

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

VSBC Protest of:

Systematic Innovations, LLC,

Protestor,

Re: NXG Solutions, Inc.

Solicitation No. 36C10B23R0011

U.S. Department of Veterans Affairs

SBA No. VSBC-367-P

Decided: June 27, 2024

APPEARANCES

Jonathan T. Williams, Esq., Meghan F. Leemon, Esq., Joseph P. Loman, Esq., Annie B. Hudgins, Esq., PilieroMazza, PLLC, Washington, D.C., for Protestor

Stephanie D. Wilson, Esq., Rachael C. Haley, Esq., Charles L. Bonani, Esq., Berenzweig Leonard, LLP, McLean, Virginia, for NxG Solutions, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On November 7, 2023, Systematic Innovations, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of NxG Solutions, Inc. (NxG), in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C10B23R0011. For the reasons discussed *infra*, the protest is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 15 U.S.C. § 657f and 13 C.F.R. part 134 Subpart J. Protestor filed its protest within five business days after receiving notification that NxG was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(3). Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

## II. Background

### A. The RFP

On March 14, 2023, the VA issued RFP No. 36C10B23R0011 for the Transformation Twenty-One Total Technology Next Generation 2 (T4NG2) multiple-award indefinite-delivery indefinite-quantity (ID/IQ) contract. (RFP, at 2.) In the RFP, the Performance Work Statement (PWS) stated that the contractors will provide information technology (IT) service solutions in 11 functional areas: “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; [and] IT facilities.” (RFP, Amend. 0001, at 14.) The RFP explained that “[t]his PWS provides general requirements . . . [,] [s]pecific requirements shall be defined in individual Task Orders.” (*Id.*)

Further, the RFP indicated the VA intended to award up to 30 contracts, with at least 15 awards reserved for SDVOSBs. (*Id.*, at 156-57.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding size standard of \$34 million average annual receipts. (*Id.*, at 112.) NxG submitted its initial proposal on April 23, 2023, and final proposal revisions on June 14, 2023. On October 31, 2023, the CO announced the identity of the successful offerors. A total of 30 awardees were selected, including 21 SDVOSBs or SDVOSB joint ventures.

### B. The Protest

On November 7, 2023, Protestor filed the instant protest with the CO, challenging NxG's status as an SDVOSB joint venture. The CO forwarded the protest to OHA for review.

Protestor asserted NxG is not an eligible joint venture for this procurement because it does not have a valid joint venture agreement (JVA) that complies with the SBA regulation for SDVOSB joint ventures at 13 C.F.R. § 128.402. (Protest, at 1-2.) First, Protestor stated TechWerks, LLC (TechWerks) an SDVOSB, is its immediate owner. Since SBA's SDVOSB joint venture rules were revised in late 2022, effective January 1, 2023, subsequent to NxG's organization on May 29, 2019, several years prior to the Solicitation's due date, Protestor argued that NxG could not be compliant with the regulations. (*Id.*, at 3, citing *Size Appeals of STAcqMe, LLC*, SBA No. SIZ-5976.) Second, Protestor pointed that NxG answered “no” to the question of whether it is a joint venture in its online Dynamic Small Business Search profile. Third, Protestor asserted NxG's Sam.gov profile uses the San Antonio mailing and street address of Business Enabled Acquisition & Technology, LLC (BEAT), a partner in the joint venture, which is not an SDVOSB, while TechWerks' address is in Arlington Heights, Illinois. (*Id.*) Fourth, Protestor stated NxG's Texas registration lists only one manager, Matthew Benavides, President and CEO of BEAT. However, Protestor contended that an SDVOSB must be the managing venturer of an SDVOSB joint venture, with an employee of the SDVOSB as responsible manager. (*Id.*, at 4.)

### C. Initial Response<sup>2</sup>

On February 2, 2024, NxG timely responded to the protest and provided the Case File.

NxG explained that it was initially formed in 2019 between two concerns, BEAT and Technology Automation and Management, Inc. (TeAM) to pursue a General Services Administration (GSA) contract, which it later decided not to. TeAM withdrew from the joint venture. Upon the release of the instant solicitation, BEAT sought other teaming opportunities. BEAT then determined it would be a subcontractor to a joint venture together with several small business concerns. Consequently, the concerns executed an updated JVA and Operating Agreement. NxG submitted its initial proposal on April 23, 2023. The proposal included the Second NxG JVA, identifying its members as LiVion Technology, LLC (LiVion), Aretec, inc. (Aretec), Dynamic Security Concepts, Inc. (Dynamic Security), Karthik Consulting, LLC (Karthik), Engenius Consulting Group, Inc. (Engenius), Nemean Solutions, LLC (Nemean) and North South Consulting Group, LLC (North South). After the Government adjusted its points values, NxG determined a restructuring was required. Aretec, Nemean, Engenius, Dynamic Security and Karthik withdrew from the joint venture. TechWerks was added as a new managing venturer, BEAT rejoined and South River Federal Solutions, LLC (South River) and 3500 Square, LLC (3500 Square) were added as small business members. The new members executed an updated NxG Solutions, LLC, JVA and Operating Agreement. The JVA was updated and submitted with NxG's final proposal revisions on June 14, 2023. That is the operative joint venture. (NxG Response, at 1-4.)

NxG maintained that as a joint venture, its certification is not required, and so it did not submit documents to the VA. It submitted to OHA documents on NxG and TechWerks. The JVA complies with 13 C.F.R. § 128.402, having five members, TechWerks, BEAT, LiVion, NorthSouth, South River and 3500 Square. TechWerks, the managing venturer, is certified in the SBA VetCert database, while LiVion, NorthSouth and 3500 Square are also certified. (*Id.*, at 6-7.)

NxG asserted that TechWerks is managing the joint venture of the T4NG2 contract. NxG acknowledged that its address was BEAT's, which had previously been managing venturer, but neither the JVA nor the regulation requires that NxG's records be kept at the SAM address. The JVA requires the records to be kept at the office of the managing venturer unless the SBA District Director approves otherwise. The current NxG JVA also states the while its principal office is 802 E. Quincy St., San Antonio, Texas, the managing venturer may designate additional offices, and TechWerks maintains one at 5101 Broadway, # 100 San Antonio, TX. (*Id.*, at 7.) \*3 Finally, Mr. Benavides is listed as manager in the Texas records because NxG has not yet updated its listing, which is not yet due. (*Id.*, at 8.) NxG's current JVA confirms TechWerks as

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<sup>2</sup> On November 28, 2023, OHA first directed SBA to furnish the Case File. On December 6, 2023, SBA informed OHA that it could not locate NxG's records. On December 8, 2023, OHA ordered NxG to furnish the Case File. On December 19, 2023, NxG filed a Motion to Dismiss, arguing that Protestor lacked standing. On January 3, 2024, Protestor proffered documentation that it is an interested party. On January 11, 2024, OHA denied NxG's Motion and directed NxG to file a response to the Protest with the Case File by February 2, 2024.

the managing venturer and Michael Fravell, TechWerks' President and CEO, and the responsible manager.

#### D. Supplemental Protest

On February 20, 2024, Protestor filed its Supplemental pleading. Protestor argued that NxG is not a true joint venture, originally formed in 2019 as a joint venture between BEAT (majority owner) and TeAM. On February 18, 2021, TeAM withdrew, leaving BEAT as sole member. (Supplemental Protest, at 4.) Protestor characterized NxG's account as "supposedly BEAT agreed to transfer the NxG entity to various joint venture members." However, there is nothing in the record to document the transfer, except declarations of BEAT's CEO and LiVion's CEO. BEAT's address was used for NxG, and its CEO is identified as NxG's sole manager, which Protestor argued would make sense because NxG is a wholly owned subsidiary of BEAT, not a true joint venture. (*Id.*)

Protestor noted that NxG submitted its initial proposal on April 23, 2023, however, after the procuring agency issued Amendment 4 on or around May 12, 2023, numerous NxG members withdrew and others were added, including BEAT rejoining. Protestor found it questionable that NxG's "purported" JVA is dated April 18, 2023, well before certain members joined. BEAT's signature is dated April 20, 2023, weeks before BEAT rejoined. (*Id.*, at 5 citing Initial Response at 4, Case File (CF) Tab 2 JVA at 1, 24.) SBA had never intended a joint venture's composition to be fluid, and a joint venture should have the same partners throughout, unless one is acquired. (*Id.*, citing 83 Fed. Reg. 66146, 66148 (Oct. 16, 2020).) Protestor maintained NxG is not a true joint venture but a subsidiary of BEAT. Given the short time trying to convert NxG to a true joint venture, NxG's bank account is still associated with BEAT and is not a special bank account, which requires the signature or consent of all parties to the joint venture for payments made by the venture to its members for services performed, as required by 13 C.F.R. § 128.402(c)(5). (*Id.*)

By asserting that NxG's JVA is deficient, Protestor alleged there is no valid Addendum for the instant solicitation. The JVA is not specific to any particular contract, but rather contemplates that the parties will execute an Addendum as Exhibit A to address project-specific issues. (*Id.*, at 6, citing CF, Tab 2 JVA at 1.) Protestor argued that there is no valid Addendum for this solicitation, noting that Exhibit A is dated April 20, 2023, well before certain members joined and/or rejoined, including TechWerks, the purported managing member, after Amendment 4 to the Solicitation, which was not issued until May 2023. Protestor indicated the signature pages to the Addendum make no reference to the Addendum itself. Exhibit A defines the Addendum as "Addendum" and the "Agreement" as the joint venture agreement entered into on April 18, 2023. (*Id.*, CF, Tab 2 JVA at 28.) Further, the signature pages to the "Addendum" are the exact same as the signature pages to the "Agreement" and reference the "agreement," not an addendum. Protestor concluded the Addendum was not signed for this Solicitation and invites comparison of CF, Tab 2 JVA, at 22-27 with page 30-35. Protestor thus, argued both the JVA and Addendum are dated effective well before the restructuring of NxG after Amendment 4 of the Solicitation. (*Id.*)

Protestor maintained there is nothing in the record to confirm that after Amendment 4 was issued, the parties to NxG are TechWerks, LiVion, BEAT, North South, South River, and 3500. There is no valid agreement or addendum for this Solicitation, and NxG should be found ineligible on that basis alone. (*Id.*, citing *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188 (2023).)

Further, Protestor claimed the Addendum is noncompliant with 13 C.F.R. § 128.402(c)(2). Particularly, the JVA is not specific to any solicitation, and provides that upon issuance of a solicitation, the venturers shall execute a written addendum addressing pertinent details. However, the regulation requires an SDVOSB JVA must have a provision designating a certified SDVOSB as managing venturer and designating a named employee of that firm as manager with ultimate responsibility for contract performance. The managing venturer is responsible for controlling day-to-day management of contract performance, but other partners may participate in corporate governance as is commercially customary. Here, the Addendum merely provides that TechWerks will provide the Responsible Manager, and names no individual. In Protestor's view, this is deficient. (*Id.*, at 7, CF Tab 2 JVA at 28, citing *VSBC Protests of Beshenich Muir & Assoc., LLC & ELB Svcs., LLC*, SBA No. VSBC-292-P (2023) (*BMA*).)

The Addendum also provides that TechWerks and the other members of the joint venture will assign personnel subject to task order agreements reached during contract performance. Here, Protestor read as staffing at the task order level must be a unanimous decision. Thus, Protestor claimed this clause creates impermissible negative control by BEAT, the non-SDVOSB venturer, because it deprives TechWerks of control of day-to-day management and administration. (*Id.*, at 8, citing CF, Tab 2 JVA at 29, *VSBC Protests of U.S. Dept. of Veterans Affairs*, SBA No. VSBC-297 (2023).)

Protestor also insisted the Addendum is noncompliant with 13 C.F.R. § 128.402(c)(6), failing to provide a general description of the anticipated major equipment or specify how the parties to the joint venture will furnish resources. It merely says "TBD." (*Id.*, at 9., citing *BMA*.) Similarly, the Addendum is noncompliant with 13 C.F.R. § 128.402(c)(7). The regulation requires the JVA specify responsibilities with regard to negotiation of the contract, source of labor and contract performance. However, Addendum § 12 does not attempt to include any provision regarding the negotiation of the contract. And because the JVA does not address the Solicitation, the Addendum does not meet the requirement to specify responsibilities with regard to contract negotiation. (*Id.*, at 10, CF, Tab 2 JVA at 28-29, citing *Matter of Asirtek Fed. Svcs, LLC*, SBA No. VET-269 (2018) (*Asirtek*).) Further, the Addendum does not demonstrate that NXG will comply with the limitations on subcontracting or that NxG's SDVOSB partners will perform at least 40% of NxG's work. There is nothing to confirm who will perform what work and at what percentages. This renders NxG ineligible. (*Id.*, citing *CVE Protest of Patriot Strategies, LLC*, SBA No. CVE-243 (2022) (*Patriotic Strategies*).)

#### E. Response to Supplemental Protest

On March 6, 2024, NxG responded to the Supplemental Protest. NxG first asserted that the record confirms the transfer of the NxG Solutions, LLC entity from BEAT to the newly

formed joint venture. The second JVA, which also served as NxG Solutions, LLC's Operating Agreement set forth the members of the company as of the date NxG submitted its initial proposal. This agreement, which does not list BEAT as a member, is itself evidence of the transfer from BEAT to the newly formed joint venture listed in the second JVA. Also, BEAT's President and CEO, Mr. Benavides states in his declaration that BEAT would be a subcontractor for the newly formed joint venture. The newly formed JVA's agreement to have BEAT as a subcontractor would qualify as consideration for the transfer. (Response to Supp., at 1-3.)

NxG maintained the record confirms all members of the current joint venture executed the JVA prior to the due date for final proposals. Protestor alleged the joint venture is invalid because its effective date is April 18, 2023, which is well before certain members joined the NxG. NxG, however, stated this is a retroactive effective date implemented by the current members and is not dispositive as to whether the concern is eligible. Eligibility for compliance with the SDVOSB regulations is the date of final proposal revisions, which here is June 14, 2023. (*Id.*, at 3-4, citing 13 C.F.R. § 134.1003(e)(1).)

Initially, NxG explained that BEAT had explored teaming opportunities for this solicitation, and as one of the options included being a member of a joint venture with Livion, BEAT executed a signature page on April 20, 2023 for the NxG JVA. Ultimately, the parties decided BEAT would not be member but a subcontractor, so it was not listed as a member nor was its signature page attached to the initial proposal. After the Government issued Amendment 4, the parties to NxG decided to restructure it to include a new managing venturer and to replace certain small business members. BEAT then joined the joint venture and is listed as member in the current JVA. BEAT used its existing signature page for the current JVA and Addendum. (*Id.*, at 4-5.)

NxG argued SBA's regulations do not prohibit a joint venture from using a previously formed LLC. Protestor argued NxG is not valid because it was formed as an LLC and as a joint venture between BEAT and TeAM, and continued to exist as a subsidiary of BEAT for years until just before proposals for this procurement were due. Protestor pointed to SBA regulatory commentary that it never intended the composition of joint ventures to be fluid. (*Id.*, at 5, citing 85 Fed. Reg. 66146, 66148 (Oct. 16, 2020).) However, NxG indicated that SBA's concern was with joint ventures exchanging one joint venture partner for another after receiving award. NxG was originally formed in 2019 to pursue a GSA procurement, and then the parties to it decided not to do so, and there was no business activity for years. In 2023, NxG was transferred to its current members to pursue this procurement. Nothing in SBA's regulations prohibits members of a newly formed joint venture from acquiring a pre-existing inactive LLC for the purpose of existing as a separate legal entity. (*Id.*, at 6.)

Further, NxG asserted Protestor's allegations regarding NxG's bank account are unfounded and ignore the regulation's requirements. Specifically, NxG's bank account is still associated with BEAT and does not require the signature or consent of all parties to the joint venture for payments made to members for services performed. NxG explained the JVA provides the joint venture's bank account will be established at a bank of the Managing Venturer's choosing, and any payments made to the members for services performed will require the signature or consent of all parties to the joint venture. This is consistent with the regulation at 13

C.F.R. § 128.402(c)(5). BEAT's only association with the bank account is its consent as a joint venturer to the payments made. (*Id.*, at 7, citing CF, Tab 2 JVA § 9.0, *VSBC Protest of ThunderYard Liberty JV II, LLC*, SBA No. VSBC-332-P (2024).)

Additionally, NxG maintained the Addendum is valid. Protestor disputed this, because it is dated April 20, 2023, which is prior to some members joining the joint venture. However, eligibility is determined as of the date of final proposal revisions, and each of the signature pages for the Addendum is dated prior to NxG's final proposal revision. Each of the joint venturers submitted a declaration that it is bound by the signature pages attached to the JVA and Addendum. (*Id.*, at 8.)

NxG stressed that it has complied with 13 C.F.R. § 128.402(c)(2) because the JVA states the Responsible Manager will be Michael Fravel, a TechWerks employee. The named employee need not be in the Addendum, and the JVA and Addendum must be read together. (*Id.*, at 9-10, citing *BMA*.)

Conversely, NxG denied the JVA gives BEAT negative control. The JVA provides that the Managing Venturer, acting through the Responsible Manager “shall have primary responsibility for ensuring appropriate labor for the effort,” and other members will support the Managing Venturer as requested. Control over personnel decisions is properly vested in the Managing Venturer. (*Id.* at 11, CF Tab 2 JVA § 12.1.) The Managing Venturer is responsible for day-to-day management and administration of contract performance and general management of NxG's strategic decision-making. (*Id.*, JVA at § 5.0.) The other members, including BEAT, are only involved in decision-making in the extraordinary circumstances enumerated in the SBA regulation. (*Id.*, at 11-12, JVA at §§ 5.0, 5.1, 12; 13 C.F.R. § 128.203(j).) Section 12 does not enable BEAT to exercise impermissible control but specifies how the parties will define their responsibilities once a scope of work is available. NxG is an unpopulated joint venture and relies upon the members' employees to perform work. Thus, Section 12 merely memorializes this status and confirms the members will provide personnel for performance. (*Id.*, at 12, citing 13 C.F.R. § 128.402(c)(7).)

NxG affirmed the JVA complies with 13 C.F.R. § 128.402(c)(6). The PWS provides only “general requirements,” with specific requirements to be defined in individual Task Orders. The regulation requires the JVA to provide a general description of anticipated major equipment, facilities and other resources to be furnished by each party, or to specify how the venturers will furnish such resources once a definite scope of work is available. OHA has held that it is reasonable to omit major equipment details and no major equipment is required for IT service procurements such as the instant one. (*Id.*, at 12-13, citing *VSBC Protest of ThunderYard Liberty JV II, LLC*, SBA No. VSBC-264 at 11 (2024); *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012 (2019).) In fact, the JVA provides that once a definite scope of work is available, the venturers will jointly review it and consider each venturer's capabilities in order to determine a division of major equipment, facilities and resources best suited to meet the client's needs. This is as much as it can be provided given the general requirements of the solicitation. (*Id.*, at 13, JVA, § 11.)

NxG further asserted the JVA complies with 13 C.F.R. § 128.402(c)(7). The regulation provides that a JVA may specify how the parties to a joint venture will define such responsibilities once a definite scope of work is available. Here, the JVA at §§ 12.1 and 12.2 sets forth how the venturers will define responsibilities once a scope of work is available for the task orders. The venturers will jointly review the scope and consider each venturer's capabilities and skillsets, in order to determine a division of labor best suited to meet the client's needs. Generally, they will use their existing workforce and divide labor for performance of the contract. (*Id.*, at 14, JVA § 12.1.) TechWerks, as Managing Venturer, has primary responsibility for ensuring appropriate labor for the effort, and the other members will support the Managing Venturer. The JVA also provides the Managing Venturer will always perform at least 51% of the work and such work must be more than merely administrative or ministerial. (*Id.*, at 15, JVA § 12.2.) The Responsible Manager will have primary responsibility for negotiations. (*Id.*, JVA § 12.3.)

NxG explained the Addendum further provides that TechWerks will, as appropriate, assign existing or newly hired personnel to fulfill staffing obligations, and other members will, as appropriate assign existing personnel or new hires to fill staffing obligations. (*Id.*, Addendum, § 12.1.) The Addendum states TechWerks will perform the duties required for the managing member, including task order management and all contractual and regulatory responsibilities. Other members' duties include all contractual and regulatory responsibilities and participation in task order level teams, subject to task order agreements reached during contract performance. (*Id.*, Addendum § 12.2.) NxG contended all information on responsibilities regarding negotiation of the contract, source of labor, and contract performance of the members is in the JVA and Addendum.

Lastly, NxG argued two cases Protestor relies upon are inapposite. In *Asirtek, supra*, the JVA referred to an unrelated 8(a) procurement, not the procurement at issue. This JVA expressly identifies the Solicitation in question. In *Patriot Strategies, supra*, the JVA did not state whether the SDVOSB partner would perform at least 40% of the work and perform work beyond administrative duties, which this JVA does. Further, it was a definite contract, where the nature of the work was clearly known, as opposed to this case. (*Id.*, at 15-16.)

#### F. Case File

NxG provided copies of its proposal, JVA, JVOA, and Addendum, as well as Declarations from the joint venturers.

Particularly, the JVA and JVOA, were amended on April 18, 2023, between TechWerks, LiVion, BEAT, North South, South River, and 3500 Square. The JVA indicates that TechWerks is the SDVOSB. The JVA executed an addendum to this Agreement as Exhibit A. (CF, Tab 2 JVA at 1.) The following provisions of this JVA are pertinent to this protest:

#### **5.0 MANAGING VENTURER.**

TechWerks will be the “Managing Venturer” of the Joint Venture, responsible for controlling the day-to-day management and administration of the



contractual performance of the Joint Venture and for the general management of the Joint Venture's strategic decision-making, provided that other members of the JV may participate in all corporate governance activities and decisions of the joint venture as is commercially customary. See 128.402(c)(2). TechWerks and the other JV members' points of contact will coordinate as is appropriate with regards to the operation of the Joint Venture. The Managing Venturer is responsible for the Proposal and resulting Contract and shall be responsible for coordinating preparation of such Proposal, coordinating performance and division of performance of such Contract and (if applicable) any Orders thereunder, and for selecting, appointing, and providing a responsible manager (the "Responsible Manager"), as set forth in Section 7.0. The Managing Venturer shall administer the Contract, including, without limitation: (i) preparation of progress reports; (ii) submission of invoices; (iii) receipt of payments; (iv) payments of invoices submitted by the Venturers and the Joint Venture's subcontractors, if any; (v) opening of bank account(s) for the Joint Venture; and (vi) keeping books and records relating to the foregoing transactions and to such Contract.

*(Id., at 5-6.)*

Further, the JVA states that in addition to "the Managing Venturer's authority to manage and control the business and day-to-day operations of the Joint Venture, the Managing Venturer's powers shall include, but are not limited to, the power":

- a) To conduct business, carry on its operations and have and exercise the powers granted to a limited liability company by the Act in any state, territory, district or possession of the United States, or in any foreign country that may be necessary, convenient or incidental to the accomplishment of the purpose of the Joint Venture;
- b) To enter into, execute, deliver, perform and carry out contracts of any kind, including, without limitation, contracts with any Venturer, or agent of the Joint Venture necessary to, in connection with, convenient to, or incidental to the accomplishment of the purpose and business of the Joint Venture;
- c) To negotiate, enter into, renegotiate, extend, renew, terminate, modify, amend, waive, execute, acknowledge or take any other action with respect to any lease, contract or security agreement in respect of any assets of the Joint Venture;
- d) To employ accountants, legal counsel, agents, or other experts to perform services for the Joint Venture and to compensate them from Joint Venture funds;
- e) To purchase liability and other insurance to protect the Joint Venture's officers, agents, property and business;
- f) To make, execute, acknowledge and file any and all documents or instruments necessary, convenient or incidental to the accomplishment of the purposes of the Joint Venture; and

g) To do and perform all other acts as may be necessary or appropriate to the conduct of the Joint Venture's business.

*(Id., at 6.)*

#### 5.1 Unanimous Requirements:

The affirmative vote of all of the Members (and the votes held by all Members) evidenced by the vote of the Members on or a written consent of all Members, shall be required to approve each of the following extraordinary matters that fall outside of the normal day-to-day operations of the Joint Venture set forth below in this Section:

- a) The addition of a new equity stakeholder;
- b) The dissolution of the Joint Venture;
- c) The sale of the Joint Venture;
- d) The merger of the Joint Venture; and
- e) The declaration of bankruptcy by the Joint Venture.

Any disagreement over the scope of any of the matters set forth in this Section shall be resolved in accordance with the dispute resolution process set forth in this Agreement.

*(Id., at 6-7.)*

#### 5.2 Voting and Quorum:

In the event that voting by the Parties is needed to conduct business operations of the Joint Venture, the Managing Venturer shall have two (2) votes and the other members shall have one (1) vote on each matter requiring a vote.

For the duration of this Agreement, and as long as the Joint Venture is performing contracts under the Agreement, the Managing Venturer shall have no less than 51% of the ownership interest in the Joint Venture. A representative of the Managing Venturer must be present to form a quorum in person or by proxy of all meetings of the Parties. Except as otherwise provided in this Agreement, an action of the Members shall be by majority vote.

(*Id.*, at 7.)

**6.0 RESPONSIBLE MANAGER.**

The Responsible Manager shall be Michael Fravel, a current employee of TechWerks, who shall be the person with the ultimate responsibility for performance of the Contract and for reporting to and implementing the instructions of the Managing Venturer. See 128.402(c)(2). The Joint Venture may designate other individuals to be the Responsible Manager for other procurements so long as they are employees of the Managing Venturer, each of which may be designated in an addendum to this Agreement. Additionally, the Joint Venture may designate other individuals to assist in the management of specific Orders under the Contract provided that such individuals shall at all times be subject to the overall direction of the Responsible Manager.

(*Id.*, at 7-8.)

**7.0 PERCENTAGE OWNERSHIP.**

The Joint Venture is a separate legal entity. TechWerks [*sic*] is a small business under the Solicitation's size standard. Each Party's Percentage Ownership Interest follows:

**TechWerks — 95%**

**LiVion — 1%**

**BEAT — 1%**

**North South — 1%**

**South River — 1%**

**3500 — 1%**

See 13 C.F.R. 128.402(c)(3)

(*Id.*, at 8.)

**9.0 SPECIAL BANK ACCOUNT.**

A special bank account (“Operating Account”) in the name of the Joint Venture will be established and administered at a bank of the Managing Venturer's choosing. The Operating Account will be in the name of NXG Solutions, LLC. All payments to the Joint Venture for performance on the Contract will be deposited in

the Operating Account, and all expenses incurred under the Contract will be paid from the special account, as well. Any payments made by the Joint Venture to its members for services performed will require the signature or consent of all parties of the Joint Venture. Each Venturer will designate the person or persons authorized to sign on their behalf. See 13 C.F.R. 128.402(c)(5).

(*Id.*, at 9.)

#### **11.0 MAJOR EQUIPMENT, FACILITIES, AND OTHER RESOURCES.**

Generally, each Venturer shall provide resources required to perform, in accordance with the terms and conditions of the Contract and any Orders awarded to the Joint Venture as a result of the Proposal, the work assigned to each Venturer pursuant to the division of work and responsibilities herein and in the attached **Exhibit A**. Each Venturer shall be responsible for and bear all costs and expenses arising out of such Venturer's own effort in performance of the Contract.

The Contract is currently unspecified, and the level of effort and scope of work is not currently known. Additionally, if the Contract is indefinite in nature and/or is a “pre-competed” vehicle involving multiple requests for proposals and subsequent awards over the life of the Contract, the specific equipment, facilities, and other resources that may be required for individual Orders under the Contract may also be unspecified, making the level of effort and scope of work for the Orders unknown as well.

...

(*Id.*)

#### **12.0 RESPONSIBILITIES REGARDING NEGOTIATIONS, PERFORMANCE, AND SOURCE OF LABOR.**

Generally, each Venturer shall provide the personnel required to perform, in accordance with the terms and conditions of the Contract and any Orders awarded thereunder as a result of the Proposal, as set forth in **Exhibit A**. Each Venturer shall be responsible for and bear all costs and expenses arising out of such Venturer's own effort in performance of the Contract.

12.1 Source of Labor. The Contract is currently unspecified, and the level of effort and scope of work is not currently known. Additionally, if the Contract is indefinite in nature and/or is a “pre-competed” vehicle involving multiple requests for proposals and subsequent awards over the life of the Contract, the specific personnel and labor that may be required for individual Orders under the Contract may also be unspecified, making the level of effort and scope of work for the Orders unknown.

Once a definitive scope of work is made publicly available for the Contract, and (if applicable) for the specific Orders thereunder, the Venturers will jointly review the scope and consider each Venturer's unique capabilities and skillsets, in order to determine a division of labor best suited to meet the Client's needs in an efficient and effective manner. The Venturers shall execute a written addendum to this Joint Venture Agreement setting forth their specific responsibilities regarding labor for performance of the Contract (attached to this Agreement as **Exhibit A**).

Generally, the Venturers shall use their existing workforce and divide the labor for performance of the Contract in accordance with the terms of this Agreement. TechWerks will always provide the Responsible Manager, who must be an employee of TechWerks. To the extent additional labor is required, the Venturers may hire additional employees or subcontractors from the marketplace, consistent with the requirements of 13 C.F.R. 128.402(c)(7), 128.402(d). The Managing Venturer, acting through the Responsible Manager, shall have the primary responsibility for ensuring appropriate labor for the effort. Other JV members shall support the Managing Venturer as requested.

12.2 Contract Performance. The Contract is currently unspecified, and the level of effort and scope of work is not currently known. Additionally, if the Contract is indefinite in nature and/or is a “pre-competed” vehicle involving multiple requests for proposals and subsequent awards over the life of the Contract, the specific performance requirements for individual Orders under the Contract may also be unspecified, making the level of effort and scope of work for the Orders unknown.

[. . .]

Generally, to ensure successful contract performance, the Parties agree that for any SDVOSB, set-aside contract, the Managing Venturer must perform the percentage required by 128.402(d), as may be applicable and for any small business set-aside contract, the Joint Venture will perform the percentage required by 13 C.F.R. §§ 125.8(c) and 125.6, as applicable, meaning the Managing Venturer will always perform at least 51% of the work of the Joint Venture and such work must be more than merely administrative or ministerial work. The Managing Venturer shall have the primary responsibility for allocating work and shall have the right to reallocate work among the Venturers to ensure such compliance, provided that no work shall be reallocated among the Venturers unless such is reasonably required by the Client, the Solicitation, the Contract, or the applicable limitations on subcontracting or performance of work requirements. See 13 C.F.R. 128.402(d).

12.3 Negotiations. The Managing Venturer, will be the primary point of contact with the Client during evaluation of the Proposal. The Responsible Manager will have primary responsibility for negotiations with the Client regarding the Proposal, as well as any proposals for Orders thereunder, if applicable. At the request of the Responsible Manager, other employees of the Managing Member, and/or other JV members may also be involved in negotiations. See 13 C.F.R. § 124.513(c)(7).

(*Id.*, at 10-11.)

#### **14.0 RECORDS AND STATEMENTS.**

14.1 Accounting and Administrative Records. Accounting and other administrative records relating to the Joint Venture shall be kept and maintained at the office of the Managing Venturer, unless approval to keep them elsewhere is granted by the SBA District Director or his/her designee upon written request. Each Venturer shall during regular business hours have access to and may inspect and copy any and all such books and records, be they in physical or digital form, stored on site, or stored via cloud computing. The Responsible Manager shall promptly send to each Venturer copies of all reports, correspondence, documents, and other information sent or received by the Joint Venture and each Venturer may have full access to bank account and corporate and financial records for the Joint Venture. See 13 C.F.R. §§ 128.402(c)(9) and 125.8(b)(2)(ix).

(*Id.*, at 12.)

#### **15.0 PERFORMANCE OF WORK.**

15.1 Performance Requirements. The Joint Venture will perform the percentage of work required by 13 C.F.R. §§ 128.402(d), 125.8(c) and 125.6, as may be applicable to the Contract. Because the Managing Member is a small business concern, is a SDVOSB, the Managing Member and similarly situated entities must perform the applicable percentage of work required by 13 C.F.R. §§ 128.402(d) and 125.8(c) for any SDVOSB Program set-aside contract. The Responsible Manager shall have primary responsibility for contract performance and monitoring compliance with the performance of work requirements.

(*Id.*, at 13.)

#### **Exhibit A, JVA Proposal Addendum**

This Proposal Addendum (“Addendum”) is entered into this 20th day of April, 2023 (“Addendum Date”), by and between the members of the NXG Solutions Joint Venture. The purpose of this Addendum is to enable the Joint Venture to bid upon and, if awarded, perform work solicited by the VA under Solicitation No. 36C10B23R0011, T4NG2 Program (the “Solicitation”). This work is reserved for SDVOSBs under NAICS code 541512, with a corresponding size standard of \$34 million; All members of the JV qualify as a small business under the corresponding size standard, and TechWerks, the Managing Venturer, qualifies for the SDVOSB socio-economic designation, making the Joint Venture eligible to bid on and perform this work.

(JVA, Exh. A, Addendum, at 1.)

The Joint Venture Agreement is hereby modified as follows:

**11.0 MAJOR EQUIPMENT, FACILITIES AND OTHER RESOURCES**

Upon award of the Contract, the Parties anticipate providing the following equipment, facilities, and other resources to the Joint Venture.

*To be furnished by TechWerks:*

Major Equipment: TBD at Task Order Level = \$TBD at Task Order Level

Facilities: TBD at Task Order Level = \$TBD at Task Order Level

Other Resources: TBD at Task Order Level = \$TBD at Task Order Level

*To be furnished by other JV Members:*

Major Equipment: TBD at Task Order Level = \$TBD at Task Order Level

Facilities: TBD at Task Order Level = \$TBD at Task Order Level

Other Resources: TBD at Task Order Level = \$TBD at Task Order Level

**12.0 RESPONSIBILITIES REGARDING NEGOTIATIONS, CONTRACT PERFORMANCE AND SOURCE OF LABOR**

12.1 Source of Labor. The Venturers shall generally divide the labor as follows:

TechWerks will provide the Responsible Manager, who is an employee of TechWerks, and will provide the following positions for the Contract:

TBD at Task Order Level

TechWerks will, as appropriate, assign existing personnel or newly hired personnel to fulfill the remainder of its personnel staffing obligations.

Other JV Members will be responsible for providing the following positions for the Contract:

TBD at Task Order Level

Other Members will, as appropriate, assign existing personnel or new hires to fulfill its personnel staffing obligations.

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

12.2 Contract Performance. The Parties each envision performing the following responsibilities for Contract performance:

TechWerks shall perform the duties required for the managing member of the joint venture including task order management and all contractual and regulatory responsibilities.

Other members' duties shall include all contractual and regulatory responsibilities and participate in task order level teams subject to task order agreements reached during contract performance.

(*Id.*, at 2.)

### III. Discussion

#### A. Burden of Proof and Date of Eligibility

As the protested firm 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).

In an SDVOSB status protest pertaining to a procurement, OHA determines a joint venture's compliance with 13 C.F.R. § 128.402 as of the date of final proposal revisions. 13 C.F.R. §§ 128.500(c) and 134.1003(e)(1). Here, NxG submitted its final proposal revisions on June 14, 2023. Section II.A, *supra*. Therefore, OHA must examine NxG's eligibility as of this date, using the version of SBA regulations contemporaneously in effect.

#### B. Analysis

An SDVOSB 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. *Id.* When competing for an SDVOSB procurement, though, the joint venturers must create a written joint venture agreement (JVA) that meets the requirements set forth at 13 C.F.R. § 128.402. 13 C.F.R. §§ 128.401(b) and 128.402(c).

Here, the heart of the protest is that NxG's JVA does not comply with the regulation. Sections II.B, and II.D, *supra*. Protestor argues that NxG is not an eligible joint venture because, as an LLC, it has been through a number of owners, at one time being owned by BEAT as a subsidiary. In its initial protest, Protestor reasons the JVA could not be compliant because its formation as an LLC predated the regulations. However, the applicable JVA here was executed on April 18, 2023, with an Addendum dated April 20, 2023, and thus, it does not predate the regulation. CF, Tab 2 JVA. Next, Protestor argues that NxG has not shown that ownership has



been transferred from BEAT to TechWerks. However, the JVA itself and the signature pages attached, all show a JVA with TechWerks, an eligible SDVOSB, as the managing venturer. Further, every concern involved has submitted a declaration confirming their membership in NxG. *See* CF, Ventures' Declarations and Tab 2 JVA. That some members chose to continue to use pre-existing signature pages and attach them to the current document, does not render it invalid. Further, the Addendum which specifically identifies the subject procurement, was included with the JVA. All the signature pages for the documents predate June 14, 2023, the date of determining eligibility. I therefore must read the CF, Tab 2 JVA and Addendum as whole to determine NxG's eligibility.

Protestor also points to NxG's use of BEAT's address in its SAM.gov profile. However, NxG's response that neither the JVA nor the regulation requires that NxG's records be kept at the SAM address is correct. Section II.C, *supra*. The regulation requires the JVA must designate that the administrative and accounting records must be kept at the office of the managing venturer unless the SBA District Director approves otherwise. 13 C.F.R. § 128.402(c)(9). Here, the JVA does require this, and NxG is the compliant with the regulation. JVA, § 14.1.

Protestor points to a preamble of the regulations, stating that SBA did not intend for eligible joint ventures to be fluid in their composition. 83 Fed. Reg. 66146, 66148 (Oct. 16, 2020). As NxG points out, SBA's concern was related to the exchange of partners in a joint venture after receipt of award. Here, Protestor attempts to argue that NxG's history prior to its submission of its final proposal revisions disqualifies it. However, the regulation, *supra*, does not look into a concern's past ownership. Rather, the joint venture must be eligible as of the date at which its eligibility is determined, and the question of whether other firms have had an ownership interest in the joint venture in the past is irrelevant.

Principally, the JVA identifies TechWerks as the Managing Venturer with responsibility for day-to-day management and administration of the contract (JVA, ¶ 5.0), and Michael Fravel, a TechWerks employee, as the Responsible Manager with ultimate responsibility for contract performance (JVA, ¶ 6.0). This is in compliance with the regulation, which requires that an SDVOSB be named Managing Venturer and an identified employee of the SDVOSB be named Responsible Manager, with responsibility for contract performance. The regulations do not require the Responsible Manager be named in the Addendum, and here, it was identified in the JVA itself. This again complies with the regulation. 13 C.F.R. § 128.402(c)(2).

Protestor points to the Addendum § 12.2, on contract performance, arguing that this provision mandates that staffing at the task order level must be a unanimous decision and thus, it grants impermissible negative control to BEAT. However, the JVA and Addendum, taken as a whole, do not grant BEAT or any other members of NxG negative control. In fact, the JVA provides that TechWerks will be the Managing Venturer of the Joint Venture, "responsible for controlling the day-to-day management and administration of the contractual performance of the Joint Venture." JVA § 5.0. Further, the JVA makes clear "[t]he Managing Venturer, acting through the Responsible Manager, shall have the primary responsibility for ensuring appropriate labor for the effort. Other JV members shall support the Managing Venturer as requested." JVA § 12.1.

Clearly, the JVA gives the Managing Venturer and Responsible Manager the authority to manage the contract, assign labor, and the other Members must support the Managing Venturer as requested. Addendum, § 12.1. I find the CF, Tab 2 JVA and Addendum give control over the assignment of labor to the Managing Venturer, TechWerks, rather than negative control to BEAT or any of the other Members. The JVA also carefully provides that unanimous consent of the Members is required only for certain actions, which permissible and enumerated at 13 C.F.R. § 128.203(j), as those actions do not require the veteran Member to have unilateral power. JVA, § 5.1.

Protestor's allegation that NxG must be relying upon BEAT's bank account appears to be no more than speculation. The JVA contains the required provision regarding the joint venture's bank account. JVA, § 9.0. NxG is to have a special bank account, into which all payments for performance will be deposited, all expenses incurred under the contract will be paid, and any payments to Members for their services performed will require the signature of all parties to the joint venture. *Id.* This meets the requirements of the regulation. 13 C.F.R. § 128.402(c)(5).

I find Protestor's argument that the JVA fails to comply with 13 C.F.R. § 128.402(c)(6), failing to itemize of all major equipment, facilities and other resources to be furnished by each party, is not applicable here when this is an IDIQ contract. The Solicitation seeks a contractor that provides “solutions and services in support of Information Technology (IT)” and indicates “[s]pecific requirements shall be defined in individual Task Orders.” Solicitation, Section C, Performance Work Statement, ¶ 1.0 at 14. The regulation at hand accounts for indefinite contracts and states the JVA must either provide a general description of the equipment and resources to be furnished by each party, or “specify 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.” OHA has held it is reasonable to omit major equipment details in a JVA in the case of a services procurement. *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 20 (2019); *Size Appeal of Alpine/First Preston JV II, LLC*, SBA No. SIZ-5822, at 11 (2017). Further, OHA has held that in the particular case of IT services, no major equipment is required. *VSBC Protest of ThunderYard Liberty JV II, LLC*, SBA No. VSBC-264 at 11 (2024).

More importantly, the JVA provides that “[o]nce a definitive scope of work is made publicly available for the Contract, and (if applicable) for the specific Orders thereunder, the Venturers will jointly review the scope and consider each Venturer's unique capabilities and skillsets, in order to determine a division of major equipment, facilities and other resources best suited to meet the Client's needs in an efficient and effective manner.” JVA § 12.1. The JVA has thus specified how the parties to NxG will furnish resources to the joint venture once specific Task Orders are issued, and how they will jointly review the Task Orders and each venturer's capabilities for the Responsible Manager to assign resources to each Task Order. In light of OHA's precedents, I conclude the instant JVA does comply with the regulation at 13 C.F.R. § 128.402(c)(6).

Next, Protestor's third argument that NxG's JVA fails to comply with 13 C.F.R. § 128.402(c)(7) because it does not sufficiently provide responsibilities regarding negotiation of the contract, source of labor, and contract performance, is not supported by the record. The instant regulation requires that a JVA must contain a provision:

Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available.

13 C.F.R. § 128.402(c)(7), emphasis supplied [sic].

The JVA has a substantial section discussing negotiations, performance and source of labor. Particularly, on negotiations, the JVA § 12.3 clearly provides for the Managing Venturer, who in charge of managing the contract, to be in charge of negotiations. This complies with the regulation, *supra*. As for the JVA addressing the issue of the limitations on subcontracting requirements, JVA § 12.2 supplies the applicable regulations and provides the Managing Venturer will always perform at least 51% of the work of the Joint Venture and such work must be more than merely administrative or ministerial work. This squarely addresses the issue of limitations on subcontracting, providing that for any SDVOSB contract, NxG will comply with the applicable regulations. Thus, the JVA complies with the regulation on this point. 13 C.F.R. § 128.402(c)(7).

As for the remaining issue regarding the scope of work and contract performance, JVA § 12 provides that once a definite scope of work is available, the Venturer will jointly review it, and consider each Venturer's capabilities to determine an appropriate division of labor. It further states that generally, the Venturers will use their existing workforce. Additionally, the Managing Venturer, acting through the Responsible Manager, will have the primary responsibility for ensuring appropriate labor. JVA, § 12.1. As noted above, Addendum, § 12 specifies that TechWerks will assign existing personnel to meet the contract requirements. This is appropriate for the Managing Venturer to have this responsibility falling under the day-to-day management and administration. I thus conclude that the JVA complies with regulation at 13 C.F.R. § 128.402(c)(7).

Lastly, I find that Protestor relies upon cases which are inapposite here. In *Asirtek, supra*, the JVA at issue had been prepared for unrelated 8(a) contracts and the procurement at issue was an SDVO SBC contract, while the Addendum there had been executed after the date for determining eligibility, and thus was not relevant to the case. Here, the Addendum clearly identifies the procurement in question. In *Patriot Strategies, supra*, the contract in question was a

definite contract where the nature of the work, elevator repair and maintenance, was clearly known, and the contract did not clearly state whether the SDVOSB partner would perform at least 40% of the work and its tasks are not to be merely administrative or ministerial duties. Here, the JVA clearly provides for TechWerks to perform 51% of the work and that its duties will not be merely administrative or ministerial.

Accordingly, I find that the CF, Tab 2 JVA, as supplemented by the JVOA and Addendum, satisfies the requirements of 13 C.F.R. § 128.402. I therefore conclude that Protestor has failed to establish that NxG is not an eligible SDVOSB and I DENY the protest.

### III. Conclusion

For the above reasons, Protestor's protest is 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).

CHRISTOPHER HOLLEMAN  
Administrative Judge