Cite as: *CVE Protest of Randy Kinder Excavating, Inc., d/b/a RKE Contractors*, SBA No. CVE-232 (2022)

United States Small Business Administration
Office of Hearings and Appeals

CVE Protest of: Randy Kinder Excavating, Inc., d/b/a RKE Contractors, Protestor, Re: E & L Construction Group, LLC Solicitation No. 36C78621B0004 U.S. Department of Veterans Affairs	SBA No. CVE-232 Decided: June 13, 2022

APPEARANCES

Peter B. Ford, Esq., Samuel S. Finnerty, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Randy Kinder Excavating, Inc. d/b/a RKE Contractors

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DECISION[1]

I. Introduction

This dispute arises from a decision of the U.S. Court of Federal Claims (Court), vacating and remanding the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *CVE Protest of Randy Kinder Excavating, Inc. d/b/a RKE Contractors,* SBA No. CVE-198-P (2021) (*RKE I*). *E&L Constr. Grp., LLC v. United States*, 159 Fed. Cl. 115 (2022) (Court's Order and Opinion). In its decision, the Court found that OHA did not explicitly articulate why the 2018 version of 13 C.F.R. § 125.11 supports its conclusion that the *Wexford* definition remains largely undisturbed, did not provide insight into the continued applicability of pre-2018 SBA decisions to the new regulations that mirrors the pre-2018 VA language, and did not evaluate the effects of *Veterans Contracting Grp., Inc. v. United States*, 743 F. App'x 439, 441 (Fed. Cir. 2018) (*Veterans II*), where "the Federal Circuit chose to dismiss

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

the case, at least in part, due to the effect of the new regulations on the *Wexford* standard." (Court's Order and Opinion, at 8-10.) Thus, the Court remanded the case for further explanation of the legal basis for applying the *Wexford* definition. (*Id.*)

To assist with the remand order, OHA directed the SBA's Office of General Counsel (SBA/OGC) to file comments in response to the Court's remand order. OHA also invited interested parties to submit a response to the Court's remand order and a reply to SBA's comments. OHA received comments from SBA, as well as responses and replies from Randy Kinder Excavating, Inc., d/b/a RKE Contractors (RKE) and E & L Construction Group, LLC (E&L).

Having reviewed the entire record, and after considering all responses, replies, and comment from interested parties and SBA, OHA finds that E&L has failed to establish by the preponderance of the evidence that it is an eligible Service-Disabled Veteran-Owned Small Business (SDVOSB), as explained *infra*.

II. Background

A. Solicitation

On March 17, 2021, the VA issued IFB No. 36C78621B0004 (Solicitation) for a construction project at Fort Sill National Cemetery in Elgin, Oklahoma. The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding $39.5 million annual receipts size standard, as the appropriate code.[2] Bids were due on April 22, 2021.

B. Protest

On April 22, 2021, the bids were opened, and the CO announced that E&L was the lowest bidder and apparent awardee. On April 29, 2021, RKE, an unsuccessful bidder, filed a protest with the CO, challenging E&L's SDVOSB status. In its protest, RKE alleged that E&L's Service-Disabled Veteran and majority owner, Christopher Esponge, does not fully control E&L under 13 C.F.R. § 125.13. (Protest, at 5.) E&L is substantially dependent on a non-veteran, and E&L cannot exercise independent business judgment without great economic risk. (*Id.*)

C. Response

On May 21, 2021, E&L responded to RKE's allegations raised in the initial protest. E&L stated that it is not affiliated or economically dependent on Patriot, as previously determined by the Area Office's Recertification Determination issued on July 20, 2020. (Response, at 1.) E&L

[2] The description under the Solicitation No. 36C78621B0004 identified a $36.5 million annual receipts size standard for the NAICS code 237990. (Solicitation, at 1.) The parties do not dispute the size standard in question. As the error is harmless, further discussion is unnecessary.

explains that Mr. Esponge is the founder, manager, and majority owner of E&L, while Mr. Ben LeBlanc is a minority owner and does not hold an officer or managing position. (*Id.*, at 2.)

D. Supplemental Protest

On June 14, 2021, after reviewing the Case File under the terms of an OHA protective order, RKE submitted a supplemental protest. RKE argued the Case File bolstered its original contentions that E&L is ineligible for this award having failed to inform the CVE of a change in circumstances and is not unconditionally owned or controlled by a Service-Disabled Veteran. (Supp. Protest, at 1-2.)

RKE further argued that E&L does not satisfy the ownership requirement even under the 2020 Operating Agreement. (*Id.*, at 9.) RKE relies on OHA's definition of "unconditional" ownership discussed in *In the Matter of Wexford Group Int'l, Inc.*, SBA No. SDV-105 (2009) (*Wexford*), and 13 C.F.R. § 125.11 to find impermissible limitations on Mr. Esponge's ownership interest in E&L. (*Id.*, 9-10.)

E. Supplemental Response

On June 29, 2021, E&L responded to the supplemental protest. E&L disputed RKE's allegations that the 2020 Operating Agreement contains impermissible conditions on Mr. Esponge's ownership and control of E&L. (Supp. Response, at 1.)

E&L relied on OHA precedent concluding that situations where a minority owner may have the power to block certain extraordinary actions, do not endow the minority owner with negative control if those provisions are crafted to protect the investment of the minority shareholders and not to impede the majority's ability to control the business. (*Id.*, at 6, citing *Size Appeal of Carntribe-Clement 8AJV#l, LLC*, SBA No. Siz-5357 (2012); *Size Appeal of EA Engineering, Sci. and Tech., Inc.*, SBA No. SIZ-4973 *(2008); Size Appeal of Southern Contracting Solutions III, LLC*, SBA No. Siz-5956 (2018).) Therefore, E&L maintained that the provisions of the 2020 Operating Agreement that govern the withdrawal of members, filing for bankruptcy, and amending the operating agreement are permissible.

E&L further argued that *Wexford* is no longer applicable with the promulgation of 13 C.F.R. § 125.11 and its definition of unconditional ownership. In turn, E&L cites to federal court decisions discussing unconditional ownership prior and after the promulgation of 13 C.F.R. § 125.11, to support a finding that SBA should follow this regulation or alternatively, adopt the federal court interpretation of 38 C.F.R. § 74.3 and 13 C.F.R. § 124.3 wherein "normal commercial practices" were referenced. (*Id.*, at 11-12, citing *Miles Construction, LLC v. U.S.*, 108 Fed. Cl. 792 (2013) (*Miles*) and *AmBuild Co. v. U.S.* 119 Fed.Cl. 10 (2014) (*AmBuild*).)

F. 2020 Operating Agreement[3]

E&L's 2020 Operating Agreement was executed on and effective as of April 30, 2020. The Agreement amended and reinstated the 1st Amended and Restated Agreement in full. (2020 Operating Agreement, at 1.)

Under Article 3, Management, § 3.1 states that E&L will have one manager who may also be a member of E&L, and Mr. Esponge is appointed the manager (Manager). (*Id.*, at 6.) § 3.2 further states that within 15 days following bankruptcy, insolvency, resignation, or other removal of a Manager, the remaining Members will call a meeting of the Members to elect a successor Manager. (*Id.*) The meeting will be held within 15 days after notice of the meeting at the principal office of E&L. The successor Manager will be elected upon the vote of Members holding 65% of the ownership interests. (*Id.*)

The Authorities of Manager are set out at § 3.3. It provides he will be the principal executive officer of E&L, will supervise and control all of the business of E&L and will send all required notices to Members. (*Id.*) The Manager, acting alone, will have authority to transact all business of E&L. The Manager may undertake:

> a) Expend the capital and revenues of the Company in furtherance of the Company's business;
>
> b) Enter into and execute, for and on behalf of the Company, such agreements, documents and instruments as the Manager deems necessary and/or appropriate to complete the transactions and arrangements contemplated by and/or described in this Agreement and to further the business of the Company;
>
> c) Open, maintain, and close bank accounts and disburse any money of the Company, including without limitation draw checks and other orders;
>
> d) Borrow money from banks, other lending institutions or persons for Company purposes;
>
> e) Acquire real or personal, movable or immovable, tangible or intangible property in the name of the Company, by purchase, lease, exchange, giving in payment or otherwise;
>
> f) Execute any mortgage, encumbrance, pledge, hypothecation or other security device, and prepay, in whole or in part, refinance, increase, modify, consolidate or expend any mortgage, encumbrance, pledge, hypothecation or other security device;

[3] On May 21, 2021, E&L submitted a response to the protest, along with the 2020 Operating Agreement marked as Exhibit B.

g) Employ, at the expense of the Company, consultants, accountants, attorneys, brokers, management companies, escrow agents, and other professionals as the Manager deems necessary or desirable;

h) Refinance any portion or all of the debt of the Company;

i) Bring or defend, pay, collect, compromise, arbitrate, resort to legal action, or otherwise adjust claims or demands of or against the Company;

j) Lease, sell, exchange, or otherwise dispose of Company Property;

k) Purchase, at the expense of the Company, liability and other insurance and bonds to protect the Manager, the Company and the Company's property and business;

l) The adoption of a plan to liquidate or dissolve the Company; and

m) Any voluntary action that would cause a bankruptcy of the Company.

[. . .]

(*Id.*)

The Manager may delegate some or all of the duties and powers of their office to other persons. (*Id.*, § 3.4.) The Manager who delegates the duties or powers of an office remains subject to the standard of conduct for a Manager with respect to the discharge of all duties and powers so delegated. (*Id.*)

In terms of Restriction of Transfer, § 6.1 provides that:

a) No part of a Member's Ownership Interest Ownership Interest may be sold, exchanged, transferred, assigned, or alienated, whether voluntarily or by operation of law, or by gift or otherwise, without the consent of the Manager, except through a transfer which meets the requirements of this Article 6. Any purported transfer in violation of any provision of this Article 6 will be void and ineffectual and will not operate to transfer any interest or title to the purported transferee.

The Agreement also includes § 6.2 Right of First Refusal.

a) If at any time a Member (the "Proposed Transferor") desires to sell for value all or any part of his Ownership Interest pursuant to a bona fide offer from a third party (the "Proposed Transferee"), the Proposed Transferor will submit a written offer (the "Offer") to sell the Ownership Interest (the ""Offered Ownership Interest") to the Company on terms and conditions, including price, not less favorable to the Company than those on which the Proposed Transferor proposes to sell the Offered Ownership Interest to the Proposed Transferee. . .

b) If the Company desires to purchase all or any part of the Offered Ownership Interest, the Company will communicate in writing to the Proposed Transferor its election to purchase, which communication will state the number of Offered Ownership Interest that the Company desires to purchase and will be given to the Proposed Transferor within 30 days of the date the Company received the Offer. . .

c) If the Company does not purchase all of the Offered Ownership Interest, the Proposed Transferor will submit a similar written offer (the "Second Offer") to sell that percentage of Offered Ownership Interest not purchased by the Company pursuant to this Section 6 (the "Remaining Offered Ownership Interest") to the other Members on terms and conditions, including price, not less favorable to the Members than those on which such Proposed Transferor proposes to sell such Offered Ownership Interest to the Proposed Transferee. Each other Member will have the absolute right to purchase that percentage of Remaining Offered Ownership Interest that is equal to the number of Remaining Offered Ownership Interest multiplied by a fraction, the numerator of which is the percentage of Ownership Interest then owned by the Member and the denominator of which is the aggregate percentage of Ownership Interest then owned by all Members other than Proposed Transferor. . .

[. . .]

g) The rights of first refusal provided in this Section 6.2 shall not apply with respect to sales of Ownership Interest by a Member to an Affiliate of such Member, to the Company or to other Members.

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

§ 6.5 designates Assignees as:

a) Any Person acquiring an interest in the Company by bequest or inheritance or by a transfer permitted by this Article 6 will not become a substituted Member unless and until the conditions of Article 7 have been complied with.

b) Except as otherwise set forth herein, the death, interdiction, dissolution, seizure of an interest in the Company or bankruptcy of a Member will not result in a cessation of that Member's interest in the Company but will effectuate an assignment of that Member's interest to its successor in interest who will not become a substituted Member unless and until the conditions of Article 7 have been complied with; provided, however, that each of such transferees will be allocated the percentage of Company capital, profits, gains, depreciation deductions, losses and Net Cash Flow attributable to the interest in the Company transferred to him or it and will otherwise be treated as a partner for Federal and Louisiana income tax purposes and for purposes of the distribution of cash or other assets to him or it upon the dissolution of the Company pursuant to the Articles and this Agreement.

c) No Member or Assignee of any Member will have the right or power to receive any distribution of its interest in the Company upon his or its cessation as a Member or Assignee, notwithstanding the provisions of La. R. S. 12:1325 or any other provision of applicable law. In the event the preceding sentence is finally determined by a court of proper jurisdiction to be unenforceable, unlawful, or invalid, the amount to be paid will be equal to the Capital Account balance of the Member at the time of his or its cessation as reflected on the books of the Company.

d) No Member may retire or withdraw from the Company without the prior written approval of Members holding 100% of the Ownership Interests.

(*Id.*, at 14.)

§ 6.7 Redemption of Interest of Member consists of:

a) Prior to 180 days before the filing by any Member of a petition for voluntary bankruptcy under Chapter 7 of Title 11 of the United States Code, that Member will give written notice thereof to the Company and will convey to the Company that Member's entire right, title and interest in and to the Company and the Company will purchase same for cash equal to the greater of (i) that Member's positive Capital Account balance on the date of the conveyance (if any), or (ii) $100.

b) In the event the Member fails to give notice to the Company as provided in Section 6.2(a) and in the event a voluntary or an involuntary bankruptcy under Chapter 7 is instituted by or with respect to that Member, the interest of that Member in the Company will be deemed for all purposes to have been sold to the Company 180 days prior to the date on which the voluntary or involuntary bankruptcy or reorganization proceeding is instituted, for cash equal to the greater of (i) the positive Capital Account balance of that Member as of 180 days prior to the institution of those proceedings, or (ii) $100. The amount of cash will be paid to that Member's legal representative in those proceedings.

(*Id.*, at 15.)

§ 6.10 Purchase Option by Company:

a) In the event a Member has i) been indicted or convicted of any felony, ii) except at arm's length, has committed self-dealing acts without the written consent of the Members, iii) has committed fraudulent acts, iv) has committed a material breach of this Agreement or any consulting, employment or other agreement with the Company; or v) terminated any consulting, employment or other agreement with the Company for any reason (each an “Involuntary Transfer Event”), the remaining Members will have the right to cause the Company to acquire some or all of the Member's Ownership Interest under the terms and conditions set forth in this Section 6.10. If the Company desires to purchase some or all of the Member's Units,

> the Company will deliver a written notice of its election to the Member within 60 days after the Involuntary Transfer Event, which communication will state the number of Units that the Company desires to purchase. Sale of the Units to be sold to the Company will be made at the office of the Company on the 90th day after the Involuntary Transfer Event (or if such 90th day is not a business day, then on the next succeeding business day).
>
> b) The purchase price for a Member's Ownership Interest purchased under this Section 6.10 will be the Fair Market Value of the Units as of the Determination Date. The Determination Date for purposes of this section will be the date of the Involuntary Transfer Event.
>
> [. . .]

(*Id.*, at 16.)

Finally, § 11.10 Amendments states:

> Except as otherwise provided, this Agreement may not be amended, changed or modified in any respect without the affirmative vote of Members holding 100% of the Ownership Interests. Notwithstanding the foregoing, the Manager may modify or amend this Agreement so long as such modification or amendment does not affect the economic interest of any party hereto, and any such modification or amendment to this Agreement shall be binding on all Members.

(*Id.*, at 22.)

G. RKE I

On August 17, 2021, OHA issued its decision in *RKE I*. OHA rejected most of RKE's arguments, and then turned to the issue of E&L's ownership. RKE argued that the 2020 Operating Agreement has impermissible clauses limiting the SDV's ownership and control. The regulations require that an SDVO SB must be at least 51% unconditionally and directly owned by one or more Service-Disabled Veterans. 13 C.F.R. § 125.12. In *Wexford*, SBA No. SDV-105, at 6 (2009), OHA addressed the issue of what constituted unconditional ownership, and that it meant there would be no conditions or limitations upon an individual's right to exercise full control and ownership of the concern. OHA then stated that SBA later defined unconditional ownership at 13 C.F.R. § 125.11, adding the exceptions for death, incapacity, and pledges of stock as collateral if the terms follow normal commercial practices, but did not otherwise disturb the *Wexford* definition. 83 Fed Reg. 48908, 48909 (Sep. 28, 2018).

OHA found that the 2020 Operating Agreement places significant limitations on Mr. Esponge's ownership. His ability to sell his ownership interest is limited by the requirement in § 6.2 that provides a right of first refusal to E&L, and if it elects not to purchase his entire interest, to other members. He may not retire or withdraw from the company, without written approval from other members under § 6.5. There are certain “involuntary transfer events” which require

him to transfer his interest to E&L under § 6.10. All of which place significant limitations on Mr. Esponge's ownership of E&L. Accordingly, OHA found that E&L was not at least 51% unconditionally owned by a Service-Disabled Veteran and granted the protest.

H. The Court of Claims Decision

In response to *RKE I*, E&L filed a bid protest with the Court. On March 25, 2022, the Court remanded the matter to OHA. (Court's Order and Opinion.) The Court first considered the question of what unconditional ownership is. It noted that initially SBA's regulations had not defined the term, and thus OHA defined it in the *Wexford* decision:

> In the context of 13 C.F.R. § 125.9, unconditional necessarily means there are no conditions or limitations upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

(Court's Order and Opinion, at 7, citing *Wexford*, SBA No. SDV-105, at 6 (2009).)

The Court then noted the VA regulations had defined the following term:

> Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practice and owner retains control absent violations of the terms.

(*Id.*, citing 38 C.F.R. § 74.3(b) (2011).)

Further, the Court identified two federal court decisions interpreting this regulation, *Miles*, 108 Fed. Cl. 792 (2013) and *AmBuild*, 119 Fed. Cl. 10 (2014). It also acknowledged that in 2018, SBA and VA issued new regulations to consolidate and standardize definitions for SDVO SBs. The definition of unconditional ownership was:

> Unconditional ownership means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral,

> including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(Court's Order and Opinion, at 8, citing 13 C.F.R. § 125.11.)

The Court thus noted that this language is identical to the VA's pre-2018 regulation. Then, it found that OHA's decision in *RKE I* was deficient for three reasons. *RKE I* held that the regulatory revision of 2018 added exceptions to the definition of unconditional ownership but did not otherwise disturb the *Wexford* definition. However, the Federal Register article promulgating the regulation did not mention *Wexford* or discuss the effect of the regulation on the existing case law. (*Id.*, at 9, citing 38 Fed. Reg, 48908 (September 28, 2018).) The Court found that absent a discussion of *Wexford* in the preamble to the regulation, it is unclear how OHA arrived at its conclusion, and it was thus unable to evaluate it. (*Id.*)

Second, the Court found the authority upon which OHA relied, in addition to *Wexford*, is equally flawed. OHA issued *Matter of Veterans Contracting Group, I*nc., SBA No. VET-265 (2017) (*Veterans I*) prior to the issuance of the new regulation, and thus, this decision cannot provide insight into the continued applicability of pre-2018 SBA decisions to the new regulation, which mirrors the pre-2018 VA language. While OHA's decision in *Matter of ALOG Corporation*, SBA No. VET-285 (2020) (*ALOG*) was issued after the 2018 regulations were promulgated, it suffers from the same deficiencies as *RKE I*, and thus provides no aid in understanding OHA's reasoning here. (*Id.*)

Third, the Court noted that the Federal Circuit dismissed as moot *Veterans*, 743 F. App'x 439, 441, which was filed just before the regulations took effect. There, the Federal Circuit stated that the new regulations overturned *Wexford*. The Federal Circuit held that the protestor's request for restoration of its SDVOSB eligibility under the previous SBA regulations was moot. The Court concluded after reviewing *Veterans*, 743 F. App'x 439, 441 (Fed. Cir. 2018) that the Federal Circuit's characterization of the new regulations as overturning *Wexford* was not *dicta* but essential to its holding in the case. (*Id.*, at 10.)

In concluding, absent a sufficiently reasoned basis for the continued use of Wexford, the Court was unprepared to sustain the decision in *RKE I*. The Court thus remanded the case to OHA for further explanation of the legal basis for applying the *Wexford* definition. (*Id.*)

I. Protestor's Response

On March 29, 2022, I instructed the parties to file their responses to the Remand Decision. On April 25, 2022, RKE (hereinafter Protestor) filed its response.

Protestor points out that the *Miles* and *AmBuild* decisions were based upon a previous version of 38 C.F.R. § 74.3, based on the Vets First Contracting Program, and these decisions were issued before October 1, 2018. Protestor further notes that since October 1, 2018, SBA and OHA have continued to uphold the requirement that the service-disabled veteran's ownership of the challenged concern must be unlimited, with no restrictions. The revised regulation continues

SBA's policy of requiring unconditional ownership, but with certain identified exceptions. (Protestor's Response, at 5-6, citing *ALOG*.)

Protestor notes that SBA adopted a definition of unconditional ownership from the 8(a) program. Protestor asserts that SBA's 8(a) program Standard Operating Procedure (SOP) makes clear that there must be no conditions on the interest held by a firm's disadvantaged owners, except arrangements for the death or incapacity of an owner or the pledging of stock as collateral for a loan, if the pledge follows normal commercial practices. The only time a restriction on transfer does not impact unconditional ownership is in the event of death or incapacity. (*Id.*, at 6, citing SBA SOP 80 05 5, Ch. 2D, § 8(b).)

The version of E&L's Operating Agreement in effect on the relevant dates, April 22, 2021, and April 29, 2021, encumbers Mr. Esponge's ability to sell his ownership interest in E&L by requiring him to provide a right of first refusal to E&L, and in event E&L elects not to buy all of Mr. Esponge's ownership interest, to E&L's other members. The Operating Agreement states a Member seeking to sell its ownership interest will submit a written offer to sell that interest to E&L. Mr. Esponge is subject to a forced sale should he desire to sell. This is a condition on Mr. Esponge's ownership and is contrary to the definition in the regulation. (*Id.*, at 7.)

Protestor contends the notion that 2018 regulatory change overturned, or superseded *Wexford* is incorrect. The only change was to provide exceptions in the event of death or incapacity and the pledge or encumbrance of stock or other ownership interest as collateral. The exception for normal commercial practices is limited to provisions involving a pledge of ownership as collateral. (*Id.*, at 8.)

Further, sections 6.5 and 6.10 of the Operating Agreement place further conditions on Mr. Esponge's ownership. Under § 6.5, Mr. Esponge may not retire or withdraw without the written approval of the other members, which is a condition. The Remand Decision did not discuss it and finding in *RKE I* that this places a limitation on Mr. Esponge's ownership is unchanged. In addition, § 6.10 creates “involuntary transfer events” which would require Mr. Esponge to transfer his ownership in the company. Neither section concerns Mr. Esponge pledging his stock as collateral, and so the normal commercial practices exception does not apply. (*Id.*, at 9.)

Protestor distinguishes the *AmBuild* decision, because while the operating agreement at issue there included certain involuntary withdrawal provisions, they involved involuntary withdrawal in event of bankruptcy or having to transfer an interest through a court order or other operation of law. (*Id.*, at 9-10, citing *AmBuild* at 17.) The events in E&L operating agreement were not those where Mr. Esponge's ownership would be placed in custody of a court. They are conditions upon his ownership, as he could commit the acts specified there, and still retain his ownership.

Protestor concludes by arguing that E&L's Operating Agreement also fails to give Mr. Esponge unconditional control of the firm. Except for certain extraordinary circumstances, the SDV must have unfettered control of the concern. (*Id.*, at 11, citing 13 C.F.R. § 125.11.) Mr.

Esponge cannot amend the Operating Agreement on his own (§ 11.10) and cannot elect a successor manager on his own (§ 3.2). (*Id.*)

J. E&L's Response

On April 25, 2022, E&L also responded to the Remand Order. E&L argues that OHA should rely on what it characterizes as existing Federal jurisprudence in applying 13 C.F.R. § 125.11. The language there is identical to the language in the pre-2018 VA regulation on the same subject. The Court of Federal Claims (COFC) has already analyzed this language, and OHA should rely on the existing federal jurisprudence. COFC has held the regulation modifies "unconditional ownership" to mean something other than the categorical bounds of the dictionary definition of the word "unconditional." (E&L Response at 3, citing *Miles* at 802, emphasis supplied.) The regulation "sets forth prohibited arrangements that would cause ownership interests to vest in non-veterans while accommodating and providing exceptions for normal commercial arrangements." (*Id.*, citing *AmBuild* at 23.) E&L argues these interpretations are far less restrictive than the *Wexford* standard, and the Federal Circuit has confirmed that SBA's adoption of 13 C.F.R. § 125.11 "effectively overturned *Wexford*." (*Id.*, citing *Veterans II* at 441.)

E&L further argues that the Operating Agreement does not place impermissible conditions on Mr. Esponge's ownership. Rights of first refusal are valid, are a normal commercial practice and are not listed as one of the impermissible ownership conditions at 13 C.F.R. § 125.11. They do not burden either party with unperformed obligations that would constitute a material breach if not performed. (*Id.*, at 5, citing *Miles*.)

Right of first refusal clauses are not executory contracts and are thus permissible under the regulation. An executory agreement is one that requires a party to act. If a provision is not an executory agreement as understood under 13 C.F.R. § 125.11, it is not a prohibited restriction on the subject concern. E&L relies on this language in *Miles*:

> In sum, the right of first refusal provision in Article IX is not presently executory, *is a standard provision used in normal commercial dealings, and does not burden the veteran's ownership interest* unless he or she chooses to sell some of his or her stake. As a result [the right of first refusal provision] does not affect the veteran's unconditional ownership.

(*Id.*, citing *Miles* at 803, emphasis supplied.)

Similarly, a condition subsequent prohibited by the regulation requires an affirmative action, and a condition precedent would force the SDV to do something to retain his ownership interest. Absent a requirement to act in order to keep his or her ownership interest no condition subsequent is created by the provision. Even notwithstanding the inapplicability of *Wexford*, the Operating Agreement here is distinguishable from that considered in *ALOG* because it does not contain a forced sale arrangement, mandatory redemption provisions, or any other condition impermissible under SBA's regulations. (*Id.*, at 6.)

Addressing § 6.5(d) of the operating agreement, which prohibits the withdrawal of a Member without the written approval of all the members, E&L maintains SBA has previously determined that minority owners may have the ability to block certain actions to protect their investment without impeding the majority's ability to control the business. These actions include minority approval for the withdrawal of members. This is therefore within the definition of unconditional ownership. (*Id.*, citing *Size Appeal of Carntribe-Clement 8AJV#1, LLC*, SBA No. SIZ-5357 (2012); *Size Appeal of EA Engineering, Sci. and Tech, Inc.*, SBA No. SIZ-4973 (2008); *Size Appeal of Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018).)

E&L then considers § 6.10 of the Operating Agreement, which allows the company to buy back the shares of a member who is a bad actor, who could cause the concern to lose its SDVOSB status due to a lack of good character. E&L maintains this section cannot be considered a disallowable restriction on unconditional ownership because these acts would cause the concern to lose its SDVOSB status. This allows the minority member to protect his investment. This section is a standard practice used to resolve ownership issues from involuntary transfers. E&L concludes that OHA's finding it outside the scope of unconditional ownership is arbitrary and capricious and contrary to law. (*Id.*, at 7-8.)

K. SBA's Comments

On May 2, 2022, SBA's OGC filed its comments on this case. SBA stated that the *Wexford* standard for unconditional ownership continues to apply despite the consolidation of SBA and VA regulations in 2018. The 2018 revision added a definition of unconditional ownership nearly identical to the pre-2018 definition used by VA and SBA's 8(a) Business Development Program. SBA clearly articulated in the proposed and final rule that the agency did not adopt the VA's definition from 38 C.F.R. § 74.3(b) but instead adopted the 8(a) definition in 13 C.F.R. § 124.3. SBA thus rejected the pre-2018 VA definition and any case law interpreting VA's language. (Agency Comments, at 1-2.)

SBA asserts the argument the 2018 regulatory change overturned the *Wexford* standard is incorrect and contrary to SBA's intent. SBA's intent was merely to add limited exceptions to the *Wexford* standard in the event of death or incapacity or the pledge or encumbrance of stock or other ownership interest as collateral. Had SBA sought to add more exceptions or to adopt the VA interpretations, SBA would have so stated in its rulemaking. (*Id.*, at 2.)

SBA states that a straightforward reading of the definition of unconditional ownership in 13 C.F.R. § 125.11 is that any condition or arrangement that may cause the transfer of ownership to another person or entity other than the SDV would violate the unconditional ownership requirement except in three limited circumstances: death, incapacity or a pledge of ownership interest as collateral under normal commercial terms. No other conditions to ownership outside of those specifically identified in § 125.11 are valid. (*Id.*)

In 2018, SBA issued a final rule to consolidate ownership and control regulations for use by SBA's service-disabled veteran-owned small business contracting program. This consolidation included adding the definition of "unconditional ownership" to 13 C.F.R. § 125.11. Although VA and SBA's 8(a) program had nearly identical definitions prior to 2018, the

interpretation of these regulations diverged significantly. SBA argues it sought to ensure the proper interpretation was articulated in the revision, by clearly establishing in the preambles of both the proposed and final rules by stating that it was adopting the 8(a) definition of unconditional ownership, rather than the nearly identical definition at 38 C.F.R. § 74.3(b). SBA signaled its intent to limit exceptions to only those specifically mentioned in the definition, rejecting a comment that the definition be subject to the same conditions as "extraordinary circumstances." SBA's adoption of the 8(a) definition thus rejects the pre-2018 VA definition and its interpretations in *Miles* and *AmBuild*. SBA's interpretation of "unconditional ownership" has not waivered, the SDV's ownership must be unlimited, with no restrictions whatsoever and the ability to dispose of their shares as they choose. (*Id.*, at 3, citing 83 Fed. Reg. 4005, 4006 (January 29, 2018) and 83 Fed. Reg. 48,908, 48,909 (September 28, 2018).)

L. E&L's Reply to SBA's Comments

On May 9, 2022, E&L responded to the SBA comments. E&L argues SBA failed to provide the explanation for the continued use of the *Wexford* standard, as directed by the Court, and instead simply focuses on the meaning and intent of the regulations. E&L emphasizes that *Wexford* held, in the absence of a regulatory definition, that the unconditional ownership requirement should rely on the plain meaning of the word 'unconditional.' Twelve years after *Wexford* was decided, SBA amended its regulations to add a definition of unconditional ownership. This definition prevents any application of the *Wexford* standard because there is now a regulatory definition to rely upon. There is no basis for a continued reliance upon *Wexford*. (E&L's Reply, at 1-2.)

E&L finds confusing SBA's argument that the definition in the regulation was taken, not from the VA's regulatory scheme, but from SBA's 8(a) program. There is no connection between the 8(a) definition and *Wexford*, and no 8(a) decision has referenced *Wexford* because there is a regulatory definition to rely upon. (*Id.*, at 2.) E&L further points out the COFC found *Wexford* a sharp departure from the definition of unconditional ownership for the 8(a) program, which built in nuances virtually identical to the VA's definition, including the allowance to follow normal commercial practices common to each of them. E&L argues SBA's explanation is unreasonable because the 8(a) program does not use the *Wexford* definition and this definition led to veterans being treated differently than in other SBA programs. SBA is using the same language in its regulation for veterans' programs as in the 8(a) program, but still seeks to treat veterans differently. E&L argues SBA should not only find that it is unconditionally owned by Mr. Esponge, but to abandon *Wexford* entirely. (*Id.*, at 3, citing *Veterans Contracting Group, Inc. v. U.S.* 135 Fed. Cl. 610 (2017), aff'd. 920 F. 3d 801 (Fed, Cir. 2019).)

M. Protestor's Reply to SBA's Comments

On May 9, 2022, Protestor responded to SBA's Comments. RKE states that it fully concurs with SBA's Comments and SBA's interpretation of the definition of unconditional ownership as defined in 13 C.F.R. § 125.11 and as required under 13 C.F.R. § 125.12, consistent with the plain language of the regulation and SBA's prior interpretations of its own regulation. Indeed, SBA has consistently found that a right of first refusal places conditions on an SDV

ownership, contrary to the requirement that the SDV owner must have *unconditional* ownership. (Protestor's Reply, at 1.)

Protestor revisits SBA's Comments and states there are very limited exceptions to the requirement for unconditional ownership of an SDVOSB, which include in the event of death or incapacity and the pledge or encumbrance of stock or other ownership interest as collateral. That is consistent with the plain reading of the regulation:

> *Unconditional ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death [or] incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(*Id.*, at 2, citing 13 C.F.R. § 125.11, emphasis supplied.)

Protestor highlights that OHA has explained an "agency's interpretation of a regulation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulations, adjudicatory bodies will, as a general rule, defer to it unless that interpretation is 'plainly erroneous or consistent with the regulation'" (*Id.*, citing *Size Appeal of Digital Mgmt., Inc.*, SBA No. SIZ-5709 (2016) (quoting *Chase Bank, USA, N. A. v. McCoy*, 562 U.S. 195, 208 (2011))).

Protestor asserts SBA did not include a definition of unconditional ownership for SDVOSBs in its regulations until 2018. However, it adopted the definition from its regulations governing the 8(a) business development program in 83 Fed. Reg. 48,908, 48,909 (Oct. 1, 2018). As it relates to the 8(a) and SDVOSB program, SBA has consistently taken the position that a right of first refusal renders the qualifying owner's ownership conditional and, thus, is not permissible. (Protestor's Reply, at 3, citing SBA SOP 80 05 5, Chpt, 2D, § 8(b).)

As for the COFC interpretation of the definition of unconditional ownership in *Miles Construction* and *AmBuild*, they involved a VA regulation, not SBA, and should be given no merit. The COFC has even recognized that that "SBA is the best interpreter of its own regulations" in *Team Waste Gulf Coast, LLC v. United States*, 135 Fed. Cl. 683, 687 (2018). As a general rule, the COFC "defers 'even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly suited to speak to its original intent in adopting the regulation.'" (*Id.*, citing *Mission Critical Sols. v. United States*, 96 Fed. Cl. 657, 662 (2011) (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006)).

Protestor recognizes that OHA has consistently held, both before and after the definition of unconditional ownership existed in SBA's SDVOSB regulations, that the SDV owner must be able to do what he or she wants with his or her ownership, when he or she wants. (*Id.*, at 3-4,

citing *Int'l Logistics Grp., LLC*, SBA No. VET-162 (2009) (finding ownership conditional where SDV owner could not sell her ownership to anyone she chooses); *see also Veterans Constr. Servs., Inc.*, SBA No. VET-167 (2009) (finding SDV ownership not unconditional where he "simply does not have an absolute right to do anything he wants with his ownership interest at any time he wants."); *Veterans I*, SBA No. VET-265 (2017) ("SBA regulation at § 125.12 requires that the SDV's ownership be unconditional, without condition or limitation upon the individual's right to exercise full ownership and control of the concern."); *ALOG Corp.*, SBA No. VET-285 (2020) (noting corporation's right of first refusal places restriction on SDV's owner's ownership and renders ownership conditional).)

Given that its interpretation is consistent with prior interpretations, deference to SBA's interpretation is warranted here. (*Id.*, at 4, citing *Analytic Strategies, Inc.*, SBA No. VET-268 (2018) (noting deference established by Auer v. Robbins, 519 U.S. 452, 461 (1997) is "particularly warranted where the agency's interpretation is consistent with prior interpretations.").) Further, SBA has consistently taken the position and interpreted the requirement for unconditional ownership that "any condition or arrangement that may cause the transfer of ownership to another person or entity would violate the unconditional ownership requirement" except in the three limited circumstances that were added in 2018. (*Id.*, citing SBA's Comments at 2.)

Highlighting the E&L Operating Agreement at § 6.2, Protestor explains that here, if Mr. Esponge wants to set all or part of his ownership interest in E&L, the company's Operating Agreement in effect on the relevant dates requires that Mr. Esponge first offer to sell his ownership to E&L, then to the other members, and only if the company and/or the other members decline to purchase his ownership, may he then sell it to the person or entity of his choosing. (*Id.*) This clearly places a restriction on Mr. Esponge's ability to dispose of his ownership and it does not only apply in the event of death or incapacity. Accordingly, there is a condition on Mr. Esponge's ownership and SBA's stance on the impermissibility of a right of first refusal has remained unchanged. As such, E&L is not a compliant SDVOSB for the instant IFB.

III. Discussion

A. Burden of Proof

As the protested firm, E&L has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010.

B. Dates to Determine Eligibility

In a CVE Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of two dates: (1) the date of the bid or initial offer including price, and (2) the date the CVE Protest was filed. *See* 13 C.F.R. § 134.1003(d)(1). Here, E&L submitted its bid on April 22, 2021, and the instant protest was filed on April 29, 2021. Section II.C, *supra*. Therefore, OHA must examine E&L's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more Service-Disabled Veterans. 38 C.F.R. § 74.2(a); 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Blue Cord Design and Construction, LLC*, SBA No. CVE-100-P (2018). The control requirements for SDVOSBs are found at 13 C.F.R. part 125. *See* 38 C.F.R. § 74.4, "[c]ontrol is determined in accordance with 13 C.F.R. part 125."

C. Analysis

OHA initially addressed the issue of an SDVOSB's unconditional ownership in *Wexford*, SBA No. SDV-105, at 6 (2009), and addressed the issue of what constituted unconditional ownership:

> In the context of 13 C.F.R. § 125.9, unconditional necessarily means there are no conditions or limitations upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

Wexford, at 6.

In continuing to uphold the *Wexford* standard, OHA did not adopt the standard articulated by the COFC in *Miles*, 108 Fed. Cl. 792 (2013).[4] There, the Court considered the VA's regulation defining unconditional ownership:

> Ownership must not be subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restriction on assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

38 C.F.R. § 74.3(b) (2013) cited in *Miles*, at 799.

[4] As noted in *RKE I*, OHA further held that provisions of an operating agreement dealing with the bankruptcy of an owner do not render that ownership conditional. *RKE I*, at 22, citing *Matter of Veterans Contracting Group, Inc*. SBA No. VET-265, at 8 (2017).

The COFC in *Miles* held that this provision was different from that expressed in *Wexford* and modifies unconditional to mean something other than the dictionary definition of unconditional, and that a right of first refusal is not an executory contract because it does not burden either party with unperformed obligations that would constitute a material breach if not performed, and that it is further a "normal commercial practice" that does not hinder a veteran's interest unless they receive a bona fide offer and choose to sell. *See Miles*, at 801-803.

In *AmBuild*, 119 Fed. Cl. 10 (2014), the COFC relied on the same regulation holding that it sets forth prohibited arrangements that would cause ownership to vest in non-veterans, while accommodating and providing exceptions for "normal commercial arrangements." *See AmBuild*, at 23. OHA declined to adopt these cases to find the meaning of "unconditional ownership" under the regulation. *See Veterans I*, SBA No. VET-265, at 9-10 (2017).

In 2018, SBA issued new regulations covering the issues of ownership and control of Veteran Owned and SDVO SBs, providing one set of definitions for both the VA and SBA programs. The definition is:

> *Unconditional ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity). The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

13 C.F.R. § 125.11, italics in original.

Although the VA and the SBA 8(a) BD program had nearly identical definitions prior to 2018, the interpretations diverged. SBA clearly states in the preambles of both, the proposed and final rules, that the source for the regulation is the definition of unconditional ownership from SBA's 8(a) BD program found at 13 C.F.R. § 124.3. *See* 83 Fed. Reg. 4005, 4006 (January 29, 2018). SBA said nothing about abandoning the longstanding *Wexford* definition. The final rule did not alter the proposed rule on this issue, emphasizing that SBA was adopting the definition from the 8(a) BD program, and rejecting a comment that the definition should be subject to the same conditions as "extraordinary circumstances" because SBA did not want to conflate ownership and control requirements. SBA, thus, signaled its intention to limit exceptions only to those specifically mentioned in the definition under 83 Fed. Reg. 48908, 48909 (September 28, 2018).

The definition of unconditional ownership was thus taken from SBA's 8(a) BD program. SBA's SOP on the 8(a) BD program discusses unconditional ownership in more detail:

> (1) In reviewing the ownership structure of an applicant firm, the BOS [Business Opportunity Specialist] must verify that there are no conditions on the interests held by the firm's disadvantaged owners. The interests of the disadvantaged owners

> cannot be subject to any executory agreements, voting trusts, restrictions on or assignments of voting rights, or any other arrangements or conditions that could result in the transfer of their interests to other parties. This restriction does not include arrangements for the transfer of ownership interests in the event of the holder's death or incapacity.
>
> (2) If an applicant has pledged or encumbered his or her stock or other ownership interest as collateral on a loan or other obligation, this does not violate the requirement of unconditional ownership. However, the terms of the loan or obligation must follow normal commercial practices and the disadvantaged owner must retain control over the firm unless and until there is a default on the loan or obligation.

SBA SOP 80 05 5, Chapter 2D, § 8(b), emphasis supplied.

The extended discussion in the 8(a) BD SOP thus emphasizes that there can be no conditions on the interests held by the owners of the firm upon whom the firm's claim of eligibility is based. It also further clarifies that the exception for terms which follow "normal commercial practices" is limited to pledges or encumbrances of an ownership interest as collateral. Thus, the only circumstance in which the "normal commercial practices" standard can be used to find that a provision does not compromise an SDV's unconditional ownership is in the case of a pledge or other encumbrance of an ownership interest. This is in contrast to the course taken by the COFC in *Miles* and *AmBuild*, which measured other terms of a challenged concern's ownership agreement by whether they followed "normal commercial practices." Under the SBA regulations, that standard can only be considered in evaluating a pledge or encumbrance of the ownership interest of the individual upon whom a concern's claim of eligibility is based. The "normal commercial practices" standard cannot be used to determine whether any other provision renders an individual's ownership conditional.

The Comments by SBA's Office of General Counsel emphasize that SBA continues to adhere to the interpretation of "unconditional ownership" that the term requires that the Service-Disabled Veteran owner immediately and fully own his or her ownership interest and be able to dispose of it as they want without any restrictions. They must "immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want." SBA has consistently maintained this interpretation over the years. Deference to SBA's interpretation is thus warranted here, because it is consistent with the prior interpretations. *Matter of Analytic Strategies, Inc.*, SBA No. VET-268, at 15 (2018). The Court of Federal Claims has observed that "SBA is the best interpreter of its own regulations." *Team Waste Gulf Coast, LLC v. United States*, 96 Fed. CL. 657, 662 (2011). Further, a court "defers even more broadly to an agency's interpretation of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly suited to speak to its original intent in adopting the regulation." *Mission Critical Solutions v. United States*, 96 Fed. Cl. 657, 662 (2011) quoting *Gore v. U.S. Postal Service*, 451 F. 3d 831, 836 (2006).

Therefore, I conclude that the *Wexford* standard remains undisturbed, that by adopting the 8(a) standard for unconditional ownership SBA's regulations require that there must be no

conditions upon an SDV's ownership of a firm in order for it to be found to be unconditionally owned by an SDV. The exceptions are agreements dealing with the death, incapacity or bankruptcy of a shareholder, and the pledge of stock as collateral if the terms follow normal commercial practices. The regulation enumerates several types of contracts which are found to place conditions on an owner's interest, but the list is not exhaustive. A pledge or encumbrance of an ownership interest may be found not to place a condition upon an ownership, providing it follows normal commercial practices. Again, it is important to note that the exception the regulation carves out for "normal commercial practices" is limited to provisions involving the pledge of an ownership interest as collateral.

While the COFC in *Veterans II*, 743 F. App'x 439 (Fed. Cir. 2018), did state that the 2018 regulations overturned *Wexford*, this is *dicta* because the case was dismissed as moot because the Government had terminated the contract at issue and "because each of the remedies VCG originally requested is now beyond the power of the court to grant." *Id.*, at 440. As explained above, SBA regulations did not invalidate *Wexford*. Therefore, the holding of *Veterans II*, dismissing on the grounds of mootness, does not compel a rejection of SBA's interpretation of the regulation discussed *supra*.

Accordingly, I reaffirm the finding in the earlier decision:

> Applying the regulations to this case, the 2020 Operating Agreement places significant limitations on Mr. Esponge's ownership. His ability to sell his ownership interest is limited by the requirement in § 6.2 that provide a right of first refusal to E&L, and if it elects not to purchase his entire interest, to other members. He may not retire or withdraw from the company, without written approval from other members under § 6.5. There are certain "involuntary transfer events" which require his to transfer his interest to E&L under § 6.10. All of which place significant limitations on Mr. Esponge's ownership of E&L.
>
> EE&L argued that OHA's holding in *Carntribe-Clement 8AJV#l, EA Engineering, Sci., Tech., Inc.*, and *Southern Contracting Solutions III, DHS Systems*, and *Dooleymack Government Contracting*, that certain normal commercial practices are exceptions to ownership in the context of size appeal, should apply in this case. *Id.* However, the regulations governing SDVOSB are clear about ""ownership" and "exceptions," and do not allow for the type of provisions which can be characterized as the protection of minority investment in these size appeal cases, *supra*

RKE I, at 22-23.

Thus, I also reaffirm the earlier holding in *RKE I*, that E&L is not at least 51% unconditionally owned by an SDV, and therefore I must GRANT the protest.

IV. Conclusion

E&L has failed to establish by the preponderance of the evidence that it is an eligible SDVOSB. The protest therefore is GRANTED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN
Administrative Judge