

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

VSBC Protests of:

Beshenich Muir & Associates, LLC &
ELB Services LLC,

Protestors,

Re: YKJY LLC

Solicitation No. FA8217-22-R-0001

U.S. Department of Air Force Consolidated

SBA No. VSBC-292-P

Decided: July 19, 2023

APPEARANCES

Matthew T. Schoonover, Matthew P. Moriarty, John M. Mattox II, Ian P. Patterson,
Timothy J. Laughlin, Schoonover & Moriarty LLC, Olathe, KS. for ELB Services LLC

Emily J. Chancey, Joshua B. Duvall, Jon D. Levin, Nickolas P. Greer, Maynard Nexsen,
P.C., Huntsville, AL, for Beshenich Muir & Associates, LLC

Judith B. Kassel, Saul Ewing LLP, Washington, DC, for YKJY, LLC

DECISION¹

I. Introduction and Jurisdiction

On March 30, 2023, the Contracting Officer (CO) for the U.S. Department of the Air Force (Air Force), Directorate of Contracting AFLCMC PZZK, forwarded to the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) a status protest filed by Beshenich Muir & Associates, LLC (BMA) against YKJY, LLC (YKJY) in connection with the Air Force Solicitation No. FA8217-22-R-0001. Additionally, on March 31, 2023, the CO forwarded to OHA a status protest filed by ELB Services LLC (ELB) against YKJY in connection with the Air Force Solicitation. Protestors allege that YKJY is not eligible for the subject Service-

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

Disabled Veteran-Owned Small Business (SDVOSB) set aside because its SBA's Mentor Protege Joint Venture agreement does not comply with SBA's regulations. For the reasons discussed *infra*, the protests are GRANTED.

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. Protesters filed protests within five business days of receiving notification that YKJY was the apparent awardee, so the protests are timely. 13 C.F.R. § 134.1004(a)(2)(i). Accordingly, these matters are properly before OHA for decision.

II. Background

A. Solicitation

On June 6, 2022, the Air Force issued Solicitation No. FA8217-22-R-0001. (Solicitation, at 1.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 541513, Computer Facilities Management Services, with a corresponding \$30 million annual receipts size standard, as the applicable code. (*Id.*) The purpose of the solicitation was “to provide support and sustainment for Mission Planning systems to CONUS/OCONUS operational units and FMS customers.” (Solicitation, Section L.1.0., at 2.) The Performance Work Statement (PWS) calls for a “Mission Planning Support Contract (MPSC) [that] ensures sustainment infrastructure is established to support all Mission Planning Environments (MPEs) and future JMPS Open Mission Systems (JOMS) deployment environments . . . [s]ustainment of MPEs includes configuration management and control, drafting and publishing of technical documentation, system checkout, fielding, supply, maintenance, supplemental training, customer assistance visits” (Solicitation, PWS, at 4.)

Request for Proposals (RFP) were due July 27, 2022 and final proposal revisions were due January 18, 2023. Protesters and YKJY submitted timely RFPs. On March 23, 2023, the CO issued a pre-award notice, *Identifying YKJY as the successful offeror.*

B. BMA's Protest

On March 28, 2023, BMA filed a protest with the CO, challenging YKJY's SDVOSB status. (BMA Protest, at 1.) BMA asserts YKJY's joint venture agreement was prepared before substantive changes to the regulation, but was not updated and thus, “does not address SBA's current regulatory requirements.” (*Id.*, at 4.)

BMA maintains YKJY can not address the performance of work in the solicitation without updating the prior joint venture agreement. (*Id.*) According to BMA, YKJY's amended records list two individuals as YKJY, but failed to list Young Engineering Services, Inc. (YOUNG), the SDVOSB protege concern, as required under SBA regulations. (*Id.*) BMA maintains YKJY consequently violates SBA's joint venture regulation and any update to the joint venture agreement renders YKJY ineligible for the contract. (*Id.*, at 4-5.) BMA further asserts the joint venture appears to be owned and/or managed by two individuals, which is contrary to the

SBA regulation that requires the joint venture be owned by the companies in the mentor-protege relationship and managed by the SDVOSB protege concern. (*Id.*) Specifically, SBA regulations mandate that joint venture agreements are between the protege firm and its mentor, as well as include the SDVOSB as the managing venture per 13 C.F.R. §§ 125.18(b)(1)(ii) and (b)(2)(ii).² (*Id.*, at 5.) BMA maintains, however, that Utah public records suggest YKJY is not owned by the companies in the mentor-protege relationship and managed by YOUNG, the SDVOSB protege concern and thus, fails to comply with SBA regulations. (*Id.*) BMA further deduces that the joint venture fails to comply with SBA regulations because the day-to-day management and administration is not controlled by YOUNG, the SDVOSB protege, but two individuals. (*Id.*)

Next, BMA asserts YKJY's organization under Utah law contradicts SBA joint venture requirements. Specifically, the joint venture is managed equally by two individuals and not the SDVOSB protege. (*Id.*) BMA deduces that any “potential conflict would cast serious doubt as to whether the management of the joint venture truly rests with the SDVOSB protege, SBA should find that YKJY is ineligible for award under the Solicitation.” (*Id.*, at 5-6.)

Alternatively, BMA asserts that even if YKJY was not a mentor-protege joint venture, it remains ineligible for the award because KIHOMAC, Inc. (KIHOMAC), the mentor firm is a large business under the solicitation. (*Id.*) Thus, YKJY does not qualify as SDVOSB because (1) it is not a small business concern, and (2) it is not unconditionally owned and controlled by an SDV. (*Id.*, at 6-7.)

C. ELB's Protest

On March 30, 2023, ELB filed a protest with the CO, challenging YKJY's SDVOSB status. (ELB Protest, at 1.) First, ELB alleges affiliation between YOUNG and KIHOMAC (the venturers constituting YKJY) and asserts YKJY is large under the NAICS code 541513. (*Id.*, at 3.) Next, ELB asserts YKJY is not an eligible SDVOSB because YKJY fails to “structure the joint venture with the corporate venturers as owners, and to name YOUNG, the protege venturer, as the 51% owner.” (*Id.*, at 4.) Specifically, ELB alleges YKJY's SAM profile list noncorporate owners, Ki Ho Kang and Steve Rogers, which does not meet joint venture regulations. (*Id.*)

Further, ELB asserts YKJY's joint venture agreement does not comply with SBA regulations because it fails to explain how YOUNG will perform the contract and meet the 40% work share requirement. (*Id.*) ELB also alleges that YOUNG is a home-based business and thus, unable to provide the best support in the most efficient manner, as required by the Air Force solicitation. (*Id.*, at 5.) ELB suggests YOUNG does not have adequate space, equipment, or personnel for contract performance. (*Id.*) According to ELB, YKJY's JVA fails to meet the joint venture requirements because YOUNG is unable to fulfill contract requirements due to its location at its principal's residence. (*Id.*) ELB suggests YOUNG will rely on KIHOMAC, the large business venturer and its mentor, to perform under the contract. (*Id.*) YKJY's joint venture

² This section was removed, effective January 1, 2023. See 87 FR 73400, 73412, Nov. 29, 2022. The rule for the Veteran Small Business Certification (VSBC) Program may now be found at 13 C.F.R. §§ 128.402(b)(2) and (c)(2), respectfully

agreement also lacks details regarding task performance and the labor YOUNG intends to furnish for the contract. (*Id.*)

D. YKJY's Response

On April 18, 2023, YKJY filed a Response to the Protests. (Response at, 1.) First, YKJY submits additional background information. (*Id.*, at 2.) Specifically, YOUNG self-certified its status as a SDVOSB. KIHOMAC is a large business with its principal office located in Reston, Virginia. (*Id.*) On, October 6, 2016, YOUNG and KIHOMAC entered an SBA approved mentor/protege agreement. (*Id.*, at 3.) Under the agreement, YOUNG and KIHOMAC formed YKJV on May 31, 2017. (*Id.*) On June 10, 2022, YOUNG and KIHOMAC entered into an Operating Agreement (JVOA), which serves as the joint venture agreement and governs the management of YKJY. (*Id.*)

Second, YKJY asserts Protestors allegations are “facially deficient for lack of specificity” because Protestors fail to *Identify* which allegations relate to YKJY's SDVOSB status and which relate to the size determination. (*Id.*, 4-5.)

YKJY further asserts that it maintains an SBA approved mentor/protege agreement and satisfies the joint venturer ownership requirements. (*Id.*, at 5.) YKJY rejects BMA's assertion that it is not in compliance with SBA regulations because the joint venture is comprised of two individuals, and YKJY maintains it is an LLC formed under Utah law. (*Id.*) Under YKJY's JVOA, YOUNG owns 51% of YKJY, while KIHOMAC owns 49%. (*Id.*, at 6.) Thus, YKJY asserts “[t]his ownership structure complies with 13 C.F.R. § 125.18.” (*Id.*)

Next, YKJY asserts that it satisfies the workshare requirements under SBA's joint venture regulations. (*Id.*, at 6-7.) YKJY rebuts ELB's assertion that YKJY cannot perform the 40% minimum workshare requirement. YKJY asserts the “[JVOA] specifically addresses workshare requirements.” (*Id.*, at 7.) Specifically, under Paragraph 5.5 of the JVOA provides that performance from each member will be consistent with ownership percentages. (*Id.*, citing JVOA ¶ 5.5.) Further, the JVOA confirms that the joint venture shall perform “the applicable portion of the work under the Resultant Contract.” (*Id.*, citing JVOA ¶ 5.4.) YKJY notes that ELB's assertions regarding YOUNG's ability to perform under the contract are “issues of responsibility beyond the preview of [OHA]” and “lies firmly within the [contracting officer's] purview.” (*Id.* at 7, citing *Size Appeal of Spiral Sols. & Techs., Inc.*, SBA No. SIZ-5279 (2011).)

Lastly, YKJY maintains it fully complies with the remaining provisions for a joint venture under 13 C.F.R. § 125.18.³ (*Id.*, at 8.) Specifically, the JVOA confirms that YOUNG, as the protege and manager of YKJY, is responsible for administrative matters, including accounting, record-keeping, policy and procedure development, and business administration. (*Id.*) Further, Paragraph 5.1 of the JVOA confirms the Protege employee shall serve as the Project Manager of the contract and shall be responsible for contract negotiation, as well as manage other matters related to administration and performance of the contract. (*Id.*, at 9, citing JVOA ¶ 5.1.)

³ The rule for the VSBC Program may now be found at 13 C.F.R. § 128.402.

E. ELB's Supplemental Protest

On April 28, 2023, ELB filed a supplemental protest. ELB asserts that YOUNG, the purported protege venturer, is not a SDVOSB, thus YKJY cannot be a SDVOSB. (ELB's Supplemental Protest, at 1.) Specifically, YOUNG's Bylaws do not provide that Steve Rogers, the firm's only SDV, holds requisite control. (*Id.*)

According to ELB, YOUNG's Bylaws suggest Mr. Steve Rogers does not hold control over the Board of Directors (the Board) because the firm's only other board member, Sarah Rogers, “possess invalidating direct and negative control.” (*Id.*, at 2.) Specifically, under the Bylaws, Ms. Sarah Rogers “[p]ossesses equivalent voting power on the board of directors . . . [h]as power to prevent quorums at both board of directors meetings and shareholder meetings; and . . . [c]ontrols the firm in Mr. Steve Rogers' ‘absence.’” (*Id.*) (citation omitted.) ELB thus asserts that these functions negate YOUNG's SDVOSB status, thereby negating YKJY's SDVOSB status. (*Id.*) Citing YOUNG's Bylaws, ELB further asserts that YOUNG's Board consist of two owner-directors, Mr. Steve Rogers and Ms. Sarah Rogers, who are also the voting members of the Board. (*Id.*, at 3.) ELB deduces that Ms. Sarah Rogers can block Mr. Steve Rogers' vote on the Board. (*Id.*) Because the Bylaws are silent on voting power, ELB cites to Utah corporate law to fill in the gap and argues that Mr. Steve Rogers has one vote on the Board, while Ms. Sarah Rogers holds an equally weighted one vote. (*Id.*) ELB further deduces that because YOUNG's Bylaws fail to “implement a weighted voting system favoring Steve Rogers, he cannot singlehandedly control [YOUNG's] board of directors.” (*Id.*) Mr. Steve Rogers is unable to control a majority of the Board vote and thus, cannot meet the control requirements. (*Id.*)

ELB also asserts that Ms. Sarah Rogers holds indirect negative control. (*Id.*, at 4.) Specifically, ELB suggest Ms. Sarah Rogers, as the Vice President, may block a quorum at a Board or shareholder's meeting. (*Id.*) According to ELB, the Bylaws require Ms. Sarah Rogers participate in both Board and shareholder meetings. (*Id.*) ELB argues that Ms. Sarah Rogers can exercise control by “refusing to attend board of director meetings and inhibiting [YOUNG's] ability to act.” (*Id.*) ELB further asserts Ms. Sarah Rogers may directly control YOUNG under provisions in the Bylaws. Specifically, the Bylaws anticipate Mr. Steve Rogers' absence and subsequently provides Ms. Sarah Rogers' control over management. (*Id.*) ELB argues this provision suggests Mr. Steve Rogers lacks control over YOUNG because “[a]n SDVOSB is not permitted to confer control on a non-service-disabled person in the service-disabled veteran's absence. . . .” (*Id.*)

Lastly, ELB asserts YKJY is ineligible for the award because the JVOA fails to comply with SBA regulations for joint ventures. (*Id.*, at 5.) Specifically, the JVOA fails to comply with 13 C.F.R. § 128.18(b)(2)(ii)⁴ because the JVOA fails to *Identify* the Responsible Manager from YOUNG. (*Id.*) Next, the JVOA fails to meet SBA regulation at 13 C.F.R. § 125.18(b)(2)(vi)⁵ because “it fails to specifically *Identify* the equipment, facilities or other

⁴ The rule for the VSBC Program may now be found at 13 C.F.R. § 128.402(c)(2)(ii).

⁵ *See* 13 C.F.R. § 128.402(c)(6).

resources required to meet the terms of the solicitation.” (*Id.*, at 6.) Further, the JVOA fails to reference the solicitation and does not list specific equipment, facilities or other resources that will be furnished by each party, nor provide costs or values of items as required under the regulation. (*Id.*) The JVOA fails to comply with the SBA regulation at 13 C.F.R. § 125.18(b)(2)(vii)⁶ because it “fails to address the specific solicitation or procurement on its face or through an addendum.” (*Id.*, at 7.) Further, the JVOA fails to specify the responsibility of parties as it relates to the source of labor. (*Id.*, at 7-8.)

F. BMA's Supplemental Protest

On May 3, 2023, BMA filed a supplemental protest and asserts that YKJY's JVOA fails to meet the requirements under 13 C.F.R. § 125.18(b)(2).⁷ (BMA's Supplemental Response, at 2.) Specifically, the JVOA does not *Identify a Responsible Manager*. (*Id.*, at 3.) Also, the JVOA does not itemize or provide a general description of the major facilities, equipment, or other resources; nor provide a general description for the source of labor and contract performances. (*Id.* at 4-5, citing *Size Appeal of Eagle Home Medical Corp.*, SBA No. SIZ-6163 at 20 (2022).) Further, the JVOA fails to specify the responsibilities regarding the sources of labor and contract performance. (*Id.*, at 6-7.) According to BMA, the JVOA's section regarding performance is “not specific.” (*Id.*, citing *Patriot Strategies, LLC*, SBA No. CVE-243 (2022).) BMA asserts that “the joint venture agreement is devoid of any specificity with respect to the Responsibilities” and “fails to describe or explain how YKJY's members ‘will ensure that the joint venture and the SDVO small business partner(s) to the joint venture will meet the performance of work requirements.’” (*Id.*, citing 13 C.F.R. § 125.18(b)(2)(vii).)⁸

Next, BMA asserts that the protege concern, YOUNG, is an ineligible SDVOSB and thus YKJY is ineligible for the solicitation. (*Id.*, at 8.) First, a Service-Disabled Veteran (SDV) does not control YOUNG because in a two-person Board each member has equal voting power and thus, “the concern must employ weighted voting wherein the SDV has more weighted votes to enable it to be eligible as an SDVO SBC.” (*Id.*, at 9, citing 13 C.F.R. § 125.14(e)(2).) According to BMA, the SDV's votes are not weighted, and YOUNG's Bylaws provide two directors, President and Vice President. (*Id.*) BMA thus asserts that “Mr. Rogers, cannot meet the requirement that he control YOUNG because both directors have equal voting power, and both must approve ordinary business decisions of the company.” (*Id.*)

Further, BMA contends that the non-SDV has negative control over the company because the non-SDV can block a quorum. (*Id.*) Specifically, under the Bylaws, that “[t]he President and Vice President of the Board of Directors shall be necessary at all meetings to constitute a quorum for the transaction of business as defined in para 2.7 above.” (*Id.* at 10, citing YOUNG's Bylaws at Article 4.8.) BMA interprets this section to mean a non-SDV may block a transaction for YOUNG by preventing a quorum; this is prohibited under 13 C.F.R. § 125.14(e)(2)(i).⁹

⁶ See 13 C.F.R. § 128.402(c)(7).

⁷ See 13 C.F.R. § 128.402(c).

⁸ See 13 C.F.R. § 128.402(c)(7).

⁹ See 13 C.F.R. § 128.203(e)(2)(1).

According to BMA, the non-SDV has control over the company. The Bylaws states the “Vice President: During absence or disability of the President, Vice-President shall exercise all functions of the President.” (*Id.*, citing YOUNG Bylaws at Article 5.3.) BMA concludes that the Bylaws “travel beyond SBA’s cabined regulations and give a non-SDV impermissible negative control over [YOUNG].” (*Id.*, at 11.)

Lastly, BMA asserts the protest is sufficient and specific because it “directly challenged YKJY’s status as an eligible SDVOSB joint venture.” (*Id.* at 11-12.) BMA maintains that its protest meets the specificity requirements by relying on public records. (*Id.*) Further, YKJY was adequately notified of the issues enough to craft a meaningful response; therefore, the protest was sufficiently specific. (*Id.*)

G. YKJY’s Supplemental Response

On May 22, 2022, YKJY filed a supplemental response and asserts the protests “must be dismissed for lack of specificity.” (YKJY’s Supplemental Response, at 3.) YKJY alleges that Protestors fail to *Identify* allegations that relate to SDVOSB status and *Identify* allegations that relate to size determination. (*Id.*) YKJY maintains that Protestors’ protests and supplemental protests are “facially deficient for lack of specificity” and should be dismissed. (*Id.*)

Next, YKJY maintains that YOUNG is a SDVOSB concern that is “unequivocally controlled” by Mr. Steve Rogers, an SDV under 13 C.F.R. § 125.13.¹⁰ (*Id.*, at 4.) Specifically, YOUNG has one class of stock and it is undisputed that Mr. Steve Rogers owns 51% of YOUNG’s stock. (*Id.*, citing Bylaws at App’x 1; Rogers Decl. at ¶ 7.) YKJY asserts that Mr. Steve Rogers is the President, CEO, and sole director of YOUNG. (*Id.*, at 5.) Further Mr. Steve Rogers controls the Board, is a member of the Board, and is not bound by supermajority voting requirements. (*Id.*) YKJY maintains Mr. Steve Rogers holds long term and day to day control over YOUNG. (*Id.*)

Moreover, YKJY rejects Protestors’ argument that Mr. Steve Rogers and Ms. Sarah Rogers’ votes are equal and asserts that this argument ignores the SBA regulation that explicitly states under 13 C.F.R. § 125.14(e)(2),¹¹ control of the Board by voting power, does not apply when a SDV satisfies the ownership requirements under 13 C.F.R. § 125.14(e)(1)(ii).¹² (*Id.*) Further, YKJY asserts that Protestors’ arguments fail because the Bylaws indicate that Mr. Steve Rogers is the sole director of YOUNG; therefore, ELB’s argument that Mr. Steve Rogers and Ms. Sarah Rogers are both directors is “categorically false.” (*Id.*, at 6-7.) In support, YKJY cites to the Bylaws; specifically, Article 4.1 states that “[t]he management of all the affairs, property and interest of the corporation shall be vested in the Board of Directors, *consisting of one person* who shall be elected for a term of two years.” (*Id.*, citing Bylaws at Article 4.1.) (emphasis added by YKJY.) Further, Mr. Steve Rogers is *Identified* as the sole director, while Ms. Sarah Rogers is never *Identified* as a director; and this is further confirmed in the corporate document with the same titles in the signature blocks. (*Id.*)

¹⁰ See 13 C.F.R. § 128.203.

¹¹ See 13 C.F.R. § 128.203(e)(2).

¹² See 13 C.F.R. § 128.203(e)(1)(ii).

In the alternative, YKJY asserts even if Ms. Sarah Rogers is considered a Director, Mr. Steve Rogers retains control over YOUNG because he is the owner of the majority of the voting stock. (*Id.*, at 7.) Under Utah law and the Bylaws, Mr. Steve Rogers holds the authority to take action by a simple majority, and thus maintains control over YOUNG. (*Id.*) In support, YKJY also provides sworn testimony from Mr. Steve Rogers, and assert that Mr. Steve Rogers' testimony demonstrates his long-term day to day control over YOUNG. (*Id.*, at 8.) Specifically, Mr. Steve Rogers has been the President of YOUNG for nine years; he holds the highest position in the firm and is the highest compensated; he works an average of 9 hours a week for 5 days a week at YOUNG; YOUNG's principal office is his residence; and his responsibilities include managing [X] employees. (*Id.*) Further, the Bylaws do not allow anyone other than the SDV to control operations. The Bylaws states the Board may “make such decisions to ensure that control of daily operations is retained by the service-disabled veteran director(s).” (*Id.*, at 10, citing Bylaws at Article at 5.6.) Thus, Ms. Sarah Rogers is unable to gain control of YOUNG or exercise negative control by preventing a quorum. (*Id.*)

Next, YKJY asserts that the JVOA meets joint venture requirements under 13 C.F.R. § 125.18(b)(2).¹³ (*Id.*, at 11.) The JVOA itself states its formation is for the pursuit of the solicitation. (*Id.*, citing JVOA ¶ 1.2.) First, the JVOA complies with 13 C.F.R. § 125.18(b)(2)(ii)¹⁴ because it identifies a named employee. Specifically, the JVOA states “[a] Protege employee shall serve as the project manager of any Resultant Contract.” (*Id.*, at 12, citing JVOA ¶ 5.1.) Referencing OHA case law, YKJY asserts this “has not been problematic in other proceedings.” (*Id.*, citing *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ-5618 (2014).)

YKJY maintains that the JVOA complies with 13 C.F.R. § 125.18(b)(2)(vi).¹⁵ (*Id.*, at 14.) YKJY argues that the *IDIQ* solicitation provides a general description of the scope of work and clearly states that the government will furnish and provide all necessary facilities and equipment. (*Id.*) YKJY concludes the JVOA provides an adequate description of the few resources YKJY needs to provide under the solicitation. (*Id.*, at 16.) The JVOA states “that “[m]ajor equipment, facilities, and all other resources will be furnished by each Member as needed to respond to Solicitations.” (*Id.* at 17, citing JVOA ¶ 2.6.) YKJY maintains that OHA has found similar language sufficient to meet joint venture requirements under the regulations. (*Id.*, citing e.g., *Size Appeal of Klutina River Contractors*, SBA No. SIZ-6117 (2021).) YKJY maintains that the JVOA coupled with the solicitation “provide an alternative method to share information once it is known” and thus, satisfies 13 C.F.R. § 125.18(b)(2)(vi)¹⁶ because it provides a broad understanding of how the parties will furnish equipment in greater detail once the scope of work is provided. (*Id.*, at 18.) According to YKJY, the JVOA was enacted specifically to pursue the solicitation and was created by YKJY before submitting its Proposal. (*Id.*, at 19.) YKJY concludes that the solicitation confirms the government would provide all necessary facilities and equipment; and the JVOA and Proposal provides a general description of the remaining

¹³ See 13 C.F.R. § 128.402(c).

¹⁴ See 13 C.F.R. § 128.402(c)(2)(ii)

¹⁵ See 13 C.F.R. § 128.402(c)(6).

¹⁶ *Id.*

resources to be furnished by each party. (*Id.*) Thus, the JVOA meets the joint venture requirements under 13 C.F.R. § 125.18(b)(2)(vi).¹⁷ (*Id.*)

Y contends that the JVOA complies with 13 C.F.R. § 125.18(b)(2)(vii).¹⁸ (*Id.*) The solicitation requires the deployment of an unknown number of employees with specific skill sets to be *Identified* in subsequent task orders for later designated worldwide locations. (*Id.*, at 20.) YKJY asserts that due to the broad description of work that may be ordered under the contract, the JVOA sufficiently provides “general description of anticipated responsibilities and workshare and provides a mechanism for furnishing additional information about responsibilities. . . .” (*Id.*) Further, YKJY maintains that the JVOA satisfies the “general descriptions of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance.” (*Id.*, citing 13 C.F.R. § 125.18(b)(2)(vii)).¹⁹ Further, Section 4.1.4 of the JVOA provides a mechanism through which the parties may “specify how the parties to the joint venture will define [their] responsibilities once a definite scope of work is made publicly available.” (*Id.*) YKJY further asserts its Proposal supports the JVOA should be considered. YKJY asserts that the language of the Proposal includes examples of KIHOMAC's and YOUNG's past performance and ability to meet the requirements of the solicitation, which demonstrates the parties' ability to fulfill the required workshare and demonstrates the understanding of the parties. (*Id.*, at 22-23, citing *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888 (2018).)

H. ELB's Reply to YKJY's Supplemental Response

On May 31, 2023, ELB filed a motion for leave to reply and submitted its proposed Reply. ELB argues its reply discusses issues regarding the SDVOSB joint venture and YOUNG's eligibility as a SDVOSB. Thus, this reply “allows OHA to formulate its decision with all the arguments fully developed.” (ELB's Reply Motion, at 1.) Further the Reply does not enlarge the issues and only discusses why YKJY's argument should not prevail.” (*Id.*, citing *Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964 (2018).) An OHA Judge may permit a reply to a response, and no reply is permitted unless the OHA Judge directs otherwise. 13 C.F.R. § 134.1007(f)(3); § 134.211(c). Accordingly, for good cause shown, ELB's Reply is GRANTED.

In its Reply, ELB maintains that the supplemental protest does not lack specificity and argues that while compliant with the joint venture requirements under 13 C.F.R. § 125.18(b)(2)²⁰ may invoke size considerations, here they are considered “the principal discriminators of YKJY's SDVOSB eligibility” in this protest. (ELB's Reply, at 1.)

Second, ELB asserts that YOUNG does not qualify as a SDVOSB because Mr. Steve Rogers does not control the Board. (*Id.*, at 2.) Specifically, YOUNG's Bylaws impose a super majority voting requirement for shareholders to approve corporate actions. (*Id.*, citing 13 C.F.R.

¹⁷ *Id.*

¹⁸ *See* 13 C.F.R. § 128.402(c)(7).

¹⁹ *See* 13 C.F.R. § 128.402(c)(7).

²⁰ *See* 13 C.F.R. § 128.402(c).

§ 125.13(e)(1)(ii).²¹ ELB maintains that Ms. Sarah Rogers has the ability to “frustrate a quorum” and if Mr. Steve Rogers intended to use his majority ownership to control the business, Ms. Sarah Rogers could “thwart that effort by refusing to attend the shareholder’s meeting.” (*Id.*) ELB concludes that Ms. Sarah Rogers could exercise negative control and thus, Mr. Steve Rogers’ ability to control YOUNG through his majority ownership percentage is not guaranteed. (*Id.*)

ELB further asserts the Articles of the Bylaws suggests Ms. Sarah Rogers is a member of the Board. (*Id.*) Specifically, Article 4.1 of the Bylaws states the Board consist of one person; however, this conflicts with Article 2.1, which states that YOUNG’s Board shall consist of the company shareholders. (*Id.*) ELB argues that “read wholistically, this provision has one effect: it makes each owner a director.” (*Id.*) Further, ELB asserts that YKJY confirms Mr. Steve Rogers and Ms. Sarah Rogers are President and Vice President and under the Bylaws these positions hold voting rights as members of the Board; therefore, “[t]hat language is unequivocal: both Steve Rogers and Sarah Rogers sit on the board and have a vote.” (*Id.*, at 3.) Without a weighted voting mechanism, Ms. Sarah Rogers, as an owner and vice president of YKJY hold a place on the Board and has an equal vote to Mr. Steve Rogers under Utah law. (*Id.*) ELB rejects YKJY’s argument that Mr. Steve Rogers can unilaterally modify the Bylaws due to his majority ownership and asserts that Ms. Sarah Rogers “still holds a trump card: she can prevent a quorum at the regular or special meeting.” (*Id.*) ELB suggest that if deadlocked, Mr. Steve Rogers will not have the means to break the impasse and Ms. Sarah Rogers could present a quorum at the shareholder’s meeting on amendments to the Bylaws. (*Id.*) Thus, ELB concludes Mr. Steve Rogers does not have control over YKJY. (*Id.*)

Lastly, ELB reiterates its argument that YKJY’s JVOA does not comply with joint venture requirements under 13 C.F.R. § 125.18(b)(2).²² (*Id.*) Specifically, ELB notes that YKJY cites to extraneous documents such as the proposal and the solicitation, but the JVOA “must rise or fall based on its own content.” (*Id.*, at 3.) First, the JVOA does not *Identify* a Responsible Manager. (*Id.*) OHA has concluded that the responsible manager must be *Identified* “by name.” (*Id.*, at 3-4, citing *Gray Venture, LLC*, SBA No. VET-276 (2022).) Here, the JVOA fails to name a responsible manager and thus “[t] hat omission is fatal.” (*Id.* at 4.) Second, ELB rejects YKJY’s argument regarding its compliance with 13 C.F.R. § 125.18(b)(2)(vi)²³ and asserts the general work under the solicitation is well known from the PWS of the solicitation. (*Id.*) ELB argues that in contrast to the facts in *KlutinaRiver Contractors, supra*, YKJY failed to “provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture.” (*Id.*, citing 13 C.F.R. § 125.18(b)(2)(vi).)²⁴ ELB asserts that even if a general description was sufficient, “[n]o provision communicates how the parties plan to *Identify* the needed equipment, resources, and facilities and who will provide it.” (*Id.*, at 5.) ELB maintains that the “joint venture must stand on its own” and “There is no allowance for a proposal to fill in the omitted gaps. . . .” (*Id.*) Third, ELB maintains that the PWS details the parameters of the contract, yet YKJY’s JVOA failed to discuss, the general work that

²¹ See 13 C.F.R. § 128.203(e)(1)(ii).

²² See 13 C.F.R. § 128.402(c).

²³ See 13 C.F.R. § 128.402(c)(6).

²⁴ *Id.*

each venturer will perform under the contract as required by 13 C.F.R. § 125.18(b)(2)(vii).²⁵ (*Id.*) ELB rejects YKJY's reliance on OHA case law and argues that the joint venture agreement in *Spinnaker Joint Venture, LLC, supra*, included a list of general tasks to be performed, while YKJY did not include any reference to the general tasks. (*Id.*) ELB concludes that YKJY is an ineligible SDVOSB because (1) the Bylaws do not provide the SDV requisite control and (2) the JVOA does not meet SBA's joint venture requirements. (*Id.*, at 5-6.)

I. Case File

On April 11, 2023, VetCert informed OHA that there are no records from the former Center for Verification and Evaluation (CVE), nor the SBA VetCert, pertaining to YKJY, LLC. YKJY self-certified its status as an SDVOSB.

On April 12, 2023, OHA issued an Order to YKJY requesting that YKJY provide, among other things, corporate documents for the record. KIHOMAC is a corporation wholly owned by Mr. Ki Ho Kang. (KIHOMAC, Inc. Incorporation Documents.)

According to YOUNG's Bylaws, YOUNG is a “closely held S Corporation with two owners.” (YOUNG Incorporation Documents at Article 3.3.1.) Mr. Steve Rogers, the SDV, holds 51% ownership, while Ms. Sarah Rogers, his spouse, holds 49% ownership. (YOUNG Incorporation Documents at Appendix 1; VA Form 0877_YOUNG.) According to Mr. Roger's resume, he is Owner, President and CEO of YOUNG and his responsibilities include, among other things, management of “daily operations for a multi-million dollar a year defense contracting business.” (YOUNG Resumes, at 1.)

On October 6, 2016, YOUNG and KIHOMAC entered into a mentor protege agreement. (KIHOMAC and YOUNG MPA.)

On June 10, 2022, KIHOMAC and YOUNG entered into an Operating and Joint Venture Agreement (JVOA). (YKJY, LLC Operating Agreement.) Mr. Steve Rogers of YOUNG, SDV, holds 51% ownership interest in YKJY, while Mr. Kang of KIHOMAC, veteran, holds 49% ownership interest. (YKJY, LLC Operating Agreement; VA Form 0877_YKJY.)

III. Discussion

A. Burden of Proof

As the protested firm, YKJY 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, if applicable, and the information provided by the protesters, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestors and YKJY is part of the record.

²⁵ See 13 C.F.R. § 128.402(c)(7).

B. Dates to Determine Eligibility and Presiding Regulations

In a SDVOSB status protest pertaining to a concern's joint venture compliance with the joint venture agreement requirements, OHA determines the eligibility of the protested concern's SDVOSB status as of the date of the joint venture's initial offer, including price. 13 C.F.R. § 134.1003(e)(1). Here, YKJY submitted its initial offers on July 26, 2022, and thus I must determine YOUNG's eligibility as an SDVOSB as of the date of its initial offer, July 26, 2022. For a protest challenging and SDVOSB's compliance with the joint venture requirements, OHA determines eligibility as of the date of final proposal revisions. *Id.*

Here, final proposal revisions were due January 18, 2023. Thus, I must determine YKJY's compliance with the joint venture agreement requirements as of the date of its final proposal revision, January 18, 2023. As of January 1, 2023, the requirements for SDVOSBs status protest are found at 15 U.S.C. § 657f and 13 C.F.R. Part 128.

C. Analysis

To be an eligible SDVOSB, a concern must be unconditionally and directly owned at least 51% by a veteran(s). 13 C.F.R. § 125.13.²⁶ In the case of a corporation, at least 51% of all outstanding stock and 51% of each class of stock must be unconditionally owned by one or more veterans. 13 C.F.R. § 125.13(e)(1)(ii).²⁷ Further, a concern's day to day management and daily business operations must be controlled by one or more SDVs. 13 C.F.R. § 125.13(a).²⁸ Control means the SDV(s) controls both the long-term decision-making and day to day operations. *Id.* operations. *Id.* The SDV must also hold the position of the highest officer in the concern. 13 C.F.R. § 125.13(b).²⁹ If the concern is a corporation, the service-disabled veteran must control the Board of Directors. 13 C.F.R. § 125.13(e).³⁰ If the service-disabled veteran owns at least 51% of the concern's stock, has a seat on the Board, and there are no supermajority voting requirements, the service-disabled veteran is deemed to control the Board. *Id.* § 125.13(e)(1)(ii).³¹ The terms of the concern's governing documents determine who controls the decisions of the company. *See CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15 (2021), *citing XOtech LLC v. United States*, 950 F.3d 1376, 1380 (Fed. Cir. 2020).

In the present case, the record reflects Mr. Steve Roger's ownership and control of YOUNG. According to YOUNG's Bylaws, Mr. Roger, an SDV, owns 51% of YOUNG. Section

²⁶ OHA adjudicates SDVOSB status protests under the authority of 15 U.S.C. § 657f and 13 C.F.R. Part 134 Subpart J. Effective January 1, 2023, SBA amended OHA's procedural regulations governing SDVOSB status protests. 87 Fed. Reg. 73400 (Nov. 29, 2022). However, the date to determine eligibility was prior to the effective date of the new regulations, so the older version of the rules continues to apply here. The rule for the VSBC Program may now be found at 13 C.F.R. § 128.202.

²⁷ The rule for the VSBC Program may now be found at 13 C.F.R. § 128.202(e)(1)(ii).

²⁸ *See* 13 C.F.R. § 128.203(a).

²⁹ *See* 13 C.F.R. § 128.203(b).

³⁰ *See* 13 C.F.R. § 128.203(e).

³¹ *See* 13 C.F.R. § 128.203(e)(1)(ii).

II.I, *supra*. This issue is not in dispute. Protestors assert Mr. Steve Rogers is not an eligible SDVOSB because he does not control YOUNG. Sections II.E, II.F, & II.H, *supra*. Specifically, Protestors allege Mr. Steve Rogers and Ms. Sarah Rogers, two members of YOUNG's Board of Directors, have equal voting power; thus Ms. Sarah Rogers, a non-SDV, may block a quorum and establish negative control. *Id.* These allegations are contradicted by sworn declarations of Mr. Steve Rogers and other evidence in the record. Sections II.G & II.I, *supra*. OHA must give greater weight to sworn declarations. 13 C.F.R. § 134.1011; *CVE Protest of Veterans Command, LLC*, SBA No. CVE-191-P, at 4 (2021). Sworn statements provide first-hand evidence that Mr. Steve Rogers has maintained the highest role at YOUNG as the President and CEO since 2011. Sections II.G & II.I, *supra*. Further, Mr. Steve Rogers conducts the long-term decision-making and day to day management of YOUNG. *Id.* Mr. Steve Roger's expertise is detailed in his resume, where his responsibilities to the concern include management of the daily operations for multi-million dollar defense contracts. Section II.I, *supra*. According to the YOUNG Bylaws, Mr. Steve Rogers is the President and “Sole Director” of YOUNG. *Id.* Further, the Bylaws do not provide super majority requirements. *Id.* Based on Mr. Steve Rogers' sworn testimony and the Bylaws, I conclude that YOUNG has established that Mr. Steve Rogers controls the Board and thus, controls the concern. 13 C.F.R. § 125.13(e)(1)(ii).³²

The remaining issue is whether YKJY's JVOA complies with joint venture eligibility requirements at 13 C.F.R. § 128.402.³³ An SDVO SBC may enter into a joint venture agreement with one or more other small business concerns or its mentor for the purpose of performing an SDVO contract. *Id.* 13 C.F.R. § 128.402(a). The regulations require that twelve specific provisions be included in each such joint venture agreement. *Id.* 13 C.F.R. § 128.402(c). I find however, that YKJY failed to meet three of the twelve provisions, and thus, I must grant the protests.

First, the JVOA must contain a provision that designates *a named employee* of the SDVOSB managing venturer “as the manager with ultimate responsibility for performance of the contract (the ‘Responsible Manager’).” 13 C.F.R. § 128.402(c)(2) (emphasis added). The JVOA details the Managing Member's duties and role. Section 11.1, *supra*. However, the JVOA did not specifically name a responsible manager. *Id.* OHA precedent has established that “an individual employee of the SDVO SBC must be *Identified* by name and appointed as the Project/Responsible Manager, the person who will be directly managing performance on this particular contract.” *In the Matter of Gray Venture, LLC*, SBA No. VET-276, at 10 (2022).

Here, the JVOA fails to name a specific individual who will serve as the responsible manager. Section II.I, *supra*.

³² See 13 C.F.R. § 128.203(e)(1)(ii).

³³ Effective January 1, 2023, SBA amended OHA's procedural regulations governing SDVOSB status protests. 87 Fed. Reg. 73400 (Nov. 29, 2022). The date to determine joint venture compliance was after the effective date of the new regulations, so the regulations apply here. The requirements for SDVOSBs status protest are found at 15 U.S.C. § 657f and 13 C.F.R. Part 128.

YKJY contends that OHA should consider the terminology in the JVOA that “[a] Protege employee shall serve as the project manager of any Resultant Contract.” Section II.G, *supra*. OHA should accept YKJY's intent to *Identify* an individual in the Proposal, stating “[o]ur YKJY Program Manager will be a new external hire that we have identified with exceptional experience and a cooperative attitude with a focus on customer service.” *Id.* I find this argument flawed. SBA regulations require the JVOA agreement provide a *named employee*, that is, *Identify* a particular individual by name. 13 C.F.R. § 128.402(c)(2) (emphasis added). The Proposal here in addition to the JVOA fails to name a Responsible Manager, and only asserts that an individual has been “*Identified*.” Section II.I, *supra*. This is insufficient because it fails to name employee or an anticipated employee, as required under 13 C.F.R. § 128.402(c)(2).

YKJY further contends OHA should consider the May 1, 2023 Contingent Employment Offer Letter (Offer Letter) as an intent to hire [XXXXXXXXXX], contingent on the award. Section II.G, *supra*. Under SBA regulations, the “Responsible Manager need not be an employee at the time offers are submitted, but there must be a signed letter of intent that an individual commits to be [an] employee.” 13 C.F.R. § 128.402(c)(2). This Offer Letter was executed after the date of final proposal revisions, the relevant date for examining joint venture compliance pursuant to 13 C.F.R. § 128.500(c). Section II.G, *supra*. OHA may only determine joint venture eligibility at the time of final proposal revisions. *See, e.g., Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 21 (2023). The Offer Letter did not exist at the time of the January 18 final proposal revisions and was submitted for the first time to these protests proceedings as an attachment on May 22, 2022. Section II.G, *supra*. OHA cannot consider this Offer Letter, and thus, I find the JVOA fails to meet the requirements of 13 C.F.R. § 128.402(c)(2).

Second, the JVOA must contain a provision “itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture.” 13 C.F.R. § 128.402(c)(6). Section II.G, *supra*. Here, the JVOA alludes to an Appendix A, however, this attachment was not provided for the record. *Id.* The decision is based upon the entire record, the Case File, the information provided by the protester, the protested concern, any other parties, and the arguments of the parties. 13 C.F.R. § 134.1007(g); *see VSBC Protest of Protection Strategies, Inc.*, SBA No. VSBC-288-P (2023). Thus, I cannot consider the contents of Appendix A because it was not provided for the record. I must only consider the contents of the JVOA.

Here, the *IDIQ* solicitation's SOW is indefinite and calls for “management and control, drafting and publishing of technical documentation, system checkout, fielding, supply, maintenance, supplemental training, customer assistance visits.” Section II.A, *supra*. If the contract is indefinite, such as an indefinite quantity contract or a multiple award contract, the JVOA need only provide a general description of anticipated major equipment without a detailed schedule of cost. 13 C.F.R. § 128.402(c)(6). The JVOA, however, fails to provide a minimum general description of equipment. *Size Appeal of Eagle Home Medical Corp.*, SBA No. SIZ-6163 at 20 (2022); *see also CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P at 9-10 (2020) (finding that the JVOA fails to “include specific information on the subject procurement” and merely states in general terms the purchase of unspecified equipment.) Like *KTS Solutions, Inc.*, *supra*, the JVOA fails to provide specific details on the equipment relating to the subject procurement. Thus, I find the JVOA fails to meet 13 C.F.R. § 128.402(c)(6).

Third, the JVOA must “[s]pecify[] the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance” under 13 C.F.R. § 128.402(c)(7.) Here, the JVOA fails to specify the responsibilities of the parties with respect to the negotiation of the contract, source of labor, and contract performance. Section II.I, *supra*. The JVOA merely provides the percentages of work to be performed by each member. OHA has determined this information to be insufficient. *Id.*; *see also KTS Solutions, Inc.*, SBA No. CVE-146-P at 9-10. YKJY contends that in the context of IDIQ solicitation, OHA has found “similar language to be sufficient.” YKJY relies upon *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964 (2018), where OHA determined “the [solicitation] provides no detail on exactly what type of work will be required . . . [u]nder these circumstances, the JV Agreement provides about as much detail as could be provided given the lack of substantive information in the [solicitation].” *Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 12. Nevertheless, *Spinnaker Joint Venture, LLC* is inapposite. Unlike *Spinnaker Joint Venture, LLC*, the JVOA here fails to “lists the general types of tasks each member will perform” nor acknowledge “the indefiniteness of the [solicitation].” *Id.*

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. . . .” 13 C.F.R. § 128.402(c)(7). Here, the IDIQ solicitation is indefinite, and thus “only a general description of anticipated major equipment by each party to the joint venture is required.” *KTS Solutions, Inc.*, SBA No. CVE-146-P at 11. However, despite detailing some responsibilities of the Manager, the JVOA fails to provide any indication of the task other members of the joint venture will perform, nor which employees of each member will perform which functions, details OHA has determined essential to meet joint venture requirements. *See e.g., KTS Solutions, Inc.*, SBA No. CVE-146-P (2020). Thus, I find the JVOA fails to meet 13 C.F.R. § 128.402(c)(7).

Lastly, YKJY contends that the Protests and Supplemental Protests lack specificity because “Protestors have failed to *Identify* which allegations relate to the SDVOSB status issue and which relate to a size determination.” Sections II.G, *supra*. OHA will dismiss a protest styled as both a size and status protest that fails to present any allegations, facts, or evidence to suggest a business concerns lack of ownership and control by one or more SDVs. *CVE Protest of Land Shark Shredding, LLC*, SBA No. CVE-138-P, at 1 (2019); *see e.g., VSBC Protest of Terrestris LLC*, SBA No. VSBC-269-P, at 1 (2023) (dismissing a protest as non-specific for making allegations under regulations applicable to size matters but failing to explain how the protested concern violated any provision under SDVO SB status matters.) Here, Protestors proffer allegations regarding SDV control under 13 C.F.R. § 128.203(a) and the contents of joint venture agreements under 13 C.F.R. § 128.402(c). Thus, I find the Protests and Supplemental Protests to be specific.³⁴

³⁴ Allegations regarding YKJY's size is a question that has been decided in the size protest and subsequent appeals process, and not in this SDVO SB protest. *See Size Appeal of YKJY, LLC*, SBA No. SIZ-6219 (2023); *Size Appeal of YKJY, LLC*, SBA No. SIZ-6220 (2023).

Therefore, I conclude that YOUNG has established its eligibility as an SDVOSB; however, YKJY fails to meet the requirements of a joint venture and is therefore not an eligible SDVOSB joint venture.

IV. Conclusion

For the above reasons, the protests are 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