

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

VSBC Protests of:

Data Monitor Systems, Inc.,

Protestor,

Re: Elk Solutions, LLC

Solicitation Nos. SPE603-24-R-0508,  
SPE603-24-R-0509, SPE603-24-R-0510

Defense Logistics Agency

SBA No. VSBC-423-P

Decided: January 16, 2025

APPEARANCES

Matthew T. Schoonover, Matthew P. Moriarty, John M. Mattox II, Ian P. Patterson, Timothy J. Laughlin, Haley M. Sirokman, Schoonover & Moriarty LLC, Olathe, Kansas, for Protestor

Peter B. Ford, Meghan F. Leemon, Emily A. Reid, PilieroMazza PLLC, Washington, DC, for ELK Solutions, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 3, 2024, Data Monitor Systems, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of ELK Solutions, LLC (ELK) in connection with the Defense Logistics Agency Solicitation Nos. SPE603-24-R-0508, SPE603-24-R-0509, and SPE603-24-R-0510 to the U.S. Small Business Administration (SBA), Office of Hearings and Appeals (OHA). Protestor alleges that ELK is not unconditionally controlled by one or more service-disabled veterans (“SDVs”), that ELK's qualifying veterans cannot devote full-time to the operations of the concern, and that ELK is unusually reliant on its ostensible subcontractor, [REDACTED], to perform the requirements for the Solicitations. For the reasons discussed *infra*, I DENY the protest.

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<sup>1</sup> This decision was originally issued under a Protective Order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

OHA adjudicates SDVOSB status protests under 15 U.S.C. § 657f and 13 C.F.R. part 134 subpart J.

## II. Background

### A. Solicitations and Protests

Throughout July 2024, the Defense Logistics Agency (“DLA” or “Agency”) issued Solicitation Numbers SPE603-24-R-0508, SPE603-24-R-0509, and SPE603-24-R-0510 (“the Solicitations”) for services contracts to provide aircraft/ground fuel services and fuel storage and distribution at the Kirtland, Wright-Patterson, and Tinker Air Force Bases, respectively. Other than the locations, the Solicitations had near-identical requirements. The Contracting Officer (CO) set the Solicitations aside 100% for SDVOSBs and designated North American Industry Classification System (NAICS) code 493190, Other Warehousing and Storage, with a corresponding \$36.5 million annual receipts size standard, as the appropriate code.

On September 17, 2024, ELK submitted its final proposal revisions for each Solicitation. On September 26 and 27, 2024, the CO announced that ELK was the apparent successful offeror for each of the Solicitations. On October 3, 2024, Protestor filed the instant Protest. Protestor asserts ELK is not unconditionally controlled by one or more SDVs, that ELK's qualifying veterans cannot devote full-time to the operations of the concern, and that ELK is unduly reliant on its ostensible subcontractor to perform the requirements for the Solicitations. (Protest at 1-2).

First, Protestor notes that the highest officer position in the concern appears to be held by a non-SDV, [REDACTED]. [The non-SDV] is the sole signatory registered with the Massachusetts Secretary of State and the sole person authorized to execute any recordable instrument purporting to affect an interest in real property. By virtue of these authorities, [the non-SDV] has the ability to control both daily operations and long-term strategic actions of ELK by refusing to file necessary documents. Protestor alleges that this degree of control from a non-veteran does not comply with the SDVOSB regulations at 13 C.F.R. § 128.203(h)(1)(i). (Protest at 3-4).

Furthermore, Protestor alleges that even if the service-disabled veterans - [Individual 1 and Individual 2] - have control authority over ELK on paper, [the non-SDV] is the president and owner of [the subcontractor] and thus he would exercise control over them both in that capacity. He therefore would also do so in the same capacity at ELK. Protestor emphasizes this point by asserting ELK does not appear to have any reported revenue. Protestor alleges that this creates a scenario in which: “[Individuals 1 and 2] are dependent on their positions with [the subcontractor] for gainful employment. To the extent they take independent action at ELK that is contrary to the desires of [the non-SDV], they jeopardize their careers at [the subcontractor]. As such, any control exercised by [Individuals 1 and 2] is necessarily limited by the desires of the non-veteran manager.” (Protest at 4). This is precisely the negative control the SBA regulations prohibit.

Second, Protestor alleges neither qualifying veteran devotes full-time to the management and operation of ELK because of their other commitments at **[the subcontractor]**. Moreover, **[both firms]** are in the same line of business and have NAICS code 493190 as their primary code. Accordingly, both entities likely have identical normal hours of operation. Protestor alleges that therefore the qualifying veterans must use at least some of the normal operating hours of ELK to manage the day-to-day operations of **[the subcontractor]**. Therefore, one or more service-disabled veterans do not devote full time to the management and operations of ELK. (Protest at 5).

Third, ELK is unduly reliant on its ostensible subcontractor to perform the Solicitation's requirements. Protestor maintains this violates 13 C.F.R. § 128.401(g), the ostensible subcontractor rule in SBA's SDVOSB regulations. The rule requires that if a subcontractor that is not a certified SDVOSB will perform the primary and vital requirements of a SDVOSB contract, or the prime contractor is unduly reliant on one or more small businesses that are not certified SDVOSBs, the prime contractor is not eligible for award of the contract at issue.

Protestor asserts the first part of an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the primary and vital requirements. (*Id.*, citing *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882 (2018).) The primary and vital requirements are the goods and services the procuring agency actually seeks to acquire. (*Id.*, citing *Size Appeal of Anadarko Indus., LLC*, SBA No. SIZ-4708 (2005).)

Protestor characterizes the primary and vital requirements of this contract as aircraft refueling services. Protestor alleges ELK is a newly organized business, with no federal revenue, no federal contracts, no federal contracting footprint of any kind, and does not appear have the equipment, resources or capability to take on a multimillion-dollar federal procurement by itself. Therefore, Protestor maintains ELK is extremely likely to rely upon another contractor in order to adequately perform. Given the common management shared between ELK and **[the subcontractor]**, Protestor reasons it is very probable that **[the subcontractor]** will perform the primary and vital requirements of the contract. This would be in violation of the ostensible subcontractor rule, and thus ELK is ineligible for this procurement. (Protest at 5-6).

#### B. Protest Response

On November 5, 2024, ELK responded to the protest, and included extensive exhibits.

In response to Protestor's first argument that ELK was not unconditionally controlled by the SDVs, ELK points to the company's Operating Agreement. ELK contends that the concern's Operating Agreement complies with the regulation at 13 C.F.R. § 128.203(d), in all respects because it clearly states that **[the SDVs]** are Managing Partners with control of all decisions. The Operating Agreement provides that, for matters requiring a vote of the Members, the SDVs will serve collectively as the controlling voting bloc. Additionally, the SDVs alone constitute a quorum. (Response at 8). It is this voting bloc that controls the operations and long-term decision making of the concern. While the non-SDV is a minority owner, the only unanimous consent provisions in the Operating Agreement are those that are allowed under 13 C.F.R. § 128.203(j).

Otherwise, **[the non-SDV]** is merely a minority member and advisor in the business, with no role in the day-to-day or long-term operations of the Company. (Response at 8).

ELK addresses Protestor's contention that the non-SDV is the sole signatory registered with the Massachusetts Secretary of State. ELK argues a concern having a non-SDV as registered agent does not amount to loss of control by SDV over company. (*Id.*, at 8-9, citing *CVE Protest of Valiant Constr., LLC*, SBA No. CVE-205-P (2021).)

ELK argues the actual language of its organizing documents should be definitive in determining control of the concern. (*Id.*, citing *VetIndy, LLC*, SBA No. VET-175 (2010) and *NuGate Group*, SBA No. VET-132 (2008).)

ELK rejects the argument it is so dependent upon its subcontractor that the qualifying SDVs cannot exercise independent business judgement without great economic risk. ELK thus reasons it does not violate the regulatory requirements of 13 C.F.R. § 128.203(h). ELK has not derived 70% or more of its revenue from any one concern in the past three fiscal years, and thus is not economically dependent upon any other firm. (*Id.*, at 9-10, citing *VSBC Protest of MicroTech*, SBA No. VSBC-286 (2023).) ELK emphasizes that while the presence of the non-SDV as a minority shareholder is highly beneficial due to his extensive experience in the industry, it does not in any way amount to control over the concern. The Operating Agreement ensures control remains with the SDVs.

ELK rejects Protestor's second argument that the SDVs' full time outside employment with **[the subcontractor]** precludes them from devoting sufficient time to ELK's business. Protestor asserted the two firms are in the same line of business and likely have identical hours of operation. ELK concedes the two firms share the same NAICS code 493190, but the business operations of the two concerns are different. **[The subcontractor]** was formed in 2007, ELK was formed this year, and these procurements mark its entry into the industry. **[The subcontractor]** is not dependent upon the SDVs continued involvement in the company. While SBA regulations generally require a qualifying veteran devote full-time to the applicant business during a company's normal hours of operation, this is not required if the company demonstrates the qualifying veteran has ultimate managerial and supervisory control over both long-term decision-making and day to day management of the concern. No persons other than the SDVs control ELK's long-term decision making and day-to-day management, and so ELK is compliant with the regulation. (*Id.*, at 12, citing 13 C.F.R. § 128.203(i).)

ELK argues the Operating Agreement and the SDVs' resumes rebut the presumption the SDVs do not control it. The Operating Agreement makes clear the SDVs are a voting bloc with majority control over the concern. Their resumes show they have years of experience in the industry. The many documents they have signed show they are running the concern. Further, because ELK is a new business it is reasonable to conclude it requires less than full time attention. Further, **[Individual 2's]** statement confirms he led the proposal process while working for ELK, not **[the subcontractor]**. Since that time, **[Individual 2]** has resigned from **[the subcontractor]** and works full-time for ELK. (*Id.*, at 12-13.)

ELK then addresses Protestor's third point, that ELK is unduly reliant upon its ostensible subcontractor. ELK contends that under the regulation a SDVOSB will not be considered unduly reliant “where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.” (*Id.*, at 13, citing 13 C.F.R. § 128.401(g).) ELK contends its submissions, such as its declaration of partnerships, correspondence with the SBA, and declaration of **[Individual 2]**, establish that it will comply with the limitations on subcontracting rule for the instant Solicitations.

In his declaration, **[Individual 2]** states that he is an SDV and **[a minority owner]** of ELK. During proposal preparation, he oversaw and led ELK's proposal development effort, while working full time for ELK. **[Individual 1, another minority owner]**, worked approximately half-time for ELK. ELK will be the prime contractor and provide all management and staffing for the contracts. **[The subcontractor]** will be the sole subcontractor, to assist with transitional staffing and provide new refueling equipment. The Government will provide refueling trucks for the first 24 months of the contract. ELK will perform at least 51% of the work for the contract. **[Individual 2]** used to work for **[the subcontractor]** and resigned effective September 29, 2024. **[Individual 2]** maintains his former position did not take away from his ability to control ELK's long-term and day-to-day decision making. **[He and Individual 1]** control the concern, while **[the non-SDV]** is merely an advisor and is not involved in day-to-day or long-term decision-making. (**[Individual 2]** Declaration, at 1-2.)

ELK points out that its proposal makes clear it is the prime contractor. The technical point of contact is **[Individual 2]** and the cost and pricing point of contact is **[Individual 1]**, both of whom together own and control the concern. Where the procurement is for services, and the challenged concern's proposal establishes it is in compliance with the Limitations on Subcontracting rule, performing at least 51% of the work, there is no violation of the ostensible subcontractor rule. ELK argues it is in compliance, and the protest should be denied. (Response at 14-16, citing *VSBC Protest of Panakeia, LLC*, SBA No. VSBC-352 (2024).)

### C. Supplemental Protest

On November 22, 2024, Protestor filed a Supplemental Protest. 13 C.F.R. § 134.1007(e).

Protestor maintains first that the record shows that a non-veteran controls ELK. In ELK's application, **[the non-SDV]** stated his job title was “Managing Member,” and explained he would be involved in the firm's business operations. He would provide business development to pursue federal contracts and assist in management of operations and finance. He thus admits control over ELK's business operations. A non-veteran will direct long-term strategic direction of the business. (Supplemental Appeal, at 2-3, citing Case File, (CF) Exh. 36.)

ELK's Operating Agreement does not name a Managing Member. If a limited liability company has no manager, then, unless otherwise provided in the Operating Agreement, the members manage the company. (*Id.*, at 3, citing CF, Exh. 16, Mass. Gen. Laws ch. 156C, § 24(b).) [ELK is a Massachusetts limited liability company]. ELK's Operating Agreement states that each Member is an agent of the company and has authority to bind the company in the

ordinary course of business. No manager is identified in the Operating Agreement, and **[the non-SDV]** can bind the company, and since **[the non-SDV]** accordingly has as much power as the SDV Members, they therefore do not control ELK. (*Id.*, at 3, Exh. 16, at 7.)

Protestor points to *Matter of XOtech, LLC*, SBA No. VET-277 (2018), where OHA found ineligible a concern where the SDV was majority owner but was only one of three managers, all of whom had the power to manage the company. Here, all three Members, including **[the non-SDV]**, have authority to manage ELK. (*Id.*, at 4.)

Protestor also relies upon *Matter of Benetech, LLC*, SBA No. VET-225 (2011). There, the challenged concern was formed under a limited liability company statute that provided a firm was managed by its members unless the operating agreement provided otherwise. That firm's operating agreement designated a veteran and a non-veteran as managers, but did not designate the veteran as managing member or in any way as the concern's highest-ranking officer. Accordingly, the concern was ineligible. Here, the Operating Agreement names three Members, but no one is designated Managing Member. The Massachusetts Secretary of State lists **[the non-SDV]** as signatory for ELK. It is not clear that either of the SDVs hold the highest officer position in ELK, and so it is not an SDVOSB. (*Id.*, at 5, CF, Exh. 18, at 2.)

Protestor points out SBA regulations prohibit a non-qualifying veteran from having business relationships that cause such dependence the qualifying veterans cannot exercise independent business judgement without great economic risk. (*Id.*, at 5, citing 13 C.F.R. § 128.203(h)(1)(ii).) Protestor maintains that is the case here where the SDVs are employees of **the ostensible subcontractor**, and thus dependent upon that concern for income. **[Individual 2's]** resignation took place after the date for determining ELK's eligibility, and so cannot be considered here. The SDVs are both employed by **[the non-SDV's]** concern. (*Id.*, at 6, CF, Exh. 41, 48, 61.) Protestor alleges **[the subcontractor]** is providing ELK with office space, in a less than arm's length transaction. (*Id.*, at 7, CF, Exh. 61.) **[The subcontractor]** is also supplying ELK with the fuel trucks necessary to perform the contract and so ELK is dependent upon **[the subcontractor]** for the equipment to perform these contracts. (*Id.*, at 8, ELK Response Exh. C (PDF p. 105), Exh. D (PDF p. 184), Exh. E (PDF p. 270).)

Protestor argues ELK depended upon **[the non-SDV]** to start the company. Where a minority owner employs the SDV majority owner of a relatively new enterprise with no revenues, provides equipment without which it cannot operate, then the concern is economically dependent upon the minority owner and the SDV cannot exercise independent judgement without great economic risk. (*Id.*, at 9, citing *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011).)

Protestor takes exception to ELK's contention that it will comply with the Limitations on Subcontracting rule. Protestor argues that ELK's proposal states that it will split the profits of this procurement **[REDACTED]** with **[the subcontractor]**. (*Id.* at 10, ELK Response Ex. C (PDF p. 105), Ex. D (PDF p. 184), Ex. E (PDF p. 270).) However, the limitation on subcontracting is measured in total dollars paid by the government, not profits, which are not synonymous with total dollars paid. ELK's assertion it will retain **[REDACTED PERCENTAGE]** of profits on the contracts does not establish compliance with the Limitation

in Subcontracting rule. (*Id.*, citing 13 C.F.R. § 125.6(a)(1).) **[The subcontractor]** will supply the critical equipment necessary to perform the primary and vital functions of the contract, and thus ELK is in violation of the ostensible subcontractor rule.

#### D. ELK's Response to Supplemental Protest

On December 9, 2024, ELK filed a Response to the Supplemental Protest. ELK contends Protestor's allegations in the Supplemental Appeal are mere speculation unsupported by any evidence in the record. Furthermore, Protestor relies on cases that are outdated and inapposite, in addition to inapplicable regulations and an inaccurate analysis of the limitations on subcontracting rule for services contracts. (Supplemental Response at 1-2).

First, ELK responds to the argument that a non-veteran controls the concern. Protestor relies on **[the non-SDV's]** single two-sentence statement in made in connection with ELK Solutions' SDVOSB application to argue that the qualifying SDVs do not control the concern. **[The non-SDV]** stated he was one of the Managing Members and provided business development to pursue contracts and once ELK had revenue would assist in management of operations and financing. (*Id.* at 3, citing Supplemental Appeal at 2). Protestor contends that statement is an admission that **[the non-SDV]** exercises control over the business development and operations of the concern. ELK argues this argument is misguided for two reasons.

**[The non-SDV]** does not state he will manage ELK's business operations but rather that he will “provide business development,” which is a function commonly delegated to subordinate employees by business owners. Protestor does not cite to any case law or regulations to show that such duties being performed by a non-SDV minority owner is prohibited in any way. Furthermore, **[the non-SDV's]** statement that he will “assist” the SDVs with the “operations and finance” of the concern does not in any way amount to exercising control, and SBA's regulations not only do not prohibit but actively allow for such arrangements. (*Id.* at 3, citing 13 C.F.R. § 128.203(h)(2).)

Second, as Protestor itself admits, the key document for the control analysis is ELK's Operating Agreement. (*See* Supplemental Protest at 3; see also CF Exh. 16; *VSBC Appeal of Precision Global Supply LLC*, SBA No. VSBC-413-A (2024).) While Protestor claims that the Operating Agreement gives **[the non-SDV]** the ability to control ELK Solutions, the plain language states otherwise. The Operating Agreement complies with 13 C.F.R. § 128.203(d) in all respects because it makes clear that **[the SDVs]**, as the only members of the voting bloc, control all decisions of ELK Solutions. (CF, Exh. 16 § 6). Despite this, Protestor contends that there is a control issue because the term “Managing Member” is not used in the Operating Agreement. However, the SDVOSB application documents and the proposals make clear that **[the SDVs]** are both Managing Members or Managing Partners, and **[Individual 2]** the CEO of ELK Solutions. (CF, Exhs. 41 and 61). Finally, the fact the Operating Agreement provides that for matters requiring a vote of the Members, **[the SDVs]** will serve collectively as the controlling voting bloc is more than sufficient to demonstrate sufficient control according to Massachusetts law. (Mass. Gen. Laws ch. 156C, § 24(b)).

ELK thus argues there is no merit to Protestor's claim there are no limits on **[the non-SDV's]** ability to control ELK. He has no unfettered right to bind the company because the limitations imposed by the voting bloc and the quorum limit his ability to act without the SDV owners' consent. (Response to Supplemental at 5, citing CF at Tab 16, § 6.1, phrase: "Subject to the limitations imposed by this Agreement or by the action of the Members, each Member is an agent of the Company and has authority to bind the Company in the ordinary course of its business.") **[The non-SDV]** has no ability to control the operations of the company, and even if he could bind the company - which he cannot - Protestor points to no regulations or case law demonstrating the ability to act as an agent of a concern equates to managing the day-to-day operations and controlling the long-term decisions. (*Id.*, at 5-6.)

ELK argues the cases cited by Protestor are not apposite here. In *Matter of XOtech, LLC*, SBA No. VET-277 (2018), the Operating Agreement designates three managers, including the single SDV manager, and provides that each manager would have a single vote. By contrast, ELK Solutions' Operating Agreement holds that, with the limited exception of the unanimous consent provisions allowed under 13 C.F.R. § 128.203(j), all decisions of the company will be subject to the control of the SDV-controlled voting bloc. (Supplemental Response at 6).

In *Matter of Benetech, LLC*, SBA No. VET-225 (2011), OHA could not determine who held the highest officer position in the challenged firm and determined that there were numerous examples of a minority owner actively exercising management authority on behalf of the company. By contrast, Protestor provides no evidence of this with respect to ELK. (*Id.*)

Protestor's second argument is that the SDV owners of ELK cannot exercise independent business judgment due to their relationship with the ostensible subcontractor. Yet Protestor presents no actual evidence to back up this claim. While Protestor asserts that the SDVs must rely on **[the subcontractor]** as their "source of revenue" for ELK and are dependent on their continued employment with **[the subcontractor]**, nothing in the record establishes ELK has received any revenue from **[the subcontractor]**. (*Id.* at 7.)

While one SDV resides in Utah and the other in Georgia, they both manage the company from their home offices and are in constant communication with one another. The business space provided by **[the subcontractor]** in Massachusetts is nothing more than an office space for receiving mail, while the procurements at issue will be performed at Air Force bases in New Mexico, Ohio, and Oklahoma. (*Id.*). Protestor's claim that **[the subcontractor]** is supplying capital equipment misconstrues the relationship between the two firms. In accordance with the limitations on subcontracting rule, **[the subcontractor]** will provide equipment to ELK in its capacity as a subcontractor, but there is no evidence that a prime-subcontractor relationship will render ELK unable to exercise independent business judgment. (*Id.* at 7-8).

Protestor also misconstrues **[Individual 2's]** explanation of why **[the non-SDV's]** involvement in ELK Solutions is in the best interest of the concern. **[Individual 2]** merely communicated that **[the non-SDV's]** experience performing federal contracts in the fuel services industry is beneficial to helping a new SDVOSB effectively compete for new federal awards. Protestor cites no evidence to support its claim that **[the non-SDV]** has an outsized role in



“guiding the business” nor to any SBA regulations that prohibit SDVs from seeking guidance from non-veterans. (*Id.* at 8).

Finally, the facts in *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011), the case Protestor cites to bolster this argument bear little resemblance to the facts here. That case turned on 8(a) Business Development program regulations. There the former employer “furnished facilities and equipment” to the challenged concern but, unlike here, the support was not in the context of a subcontractor or teaming relationship. Furthermore, the former employer in that case provided “critical financial support,” including all the SDVOSB firm’s “financial capital,” whereas Protestor has still provided no evidence of such an arrangement in this case. (Supplemental Response at 8-9, citing *Marine Construction Services*).

Protestor’s third argument is that ELK Solutions cannot comply with the limitations on subcontracting rule, as required by 13 C.F.R. § 128.401(g)(2). Yet Protestor has not pointed to anything in the record suggesting **[the subcontractor]** is an ostensible subcontractor. (*Id.*)

ELK argues OHA should reject Protestor’s allegations that it will not perform the “primary and vital” requirements of each solicitation because such an inquiry is based on outdated regulations. Rather, OHA should look at the revised regulations at 13 C.F.R. § 128.401(g)(2), for guidance on this matter. The preamble to the rule states that “meeting the applicable limitation on subcontracting requirement is sufficient to overcome any claim of an existence of an ostensible subcontractor.” (*Id.*, at 9, citing 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023).)

Protestor’s claim that ELK will pay **[the subcontractor] [REDACTED PERCENTAGE]** of the total profits rather than **[REDACTED PERCENTAGE]** of the total contract dollars does not establish ELK does not meet the limitations on subcontracting. However, the record confirms ELK will comply with the relevant regulations regarding limitations on subcontracting. The proposal documents that ELK is the prime contractor and primary contact with the government. (Supplemental Response at 9, citing Response to Protests Exhs. C-E.) **[Individual 2]** is the technical point of contact, **[Individual 1]** the cost and pricing point of contact. ELK employs **[Individual 2]** full-time and has direct oversight over all contractual matter regarding the instant solicitations, having final decision authority. (*Id.*, at 10.)

**[The subcontractor’s]** only role - as ELK’s sole subcontractor for these procurements - is providing start-up support, as requested by ELK, and new refueling equipment. These tasks in no way account for more than 50% of the services. (*Id.*, at 9-10, citing *VSBC Protest of In & Out Valet Co.*, SBA No. VSBC-363-P (2024).) This is especially true given that much of what **[the subcontractor]** is responsible for is materials cost, which is not considered to be subcontracted and is not factored into the limitations on subcontracting calculation. (*Id.*, citing 13 C.F.R. § 125.6.) Accordingly, Protestor’s arguments based on **[the subcontractor]** providing new refueling equipment have no bearing on the limitations on subcontracting/ostensible subcontractor rule analysis. Further, **[Individual 2]** confirmed ELK will perform at least 51% of the contract and not pay more than **[REDACTED PERCENTAGE]** to **[he subcontractor]**. (*Id.*, citing Response to Protests Exhs. B, C-F.)

In sum, ELK argues, Protestor's arguments fail to establish how ELK's proposals contravene the requirements of 13 C.F.R. § 128.401(g) and, thus, the Protests should be denied. (*Id.*, at 10).

### III. Discussion

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

As the protested firm, ELK has the burden of proving her eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the case file and the information provided by the protester, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestor and ELK is part of the record.

OHA determines the eligibility of the protested concern's SDVOSB status as of the date of the initial offer, including price. 13 C.F.R. § 134.1003(e)(1).

#### B. Analysis

In order to qualify as an SDVOSB, SBA regulations require that a concern must be at least 51% owned and controlled by one or more service-disabled veterans. 13 C.F.R. § 128.200(b)(2). The management and daily business operations of the concern must be controlled by one or more service-disabled veterans. 13 C.F.R. § 128.203(a). The terms of a concern's governing documents (e.g., an operating agreement) determine who controls the company's decisions. *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).

Here, Protestor's first ground alleges that the concern is not unconditionally controlled by one or more SDVs. Protestor does not dispute SDV ownership of ELK. Protestor supports its claim by alleging the highest officer position in the concern is held by **[the non-SDV]**, who is also the sole signatory registered with the Massachusetts Secretary of State and the sole person authorized to execute any recordable instrument purporting to affect an interest in real property. Protestor alleges this is a violation of 13 C.F.R. § 128.203(h)(1)(i), resulting in ELK not being controlled by SDVs. ELK responds by pointing to the concern's Operating Agreement, and arguing it complies with the regulation at 13 C.F.R. § 128.203(d).

In the case of a limited liability company, one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.

13 C.F.R. § 128.203(d).

A non-qualifying-veteran must not . . . [e]xercise actual control or have the power to control the concern. . . .

13 C.F.R. § 128.203(h)(1)(i).

ELK is a limited liability company. (Exhs. 18 and 22). There are three Members, with **[REDACTED ownership]**; two of them, **[Individuals 1 and 2]**, are SDVs. ELK is a limited liability company, and therefore the Operating Agreement determines who controls the concern. Section 6.2 of ELK's Operating Agreement (CF, Exh. 16) sets out the powers and duties of the Members:

- “The presence, in person or by proxy, of Members holding at least fifty-one percent (51%) of the Percentage Interests shall constitute a quorum. For so long as the Company is participating in the VetCert Program, **[Individual 1 and Individual 2's]** presence shall be required at all meetings of the Members and shall constitute quorum.”
- “Except as otherwise provided in this Agreement, all decisions requiring action of the Members or relating to the business or affairs of the Company will be decided by the Consent of the Members.”
- “For matters requiring a vote of the Members, **[Individual 1 and Individual 2]** will serve collectively as the controlling voting bloc (“Voting Bloc”).
- “For so long as the Company is participating in the VetCert Program, the Company's management and governance shall be structured so that the Voting Bloc shall control the activities, affairs, and business and operations and long-term decision making of the Company.” (emphasis supplied).

(Exh. 16, Section 6.2)

The Operating Agreement clearly designates the two SDVs as a Voting Bloc, whose presence is required at all meetings, is necessary to form a quorum and that clearly has control over the concern, both of day-to-day operations and long-term decision-making. While **[the non-SDV]** may act as a Member, the Voting Bloc formed by the two SDVs has the power to outvote him at any time. The Operating Agreement does not give him the authority to act unilaterally in a manner that would give him control over the concern that would violate 13 C.F.R. § 128.203(h)(1)(i), as Protestor alleges. The Operating Agreement provides that the Voting Bloc formed by the SDVs is essential to form a quorum, and control ELK's day-to-day operations and long-term decision-making. The only unanimous consent provisions are those allowed by 13 C.F.R. § 128.203(j).

**[Individual 2]** is the Managing Member, and CEO, and ELK thus complies with 13 C.F.R. § 128.203(b), requiring that the qualifying veteran hold the highest officer position in the concern. CF, Exh. 41, 61. That **[the non-SDV]** is involved in the management of the concern is permitted by the regulation. 13 C.F.R. § 128.203(h)(2). While the Operating Agreement provides that each Member is an agent of the company, their actions are subject to the limitations imposed by the Agreement or the action of the Members. CF, Exh. 16, § 6.1. The control exercised by the SDV Voting Bloc can override any action taken by **[the non-SDV]**.

As to Protestor's argument that having **[the non-SDV]** as ELK's sole signatory registered with the Massachusetts Secretary of State, OHA has held that a concern having a non-SDV as registered agent does not amount to loss of control by SDV over company. *CVE Protest of Valiant Constr., LLC*, SBA No. CVE-205-P, at 16 (2021). Similarly, **[the non-SDV's]** statement that he aids in ELK's business development does not evidence control by him over the concern.

Protestor's reliance on *Matter of XOtech, LLC*, SBA No. VET-277 (2018) is misplaced. That concern had three managers, all with equal authority, only one of whom was an SDV. Similarly, in *Matter of Benetech, LLC*, SBA No. VET-225 (2011), it was not clear that the SDV held the highest officer position, the operating agreement provided that the firm was managed equally by its two members, only one of whom was an SDV. Here, the two SDVs comprise the controlling Voting Bloc of the concern, and these cases Protestor relies upon are inapposite.

Protestor also alleges the SDVs cannot exercise independent business judgment, because of their employment with **[the subcontractor]**. Protestor alleges that the SDVs are reliant upon **[the subcontractor]** for a source of revenue. Since the non-SDV controls the other company where the SDVs work, this creates a situation in which the SDVs are dependent on their positions with **[the subcontractor]** for gainful employment. Accordingly, Protestor argues any control exercised by the SDVs is necessarily limited by the desires of the non-SDV manager of **[the subcontractor]**. OHA has held that the inability to exercise independent business judgement is found when the involvement of the non-SDV-owned firm is crucial to the SDV-owned firm's ability to conduct business. *CVE Protest of Blue Cord Development Group, LLC*, SBA No. CVE-179-P, at 10 (2021). Here, while the SDVs are employed at **[the subcontractor]**, it does not appear that its involvement is crucial to ELK's ability to conduct business. The SDVs can exercise independent business judgment without economic risk.

The Protestor further argues that no qualifying veteran devotes full-time to the management and operation of ELK by virtue of their other commitments at **[the subcontractor]**, as required by 13 C.F.R. § 128.203(i). However, the regulation also provides that:

A qualifying veteran generally must devote full-time during the business's normal hours of operations, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the concern. Where a qualifying veteran claiming to control a business, concern devotes fewer hours to the business than its normal hours of operation, SBA will assume that the qualifying veteran does not control the concern, unless the concern demonstrates that the qualifying veteran has ultimate managerial and supervisory control over both the long-term decision making and day-to-day management of the business. (emphasis supplied).

13 C.F.R. § 128.203(i).

Here, the record establishes that the SDVs have ultimate managerial authority under the Operating Agreement and have control over both the long-term decision making and day-to-day management of ELK, and so their other employment does not disqualify ELK as an SDVOSB. Further, ELK responded to these assertions it was financially dependent upon **[the**

**subcontractor]** by noting that it will “receive revenue and income from the contracts contemplated by the Solicitations prior to the need to purchase any vehicles, which are not required until the 24-month mark.” Response at 9-10. The SDVs thus showed they could conduct their business and exercise independent judgment without great economic risk.

Protestor's reliance upon *Matter of Marine Construction Services, LLC*, SBA No. VET-216 (2011) is misplaced. There, the concern which employed the veteran owners also owned 49% of the concern and supplied all of its capital and equipment. **[The subcontractor]** does not have that role here, as it has no ownership interest in ELK. While **[the non-SDV]** does, it is one that can be outvoted by the Voting Bloc. Further, **[the subcontractor]** is not a source of capital for ELK, and thus cannot exercise control the way the concern in *Marine Construction* could.

Finally, Protestor argues ELK is in violation of 13 C.F.R. § 128.401(g), the ostensible subcontractor rule, because it is unduly reliant upon **[the subcontractor]** to adequately perform the contracts required by the Solicitations. However, a protest based upon the ostensible subcontractor rule must present credible evidence that the challenged concern is unduly reliant upon the ostensible subcontractor, or that the ostensible subcontractor is performing the contract's primary and vital functions. 13 C.F.R. § 134.1003(c); *VSBC Protest of MicroTech*, SBA No. VSBC-286, at 8 (2023). Protestor has failed to present credible evidence of an ostensible subcontractor violation here, but mere allegations.

Further, SBA revised the regulation in 2023:

In the case of a contract or order for services, specialty trade construction or supplies, SBA will find that a prime VOSB or SDVOSB contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not certified VOSBs or SDVOSBs, where the prime contractor can demonstrate that it, together with any subcontractors that are certified VOSBs or SDVOSBs, will meet the limitations on subcontracting provisions set forth in § 125.6 of this chapter.

13 C.F.R. § 128.401(g)(2)

The SBA preamble to the final rule stated:

For a services, specialty trade construction, or supply contract or order, SBA believes that meeting the applicable limitation on subcontracting requirement is sufficient to overcome any claim of the existence of an ostensible subcontractor. (emphasis supplied).

88 Fed. Reg. at 26,166.

This requirement is that in the case of a services contract, the challenged concern will not pay more than 50% paid to it by the government to firms which are not similarly situated. 13 C.F.R. § 125.6(a)(1).

ELK included a letter in each of its proposals which laid out that it would be the primary contact with the Government, that **[Individual 2]** would be the Technical POC and **[Individual 1]** the Cost and Pricing POC. **[The subcontractor]** was to provide assistance at the pre-proposal, proposal and post-proposal stages, and to provide new refueling equipment. The Government would initially provide refueling equipment. ELK proposes that the profit of the contract would be split **[majority number]** for ELK, **[minority number]** for the subcontractor.

A recent case, *VSBC Protest of Panakeia, LLC*, SBA No. VSBC-352 (2024), interpreted the new provision of the ostensible subcontractor rule. In that case, in which apparent awardee's proposal confirmed that it would perform at least 51% of the contract, and would retain control over the contracts' primary and vital requirements, OHA held:

Because the instant procurement is for services, WSC, the prime contractor, need only comply with the "Limitations on Subcontracting" provisions related to services at 13 C.F.R. § 125.6(a)(1). That regulation, in turn, stipulates that the prime contractor may subcontract no more than 50% of services to entities that are not similarly situated. Even if OHA were to reach the merits of the protest, then, the protest appears deficient, as Protestor has not shown any reason to believe that [the] proposal would contravene § 128.401(g). *See, e.g., CVE Protest of Veterans Care Med. Equip., LLC*, SBA No. CVE-241-P, at 11 (2022); *CVE Protest of Welch Constr., Inc.*, SBA No. CVE-210-P, at 4 (2021); *CVE Protest of In and Out Valet Co.*, SBA No. CVE-174-P, at 4 (2020).

*Panakeia* at 2-3.

The record thus does not contain credible evidence that **[the subcontractor in question]** will be an ostensible subcontractor. Any business space that is being provided is simply a formality for ELK to receive mail, as the SDVs otherwise manage the businesses from their home offices and ensure that the procurements are performed at their designated locations, the specific Air Force bases.

The same is true with respect to this case, as Protestor based its assertions solely on speculative grounds due to ELK being a new company and lacking revenue. While perhaps plausible in theory, this is a convincing enough response to rebut an allegation otherwise lacking in evidence.

In sum, I conclude that ELK has met the burden of establishing that it is an eligible SDVOSB. I therefore must DENY the protest.

#### IV. Conclusion

For the above reasons, the protest is DENIED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN  
Administrative Judge