

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

SIZE APPEAL OF:

BR Construction, LLC,

Appellant,

Appealed From
Size Determination No. 6-2011-140

SBA No. SIZ-5327

Decided: February 21, 2012

ORDER DENYING APPEAL

I. Background

This appeal arises from size determination number 6-2011-140 issued on November 2, 2011 to BR Construction, LLC (Appellant) in connection with Appellant's offer on a procurement set aside for service disabled veteran owned small businesses. In the size determination, the Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) found that Appellant was not a small business under the applicable size standard of \$33.5 million. The Area Office determined that Appellant's minority owner, Mr. David Christa, had the power to exert negative control over Appellant through provisions in Appellant's operating agreement. As a result, Appellant was found to be affiliated with Christa Construction, LLC (Christa Construction), another company controlled by Mr. Christa.

Less than two months before size determination 6-2011-140 was issued, the Area Office had previously issued a substantially similar size determination (number 6-2011-114) to Appellant in conjunction with a different procurement. The earlier determination likewise found that Appellant was not a small business under the \$33.5 million size standard due to negative control by Mr. Christa and affiliation with Christa Construction. Appellant appealed the earlier size determination to the SBA Office of Hearings and Appeals (OHA), and on November 21, 2011, OHA issued a final decision on the merits denying the appeal. *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303 (2011). A large portion of OHA's decision addresses the issue of Mr. Christa's negative control over Appellant. *Id.*, at 7-9.

On November 16, 2011, Appellant filed the instant appeal of size determination 6-2011-140. In its appeal petition, Appellant stated that it is “incorporat [ing] by reference its previous appeal” of size determination 6-2011-114, because the issues in the cases are essentially identical. (Appeal at 2-3.)

II. Discussion

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, the Area Office issued two size determinations (numbers 6-2011-114 and 6-2011-140) finding that Appellant was not a small business. The size determinations were issued on different dates, and arose from protests on different procurements, but are substantively identical. Both determinations concluded that Appellant's minority owner, Mr. Christa, could exert negative control over Appellant through provisions in Appellant's operating agreement, and that Appellant therefore was affiliated with Christa Construction. As a result, Appellant exceeded the applicable size standard of \$33.5 million. Appellant appealed the first size determination on September 20, 2011, and OHA issued a final decision on the merits denying that appeal on November 21, 2011. *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303 (2011). The second size determination was issued November 2, 2011, and Appellant appealed the second size determination on November 16, 2011. In its second appeal, Appellant indicates that because the two size determinations utilize “the same reasoning” and “are based on the same set of facts and circumstances,” Appellant is “incorporat[ing] by reference its previous appeal.” (Appeal at 2-3.) In both appeals, Appellant is represented by the same legal counsel.

I find that, under the doctrine of issue preclusion, Appellant is barred from re-litigating issues already decided in *Size Appeal of BR Construction, LLC*, SBA No. SIZ-5303 (2011). Although that decision pertained specifically to the first (and not the second) size determination, the issues adjudicated in the first case are substantively identical to those presented here. In particular, the question of whether Mr. Christa could exert negative control over Appellant, and whether Appellant consequently is affiliated with Christa Construction, has been fully litigated and decided. These same issues are dispositive of the instant appeal. As a result, the instant appeal must be denied.

III. Conclusion

For the reasons discussed *supra*, the instant appeal is DENIED, and size determination 6-2011-140 is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge