

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

VSBC Protest of:

Systematic Innovations, LLC,

Protestor,

Re: DigiPathy LLC

Solicitation No. 36C10B23R0011

U.S. Department of Veterans Affairs

SBA No. VSBC-339-P

Decided: February 28, 2024

APPEARANCES

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

Adam K. Lasky, Esq., Erica L. Bakies, Esq., Seyfarth Shaw LLP, Seattle, Washington, for DigiPathy LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

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

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

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<sup>1</sup> This decision was originally issued under a protective order. After receiving and considering one

## II. Background

### A. The RFP

On March 14, 2023, VA issued RFP No. 36C10B23R0011 for the Transformation Twenty-One Total Technology Next Generation 2 (T4NG2) multiple-award indefinite-delivery indefinite-quantity (ID/IQ) contract. (RFP at 2.) According to the RFP's Performance Work Statement (PWS), the contractors will provide information technology (IT) service solutions in 11 functional areas: “program management, strategy, enterprise architecture and planning; systems/software engineering; software technology demonstration and transition; test and evaluation; independent verification and validation; enterprise network; enterprise management framework; operations and maintenance; cybersecurity; training; [and] IT facilities.” (RFP Amend. 0001, at 14.) The RFP explained that “[t]his PWS provides general requirements . . . [,] [s]pecific requirements shall be defined in individual Task Orders.” (*Id.*)

The RFP stated that VA intended to award up to 30 contracts, with at least 15 awards reserved for SDVOSBs. (*Id.* at 156-57.) The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541512, Computer Systems Design Services, with a corresponding size standard of \$34 million average annual receipts. (*Id.* at 112.) DigiPathy submitted its initial proposal on April 23, 2023, and final proposal revisions on June 13, 2023. On October 31, 2023, the CO announced the identity of the successful offerors. A total of 30 awardees were selected, including 21 SDVOSBs or SDVOSB joint ventures.

### B. Protest

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

In the protest, Protestor alleges that DigiPathy's joint venture agreement (JVA) does not comply with 13 C.F.R. § 128.402. (Protest at 3.) More specifically, Protestor highlights that DigiPathy was formed in December 2022, prior to issuance of the RFP. (*Id.*) Unless the JVA was updated for the instant procurement, then, the JVA cannot meet the contract-specific requirements of 13 C.F.R. § 128.402(c)(2), (c)(6) and (c)(7). (*Id.*, citing *Size Appeals of STAcqMe, LLC*, SBA No. SIZ-5976 (2018).) Additionally, DigiPathy's online Dynamic Small Business Search (DSBS) profile does not identify DigiPathy as an SDVOSB joint venture. (*Id.* at 4.)

Protestor also alleges that Mind Computing, the SDVOSB member of the joint venture, will not manage DigiPathy and perform at least 40% of the substantive work on the T4NG2 procurement, in contravention of 13 C.F.R. § 128.402(d). (*Id.*) In support, Protestor contends that DigiPathy and Mind Computing share office space at a residential address, which in Protestor's view is unsuitable for managing and sufficiently contributing to a procurement of this magnitude. (*Id.*)

### C. DigiPathy's Response

On February 5, 2024, DigiPathy timely responded to the protest, urging that it should be denied.<sup>2</sup> According to DigiPathy, the relevant date for determining its SDVOSB joint venture eligibility is June 13, 2023, the date that DigiPathy submitted its final proposal revisions for the subject procurement. (Response at 3, citing 13 C.F.R. § 134.1003(e)(1).) Furthermore, because T4NG2 is a broad, multiple-award ID/IQ contract without a specific scope of work, OHA should apply the more lenient standards of 13 C.F.R. § 128.402(c)(6) and (c)(7) in reviewing DigiPathy's JVA. (*Id.* at 3-4.)

DigiPathy observes that, in evaluating the eligibility of an SDVOSB joint venture, OHA will consider the JVA and any additional documents amending the JVA that were executed prior to the date of final proposal revisions. (*Id.* at 4, citing *VSBC Protest of U.S. Dep't of Veterans Affairs*, SBA No. VSBC-297-P (2023).) In the instant case, there are three relevant documents: DigiPathy's JVA, executed by the joint venturers on March 17, 2023 and March 21, 2023, respectively; an April 10, 2023 Joint Venture Operating Agreement (JVOA); and a June 7, 2023 Addendum (Addendum), which incorporated terms of DigiPathy's proposal into the JVA and the JVOA. (*Id.* at 5.) Based on these documents, DigiPathy offers a chart purporting to explain how its JVA, JVOA, and Addendum collectively meet each element of 13 C.F.R. § 128.402(c). (*Id.* at 6-15.)

DigiPathy disputes Protestor's claim that DigiPathy's JVA does not meet the contract-specific requirements of 13 C.F.R. § 128.402(c). (*Id.* at 16.) Contrary to Protestor's suggestions, DigiPathy's joint venturers entered into the JVA in March 2023, after the RFP was issued. (*Id.*) Moreover, the initial JVA was then supplemented by two further agreements — the JVOA and Addendum — both executed prior to final proposal revisions. (*Id.*) DigiPathy adds that VA issued a draft version of the T4NG2 RFP on January 13, 2023, which enabled DigiPathy to begin planning how to address contract-specific requirements even in the initial JVA. (*Id.*)

DigiPathy contends that Protestor's allegation concerning DigiPathy's DSBS profile is not a proper basis for an SDVOSB status protest against a joint venture. (*Id.* at 17.) In such a dispute, OHA considers only “(1) the SDVOSB status of the managing joint venture partner and (2) the joint venture's “failure to meet the requirements of 13 C.F.R. § 128.402.”” (*Id.*, citing 13 C.F.R. § 134.1003(d)(1).) As a DSBS profile is unrelated to either of those two grounds, OHA should disregard this claim. (*Id.* at 18, citing *VSBC Protest of MicroTechnologies LLC*, SBA No. VSBC-324-P, at 2 (2023).) Regardless, a DSBS profile has no bearing on whether a JVA meets SBA requirements. (*Id.*) DigiPathy observes that SBA regulations require only that the SDVOSB member of a joint venture must be certified. (*Id.*, citing 13 C.F.R. § 128.402(a).) Here, Mind Computing is an SBA-certified SDVOSB. (*Id.* at 19.) DigiPathy, the joint venture, also is SBA-certified. (*Id.* at 19-20.)

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<sup>2</sup> DigiPathy initially moved to dismiss the protest for lack of standing. OHA denied the motion by Order dated January 19, 2024, and established February 5, 2024 as the deadline for DigiPathy to respond to the merits of the protest.

Lastly, DigiPathy refutes Protestor's claims that Mind Computing will not perform at least 40% of the substantive work. (*Id.* at 20.) Because the underlying procurement is a multiple-award ID/IQ contract where specific requirements will be defined in future task orders, DigiPathy's JVA was not required to explain in detail exactly how DigiPathy will meet the requirements of 13 C.F.R. § 128.402(d). (*Id.*, citing 13 C.F.R. § 128.402(c)(7).) Nonetheless, DigiPathy's organizational documents and proposal reveal that Mind Computing will play a very substantial role on the T4NG2 procurement. (*Id.* at 21.) The proposal “shows that Mind Computing will perform no less than [XX]% of the total work performed by the joint venture, and Mind Computing will perform substantive contract requirements across [XXXX] of [the] functional areas of the contract.” (*Id.* at 21-22.) Mind Computing also will employ the Responsible Manager for T4NG2, and Mind Computing was a prime contractor on the predecessor contract to T4NG2, thereby acquiring expertise and experience to accomplish the substantive work of the T4NG2 contract. (*Id.* at 22.) It is of no consequence that Mind Computing “lists a residence as its primary place of business.” (*Id.* at 23.) Protestor offers no regulatory authority forbidding the use of a home office, and Protestor overlooks that Mind Computing operates most efficiently and cost effectively with this approach. (*Id.*) Furthermore, Mind Computing successfully performed as a prime contractor on the predecessor contract from this same home office. (*Id.*)

#### D. Supplemental Protest

On February 5, 2024, after its counsel reviewed the Case File under the terms of an OHA protective order, Protestor supplemented its protest. In addition to its original protest grounds, Protestor contends that DigiPathy's JVA is non-compliant with 13 C.F.R. § 128.402(c)(2), (c)(7) and (c)(9). (Supp. Protest at 2.)

Protestor alleges that Mind Computing will not be “responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture.” (*Id.* at 3, citing 13 C.F.R. § 128.402(c)(2).) In support, Protestor observes that DigiPathy's JVA indicates that for “each Task Order, the Venturers shall collaborate to determine the exact specifications for such hardware and software, including the costs to be borne by each Venturer”; that “[a]ny task order requirements for contractor-site performance that requires facilities will be negotiated in collaboration between the Venturers, including the cost of such facility provisioning”; and that “[s]taff required to fulfill roles within individual task orders will be determined collaboratively between the Venturers at the Task Order Level.” (*Id.* at 4, quoting JVA, Appxs. D and E (emphases added by Protestor).) Protestor contends that the requirement to engage in “collaboration” gives Dynanet impermissible negative control over DigiPathy's decision-making. (*Id.*) Protestor notes that purchasing equipment is essential to the daily business of a concern. (*Id.*, citing *Size Appeal of S. Contracting Sols. III, LLC*, SBA No. SIZ-5956 (2018).) Additionally, OHA has found a joint venture ineligible for SDVOSB certification when the JVA gave a non-SDVOSB venturer power to “exercise negative control by controlling the hiring and firing of employees” and “could conceivably exercise control by withholding enough employees from performance of the contract.” (*Id.* at 4-5, quoting *VSBC Protest of U.S. Dep't of Veterans Affairs*, SBA No. VSBC-297-P, at 7 (2023).) Provisions necessitating collaboration thus prevent Mind Computing from enjoying uninhibited control over the day-to-day management of DigiPathy. (*Id.* at 5.)

Next, Protestor renews its contention that Mind Computing will not perform at least 40% of the substantive work. (*Id.*) In Protestor's view, § 17 of the JVA only gives Mind Computing administrative control of DigiPathy. (*Id.*) Meanwhile, § 12 says that “[f]or any opportunities, workshare allocated to the Joint Venture shall be allocated to each of the Venturers in accordance with their Joint Venture ownership percentages, contingent upon each Venturer's active participation in efforts to successfully capture such opportunities.” (*Id.*, quoting JVA (emphasis added by Protestor).) Although Mind Computing owns [XX]% of DigiPathy, the language of § 12 means that Mind Computing will not necessarily handle at least 40% of the work performed by DigiPathy. (*Id.* at 5-6.) In *CVE Protest of Patriot Strategies, LLC*, SBA No. CVE-243-P (2022), OHA sustained an SDVOSB status protest when the JVA did not make clear that the SDVOSB venturer would perform at least 40% of the work and more than administrative or ministerial functions. (*Id.* at 6.)

Protestor lastly claims that the JVA is non-compliant with 13 C.F.R. § 128.402(c)(9). (*Id.*) This provision requires that a joint venture's accounting and administrative records be kept by the SDVOSB venturer, unless given approval by the District Director. (*Id.*) DigiPathy's JVA, however, permits such records to be kept at a location other than Mind Computing's offices if both joint venturers were to agree. (*Id.* at 7.) Because DigiPathy's JVA attempts to circumvent District Director approval, the JVA is not compliant with SBA regulations. (*Id.*)

#### E. Supplemental Response

On February 20, 2024, DigiPathy timely responded to the supplemental protest.<sup>3</sup> DigiPathy maintains that Protestor's new allegations are meritless, and renews its call for the protest to be denied. (Supp. Response at 1.)

Regarding the “collaboration” provisions in its JVA, DigiPathy disputes Protestor's assertion that these would enable Dynanet to exert negative control over DigiPathy. (*Id.* at 3.) First, these clauses do not give Dynanet any veto power over Mind Computing's decisions. (*Id.*) The regulation governing control over an SDVOSB joint venture provides that:

The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, *but* other parties to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary[.]

(*Id.* at 4, quoting 13 C.F.R. § 128.402(c)(2)(i) (emphases added by DigiPathy).) This regulation dictates that the SDVOSB managing member must unilaterally control the daily performance of contracts, however, the non-managing member(s) may still contribute so long as they cannot veto any decisions. (*Id.*, citing *Def. Integrated Sols., LLC v. United States*, 165 Fed. Cl. 352

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<sup>3</sup> In accordance with 13 C.F.R. § 134.1007(f)(1), OHA's Order denying DigiPathy's motion to dismiss permitted DigiPathy to respond to any supplemental protest within 15 calendar days. Protestor filed its supplemental protest on February 5, 2024, so DigiPathy's supplemental response was timely submitted on February 20, 2024.

(2023).) DigiPathy further cites *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783, at 24 (2016), where OHA found that a “requirement that decisions be ‘addressed’ to the non-managing member did negate [the] managing member's right to ultimately control those decisions.” (*Id.* at 5.) DigiPathy contends that OHA should review its JVA to ascertain whether the collaboration provisions give Dynanet any veto authority. (*Id.*)

DigiPathy explains that it was formed as a limited liability company (LLC) under Vermont law with Mind Computing designated as the managing member. (*Id.* at 6.) Vermont state law affords Mind Computing, as managing member, the “exclusive authority to manage and conduct the company activities,” and provides that “any matter relating the activities of the company may be exclusively decided by the manager.” (*Id.*, quoting 11 V.S.A. § 4054(c)(1), (c)(3).) DigiPathy's JVOA further provides that the “Managing Member shall have the exclusive power and authority to manage the business and affairs of the Company, including performance of the Contract.” (*Id.* at 7, quoting JVOA, Article 4, § 1.A.) Even though the provisions cited by Protestor allow Dynanet to speak on certain decisions, Mind Computing does not require Dynanet's consent or approval. (*Id.* at 8.) Moreover, these provisions cannot override the authority statutorily and contractually given to Mind Computing. (*Id.*) The plain dictionary meaning of “collaborate” means merely to “assist.” (*Id.*) If Mind Computing and Dynanet had intended that there must be mutual agreement, they could have used stronger language, such as “concur.” (*Id.* at 9.)

DigiPathy compares these provisions to those reviewed by OHA in *Sage*. (*Id.* at 11.) In that case, a JVA provided that “any decision, commitment, agreement, undertaking, understanding, or any other matter that relates to the performance associated with the instant procurement would be ‘addressed’ by [the joint venture's] management committee before any response is given to the agency.” (*Id.* at 11-12, citing *Sage*, SBA No. SIZ-5783, at 9.) OHA assumed that the non-managing venturer controlled the management committee. (*Id.* at 12, citing *Sage*, SBA No. SIZ-5783, at 24.) Nonetheless, OHA determined that even though decisions must be “addressed” by the management committee, this did not give the committee the ability to override decisions of the managing venturer. (*Id.*, citing *Sage*, SBA No. SIZ-5783, at 24.) DigiPathy argues that the word “addressed” is similar to “collaborate” since neither necessitates “consent.” (*Id.*) Even if OHA were to find ambiguity on this point, these provisions should be interpreted as the joint venturers intended — to meet the requirements of SBA joint venture regulations. (*Id.* at 14.)

DigiPathy maintains that any veto power is also immaterial because the particular decisions in question here are not within the scope of the joint venture's daily management. (*Id.* at 15.) The collaboration provisions do not concern decisions “during the daily performance of any task order scope of work”; instead they are “made prior to the joint venture commencing performance of each task order scope of work.” (*Id.* at 16-17.) DigiPathy further distinguishes the negative control cases relied upon by Protestor. (*Id.* at 17-18, fn. 20.) Both *Size Appeal of S. Contracting Sols. III, LLC*, SBA No. SIZ-5956 (2018) and *VSBC Protest of U.S. Dep't of Veterans Affairs*, SBA No. VSBC-297-P (2023) involved control over different types of matters than the instant case, and the disputed provisions, unlike here, expressly required approval of the non-managing venturer. (*Id.*) Accordingly, there is no violation of 13 C.F.R. § 128.402(c). (*Id.* at 17.)

DigiPathy next disputes Protestor's claim that its JVA does not comply with 13 C.F.R. § 128.402(c)(7). (*Id.* at 19.) Because T4NG2 is a broad ID/IQ contract, DigiPathy's JVA needs only to “provide a general description of the anticipated responsibilities of the parties.” (*Id.* at 20, quoting 13 C.F.R. § 128.402(c)(7).) Protestor is simply incorrect, therefore, in claiming that DigiPathy was required to include greater detail as to the joint venturers' respective responsibilities. (*Id.* at 19-20, citing *VSBC Protest of ThunderYard Liberty JV II, LLC*, SBA No. VSBC-332-P (2024).) DigiPathy further contends that its JVA does show that Mind Computing will perform at least 40% of the substantive work. (*Id.* at 20.) DigiPathy's proposal, as incorporated into its JVA through the Addendum, shows that Mind Computing will perform at least [XX]% of the work done by DigiPathy. (*Id.* at 20-21.) The proposal additionally shows that Mind Computing will perform work amongst [XXXX] T4NG2 functional areas identified in the RFP. (*Id.* at 22.)

Lastly, DigiPathy argues that its JVA is compliant with 13 C.F.R. § 128.402(c)(9). (*Id.* at 22.) Protestor ignores that DigiPathy's JVOA requires District Director approval before holding administrative records outside of Mind Computing's offices. (*Id.* at 23.) Furthermore, while 13 C.F.R. § 128.402(c)(9) necessitates SBA approval via a District Director, the regulation does not preclude additional approval by the joint venturers themselves. (*Id.* at 24.) Under principles of contract interpretation, these two approvals should not be read to negate one another. (*Id.* at 26.) Rather, they should be considered merely supplementary. (*Id.* at 27.)

#### F. Case File

The CO forwarded OHA copies of DigiPathy's proposal and JVA, and DigiPathy submitted copies of its JVOA and Addendum. The Addendum incorporates the terms of DigiPathy's proposal into the JVA and JVOA. (Addendum at 1.)

DigiPathy's proposal indicates that Mind Computing will perform [XX]% of the work on the T4NG2 contract and across [XXXX] functional areas. (DigiPathy Proposal, Vol. V, Small Business Participation Commitment Narrative, at 2-3.) Dynanet will perform work within [XL] functional areas and up to [XX]% of the work on the T4NG2 contract. (*Id.*) DigiPathy plans to subcontract the remaining [XXXX]. (*Id.*)

The JVA explains that the purpose of the joint venture is to compete for, and perform, the T4NG2 contract. (JVA § 1.) Representatives of Dynanet and Mind Computing executed the JVA on March 17, 2023 and March 21, 2023, respectively. (*Id.* at 12.) The following provisions of the JVA are pertinent to this protest:

### **3 Management**

...

#### 3.1 Managing Venturer

**Mind Computing, Inc**, the [SDVOSB], HUBZone Small Business, Small Disadvantaged Business (SDB), and Small Business Participant, is the Managing Venturer of the Joint Venture.

### 3.1.1 Responsible Manager

[XXXX], a current employee of the Managing Venturer, is the Responsible Manager of this Joint Venture. He is responsible for performance of the Contract, overseeing the jobsite, and reporting to and implementing the instructions of the Managing Venturer.

...

## **7 Contract Performance**

All parties to the Joint Venture are obligated to complete contract performance. The Responsible Manager will perform the day-to-day management and administration of the Contract. Each of the Venturers will have the right to visit the job site(s) to evaluate contract performance.

**7.1 Source of Labor.** The Managing Venturer will submit a staffing plan outlining its method of maintaining a labor pool throughout the duration of Contract performance. **Staffing Plan as Appendix E.**

**7.2 Negotiating the Contract.** The Managing Venturer or its Responsible Manager will be responsible for negotiating the original Contract, and any subsequent negotiations. Any significant changes to the negotiations impacting both Venturers will require Partner Venture approval.

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## **9 Accounting and Administrative Records**

Accounting and other administrative records relating to the Joint Venture will be kept in the offices of the Managing Venturer, unless both parties agree in writing to keep them at an alternate location. Partner Venturers will always have access to all Accounting and Administrative records.

...

## **12 Distribution of Contract and Task Order Work Share to the Venturers**

For any set aside contract, including those performed by a Joint Venture, the Joint Venture must perform the applicable percentage of work required by 13 C.F.R. § 125.6, Limitations on Subcontracting. As such, the performance of work will be as follows:

For any SDVOSB set aside opportunities, the Joint Venture or similarly situated SDVOSB subcontractors will be allocated at least 51% of the cost of services performance. For any opportunities, workshare allocated to the Joint Venture shall be allocated to each of the Venturers in accordance with their Joint Venture ownership percentages, contingent upon each Venturer's active participation in efforts to successfully capture such opportunities. Should a Venturer be solely or primarily responsible for introducing and capturing an opportunity, the workshare allocations may be adjusted and documented accordingly in good faith negotiations between the Venturers, to reflect that out-of-the-ordinary contribution.

...

### **17 Duties and Responsibilities of the Managing Venturer**

The Managing Venturer will be responsible for the overall content of all proposals and performance of any awarded contracts and task orders, as it relates to the Joint Venture, to include contract administration, financial management, financial reporting, contract/task order performance, security compliance, marketing of opportunities, workshare compliance, monitoring past performance and compliance of all Joint Venture terms and conditions. Other duties of the Managing Venturer include:

- Contract administration, management, and reporting.
- Oversight of personnel security processes and management of Government Furnished Equipment.
- Providing the Contractor Program Manager as the primary point of contact to the Government for contract management and administration.
- Oversight to ensure successful execution of project task orders.
- Providing business development and proposal development services in pursuit of individual opportunities.

### **18 Duties and Responsibilities of the Partner Venturer(s)**

The Venturer Team Member(s) will be responsible for assisting and supporting the Joint Venture with all the above Managing Venturer's areas of responsibility, in addition to other assigned specific responsibilities for each awarded task orders. Other duties of the Partner Venturers include:

- Support of the Managing Venturer in contract administration, management, and reporting.

- Support to ensure successful execution of project task orders.
- Providing business development and proposal development services in pursuit of individual opportunities.
- Financial management for Cost Reimbursement type task orders awarded to the Joint Venture shall be controlled by a Venturer that possesses a Government-audited cost accounting system.

...

## **APPENDIX D**

### **Major Equipment Facilities & Other Resources**

As required for Joint Ventures, 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 major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available. As such, we herein specify how major equipment, facilities, and other resources shall be furnished by the parties:

...

- Computer hardware and software required to support individual task orders, which is considered typical for task order performance, and which is not provided as Government Furnished Equipment (GFE), shall be furnished by each Venturer for those staff members of each Venturer who are engaged to support said task order. For each Task Order, the Venturers shall collaborate to determine the exact specifications for such hardware and software, including the costs to be borne by each Venturer. No costs for such hardware and software shall be paid directly by the JV, itself.

...

- Any task order requirements for contractor-site performance that require facilities will be negotiated in collaboration between the Venturers, including the cost of such facility provisioning.

...

## **APPENDIX E**

## STAFFING PLAN

The Managing Venturer shall provide the Responsible Manager who is responsible for overseeing operation of the joint venture.

The Managing Venturer, having responsibility for JV business operations, shall provide staff within its own organization to support financial management, contracting, personnel security, and other back-office functions of the JV.

Staff required to fulfill roles within individual task orders will be determined collaboratively between the Venturers at the Task Order Level.

(JVA at 3, 6, 8-9, 11, 16-18.)

The JVOA was executed on April 10, 2023. (JVAO at 11.) Mind Computing owns [XX]% of DigiPathy, while Dynanet owns the remaining [XX]%. (*Id.*, Exh. A.) The following provisions from the JVOA are pertinent to this protest:

### ARTICLE 4: MANAGEMENT

**4.1 Management.** The managing member is Mind Computing.

**A. Generally.** Subject to the terms of this Agreement and the Vermont Limited Liability Company Act, the business and affairs of the Company will be managed by the Managing Member. The Managing Member shall have the exclusive power and authority to manage the business and affairs of the Company, including performance of the [T4NG2] Contract. Except for those matters to be decided in accordance with unanimous consent pursuant to Clause C, all other matters shall be decided by the Managing Member. Decisions of the Managing Member within its scope of authority shall be binding upon the Company and each Member.

**B. Approval and Action.** Unless greater or other authorization is required pursuant to this Agreement or under the Vermont Limited Liability Company Act for the Company to engage in an activity or transaction, all activities or transactions must be approved by the Managing Member, to constitute the act of the Company or serve to bind the Company.

**C. Certain Decisions Requiring Greater Authorization.** Notwithstanding clause B above, the following matters require unanimous approval of the Members in a consent in writing to constitute an act of the Company:

- (i) With the exception of a transfer of interest governed by Article 6 of this Agreement;
- (ii) The merger of the company with any other entity or the sale of all or substantially all of the Company's assets; and

(iii) The amendment of this Agreement.

## ARTICLE 5: ACCOUNTS AND ACCOUNTING

**5.1 Accounting and Other Administrative Records.** The Company must maintain complete accounting records of the Company's business, including a full and accurate record of each Company transaction. Accounting and other administrative records relating to the Company will be kept in the offices of the Managing Venturer, unless both parties agree in writing to keep them at an alternate location. The Company shall obtain written authorization from the SBA District Director or their designee upon written request prior to utilizing an alternate location. The Company's financial books and records shall be maintained in accordance with sound accounting principles consistently applied (and consistent with requirements for performance of the [T4NG2] Contract). Accounting and other administrative records must be open to inspection and copying by Members during normal business hours upon reasonable notice by the Members wishing to inspect or copy the records or their authorized representatives, for purposes reasonably related to the Membership Interest of such Members. The costs of inspection and copying will be borne by the respective Member. In addition, SBA, including representatives authorized by SBA's Office of Inspector General, may inspect and copy the records of the Company without notice at any time deemed necessary.

...

## ARTICLE 8: PERFORMANCE OF WORK, COMPLIANCE REPORTS AND CERTIFICATIONS

**8.1 Performance of Work.** The Managing Venturer will provide overall executive oversight and will have overall responsibility for managing the [T4NG2] Contract to a successful completion. Regarding the specific Contract tasks, the Managing Venturer will perform major contract functions including overall Contract management. As permitted by 13 C.F.R. § 128.402(c)(2)(iii), the Partner Venturers may be responsible for orders issued under the IDIQ Contract, and such managers shall report to and be supervised by the Managing Venturer.

...

## ARTICLE 9: GENERAL PROVISIONS

...

**9.3 Entire Agreement; Amendment.** This Agreement along with the JVA (together, the "Organizational Documents"), constitute the entire agreement among the Members. There are no representations, agreements, arrangements, or

undertakings, oral or written, between or among the Members relating to the subject matter of this Agreement that are not fully expressed in the Organizational Documents. This Agreement may not be modified or amended in any respect, except in a writing signed by all of the Members, except as otherwise required or permitted by the Vermont Limited Liability Company Act. In the event of a conflict between a provision in this Agreement and a provision in the SBA's regulations, the SBA's regulations, as applicable, shall control.

(JVOA at 5-6, 8-9.)

### III. Discussion

#### A. Burden of Proof

As the protested concern, DigiPathy has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010.

#### B. Date to Determine Eligibility

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

#### C. Analysis

SBA regulations permit that a certified SDVOSB may enter into a joint venture with one or more small businesses, or with an SBA-approved mentor, for the purpose of performing an SDVOSB contract. 13 C.F.R. § 128.402(a). So long as the SDVOSB member of the joint venture is certified, “[t]he joint venture itself need not be a certified VOSB or SDVOSB.” *Id.* When competing for an SDVOSB procurement, though, the joint venturers must create a written joint venture agreement (JVA) that meets the requirements set forth at 13 C.F.R. § 128.402. 13 C.F.R. §§ 128.401(b) and 128.402(c).

Here, there is no dispute that Mind Computing, a certified SDVOSB, owns [XX]% of DigiPathy and is the managing venturer. Section II.F, *supra*. In addition, although not required, DigiPathy too is certified. *Id.* The key question presented, then, is whether DigiPathy's JVA meets the requirements for SDVOSB joint ventures specified at 13 C.F.R. § 128.402. Having reviewed DigiPathy's JVA, as supplemented by the JVOA and Addendum, I find that DigiPathy does meet all requirements, and thus, I must deny the protest. DigiPathy is an eligible SDVOSB joint venture for the T4NG2 procurement.

Protestor questions the validity of DigiPathy's JVA on several grounds. In its original protest, Protestor highlighted that DigiPathy was established in December 2022, whereas the RFP was not issued until March 2023. Section II.B, *supra*. Because several of the requirements

at 13 C.F.R. § 128.402 are contract-specific in nature, Protestor posited that DigiPathy could not have addressed all such matters in the initial JVA. *Id.* DigiPathy counters, though, that its joint venturers revised the initial JVA through the JVOA and the Addendum, both executed before final proposal revisions, thereby more specifically delineating Mind Computing's and Dynanet's respective responsibilities for the T4NG2 contract. Section II.F, *supra*. DigiPathy further highlights that the RFP contemplated the award of multiple ID/IQ contracts. Section II.A, *supra*. When, as here, the underlying procurement is indefinite in nature, SBA regulations are less stringent as to the level of detail that must be included within a JVA. The regulations thus provide that:

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 major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available[.]

13 C.F.R. § 128.402(c)(6). And similarly:

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

13 C.F.R. § 128.402(c)(7).

OHA's recent decision in *VSBC Protest of ThunderYard Liberty JV II, LLC*, SBA No. VSBC-332-P (2024) — which also involved a joint venture competing for the T4NG2 procurement — is instructive here. In *ThunderYard*, OHA found that T4NG2 is an indefinite contracting vehicle, and that particular requirements will be defined only in future task orders. *ThunderYard*, SBA No. VSBC-332-P, at 11. Furthermore, T4NG2 is predominantly a procurement of “IT services,” rather than IT products, and was assigned a services NAICS code. *Id.* This latter point is significant because OHA has recognized that joint venturers may “omit major equipment details in a [JVA] in instances where the procurement is for services.” *Id.* (citing *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012, at 20 (2019)). Given the nature of the T4NG2 procurement, OHA found that a description in the JVA of any “general equipment” to be contributed by each joint venturer for future task orders is sufficient to meet the requirement of § 128.402(c)(6). *Id.* Likewise, an explanation of the “general types of tasks each [joint venturer] will perform” satisfies the requirement of § 128.402(c)(7). *Id.* at 12

(citing *Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 12 (2018)). After concluding that the challenged concern's JVA was sufficiently detailed to meet these requirements, OHA denied the protest.

Here, as in *ThunderYard*, DigiPathy's JVA, supplemented by the Addendum and JVOA, explains general equipment to be supplied by each joint venturer for future T4NG2 task orders. Section II.F, *supra*. Likewise, DigiPathy's proposal, incorporated into its JVA through the Addendum, shows that Mind Computing will perform at least [XX]% of the work done by DigiPathy. *Id.* In addition, Mind Computing will perform work across [XXXX] functional areas, whereas Dynanet will perform work within [XXXX] functional areas. *Id.* Accordingly, given that DigiPathy's joint venturers executed a JVA, as supplemented by the JVOA and Addendum, addressing contract-specific matters, and given further that the instant RFP called for the award of indefinite contracts for services, DigiPathy has shown that its JVA meets the requirements of 13 C.F.R. § 128.402(c)(6), (c)(7), and (d).

In its supplemental protest, Protestor alleges that Dynanet has the power to exert negative control over DigiPathy due to various provisions in the JVA which call for “collaboration” amongst the venturers on certain matters. Section II.D, *supra*. I agree with DigiPathy, however, that collaboration is an inherent aspect of any joint venture. Indeed, applicable regulations specifically state that, although the managing venturer must be “responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture,” the “other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.” *See* 13 C.F.R. § 128.402(c)(i). Here, the JVA, JVOA, and Addendum do not vest Dynanet with any decision-making authority, nor the power to block actions or decisions that Mind Computing may wish to implement. Section II.F, *supra*. Furthermore, Mind Computing is Managing Venturer, retaining “the exclusive power and authority to manage the business and affairs of [DigiPathy].” *Id.* Although Dynanet has the ability to “collaborate” with Mind Computing, when read in context this is merely a consultative or advisory role. Accordingly, I see no basis to conclude that Dynanet can exert negative control over DigiPathy.

OHA's decision in *VSBC Protest of U.S. Dep't of Veterans Affairs*, SBA No. VSBC-297-P (2023), referenced by Protestor, is plainly distinguishable. There, OHA found negative control to be present because, under the terms of the JVA, each joint venturer could control “the hiring and firing of employees, and other HR actions.” *U.S. Dep't of Veterans Affairs*, SBA No. VSBC-297-P, at 7. In the instant case, though, as DigiPathy explains, there is no mechanism for Dynanet to exert comparable control over the joint venture. The “collaboration” language in the JVA is more akin to the situation presented in *Size Appeal of Sage Acquisitions, LLC*, SBA No. SIZ-5783 (2016), which OHA found was not problematic. In *Sage*, although the JVA indicated that certain matters would be “addressed” by a Management Committee, ultimate decision-making authority nevertheless rested solely with the managing venturer. *Sage*, SBA No. SIZ-5783, at 24. OHA found that the JVA merely would enable the non-managing venturer “to voice its opinions on management questions that arise,” but did “not give the [non-managing venturer] veto power over the decisions that will ultimately be made by [] the Managing Venturer.” *Id.* Similarly, Mind Computing retains control over the ultimate decisions of

DigiPathy, notwithstanding that Mind Computing will “collaborate” with — or in other words, consult with or consider input from — Dynanet on various issues. Section II.F, *supra*.

Lastly, Protestor claims that the JVA improperly permits DigiPathy to ignore SBA regulations and hold administrative records outside of Mind Computing's offices without District Director approval. Section II.D, *supra*. This argument fails based on the plain text of the JVOA. If Mind Computing and Dynanet were to decide to keep these records elsewhere, DigiPathy “shall obtain written authorization from the SBA District Director or their designee upon written request prior to utilizing an alternate location.” Section II.F, *supra*. Additionally, even if OHA were to find this provision inconsistent with regulation, the JVOA states that “[i]n the event of a conflict between a provision in this Agreement and a provision in the SBA's regulations, the SBA's regulations, as applicable, shall control.” *Id*.

In sum, DigiPathy has persuasively shown that its JVA, as supplemented by the JVOA and Addendum, is fully compliant with SDVOSB joint venture requirements. The JVA meets the requirements of 13 C.F.R. § 128.402(c)(6) and (7) by providing a general description of the “anticipated major equipment, facilities, and other resources” to be furnished by Mind Computing and Dynanet for this procurement, and by broadly describing the source of labor and the respective contract responsibilities of Mind Computing and Dynanet. Section II.F, *supra*. In accordance with § 128.402(c)(2), the JVA designates Mind Computing, a certified SDVOSB, as Managing Venturer of DigiPathy, and designates a named employee of Mind Computing, [XXXX], as Responsible Manager with ultimate responsibility for performance of the T4NG2 contract. *Id*. Contrary to Protestor's allegations, there is no mechanism whereby Dynanet may exert negative control over the joint venture. *Id*. Furthermore, the JVOA appropriately provides that, absent District Director approval, administrative records will be kept at Mind Computing's offices. *Id*. Accordingly, I find that the JVA, as supplemented by the JVOA and Addendum, satisfies the requirements of 13 C.F.R. § 128.402.

#### IV. Conclusion

DigiPathy has proven its eligibility as an SDVOSB joint venture by a preponderance of the evidence. The protest therefore is DENIED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(B)(i); 13 C.F.R. § 134.1007(i).

KENNETH M. HYDE  
Administrative Judge