United States Small Business Administration
Office of Hearings and Appeals

VSBC Protest of: ThunderYard Liberty JV II, LLC., Protestor, Re: VCH Partners, LLC. Solicitation No. 36C10B23R0011 U.S. Department of Veterans Affairs	SBA No. VSBC-332-P Decided: January 25, 2024

APPEARANCES

Stephen P. Ramaley, Roger V. Abbott, Miles & Stockbridge P.C., Washington, D.C., for ThunderYard Liberty JV II, LLC

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DECISION[1]

I. Introduction and Jurisdiction

On November 7, 2023, ThunderYard Liberty JV II, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of VCH Partners, LLC (VCH), in connection with the U.S. Department of Veterans Affairs' (VA) Solicitation No. 36C10B23R0011, to the U.S. Small Business Administration (SBA), Office of Hearings and Appeals (OHA). Protestor alleges that VCH is not eligible for the subject SDVOSB set aside because the SDVOSB protégé does not own 51% of VCH, and VCH's SBA's Mentor Protégé 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 DENIED.

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

OHA adjudicates Service-Disabled Veteran-Owned Small Business (SDVOSB) status protests under 15 U.S.C. § 657f and 13 C.F.R. part 134 subpart J.

II. Background

A. Solicitation

On March 14, 2023, the VA issued a Request for Proposals (RFP), Solicitation No. 36C10B23R0011, for the Transformation Twenty-One Total Technology 2 (T4NG2) multiple-award Indefinite-Delivery Indefinite-Quantity (IDIQ) contract. (Solicitation, at 2.) According to the Performance Work Statement (PWS), the contractor must provide Information Technology (IT) service solutions, including "program management, strategy, enterprise architecture and planning; systems/software engineering; software technology demonstration and transition; test and evaluation; independent verification and validation; enterprise network; enterprise management framework; operations and maintenance; cybersecurity; training; IT facilities; and other solutions encompassing the entire range of IT and Health IT requirements, to include software and hardware incidental to the solution." (Solicitation Amend. 0001, at 16.) The CO noted, "[t]his PWS provides general requirements . . . [,] [s]pecific requirements shall be defined in individual Task Orders." (*Id.*) Further, the individual task orders "may include acquisitions of software and IT products." (*Id.*)

The CO set the procurement 100% aside for SDVOSBs and designated North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding $34 million annual receipts size standard, as the appropriate code. (*Id.*) Proposals were due June 14, 2023. (Solicitation Amend. 0005.) On October 31, 2023, the CO notified offerors of the identity of the apparently successful offeror. The CO issued 30 awards total, with 21 awards to SDVOSBs.

B. Protest

On November 7, 2023, Protestor filed a protest challenging VCH's status as a small business and as an SDVOSB.[2] Protestor asserts VCH's mentor firm Harmonia appears to control VCH because Harmonia is identified as VCH's "immediate owner." (Protest, at 6.) Citing SBA regulations, an immediate owner is defined as "an entity, other than the offeror, that has direct control of the offeror." (*Id.*, citing FAR 4.1801.) According to Protestor, Harmonia is "other than small under NAICS code 541512." (*Id.*)

Further, Protestor alleges VCH's mentor-protégé joint venture is defective because "VCH's protégé firm and SDVOSB partner, which is Visual Connections, does not own at least 51% of the joint venture entity, as required under 13 CFR 125.8(b)(2)(iii)." (*Id.*) Protestor alleges that Harmonia owns 51% of VCH, while Visual Connections holds 49%. Citing SBA regulations, Protestor alleges Visual Connections is not "the managing venturer of the joint

[2] Protestor's allegations as to VCH's size are not addressed in this decision.

venture" as required under 13 CFR 128.402(a) and does not "own at least 51% of the joint venture entity," as required under 13 C.F.R. § 128.402(c)(3). (*Id.*)

C. VCH Partners, LLC Response

On December 7, 2023, VCH filed a response to the protest and asserts that Appellant "merely speculates that VCH is not a qualifying SDVOSB joint venture with little to no supporting evidence other than their erroneous assumptions." (Response, at 3.) As background, VCH asserts that it is a joint venture between Visual Connections as managing venturer/protégé and Harmonia as the SBA approved mentor. (*Id.*, at 2.) More specifically, Mr. Frederick Deese, a serviced-disabled veteran (SDV), owns 100% of Visual Connections and thus that firm meets the control requirements of 13 C.F.R. § 128.203. (*Id.*, at 4.)

Next, VCH proffers its Joint Venture Operating Agreement (JVOA) and asserts "it is plain to see that Visual Connections, and not Harmonia, owns 51% of VCH." (*Id.*, at 5-6.) VCH cites to the JVOA, which states "[t]he Managing Member [Visual Connections] will have 51% ownership interest in the Joint Venture." (*Id.* at 6, citing JVOA at ¶ 6.) The JVOA identifies Visual Connections as the "Managing Member" and Harmonia as the "Partner Member." (*Id.*, citing JVOA at 1.) VCH maintains its governing documents meet the requirements of 13 C.F.R. § 128.402(a), (c) by confirming Visual Connections "is the managing venturer with a 51% ownership interest in VCH." (*Id.*)

Lastly, VCH asserts the JVOA and Second Addendum (Addendum) satisfy "all of the SDVOSB mentor-protégé joint venture requirements in 13 C.F.R. § 128.402(c)." (*Id.*, at 6-7.)

D. Supplemental Protest

On December 22, 2023, Protestor filed a supplemental protest with four additional allegations. First, Protestor contends VCH does not have an effective JVOA as required by 13 C.F.R. § 128.402 because the JVOA "by its own terms, never became effective." (Supplemental, at 1, 3.) Protestor asserts the effective date of the JVOA is the latter of the date, either the JVOA was first written, July 22, 2022, or the date SBA approved the agreement. (*Id.*, at 3.) Protestor asserts "the later of two events can only occur if both events actually occur" but "[t]his JVOA was not approved by SBA indeed, SBA does not and never has approved the operating agreements of SDVOSB joint ventures." (*Id.*, citing 13 C.F.R. § 128.402(a); *cf.* 13 C.F.R. § 124.513(e).) Further, this deficiency is not cured by the Addendum. Particularly, Protestor states, "the subordinate clause, 'that was executed and effective as of July 22nd, 2022,' is as an appositive phrase that provides additional description of the subject and could be deleted without changing the meaning of the sentence." (*Id.*, at 4.) Protestor claims this phase fails to alter the effective date of the JVOA, which "has not yet occurred," and "merely "supplement[s]' the terms of the JVOA." (*Id.*) Protestor surmises, the JVOA and Addendum "never became effective," thus, "[i]f a dispute arose between VCH's joint venture partners, either partner could argue that the JVOA is not effective, and, thus, does not bind the partners." (*Id.*)

Second, Protestor contends the JVOA fails to delegate control over day-to-day management of the joint venture to the managing member, as required by 13 C.F.R. §

128.402(c)(2). (*Id.*, at 1, 4.) Section 14.1.d of the JVOA "requires mutual agreement to create and operate a contingency bank account." Specifically, Section 14.1(d) provides "[a] contingency account may be determined necessary by mutual agreement of the Parties for operating expenses reasonably incurred. . . ." (*Id.*, citing JVOA ¶ 14.1.d.) Protestor asserts that incurring operating expenses is "essential to performance of a contract and that the ability to block the creation of an account for operating expenses is an impermissible negative control." (*Id.*, at 5.) Further, the Contingency Account would cover items that are part of contractual performance. (*Id.*, at 6.) According to Protestor, the JVOA grants the minority member control over creating the account, as well as the contents and use of the account. The JVOA further provides "[t]he amount and balance of the Contingency Account will be that agreed upon by the Parties to cover agreeable costs not recoverable under the VOSB Contracts." (*Id.*) Protestor claims a mutual agreement on the amount and balance of the accounts payable prevents Visual Connections from maintaining or operating basic function of the account without Harmonia's approval. (*Id.*, at 7-8.) Thus, negative control exists because Harmonia, the minority member, can control ordinary and essential actions to operate VCH by withholding approval. (*Id.*)

Third, Protestor maintains the JVOA is defective because it fails to describe "anticipated major equipment, facilities, and other resources of the parties nor specifies how the parties will furnish such resources in the future once a definite scope of work is available, as required by 13 C.F.R. § 128.402(c)(6)." (*Id.*, at 1, 7.) Protestor contends that the JVOA must provide a "'general description' or, alternatively, explain how such resources will be allocated at a later date." (*Id.*, at 7, citing 13 C.F.R. § 128.402(c)(6).) However, the JVOA and Addendum fail to meet this requirement. Section 12 of the JVOA provides "[g]enerally, each Party will furnish its own facility to be used by its own respective employees designated to perform under the VOSB Contract." (*Id.*, at 8, citing JVOA ¶ 12.) Further, the Addendum provides that to the extent equipment, facilities or resources are required for any task order ". . . each Venturer shall be responsible for providing it for their respective portion of the workshare." (*Id.*, at 9, citing JVOA.) Protestor asserts the JVOA and addendum "merely restates the regulatory requirement, without any additional information." (*Id.*, at 8.) Protector surmises "[a] simple vague recitation that the joint venturers will contribute equipment, facilities, or resources is not the same as providing 'a general description of the anticipated major equipment, facilities, and other resources,' or as 'specify[ing] how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available.'" (*Id.*, citing 13 C.F.R. § 128.402(c)(6).)

Lastly, Protestor contends that the JVOA is defective because it fails to "describe[] the responsibilities of the parties regarding source of labor and contract performance, nor describe[] how such resources will be determined later, as required by 13 C.F.R. § 128.402(c)(7)." (*Id.*, at 1, 9.) With an IDIQ solicitation, Protestor notes the JVOA must provide a "general description" or, alternatively, specify how such responsibilities will be defined later on. (*Id.*, at 9, citing 13 C.F.R. § 128.402(c)(7).) However, the JVOA and Addendum fails to "provide either 'a general description of the anticipated responsibilities of the parties' with respect to 'source of labor' or 'contract performance,' or a statement of 'how the parties to the joint venture will define such responsibilities' for the same 'once a definite scope of work is made publicly available.'" (*Id.*, at 9.) According to Protestor, the Addendum "includes a general statement that "[t]he Managing Member will provide overall executive oversight" and that "[t]he Responsible Manager will

perform day-to-day management and administration." (*Id.*) However, it fails to "specify any division of labor and does not describe 'how the parties . . . will define such responsibilities' in the future, as required by 13 C.F.R. § 128.402(c)(7)." (*Id.*, at 9-10.) Protestor asserts OHA precedent requires "something more than a general statement about workshare." (*Id.*, at 10, citing *CVE Protest of: KTS Sols., Inc.*, SBA No. CVE-146 (2020).)

E. VCH Partners, LLC Response to Supplemental Protest

On January 8, 2024, VCH filed a response asserting "[t]he Supplemental Protest, like the initial Status Protest, is meritless." (Supplemental Response, at 1.) First, VCH points to Section 29.5 of the JVOA, which states "[a]ny term or provision of this Agreement which is invalid or unenforceable in any jurisdiction shall . . . be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms. . . ." (*Id.*, at 2-3.) VCH acknowledges that SBA does not approve operating agreements for SDVOSB joint ventures, thus, any requirement of SBA approval in the JVOA is invalid and unenforceable. (*Id.*) More specifically, "any requirement that the JVOA be approved by SBA to be effective is carved out of the JVOA in accordance with the severability clause at Section 29.5 . . . [t]hus, the term of the JVOA will be deemed to commence on 'the date first above written' which, as stated in the JVOA, is July 22, 2022." (*Id.*, at 3.)

Second, VCH rejects Protestor's allegations of negative control and asserts Protestor's "argument fails to consider the fact that any contingency funds that would be placed in a contingency or a reserve account would necessarily be held back from VCH's bank account." (*Id.*, at 5.) Specifically, 13 C.F.R. § 128.402(c)(5) requires a "signature or consent of all parties to the joint venture for any payments to members for services performed." (*Id.*) In addition, Section 15.2 of the JVOA states "[a]ll receipts of the Joint Venture, including all payments due to the Joint Venture for performance of the VOSB Contracts, shall be deposited into the Operating Account." (*Id.*) Thus, VCH surmises that both joint venture partners must consent to any withdraws from the Special Bank Account and thus, "it is axiomatic that a contingency amount (or by extension creating a contingency account) would be subject to mutual agreement by both Visual Connections and Harmonia and this is fully permissible (and is even required) under SBA's SDVOSB joint venture regulations." (*Id.*, at 5.) VCH further asserts expenses placed in the contingency account "are not a component of contract performance" and "do not impact Visual Connections' ability to manage, administer, and control performance of any contracts." (*Id.*)

Third, VCH asserts Protestor "misreads and overlooks the Addendum," which complies with joint venture requirements under 13 C.F.R. §§ 128.402(c)(6) and (7). The JVOA at § 12 provides that each venturer will provide its own office equipment, **[XXXXXXXXXX]**. Citing the JVOA and § 5 of the Addendum, VCH asserts the JVOA "contemplates" equipment to be provided by each venturer, while Section 5 of the Addendum, recognizing that work required here was primarily services "expressly memorializes the VCH partners' determination that no major equipment, facilities, or other resources will be required for the contract to be awarded under the Solicitation." (*Id.*, at 8.) VCH even notes "Addendum Section 5 . . . clearly reflects the VCH partners' determination that they do not need to contribute any major resources to the joint venture." (*Id.*) There is no requirement under 13 C.F.R. § 128.402(c)(6) that a joint venture

provide major equipment, facilities, or other resources. Instead, the regulation "leaves it to the joint venture partners to decide, based on the unique requirements of a solicitation, what major resources are needed, if any." (*Id.*) Thus, "the joint venture agreement complies with this rule by including a provision stating as much, just like VCH did in Section 5 of the Addendum." (*Id.*) VCH asserts, the JVOA also complies with the exceptions for IDIQ contracts under 13 C.F.R. § 128.402(c)(6) "because the Addendum specifies how the parties will furnish resources to the joint venture should the parties later determine that resources are needed for a task order." (*Id.*)

VCH asserts the JVOA has sufficient detail in its source of labor provisions. Addendum § 6.1 is a comprehensive source of labor provision with sufficient detail to meet the requirements of 13 C.F.R. § 128.402(c)(7) because this is an IDIQ contract where the JVOA may have a general description of responsibilities. The provision is nearly identical to that OHA found satisfactory in *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964 (2018), where each member was to perform with employees from their respective organizations, approved subcontractors and new recruits, and responsibility for meeting performance of work requirements were placed on the Project Manager. Further, the JVOA at § 13.1 provides that for any VOSB contract decisions on workshare are subject to the Managing Member's final approval. (*Id.*, at 12-13.)

Next, VCH asserts it complies with 13 C.F.R. § 128.402(c)(7) because the JVOA and Addendum are "specific and sufficiently detailed in addressing all aspects of this regulation particularly given the Solicitation is for an IDIQ contract" in three ways. (*Id.*, at 11.) One, § 6.2 of the Addendum "clearly designates the Responsible Manager, who is an employee of Visual Connections, as the negotiator for the Solicitation." (*Id.*, at 12.) Section 6.2 further "envisions that the Partner Member, Harmonia, may give reasonable input that the Responsible Manager will consider in the negotiations," thus, containing sufficient detailing on contract negotiations responsibilities. (*Id.*) Two, § 6.2 of the Addendum "explains that the level of effort and scope of work is not yet known, and that Visual Connections shall provide the Project Manager and that the VCH partners intend to staff the contract with existing employees of both companies and with new hires, as needed." (*Id.*) This sufficiently meets the sources of labor requirement at 13 C.F.R. § 128.402(c)(7), which allows "a general description of the anticipated responsibilities." (*Id.*, at 12, citing 13 C.F.R. § 128.402(c)(7).) Further, § 6.1 of the Addendum, which notes that further responsibilities will be determined at the task level, and § 13.1 of the JVOA, which notes the Managing Member must approve VOSB contracts, meets the requirements under 13 C.F.R. § 128.402(c)(7). (*Id.*, at 13.) Lastly, § 6.1 also cites "the parties' responsibilities for contract performance because this is a professional services contract for which a critical aspect of the work is to hire and maintain the necessary workforce." (*Id.*, at 14.) Section 6.3.1 of the Addendum also provides workshare percentages and obligates the Managing Venturer's work be more than administrative or ministerial functions. (*Id.*, at 15.) Further, § 6.3.2 assigns management of certain contract performance to Visual connections and notes the Responsible Manager "'will perform the day-to-day management and administration of the 3rd Contract"'. (*Id.*, citing Addendum § 6.3.2.) VCH concludes "[b]ased on the unknown nature of the work the government will order, the JVOA and Addendum include sufficient detail on the responsibilities for contract performance to comply with this element of 13 C.F.R. § 128.402(c)(7)." (*Id.*, at 16.)

F. Protestor's Reply

On January 10, 2024, Protestor filed a motion for leave to reply and submitted its proposed reply. Protestor contends "[t]he Response proffers certain errant assertions regarding the severability clause in VCH's [JVOA], it misleadingly conflates the JVOA's Contingency Account with its Operating Account, and it mischaracterizes the [SBA's] requirements for mentor-protégé joint venture operating agreements." (Reply Motion, at 1.) An OHA Judge may permit a reply to a response, and no reply is permitted unless the OHA Judge directs otherwise. 13 C.F.R. § 134.1007(f)(3); § 134.211(c). For good cause shown, Protestor's Reply is GRANTED.

In its Reply, Protestor asserts § 29.5 of the JVOA, Severability Clause, "applies only when a court or tribunal for a 'jurisdiction' determines that a provision is legally invalid or unenforceable as contrary to public policy." (Reply, at 4.) Protestor contends that VCH "misconstrues the Severability Clause" and by "[i]nterpreting the Severability Clause as applying automatically whenever some condition becomes improbable or even (allegedly) impossible renders meaningless these jurisdictional references." (*Id.*)

Next, Protestor asserts VCH conflates VCH's Operating Account with VCH's Contingency Account. According to Protestor, "these two accounts are distinct and serve different purposes." (*Id.*, at 5.) More specifically, the Operating Account is a Special Bank Account under 13 C.F.R. § 128.402(c)(5); whereas the Contingency Account "functions to handle administrative costs of the joint venture that are not directly chargeable to contract performance." (*Id.*, at 5.) Protestor notes, the Contingency Account is not VCH's Special Bank Account, and thus 13 C.F.R. § 128.402(c)(5) is irrelevant. Instead "the permissibility of the mentor's negative control over it is governed exclusively by [13 C.F.R. §]128.402(c)(2)(i)." (*Id.*) Citing SBA Regulations, Protestor surmises, "the managing venturer must be 'responsible for controlling the day-to-day management and administration of the contractual performance.'" (*Id.*, at 6; 13 C.F.R. § 128.402(c)(2)(i).) Here, VCH's Contingency Account "covers matters related to contract performance, e.g., 'performance bond costs and/or payment bond costs, and any other expenses relating to Joint Venture operations as provided herein.'" (*Id.*, citing JVOA § 14.1.) Therefore, expenses paid from the Contingency Account are a components of contract performance and "cannot be fairly characterized as part of corporate governance." (*Id.*, at 6.)

G. Case File

In response to this instant protest, VCH provided, among other things, a copy of its SBA Mentor-Protégé Program approval letter from SBA, dated July 21, 2022, as well as certification from VA Center for Verification and Evaluation, dated June 15, 2021 and valid for three years from the date of the letter. (Response, citing Exhs. A & C.)

Additionally, VCH provided its JVOA between Visual Connections and Harmonia. Visual Connections, a SDVOSB, is the Managing Member and Harmonia is the Partner Member. (JVOA, at 1.) The Managing Member holds 51% ownership interests, whereas the partner member holds 49% ownership interest. (*Id.*, at 2.) Mr. Deese, CEO of Visual Connections, is listed as the Responsible Manager and "employee of the Managing Member." (*Id.*, at 6.) The

parties signed this agreement on July 22, 2022. (*Id.*, at 16.) The following are provisions from the JVOA, pertinent to this protest:

> **14. Management of the Joint Venture**.
>
> **14.1. Managing Member**.
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> **d** . . . A contingency account may be determined necessary by mutual agreement of the Parties for operating expenses reasonably incurred which result from such items as management and administrative systems required by the VOSB Contracts, equipment or Joint Venture stationery and logo materials, legal fees not otherwise attributable to any of the Parties as provided herein, performance bond costs and/or payment bond costs, and any other expenses relating to Joint Venture operations as provided herein. Should the Parties agree to establish a Joint Venture contingency account (the "Contingency Account"), the Managing Member shall maintain the Contingency Account. The amount and balance of the Contingency Account will be that agreed upon by the Parties to cover agreeable costs not recoverable under the VOSB Contracts.
>
> [. . .]
>
> **12. Major Equipment, Facilities and Other Resources**. Upon award of the VOSB Contract and once a more definite scope of work is made publicly available, the Managing Member and the Partner Member will furnish to the Joint Venture the equipment, facilities and other resources as itemized on Schedule A hereto, which also specifies in detail the cost or value of each equipment, facility and resource being furnished. Generally, each Party will furnish its own facility to be used by its own respective employees designated to perform under the VOSB Contract. Each Party will also furnish to each of its own employees designated to perform under the VOSB Contract all necessary personal equipment and other resources, including, without limitation, **[XXXXXXXXXXXX]**.
>
> **13. Contract Performance. Offerors**
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> **13.1. Work Share**.
>
> **a.** All services that are required to be performed under the VOSB Contract will be performed by the Parties and the Joint Venture's subcontractors, if any.
>
> **b.** The Managing Member will perform the support services required to successfully execute the VOSB Contract. The Partner Member will perform similar services in support of the Managing Member to successfully execute the VOSB Contract.

c. Because the VOSB Contract is for services (other than construction), the Joint Venture shall perform at least fifty percent (50%) of the VOSB Contract with employees of the Parties.

[. . .]

In addition, VCH provided a copy of the Second Addendum to the Joint Venture and Operation Agreement. This Addendum was executed on March 1, 2023, by Visual Connections and Harmonia. (Addendum, at 4.) The following provisions from the Addendum are pertinent to this protest:

4. Special Bank Account. The Company has established an operating account, referred to as the Special Bank Account, in the name of the JV. All receipts of the JV shall continue to be deposited into the Special Bank Account. All expenses incurred under the 3rd Contract will be paid from the Special Bank Account. All payments to the Venturers for services performed will require the signature or consent from a representative of each Venturer. Each Venturer will designate in writing the person or persons who may sign or give consent on its behalf.

5. Major Equipment, Facilities, and Other Resources. As the 3rd Contract shall be T4NG2, where the level of effort is not known and is anticipated to be primarily services type work, no major equipment, facilities or other resources are required to be provided by either Venturer but to the extent that such equipment, facilities or resources are required for any resulting task order award under T4NG2, each Venturer shall be responsible for providing it for their respective portion of the workshare.

6. Responsibilities of the Parties for the 3rd Contract

6.1. Source of Labor. The 3rd Contract is T4NG2 under which the level of effort and scope of work is not yet known. However, the parties' general responsibilities with respect to source of labor are as follows. The Managing Member shall provide the Project Manager and shall use a combination of new hires and existing employees to staff labor positions on task orders. The Partner Member shall use a combination of new hires and existing employees to staff labor positions on task orders. Each party shall be responsible for supplying personnel to complete its own share of task order work.

[. . .]

6.3. Performance of Work. 6.3.1. The Venturers agree and understand that, for any contract performed by the Joint Venture, the Joint Venture must comply with the applicable limitation on subcontracting. For the 3rd Contract, the applicable limitation on subcontracting is 50%. Therefore, of the total amount the Client pays

> to the Joint Venture on the 3rd Contract, the Joint Venture will not pay more than 50% to firms that are not similarly situated. The Venturers further agree and understand that the Managing Member must perform at least forty percent (40%) of the work performed by the Joint Venture and its work must be more than administrative or ministerial functions so the Managing Member gains substantive experience.

On December 14, 2023, VCH filed a supplement to the case file. VCH notes that the case file lacks information on Visual Connections, the SDVOSB managing venturer of VCH. (Case File Supplement, at 1.) To supplement the case file, VCH provides Visual Connections' Second Amended and Restated Operating Agreement, which identifies Mr. Deese as the sole Member of the concern, effective January 2, 2023. (*Id.*, citing Exh. C.)

III. Discussion

A. Burden of Proof and Date of Eligibility

As the protested firm, VCH 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 VCH 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). Here final bids were due June 14, 2023, and thus, I must determine VCH's compliance with the joint venture agreement requirements as of June 14, 2023.

B. Analysis

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 SDVOSB contract. 13 C.F.R. § 128.402(a). "The [joint venture] itself need not be a certified VOSB or SDVOSB" so long as the managing member of the joint venture is certified. 13 CFR § 128.402(a). It is not in dispute that Visual Connections, an SDVOSB, holds 51% of VCH, and not in dispute that Visual Connections is the certified managing member of VCH. Section II.G, *supra*. The issue here is whether VCH's JVOA and Addendum complies with SBA regulations for joint ventures. The regulations require that twelve specific provisions be included in each such joint venture agreement. 13 C.F.R. § 128.402(c). I find that VCH's JVOA and Addendum meet all twelve provisions, and thus, I must deny the protest.

Protestor challenges the validity of the JVOA. Section II.D, *supra*. Protester cites to § 18.1.b of the JVOA, which provides "[t]he term of the Joint Venture ("Term") shall be deemed to have commenced on the later of the date first above written or the SBA's approval of this Agreement (the "Effective Date"). . . ." Section II.G, *supra*. Protestor interprets this provision to

mandate both events, SBA approval and the date written, must occur for the JVOA to be valid in its entirety. Section II.D, *supra*. VCH relies on § 29.5 of the JVOA, the Severability Clause, to counter Protestor's contentions but we need not go that far. Section II.E, *supra*. I find Protestor's argument is unpersuasive. The Addendum, which Protestor concedes supplements the JVOA, confirmed the JVOA's execution date to be July 22, 2022. Section II.G, *supra*. Further, the Addendum itself, was executed on March 1, 2023, prior to the due date for initial offers. *Id.* This, coupled with signatures of both joint venturers establishes the intent to execute the JVOA on the date of signature or SBA approval. It is undisputed that SBA approval is not a requirement for SDVOSB joint ventures. 13 C.F.R. § 128.402(a). The JVOA at § 5.1 refers to receiving prior approval from SBA "pursuant to 13 C.F.R. § 124.513(e)" which applies to joint ventures involving 8(a) concerns, and thus is not applicable here. SBA approval would not have been sought and is not necessary for this joint venture. Thus, the alternative is "the date first above written," which here is July 22, 2022. Section II.G, *supra*. That is the only applicable date here, and it is clear the JVOA was executed by the parties on that date. I find VCH's JVOA to be valid and effective.

Next, Protestor challenges other provisions of the JVOA and asserts Harmonia has negative control due to VCH's Contingency Bank Account, which requires a mutual agreement to create and operate. Section II.D, *supra*. Here, Protestor has cited to JVOA, § 14.1.d and contends that this account requires a mutual agreement from both joint venturers and thus, prevents the SDVOSB from maintaining control over the day-to-day management of VCH. Section II.G, *supra*. Again, I find this argument unpersuasive. VCH argues this contingency account is VCH's Special Bank Account. Section II.E, *supra*. In the JVOA, VCH's bank account is referred to as the "Operating Account," and further clarified in the Addendum as "an operating account, referred to as the Special Bank Account, in the name of the JV." *See* JVOA § 15.2; Addendum ¶ 4. Although the distinction is unclear, both the Operating Account, and the Contingency Account are permitted under 13 C.F.R. § 128.402(c)(5). More specifically, a special bank account requires the "signature or consent of all parties to the [JV]" for services rendered by the JV, and the account must serve as the accounts receivable/account payable bank account for the JV. *Id.* Here, the Contingency Account requires "mutual approval" for management and administrative expenses, as well as costs agreed upon by both parties for VOSB contracts. Section II.G, *supra*. Even if the contingency account is distinct from, or lesser to, the operating account, it serves as the same or similar functions, and these functions are not separate or distinct from the actions permissible, indeed required under 13 C.F.R. § 128.402(c)(5) for the operating account. Where the regulation actually requires the signature or consent of both parties for the special bank account, the creation of other accounts with both signatures is not indicative of negative control, but is consistent with the requirements of such regulation. Thus, I find no issues of negative control with the contingency bank account.

In addition, a JVOA must contain a provision "itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture." 13 C.F.R. § 128.402(c)(6). Protestor asserts that VCH failed to meet this requirement, but I disagree.

Here, the IDIQ solicitation's PWS calls for "Information Technology service solutions." Section II.A, *supra*. The CO notes, "[t]his PWS provides general requirements . . . [,] [s]pecific requirements shall be defined in individual Task Orders." *Id.* Further, the individual task orders

"may include acquisitions of software and IT products." *Id.* It is clear this solicitation calls for IT services, but also clarifies that specific requirements will be identified at a future date in each individual task order, thus rendering this solicitation indefinite. When a contract is indefinite, such as an indefinite quantity contract or a multiple award contract, the JVOA need only provide a general description of anticipated major equipment without a detailed schedule of cost. 13 C.F.R. § 128.402(c)(6); *VSBC Protests of Beshenich Muir & Associates, LLC & ELB Services LLC*, SBA No. VSBC-292-P, at 15 (2023). OHA has determined it is reasonable to omit major equipment details in a joint venture agreement in instances where the procurement is for services. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 20 (2019) (determining that because the procurement calls for nursing services and because contract performance would occur on government facilities, "there would have been no major equipment, facilities or other resources for [protested concern] to have detailed in the JVA"); *see also, Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822, at 11 (2017) (in a procurement of professional services, using information technology provided by the procuring agency, "[b]ecause the contract does not require major equipment, facilities, or other resources, [the joint venture] was not required to list them in its JVA."). Here, as asserted by VCH, no major equipment is required when the procurement calls for IT services. Section II.A, *supra*. Further, the Addendum acknowledges this and states, "level of effort is not known and is anticipated to be primarily services type work, no major equipment, facilities or other resources are required to be provided by either Venturer." Section II.G, *supra*. Despite this, the JVOA provides a general list of certain physical equipment the joint venturers anticipate will be required for contract performance. *Id.* Protestor contends that the JVOA and Addendum fails to provide specific details on the equipment that relate to the subject procurement. Section II.D, *supra*. Protestor relies on *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P at 9-10 (2020), where OHA determined the protested concern's JVOA in that subject procurement failed to include specific information on the subject procurement and merely states in general terms the purchase of unspecified equipment. However, *KTS Solutions, Inc.*, is inapposite. The procurement at issue there was for special transportation services, and thus required a great deal of specialized vehicles and other equipment. It would have been possible for that JVOA to describe the equipment that the joint venture intended to use to perform the contract. Unlike the joint venture in *KTS Solutions, Inc.*, the JVOA here calls for IT services, not equipment, thus VCH's listed general equipment **[XXXXXXXXXXXXXX]** is sufficient for this subject procurement. Section II.G, *supra*. Thus, I find the JVOA and Addendum sufficiently meet SBA requirements under 13 C.F.R. § 128.402(c)(6).

The JVOA must "[s]pecify[] the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance" under 13 C.F.R. § 128.402(c)(7); *Beshenich Muir & Associates, LLC & ELB Services LLC*, SBA No. VSBC-292-P. As previously discussed, this is an IDIQ solicitation. When a contract is indefinite, the joint venture "must provide a general description of the anticipated responsibilities of the parties." 13 C.F.R. § 128.402(c)(7.). OHA has determined that under circumstances where the solicitation provides no details on the scope of work, the joint venture agreement is sufficient when it (1) states that "each member will perform with employees from its respective organization," (2) "list general types of tasks each member will perform," and (3) "acknowledges the indefiniteness" of the solicitation. *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, 12 (2018). Here, as in *Spinnaker Joint Venture, LLC*, the Addendum acknowledges the indefinite solicitation

when its states "the level of effort and scope of work is not yet known"; yet proceeds to provide general tasks the Managing Member and Partner Member will perform, as well as divide the workshare by percentages. Section II.G, *supra*. The JVOA also divides workshare by percentages and anticipates preparation of a Schedule B once individual task orders are issued. Section II.G, *supra*. Thus, I find the JVOA and Addendum sufficiently meet SBA requirements under 13 C.F.R. § 128.402(c)(7).

IV. Conclusion

For the above reasons, the protest is DENIED. 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