

## FEDERALLY SPEAKING

### ***Federal Procurement Litigation: Size Protests: The Basic Rules of the Game***

**By Edward J. Kinberg**

#### ***Introduction***

In my practice, which is focused on federal contract litigation, I have noticed a significant increase in a unique area: size/status protests. While such protests have been around for years, they have been relatively limited. Size protests arise from an agency's decision to "set-aside" or limit a procurement to a class of contractors based on the size of their business or one of several special statuses established by Congress such as disadvantaged, disabled veteran-owned, woman-owned or other special category.

Contractors that do not qualify according to size and/or status as required by the contracting officer can file a pre-proposal protest challenging the decision to set-aside the solicitation; contractors that qualify for the status can file a post-award protest challenging the status of the contractor selected for award. This article is limited to the issues involved in post-award protests.

With the on-going federal budget crisis and market competition, contractors are increasingly looking for ways to increase their opportunities to bid contracts. One of the more common methods for doing so is for large businesses to "team-up" with small businesses to bid on size/status limited procurements. While this increases their bidding opportunities, it also increases the risk of a protest. Federal litigators need to be aware of the basic issues involved in such protests ...

#### ***The Basics***

Size/status protests are very different from traditional bid protests. They are initially decided by an area office of the Small Business Administration (SBA) with appeal to the SBA Office of Hearing and Appeals (OHA). The rules and procedures for size protests are found in two general sections of the Code of Federal Regulations (CFR). Title 13, Part 121 provides the general rules for size protests. The rules for appealing size determinations are in Part 134 of Title 13.

Size protests involve complaints that the company that won the award does not meet the required size/status standard due to its relationship with a large company. This article will be limited to a review of the basic rules for filing a size protest and the issues involved.

#### ***The Basic Rules for Filing a Protest***

While you need to carefully read the rules for filing a size protest, the following is a summary of the key requirements:

**1. File the protest on time:** Size protests must be received by the Contracting Officer prior to the close of business on the 5th business day following the day sealed bids are opened or a notice of intent to award a negotiated procurement is issued by the Contracting Officer. (13 CFR §121.1004).

**2. The protest must contain specific facts as to the basis for the protest.** The protest does not have to have a substantial amount of detail, but it must contain sufficient information to identify the issue involved. The CFR includes the following examples of an adequate protest:

Example 2: An allegation that concern X is large because it exceeds the 500 employee size standard (where 500 employees is the applicable size standard) because a higher employment figure was published in publication Y is sufficiently specific.

Example 4: An allegation that concern X is affiliated with concern Y because Mr. A is the majority shareholder in both concerns is sufficiently specific.

Example 6: An allegation that concern X exceeds the size standard (where the applicable size standard is \$5 million) because it received government contracts in excess of \$5 million last year is sufficiently specific.

See 13 CFR §121.1007(c)

**3. File a timely appeal of an adverse size determination.** Size decision appeals must be filed within 15 calendar days of the receipt of the formal size determination and NAICS appeals must be filed within 10 days. (13 CFR §134.304)

#### ***The Issues***

All of the various areas the SBA analyzes in deciding a size protest are based on a single issue: **control**. While there are specific names for various types of issues, they are all based on determining whether a large business, directly or indirectly, has the ability to control the business that received the contract award (13 CFR §121.103). The SBA can find control even though the large business or individual affiliated with the large business does not have a majority ownership in the small business.

The regulations contain an interesting concept called "**negative control**" which can be found to exist when "minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders." (13 CFR §121.103(a)(3)). Negative control may also exist when "an individual, concern, or entity exercises control indirectly through a third party." (13 CFR §121.103(a)(4)).

These, as well as many other similar types of control, are all included in the CFR under the term "affiliation." The regulation lists the following different types of affiliation:

- Based on stock ownership (13 CFR §121.103(c))
- Arising under stock options, convertible securities and

*Size Protests continued on page 9*

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*Size Protests continued from page 7*

- agreements to merge (13 CFR 121.103(d))
- Based on common management (13 CFR §121.103(e))
- Based on identity of interest (13 CFR §121.103(f))
- Based on the newly organized concern rule (13 CFR §121.103(g))
- Based on joint ventures (13 CFR §121.103(h))
- Based on franchise and license agreements (13 CFR §121.103(i))

In examining these issues, the SBA considers the “totality of the circumstances and may find affiliation even though no single fact is sufficient to constitute affiliation” (13CFR §121.103(a)(5)). As a result, the SBA can find affiliation even though they are unable to find sufficient records to support any of the specific types of affiliation listed in the regulation.

Hidden within the above categories of affiliation is a rule known as the “ostensible subcontractor rule” (13 CFR §121.103(h)). This subsection provides that affiliation can be found if a subcontractor that does not qualify as small will be performing “primary and vital requirements of the contract” or if the prime contractor is unusually reliant on the subcontractor.

In making this determination the SBA will examine the subcontract, the nature of the services or materials for which the subcontractor is responsible, agreements such as bonding assistance or financing, and whether the subcontractor is the incumbent contractor. Again, it is important to keep in mind that the SBA will look at the “totality of the circumstances” and may find affiliation based on a combination of factors even though each in itself may be insufficient to constitute affiliation.

If you would like to learn more information about the various

issues involved in size protests, I recommend a web site maintained by Stan Hinton ([stanhinton.com](http://stanhinton.com)). The SBA tab will provide you with quick access to applicable rules and cases.

### **Conclusion**

While initial compliance with federal size standards may seem like an issue for a transactional attorney, reductions in federal spending and increased competition for limited funds is likely to result in a long-term increase in both the number and complexity of size protests. Given the very short period of time to file protests and appeals, it is essential that federal litigators become familiar with issues and rules so they can quickly and accurately represent their clients when the call comes. **SB**

*Ed Kinberg served as a procurement attorney with the U.S. Army Judge Advocate General (JAG) Corp before opening Kinberg & Associates LLC in Melbourne, Fla. He represents clients in all aspects of government contract law including size protests, bid protests, and litigating disputes before federal and Florida courts and federal and state agencies.*





U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, D.C. 20416

OCT 29 2010

VIA FACSIMILE

Dear [REDACTED]

On October 15, 2010, the U.S. Small Business Administration (SBA) received a referral of a protest received from the [REDACTED]

On October 26, 2010, the SBA dismissed the protest as untimely. However, SBA has rescinded the dismissal because it did not exclude the Federal Holiday on October 11, 2010, and therefore renders the protest timely.

The subject solicitation was governed by negotiated acquisition procedures. According to the CO, notification was given to the offerors on October 5, 2010 about the apparent successful offeror [REDACTED]

[REDACTED] 5 day after notification. Therefore, the protest is considered timely under 13 C.F.R. § 125.25(d).

Protest Allegations

As authorized by 13 C.F.R. §125.25, [REDACTED] service-disabled veteran-owned small business concern. Also, [REDACTED]

Required Response by [REDACTED]

In compliance with 13 C.F.R. § 125.27, SBA must decide all protest allegations that are not dismissed as premature, untimely or non-specific. In accordance with 13 C.F.R. § 125.25(d), [REDACTED] has five business days from receipt of this letter to submit information in response to [REDACTED]

Specifically, [REDACTED] must provide the following supporting documentation (as applicable) demonstrating that the company was 51% unconditionally and directly owned by one or more service-disabled veterans at the time it submitted its offer in response to the subject contract solicitation:

- Evidence that the firm's majority owner(s) have been recognized as service-disabled veteran(s) (SDV) by either the Department of Veterans Affairs (VA) or the United States Department of Defense (DOD). Specifically, you must provide a copy of the written determination from the VA or DOD.
- Date and state in which the firm was established or incorporated;
- Name and address of the firm's owner(s), general partner(s), members, and principal shareholders/stockholders;
- Percentage of voting stock in the firm of business owned by SDVs;
- Copies of stock certificates (front and back) for all classes of stock;
- Stock ledger certified by the corporate secretary or president;
- List of any stock option(s) outstanding and name of person holding option(s), include agreement;
- List of stock held by a lender or other party as pledged collateral, include a copy of agreement;
- List of stock voted under a proxy agreement, a trust or voting trust and a copy of such agreement;
- Buy/sell agreements;
- Shareholder agreements;
- Copies of promissory note(s) and proof of payment;
- Copies of business concern's two most recent Federal tax returns.

The firm must also provide evidence demonstrating that it is controlled by one or more SDVs. Such evidence must include (as applicable):

- A copy of the corporate bylaws, partnership agreement, or operating agreement;
- A copy of the latest corporate meeting minutes;
- Articles of incorporation;
- Trust agreements;
- Copies of agreements required for the operation of the business (e.g., franchise, license, and or similar contractual agreements with other concerns);
- Names, addresses, and resumes for all officers, directors, managing partners, and/or managers of the firm;
- List of the firm's affiliates (domestic and foreign);
- List of all owners, partners, directors, officers or principal shareholders/ stockholders that hold a position (paid or unpaid) in another firm;
- List of owners, officers, directors, supervisors and or employees that have ever been employed by or performed work for any affiliate of the firm;
- List of all facilities, equipment, and or personnel shared with other firms at the time of the bid opening;
- Copy of lease agreement(s);
- List of the firm's current financial obligations to other individuals or entities (e.g., loans, security agreements, guarantees, indemnifications, etc);
- Percentage and description of work under this contract that will be performed by affiliate(s);
- Breakdown of firm's sources of revenue indicating total percentage of revenues attributable to individual source;
- List of individuals who have signed or are expected to sign documents to facilitate the ability of the business concern to receive indemnifications or credit guarantees, who are not owners, officers, directors, employees, partners, or principal stockholders of the business concern.

[REDACTED] to this protest must be [REDACTED]  
[REDACTED]

[REDACTED], SBA must receive the firm's response no later than the close of business on November 5, 2010.

Failure to provide sufficient information and supporting documentation to establish [REDACTED] as a service-disabled veteran-owned small business eligibility will result in an adverse decision.

In accordance with 13 C.F.R. §125.27(d), SBA has fifteen business days from the date it received the Protester's referral to determine [REDACTED]. SBA will notify [REDACTED] its determination. The determination will be effective immediately and will be final, unless it is overturned on appeal by the SBA's Office of Hearings and Appeals, pursuant to 13 C.F.R. §125.27(f).

Thank you for your cooperation in this matter. If you have any questions, please contact Edith Butler of my staff at (202) 205-6842.

Sincerely,



Diane Heal, Assistant Director  
Office of Contract Assistance

Enclosures

cc (via facsimile):

[REDACTED]

[REDACTED]

[REDACTED]



## SBA Office of Hearings &amp; Appeals

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**IN THE MATTER OF: A1 PROCUREMENT LLC/JVS, APPELLANT RE: IND-MAR SERVICES, INC.**  
SBA No. VET-223  
October 31, 2011

Term

SBA No. VET-223, 2011 WL 5419687 (S.B.A.)

Small Business Administration (S.B.A.)  
Office of Hearings and Appeals

[Service-Disabled Veteran Owned Small Business Concern Appeals]

IN THE MATTER OF:  
A1 PROCUREMENT LLC/JVS, APPELLANT  
RE: IND-MAR SERVICES, INC.

SBA No. VET-223  
Solidation No. HSCG80-12-Q-P45001

United States Coast Guard

Surface Forces Logistics Center

Norfolk, Virginia

October 31, 2011

**Appearances**

Derrick Storms, Esq.  
Storms and Associates, P.A.  
Miami, Florida  
For Appellant

Nicholas V. Pullgnano, Jr., Esq.  
Marks Gray, P.A.  
Jacksonville, Florida  
For IND-MAR Services, Inc.

Kevin R. Harber, Esq.  
Office of General Counsel  
For the Small Business Administration

**DECISION**

**I. Jurisdiction**

This appeal is decided under the Small Business Act of 1958, [15 U.S.C. § 631 et seq.](#), and 13 C.F.R. Parts 125 and 134.

**II. Issue**

Whether the SBA's Assistant Director for Government Contracting made a clear error of fact or law in determining the protested concern is an eligible SDVO SBC. See [13 C.F.R. §§ 125.25\(b\), 125.26, 134.508](#).

**III. Background**

### A. Protest and SDVO SBC Status Determination

On July 1, 2011, the United States Coast Guard, Surface Forces Logistics Center, in Norfolk, Virginia, issued this Solicitation No. HSCG80-12-Q-P45001 for Drydock Repairs on the USCGC Tarpon. The Contracting Officer (CO) set the procurement aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs). Offers were due on July 29, 2011. On September 9, 2011, the CO informed offerors that IND-MAR Services, Inc. (IMS) would be awarded the contract. On September 13, 2011, A1 Procurement LLC/JVS (Appellant), protested IMS's claimed SDVO SBC status to the CO.

On September 14, 2011, the CO referred the protest to the Small Business Administration (SBA).

On October 7, 2011, the SBA's Acting Director, Office of Government Contracting (AD/GC) issued his determination that IMS is an eligible SDVO SBC for this procurement.

The AD/GC found that Donald Nickle and Ariel Duchesne, the individuals upon whom IMS's claim of eligibility is based, are service-disabled veterans.

The AD/GC further found that Mr. Nickle has a 25.5% ownership interest in IMS, Mr. Duchesne has a 25.5% interest in IMS, and North Florida Shipyards, Inc. (NFSY) owns a 49% interest in IMS. The AD/GC further found that there were no impermissible conditions on the veterans' ownership interests, nor were there any ownership options. The AD/GC concluded that IMS is majority owned (51%) by service-disabled veterans.

The AD/GC further found that Mr. Nickle is IMS's president, which IMS's By-laws specified is the concern's highest officer position. Further, Mr. Nickle has more than 25 years experience in the ship repair industry, along with a comparable amount of general management experience. Further, the AD/GC found that IMS has four directors, Mr. Nickle, Mr. Duchesne, Matthew Self, and Robert Wilson. The fact that Mr. Nickle and Mr. Duchesne together own a majority of the stock gives them the authority to appoint and remove directors at their discretion. IMS has no supermajority voting requirements and Mr. Nickle and Mr. Duchesne have the authority to vote each other's shares in the event one of them is absent. Accordingly, the AD/GC found that Mr. Nickle and Mr. Duchesne, two service-disabled veterans, together control IMS's board of directors.

The AD/GC considered the Teaming Agreement (Agreement) between IMS and NFSY, its minority shareholder. Mr. Nickle and Mr. Duchesne are both former NFSY employees. The Agreement provides for the joint performance of contracts. However, the Agreement gives NFSY no power to control IMS either directly or indirectly. The AD/GC found the Agreement contains standard commercial terms found in an arm's-length transaction. The AD/GC also found IMS's corporate documents give NFSY no special protections and give Mr. Nickle and Mr. Duchesne the ability to take any action they deem appropriate without regard to the rights of the minority shareholder. The AD/GC further found that Mr. Nickle and Mr. Duchesne derive their income from IMS, not NFSY.

The AD/GC therefore concluded that IMS is not unduly reliant upon NFSY to the point that it could not exercise independent business judgment, and the NFSY has no power to control IMS. The AD/GC thus concluded that IMS is owned and controlled by service-disabled veterans.

### B. Appeal Petition

On October 11, 2011, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant asserts, first, that NFSY owns the majority interest in IMS. Appellant further argues that because NFSY is the former employer of Mr. Nickle and Mr. Duchesne, NFSY cannot be an IMS shareholder, citing [13 C.F.R. § 124.106\(e\)\(2\)](#).

Appellant also asserts that IMS is completely reliant and dependent upon NFSY to perform all the requirements of the solicitation, including providing all labor, equipment, tools, employees and capital. Appellant asserts IMS does not have its own business address, and uses NFSY's address at 2060 East Adams Street, Jacksonville, Florida. Appellant asserts IMS is reliant upon NFSY for licenses, in violation of [13 C.F.R. § 124.106\(g\)\(2\)](#).

Appellant also asserts IMS is relying upon NFSY to perform 100% of the work on this contract in violation of [13 C.F.R. § 125.6\(a\)\(1\)](#). Appellant further asserts NFSY retains more than 51% of IMS's profits, and that Mr. Nickle and Mr. Duchesne do not actually receive a 51% share of IMS's profits.

### C. Responses to the Appeal

#### 1. IMS's Response

On October 14, 2011, IMS responded to the appeal. IMS contends Appellant's allegations are false and unsupported by any proof or documentation.

Mr. Nickle and Mr. Duchesne are former NFSY employees who left that employment and began IMS in 2010. They are both employed full-time by IMS. They both have extensive experience in the field of ship repair.



IMS asserts that under its Agreement with NFSY the Project Manager of any contract awarded will be an IMS employee, and be responsible for contract performance. The operating capital account of the Agreement is established in IMS's name, and the majority of personnel utilized in any contract must be IMS employees during the performance period. IMS is responsible for the procurement of all material and services required to perform a contract, IMS is responsible for negotiating any contracts, is the party to any contract with the Government, and must perform at least 51% of the dollar amount of any labor portion of any contract, and maintain all records.

IMS asserts that Mr. Nickle and Mr. Duchesne together own and control IMS. They are service-disabled veterans, and together own a majority of the stock and control the board of directors.

IMS asserts NFSY has no power to control it. IMS further asserts it is not unduly reliant upon NFSY. IMS asserts no specialized licenses are required to perform this contract. Even if there were, IMS has the required ultimate managerial and supervisory control over any required license, pursuant to [13 C.F.R. § 125.10\(b\)](#).

IMS further asserts that under the Agreement, it will perform at least 51% of the work required by this solicitation. IMS finally asserts that, as 51% shareholders, Mr. Nickle and Mr. Duchesne are entitled to 51% of IMS's profits, and thus Appellant's contrary assertions are without foundation.

## 2. SBA's Response

On October 21, 2011, SBA responded to the appeal. SBA contends the AD/GC's determination that IMS is an eligible SDVO SBC was not based on a clear error of fact or law and should be upheld.

SBA asserts the record establishes that Mr. Nickle and Mr. Duchesne are both service-disabled veterans. Protest File, Ex. 3 at 29-35. The stock ledger also establishes that both Mr. Nickle and Mr. Duchesne directly and unconditionally own 25.5% each of IMS's stock. Protest File, Ex. 3 at 40-49.

SBA further asserts that the record reflects that a service-disabled veteran with managerial experience of the extent and complexity required to run the firm holds the highest officer position and is responsible for day-to-day business operations, and that one or more service-disabled veterans control the board of directors. Protest File, Ex. 3 at 56-57, 62-66, 73-74, 83. Therefore, IMS is owned and controlled by one or more service-disabled veterans.

SBA further asserts Appellant's allegations that NFSY owns a majority interest in IMS, receives 51% of the profits of IMS, and is reliant upon NFSY for performance, has no employees, and is contracting out all the work under this contract, are all without foundation.

On October 14, 2011, Appellant filed a Reply to IMS's Response.

## IV. Discussion

### A. Timeliness, Reply, and Standard of Review

Appellant filed its appeal petition within 10 business days of receiving the AD/GC's determination, and thus the appeal is timely. [13 C.F.R. § 134.503](#).

A reply to a response is not permitted unless the Administrative Judge gives leave for it to be filed and served.

Accordingly, I EXCLUDE Appellant's October 14<sup>th</sup> Reply from the record.

OHA reviews the AD/GC's decision to determine whether it is "based on clear error of fact or law." [13 C.F.R. § 134.508](#); see also *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2009) (discussing the clear error standard that is applicable to both size appeals and SDVO SBC appeals). Thus, I may overturn the AD/GC's decision only if Appellant proves the AD/GC made a patent error based on the record before him.

### B. Analysis

To qualify as an eligible SDVO SBC, a concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. [13 C.F.R. § 125.9\(a\), \(d\)](#). The record establishes that Mr. Nickle and Mr. Duchesne are service-disabled veterans. Protest File, Ex. 3, at 29-35. A review of the stock ledgers in the record establishes that Mr. Nickle directly and unconditionally owns 25.5% of IMS, and Mr. Duchesne directly and unconditionally owns 25.5% of IMS. Protest File, Ex. 3 at 40-49. Accordingly, it is clear that, contrary to Appellant's unfounded assertion that NFSY holds a majority interest in IMS, one or more service-disabled veterans directly and unconditionally own 51% of IMS's stock.

A service-disabled veteran must control the management and daily business operations of an SDVO SBC and possess the necessary qualifications to do so. [13 C.F.R. § 125.10\(a\) & \(b\)](#). Mr. Nickle is IMS's president, which is the highest officer position under IMS's By-laws, and controls the day-to-day operations of the business. Protest File, Ex. 3, at 66, 73-74. Both Mr. Nickle and Mr. Duchesne have extensive experience in shipyard operations, and thus have the



7.3.7. Both Mr. Nickle and Mr. Duchesne have extensive experience in shipyard operations, and thus have the qualifications to run the concern. Protest File, Ex. 3, at 83-87.

Appellant argues NFSY's minority interest is prohibited, citing [13 C.F.R. § 124.106\(e\)\(2\)](#). This is a regulation governing SBA's 8(a) Business Development program. The 8(a) Business Development regulations can provide guidance interpreting the control requirement for SDVO SBC eligibility. *Matter of Artis Builders, Inc.*, SBA No. VET-214, at 4 (2011). Here, however, Appellant seeks not merely to interpret the regulation, but to import a specific provision that is not found in the SDVO SBC regulations. Appellant does not and cannot cite to any authority for doing so. The AD/GC did not err in declining to apply this 8(a) BD program regulation to the SDVO SBC program.

IMS's board of directors does have four members, two of whom are Mr. Nickle and Mr. Duchesne. Under the IMS Shareholders' Agreement and By-laws, Mr. Nickel and Mr. Duchesne have the power to remove the **members** of the **board** at any time. Protest File, Ex. 3, at 64. In the event either Mr. Nickle or Mr. Duchesne is unable to attend a shareholders' meeting, the other has the right to vote his shares so that the 51% block of service-disabled veteran-owned stock may be voted as a block. Protest File, Ex. 3, at 56-57. A majority of the shareholders may call a meeting at any time, and vote to remove any or all of the board of directors. Protest File, Ex. 3, at 62-64. There are no supermajority voting requirements. Protest File, Ex. 3, at 57. **Under the regulation, one or more service disabled veterans control a board of directors when they own at least 51% of all voting stock, are on the board, and have the percentage of stock necessary to overcome any supermajority voting requirements.** [13 C.F.R. § 125.10\(e\)\(1\)](#). Accordingly, Mr. Nickle and Mr. Duchesne control the board of directors, meeting the regulatory requirement that one or more service-disabled veterans control the board of directors.

The Agreement between IMS and NFSY provides **that: the project manager for any contract will be an IMS employee, IMS is entitled to 51% of the income from any contract undertaken under the Teaming Agreement, the operating account for any contract will be in IMS's name, the majority of personnel used to perform a contract will be IMS employees during the performance period, IMS will responsible for procuring material and services required to complete the contract, IMS will be responsible for negotiating the contract, IMS will perform at least 51% of the total dollar amount of the labor portion of any contract, and IMS will execute any contract.** Protest File, Ex. 3, at 80-81. Further, IMS submitted documentation that it did maintain a payroll, and thus had employees. Protest File, Ex. 3, at 108-09, 114-15. Therefore, there is no support in the record for Appellant's allegations that NFSY will perform 100% of the work on any contract, or that NFSY will retain most of the profits, or that Mr. Nickle and Mr. Duchesne will not receive 51% of IMS's profits.

Appellant asserts that IMS does not possess certain required licenses, is reliant upon NFSY for these licenses, and thus is in violation of [13 C.F.R. § 124.106\(q\)\(2\)](#). However, as noted above, this is an 8(a) Business Development program regulation. The SDVO SBC regulation is applicable here. This regulation provides that service-disabled veterans need not possess any required license to control a concern if it can be demonstrated that they have ultimate managerial and supervisory control over the license holder. [13 C.F.R. § 125.10\(b\)](#). Here, the Agreement provides that IMS will control any project, and Mr. Nickle and Mr. Duchesne control IMS, and therefore have managerial and supervisory control over any license holder the concern may retain for work.

Appellant's other allegations of dependence by IMS upon NFSY do not support a finding that IMS is not owned and controlled by service-disabled veterans. The regulations require that an SDVO SBC's management and daily business operations be controlled by a service-disabled veteran. Control is defined as both long-term decision making and day-to-day management of business operations. [13 C.F.R. § 125.10\(a\)](#). Influence on a concern's business operations or managerial decisions does not amount to control. Factors such as the businesses having the same location, same line of business, the former employment of the service-disabled veterans by the alleged controlling firm, and the provision by the alleged controlling firm of business support services to the SDVO SBC do not support a finding that a concern is not owned and controlled by service-disabled veterans.<sup>[FN1]</sup> *Matter of DooleyMack Government Contracting, LLC*, SBA No. VET-159, at 5-6 (2009).

Here, the record clearly establishes that Mr. Nickle and Mr. Duchesne are service-disabled veterans who together directly own 51% of IMS, and there are no supermajority voting requirements. Mr. Nickel is IMS's president, which is IMS's highest officer position, and both Mr. Nickle and Mr. Duchesne have the requisite managerial experience to run the concern. Together, they control the board of directors. Thus, IMS is owned and controlled by service-disabled veterans, and the AD/GC made no error in his determination.

Therefore, Appellant cannot show the AD/GC based his determination on any clear error of fact or law. [13 C.F.R. § 134.508](#).

#### V. Conclusion

**Accordingly, the AD/GC's determination that IND-MAR Services, Inc., is an eligible SDVO SBC was not based upon clear error. The AD/GC's determination is AFFIRMED, and the appeal is DENIED.**

This is the final decision of the Small Business Administration. [13 C.F.R. § 134.515\(a\)](#).  
Christopher Holleman  
Administrative Judge

FN1. Some of Appellant's allegations, if supported by the record, might support a finding IMS was affiliated with NFSY for this procurement under the ostensible subcontractor rule. [13 C.F.R. § 121.103\(h\)\(4\)](#).




However, that is an issue to be considered in a size protest and size appeal, and thus it is not before OHA here.

SBA No. VET-223, 2011 WL 5419687 (S.B.A.)

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Doc 1 of 92 

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## **Recommended Web Websites for Issues Involving Size/Status Protests**

**Ed Kinberg**  
**Kinberg & Associates, LLC**  
**1290 W. Eau Gallie Blvd.**  
**Melbourne, FL 32935**  
**321-259-1910**  
[www.kblegal.com](http://www.kblegal.com)

**SBA Size Standards:** These pages from the Small Business Administration's website are a great starting place for any size or status issue:

- [What's New with Size Standards](#)
- [Small Business Size Regulations](#)
- [Size Standard Methodology](#)
- [Summary of Size Standards by Industry](#)
- [Table of Small Business Size Standards](#)
- [Size Protests, Size Determinations, and Appeals](#)
- [SBA Guide to Size Standards](#)
- [Affiliation](#)
- [Businesses Determined Other than Small](#)
- [Size Determinations and NAICS Appeals](#)

**Rules of Procedure Governing Cases Before the SBA Office of Hearings and Appeals (OHA):** These pages from the Small Business Administration's website have the rules and procedures for challenging a business's size or status

- [Rules of Practice](#)
- [Size Determinations and NAICS Codes](#)
- [Appeals Under the 8\(a\) Program](#)
- [Appeals Under the Service-Disabled Veteran Program](#)
- [Equal Access to Justice Act](#)
- [Women-Owned Small Business Concern \(WOSB\) and Economically Disadvantaged WOSB \(EDWOSB\)](#)

Miscellaneous Web Sites:

[Stanhinton.com](#): If you're looking for cases on size and status protest issues, this website has an extensive listing of cases with subject areas.

[Wifcon.com](#): This is a great website for information on most issues involving federal procurement. While the home page looks crowded, there are links in the upper right hand corner for the main sections of the web site.