

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

CVE Protest of:

Superior Optical Labs, Inc.,

Protestor,

Re: PDS Consultants, Inc.

Solicitation No. 36C24919R0105
U.S. Department of Veterans Affairs

SBA No. CVE-157-P

Decided: July 20, 2020

APPEARANCES

Elizabeth H. Connally, Esq., Connally Law, PLLC, San Antonio, Texas, for Superior Optical Labs, Inc.

David S. Gallacher, Esq., Emily S. Theriault, Esq., Sheppard Mullin Richter & Hampton LLP, Washington, D.C., for PDS Consultants, Inc.

DECISION¹

I. Introduction and Jurisdiction

On January 16, 2020, Superior Optical Labs, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of PDS Consultants, Inc. (PDS) in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C24919R0105. Protestor contends that PDS is not controlled by service-disabled veterans, and that PDS will be unusually reliant upon a subcontractor to perform the contract. For the reasons discussed *infra*, the protest is denied.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) adjudicates SDVOSB status protests pursuant to 38 U.S.C. § 8127(f)(8)(B) and 13 C.F.R. part

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now publishes the decision in full for public release.

134 subpart J.² Protestor filed its protest within five business days after receiving notification that PDS was the apparent awardee, so the protest is timely. 13 C.F.R. § 134.1004(a)(2)(i).

Accordingly, this matter is properly before OHA for decision.

II. Background

A. CVE Verification

On August 13, 2014, the VA's Center for Verification and Evaluation (CVE) initially verified PDS as an SDVOSB and included it in the Vendor Information Pages (VIP) database of eligible firms. (Case File (CF), Exh. 264.) CVE re-verified PDS on August 19, 2016. (CF, Exh. 352.) On August 9, 2019, CVE again re-verified PDS. (CF, Exh. 461.) The re-verification letters stated that PDS “is presently, as of the issuance of this notice, in compliance with the regulation.” (*Id.* at 1.) PDS was required to report any changes that might adversely affect its eligibility within 30 days of the change. (*Id.*)

B. Solicitation

On September 26, 2019, the VA issued RFP No. 36C24919R0105 for prescription eyeglasses for veterans in Veterans Integrated Service Network (VISN) 9. (CF, Exh. 466.) The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs, and assigned North American Industry Classification System (NAICS) code 339115, Ophthalmic Goods Manufacturing, with a corresponding size standard of 1,000 employees. Proposals were due October 30, 2019. (CF, Exh. 468.)

C. Proposal

PDS submitted its proposal on October 29, 2019. The proposal explained that PDS is the incumbent prime contractor, and that “[c]urrently, PDS operates over 100 optical stores and manufactures over 1,200,000 pairs of eyeglasses annually.” (Technical Proposal at 3). For the VISN 9 contract, “PDS will use its own optical labs and equipment to meet production requirements.” (*Id.*) Specifically, “PDS' Kentucky manufacturing facility (Louisville) will be the primary manufacturing location for the VISN 9 eyeglasses requirement.” (*Id.* at 4.) The proposal identified a PDS employee, Ms. Devon Del Purgatorio, as “the primary contract manager on the VISN 9 contract.” (*Id.* at 7.) Another PDS employee, Mr. Steven A. Baker, was referenced in the proposal as PDS's Chief Operating Officer. (*Id.* at 18.) According to his resume, Mr. Baker previously worked for Korrekt Optical (Korrekt) for more than 30 years until August 2019. (*Id.*) The proposal made no mention of Mr. Stephen A. Sachs.

² The regulations at 13 C.F.R. part 134 subpart J became effective on October 1, 2018. 83 Fed. Reg. 13,626 (Mar. 30, 2018).

D. Protest

On January 14, 2020, the CO notified unsuccessful offerors, including Protestor, that PDS was the apparent awardee. On January 16, 2020, Protestor filed the instant protest with the CO, challenging PDS' SDVOSB status. The CO forwarded the protest to OHA for review.

In the protest, Protestor alleges that PDS is not controlled by service-disabled veterans because although both of PDS' co-owners, Mr. John M. Loosen and Mr. Richard T. Murray, are service-disabled veterans, they have “delegated the management and daily business operations of PDS to non-service-disabled persons.” (Protest at 4.) More specifically, according to Protestor, Mr. Sachs and Ms. Del Purgatorio control PDS “through the management of contracts and subcontractors.” (*Id.*)

Protestor asserts that Mr. Sachs is “intimately involved with PDS' management, including its long-term decision making and day-to-day operations.” (*Id.* at 5.) Protestor claims that “PDS uses Mr. Sachs to bid, manage, and administer contracts” and that Mr. Sachs functions as “PDS' direct contact with the government for contract activities.” (*Id.*) Ms. Del Purgatorio “signs contracts as Contract Manager,” and likely is responsible for “management, contract administration and oversight of performance of the contract, all of which are essential to a company's economic success.” (*Id.*)

Protestor further contends that PDS will be unusually reliant upon a subcontractor, Korrekt, to perform the instant contract, in contravention of 13 C.F.R. § 134.1003(c). Protestor observes that “the manufacture of ophthalmic goods is the primary and vital requirement of the RFP.” (*Id.* at 8.) PDS itself, however, neither owns nor controls an eyeglass manufacturing facility. (*Id.* at 4-5.) Instead, Korrekt, which is not an SDVOSB, will manufacture eyeglasses for the VISN 9 contract. (*Id.* at 6.) Because “the concern which actually manufactures these goods is Korrekt,” PDS will be unusually reliant upon Korrekt “to perform all manufacturing work.” (*Id.* at 8.)

E. PDS' Response

On February 12, 2020, PDS responded to the protest. PDS insists that it is controlled by service-disabled veterans and that it will manufacture the eyeglasses for the VISN 9 contract. (Response at 2.) The protest therefore should be dismissed or denied.

PDS first argues that it is fully controlled by Mr. Loosen and Mr. Murray, who are both service-disabled veterans. They are the sole shareholders, the sole members of PDS' Board of Directors, and PDS' corporate structure vests control and authority with them. (*Id.* at 3.) In addition, Mr. Loosen is PDS' President, Mr. Murray is Vice President, and they together control both long-term and day-to-day management decisions. (*Id.*)

PDS asserts that Ms. Del Purgatorio is a “valued employee” of PDS who serves as Senior Contract Manager, but she is not in charge of PDS as a whole. (*Id.* at 4.) SBA regulations permit an SDVOSBs to hire non-veteran employees, including managerial employees, provided that service-disabled veterans remain in control. (*Id.*, citing 13 C.F.R. part 125.) Further, contrary to

Protestor's suggestions, a non-veteran employee may contribute to a concern's "economic success" without being deemed to control the entire business. (*Id.*)

PDS maintains that Mr. Sachs is not a PDS employee but rather a consultant at an independent consulting firm. (*Id.* at 4-5.) He has no day-to-day or managerial responsibilities at PDS, since he is not a PDS employee. Nor does Mr. Sachs have authority to make decisions on behalf of PDS. (*Id.* at 5.)

Turning to the ostensible subcontractor allegations, PDS states that it acquired Korrekt on August 28, 2019. (*Id.*) Korrekt is therefore "a wholly-owned subsidiary" of PDS, not a subcontractor. (*Id.*) Moreover, because PDS now owns all of Korrekt's former manufacturing capabilities, "PDS is the **actual** manufacturer of the eyeglasses under the Solicitation." (*Id.* at 6, emphasis PDS'.)

With its response to the protest, PDS submitted various documents including: a joint declaration from Mr. Loosen and Mr. Murray (Exh. 3); a recent PDS organizational chart (Exh. 8); a copy of PDS' proposal for the VISN 9 contract (Exh. 9); and a Stock Purchase Agreement relating to PDS' acquisition of Korrekt effective August 28, 2019 (Exh. 10). The Stock Purchase Agreement was signed by Mr. Murray on behalf of PDS and by Mr. Baker on behalf of Korrekt.

F. Case File

According to the documentation in the Case File, PDS is a corporation headquartered in the state of New Jersey. (CF, Exh. 428.) PDS is 50% owned by Mr. Loosen and 50% owned by Mr. Murray. (CF, Exhs. 383, 389, 440-41, 443.) Both Mr. Loosen and Mr. Murray are service-disabled veterans. (CF, Exh. 443.) Mr. Loosen is PDS' President and Mr. Murray is PDS' Vice President. (CF, Exhs. 429, 434, 451.) Mr. Loosen and Mr. Murray are the only officers of PDS, and also the only members of PDS' Board of Directors. (CF, Exhs. 375.1, 451.)

In response to inquiries from CVE during the verification process, PDS explained that both Mr. Loosen and Mr. Murray work full-time for PDS. (CF, Exh. 428, at 1-5.) PDS described Mr. Loosen's role as similar to that of a "Chief Executive Officer," whereas Mr. Murray functions like a "Chief Operating Officer." (*Id.* at 3-4.) However, "[b]oth are actively involved in the daily business operations of [PDS], including coordinating and managing contract performance on PDS's various contracts throughout the country." (*Id.* at 2.) Ms. Del Purgatorio is a PDS employee who "operates as PDS's Director of Operations, supporting Mr. Loosen and Mr. Murray in all of their administrative roles." (*Id.* at 9.) PDS maintained that it "is not co-located with any unaffiliated companies," although PDS is co-located with two wholly-owned subsidiaries. (*Id.* at 5.)

The Case File includes a copy of PDS' By-Laws, as most recently amended on January 19, 2015. (CF, Exhs. 417-19.) Section 3.1 of the By-Laws stated that "[t]he business of the Corporation shall be managed by the Board of Directors." (CF, Exh. 419 at 4.) The Board elects the principal officers of PDS, including the President, and may remove an officer, at any time, with or without cause. (*Id.* at 8-9.) Section 4.8 of the By-Laws stated that "[t]he President shall

be the chief executive officer of the Corporation and shall have general supervision over the business of the corporation.” (*Id.* at 9.)

G. Declaration

In their joint declaration, Mr. Loosen and Mr. Murray aver that they are both service-disabled veterans, and that they are PDS' only shareholders and only directors. (Response, Exh. 3 ¶¶ 2-4.) Mr. Loosen is PDS' President, and Mr. Murray is PDS' Vice President. (*Id.* at ¶¶ 1, 5-6.) Mr. Loosen and Mr. Murray together “control all PDS decisions,” “control PDS's management and daily business operations,” and “maintain ultimate managerial and supervisory control over all PDS employees.” (*Id.* ¶ 3.)

According to the joint declaration, Ms. Del Purgatorio is a PDS employee with the title of Senior Contract Manager. (*Id.* ¶ 7.) She manages individual contracts but does not make decisions that control PDS as a whole. (*Id.*) Ms. Del Purgatorio operates under the supervision of Mr. Loosen and Mr. Murray. (*Id.*)

Mr. Sachs is an independent consultant who provides “strategic advice on an *ad hoc* basis” to PDS. (*Id.* ¶ 8.) Mr. Sachs not a PDS employee, receives no salary from PDS, and “does not manage any specific contract or division of PDS.” (*Id.*)

Mr. Loosen and Mr. Murray assert that “PDS purchased Korrekt Optical on August 28, 2019.” (*Id.* ¶ 10.) “PDS will be the manufacturer for all eyewear purchased by the VA under Solicitation No. 36C24919R0105.” (*Id.*)

H. Supplemental Protest

On March 9, 2020, after reviewing the Case File under the terms of an OHA protective order, Protestor moved to supplement its protest. Protestor argues that the Case File bolsters its original contentions that PDS is not controlled by service-disabled veterans and that PDS is unusually reliant upon Korrekt. (Supp. Protest at 1.) Protestor further claims that the Case File shows that PDS has delegated control of the company to Mr. Baker, who also is President of Korrekt; that PDS can manage the VISN 9 contract only with key personnel from Korrekt; that Mr. Loosen and Mr. Murray lack “the experience necessary to operate an ophthalmic manufacturing facility”; that Mr. Sachs has previously signed a memorandum binding PDS; and that PDS will rely upon Korrekt to perform the primary and vital requirements of the contract, which Protestor describes as “manufacturing eyeglasses.” (*Id.* at 1-3.)

Protestor claims that PDS' proposal falsely suggests that PDS is an ophthalmic manufacturer. (*Id.* at 2.) In actuality, “Korrekt, not PDS, would be the entity performing the primary and vital requirements of the Contract.” (*Id.*) Although PDS appears to have purchased all the stock of Korrekt, the two companies have not been merged and Korrekt continues to operate as a separate entity. (*Id.*) Protestor claims that six of the nine personnel referenced in PDS' proposal for the VISN 9 contract are Korrekt employees. (*Id.* at 2-3.) According to Protestor, Mr. Baker is identified in the proposal as PDS' Chief Operating Officer, but “he continues to operate and control Korrekt, a separate legal entity.” (*Id.* at 3.)

Protestor argues that service-disabled veterans do not directly own or control Korrect. (*Id.* at 6.) Rather, Korrect is a separate legal entity than PDS and that PDS merely owns shares in Korrect. (*Id.*) As such, Protestor argues, Korrect and PDS should not be considered similarly situated entities. (*Id.*)

Protestor next alleges that Korrect has the power to control PDS, because Mr. Baker has “operational control of PDS” and because PDS must rely upon Korrect to perform the VISN 9 contract. (*Id.*) Protestor points to the PDS organizational chart indicating that Mr. Baker is now Chief Operating Officer of PDS. (*Id.* at 7.)

Protestor claims that, based upon PDS' proposal, PDS cannot perform the VISN 9 contract without personnel from Korrect, including the Chief Operating Officer-Optical Labs, Executive Director, Director of Laboratory Operations, Optician Manager/VA Account Manager, Human Resources and Accounting, and Customer Service. (*Id.* at 7-8.) Protestor alleges that PDS will be responsible only for Quality Assurance and Contract Management, which are not primary and vital functions. (*Id.* at 8.)

Protestor contends that Mr. Loosen and Mr. Murray lack experience in ophthalmic manufacturing, and therefore presumably have delegated such work to Mr. Baker and Korrect. (*Id.*) The resumes of Mr. Loosen and Mr. Murray show that “neither have any current or former experience operating an ophthalmic manufacturing facility.” (*Id.*) Nor do Mr. Loosen and Mr. Murray live within a reasonable distance of PDS' headquarters. (*Id.* at 9.) Mr. Murray lives approximately 160 miles away and Mr. Loosen lives over 970 miles away. (*Id.*)

Protestor reiterates its allegation that Korrect will perform the primary and vital requirements of the VISN 9 contract, the manufacturing of eyeglasses. (*Id.* at 9.) PDS itself will manage the contract and interface with the VA, but “the eyeglasses will actually be manufactured by Korrect and Korrect's employees.” (*Id.*)

I. Supplemental Response

On June 22, 2020, PDS timely responded to the supplemental protest.³ PDS contends that it is fully controlled by Mr. Loosen and Mr. Murray, that PDS employees will perform the contract, that Mr. Loosen and Mr. Murray are sufficiently experienced, that Mr. Murray lives within a reasonable commute of PDS' headquarters, that Mr. Sachs has no control over PDS, and that PDS will manufacture the eyeglasses for the VISN 9 contract.

³ While this case was ongoing, the CO informed OHA that VA would undertake corrective action on the instant source selection. Because the corrective action had the potential to result in a different awardee, OHA stayed proceedings pending the outcome of the corrective action. On June 12, 2020, the CO informed OHA that corrective action had been completed and that PDS remained the apparent awardee. OHA thereafter lifted the stay and directed that any response to the supplemental protest be filed by June 26, 2020.

PDS first argues that it is controlled by Mr. Loosen and Mr. Murray, not by Mr. Baker or Korrekt. (Supp. Response at 4.) PDS observes that the organizational chart upon which Protestor bases its allegations depicts Mr. Loosen and Mr. Murray as holding the highest officer positions. (*Id.* at 5.) Their positions at the top of the organizational chart correspond with their roles as managing, controlling, and supervising PDS' business operations. (*Id.*) Mr. Loosen and Mr. Murray control both the long-term decision making and daily management and administration of PDS. (*Id.*)

PDS highlights that applicable regulations permit an SDVOSB to hire an executive team including non-service-disabled members. (*Id.* at 6, citing 13 C.F.R. § 125.11.) Mr. Baker is part of PDS' executive team, supervised by Mr. Loosen and Mr. Murray. (*Id.*) Protestor's allegation that Mr. Baker still operates and controls Korrekt is false and unsupported by any evidence. (*Id.*) Similarly, Protestor's allegation that Korrekt will be a subcontractor to PDS is incorrect, as PDS purchased Korrekt on August 28, 2019. (*Id.*) While PDS uses "Korrekt Optical" as a brand name, PDS has acquired and transferred all of Korrekt's manufacturing assets, "so there is no reason PDS would subcontract with Korrekt under the Solicitation." (*Id.* at 6-7.)

Next, PDS argues that it will self-perform the instant contract with its own employees. (*Id.* at 7.) Having purchased Korrekt, PDS retained "all of Korrekt's staff that will be working on government contracts and that manufacture the eyeglasses." (*Id.*) All relevant former Korrekt personnel are now employed directly by PDS. (*Id.*)

PDS argues that Mr. Loosen and Mr. Murray have more than enough experience to manage PDS. (*Id.*) Together, they have 50 years' experience in the eyeglasses industry and 80 years' managerial experience, and thus have ample experience to run PDS. (*Id.* at 7-8.) Further, the regulations do not require that Mr. Loosen and Mr. Murray have the technical expertise to personally operate eyeglass manufacturing equipment, so long as they have the requisite managerial control over the machine-operators. (*Id.* at 8, citing 13 C.F.R. § 125.13(b).) PDS highlights that while Mr. Baker now serves as PDS' Chief Operating Officer, this does not mean that he controls PDS. (*Id.* at 9.) Mr. Baker is supervised by, and subordinate to, Mr. Loosen and Mr. Murray, as reflected on the organizational chart. (*Id.*)

PDS disputes the notion that Mr. Murray does not live within a reasonable distance of PDS' headquarters. (*Id.*) SBA regulations create a rebuttable presumption of no control if a service-disabled veteran does not live within a reasonable commute. (*Id.* at 10, citing 13 C.F.R. § 125.13(l).) Mr. Murray, though, plainly does live within a reasonable commute, as evidenced by the fact that he commutes to PDS headquarters three days a week, and Mr. Loosen lives near PDS' Florida operations. (*Id.*)

PDS reiterates its arguments that Mr. Sachs has no control over PDS. (*Id.* at 11.) Mr. Sachs is merely a consultant, not an employee, stockholder, or owner. (*Id.*) The fact that Mr. Sachs may have signed a document nearly six years ago does not show that he presently controls PDS. (*Id.*) Mr. Sachs currently does not have signature authority or control over management. (*Id.*)

Lastly, PDS insists that it will be the manufacturer of the eyeglasses for the VISN 9 contract. (*Id.* at 12.) The proposal makes clear that PDS will use its own manufacturing facilities. (*Id.*) Further, PDS not only purchased a stock interest in Korrekt, it purchased all of Korrekt's manufacturing assets. (*Id.*) Korrekt's employees are now PDS' employees. (*Id.*) Because Korrekt is not a subcontractor to PDS, the ostensible subcontractor rule has no bearing here. (*Id.* at 13.) PDS claims that “Korrekt will have no role in manufacturing eyeglasses under the Solicitation.” (*Id.* at 13.) Although PDS is affiliated with Korrekt, but the firms together do not exceed the 1,000-employee size standard applicable to this procurement. (*Id.*)

Accompanying its supplemental response, PDS offered a supplemental joint declaration from Mr. Loosen and Mr. Murray. Mr. Loosen and Mr. Murray assert that they supervise Mr. Baker and that Mr. Baker “has no independent control or decision-making authority regarding PDS's business, nor does he have control of PDS's administration, operations, and sales, beyond the duties that we have given him as [Chief Operating Officer].” (Supp. Response, Exh. A ¶ 4.) Mr. Baker is not President of Korrekt, and in fact “has no title at Korrekt.” (*Id.* ¶ 5.) Nor does Mr. Baker control Korrekt. (*Id.*) Korrekt is a wholly-owned subsidiary of PDS, and is controlled solely by Mr. Loosen and Mr. Murray. (*Id.*)

Mr. Loosen and Mr. Murray state that “PDS will not subcontract any work under Solicitation No. 36C24919R0105 to Korrekt.” (*Id.* ¶ 7.) Further, “PDS — not Korrekt — will manufacture the eyeglasses under Solicitation No. 36C24919R0105 in PDS's facilities.” (*Id.* ¶ 8.)

J. Reply and Sur-reply

OHA granted Protestor leave to reply to PDS' responses, and on July 1, 2020, Protestor filed its reply. Protestor alleges that there are inconsistencies in PDS' arguments. (Reply at 1.) In addition, Protestor contends, PDS improperly focuses on its current operations, whereas the relevant inquiry is whether “PDS was an ophthalmic manufacturing company on October 29, 2019, the date of PDS' proposal.” (*Id.*)

According to Protestor, although PDS claims that Korrekt is now merely a retail brand name, the record reflects that Korrekt is a separate legal entity. (*Id.* at 1-2.) As recently as April 2020, Korrekt was awarded a federal contract. (*Id.* at 2.) Protestor contends that PDS' responses and proposal show that Korrekt will perform the manufacturing for the VISN 9 contract. (*Id.*)

Protestor argues that PDS “acknowledges” that Korrekt will manufacture the eyeglasses, and thus will perform the primary and vital contract requirements. (*Id.* at 2-3.) Protestor highlights in particular that PDS' proposal stated that production would occur at a Louisville, Kentucky facility, which, Protestor asserts, is associated with Korrekt. (*Id.*) PDS' proposal also identified various managerial personnel, six of whom were employed by Korrekt. (*Id.* at 3.)

Protestor alleges that there is “no mention of a merger or the acquisition of Korrekt's assets” either in the proposal or in PDS' response to the initial protest. (*Id.* at 4.) Although PDS has produced a bill of sale with its supplemental response, that bill of sale is “very vague” and sparse of detail. (*Id.*) Protestor concludes that “PDS has provided no evidence that prior to October 29, 2019, PDS had acquired Korrekt and merged all assets, facilities and employees into

PDS.” (*Id.*) Further, the proposal shows that Korrekt will manufacture the eyeglasses, and as such “PDS is a nonmanufacturer because the “manufacturer is the concern, which, *with its own facilities*, performs the primary [manufacturing] activities.” (*Id.* at 4-5, quoting 13 C.F.R. § 121.406(b)(2), emphasis added by Protestor.)

Protestor reiterates its view that “**Korrekt is the ophthalmic manufacturer** with the capability and personnel to perform the primary and vital requirements of the contract, not PDS.” (*Id.* at 6, emphasis Protestor's, internal citations omitted.) Although PDS will manage the contract, “the eyeglasses will actually be manufactured by Korrekt and Korrekt's employees.” (*Id.*) Therefore, Protestor contends, PDS is violating 13 C.F.R. § 134.1003(c) by relying upon a non-SDVOSB subcontractor to perform the contract. (*Id.* at 6-7.)

OHA granted PDS leave to sur-reply, and on July 3, 2020 PDS filed its sur-reply. PDS maintains that Protestor improperly attempts to challenge PDS' compliance with the non-manufacturer rule. (Sur-reply at 1.) The non-manufacturer rule is purely a size question and is not a valid ground for a CVE Protest under 13 C.F.R. § 134.1003. (*Id.*)

PDS next addresses arguments raised in Protestor's reply. PDS states that on August 28, 2019, PDS purchased Korrekt and has since possessed and controlled the assets required to manufacture eyeglasses. (*Id.*) As of October 29, 2019, the date of the proposal, PDS had not yet consolidated its payrolls with Korrekt, but this process was subsequently completed and at the present time all personnel identified in PDS' proposal are PDS employees, not Korrekt employees. (*Id.* at 2.)

PDS denies that it has ever admitted that Korrekt will be the manufacturer of the eyeglasses. (*Id.*) The proposal specifically stated that PDS will be the manufacturer. (*Id.*) Furthermore, contrary to Protestor's suggestions, PDS has produced ample evidence, including a stock purchase agreement and a bill of sale, demonstrating that PDS acquired Korrekt prior to October 29, 2019. (*Id.* at 2-3.)

III. Discussion

A. Burden of Proof

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

B. Dates to Determine Eligibility

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, PDS submitted its proposal including price on October 29, 2019, and the instant protest was filed on January 16, 2020. Sections II.C and II.D, *supra*. Therefore, OHA must examine PDS's eligibility as of these dates, using the substantive ownership and control regulations in effect on each date.

Effective December 30, 2019, SBA added new language to its ownership and control regulations at 13 C.F.R. part 125, which also apply to SDVOSB procurements conducted by VA. The new provisions explain that a firm is not eligible for award of an SDVOSB contract if it is unusually reliant upon a subcontractor that is not an SDVOSB:

(f) *Ostensible subcontractor*. 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.

(1) When the subcontractor is small for the size standard assigned to the procurement, this issue may be grounds for an SDVO status protest, as described in subpart D of this part. When the subcontractor is other than small, or alleged to be other than small for the size standard assigned to the procurement, this issue may be grounds for a size protest subject to the ostensible subcontractor rule, as described at § 121.103(h)(4) of this chapter.

(2) SBA will find that a prime SDVO contractor is performing the primary and vital requirements of a contract or order and is not unduly reliant on one or more non-similarly situated subcontracts where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the limitations on subcontracting provisions set forth in § 125.6.

84 Fed. Reg. 65,647, 65,664 (Nov. 29, 2019) (now codified at 13 C.F.R. § 125.18(f)). Concurrently with this change, SBA also revised the procedural rules for CVE Protests, adding that undue reliance upon a subcontractor is valid grounds to challenge the status of an SDVOSB:

(c) *Unusual reliance*. SBA will consider a protest challenging whether the prime contractor is unusually reliant on a subcontractor that is not CVE verified, or a protest alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.

84 Fed. Reg. at 65,666 (now codified at 13 C.F.R. § 134.1003(c)).

C. Analysis

Protestor's principal argument in this case that PDS will rely upon an alleged ostensible subcontractor, Korrekt, to perform the instant contract, in contravention of 13 C.F.R. §§ 125.18(f) and 134.1003(c). I find no merit to Protestor's contention, for two principal reasons.

First, the regulations in question — §§ 125.18(f) and 134.1003(c) — apply only to procurements for services. Indeed, § 125.18(f) twice states that the rule applies only to “service contract[s] or order[s].” Section III.B, *supra*. In its *Federal Register* commentary accompanying the rules, SBA likewise repeatedly stressed that the regulations would apply only to services

procurements. 84 Fed. Reg. 65,647, 65,654 (Nov. 29, 2019). Concurrently with the promulgation of §§ 125.18(f) and 134.1003(c), SBA also introduced parallel regulations for other SBA programs, again expressly limiting those rules only to services procurements. *See* 13 C.F.R. §§ 126.601(d) and 127.504(c). The notion that §§ 125.18(f) and 134.1003(c) would apply only to services procurements also is consistent with SBA's long-standing policy that the ostensible subcontractor rule is not utilized for procurements assigned a manufacturing NAICS code; instead, such procurements are governed by the non-manufacturer rule, 13 C.F.R. § 121.406. SBA has explained:

In classifying the procurement as a manufacturing/supply procurement, the procuring agency must have determined that the “principal nature” of the procurement was supplies. As a result, any work done by a subcontractor on the services portion of the contract cannot rise to the level of being “primary and vital” requirements of the procurement, and therefore cannot be the basis of [f] affiliation as an ostensible subcontractor.

76 Fed. Reg. 8,222, 8225 (Feb. 11, 2011).

Here, the instant procurement was assigned a manufacturing NAICS code, 339115, Ophthalmic Goods Manufacturing, and neither party disputes that the primary purpose of this procurement is manufacturing, specifically the production of eyeglasses. Accordingly, §§ 125.18(f) and 134.1003(c) do not apply to the instant procurement, and PDS cannot be found to have violated those rules in performing a manufacturing procurement.

A second problem for Protestor is that, even assuming §§ 125.18(f) and 134.1003(c) were applicable to manufacturing procurements such as found here, those rules did not become effective until December 30, 2019. Section III.B, *supra*. PDS submitted its proposal for the VISN 9 procurement, though, approximately two months earlier, on October 29, 2019. Section II.C, *supra*. As a result, although Protestor argues at length that PDS had not completed its acquisition of Korrekt by October 29, 2019, and that Korrekt therefore must be deemed a PDS subcontractor as of October 29, 2019, such questions are immaterial here because the regulations upon which Protestor's allegations are predicated did not exist as of October 29, 2019. Given that §§ 125.18(f) and 134.1003(c) were not in effect as of October 29, 2019, PDS could not have violated those rules at that time.⁴

⁴ As noted in Section III.B above, 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. In the instant case, the regulations at §§ 125.18(f) and 134.1003(c) were not in effect as of the first date (October 29, 2019), but were in effect as of the second date (January 16, 2020). This case thus presents an unusual situation where a key regulatory change occurs between the two dates for determining eligibility. I find it unnecessary to further explore whether PDS was compliant with §§ 125.18(f) and 134.1003(c) as of January 16, 2020, because, as discussed above, §§ 125.18(f) and 134.1003(c) do not apply in any event to the instant procurement for manufactured products. Nor has Protestor pointed to any evidence to suggest that PDS was not in compliance as of January 16, 2020.

Protestor also contends that PDS is not controlled by its service-disabled veteran owners, Mr. Loosen and Mr. Murray, but rather is controlled by Mr. Baker, Mr. Sachs, and/or Ms. Del Purgatorio.⁵ These allegations fail because PDS has persuasively shown that Mr. Loosen and Mr. Murray control PDS, as required by 13 C.F.R. § 125.13. The record reflects that Mr. Loosen and Mr. Murray are the sole shareholders of PDS. Sections II.F and II.G, *supra*. PDS' By-Laws state that “[t]he business of the Corporation shall be managed by the Board of Directors,” and Mr. Loosen and Mr. Murray also are the only members of PDS' Board of Directors. *Id.* The Board elects the principal officers of PDS, including the President, and may remove an officer, at any time, with or without cause. *Id.* PDS' By-Laws further state that “[t]he President shall be the chief executive officer of the Corporation and shall have general supervision over the business of the corporation.” *Id.* Mr. Loosen serves as PDS' President and Mr. Murray is PDS' Vice President. *Id.* PDS offers two sworn declarations from Mr. Loosen and Mr. Murray, in which they aver that they jointly control all of PDS' long-term and day-to-day decision-making. Sections II.G and II.I, *supra*. Further, although Protestor alleges that Mr. Loosen and Mr. Murray lack the technical expertise to personally operate eyeglass manufacturing equipment, SBA regulations recognize that a service-disabled veteran manager “need not have” necessary technical expertise, so long as “the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess” such expertise. 13 C.F.R. § 125.13(b).

Weighed against this evidence, I see no basis to conclude that PDS is controlled by Mr. Baker, Mr. Sachs, and/or Ms. Del Purgatorio. Mr. Baker and Ms. Del Purgatorio are PDS managers, but they operate under the supervision and control of Mr. Loosen and Mr. Murray, and neither Mr. Baker nor Ms. Del Purgatorio has control over PDS as whole. Sections II.F, II.G, and II.I, *supra*. In its supplemental protest, Protestor observes that Mr. Baker previously was President of Korrekt. Section II.H, *supra*. While this is true, there is no evidence to suggest that Mr. Baker continued in this role after PDS' acquisition of Korrekt, and in any event, Protestor has not explained how this would show that Mr. Baker controls PDS, given that Korrekt had become a wholly-owned subsidiary of PDS as of August 28, 2019, well before the relevant dates for determining eligibility. Meanwhile, Mr. Sachs is not even a PDS employee, but instead is an independent consultant who provides *ad hoc* advice to PDS leadership. Section II.G, *supra*. Mr. Sachs, then, has no control over the decision-making or management of PDS, nor has Protestor advanced any plausible theory as to how Mr. Sachs might exert such control. While Protestor highlights that Mr. Sachs signed a memorandum on behalf of PDS in 2014, this document does not demonstrate that Mr. Sachs controlled PDS even at that time, let alone that he still controlled PDS some five years later, as of the relevant dates to determine eligibility.

⁵ In its supplemental protest, Protestor made no mention of Ms. Del Purgatorio, and contended that the contract management work she performs does not rise to the level of a “primary and vital” function. Section II.H, *supra*. It therefore appears that Protestor may have abandoned its allegation that she controls PDS.

IV. Conclusion

PDS has proven its eligibility as an SDVOSB by a preponderance of the evidence. The protest therefore 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).

KENNETH M. HYDE
Administrative Judge