Receipt number AUSFCC-10331368

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

VETERANS CHOICE MEDICAL EQUIPMENT, LLC,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Case No. 25-574 C

Judge _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to 28 U.S.C. § 1491(b), Plaintiff Veterans Choice Medical Equipment, LLC ("VCME"), by its undersigned counsel, submits this bid protest Complaint.

INTRODUCTION

1. The sole issue in this case concerns the legal interpretation of Small Business Administration ("SBA") regulations related to joint ventures ("JVs"), and specifically whether an award under which a JV performed no work, for which the JV received no payment, and which was terminated for the convenience of the Government after being stayed as a result of a bid protest, counts as the receipt of a contract that starts the two-year period for a JV's eligibility under 13 C.F.R. § 121.103(h).

2. This protest challenges the decision by SBA's Office of Hearings and Appeals ("OHA") to reverse Size Determination No. 06-2025-011 by SBA Office of Government Contracting – Area VI (the "Area Office"). OHA erroneously disagreed with the SBA Area Office's common-sense conclusion that a mere award selection in 2018, which never resulted in

any performance or payment before its termination, did not constitute a receipt of a contract that starts the two-year period for VCME's eligibility to submit proposals for additional awards. As a result, OHA determined that VCME was ineligible to submit a proposal for a new contract in 2022 based on the passage of more than two years since its first "contract" in 2018

3. VCME is a JV between members of a SBA-approved mentor-protégé relationship. The SBA's Mentor Protégé Program ("MPP") is designed to help eligible small businesses (i.e., protégés) gain capabilities and win government contracts through partnerships with more experienced companies (*i.e.*, mentors). *See* 13 C.F.R. § 125.9(a). Under the MPP, a protégé and its mentor enter into a mentor protégé agreement ("MPA"), which is reviewed and approved by SBA, for a six-year duration, and during the term of the MPA, no determination of affiliation or control may be found between the mentor and protégé firms based solely on the MPA or any assistance provided pursuant to the agreement. *See* 13 C.F.R. § 125.9(e).

4. Firms in an SBA-approved mentor-protégé relationship may form a JV and compete as a small business for any small business set-aside contract for which the protégé firm individually qualifies under SBA's regulations. *See* 13 C.F.R. § 125.9(d)(1)(iii). SBA's regulations exempt the members of a JV from a finding of affiliation with one another when the JV is created pursuant to an SBA-approved MPA so long as the JV complies with the SBA's regulations. *See* 13 C.F.R. § 125.9(d)(4).

5. VCME is a JV formed by protégé Avenue Mori Medical Equipment, Inc. ("AMME") and its SBA-approved mentor, Rotech Healthcare Inc. ("Rotech"). SBA found that protégé AMME, individually, is small under the size standard applicable to this procurement. AMME's status as a Service-Disabled Veteran-Owned Small Business ("SDVOSB") was not disputed in the SBA proceedings.

6. The issue in this case is whether VCME is eligible to have its size based solely on the size of protégé AMME. The dispute centers around SBA regulations that can strip JVs of the exception from affiliation in certain circumstances. Specifically, SBA's regulation at 13 C.F.R. § 121.103(h) contemplates that JVs are entities of limited duration, rather than permanent business entities, and therefore sets certain limits on the extent of a JV's business. As relevant here, 13 C.F.R. § 121.103(h) allows a JV to submit an unlimited number of offers, but those offers may be submitted no later than two years after receipt of the JV's first contract (hereinafter, the "2-Year Rule").

7. OHA determined that VCME was not eligible for award under the United States Department of Veterans Affairs' (the "VA" or the "Agency") Request for Proposals 36C25622R0128 (the "RFP" or the "Solicitation"), a 100% set-aside for SDVOSBs to provide in-home oxygen and ventilator services in the southeastern United States. *See Hometown Veterans Medical LLC*, SBA No. SIZ-6343 (2025). The VA issued the Solicitation on September 29, 2022, and VCME timely submitted its proposal on October 27, 2022. VCME's size was protested and SBA's Area Office denied the protest. But OHA reversed that decision and concluded that VCME exceeded the two-year period under 13 C.F.R. § 121.103(h), rendering AMME and Rotech affiliates and ineligible for award because Rotech is a large business.

8. In arriving at this determination, OHA misapplied the 2-Year Rule of 13 C.F.R. § 121.103(h). OHA held that the applicable two-year period began on March 5, 2018, when the VA awarded Contract No. 36C25918D0037 to VCME (the "2018 Award"), despite the fact that VCME never performed any work or received any payment under the 2018 Award. The 2018 Award was initially stayed due to a bid protest and was subsequently terminated for the convenience of the Government without any performance or payment. In these circumstances, both common sense

and a reasonable reading of the regulation dictate that the 2018 Award was essentially nullified and therefore did not start VCME's two-year period for eligibility to seek additional contracts under the 2-Year Rule. VCME was finally awarded a contract that it was able to perform on April 30, 2021, thus starting its two-year period. VCME's October 27, 2022 proposal under the Solicitation was thus well within the two-year period allowed under 13 C.F.R. § 121.103(h).

9. As discussed in more depth below, OHA's decision is based on a legal error. 13 C.F.R. § 121.103(h) contemplates that JVs will "engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge." SBA has stated in rulemaking that the rationale behind the 2-Year Rule is that "SBA believes that allowing a joint venture to ***operate as an independent business entity*** for more than two years erodes the limited purpose and duration requirements of a joint venture" 85 Fed. Reg. 66146, 66148 (Oct. 16, 2020) (emphasis added). The regulation is clear that a JV's unsuccessfully seeking work through submission of proposals does not constitute operating as a business entity or "engag[ing] in and carry[ing] out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge"—the 2-Year Rule does not start upon submission of a proposal, but rather when a contract is ***received***. That is, the two-year period starts with a contract that the JV can actually perform—and thus act as an "operating business entity" that "engage[s] in and carr[ies] out as a business entity for joint profit … for which purpose [the joint venturers] combine their efforts, property, money, skill, or knowledge." The triggering event for the two-year period thus sensibly ties to the stated purpose of a JV, *i.e.*, becoming a going concern for profit.

10. VCME's 2018 Award was, in practical effect, a proposal that did not ultimately result in a contract, given that the contract was stayed and then terminated without any performance

or payment. The 2018 Award was essentially nullified and never permitted VCME to "operate as an independent business entity," "engage in and carry out business ventures," the use of the joint venturers' "efforts, property, money, skill, or knowledge," or any "joint profit." It is therefore unreasonable, and creates an absurd result, to interpret 13 C.F.R. § 121.103(h) to start VCME's two-year period of eligibility on the date that award.

11. The limitation of SBA's regulation to a two-year period for JVs is meant to effectuate SBA's goal to prevent JVs from being on-going business entities, and rather ensure they are entities of limited purpose and limited duration. VCME's conduct in this procurement is perfectly in line with that goal; its proposal was submitted well before the second anniversary of its receipt of *the first contract it ever performed*. In these circumstances, OHA's decision does nothing to advance SBA's policy goals and only causes harm to an SDVOSB and the JV it created under SBA's mentor-protégé program.

PARTIES

12. VCME is an SDVOSB JV created pursuant to an SBA-approved MPA between AMME and Rotech. VCME's principal address is 2515 Pioneer Avenue, Suite 3, Vista, California, 92081.

13. Defendant is the United States of America acting through the SBA, a federal agency.

JURISDICTION

14. The United States Court of Federal Claims has jurisdiction over this bid protest under the Tucker Act, 28 U.S.C. § 1491(b)(1), which allows the Court to hear "an action by an interested party objecting to . . . any alleged violation of statute or regulation in connection with a procurement" by a federal agency. The Court's jurisdiction extends to "challenges to decisions by

SBA's OHA." *Darton Innovative Tech., Inc. v. United States*, 153 Fed. Cl. 440, 450 (2021) (quoting *Palladian Partners v. United States*, 783 F.3d 1243, 1254 (Fed. Cir. 2015)); *see also, e.g.*, *Swift & Stanley, Inc. v. United States*, 155 Fed. Cl. 630, 635 (2021) (exercising jurisdiction over challenge to OHA decision on size determination). Here, VCME objects to OHA's decision reversing the Area Office's size determination as arbitrary, capricious, an abuse of discretion, and not in accordance with law.

15. VCME is an actual offeror under the RFP (and indeed was selected by the VA as the apparent successful offeror) and therefore is an "interested party." *See Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1352 (Fed. Cir. 2004) (holding that an "interested party" is "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract").

16. The Court has jurisdiction to grant the relief requested under the Tucker Act, as amended, 28 U.S.C. § 1491(b)(2), and Rule 65 of the Rules of the United States Court of Federal Claims ("RCFC").

BACKGROUND

A. The Joint Venture

17. AMME and Rotech are members of an SBA-approved MPA pursuant to 13 C.F.R. § 125.9. AMME is the protégé and Rotech is the mentor. Pursuant to the SBA-approved MPA, AMME and Rotech entered into a JV Agreement and created the joint venture VCME. As such, the MPA shields AMME and Rotech from affiliation based on assistance provided pursuant to the MPA. *See* 13 C.F.R. § § 121.103(b)(6), 121.103(h)(2)(ii), 125.9(d)(1), 125.9(d)(4).

18. VCME does not dispute that Rotech is other-than-small under the size standard applicable to this procurement.

19. However, because AMME is an SDVOSB, under 13 C.F.R. §§ 121.103(h)(2)(ii) and 125.9(d)(1)(iii), VCME, as a mentor-protégé JV, is eligible for award of the SDVOSB set-aside procurement at issue if its members are exempted from a finding of affiliation pursuant to SBA's regulations.

B. The Solicitation and Award

20. On September 29, 2022, the VA issued the Solicitation as a 100% SDVOSB set-aside procurement under NAICS code 621610, Home Health Care Services, which at that time had a corresponding size standard of $16.5 million. The Solicitation contemplated the award of a single IDIQ contract to provide in-home oxygen and ventilator services in the southeastern United States. *See HVM*, SBA No. SIZ-6343 at 2.

21. Offers in response to the Solicitation were due on November 1, 2022. *Id.* VCME timely submitted its initial proposal including price on October 27, 2022.

22. On January 3, 2023, the VA announced that VCME was the apparent awardee under the Solicitation. *Id.*

C. Size Protests and Appeal to OHA

23. On October 31, 2024, Hometown Veterans Medical LLC ("HVM") filed a size protest with the VA contracting officer challenging VCME's eligibility for award on the basis that VCME does not comply with the two-year rule for JVs. *HVM*, SBA No. SIZ-6343 at 2. The contracting officer then forwarded the size protest to the Area Office for review.

24. On November 15, 2024, the Area Office dismissed HVM's size protest as untimely. *See id.* at 3. However, the Area Office initiated its own size protest on November 26, 2024. *Id.*

25. The Area Office issued its Size Determination on December 23, 2024, concluding that VCME was small under the applicable size standard. *See id.*

26. The Area Office's Size Determination made note of VCME's 2018 Award, but explained that it would not count this award for purposes of calculating the two-year period of 13 CFR §121.103(h) because performance of the contract was suspended due to a bid protest, the contract subsequently was terminated for convenience, and VCME performed no work and received no benefit from it. *HVM*, SBA No. SIZ-6343 at 3. The Area Office concluded it would be unfair to count the 2018 Award as starting the two-year period under 13 C.F.R. § 121.103(h) in these circumstances. *See id.*

27. The Area Office instead determined that VCME's two-year period began when VCME was awarded a contract on April 30, 2021. *See HVM*, SBA No. SIZ-6343 at 3. Accordingly, VCME met the requirements of the 2-Year Rule at the time it submitted its offer under the Solicitation, October 27, 2022.

28. The Area Office therefore appropriately concluded that VCME was small for the size standard assigned to the Solicitation. *See id.*

29. HVM appealed the Area Office's decision to OHA on January 7, 2025, with a supplemental appeal on January 23, 2024. OHA decided the appeal on March 17, 2025. The public decision issued by OHA is attached to this complaint as Exhibit A.

30. In its appeal, HVM argued that, according to the *Federal Register* commentary which accompanied the 2-Year Rule at the time of its promulgation, SBA explained that "allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture." *HVM*, SBA No. SIZ-6343 at 4 (quoting 85 Fed. Reg. 66,146, 66,148 (Oct. 16, 2020)). Accordingly, HVM argued that the 2-Year Rule should be construed to begin at the award to VCME in 2018.

31. In response, VCME argued that, under that 2018 Award, it "(i) did not and lawfully could not operate to perform and (ii) did not obtain any benefit due to a statutory stay and subsequent termination at no cost to the Government." *HVM*, SBA No. SIZ-6343 at 6. VCME also argued that 13 C.F.R. § 121.103(h) "contemplates that the parties [to a joint venture] are engaged in some effort more tangible and of more immediate effect (and benefit) than mere preparation and pursuit of proposals," and thus, "[o]nly after a joint venture is performing a contract and earning revenue can it be considered carrying out business venture [sic] as contemplated by the regulation." *Id.* at 6–7 (first alteration in original).

32. Additionally, VCME argued that, by use of the word "generally" in the sentence "a specific joint venture ***generally*** may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract," 13 C.F.R. § 121.103(h) contemplates exceptions to the strict 2-Year Rule, in which the contractor does not "receive" a contract because it cannot "perform, make money and derive experience" therefrom. *Id.* at 7 (emphasis added).

33. VCME also argued that, in the 2-Year Rule's statement that "[o]nce a joint venture ***receives a contract***, it may submit additional offers for a period of two years" (emphasis added), the term "receives" indicates that the contract in question must be one that can actually be performed, rather than simply being a paper selection for award that the JV lacks the ability to perform and benefit from.

34. OHA determined that the Area Office's decision was inconsistent with 13 C.F.R. § 121.103(h). OHA emphasized that:

> the rule contains no exceptions for situations in which a joint venture derives little, or no, benefit from an award, such as when a joint venture is unsuccessful in competing for orders under a contract, or when (as here) a contract is terminated without the joint venture performing substantial work.

HVM, SBA No. SIZ-6343 at 9. OHA also held that "although § 121.103(h) contains the caveat that a joint venture 'generally' cannot be awarded contracts beyond the two-year window, the word 'generally' is explained elsewhere in the rule as referring to two particular situations": "(1) a 'joint venture may be awarded one or more contracts after [the] two-year period as long as it submitted an offer prior to the end of that two-year period'; and (2) 'a joint venture may be issued an order under a previously awarded contract beyond the two-year period'." *Id.* (alteration in original) (quoting 13 C.F.R. § 121.103(h)). Accordingly, "the extent to which VCME benefited, or failed to benefit, from its 2018 contract is not a relevant consideration," according to OHA. *Id.* OHA further relied on SBA's commentary adopting the predecessor to the 2-Year Rule, rejecting "a proposal to revise § 121.103(h) such that a 'contract award' would mean 'only a contract that was kept and performed by the joint venture,'" which SBA determined "would serve no useful purpose, as SBA regulations already permit the same joint venture partners to establish multiple joint ventures." *Id.* at 10 (quoting 76 Fed. Reg. 8,222, 8,223 (Feb. 11, 2011)). OHA also relied on other SBA commentary adopting the current 2-Year Rule in which "SBA again expressed the view that 'allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture.'" *Id.* (quoting 85 Fed. Reg. at 66,148).

35. Based on the above, OHA reversed the Area Office's Size Determination and found VCME ineligible for award under the Solicitation.

36. This protest follows.

COUNT I

OHA Improperly Applied 13 C.F.R. § 121.103(h)

37. The allegations of paragraphs 1 through 36 are hereby incorporated by reference.

38. SBA's regulation at 13 C.F.R. § 121.103(h) provides that for two years after a JV's receipt of its first contract, the JV may submit an unlimited number of proposals without the JV's partners being considered affiliated for size purposes. As OHA noted, the regulation states in relevant part:

> A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out business ventures for joint profit over a two-year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that *a specific joint venture generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract*, without the partners to the joint venture being deemed affiliated for the joint venture. However, a joint venture may be issued an order under a previously awarded contract beyond the two-year period. *Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award.* An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer prior to the end of that two-year period. SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award.

13 C.F.R. § 121.103(h) (emphasis added).

39. VCME received the 2018 Award on March 5, 2018. However, before any work had been performed on that contract, due to a statutory stay resulting from a bid protest, the VA terminated the contract for the convenience of the Government. The 2018 Award was thus effectively nullified.

40. VCME was not awarded any contract on which VCME performed or received any other benefit until April 30, 2021. *See HVM*, SBA No. SIZ-6343 at 3. Under the terms of 13

C.F.R. § 121.103(h), VCME was therefore allowed to submit an unlimited number of offers until April 30, 2023, two years after the 2021 Award.

41. Because VCME's offer in response to the Solicitation was submitted on October 27, 2022, within two years of the 2021 Award, VCME's partners were not affiliated for the purpose of size, and, accordingly, only AMME's size and eligibility as an SDVOSB was relevant to award under the Solicitation. AMME's SDVOSB status was not protested and the Area Office found AMME to be small for the size standard. *See HVM*, SBA No. SIZ-6343 at 3. VCME therefore is eligible for award.

42. OHA's decision that the 2018 Award, rather than the 2021 Award, triggered the beginning of VCME's two-year period of eligibility under the 2-Year Rule was an improper application of 13 C.F.R. § 121.103(h). HVM demonstrated no error of fact (e.g., whether VCME derived any benefit from the 2018 Award) or of law (e.g., that Area Office incorrectly interpreted the 2-Year Rule) in the Area Office's Size Determination as required by regulation. *See* 13 C.F.R. § 134.314. Thus, OHA should not have disturbed the Area Office's Size Determination.

43. OHA misinterpreted the relevant regulation, 13 C.F.R. § 121.103(h). While the purpose of the 2-Year Rule is certainly to limit the duration of JVs, it is important to bear in mind that this limitation is narrowly defined. The two-year period does not, for example, start when the JV entity is formed. A JV entity may therefore exist for far longer than two years and still be eligible for new awards. The regulation also does not contemplate that the JV's submission of proposals starts the two-year period. Rather, the limitation is that "[o]nce a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award." 13 C.F.R. § 121.103(h). The practical import of this language is that a JV can submit

proposals for years without starting the two-year period, so long as it does not "receive[] a contract."

44. While 13 C.F.R. § 121.103(h) refers to the start date of the two-year period as when the JV "receives a contract," it is contrary to the overall intent of the regulation to construe that phrase to include an award for which the JV was selected, but never actually performed. A JV's mere selection for award, which never results in performance of work or payment, cannot reasonably be said to constitute the receipt of a contract within the meaning of the 2-Year Rule. Indeed, SBA noted in rulemaking that its rationale for the 2-Year Rule is that "SBA believes that allowing a joint venture to ***operate as an independent business entity*** for more than two years erodes the limited purpose and duration requirements of a joint venture" 85 Fed. Reg. 66146, 66148 (Oct. 16, 2020) (emphasis added). It is thus operating as a business entity, not merely submitting proposals or temporarily holding paper "awards" that are not performable contracts, that starts the two-year period. A JV's mere selection for award, which never results in performance of work or payment, certainly does not constitute "engag[ing] in and carry[ing] out business ventures for joint profit . . . for which [the joint venturers] combine their efforts, property, money, skill, or knowledge" any more than merely submitting a proposal. Being selected for award but then having the contract terminated without any work or payment is no different, in practical effect, than having simply submitted a proposal and not being selected for award. It makes no sense, and would create an absurd result, for a JV's award in such circumstances to start the short two-year period for the JV's eligibility for additional awards.

45. Moreover, OHA failed to properly apply section 121.103(h)'s statement that a JV "generally" may not be awarded contracts after the two-year period. Section 121.103(h) states that its own first sentence—which states that a JV "engage[s] in and carr[ies] out business ventures for

joint profit over a two year period . . .”—“means that a specific joint venture ***generally*** may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract.” 13 C.F.R. § 121.103(h) (emphasis added). Properly read, the term “generally” indicates that the rare case of an award that does not result in “engag[ing] in and carry[ing] out business ventures for joint profit . . . , for which purpose they combine their efforts, property, money, skill, or knowledge” does not start the two-year period. OHA ignored the fact that the “generally” sentence expressly defines the “mean[ing]” of the prior sentence, and instead erroneously assumed it refers to the *subsequent* sentences of section 121.103(h).

46. Furthermore, section 121.103(h) states the 2-Year Rule as follows: “Once the joint venture ***receives a contract***, it may submit additional offers for a period of two years . . .” (emphasis added). The use of the term “receives” in the context of a contract connotes that the party must have or be able to perform the contract, not merely that it has been selected for award. The term “receives”—phrased in the present tense—connotes some possessory interest. It indicates that the entity possesses or has the contract. It can do something with the contract. It can use the contract, *e.g.*, to obtain experience and revenue. OHA’s decision conveys no particular meaning to this term.

47. The intent of the 2-Year Rule that is clear from its plain language, then, is to limit JVs from submitting proposals for new work for more than two years after they first receive a contract that results in performance of work in exchange for payment. The triggering event thus ties to the stated purpose, *i.e.*, becoming a going concern for profit. If the entity has not obtained any business on which it can act, the brief window in which it can pursue work should not begin to close. The regulation thus sets forth a practical test that makes sense in the context of when an entity’s operating window should begin to close. OHA’s interpretation to the contrary was

unreasonable and would create the absurd result that VCME's two-year window started before it obtained any work at all.

48. Contrary to OHA's decision, the fact that the parties to the JV arguably *could* have entered into a new JV does not reasonably change the meaning of the regulation or the absurdity of the result under OHA's interpretation. The parties could not have reasonably anticipated that a contract they never actually performed would be counted toward the two-year period, because that would require adopting an unreasonable interpretation of 13 C.F.R. § 121.103(h).

49. Additionally, section 121.103(h) is clear that simply creating new JVs is not a riskless proposition as OHA implies—it states: "The same two (or more) entities may create additional joint ventures, and each new joint venture may submit offers for a period of two years from the date of the first contract to the joint venture without the partners to the joint venture being deemed affiliates. ***At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners may lead to a finding of general affiliation between and among them. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture pursuant to paragraph (h)(3) of this section***" regarding ostensible subcontractors. (Emphasis added.) Parties thus cannot simply assume that new JVs can be created in every instance. Moreover, the creation of a new JV entails costs that a reasonable small business would not voluntarily undertake absent an apparent need to do so. For these reasons and others, the notion that JV parties can always simply create a new JV to avoid even *questions* about the interpretation of the 2-Year Rule does not justify OHA's position. OHA's reliance on the possibility that a new JV could be created, in place of rigorous analysis of the regulation, further renders its decision arbitrary and capricious.

50. Similarly, SBA's commentary in the 2011 Federal Register, which OHA cited in its decision, does not provide a rational basis supporting OHA's decision. *See HVM*, SBA No. SIZ-6343 at 9-10, quoting 76 Fed. Reg. 8,222, 8,223 (Feb. 11, 2011). Among other reasons, the quoted commentary related to rulemaking that established a prior version of 13 C.F.R. § 121.103(h) in 2011. The 2-Year Rule was established in 2020. SBA's reasoning from more than nine years earlier, in establishing a different rule, cannot override the clear intent behind the 2-Year Rule in the current regulatory text.

51. Finally, OHA's reliance on SBA's commentary in the 2020 rulemaking that "allowing a joint venture to operate as an independent business entity for more than two years erodes the limited purpose and duration requirements of a joint venture" does nothing to support its decision. *See HVM*, SBA No. SIZ-6343 at 10, quoting 85 Fed. Reg. 66,146, 66,148 (Oct. 16, 2020). SBA did not make this statement in the context of whether an unperformed and ultimately nullified award counts as receipt of contract. Rather, it was a response to commenters' suggestions that JVs be allowed to seek contracts for longer than two years. *See* 85 Fed. Reg. at 66,148. This comment by SBA is neither here nor there in VCME's case, because there is no dispute that a 2-Year Rule applies in this case. The question is simply when to start the two-year period. SBA's emphasis in commentary that there should be a two-year period thus does not support OHA's decision. OHA's reliance on that commentary to support its decision thus further renders it arbitrary and capricious.

52. Therefore, the regulation at 13 C.F.R. § 121.103(h) did not require the affiliation of AMME and Rotech for the purposes of size determination the time of the submission of VCME's offer under the Solicitation. OHA's interpretation to the contrary was arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law, and should be set aside. *See* 28 U.S.C. § 1491(b)(4); 5 U.S.C. § 706(2).

53. OHA's actions have clearly prejudiced VCME because, as the awardee under the Solicitation, but for OHA's erroneous conclusion that VCME's partners are deemed affiliated, VCME would be the awardee and eligible to perform the contract in its entirety.

54. The Court should issue a permanent injunction vacating OHA's decision and directing OHA to issue a decision finding VCME's members are not affiliated under the 2-Year Rule and, therefore, VCME is small and eligible for award under the applicable size standard. VCME has demonstrated success on the merits, as set forth above. VCME would be irreparably harmed absent a permanent injunction because VCME could lose the contract prematurely and be denied a fair opportunity to compete for the VA's requirement. VCME has no adequate remedy for that loss absent an injunction. Further, the balance of harms favors VCME: there would be no significant harm to the Agency by awarding VCME an injunction, but rather a benefit, as the Agency would be able to obtain performance from VCME, which is the Agency's best-value selection in the competition under the Solicitation. Finally, the public interest would be served by granting a permanent injunction because the public's interest lies in preserving the integrity of the procurement process.

PRAYER FOR RELIEF

WHEREFORE, VCME respectfully requests that this Court:

i. Issue declaratory relief declaring that OHA's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that VCME was prejudiced by this improper action.

ii. Issue a permanent injunction (a) vacating OHA's March 17, 2025 decision reversing the Area Office's Size Determination; (b) directing OHA to issue a decision that VCME is small for purposes of the Solicitation; and (c) preventing the VA from making any contract actions in reliance upon OHA's March 17, 2025 decision.

iii. Order such other and further relief as the Court deems just and proper.

Dated: April 1, 2025

Respectfully submitted,

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