United States Small Business Administration
Office of Hearings and Appeals

CVE Protest of: Avenue Mori Medical Equipment, LLC, Protestor, Re: First Nation Group, LLC d/b/a Jordan Reses Supply Co. Solicitation No. 36C791-19-R-0009 U.S. Department of Veterans Affairs National Acquisition Center Commodities and Services Acquisition Service	SBA No. CVE-192 Decided: May 21, 2021

APPEARANCES

David F. Dowd, Esq., Luke Levasseur, Esq., Mayer Brown, LLP, Washington, District of Columbia. for Protestor

Jonathan T. Williams, Esq., Peter B. Ford, Esq., Meghan F. Leemon, Esq., PilieroMazza, PLLC, Washington, DC, for First Nation Group, LLC d/b/a Jordan Reses Supply Co.

DECISION[1]

I. Introduction and Jurisdiction

On February 11, 2021, Avenue Mori Medical Equipment, LLC (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of First Nation Group, LLC d/b/a Jordan Reses Supply Company (First Nation) in connection with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C791-19-R-0009. Protestor alleges that First Nation is not controlled by a veteran and should be excluded from the VA Center for

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

Verification and Evaluation (CVE) database of eligible SDVOSBs. 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 134 subpart J.[2] Protestor filed its protest within five business days after receiving notification that First Nation 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 February 4, 2021, the D/CVE notified First Nation of its reverification as an SDVOSB eligible to participate in the VIP Database. (Case File (CF), Ex. 406, at 1.) The verification was valid for a period of three years from February 4, 2021. (*Id.*)

B. Solicitation

On July 16, 2019, VA issued RFP No. 36C791-19-R-0009 for the provision of "positive airway pressure devices and associated accessories/replacement parts, facial interfaces and mask liners" for VA's Prosthetic and Sensory Aids Service. (CF, Ex. 414, at 6.) The RFP contemplated the award of multiple indefinite-delivery indefinite-quantity (ID/IQ) contracts. (*Id.*) Ten Contract Line Item Numbers (CLINs) were identified in the RFP, each consisting of a different type of product, and that the RFP stated that more than one award might be made for each CLIN. (*Id.* at 6-7.)

The Contracting Officer (CO) set aside the procurement entirely for SDVOSBs and assigned North American Industry Classification System (NAICS) code 339113, Surgical Appliance and Supplies Manufacturing, with a corresponding 750 employees size standard. First Nation submitted its initial proposal on December 11, 2019. In July 2020, the CO announced awards to both Protestor and First Nation. In September 2020, two unsuccessful offerors filed post-award bid protests with the U.S. Government Accountability Office. Thus, the VA took corrective action by requesting final proposal revisions. First Nation submitted its final proposal revision on November 2, 2020.

On February 4, 2021, the CO announced new awards and both First Nation and Protestor remained awardees.

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

C. Promissory Note[3]

On April 1, 2016, First Nation acquired Jordan Reses Supply Company (Jordan Reses) from Patton Holdings, Inc. (PHI), which is owned by [Individual #1], a non-veteran, resulting in the merger of the two companies into First Nation. First Nation's acquisition of Jordan Reses was financed by PHI through an unsecured, subordinate promissory note (Note) in the amount of $[XXX] to be paid in full within 9 years. (Note, at 1.) In exchange for contributing Jordan Reses to First Nation, PHI received 49% of First Nation's Class B membership units. (*Id.*, at 3.) The Note does not, on its face, provide for the ability of PHI or its owner to control First Nation. However, in the event of a default, PHI may declare the Note immediately due and payable, and in the event of a sale, all amounts due will become due immediately. (*Id.*)

D. Operating Agreement

On April 3, 2016, First Nation, Ms. Cheryl Nilsson, and PHI entered into the Second Amended and Restated Operating Agreement (Operating Agreement). The Operating Agreement states that the name of the Company is First Nation Group, LLC. The Operating Agreement states in relevant part:

2.1 **Management of the Company by the Managing Member**.

. . .

(i) [XXX.]

. . .

2.9 **Officers; Committees**.
[XXX].

. . .

[XXX.]

. . .

2.14 **[**XXX.]

. . .

3.1 **Limitations.** [XXX.]

. . .

[3] The Note was not included in the Case File. However, due to its relevance, OHA admitted the Note into the record on April 27, 2021.

4.1 **Capital of the Company**.
(a) **Original Capital Contributions**.
(i) [XXX.]

Exhibit A of the Operating Agreement states that Ms. Nilsson has 100% of First Nation's Class A membership with a voting interest. Ms. Nilsson also has 51% of First Nation's Class B membership, which does not include a voting interest. PHI has 49% of First Nation's Class B membership, which does not include a voting interest.

E. 2017 Size Decision

On January 27, 2017, OHA issued *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Company, LLC*, SBA No. SIZ-5807, finding First Nation a small business concern. OHA found that the area office erred in finding First Nation affiliated with PHI as there lacked an element of control between the two concerns. (*First Nation*, SBA No. SIZ-5807, at 9 (2017).) In the decision, OHA addressed the area office's reliance on the Note in its finding of affiliation between the concerns and determined, "based on the [area office]'s own findings, no justification exists to conclude that PHI could exert financial control over Appellant. . . ." (*Id.*, at 10.) OHA found that the Note is subordinate and unsecure, making it unclear how PHI could use its status as a lender to control First Nation. The Note does not contain any unusual provisions that could give rise to any power to control. OHA found, though the value of the Note is substantial, it is unsecured, and First Nation's ability to make payments (based on the concern's post-merger revenues as of the date to determine size) leaves little risk it would be unable to service the Note. (*Id.*)

OHA highlighted that PHI is a minority owner of First Nation's Class B, non-voting stock, which affords PHI no ability to control First Nation or to interfere with Ms. Nilsson's control. (*Id.*) Further, the area office found no indication that PHI or [Individual #1] holds a managerial interest in First Nation, or that First Nation and PHI have other significant business dealings. Thus, OHA determined the facts do not demonstrate financial dependence such that PHI could control First Nation as of the relevant date to determine size, as the Note is arm's length and conforms to normal business transactions. (*Id.*)

F. Protest

On February 4, 2021, the CO announced that First Nation was the apparent awardee. On February 11, 2021, Protestor filed the instant protest, challenging First Nation's SDVOSB status. The CO forwarded the protest to OHA for review.

In its protest, Protestor alleges First Nation is not controlled by service-disabled veterans (SDV)s. Protestor first argues Ms. Nilsson did not found First Nation. (Protest, at 3.) Protestor also contends Ms. Nilsson had no background in the healthcare field prior to the merger between First Nation and Jordan Reses, arguing there is staff of First Nation with more experience, which calls into question Ms. Nilsson's ability to control the concern. (*Id.*) Protestor questions Ms. Nilsson's ability to control the concern's healthcare business, which is distinct from its [XXX].

(*Id.*, at 3-4.) Protestor highlights that Ms. Nilsson's compensation is only $[XXX] more than another First Nation officer, which, "relative to that of another employee who lacks any equity stake - does not reflect status as a controlling owner." (*Id.*, at 4.)

Protestor maintains that Ms. Nilsson had very little capital to acquire a controlling interest in Jordan Reses without the Note provided by PHI, where PHI retains a 49% interest in First Nation. (*Id.*) Because PHI paid nearly half of the acquisition price of First Nation, the concern "must rely on the continued support of PHI for permitting it to divert PHI's share of the profits," which gives the seller an unusual amount of control over First Nation. (*Id.*, at 5.) Protestor contends by continuing to provide critical financial support to First Nation, PHI has exercised control. (*Id.*) Protestor argues First Nation could not have obtained a commercial loan on its own and argues that the decision in the *First Nation* size case did not mention that PHI itself was funding the repayment. (*Id.*) Protestor claims the debt cannot be considered arm's length where a party is on both sides of the transaction as the lender and borrower repaying the loan. (*Id.*)

Lastly, Protestor argues Ms. Nilsson cannot exercise independent judgment without great economic risk. Protestor maintains First Nation, under the Jordan Reses name, has been and continues to be an exclusive distributor of medical products manufactured by large businesses. (*Id.*, at 6.) As an exclusive distributor for certain manufacturers, including [Company #1], First Nation, "would have to agree to terms that govern where or how [First Nation] sells products and potentially even the prices charged," allowing [Company #1] and other manufacturers to have control over First Nation. (*Id.*) By [Company #1] authoring letters naming First Nation as an exclusive distributor, "the manufacturer is taking extraordinary action to intervene to preserve First Nation's income stream and materially assist in its marketing efforts." (*Id.*)

G. First Nation's Response

On March 9, 2021, First Nation responded to the protest. First Nation finds Protestor's allegations speculative and meritless. (Response, at 11.) First Nation satisfied all of the SDVOSB eligibility criteria as of December 11, 2019, when it submitted its proposal, and February 11, 2021, the date Protestor filed its protest. At all times following the First Nation/Jordan Reses merger, the qualifying ownership of First Nation has been comprised of Ms. Nilsson, a service-disabled veteran, unconditionally owning at least 51% of each class of First Nation's membership interests, and she is the only member with voting interests. (*Id.*, at 11-12, citing to the Operating Agreement.)

First Nation satisfies the control requirements under 13 C.F.R. § 125.1,3 as Ms. Nilsson serves as the concern's managing member and her control over all company decisions is readily confirmed in the Case File through the Operating Agreement. (*Id.*, at 12.) There have been no changes to the Operating Agreement since the 2017 *First Nation* decision. Ms. Nilsson remains the managing member and the Operating Agreement makes clear she has sole control over the company's decisions. (*Id.*, at 13.) As Chief Executive Officer (CEO), Ms. Nilsson is First Nation's highest ranked officer, she devotes full time to running the concern, and the Case File shows the company's "numerous and consistent responses confirming Ms. Nilsson's direct, sustained, and substantive control over all aspects of First Nation's operations." (*Id.*) Ms. Nilsson

also receives the highest compensation from First Nation. With more than 30 years of experience in the government contracting industry and nearly 10 years of experience as CEO of First Nation, Ms. Nilsson also has the experience of the extent and complexity required to run the concern. (*Id.*, at 13-14.) Ms. Nilsson lives in close proximity to First Nation's headquarters, there are no critical licenses that she does not possess, she does not have employment outside of First Nation, and she is not subject to control by any non-service-disabled veteran. (*Id.*, at 14.) First Nation contends the CVE has reviewed the concern's SDVOSB status six times since its 2016 transaction acquiring Jordan Reses, which included scheduled re-verifications and surprise on-site inspections, and each time the concern was approved. (*Id.*)

Protestor has failed to show that First Nation does not meet the control requirements under 13 C.F.R. § 125.13. Protestor attempts to re-litigate issues resolved in the 2017 *First Nation* size decision. The arguments regarding the financing of the First Nation/Jordan Reses merger are "substantively identical to the issues OHA ruled on in the 2017 decision." (*Id.*, at 15.) OHA reviewed the Operating Agreement, the Note, and other transaction documents and found no ability for PHI to control First Nation. (*Id.*) OHA's conclusions in the *First Nation* size decision are relevant and dispositive here because none of the key documents or circumstances have changed. The only change to the Note is that the balance due has been significantly reduced because First Nation has timely made all payments. (*Id.*, at 16.) First Nation finds no meaningful difference between the concepts of financial control and economic dependence that OHA considered in 2017 under the affiliation rules and the SDVOSB control requirements here. (*Id.*) "For the same reasons the Note did not give PHI any ability to exert financial control or cause First Nation to be economically dependent on PHI under SBA's affiliation rules, the Note cannot constitute critical financing that could give PHI the ability to control First Nation under 13 C.F.R. §§ 125.13(i)(5) or (j)." (*Id.*)

First Nation contends there is no requirement in the regulations that the service-disabled veteran owner be the founder of the SDVOSB concern in question. Protestor cites to no authority to support this claim. First Nation is the surviving entity of the merger with Jordan Reses. Protestor failed to provide an explanation as to how the two companies' different lines of business could have any impact on Ms. Nilsson's ability to control First Nation. (*Id.*, at 17.)

Ms. Nilsson has the managerial experience of the extent and complexity needed to run First Nation. Ms. Nilsson has a Juris Doctor Degree, Masters of Law in Government Procurement and Environmental Law, is a Certified Public Accountant, and had a 23-year career as an Air Force Judge Advocate General, retiring as Colonel. She has served as a Chief Legal Officer, Chief of Technology Division for the Air Force Trial Team, and Senior Legal Counsel managing six diverse professional legal staffs ranging from 10 to 50 professionals. (*Id.*, at 18.) Ms. Nilsson has over 30 years of government procurement experience and has held several senior management positions for government contractors. Ms. Nilsson has been managing First Nation since 2014. Though First Nation does employ some of the personnel previously employed by Jordan Reses, the Operating Agreement provides that Ms. Nilsson is First Nation's highest-ranking officer and is responsible for employment decisions for all agents and employees of the concern. (*Id.*, at 19.) All officer positions are subordinate to Ms. Nilsson, including those in the medical product distribution business. (*Id.*, at 20.)

First Nation contends there is no requirement that Ms. Nilsson be paid a certain compensation compared to other employees. Nevertheless, accounting for Ms. Nilsson's distributions as an owner, she receives a significantly greater compensation compared to all other First Nation employees. (*Id.*, at 21.)

There is no requirement in the SDVOSB regulations that the service-disabled veteran owner contribute capital to the firm to demonstrate control over the concern. Ms. Nilsson acquired First Nation in 2014 from [Individual #2] and [Individual #3] pursuant to an arm's length purchase agreement. (*Id.*, at 22.) In exchange for 100% ownership in First Nation, Ms. Nilsson agreed to [XXX]. This transaction is not relevant to First Nation's SDVOSB eligibility for the instant procurement.

With respect to the 2016 Note, PHI has the rights of an ordinary creditor. Seller financing is expressly permitted under SBA's SDVOSB regulations. (*Id.*, at 22-23, citing to 13 C.F.R. § 125.11.) PHI is not providing any ongoing financial assistance to First Nation and the payments First Nation is making to PHI are a business expense and not a diversion of profit. (*Id.*, at 23.) OHA will look at the terms of a seller-financed loan to determine if there are any conditions that would give rise to control over the concern by the seller. OHA found in the *First Nation* size decision that the Note does not contain unusual terms or give PHI actual control or power to control First Nation. (*Id.*, at 25.) OHA also found that the Note does not make First Nation dependent on PHI. (*Id.*)

First Nation notes Protestor argues that 13 C.F.R. § 125.13(i)(7) is applicable here, which provides there is a rebuttable presumption that non-SDVs control a concern when there are business relationships with non-SDV individuals or entities which cause such dependence the applicant firm cannot exercise independent business judgment without great economic risk. First Nation maintains this regulation is inapplicable with respect to the concern's relationship with [Company #1] or any other manufacturer. (*Id.*, at 27.) [Company #1] has no control over First Nation. First Nation has distribution agreements with [XX] manufacturers, and its 2020 sales with [Company #1] amount to [XX]% of the concern's revenue with significant percentages of its revenues attributable to sales of products made by companies other than [Company #1]. (*Id.*, at 28.) First Nation's economic viability is not tied to one business relationship with a manufacturer. [Company #1] has no ability to exercise control over First Nation. The parties each maintain significant independence under the distribution agreement, including First Nation's ability to terminate the agreement under certain circumstances and the ability to decide its prices. (*Id.*, at 30.)

H. Supplemental Protest

On April 15, 2021, Protestor filed its supplemental protest after reviewing the Case File. Protestor points to First Nation's formation which shows undue reliance and dependence on non-service-disabled veterans such that independent decisions cannot be made without great economic risk. Protestor repeats arguments regarding First Nation's inability to finance the merger with PHI to acquire Jordan Reses and Ms. Nilsson's lack of experience in Jordan Reses's line of business to show a lack of control. (Supplemental Protest, at 5-7.)

Protestor contends that facts in the record contradict the Operating Agreement. First, Protestor notes that the Case File includes a distributor agreement signed by an officer of First Nation where the Operating Agreement states that Ms. Nilsson signs all company contracts. (*Id.*, at 8, citing to CF, Ex. 301, at Section 2.9 & Ex. 118, at 1.) Protestor also points to an anticipated [XXX] Plan included in the Operating Agreement which states that the managing member will implement the plan but does not provide for the manager's discretion. (*Id.*, citing Ex. 301, at Section 2.14). There is no [XXX] Plan in the Case File. Protestor speculates this plan is meant to assure favorable treatment for former PHI executives who will prioritize PHI's interests. Due to the close relative pay between Ms. Nilsson and other officers of First Nation, "it appears that Ms. Nilsson's hands have been constrained with regard to compensation decisions (at least for certain personnel) as a result of a deal struck with PHI that limits her flexibility post-merger." (*Id.*, at 9, citing to CF, Ex. 333.)

Though Section 3.1 of the Operating Agreement provides that no member other than the managing member shall participate in the operation or control of First Nation, the Case File reveals that [Individual #1], PHI's owner, is on First Nation's payroll. (*Id.*, at 10, citing to CF, Ex. 293, 295, 297, 299, and 333.) The Operating Agreement does not provide for [Individual #1] to be a paid employee or receive benefits. Protestor argues "there appears to be some separate agreement between [First Nation] and [Individual #1] or PHI." (*Id.*) Ms. Nilsson's statement that neither PHI nor [Individual #1] has any management role or daily management involvement in First Nation is at odds with the years of payroll [Individual #1] has received from First Nation as an employee. (*Id.*, at 10-11.)

I. Response to Supplemental Protest

On April 30, 2021, First Nation responded to the supplemental protest. First Nation maintains that Ms. Nilsson, the service-disabled, majority owner and highest officer of First Nation, owned and controlled the concern on the relevant dates. (Supplemental Response, at 2.) Protestor has provided no cogent theory as to how the merger that occurred in 2016 prevents the concern from qualifying as an SDVOSB in December 2019 and February 2021. (*Id.*)

Protestor failed to acknowledge that the SDVOSB regulations explicitly allow a service-disabled veteran to acquire or form an SDVOSB using seller financing, "the precise type of financing First Nation used." (*Id.*, at 6.) The Note is permissible as long as it follows normal commercial practices and Ms. Nilsson remains in control of First Nation absent a breach of the Note. (*Id.*) OHA assessed these circumstances in the 2017 *First Nation* size decision. There has been no change to the Note. By operating the firm for years, Ms. Nilsson has further bolstered her experience managing the daily operations of the merged entity. (*Id.*, at 7.) Protestor offers no theory on how the Note can prevent Ms. Nilsson from satisfying the SDVOSB requirements in 13 C.F.R. § 125.12 as of the relevant dates. The 2017 *First Nation* size decision determined the Note did not provide PHI or [Individual #1] with any ability to control First Nation absent a default on the Note. (*Id.*)

Ms. Nilsson controlled First Nation on the relevant dates and no non-service-disabled veteran controlled or had the ability to control First Nation. (*Id.*, at 8.) Ms. Nilsson controls both the medical supply and [XXX] of First Nation. Ms. Nilsson "set policies and strategies,

monitored sales and operations, reviewed and approved all significant personnel actions, all financial reports, and reviewed and signed contracts" of the medical supply distribution business. (*Id.*, at 9.) Ms. Nilsson executed First Nation's FSS contract, which is the primary vehicle used to sell medical products, and the 2018 amendment to the concern's distribution agreement with [Company #2] (*Id.*) Protestor does not address the Operating Agreement which gives Ms. Nilsson full control over First Nation with no conditions. First Nation discontinued its [XXX] in June 2020 and the vast amount of Ms. Nilsson's time is devoted to running the company's medical product distribution business. (*Id.*, at 10.)

With respect to another officer signing a contract on behalf of First Nation, Protestor ignores that Ms. Nilsson has the power to delegate responsibilities, as the managing member of the concern. (*Id.*, at 10-11.) All other officer positions are subordinate to Ms. Nilsson and all report to her. Protestor does not explain how the signing of one document several years before December 2019 and February 2021 has an impact on Ms. Nilsson's control over First Nation. Ms. Nilsson was the highest-paid employee of First Nation in 2018, 2019, and 2020. (*Id.*, at 13.) Because Ms. Nilsson has an equity stake in First Nation, her total compensation far exceeds that of any other First Nation employee.

Ms. Nilsson approves all salary and compensation packages, and signs all offer letters for all new employees. (*Id.*, at 14.) Ms. Nilsson established the First Nation [XXX] Plan and "she alone is responsible for determining how [XXX]." (*Id.*) There is no constraint on Ms. Nilsson's ability to make compensation decisions for First Nation and nothing in the Case File indicates otherwise.

[Individual #1] is on First Nation's payroll so that he can maintain his health benefits and to compensate him for consulting and occasional meetings and phone calls with Ms. Nilsson. (*Id.*, at 15.) [Individual #1]'s compensation is minimal compared to other executives and he is not an officer of First Nation or a key employee. [Individual #1] is a passive investor. The Operating Agreement gives PHI and [Individual #1] no ability to control First Nation. [Individual #1]'s role with First Nation has been disclosed in numerous submissions to SBA and CVE. (*Id.*, at 17, citing to Case File Ex. 140.1, 231, 247, and 271.) Protestor has not shown how [Individual #1] controls First Nation and how the concern is not controlled by Ms. Nilsson.

III. Discussion

A. Burden of Proof

As the protested firm, First Nation has the burden of proving its eligibility as a SDVOSB by a preponderance of the evidence. 13 C.F.R. § 134.1010. The decision must be based primarily on the case file and the information provided by the Protestor, the protested concern, and any other parties. 13 C.F.R. § 134.1007(g). Accordingly, all the evidence submitted by the Protestor and First Nation, including the Note is part of the record.

B. Analysis

To be considered an eligible SDVOSB, a concern must be a small business that is unconditionally owned and controlled by one or more service-disabled veterans. 38 C.F.R. § 74.2(a); 13 C.F.R. §§ 125.12 and 125.13; *CVE Protest of Blue Cord Design and Constr., LLC*, SBA No. CVE-100-P (2018). The control requirements for SDVOSBs are found at 13 C.F.R. part 125. *See* 38 C.F.R. § 74.4, "[c]ontrol is determined in accordance with 13 CFR part 125. As discussed below, First Nation has persuasively demonstrated that it meets these requirements. In reviewing the protest in light of the record and First Nation's responses, I find Protestor's allegations to be speculative and without a legal or factual basis. Therefore, I must deny this protest.

In a CVE protest concerning a procurement, the dates for determining the eligibility of the protested concern are (1) the date of the bid or initial offer that included price, and (2) the date the CVE protest was filed. 13 C.F.R. § 134.1003(c)(1); *CVE Protest of Alpha4 Solutions, LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019). For the case at hand, the relevant dates are the date offers were submitted, December 11, 2019, and February 11, 2021, the date the protest was filed.

Protestor first alleges First Nation is not controlled by a service-disabled veteran because Ms. Nilsson, the service-disabled veteran upon which First Nation's SDVOSB status is based, did not found First Nation. However, I agree with First Nation that there is no OHA caselaw or regulation that requires the service-disabled veteran to have been the founder of the concern in question. The requirement is that the concern be at least 51% unconditionally owned by a service-disabled veteran at the time a concern submits a proposal for a procurement and at the time of any protest that may arise. *See* 13 C.F.R. §§ 125.12; 125.13; and 134.1003(c)(1). Protestor does not contend that First Nation is not currently owned by Ms. Nilsson, but highlights that First Nation was once owned by another individual or individuals. It is clear from the record that Ms. Nilsson owned First Nation on the dates in question. Thus, Protestor's contention that First Nation is not owned or controlled by a service-disabled veteran because, at some time in the past, another individual owned the firm has no legal basis.

Next, Protestor argues Ms. Nilsson did not contribute the requisite managerial experience prior to First Nation's merger with Jordan Reses in 2016. However, this point is irrelevant at this juncture. Regardless of Ms. Nilsson's experience, or lack thereof, prior to the merger, the dates by which I must determine First Nation's compliance with the pertinent regulations are the date the concern submitted its proposal for the instant proposal, which is December 11, 2019 and the date of the protest, which is February 11, 2021. Thus, I must determine whether Ms. Nilsson had the managerial experience of the extent and complexity required to run First Nation on these dates only.

First Nation responded to the protest and provided that Ms. Nilsson has extensive experience in the government contracting industry and has been running First Nation for several years. Ms. Nilsson has a Juris Doctor and Masters of Law in Government Procurement and Environmental Law, is a Certified Public Accountant, and served in multiple senior leadership roles before she began working as Chief Executive Officer of First Nation. Protestor contends

Ms. Nilsson did not have healthcare experience before the merger with Jordan Reses. Though it is clear that Ms. Nilsson's experience prior to the dates by which I must determine First Nation's compliance with the SDVOSB regulations is irrelevant, even if Ms. Nilsson did not currently have healthcare experience, as will be discussed further, Ms. Nilsson possesses the ultimate managerial and supervisory control over any other First Nation employee that may have that specific technical expertise. *See* 13 C.F.R. § 125.13(b), ("The service-disabled veteran manager . . . need not have the technical expertise or possess the required license to be found to control the concern if the service-disabled veteran can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.") Nevertheless, I find that on the dates for determining First Nation's SDVOSB status, Ms. Nilsson had the requisite managerial experience to run the concern.

Protestor maintains that First Nation is not controlled by a service-disabled veteran due to Ms. Nilsson's inability to fund the merger between First Nation and Jordan Reses without the assistance of [Individual #1], who is the owner of PHI, the minority owner of First Nation. Protestor contends that because the merger was financed by PHI, the concern controls First Nation. However, the regulations explicitly allow and anticipate seller financing, and provides that such an arrangement, "does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms." 13 C.F.R. § 125.11. Furthermore, OHA addressed the financing of the First Nation/Jordan Reses merger in 2017, and found that the Note in question provided no mechanism by which PHI could control First Nation. *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Company, LLC*, SBA No. SIZ-5807 (2017). First Nation contends there have been no amendments or changes to the Note following the 2017 *First Nation* size decision except that the balance on the Note has been significantly reduced. The central question of whether the Note provides for PHI to control First Nation is the same here as it was in the 2017 *First Nation* size decision. This raises the issue of collateral estoppel:

> Under 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 has a full and fair opportunity to litigate the issue in the first action." *In re Freeman*, 30 F.3d 2459, 1465 (Fed. Cir. 1994).

CVE Protest of Superior Optical Labs, Inc., SBA No. CVE-163-P, at 8 (2020).

Here, the Protestor raised the issue of whether the Note gave PHI control of First Nation in *First Nation*, the issue was litigated, it was essential to the holding in the case, and Protestor

had a full and fair opportunity to litigate it. OHA held the Note does not give PHI control over First Nation. Accordingly, under the doctrine of collateral estoppel, the issue is already decided, and Protestor may not relitigate it here.

Protestor alleged that First Nation could not exercise independent business judgment without great economic risk because of its distribution agreement with [Company #1], one of First Nation's manufacturers, but later abandoned the argument in its supplemental protest. First Nation provided extensive information to establish that it is not reliant on one manufacturer and only attributed [XX]% of its 2020 revenues to the company. First Nation provided numerous distribution agreements that provide for a diverse portfolio of manufacturers with whom the concern contracts. The fact that one of those manufacturers advertises its relationship with First Nation appears to be advantageous to both First Nation and [Company #1] in marketing their products and services, but in no way creates a stranglehold on First Nation's ability to exercise independent business judgment. The fact that the parties have a contract does not create control by [Company #1] on First Nation's business any more than it would create control on behalf of First Nation to control [Company #1], absent any provisions which would give one party the power to control the other. Protestor can point to no such provisions here. The very essence of a contract is an agreement between two or more parties to engage in a relationship within mutually agreed upon terms. Protestor's contentions on this point lack any factual or legal substance, thus I find First Nation can exercise independent business judgment without economic risk.

Next, Protestor argues although Ms. Nilsson receives the highest compensation from First Nation, her salary is comparable to other officers of First Nation, where one officer received only $[XXX] less than Ms. Nilsson. There is a rebuttable presumption of control by a non-service-disabled veteran where the non-service-disabled veteran receives compensation from the protested concern that exceeds the compensation to the highest-ranking officer. 13 C.F.R. § 125.13(i)(2). The record establishes that Ms. Nilsson has received the highest compensation of any First Nation employee for the relevant dates. Thus, the rebuttable presumption cannot be invoked here. There is no requirement in OHA caselaw or in the relevant regulations that requires the service-disabled veteran CEO to have a compensation that is a certain amount higher than her subordinate employees. So long as the service-disabled veteran CEO's compensation is highest, the rebuttable presumption of control by a non-service-disabled veteran is not triggered. Thus, Protestor's contentions fail.

Protestor argues the business operations of First Nation conflict with the absolute control the Operating Agreement affords Ms. Nilsson as CEO and Managing Member of First Nation. First, Protestor contends the Operating Agreement requires that Ms. Nilsson sign all contracts on behalf of First Nation, yet another First Nation officer signed a distribution agreement. Though Protestor contends the Operating Agreement conflicts with First Nation's business practices, it is clear from the language of the Operating Agreement that Ms. Nilsson, in her discretion as CEO and Managing Member of First Nation, has the ability to delegate responsibilities to other officers of the concern. *See supra*, Section II.D. Thus, Protestor's allegation on this point fails.

Protestor then finds issue with the mention of an anticipated [XXX] Plan included in the Operating Agreement. *See id.* With not a shred of evidence, Protestor suggests of a deal being struck between First Nation and PHI that limits Ms. Nilsson's ability to decide upon the

compensation structure of some of First Nation's employees. First Nation responded explaining that Ms. Nilsson ultimately decided against the program provided for in the Operating Agreement in favor of another program, of which she has the sole discretion. Protestor points to nothing in the record to support its contention other than a lack of further information about the [XXX] plan that was anticipated at the time the Operating Agreement was executed. Protestor's allegation is speculative at best. There is nothing in the record to support a separate agreement with PHI and First Nation or Ms. Nilsson regarding employee compensation and I am limited to grounding this decision based on the facts before me either in the record or presented by the parties. *See* 13 C.F.R. § 134.1007(g), ("The decision will be based primarily on the case file and information provided by the Protestor, the protested concern, and any other parties.")

Lastly, Protestor highlights that [Individual #1] receives a salary from First Nation, questions whether [Individual #1] has a management role with First Nation, and argues that there appears to be some separate agreement between First Nation and [Individual #1] or PHI. As First Nation explains, [Individual #1]'s role in the company has repeatedly been disclosed to the CVE and the concern has explained [Individual #1]'s role in the firm here. For example, in a February 6, 2017 response to a CVE Notice of Proposed Cancellation, First Nation stated:

> . . . [Individual #1] had to completely relinquish all current and any future control of Jordan Reses. [Individual #1] understood and was willing to completely cede control to Ms. Nilsson because doing so would allow the company to better attain its business, social, and philanthropic goals.
> . . .
>
> To ensure Ms. Nilsson's total control, First Nation's membership was restructured into two classes, and only Ms. Nilsson received Class A voting interests; [PHI]'s 48.5% interest is Class B non-voting. The other transaction documents, including the Note, were similarly structured to ensure Ms. Nilsson's total control and that [PHI] is only a passive owner.

CF Ex. 140.1, at 4. Nevertheless, as First Nation has explained, [Individual #1] is a passive minority owner, with no voting rights, who does some occasional consulting for the company. Nothing in the record establishes that [Individual #1] can control First Nation. [Individual #1] is a minority owner of the concern with no voting rights. [Individual #1] is not an officer of First Nation. Furthermore, the Operating Agreement affords Ms. Nilsson total control over First Nation. [Individual #1]'s employment with First Nation, without more, is not indicative of his ability to control the concern. Thus, Protestor's claim of some separate agreement without any documentation or evidence to support it is baseless.

IV. Conclusion

First Nation has proven its eligibility as a SDVOSB by a preponderance of the evidence. I therefore DENY the protest. This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(B); 13 C.F.R. § 134.1007(i).

CHRISTOPHER HOLLEMAN
Administrative Judge