United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Superior Optical Labs, Inc., Appellant, RE: ACTFL Professional Services, LLC Appealed From Size Determination No. 3-2021-050	SBA No. SIZ-6158 Decided: June 01, 2022

APPEARANCES

John E. McCarthy Jr., Esq., Zachary H. Schroeder, Esq., Crowell & Moring LLP, Washington, D.C., for Appellant

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

DECISION[1]

I. Introduction and Jurisdiction

On July 26, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2021-050, concluding that Superior Optical Labs, Inc. (Appellant) is affiliated with Essilor of America, Inc. (Essilor), a large business, under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the appeal within 15 calendar days after receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[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 therefore now issues the entire decision for public release.

II. Background

A. The RFP and Prior Proceedings

On August 24, 2020, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24820R0087 for prescription eyeglasses and related services in Veterans Integrated Services Network 8. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (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 September 23, 2020. On October 1, 2020, the CO announced that Appellant was the apparent awardee.

On October 8, 2020, PDS Consultants, Inc. (PDS), an unsuccessful offeror, filed protests with the CO challenging Appellant's size and status as an SDVOSB. The CO directed the size allegations to the Area Office for review, and the status allegations to OHA. In the size protest, PDS contended that Appellant is affiliated with Essilor, a large business, on various grounds, including economic dependence, loan arrangements, identity of interest, and the totality of the circumstances. (Protest at 3-8.) PDS maintained that "Essilor previously owned [Appellant]" but later sold a majority interest to a service-disabled veteran in an effort "to qualify for SDVOSB set-aside awards," and that a prior purchase agreement between Appellant and Essilor created "a debt-related requirement" for Appellant to use Essilor products. (*Id.* at 5-6.) Additionally, PDS alleged, Appellant will not itself manufacture the eyeglasses for the instant procurement, and cannot meet the requirements of the nonmanufacturer rule. (*Id.* at 8, 10-11.)

In response to PDS's size protest, Appellant argued that: (1) Essilor no longer holds any ownership or managerial interest in Appellant; (2) Appellant is not controlled by, or affiliated with, Essilor; (3) Appellant does not have a debt-related requirement to use Essilor products, rather Appellant "purchases lenses from a number of different companies," including Essilor; and (4) Appellant alone will manufacture the eyeglasses for the instant procurement. (Protest Response at 2-3, 5-9.)

On November 12, 2020, the Area Office issued Size Determination No. 3-2021-009, concluding that Appellant is a small business for the instant procurement. The Area Office examined Appellant's size "as of September 23, 2020, the date of the initial proposal submission which included price," and found that Appellant is not affiliated with Essilor on any of the grounds set forth in the protest. (Size Determination No. 3-2021-009, at 3-9, 11.) The Area Office accepted Appellant's representation that Appellant "is not required to purchase Essilor products," and that Appellant instead "purchases lenses from a number of different companies to include Essilor, all at commercial rates." (*Id.* at 6.) In addition, the Area Office determined, the nonmanufacturer rule does not apply because Appellant itself will manufacture the eyeglasses for the instant procurement, to include grinding of the prescription lenses, at Appellant's own facilities in Mississippi. (*Id.* at 9-10.)

On November 27, 2020, PDS appealed Size Determination No. 3-2021-009. PDS argued that the Area Office erred in finding that Appellant is not affiliated with Essilor, and in finding that Appellant will act as the manufacturer for the instant procurement. (Appeal at 4-5, 15-17.) PDS further contended that the record before the Area Office was incomplete, and, consequently, that the Area Office could not have examined the full extent of Appellant's indebtedness to Essilor and the contractual relationships between the firms. (*Id.* at 4-5.) Specifically, PDS claimed that "[a]s part of the sale [of Essilor's interest in Appellant], [Appellant] entered into a 'Services and Supply Agreement' with Essilor, promising to purchase from Essilor millions of dollars in supplies and equipment," but this "Services and Supply Agreement" was not included among the documents Appellant proffered to the Area Office. (*Id.* at 6, 7 n.4, 13).

While the size appeal was pending, OHA issued its decision on PDS's status protest. In that decision, OHA sustained, in part, PDS's status allegations against Appellant, and concluded that Appellant is not an eligible SDVOSB for the instant procurement. *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021). During the course of its review, OHA directed Appellant to produce a copy of the "Services and Supply Agreement" between Appellant and Essilor and, upon review of the Agreement, found that: (1) the Agreement was in effect as of September 23, 2020, when Appellant self-certified for the instant procurement; and (2) the Agreement impermissibly restricted the ability of Mr. Derek W. Bodart, Appellant's service-disabled veteran majority owner, to fully control the long-term decision-making and day-to-day management of Appellant. *Id.* at 20-21.

On June 4, 2021, OHA requested comments from Appellant and PDS as to whether OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021) rendered the size appeal moot, as Appellant no longer would be eligible for award of the instant procurement as a result of that decision. In response, PDS urged that OHA should not dismiss its size appeal as moot for two principal reasons: (1) Appellant's alleged affiliation with Essilor based on the "Services and Supply Agreement" is not a contract-specific question, but instead could impact Appellant's size for other procurements; and (2) a decision on the merits of the size appeal would promote the integrity of the size determination process, as Size Determination No. 3-2021-009 was "demonstrably wrong" and dismissing the appeal "would only serve to reward [Appellant] for misrepresenting its status to, and concealing a material document from, the Area Office." (PDS's Comments at 3, 5-6.) Appellant, on the other hand, contended that OHA should dismiss the size appeal as moot. Appellant highlighted that: (1) the specific contract award in question has been terminated as a result of OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021); (2) the "Services and Supply Agreement" was not before the Area Office, and thus cannot be considered in the size appeal; and (3) even if OHA were to find the size appeal meritorious, the appropriate remedy would be to remand the matter to the Area Office, although such a remand would serve no useful purpose here as Appellant "would remain ineligible for award." (Appellant's Comments at 2-3.)

On July 7, 2021, OHA issued its decision in *Size Appeal of PDS Consultants, Inc.*, SBA No. SIZ-6107 (2021), vacating Size Determination No. 3-2021-009 and remanding the matter to the Area Office for further review and investigation. OHA concluded that "the Area Office was unable to fully consider [PDS's size] protest allegations" because the "Services and Supply Agreement," which imposed "a debt-related requirement to use Essilor products," was not before

the Area Office when it made its size determination. *PDS Consultants*, SBA No. SIZ-6107, at 5-6. OHA explained that "[w]hile the Area Office did obtain [Appellant]'s assurance that [Appellant] currently 'does not have an agreement with Essilor which requires [Appellant] to purchase any type or amount of product or service,' the Area Office overlooked that [Appellant] might, previously, have had such an agreement, and that such an agreement might have been in effect as of September 23, 2020, the relevant date for determining size." *Id.* at 6.

OHA directed that "[o]n remand, the Area Office should obtain a copy of the 'Services and Supply Agreement' and assess whether, in light of that agreement, [Appellant] was affiliated with Essilor as of September 23, 2020, the date that [Appellant] self-certified for the instant procurement." *Id.* OHA further explained that the Area Office need not revisit PDS's allegations concerning "whether [Appellant] will manufacture the eyeglasses for the instant procurement, and whether [Appellant] will comply with the nonmanufacturer rule," as those issues are contract-specific and had become moot in light of the termination of the contract award. *Id.*

B. Size Determination No. 3-2021-050

On remand, the Area Office obtained a copy of the "Services and Supply Agreement," and on July 26, 2021, the Area Office issued Size Determination No. 3-2021-050, concluding that Appellant was not a small business as of September 23, 2020, the date Appellant self-certified for the instant procurement, due to affiliation with Essilor under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). (Size Determination No. 3-2021-050, at 5-8.).

The Area Office first explained that Appellant was incorporated on November 11, 1991, in the state of the Mississippi. (*Id.* at 5.) Appellant is majority owned by Mr. Bodart, a service-disabled veteran. (*Id.*) The remaining ownership interest in Appellant is held by various individuals. (*Id.*) Mr. Bodart controls Appellant through his majority ownership interest. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

The Area Office found that Essilor, which is not a small business, previously held 100% of Appellant's stock, but sold its entire interest to StatSource Medical LLC (StatSource), a company controlled by Mr. Bodart, on November 1, 2017. (*Id.*) Essilor no longer has any ownership interest in Appellant. (*Id.*) On January 29, 2018, StatSource then sold all of its shares of Appellant's stock, resulting in Appellant's current ownership structure. (*Id.* at 5, 8.)

On November 1, 2017, in conjunction with the sale of Appellant to StatSource, Appellant and Essilor entered into the "Services and Supply Agreement." (*Id.* at 6.) The Agreement required Appellant to purchase services and supplies from Essilor, and to report Appellant's purchases related to VA contracts to Essilor. (*Id.* at 6-8.) Absent Essilor's advance written permission, neither Appellant's majority owner, Mr. Bodart, nor Appellant as a whole could conduct any action deemed a "Change of Control," to include any "change in possession, directly or indirectly, of the power to direct or cause the directing of the management or policies of [Appellant]" and any "sale or transfer of 50% or more of the ownership interest in [Appellant]." (*Id.* at 7-8.) Essilor had the power to approve or reject any "merger of [Appellant] with another entity which would leave the current owners of [Appellant] as holding less than 50% of the merged entity." (*Id.*) Essilor, as the approver of "Change of Control" actions, had the power to

control Appellant during the time period when the "Services and Supply Agreement" was in effect. (*Id.* at 8.)

Given these facts, the Area Office concluded that the "Services and Supply Agreement" afforded Essilor control over Appellant. (*Id.*) The Area Office also found that the "Services and Supply Agreement" was in effect as of September 23, 2020, the date for determining size. (*Id.*)

Having determined that Appellant is affiliated with Essilor for the instant procurement, the Area Office turned to the question of whether the combined employees of Appellant and Essilor exceed the size standard. (*Id.* at 9.) Although Appellant itself is small, its average number of employees, together with those of Essilor, exceed the applicable size standard. (*Id.*)

C. The "Services and Supply Agreement"

The "Services and Supply Agreement" is a three-party agreement between Essilor, Appellant, and StatSource, which at that time was the owner of Appellant. (Services and Supply Agreement at 2, 13.) According to the Agreement, Appellant "will source from Essilor and its affiliates certain of [Appellant's] purchases of laboratory services, lenses, frames, contact lenses and consumables, subject to the terms and conditions herein." (*Id.* at 2.)

The Agreement became effective November 1, 2017 and lasts for an "Initial Term" of 10 years, ending on October 31, 2027. (*Id.*) Thereafter, the Agreement would automatically extend for additional one-year terms unless a party provides written notice of its desire to terminate the Agreement at least 180 days before the expiration of the then-current term. (*Id.* § 2.) The Agreement stipulated that the Initial Term and any renewal terms "may only be shortened in accordance with the termination provisions herein." (*Id.*)

The Agreement required that for Appellant's then-existing VA contracts, Appellant will source from Essilor "the majority of the volume of [Appellant's] purchases of lenses, frames, contact lenses and consumables" if offered by Essilor, and at least 15% of ophthalmic laboratory services. (*Id.* § 3(b).) For Appellant's future VA contracts, Appellant will source from Essilor the majority of the volume of Appellant's purchases of lenses, frames, contact lenses, and consumables, and the "maximum permitted dollar volume of [Appellant's] ophthalmic laboratory services." (*Id.* § 3(c).) For both then-existing and future VA contracts, though, the Agreement stated that "if such amounts are not permitted under any given [VA] contract, [Appellant need only purchase] the maximum volumes that can be sourced from Essilor without jeopardizing [Appellant's] status as a Service-Disabled Veteran-Controlled entity and as required to maintain compliance with the SBA and Federal Acquisition Regulations." (*Id.* §§ 3(b) and 3(c).) Appellant was required to provide a monthly report to Essilor regarding Appellant's sales under VA contracts to verify compliance with the Agreement's "sourcing and outsourcing requirements." (*Id.* § 3(d).) Pricing for products and services was determined from attached pricing lists, but the Agreement specified that Essilor may make cost-of-living adjustments and may increase prices as a result of "circumstances beyond Essilor's direct control," such as a change of economic conditions. (*Id.* § 3(e).)

Pursuant to the Agreement, Appellant must notify Essilor in writing prior to bidding on any Government contract that requires a fixed-price bid, and Essilor must agree in writing to any such fixed pricing, prior to the submission of the bid, insofar as Appellant desires that Essilor also commit to fixed pricing. (*Id.*)

The Agreement stated that Appellant must obtain Essilor's written approval prior to assigning the Agreement. (*Id.* § 9(a).) Any attempt to assign or transfer the Agreement without Essilor's approval would constitute default. (*Id.* § 6(b)(iii).) Furthermore, Appellant "must obtain Essilor's written approval prior to any Change of Control." (*Id.* § 9(b).) The Agreement defined a "Change of Control" as meaning any of the following: "change in possession, directly or indirectly, of the power to direct or cause the directing of the management or policies of [Appellant]"; the sale or transfer of 50% or more of Appellant's assets (as measured either by book value or by market value); the sale or transfer of 50% or more of the ownership interest in Appellant; the merger of Appellant with another entity, after which the current owners of Appellant hold less than 50% of the merged entity; and if Appellant "ceases to be a SDVOSB." (*Id.*)

D. Appeal

On July 28, 2021, Appellant appealed Size Determination No. 3-2021-050 to OHA. Appellant asserts that the Area Office committed two principal errors in reaching its decision. (Appeal at 7.) OHA therefore should reverse Size Determination No. 3-2021-050.

Appellant argues, first, that the purchase requirements in the "Services and Supply Agreement" did not enable Essilor to control Appellant. (*Id.* at 7-8.) Although the Agreement contained provisions requiring that Appellant purchase supplies and services from Essilor, and that Appellant report purchases related to VA contracts to Essilor, the Area Office failed to address the Agreement's "express limitation" that such purchases could be excused if they would jeopardize Appellant's status as an SDVOSB. (*Id.* at 8.) As a result, Appellant contends, Appellant "was not actually *required* to purchase any supplies or services from Essilor." (*Id.*, emphasis Appellant's.) Appellant maintains that the "Services and Supply Agreement" here is analogous to the agreement discussed in *Matter of Data Voice, Inc.*, SBA No. 455 (1994), and thus the purchase requirements did not enable Essilor to control Appellant. (*Id.* at 9.)

Appellant argues that the "Change of Control" provisions likewise did not afford Essilor any control over Appellant. "The specific type of potential control at issue" here is "negative control through Essilor's potential ability to restrict [Appellant's] actions." (*Id.*) In prior decisions, OHA has held that negative control exists when a minority owner or investor can block ordinary actions essential to operating the company. Conversely, a minority owner's ability to veto extraordinary actions outside the ordinary course of business will not give rise to negative control. Appellant argues that the bulk of the "Change and Control" provision relates to a sale or merger involving Appellant, which are extraordinary events. (*Id.* at 9-13, citing *Size Appeal of DooleyMack Gov't Contracting, LLC*, SBA No. SIZ-5086 (2009); *Size Appeal of DHS Sys. LLC*, SBA No. SIZ-5211 (2011); *Size Appeal of EA Eng'g, Sci., and Tech., Inc.*, SBA No. SIZ-4973 (2008); and *Matter of Data Voice, Inc.*, SBA No. 455 (1994).) Also, subsection (v) of the "Change and Control" provision "could not possibly restrict [Appellant's] ability to operate as a

small business," as it only applies in the event that Appellant ceased being an SDVOSB. (*Id.* at 12-13.) Further, in order for subsection (i) to be implicated, Mr. Bodart — who owns the majority of Appellant's stock, is the controlling director, and runs Appellant's day-to-day operations — would have to be removed from control, which in turn would constitute an extraordinary event and thus "categorially cannot support a finding of control." (*Id.* at 13-14.)

Appellant proceeds to challenge the Area Office's interpretation of the Agreement, alleging that the Agreement cannot reasonably be interpreted "as even potentially providing Essilor meaningful control over [Appellant]" because to do so would frustrate a fundamental purpose of the Agreement: to preserve Appellant's SDVOSB status. (*Id.* at 15-16.)

Appellant also argues that, even if the Area Office did not err in evaluating the provisions of the Agreement, it erred in concluding that the Agreement remained in effect on September 23, 2020. (*Id.* at 7, 16-18.) Appellant claims that, on January 29, 2018, Mr. Bodart "expressly repudiated and thereby terminated" the Agreement. (*Id.* at 16.) The Area Office, though, did not address this question, instead finding that the Agreement had been terminated only on October 20, 2020. (*Id.*)

E. PDS's Response

On August 16, 2021, PDS responded to the appeal. PDS contends that the appeal is meritless and should be denied. The bulk of Appellant's arguments were previously considered, and rejected, by OHA in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021). (Response at 2-3.) Appellant is barred from re-litigating such matters under the doctrine of collateral estoppel. (*Id.*) PDS maintains that the Area Office referenced at least seven provisions in the Agreement that support the finding of affiliation under the totality of the circumstances. (*Id.* at 13.) The appeal, though, "ignores several of the Area Office's key findings," and Appellant thus cannot demonstrate clear error in the size determination. (*Id.* at 3, 14.)

PDS argues that Appellant is "collaterally estopped from relitigating whether the Agreement gave Essilor the power to control [Appellant]." (*Id.* at 2.) Appellant has had ample opportunities to present arguments concerning the meaning and effect of the Agreement, and Appellant already has "availed itself of this opportunity by raising many of the same arguments and same defenses — including those relating to the enforcement and termination of the Agreement — that it repeats now." (*Id.*) OHA considered, and ultimately rejected, Appellant's arguments during the parallel status protest proceeding. Particularly, PDS argues that Appellant is collaterally estopped from re-litigating whether the Agreement was in effect on September 23, 2020, and whether the Agreement gave Essilor power to control Appellant. (*Id.* at 3, 21.) OHA has already decided such matters and has expressly determined that the Agreement was in effect as of September 23, 2020, and did grant Essilor such power. (*Id.*, citing *PDS Consultants*, SBA No. CVE-189-P, at 20-21.)

Responding to Appellant's arguments regarding the "Change of Control" provision, PDS contends that Appellant "mischaracterizes the Area Office's determination as being based on a finding of 'negative control.'" (*Id.* at 17, citing 13 C.F.R. § 121.103(a)(3).) In actuality, the Area Office based its decision on entirely different grounds, the totality of the circumstances. (*Id.* at

17-18.) The Area Office therefore need not have found affiliation through negative control, but even assuming that such a finding were required, the Agreement gave Essilor the power to interfere with Appellant's daily operations. (*Id.* at 18.) Contrary to Appellant's suggestions, subsection (i) of the "Change of Control" provision "does not limit Essilor's approval to only "extraordinary' actions"; instead "Essilor must approve changes in possession of the power to direct or cause the directing of '***the management or polices of [Appellant],' without limitation***." (*Id.*, quoting Agreement § 9(b) (emphasis added by PDS).) PDS adds that none of the prior OHA decisions relied upon by Appellant "involve a change of control clause that includes such a broad-ranging prohibition affecting the direction of the management and polices of the subject concern." (*Id.* at 19.) The "Change of Control" provision is "***unlimited*** in its scope," contravening Appellant's characterization that the provision applies only to actions "tantamount to a sale of the company." (*Id.*, emphasis PDS's.)

PDS concludes that "[r]egardless of whatever 'purpose' [Appellant] now claims it and Essilor had when entering into the Agreement," the Agreement unambiguously gave Essilor the power to control Appellant through multiple restrictive provisions that interfered with Appellant's day-to-day operations. (*Id.* at 20.) Further, although Appellant claims that the Agreement included a "safety valve" to preserve Appellant's SDVOSB status, that provision only applies in limited circumstances, and "does not extend broadly to cover the entirety of the Agreement." (*Id.* at 15-16.)

F. Reply

On August 25, 2021, Appellant moved for leave to reply to PDS's Response, and filed its proposed Reply. PDS does not oppose the request. Accordingly, Appellant's motion is GRANTED and the proposed Reply is ADMITTED.

In its Reply, Appellant contends that the appeal is not barred by the doctrine of collateral estoppel, because the elements of collateral estoppel are not met. (Reply at 1-5.) OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021) made no mention of affiliation under the totality of the circumstances, so that issue could not already have been litigated and decided. (*Id.* at 2-3.) If anything, PDS should be barred from taking a contradictory position for tactical advantage under the principle of judicial estoppel. (*Id.* at 5.) Appellant observes that, in response to OHA's inquiry as to whether the original size appeal was rendered moot by OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021), PDS claimed that OHA's decision "was not a 'definitive determination' of the effect of the Agreement on [Appellant]'s size status." (*Id.* at 6.) But PDS "now claims that [the instant] appeal must be denied because it involves the 'same issues that were decided in a prior case involving the same parties,'" even though, according to PDS itself, OHA did not previously make any definitive determination on the effectiveness of the "Services and Supply Agreement" in the context of a size determination. (*Id.*)

Appellant further contends that PDS misreads the size determination and misapplies affiliation and control principles. (*Id.* at 8-11.) Specifically, PDS wrongly claims that Appellant "failed to contest three provisions of the Agreement" relating to reporting sales under VA contracts, pricing for fixed-price contracts, and approval for assignment or transfer of the

Agreement. (*Id.* at 8.) Appellant does challenge these portions of the size determination, although the Area Office's decision was "focused almost entirely upon the Agreement's purchase and Change of Control provisions." (*Id.*) Moreover, even assuming *arguendo* that Appellant did not challenge the three provisions noted by PDS, those provisions do not give Essilor any power to control Appellant. (*Id.* at 9.)

Lastly, Appellant highlights that it has filed an action at the U.S. Court of Federal Claims (Court) challenging OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021). (*Id.* at 7.) Appellant urges that OHA should stay any decision on the instant case pending the outcome of the Court proceeding. (*Id.*)

G. PDS's Supplemental Response

On February 18, 2022, PDS moved for leave to supplement its Response pursuant to 13 C.F.R. § 134.207(b). PDS explains that the Court has rendered a decision affirming OHA's decision in *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021). (Supp. Response at 2.) PDS offers a copy of the Court's opinion. *Superior Optical Labs, Inc. v. United States*, 158 Fed. Cl. 262 (2022).

In its Supplemental Response, PDS observes that the Court found that "OHA rationally concluded that the [Services and Supply] Agreement was in effect at time [Appellant] submitted its offer in response to the Solicitation on September 23, 2020," and that "the Agreement's terms, taken together, gave Essilor the power to control [Appellant] within the meaning of the applicable regulations." (*Id.* at 4, citing *Superior Optical*, 158 Fed. Cl. at 277.)

PDS also reiterates its contention that Appellant has been afforded "a full and fair opportunity to challenge the legal effect of the Agreement." (*Id.* at 3.) Specifically, the instant appeal presents many of the "same arguments" previously considered and rejected by OHA, and later again considered and rejected by the Court. Appellant should be barred from re-litigating these same issues "***for a third time***." (*Id.* at 4-8 (emphasis PDS's).)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Having reviewed the record and the arguments of the parties, I find that Appellant has not demonstrated that the size determination is clearly erroneous. As a result, this appeal must be denied.

As a threshold matter, I agree with PDS that several issues regarding the "Services and Supply Agreement" already have been adjudicated both by OHA and by the Court. In the prior proceedings, Appellant argued that the "Services and Supply Agreement" was no longer in effect as of September 23, 2020, the date Appellant submitted its proposal for the subject procurement. In *CVE Protest of PDS Consultants, Inc.*, SBA No. CVE-189-P (2021), OHA reviewed the "Services and Supply Agreement" and a separate document entitled "Termination of Services and Supply Agreement," dated October 20, 2020. OHA found that due to provisions of the "Services and Supply Agreement" establishing a 10-year Initial Term, and stipulating that the Agreement "may only be shortened in accordance with the termination provisions herein," the "Termination of Services and Supply Agreement" did not take effect until October 20, 2020. *PDS Consultants*, SBA No. CVE-189-P, at 20. As such, the Agreement was still in effect as of September 23, 2020. *Id.* Subsequently, in *Superior Optical Labs, Inc. v. United States*, 158 Fed. Cl. 262 (2022), the Court found that "OHA reasonably concluded that the Agreement was in effect at the time [Appellant] submitted its offer in response to the Solicitation on September 23, 2020," and that "OHA correctly determined that the Agreement required written consent of all parties to effectuate a termination." *Superior Optical Labs*, 158 Fed. Cl. at 277-78.

Although the prior OHA and Court decisions specifically addressed Appellant's status as an SDVOSB, the issue of whether this Agreement was in effect as of September 23, 2020 is substantively identical to that presented here, as it involves the same "Services and Supply Agreement" and the "Termination of Services and Supply Agreement." The question of whether the "Services and Supply Agreement" was in effect as of September 23, 2020 thus has been fully litigated and decided, and resolution of the issue was essential to a final judgement in those two prior cases. Accordingly, under the doctrine of issue preclusion, Appellant is barred from re-litigating the question of whether the "Services and Supply Agreement" was in effect as of September 23, 2020. *See generally Montana v. United States*, 440 U.S. 147, 153 (1979); Restatement (Second) Judgements § 27 (1982). Even if not barred, though, the Area Office's decision that the Agreement was in effect as of September 23, 2020 is consistent with the prior rulings of both OHA and the Court. Appellant has not demonstrated any error in the size determination on this point.

Next, I find no merit to Appellant's claim that the Area Office erred in finding Appellant affiliated with Essilor under the totality of the circumstances. In analyzing issues of affiliation, an area office considers factors such as ownership, management, previous relationships with or ties to another firm, and contractual relationships. 13 C.F.R. § 121.103(a)(2). Even absent a single factor sufficient by itself to constitute affiliation, though, an area office may find affiliation under the totality of circumstances where "connecting relationships between firms are so suggestive of dependence as to render them affiliated." *Size Appeal of B.L. Harbert Int'l LLC*, SBA No. SIZ-4525, at 11 (2002); *see also Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 6 (2010). OHA has cautioned that "in order to find affiliation through the totality of

the circumstances, 'an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.'" *Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128, at 23 (2021) (quoting *Size Appeal of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015)); *see also Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017).

Here, the Area Office identified multiple provisions in the "Services and Supply Agreement" that, taken together, gave Essilor the power to control Appellant. Section II.B, *supra*. The Area Office pointed in particular to the purchase requirements and to the broadly-worded "Change of Control" provision, which mandated that Appellant must obtain Essilor's written approval prior to any such Change of Control. *Id.* Notably, although OHA and the Court did not previously decide whether the Agreement gave rise to affiliation between Appellant and Essilor, both tribunals did find that the Agreement impermissibly enabled Essilor to control certain aspects of Appellant's decision-making. *PDS Consultants*, SBA No. CVE-189-P, at 20-21; *Superior Optical Labs*, 158 Fed. Cl. at 278-79.

Appellant argues that the "Change of Control" provision would not have given Essilor the power to exert negative control over Appellant. Section II.D, *supra*. While this may be true, the issue is immaterial here because the Area Office did not find affiliation through negative control, 13 C.F.R. § 121.103(a)(3), but rather based on the totality of the circumstances under 13 C.F.R. § 121.103(a)(5). Section II.B, *supra*.

Insofar as Appellant attacks individual subsections of the "Change of Control" provision, such arguments miss the point of a totality of the circumstances analysis. The question is not whether any one subsection of the Agreement, standing alone, would support a finding of affiliation, but whether the terms of the "Services and Supply Agreement" collectively, including the purchase requirements and the Change of Control provision, enabled Essilor to control Appellant. *E.g., Diverse Constr.*, SBA No. SIZ-5112, at 6. Here, the Area Office articulated valid grounds for affiliation under the totality of the circumstances by highlighting the terms of the "Services and Supply Agreement" and explaining how those provisions gave Essilor power to control Appellant. Section II.B, *supra*.

Contrary to Appellant's contention that the Area Office ignored language in the Agreement indicating that purchases from Essilor could be excused if such purchases might jeopardize Appellant's status as an SDVOSB, the size determination reflects that the Area Office did consider such language. *Id.* Furthermore, both OHA and the Court have previously examined this language and have found that "such limitation was only implicated if the maximum amounts were not permitted under a government contract, and thus it was 'not evident that [Appellant] could have refused an Essilor demand to purchase optical supplies and services under the Agreement, unless compliance would have caused [Appellant] to be in breach of a VA contract.'" *Superior Optical Labs*, 158 Fed. Cl. at 280 (quoting *PDS Consultants*, SBA No. CVE-189-P, at 21).

The "Services and Supply Agreement" here is distinguishable from the agreement described in *Matter of Data Voice, Inc.*, SBA No. 455 (1994). As the Court observed, "[o]ther than the minimum purchasing requirement, there is no indication in the *Data Voice* decision that

there were other similar provisions in the supply agreement that evidenced the same degree of power to control as are at issue here." *Superior Optical Labs*, 158 Fed. Cl. at 281.

Lastly, Appellant's argument that the Area Office's interpretation of the Agreement "frustrates the entire purpose of the Agreement" is unpersuasive. Section II.D, *supra*. Irrespective of the parties' reasons for entering into the Agreement, the Area Office would not have erred by "looking to the plain language of the Agreement to discern whether its terms improperly afforded Essilor control or the power to control [Appellant]." *Superior Optical Labs*, 158 Fed. Cl. at 280 fn. 6.

Based on the foregoing, I find that the Area Office correctly analyzed the issue of affiliation under the totality of the circumstances. Appellant does not dispute that the combined employees of Appellant and Essilor exceed the applicable size standard. Accordingly, I find no clear error of fact or law in the Area Office's determination that Appellant was not small as of September 23, 2020.

IV. Conclusion

Appellant has not shown clear error in the size determination. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge