

REDACTED VERSION FOR PUBLIC RELEASE

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

CVE PROTEST OF:

Blue Cord Dev Group, LLC

Protestor

RE: Purple Heart Heroes, LLC

Solicitation No. 36C10F20R0066
U.S. Department of Veterans Affairs

SBA No. CVE-179-P

Decided: March 4, 2021

APPEARANCES

Gordon Griffin, Esq., and Amy L. Fuentes, Esq., Holland & Knight LLP, Washington, D.C., for Blue Cord Dev Group, LLC.

John R. Sharp, Esq., and Keith Bradley, Esq., Squire Patton Boggs (US) LLP, Denver, CO, for Purple Heart Heroes, LLC.

Kristin S. Grotecloss, Esq., for the U.S. Department of Veterans Affairs.

DECISION¹

I. Introduction and Jurisdiction

On October 6, 2020, Blue Cord Dev Group, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Purple Heart Heroes, LLC (PHH) in connection with U.S. Department of Veterans Affairs (VA) Request for Lease Proposals (RLP) No. 36C10F20R0066. Protestor contends that PHH will be unusually reliant upon a subcontractor to perform the contract and that PHH is not controlled by service-disabled veterans. For the reasons discussed *infra*, the protest is granted.

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

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- Demolition, permitting, and construction of the medical outpatient center contemplated by the RLP; and
- Ongoing property management, maintenance, and janitorial services throughout the life of the 20-year term of the lease.

(Protest, at 5.) Protestor points out there is no publicly available information on Mr. Gore or on PHH that demonstrates any experience or expertise in these areas and no evidence of Mr. Gore's experience with respect to project management, construction management, architectural and design management, financing and land acquisition, or property management. (*Id.*) Therefore, all of this work will be performed by Catalyst.

Protestor further advances that PHH relies upon Catalyst or employees of Catalyst to maintain its System for Award Management (SAM) profile. This shows that PHH is unable to complete its SAM registration without reliance upon Catalyst and demonstrates that Catalyst constitutes an ostensible subcontractor for the purposes of this procurement. (*Id.* at 5-7.) Protestor notes that Catalyst lists all of PHH's awarded leases as part of its own portfolio in its marketing materials and on its website. (*Id.*, at 7-8.) This marketing approach stands in contrast to PHH's website, which has no projects, no expertise in build-to-suit lease design, construction, and project management, and no indication of any experience in these areas. (*Id.*, at 8.)

Protestor asserts that at least two properties that PHH intends to lease to the VA are registered under the care of Catalyst, while Mr. Pardo and Catalyst are performing arguably the most fundamental requirement of the RLP, i.e., obtaining and maintaining the property on behalf of PHH, demonstrating undue reliance upon a non-SDVOSB. (*Id.*, at 9.) Furthermore, Protestor observes that PHH appears to be co-located with Catalyst and Raines Feldman, LLP, the law firm founded by Robert Pardo, the CEO of Catalyst. (*Id.*, 9-11.)

Finally, Protestor concludes that PHH obtained the contract by improperly representing itself as an SDVOSB for this set-aside procurement while it unduly relied upon a non-SDVOSB to perform the primary and vital requirements contemplated by the RLP, citing *J.E.T.S., Inc. v. U.S.*, 838 F.2d 1196, 1200 (Fed.Cir.1988). (*Id.*)

E. PHH's Response

On November 13, 2020, PHH responded to the protest. PHH argues that 13 C.F.R. § 125.18(f) does not apply to the RLP, because the rule is for service contracts and the RLP is for a procurement of real estate. (Response, at 1.) Protestor has no basis for disputing PHH's SDVO status, and even if § 125.18(f) were to apply to this case, the protest would still be groundless. (*Id.*) PHH agrees with Protestor that Catalyst highlights on its website portfolio a number of projects undertaken by PHH, because Catalyst manages investment funds that invest in the underlying real estate. (*Id.*) PHH provides a declaration of Robert Garcia, President and Chief Operating Officer of Catalyst, to support this advertisement, and notes that it does not suggest Catalyst is engaged in the work of developing the properties. (*Id.*)

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PHH offers five reasons why the protest should be denied. First, the ostensible subcontractor rule does not apply to procurements for leases, and § 125.18(f) by its terms applies to a “service contract or order,” whereas the preamble to the proposed rule made it clear that it does not apply to contracts other than service contracts, such as construction contracts or contracts involving non-manufacturers. (*Id.*, at 2.) For this reason, PHH argues that OHA has held that § 125.18(f) (and its parallel provision for contracting by the Department of Veterans Affairs, 13 C.F.R. § 134.1003) does not apply to a contract for supplies. (*Id.*, citing *CVE Protest of Superior Optical Labs, Inc.*, SBA No. CVE-157-P, at 12 (2020).)

Similarly, PHH notes the rule does not apply to a contract for real property acquisition by other federal agencies, highlighting that “real property leases are [excluded] . . . from the acquisition of services and supplies” under the Federal Acquisition Regulation and the ordinary meaning of the word “services”—encompassing “labor, skill, or advice”—does not include leases of real property. (*Id.*, *Matter of Cross & Co. LLC*, No. B-417971, at 6 (2019).) Thus, the plain text of § 125.18(f), by referring to a “service contract or order,” does not apply to a procurement for a real property lease.

PHH further argues that the subcontracting limitations found at 13 C.F.R. § 125.6 are not applicable here because they address matters of responsibility, not eligibility. (*Id.*, at 3-4.)

PHH asserts it is owned and controlled by an SDV, Zachariah Gore, its 70% owner. PHH includes with its Response the latest version of its Limited Liability Company Agreement, which had not been submitted with its Proposal, nor to the CVE, as required. In this Agreement, dated June 1, 2020, [XXXXXXXXXXXX] is replaced as minority member by [XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX], whose Manager is Robert Pardo, who signed the Agreement on Catalyst’s behalf. (Response, Ex. D.) Further, PHH maintains Protestor’s allegations are inaccurate, that it has more than two employees, and will be performing the primary and vital tasks of this procurement. (*Id.*, at 4-8.)

F. Supplemental Protest

On December 1, 2020, after reviewing the Case File under the terms of an OHA protective order, Protestor filed a supplement to its protest. Protestor argues that the Case File bolsters its original contentions that PHH relies entirely upon Catalyst to perform the primary and vital work required by the RLP, and the material produced showed the two entities are so intertwined that it is impossible to tell where one ends, and another begins. (Supp. Protest, at 1-2.)

Protestor further claims that the Case File shows that PHH has [X] employees, [X] of whom are officers of Catalyst, and were hired *en masse* the day the ostensible subcontractor rule became effective. (*Id.*, at 2.) Protestor gives examples that PHH by its own admission relies entirely upon Catalyst to obtain the financing for its projects, for the preparation and submission of its bids and proposals, and for the design, construction, and management of the leased premises. (*Id.*) Mr. Gore, the founder and president of PHH, has no relevant experience or expertise to allow him to provide any meaningful oversight or management of the design,

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construction, and maintenance of the leased facilities required to perform the requirements of the RLP.

Protestor concedes Mr. Gore's honorable service, but also states:

He is not, however, in any way experienced or capable of managing a multimillion dollar build-to-suit leasing project, which requires management of architects, designers, construction contractors and subcontractors, as well as financing, land acquisition, and building maintenance and support. As your Office consistently holds, "a prime contractor must bring something to the table beyond its small business size status and under 13 C.F.R. § 121.103(h)(4) that something must be, at a minimum, the ability to perform primary and vital contract requirements." *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 at 21-22 (2009). Because Mr. Gore cannot bring the ability to perform the primary and vital contract requirements, and because the other "employees" of PHH are indisputably the employees of the subcontractor, PHH is ineligible for award under the ostensible subcontractor rule.

(*Id.*, at 2.)

Protestor then argues that the ostensible subcontractor rule applies to this procurement. Protestor argues that a lease is a service contract. First, it is indisputably a contract. Further, a service contract must directly engage the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. Protestor maintains that this lease is clearly such a contract. The lessor/contractor is required to perform a number of identifiable tasks, and these tasks are not tied to end items of supply being furnished to the Government. (*Id.*, at 2-3, citing FAR 37.101.) This contract calls for the lessor to perform maintenance, housekeeping, and architect /engineering services, all of which are included in FAR's definition of service contracts. (*Id.*, at 4-7.) The FAR provides that a contract may be for something other than just services, yet still be a service contract. (*Id.*, at 7, citing FAR 37.102(a) & (i).) The contract incorporates FAR provisions generally applicable to service contracts. Protestor asserts that PHH's reliance upon the Federal Register preambles is misplaced because the text of the regulation controls. (*Id.*, at 8.) Protestor further asserts that PHH's reliance upon *Matter of Cross & Co. LLC*, No. B-417971, at 6 (2019) is misplaced. The language PPH relies upon is not GAO's holding, which was narrower, but the description of GSA's position in the case. (*Id.*, at 9.)

Protestor points out that PHH admits [X] of its [X] employees are also Catalyst employees. The primary and vital requirements of this contract are the management of the complex set of services, and it is the Catalyst employees who will performing those services. Mr. Gore has no experience in lease development and management. (*Id.*, at 10-11, citing Response at 6.) Protestor asserts PHH's reliance on joint employees with Catalyst violates the ostensible subcontractor rule. Without those of its personnel who are also Catalyst employees, PHH lacks any relevant experience to perform this contract.

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Protestor further points to questions CVE posed to PHH. CVE inquired of PHH how Mr. Gore managed the concern when he resided [X] miles from its place of business. The answer was through email and video conferences, managing sites around the country. PHH asserted that Mr. Gore performed all management. CVE also notes that Mr. Pardo is involved in PHH's day-to-day operations because he works at PHH's address and was listed as a contact on various profiles. The main telephone number for PHH is the same as for one of Mr. Pardo's companies, and PHH's fax number is also associated with Mr. Pardo. Mr. Gore's email address on his VIP profile is the same as that listed for Mr. Pardo on his personal resume. All email correspondence for PHH is sent to Mr. Pardo and [Individual]. PHH's response was that Mr. Gore and Mr. Pardo speak three times a day and Mr. Pardo implements Mr. Gore's decisions. (*Id.*, at 12-14, CF, Ex. 84 at 1-2.)

Protestor notes that Mr. Gore's resume shows no experience in real estate, while Mr. Pardo's shows very extensive experience in real estate. (*Id.*, at 15, CF, Ex. 25, 26.) Throughout the certification process, Mr. Gore never spoke to CVE without Mr. Pardo on the line. (*Id.*, at 16, CF, Ex. 125, 128.) Protestor notes that PHH admits Catalyst employees are responsible for securing financing for PHH's projects. (*Id.*, at 16, citing PHH Response at 4, 7-8.)

Protestor asserts PHH and Catalyst share offices and resources. PHH's Response shows that four of its five employees and officers are also Catalyst employees and officers. (*Id.* at 21, Response at 6.) Protestor points to Mr. Gore's Declaration in response to the protest, where he states that he gave a 30% interest in the concern to VAF to meet PHH's financial needs and to utilize Catalyst's services. (*Id.*, at 23, citing Gore Declaration at 4.)

Protestor concludes by arguing that Mr. Gore does not really control PHH, but that its relationship with Catalyst means control does not lie with Mr. Gore. (*Id.*, at 24-27.)

G. Response to Supplemental Protest

On December 16, 2020, PHH responded to the Supplemental Protest. PHH argues that the Supplemental Protest is an untimely effort to remedy defects in the initial protest and introduces material outside the record available at the time of the initial protest. (Response to Supplemental Protest, at 1.) PHH asserts that Protestor lacks standing to protest since Protestor was eliminated from the competitive range. (*Id.*, at 2-3.)

PHH argues the ostensible subcontractor rule does not apply here. PHH emphasizes that the FAR definition of a service contract is one whose primary purpose is to perform an identifiable task rather than furnish an end item of supply. (*Id.*, at 3, citing FAR 37.101.) Here, the primary purpose of a lease is to acquire real property. The NAICS code for the contract is for leasing, not for services. The first page of the contract provides that the Lessor leases to the Government the described premises. The janitorial services ancillary to the lease represents only 1.8% of contract value. (*Id.* citing RLP, at 1, 6.) PHH reasserts the GAO's *Cross* decision excludes a lease from the category of service contracts. (*Id.*, at 4.)

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PHH rejects Protestor's argument that the RLP incorporates the FAR provisions for labor standards generally applicable to service contracts. Those provisions are in FAR Part 37, and the RLP contains no reference to them. It does state (§ 3.01) that if Lessor proposes to satisfy the RLP requirements by means of construction, then certain contract provisions apply. However, these construction provisions establish that the RLP is not a service contract. (*Id.*)

PHH maintains it performs its work with its own employees. PHH asserts that while its Response identified four officers, it did not state that these four individuals were all of its employees. (*Id.*, at 5.) PHH further asserts there is no evidence Catalyst is a subcontractor. PHH does concede that its four identified employees other than Mr. Gore are also Catalyst employees and that Catalyst has arranged financing for PHH's development projects. (*Id.*, at 5-6.) PHH denies it is co-located with Catalyst. While both offices are in the same building, they are on different floors. (*Id.*, at 6.)

PHH further maintains that Mr. Gore does, in fact, control the concern. PHH asserts that 13 C.F.R. § 125.13(i)(4) is not applicable because while certain officers of PHH are also employed by Catalyst, Catalyst is not PHH's minority owner. The minority owner is Catalyst Encore, LLC. (*Id.*, at 6, Ex. D.) PHH asserts that Mr. Gore makes the long-term decisions for the concern, and points to his declaration attached to the Response. (*Id.*, Ex. B.) PHH asserts that 13 C.F.R. § 125.13(i)(5) is not applicable because the entity providing PHH with financial support, Catalyst, is not an equity owner of PHH. Providing a loan or loan guaranty on commercially reasonable terms does not by itself give a non-service-disabled veteran the power to control the firm. Nothing in the record suggests the financing is not on ordinary, commercially reasonable terms. (*Id.*, citing 13 C.F.R. § 125.13(j), *CVE Protest of Alpha4 Solutions LLC*, No. CVE-137-P (2019).) Protestor further asserts that 13 C.F.R. § 125.13(i)(7) is not applicable because there is no showing of how Mr. Gore could not exercise independent judgment without great economic risk. Nor is there any evidence of negative control by the minority shareholder. (*Id.*)

III. Discussion

A. Standing

On November 23, 2020, I issued an Order to Show Cause why the instant appeal should not be dismissed, because Protestor was not in the competitive range. After considering the arguments of the parties, on December 23, 2020, OHA issued an Order finding that Protestor did in fact have standing to protest. The regulation grants standing to protests to offerors, which Protestor is, and does not require that the offeror be in the competitive range. 13 C.F.R. § 134.1002(b).

B. Dates to Determine Eligibility and Burden of Proof

In a CVE Protest pertaining to a procurement, OHA determines the eligibility of the protested concern as of two dates: (1) the date of the bid or initial offer including price, and (2) the date the CVE Protest was filed. *See* 13 C.F.R. § 134.1003(d)(1). Here, PHH submitted its

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initial proposal including price on March 8, 2020, and the instant protest was filed on October 6, 2020. Sections II.C and II.D, *supra*. Therefore, OHA must examine PHH's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date. Here, these are the same regulations. As the protested firm, PHH has the burden of proving its eligibility by a preponderance of the evidence. 13 C.F.R. § 134.1010.

C. The Ostensible Subcontractor Rule

The Ostensible Subcontractor rule applicable to CVE contracts provides:

Where a subcontractor that is not similarly situated performs primary and vital requirements of a set-aside or sole-source service contract or order, or where a prime contractor is unduly reliant on a small business that is not similarly situated to perform the set-aside or sole source service contract or order, the prime contractor is not eligible for award of an SDVO contract.

13 C.F.R. § 125.18(f).

When SBA issued the proposed rule, it explained in the preamble that: "This rulemaking will not apply to non-service contracts, such as construction contracts or contracts involving nonmanufacturers." 83 Fed. Reg. 62,516, 62,521 (Dec. 14, 2018). It further stated in the preamble to the final rule that "In the context of socio-economic set-aside or sole source service contracts, the ostensible subcontractor rule applies ..." 84 Fed. Reg. 65647, 65654 (Nov. 29, 2019). The text of the rule itself states that the rule applies to service contracts and mentions no other type of contract. The language of the preambles further clarifies this. OHA has held that the regulation applies only to procurements for services. *CVE Protest of Superior Optical Labs, Inc.*, SBA No. CVE-157-P, at 10 (2020).

The contract at issue here is for the VA to lease space for a clinic. The NAICS code for the contract is for Lessors of Nonresidential Buildings, an industry which comprises establishments primarily engaged in acting as lessors of buildings not used as residences, i.e., for office space or other business purposes.³ The VA seeks to obtain office space. The various services the Government requires the Lessor to provide are incidental to the acquisition of the real property. GAO has held that a procurement for a lease is not the acquisition of goods or services, but a leasehold interest in real property. *Matter of Cross & Co., LLC*, B-417971, at 5 (Dec. 20, 2019). Contrary to Protestor's argument, this is GAO's clear holding in this case. This follows because the acquisition of a lease is not an acquisition of services. Services are an intangible commodity in the form of human effort, such as labor, skill, or advice, not leasehold or real estate. (*Id.*, at 6.) Every procurement for a lease for a federal agency involves a certain amount of design, architectural, and construction services to make a space suitable for Government occupancy, but this does not make it a construction or services procurement. (*Id.*, at

³ See North American Industry Classification System: NAICS code 531120 at <https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=531120&search=2017%20NAICS%20Search>

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involvement is crucial to PHH's ability to conduct business. PHH had no real substantive response to this point. Accordingly, I find that PHH is effectively controlled by non-service-disabled veterans because Catalyst is crucial to its business operations, and Mr. Gore cannot exercise independent business judgment because of this dependence upon Catalyst.

Finally, there is a rebuttable presumption that the service-disabled veteran does not control the concern if they are not located within a reasonable commute of the firm's headquarters or job locations. 13 C.F.R. § 125.13(l). The regulation specifically excludes the service-disabled veteran's ability to communicate electronically as a rebuttal. *Id.* Mr. Gore resides in [XXXXXXX] (CF, Ex. 15.) This is approximately [X] miles from PHH's Los Angeles headquarters. The only rebuttal PHH offered on this issue was Mr. Gore's ability to communicate electronically with PHH's office and employees, which the regulation excludes as a rebuttal. *See CVE Appeal of Next Dimension Training*, SBA No. CVE-108 (2019).

Accordingly, I conclude that PHH is not controlled by Mr. Gore because he does not have managerial experience of the extent and complexity needed to run the concern, because Catalyst is so crucial to PHH's business operations that Mr. Gore cannot exercise independent business judgment without great economic risk, and because he lives too far from PHH's headquarters to adequately supervise the company. Because PHH is not controlled by Mr. Gore, the concern is not an eligible SDVOSB.

IV. Conclusion

PHH has failed to prove its eligibility as an SDVOSB by a preponderance of the evidence. The protest therefore is GRANTED. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).


CHRISTOPHER HOLLEMAN
Administrative Judge