

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

CVE Protest of:

Superior Optical Labs, Inc.

Protestor,

Re: PDS Consultants, Inc.

Solicitation No. 36C24419R0102

SBA No. CVE-163

Decided: September 2, 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.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On January 15, 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. 36C24419R0102. 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

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<sup>1</sup> 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.<sup>2</sup> 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 July 18, 2019, the VA issued RFP No. 36C24419R0102 for prescription eyeglasses for veterans in Veterans Integrated Service Network (VISN) 4. (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 August 21, 2019. (CF, Exh. 470.)

### C. Proposal

PDS submitted its initial proposal on August 21, 2019. The proposal explained that PDS is the incumbent prime contractor, and that “[f]or the purposes of the VISN 4 eyeglasses requirement, PDS will use Korrekt Optical (Korrekt or KO) as the eyeglasses manufacturer (subcontracted supplier).” (Initial Tech. Proposal at 7.) Specifically, eyeglasses will be manufactured at Korrekt's facility in Louisville, Kentucky. (*Id.* at 8.)

The proposal identified a PDS employee, Mr. Robert Yopps, as “the primary contract manager for PDS on the VISN 4 contract.” (*Id.* at 15.) Another PDS employee, Ms. Devon Del Purgatorio, would serve as alternate in the event that Mr. Yopps was unavailable. (*Id.*) Mr. Steven A. Baker was referenced in the proposal as President of Korrekt. (*Id.* at 9, 21.) The proposal made no mention of Mr. Stephen A. Sachs.

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<sup>2</sup> 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 9, 2020, the CO notified unsuccessful offerors, including Protestor, that PDS was the apparent awardee. On January 15, 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 PDS' co-owners, Mr. John M. Loosen and Mr. Richard T. Murray, are both service-disabled veterans, they have “delegated the management and daily business operations of PDS to non-service-disabled persons.” (Protest at 4.) In particular, 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 4 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 5, 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 4 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 SDVOSB 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 instant contract (Exh. 9); and a Stock Purchase Agreement relating to PDS' acquisition of Korrekt effective August 28, 2019 (Exh. 14). 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. 36C24419R0102.” (*Id.*)

#### H. Supplemental Protest

On July 17, 2020, after reviewing the Case File under the terms of an OHA protective order, Protestor moved to supplement its protest.<sup>3</sup> 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 points to the PDS' proposal as evidence that PDS will rely on Korrekt to manufacture eyeglasses. (*Id.* at 2.) Indeed, the proposal is “replete with Korrekt's eyeglass manufacturing capabilities, facilities and certifications for operating as an ophthalmic laboratory.” (*Id.*) Protestor claims that PDS' own employees will have no major role in performing the contract. (*Id.*) Protestor further argues that the proposal confirms that PDS is so dependent on Korrekt that Mr. Loosen and Mr. Murray do not control PDS. (*Id.*) Protestor claims

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<sup>3</sup> 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 July 2, 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 supplemental protest be filed by July 17, 2020, and that any supplemental response be filed by August 3, 2020.

that Mr. Baker, who is now a PDS employee, controls PDS as he controls all operations, administration, sales, and contract management. (*Id.* at 2-3.) Protestor argues that PDS' purchase of Korrekt was after the date of the initial proposal and that PDS only purchased stock in Korrekt. (*Id.* at 3-4.)

Protestor argues that PDS violates the ostensible subcontractor rule because Korrekt will perform the primary and vital requirements of the contract by manufacturing the eyeglasses, and because PDS is unusually reliant upon Korrekt for manufacturing capability and employees. (*Id.* at 6-11.) Protestor finally argues that PDS is controlled by Korrekt and thus their employees should be aggregated under 13 C.F.R. § 121.106(b)(4)(i). (*Id.* at 11.) Protestor alleges that Korrekt is a distinct and separate entity from PDS because parent and subsidiary corporations are legally distinct. (*Id.* at 12.) Finally, Protestor argues that Mr. Loosen and Mr. Murray do not personally have the expertise to manufacture optical equipment. (*Id.* at 14-15.)

### I. Supplemental Response

On July 30, 2020, PDS responded to the supplemental protest. PDS argues that it is controlled by Mr. Loosen and Mr. Murray, that PDS will perform the work of the solicitation, that Korrekt is a wholly-owned subsidiary of PDS and no longer has its own employees or assets, and that the ostensible subcontractor rule does not apply to the instant procurement for manufactured products. (Supp. Response at 2.)

PDS raises five arguments for why it does not violate the ostensible subcontractor rule. First, OHA rejected Protestor's exact arguments in *CVE Protest of Superior Optical Labs, Inc.*, SBA No. CVE-157-P (2020) ("*Superior Optical I*"). (*Id.* at 3.) *Superior Optical I* is controlling because it involved the same parties, the same allegations, and nearly identical facts. (*Id.* at 4.) The only real difference between the two cases is the date of PDS' proposal, which, PDS argues, does not affect the result here. (*Id.*)

PDS argues that, as in *Superior Optical I*, PDS could not have violated 13 C.F.R. §§ 125.18(f) and 134.1003(c) because those regulations only became effective December 30, 2019, whereas PDS submitted its initial proposal for this procurement on August 21, 2019 and its final proposal revision on September 7, 2019. (*Id.*) PDS cannot be found to have violated rules that did not exist at the time of its proposal. (*Id.*)

As also discussed in *Superior Optical I*, the ostensible subcontractor rules in question - 13 C.F.R. §§ 125.18(f) and 134.1003(c) - apply only to procurements for services. (*Id.* at 4-6, citing 84 Fed. Reg. 65,647, 65,654 (Nov. 29, 2019).) The instant procurement, though, is for manufacturing and was assigned a manufacturing NAICS code. (*Id.* at 6.) Thus, §§ 125.18(f) and 134.1003(c) do not apply to this procurement. (*Id.*)

PDS contends that, as a factual matter, there is no basis to find PDS in violation of the ostensible subcontractor rule. PDS owns Korrekt and Korrekt's former manufacturing equipment. (*Id.*) Korrekt is therefore not an ostensible subcontractor because PDS will be the actual eyeglasses manufacturer. (*Id.* at 7.) PDS claims that when it submitted its initial proposal on August 21, 2019, it had not yet acquired Korrekt and intended, at that time, to subcontract

manufacturing to Korrekt. (*Id.*) On August 28, 2019, PDS acquired Korrekt. (*Id.*) PDS then informed VA that it had acquired Korrekt, and therefore would manufacture the eyeglasses. (*Id.* at 7-8.) Thus, as of the date of final proposal revisions, PDS no longer planned to subcontract manufacturing to Korrekt. The proper date at which to determine whether the ostensible subcontractor rule is violated is the date of final proposal revisions, not the date of the initial proposal. (*Id.* at 8.) It therefore is immaterial that PDS originally intended to subcontract work to Korrekt. (*Id.* at 9-10.)

PDS argues that it is fully controlled by Mr. Loosen and Mr. Murray, issues addressed by OHA in *Superior Optical I*. Mr. Loosen and Mr. Murray exclusively own and control PDS. (*Id.* at 11.) They are the sole shareholders, sole members of the Board of Directors, and PDS' corporate structure vests control and authority solely in them. (*Id.*) PDS admits that it is affiliated with Korrekt, but the combined employees of the companies do not exceed the size standard. (*Id.* at 12.)

PDS continues that it is not controlled by Mr. Baker. (*Id.*) PDS again points to *Superior Optical I*, which found that Mr. Baker does not control PDS. (*Id.* at 13.) Further, PDS' organizational chart shows Mr. Loosen and Mr. Murray in the highest officer positions, above Mr. Baker. (*Id.*) Although Mr. Baker is a member of PDS' executive team, he is supervised by Mr. Loosen and Mr. Murray. (*Id.*)

Finally, PDS insists that Mr. Loosen and Mr. Murray have sufficient experience to run an eyeglasses manufacturing company. (*Id.* at 14.) PDS again cites *Superior Optical I*, which explained that Mr. Loosen and Mr. Murray need not have the expertise to personally manufacture eyeglasses so long as they demonstrate managerial and supervisory control over those who possess such expertise. (*Id.*) While Mr. Loosen and Mr. Murray do not themselves operate eyeglass manufacturing equipment, they have extensive managerial experience in the eyeglasses industry. (*Id.*)

### 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 initial proposal including price on August 21, 2019, and the instant protest was filed on January 15, 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

Under the doctrine of *res judicata*, a final judgment on the merits bars further claims by the parties or their privies based on the same cause of action. *See generally Montana v. United States*, 440 U.S. 147, 153 (1979); *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003); Restatement (Second) Judgments § 17 (1982). The related doctrine of issue preclusion, also known as collateral estoppel, prevents re-litigation of the same issues that were decided in a prior case involving the same parties. *Montana*, 440 U.S. at 153; Restatement (Second) Judgments § 27 (1982). Issue preclusion is appropriate when four conditions are met: “(1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first



action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) plaintiff had a full and fair opportunity to litigate the issue in the first action.” *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994).

Here, as PDS observes, Protestor has filed two parallel protests challenging PDS' status as an SDVOSB. The protests pertain to different procurements, but the underlying allegations and factual circumstances are substantively identical. Specifically, both protests contend that PDS is not controlled by its service-disabled veteran owners, Mr. Loosen and Mr. Murray, but rather is controlled by Mr. Sachs, Mr. Baker, and/or Ms. Del Purgatorio. Both protests likewise allege that PDS' relationship with Korrekt violates 13 C.F.R. §§ 125.18(f) and 134.1003(c). In both cases, however, PDS submitted its proposal for the procurement before 13 C.F.R. §§ 125.18(f) and 134.1003(c) became effective, and in both cases the procurement in question is for manufactured products (*i.e.*, eyeglasses), not for services. Having considered these allegations and circumstances, OHA issued a final decision on the merits denying the first protest on July 20, 2020. *CVE Protest of Superior Optical Labs, Inc.*, SBA No. CVE-157-P (2020) (“*Superior Optical I*”).

I find that, under the doctrine of issue preclusion, Protestor is barred from re-litigating issues already decided in *Superior Optical I*. Although *Superior Optical I* pertained specifically to an eyeglasses procurement for the VISN 9 region rather than the VISN 4 region, the issues adjudicated in the first case are substantively identical to those presented here. In particular, OHA expressly concluded that PDS is controlled by Mr. Loosen and Mr. Murray, rejecting the notion that PDS is controlled by Mr. Sachs, Mr. Baker, and/or Ms. Del Purgatorio. *Superior Optical I*, SBA No. CVE-157-P, at 11-12. OHA further determined that 13 C.F.R. §§ 125.18(f) and 134.1003(c) do not apply to procurements for manufactured products, such as found here, and that the rules cannot fairly be applied in situations where the challenged firm submitted its proposal months before the rules became effective, as also is the case here. *Id.* at 10-11. Accordingly, the issues presented in this case have already been fully litigated and decided in *Superior Optical I*, and these same issues are dispositive of the instant protest. As a result, the protest must be denied.

#### IV. Conclusion

As discussed in *Superior Optical I*, 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