurement. *See* 13 C.F.R. § 128.203 and Section III.B, *supra*. In implementing this regulatory change, SBA explained that its intent was to create a “lighter approach to control” which “balances flexibility for the applicant or participant while maintaining the integrity of the certification process.” 87 Fed. Reg. 73,400, 73,403 (Nov. 29, 2022). SBA also may have viewed this presumption as duplicative with the requirement that a qualified veteran “generally must devote full-time during the business's normal hours of operations, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the concern.” 13 C.F.R. § 128.203(i).

The question here, then, is whether Mr. Cortez, although residing in North Carolina, has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of Ben-Cor. Protestor highlights that Mr. Cortez owns and controls another company, Samuel Cortez Inc. Section II.B, *supra*. While this is true, there is no indication that Mr. Cortez's involvement with Samuel Cortez Inc. interferes with his ability to manage Ben-Cor, and Ben-Cor offers sworn declarations that Mr. Cortez fully controls Ben-Cor and will lead all construction projects. Section II.F, *supra*. Because Ben-Cor competes for contracts far outside of New York, it is of little matter that Mr. Cortez does not reside near the designated offices. What matters is whether he will oversee these projects and control Ben-Cor's decision-making.

Protestor further contends that the Bennetts, who are not veterans, may exert control over Ben-Cor in contravention of 13 C.F.R. § 128.203(h). Sections II.B and II.D, *supra*. In particular, Protestor claims, Ben-Cor may be unduly reliant on the Bennetts through either critical financing or other business relationships. *Id.* Protestor, though, offers no specific evidence to support these allegations. Although Ben-Cor does utilize rent-free office space from a company partly owned by the Bennetts, Protestor has not explained how such an arrangement would prevent Mr. Cortez from exercising his independent business judgment. Ben-Cor makes clear that the decision as to whether to continue the arrangement rests solely with Mr. Cortez. Section II.F, *supra*.

Lastly, it is immaterial that Mr. Cortez had a prior business relationship with the Bennetts before establishing Ben-Cor. SBA regulations only restrict non-qualifying veterans from being involved in the management of an VOSB when they are former employers of the veteran. *See* 13 C.F.R. § 128.203(h)(2)(i).

IV. Conclusion

Ben-Cor has shown that it is an eligible VOSB by a preponderance of the evidence. The protest is therefore DENIED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(B); 13 C.F.R. § 134.1007(i).

KENNETH M. HYDE
Administrative Judge