

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

CVE Protest of:

PDS Consultants, Inc.,

Protestor,

Re: Superior Optical Labs, Inc.

Solicitation No. 36C24820R0087  
U.S. Department of Veterans Affairs

SBA No. CVE-189-P

Decided: May 6, 2021

APPEARANCES

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

John E. McCarthy Jr., Esq., Zachary H. Schroeder, Esq., Crowell & Moring LLP, Washington, D.C., for Superior Optical Labs, Inc.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 8, 2020, PDS Consultants, Inc. (Protestor) protested the Service-Disabled Veteran-Owned Small Business (SDVOSB) status of Superior Optical Labs, Inc. (Superior) in conjunction with U.S. Department of Veterans Affairs (VA) Request for Proposals (RFP) No. 36C24820R0087. Protestor contends that Superior is controlled by a non-SDVOSB business, [Business Concern 1], and/or by its Chief Operating Officer and minority owner, [XXXX]. For the reasons discussed *infra*, the protest is sustained in part and denied in part.

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. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

134 subpart J.<sup>2</sup> Protestor filed its protest within five business days after receiving notification that Superior 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. Solicitation and Proposal

On August 24, 2020, VA issued RFP No. 36C24820R0087 for prescription eyeglasses and related services in Veterans Integrated Services Network (VISN) 8. (Case File (CF), Exh. 337.) 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 September 23, 2020. Superior and Protestor submitted timely proposals.

### B. Protest

On October 1, 2020, the CO announced that Superior was the apparent awardee. On October 8, 2020, Protestor filed the instant protest with the CO, challenging Superior's SDVOSB status. The CO forwarded the protest to OHA for review.<sup>3</sup>

In the protest, Protestor alleges that Superior is not controlled by one or more service-disabled veterans, and instead is controlled by [Business Concern 1] and/or by [XXXX]. (Protest at 1.) Protestor first contends that Superior shares resources, equipment, and/or services with [Business Concern 1]. (*Id.* at 2.) Protestor observes that SBA regulations create a rebuttable presumption that a firm is not an SDVOSB if it shares “employees, resources, equipment, or any type of services, whether by oral or written agreement with another firm in the same or similar line of business, and that firm or an owner, director, officer, or manager, or a direct relative of an owner, director, officer, or manager of that firm owns an equity interest in the concern.” (*Id.* at 2-3, quoting 13 C.F.R. § 125.13(i)(4).) Here, [Business Concern 1], a large business, previously owned all of Superior, and Protestor asserts that [Business Concern 1] continues to hold an ownership interest in Superior. (*Id.* at 3.) Further, [Business Concern 1] used to own Superior's Mississippi optical laboratory. (*Id.*) Protestor alleges that [Business Concern 1] and Superior share resources, equipment, and/or services. According to Protestor, Superior purchases eyeglass lenses from [Business Concern 1], uses [Business Concern 1] equipment to manufacture the eyeglasses, and uses [Business Concern 1's] bulk shipping discounts to ship the eyeglasses. (*Id.*) In addition, Superior depends on [Business Concern 1] for its Lab Management Software, which is necessary to fabricate eyeglasses. (*Id.*)

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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).

<sup>3</sup> Protestor concurrently filed a size protest alleging that Superior is not a small business. The size protest was referred to SBA's Office of Government Contracting — Area III. 13 C.F.R. § 134.1001(c).

Next, Protestor argues that Superior receives critical financial support from [Business Concern 1], in contravention of 13 C.F.R. § 125.13(i)(5). (*Id.* at 3-4.) Protestor alleges that a prior purchase agreement resulted in Superior being contractually required to use [Business Concern 1] products. (*Id.* at 4.) Further, Superior relies upon other financial assistance, such as bulk shipping discounts, from [Business Concern 1]. (*Id.*)

Protestor argues that Superior's relationship with [Business Concern 1] also causes such dependence and that Superior is unable to exercise independent business judgment. (*Id.*) Protestor reiterates its contention that Superior relies upon [Business Concern 1] products, equipment, and resources. (*Id.*) Superior advertises that it is part of the “[XXXX]” rewards program and that it has been “chosen by [Business Concern 1] to have an in-house [XXXX].” (*Id.*) Protestor alleges that, for most of Superior's lenses, [Business Concern 1] performs all of the “surfacing” or “grinding” stages of eyeglass manufacturing in [Business Concern 1] laboratories. (*Id.*) Superior thus relies extensively on [Business Concern 1]. Due to their “intertwined” business relationship, [Business Concern 1] has “an effective veto” on Superior's operations. (*Id.* at 4-5.) This reliance is extensive enough that Superior cannot exercise independent business judgment. (*Id.* at 5.)

Protestor contends that [Business Concern 1] also controls Superior through loan arrangements. (*Id.*) Protestor claims that Superior entered into “a debt-related requirement to use [Business Concern 1] products,” arising from a prior purchase agreement. (*Id.*)

Next, Protestor argues that Mr. Derek W. Bodart, Superior's service-disabled veteran majority owner, does not live within a reasonable commute to Superior's headquarters. (*Id.*) Specifically, Mr. Bodart resides in Tampa, Florida, some 540 miles from Superior's headquarters in Ocean Springs, Mississippi. (*Id.*) SBA regulations create a rebuttable presumption that a service-disabled veteran does not control a concern if the individual “is not located within a reasonable commute to firm's headquarters and/or job-sites locations, regardless of the firm's industry.” (*Id.* at 5-6, quoting 13 C.F.R. § 125.13(l).)

Lastly, Protestor posits that Superior may be controlled by [XXXX], who is not a service-disabled veteran. (*Id.* at 6.) [XXXX] is Superior's Vice President and Chief Operating Officer, and also holds an ownership interest in Superior. (*Id.*) Protestor claims that [XXXX] controls the long-term and day-to-day management of Superior. (*Id.*) [XXXX] “corresponds directly” with VA regarding Superior's contracts. (*Id.*) Protestor further alleges that Mr. Bodart lacks the managerial experience needed to run Superior and therefore must rely upon [XXXX]. (*Id.* at 6-7.)

### C. Superior's Response

On October 28, 2020, Superior responded to the protest. Superior argues that it is owned and operated by Mr. Bodart, and denies that it is controlled by [Business Concern 1] or any other non-SDVOSB entity. [Business Concern 1] previously held [more than 50%] of Superior's stock, but sold its entire interest to StatSource Medical LLC (StatSource), a company controlled by Mr. Bodart, on November 1, 2017. (Superior Response at 2.) As a result, [Business Concern 1] no

longer has any ownership interest in Superior. (*Id.*) On January 29, 2018, StatSource sold all of its shares of Superior stock, resulting in Superior's current ownership structure:

Mr. Bodart: [more than 50%]  
[XXXXXX]

(*Id.* at 2-3, citing CF, Exh. 281.)

Superior's majority owner, Mr. Bodart, is a service-disabled veteran and serves as Superior's President, Chairman of the Board of Directors, and Treasurer. (*Id.* at 3.) Mr. Bodart is the “controlling director” because his vote counts for [XXXX], whereas other Directors' votes are counted as only [XXXX], pursuant to Superior's Second Amended and Restated Bylaws (Bylaws). The Bylaws further provide that Mr. Bodart cannot be removed from the Board of Directors as long as he is a shareholder. (*Id.*) Mr. Bodart also runs the day-to-day operations of Superior. (*Id.*)

Superior denies the allegations raised in the protest. Superior argues, first, that it is not owned or controlled by [Business Concern 1], and does not share resources, equipment, or services with [Business Concern 1]. (*Id.* at 5.) The “four-year-old internet articles” referenced by Protestor to support its contention that [Business Concern 1] has an ownership interest in Superior are incorrect. (*Id.* at 5-6.) Although [Business Concern 1] previously held an ownership interest in Superior, this has no bearing on whether Superior could control Superior as of September 23, 2020, the proposal submission date. (*Id.* at 6, citing *CVE Protest of Alpha4 Sols. LLC d/b/a Alpha Transcription*, SBA No. CVE-103-P (2019).)

Furthermore, Superior does not depend on [Business Concern 1] to run lab management software. (*Id.*) Instead, Superior uses the [XXXX] commercial lab management system. (*Id.* at 6-7.) [XXXX] was acquired by [Business Concern 1] in 2006, but Superior licenses [the software] on an arm's-length basis the same way it has done since 2004, which was before the acquisition. (*Id.* at 7.) Superior does not receive any discounts through [Business Concern 1] for using [the software]. (*Id.*)

Similarly, Superior does not share equipment with [Business Concern 1], but rather uses its own equipment to manufacture eyeglasses except for a single “[machine]” that Superior leases from [Business Concern 1]. (*Id.*, citing Bodart Decl. ¶ 6.) All manufacturing is done in-house at the Ocean Springs, Mississippi location using Superior's own facilities, employees, and equipment. (*Id.*, citing Bodart Decl. ¶ 10.) Finally, Superior does not subcontract to [Business Concern 1] for any services and does not rely on [Business Concern 1] to perform contracts. (*Id.*, citing Bodart Decl. ¶ 6.) Superior purchases some lenses from [Business Concern 1] on a “commercial, arm's-length basis,” but [Business Concern 1] is only one of several companies from which Superior purchases lenses. (*Id.* at 7-8, citing Bodart Decl. ¶ 9.)

Next, Superior argues that it does not receive critical financial support from [Business Concern 1]. (*Id.* at 8.) Superior asserts that it is not required to use [Business Concern 1] products and does not receive bulk shipping discounts from [Business Concern 1]. (*Id.*, citing

Bodart Decl. ¶ 9.) [Business Concern 1] holds [XXXX], but [XXXX] in any capacity. (*Id.* at 8-9.)

Superior insists that it is able to exercise independent business judgment. (*Id.* at 9.) Superior's participation in the “[rewards]” program and in-house [XXXX] facility do not meet the “great economic risk” threshold of 13 C.F.R. § 125.13(i)(7). (*Id.*) The “[rewards]” program gives rewards to eye care professionals for purchasing [Business Concern 1] products; Superior does not receive benefits under the program. (*Id.* at 9-10.) [XXXX] is an anti-reflective coating which Superior is licensed to apply, although it also has its own [XXXX]. (*Id.* at 10.) [XXXX] is widely available to the industry and does not demonstrate an exclusive relationship between Superior and [Business Concern 1]. (*Id.*)

Additionally, contrary to Protestor's suggestions, Superior does not outsource any part of the lens-making process to [Business Concern 1] labs. (*Id.*) All of the necessary work takes place in Superior's facilities using its own equipment. (*Id.*) Superior uses designs from various companies, including [Business Concern 1], to create certain lenses. (*Id.*) Superior electronically communicates with such designers when creating lenses, a practice known as a “click fee.” (*Id.*) Superior also has click fee arrangements with other vendors as it is common in the industry. (*Id.* at 11.)

Superior argues that [Business Concern 1] does not control it through loan arrangements. (*Id.*) Superior has a single note held by [Business Concern 1], and the note does not create an obligation for Superior to use [Business Concern 1] products or give [Business Concern 1] control over Superior's business. (*Id.*) According to Superior, this sort of promissory note and accompanying security agreement are not vehicles to control a concern, but rather are a means to guarantee payment of an obligation. (*Id.*, citing *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047 (2020).) The note in question does not give the creditor, [Business Concern 1], power to control Superior or to interfere in its business operations, but merely ensures that the creditor's interest would be returned in the event of default. (*Id.* at 12.)

Superior asserts that Mr. Bodart fully controls its long-term and day-to-day operations. (*Id.*) Mr. Bodart owns a majority interest, controls [XXXX] votes on the Board of Directors, and runs the day-to-day operations. (*Id.*) He is Superior's President, Chairman of the Board of Directors, and Treasurer. (*Id.*) His resume shows that he is “unquestionably qualified” to manage Superior. (*Id.* at 13, citing Response Exh. 10.)

Superior argues that Mr. Bodart controls Superior from its Mississippi location. (*Id.*) Mr. Bodart owns a home in Tampa, Florida, but leases an apartment in Biloxi, Mississippi, from which he commutes for fifteen minutes to Superior's Ocean Springs, Mississippi facility. (*Id.*) As such, he can exercise control over Superior's day-to-day operations. (*Id.* at 14.)

Lastly, Superior denies that [XXXX] controls Superior. (*Id.* at 16.) [XXXX] owns only [a minority] of Superior's shares, whereas Mr. Bodart owns [XX]%. Further, although [XXXX] is Superior's Vice President and COO, his actions are subject to the direction and approval of Mr. Bodart, as stated by the Bylaws. (*Id.*) Mr. Bodart controls the day-to-day operations and long-term direction of Superior. (*Id.*)

#### D. Supplemental Protest

On November 23, 2020, after reviewing the Case File under an OHA protective order, Protestor moved to supplement its protest. Protestor argues that the record shows that Superior is controlled by [Business Concern 1] through loan documents and agreements, and that Mr. Bodart does not control Superior because he has other employment and lacks the necessary expertise.

Protestor alleges that as part of the 2017 sale of [Business Concern 1]'s interest in Superior to StatSource, Superior entered into a “[Agreement]” with [Business Concern 1], in which Superior committed to purchase “millions of dollars in supplies and equipment” from [Business Concern 1]. (Supp. Protest at 3.) More specifically, according to Protestor, the “[Agreement]” requires that Superior purchase \$[XXXX] in supplies and equipment from [Business Concern 1], and that Superior provide [Business Concern 1] with [XX]% of the manufacturing opportunities from Superior's VA contracts. (*Id.*) Although Protestor does not have a copy of the “[Agreement],” the document at Exhibit 267 of the Case File refers to the agreement. (*Id.*)

Protestor contends that [Business Concern 1]/Superior loan documents demonstrate that [Business Concern 1] controls Superior. (*Id.*) Protestor claims that a Pledge Agreement executed by Mr. Bodart and StatSource on November 1, 2017 pledged as security against the debt owed to [Business Concern 1] all of the shares of stock of Superior. (*Id.* at 4-5, citing Superior Response Exh. 8.) StatSource then sold its Superior stock to Mr. Bodart and other individuals, and Protestor alleges that the new owners agreed to assume the debt owed to [Business Concern 1] (of at least \$[XXXX]) and pledged other security to [Business Concern 1] as guarantee for the loans. (*Id.* at 4.) The Pledge Agreement promised [Business Concern 1] a “valid first lien upon and security interest in the Pledged Securities.” (*Id.* at 5.) If Superior were to default on the obligation, the Pledge Agreement cedes the right to vote Superior's shares. (*Id.*) Protestor claims that in the event of a default, Superior cedes much power and authority to [Business Concern 1], and this means that Superior's loan arrangement with [Business Concern 1] is “more than mere indebtedness.” (*Id.* at 5-6.) If Superior defaults, [Business Concern 1] can block Superior's ordinary business actions, and therefore [Business Concern 1] controls Superior. (*Id.*, citing *Size Appeal of Washington Patriot Constr., LLC*, SBA No. SIZ-5491 (2013).)

Protestor additionally argues that the Pledge Agreement restricts Superior's shareholders' ability to sell Superior stock without [Business Concern 1's] consent. (*Id.* at 6.) In Protestor's view, this is more evidence that the security agreements are not merely a means to guarantee payment, but rather evince [Business Concern 1's] control over Superior. (*Id.*) “[W]here (as here) Superior's indebtedness to [Business Concern 1] deprives Mr. Bodart and the other Superior shareholders of their unconditional right to sell their shares unilaterally without the discretionary consent of non-SDVOSB [Business Concern 1], the requisite showing of control by a service-disabled veteran is simply lacking.” (*Id.*)

Next, Protestor makes allegations regarding [Business Concern 1's] rights in Superior in January 2018, following StatSource's sale of Superior stock to the current owners. (*Id.* at 7.) Protestor states that the document entitled “Agreement for Transfer of Stock, and Assignment

and Assumption of Secured, Substituted Promissory Note and Loan Documents” shows that the new owners acknowledged Superior's debts to [Business Concern 1] and adopted agreements that provided [Business Concern 1] superior rights to Superior's stock. (*Id.*, citing CF, Exh. 281.) Superior also agreed to assume the loan payments to [Business Concern 1]. (*Id.* at 7-8, citing CF, Exh. 266.)

Protestor claims that [Business Concern 1] controls all of Superior's assets, inventory, and real estate. (*Id.* at 8.) Protestor argues that since November 2017, [Business Concern 1] has held “a prior security interest in virtually all of Superior's assets.” (*Id.*, citing CF, Exh. 242.) Protestor alleges that [Business Concern 1] holds a deed of trust on Superior's Ocean Springs, Mississippi facility, which Protestor argues represents [Business Concern 1's] control over Superior. (*Id.*) “Even though Superior may hold legal title to some assets, [Business Concern 1] looms over Superior, reserving significant rights to control Superior's stock and claim Superior's assets.” (*Id.* at 9.)

Protestor contends that additional documents demonstrate that Superior is unusually reliant upon [Business Concern 1] and that the companies have identical interests. (*Id.*) Protestor renews its argument that as part of the sale in November 2017, Superior and [Business Concern 1] entered into a “[Agreement]” which obligated Superior to purchase [Business Concern 1] optical products for [XXXX]. (*Id.*) Protestor alleges that this agreement obligates Superior to purchase at least \$[XXXX] in [Business Concern 1] supplies and materials and to outsource [XX]% of VA contract manufacturing to [Business Concern 1]. (*Id.* at 9-10.)

Protestor further alleges that Superior's continued use of a [machine] leased from [Business Concern 1] is demonstration of Superior's reliance on [Business Concern 1]. (*Id.* at 10.) Protestor claims that Superior cannot deliver eyeglasses with anti-reflective coating without this machine. (*Id.*)

Protestor additionally claims that Superior licenses [XXXX] software. (*Id.*) Protestor argues that even if this particular software was acquired through an arm's-length transaction, as Superior represents, the totality of the circumstances demonstrate that Superior is overly reliant on [Business Concern 1], as “Superior is already closely intertwined with and dependent upon [Business Concern 1].” (*Id.*)

Protestor argues that the totality of the circumstances show that [Business Concern 1] controls Superior. (*Id.* at 11.) The firms share an identity of interest, Superior is financially dependent upon [Business Concern 1], and [Business Concern 1] has financial rights in Superior, and so the totality of circumstances shows control. (*Id.*)

Protestor contends that Mr. Bodart does not fully control Superior. (*Id.*) Protestor claims that during the relevant time period for determining eligibility (approximately September 2020), Mr. Bodart did not work full-time for Superior. (*Id.*) Rather, according to his resume, Mr. Bodart simultaneously worked at both Superior and StatSource. (*Id.*, citing CF, Exh. 248.) Additionally, Protestor points to a letter from Superior to CVE stating that Mr. Bodart spends “about [XXXX] per week working directly for StatSource.” (*Id.* at 12, quoting CF, Exh. 278, at 1.) Under 13 C.F.R. § 125.13(k), there is a rebuttable presumption that a service-disabled veteran does not

control a firm if he or she “cannot work for the firm during the normal working hours that businesses in that industry normally work,” including other part-time employment. (*Id.*)

Lastly, Protestor maintains that Mr. Bodart lacks the necessary expertise to run Superior. (*Id.*) Mr. Bodart's experience prior to Superior was in the pharmaceutical and banking industries. (*Id.* at 12-13, citing CF, Exh. 248.) Protestor alleges that Mr. Bodart does not have the license or certification that demonstrates he has the managerial and industry experience to run an eyeglass manufacturing concern. (*Id.* at 13.)

#### E. Supplemental Response

On December 8, 2020, Superior responded to the supplemental protest. Superior contends that it is controlled solely by Mr. Bodart and is not reliant on [Business Concern 1].

Accompanying Superior's response and supplemental response, Superior offered copies of a “Substituted Promissory Note,” “Pledge Agreement,” “Land Deed of Trust,” “Security Agreement,” and “Second Deed of Trust Modification” (collectively, “the Loan Documents”). (Superior Exhs. 8-9, 14-16.) The Loan Documents are not in the Case File.

Superior argues that the record shows that Superior is controlled by Mr. Bodart. (*Id.*) Superior points to its current ownership structure, where Mr. Bodart owns a majority interest in Superior and [Business Concern 1] holds no ownership interest. (Supp. Response at 2.)

Superior explains that the “January 29, 2018 Stock Transfer Agreement conveyed all obligations of StatSource to Superior's current shareholders.” (*Id.*) However, the Stock Transfer Agreement and the Loan Documents associated with StatSource's purchase of Superior from [Business Concern 1] do not contain any requirement that Superior use [Business Concern 1] in any capacity. (*Id.* at 2-3.) The Loan Documents merely guarantee the payment of an existing obligation and do not provide [Business Concern 1] with control over Superior. (*Id.* at 3, citing *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 16 (2020) (“[t]he issue [with respect to a debt agreement] is whether the provisions of the instruments do more than merely guarantee payment of an obligation, and actually give the creditor control over the debtor firm.”).)

Superior argues that, as in OHA's *Lukos* decision, the Loan Documents here merely provide a remedy in the event of default, and ensure that [Business Concern 1's] interest will be recovered if Superior were to default. (*Id.* at 4.) The debtor, [Business Concern 1], has no remedy unless and until Superior defaults. (*Id.*) The Loan Documents do not empower [Business Concern 1] to control, or interfere with, Superior, and “also do not require Superior to depend on [Business Concern 1] for *any* equipment, employees, or products.” (*Id.* at 4-5, emphasis Superior's.) Superior distinguishes the instant case from *Washington Patriot*, cited by Protestor, because in *Washington Patriot*, OHA simply remanded a case so that the Area Office could further review and analyze the security agreement at issue. (*Id.* at 5-6.) More pertinent here is *Size Appeal of Alex-Alternative Experts, LLC*, SBA No. SIZ-4974 (2008), where OHA held that a debt agreement that prevented a debtor from transferring assets without the creditor's permission did not provide control. (*Id.* at 6.)



Superior disputes Protestor's claim that [Business Concern 1] controls all of Superior's assets. (*Id.* at 7.) On the contrary, the record shows that [Business Concern 1] only has rights upon default. (*Id.*)

Next, Superior insists that it does not share an identity of interest with [Business Concern 1]. (*Id.* at 8.) Protestor's allegation that Superior must purchase and outsource goods and services to [Business Concern 1] is unfounded. (*Id.* at 8-9, citing Bodart Decl. ¶¶ 6, 8-10.) Superior does not rely on [Business Concern 1] for the primary and vital requirements of eyeglass manufacturing contracts, as it uses its own facilities, employees, and equipment. (*Id.* at 9-10.) Superior also can deliver [XXXX] eyeglasses without using [Business Concern 1's] equipment, as it has its own coating. (*Id.* at 10.) Furthermore, Superior's usage of the [XXXX] software does not show reliance as it is commercially-available software obtained on an arm's-length basis. (*Id.* at 10-11.)

Superior claims that the totality of the circumstances do not suggest that [Business Concern 1] controls Superior. (*Id.* at 11.) Superior observes that in order to find affiliation through the totality of circumstances, some element of control must be present. (*Id.*, citing *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507 (2013).) In the instant case, though, there are no indicia of control. (*Id.*)

Superior then argues that Mr. Bodart manages and controls Superior on a day-to-day basis. (*Id.* at 12.) Mr. Bodart works 12-hour days with Superior. (*Id.*) While Protestor highlights that Mr. Bodart works [XXXX] per week with StatSource, the same document which contains that information also states that Mr. Bodart works [XXXX] per week for Superior. (*Id.* at 13, citing CF Exh. 278.) As Mr. Bodart works more than full-time for Superior during normal business hours, the presumption at 13 C.F.R. § 125.13(k) is not applicable. (*Id.*)

Finally, Superior maintains that Mr. Bodart has the expertise to run Superior. (*Id.* at 14.) SBA regulations stipulate that a service-disabled veteran need not personally have technical expertise to control a concern, but rather only managerial control over those with such expertise. (*Id.*, citing 13 C.F.R. § 125.13(b).) Further, Mr. Bodart's prior management experience is directly relevant to his current responsibilities. (*Id.* at 15.)

#### F. OHA's Request for Information and Superior's Response

On February 2, 2021, OHA issued an order, pursuant to 13 C.F.R. § 134.1007(g), requesting that Superior produce a copy of, or otherwise address, the “[Agreement],” which is referenced at Exhibit 267 of the Case File, and which Protestor alleges requires Superior to purchase millions of dollars of supplies and services from [Business Concern 1].

On February 16, 2021, Superior responded to OHA's order and submitted a copy of the [Agreement]. Superior states that Superior, [Business Concern 1], and StatSource entered into the Agreement on November 1, 2017 as part of StatSource's purchase of Superior's shares then held by [Business Concern 1]. The Agreement was conditioned on assuring that Superior retained its SDVOSB status, and as such, the Agreement was never enforced, and Superior never purchased lenses or other materials from [Business Concern 1] pursuant to the Agreement.

(Response to OHA's Order at 1.) Further, the parties “effectively terminated” the Agreement January 29, 2018. (*Id.*)

Superior acknowledges that the Agreement stated that Superior will source from [Business Concern 1] certain purchases of goods and laboratory services, as outlined in price schedules attached to the Agreement. (*Id.* at 1-2.) These purchase requirements applied to Superior's then-existing and future VA contracts. (*Id.* at 2.) For future VA contracts, the agreement required Superior to purchase from [Business Concern 1] “the majority of the volume of Superior's purchases of lenses, frames, contact lenses and consumables” as well as the “maximum permitted dollar value of Superior's ophthalmic laboratory services.” (*Id.*, quoting Agreement § 3(c).)

Nevertheless, Superior maintains, the Agreement also stated that such purchase requirements would apply only if Superior could do so without jeopardizing its status as an SDVOSB. (*Id.* at 2, 4.) The Agreement therefore was not enforced. (*Id.* at 4.) Superior never outsourced work to [Business Concern 1], nor purchased lenses, frames, or contact lenses from [Business Concern 1] under the Agreement. (*Id.* at 5.) In support of these contentions, Superior offers a second sworn declaration from Mr. Bodart, and a sworn declaration from [Business Concern 1's] Senior Vice President and Chief Legal Officer, [XXXX]. (*Id.*, citing Second Bodart Decl. ¶¶ 6-11 and [XXXX] Decl. ¶ 10.) In his second declaration, Mr. Bodart acknowledges that Superior often has purchased lenses and other optical products from [Business Concern 1] “if the prices are competitively reasonable.” (Second Bodart Decl. ¶ 7.) However, such purchases were not made under the Agreement. (*Id.* ¶¶ 5, 9.) Mr. Bodart adds that “[d]uring the period of November 2017-February 2021, Superior purchased more lenses from suppliers other than [Business Concern 1] than it did from [Business Concern 1].” (*Id.* ¶ 7.)

Superior next argues that the Agreement was terminated effective January 29, 2018, and therefore should not affect the outcome of this case. (*Id.* at 5-6.) Superior observes that in a CVE Protest related to a procurement, OHA examines eligibility as of two dates, first, the date of the initial offer including price, and second, the date the CVE Protest was filed. (*Id.* at 7, citing 13 C.F.R. § 134.1003(d)(1).) Here, Superior submitted its proposal for the procurement on September 23, 2020, and the initial protest was filed on October 8, 2020. (*Id.*) The Agreement was terminated effective January 29, 2018, and thus was not in effect as of either of the pertinent dates for determining eligibility. (*Id.*) Superior offers a copy of a document entitled “Termination of [Agreement],” signed by Mr. Bodart and [XXXX] and dated October 20, 2020, which states that the Agreement was terminated effective as of January 29, 2018. (*Id.*)

Superior also argues that OHA has previously held that similar supply agreements do not show that a manufacturer has control over the purchasing entity. (*Id.* at 8.) In *Matter of Data Voice, Inc.*, SBA No. 455 (1994), OHA found that a supply agreement requiring a concern to purchase exclusively from a single supplier at least 50% of the required products did not create control over the concern. (*Id.* at 9-10.) OHA reasoned that the supply agreement did not allow the supplier to manage and direct the daily operations of the concern's business. (*Id.* at 10.)

### G. Reply

On February 18, 2021, Protestor moved for leave to reply to Superior's response to OHA's order, and filed its proposed Reply. Protestor argues that a reply is warranted to address new arguments raised for the first time in a response. (Motion at 2.) Here, Superior's response to OHA's order, and the Agreement itself, present new issues that the proposed Reply will address. (*Id.*) As such, there is good cause to permit a reply. (*Id.*)

In its proposed Reply, Protestor contends that the Agreement gives [Business Concern 1] the power to control Superior. The relevant issue is whether power to control exists, not whether such control actually is exercised. (*Id.* at 2-3, citing 13 C.F.R. §§ 121.103(a)(1) and 125.13 and *Size Appeal of Clarity Commc'ns Group, LLC*, SBA No. SIZ-6011 (2019).) By Superior's own admission, the Agreement was not actually terminated until October 2020. (*Id.* at 3.) Further, the Agreement was never submitted to CVE for review. (*Id.*)

Protestor argues that the Agreement shows that [Business Concern 1] had significant rights in Superior's business operations, including requiring Superior to source substantial quantities of supplies and services from [Business Concern 1]. (*Id.* at 4.) For then-existing contracts, Superior was required to purchase from [Business Concern 1] “(i) the majority of the volume of Superior's purchases of lenses, frames, contact lenses and consumables by unit and category, to the extent such category is offered by [Business Concern 1], and (ii) at least [XX] percent ([XX]%) of the volume of Superior's ophthalmic laboratory services.” (*Id.*, quoting Agreement ¶ 3(b).) For future contracts, Superior was required to purchase from [Business Concern 1] “(i) the majority of the volume of Superior's purchases of lenses, frames, contact lenses and consumables by unit and category . . . , and (ii) the maximum permitted dollar volume of Superior's ophthalmic laboratory services.” (*Id.* at 5, quoting Agreement ¶ 3(c).)

Protestor maintains that [Business Concern 1] also enjoyed other rights under the Agreement. (*Id.* at 6.) [Business Concern 1] could unilaterally increase the price of its products and services at any time without Superior's consent. (*Id.*, citing Agreement ¶ 3(e).) Further, [Business Concern 1] could assign the Agreement upon written notice, whereas Superior needed the prior written approval of [Business Concern 1]. (*Id.*) Additionally, the Agreement required Superior to obtain [Business Concern 1's] written approval before any change of ownership or control. (*Id.*, citing Agreement ¶ 9(b).)

Protestor further contends that the Agreement gave [Business Concern 1] the power to control which Government business opportunities Superior could pursue. (*Id.* at 6-7.) The Agreement stated that Superior must “notify [Business Concern 1] in writing prior to bidding on any government contract” that required fixed-priced bidding for the products and services Superior was obliged to purchase from [Business Concern 1]. (*Id.* at 7, citing Agreement ¶ 3(e).) In addition, “[Business Concern 1] must agree in writing to any such fixed pricing offered in the bid before submission to the extent Superior or [its affiliate] StatSource, as applicable, is also requesting [Business Concern 1] to fix pricing.” (*Id.*) Protestor argues that these provisions required Superior to seek [Business Concern 1's] written permission before bidding on fixed-priced contracts where prices might be lower than contemplated in the Agreement. (*Id.*)

Protestor argues that the language that the Agreement was not intended to jeopardize Superior's SDVOSB status does not establish that the Agreement did not actually jeopardize that status. (*Id.*) In Protestor's view, the language instead indicates that [Business Concern 1] and Superior knew full well that the Agreement would compromise SDVOSB status. (*Id.*) "Far from saving Superior, this language reveals perfectly clearly what the parties were trying to do with this Agreement." (*Id.*)

Protestor argues that Superior's response to OHA's order consists of self-serving, *post hoc* rationalizations that should not be credited. (*Id.* at 8.) Beyond Mr. Bodart's vague and conclusory statements, Superior does not offer evidence to support its claim that Superior purchased [Business Concern 1] supplies at arms-length and at competitive prices. (*Id.* at 8-9.) Further, it is possible that Superior's purchases of [Business Concern 1's] products were made on terms that would meet the requirements of the Agreement even if not technically made "under" the Agreement. (*Id.* at 9.) Superior offers no explanation for why Superior and [Business Concern 1] would want to terminate the Agreement effective January 2018 if, as Superior claims, they believed the Agreement would not jeopardize Superior's SDVOSB status in November 2017. (*Id.*) Superior's delay in producing the Agreement, which was first raised by Protestor on November 23, 2020, reveals that Superior was attempting "to keep the Agreement out of the record and avoiding the uncomfortable (and damning) issue, rather than dealing with the facts head-on as to whether [Business Concern 1] actually controls Superior." (*Id.* at 9.)

Lastly, Protestor argues that the Agreement plainly was in effect until October 2020, and therefore should have been disclosed to CVE when Superior was seeking verification in 2018. In Protestor's view, Superior may have misrepresented itself to CVE "by hiding its true relationship with [Business Concern 1]." (*Id.* at 10.)

#### H. The Case File and Other Evidence

The Case File reflects that Superior is a corporation based in the state of Mississippi. Superior is now [more than 50]% owned by Mr. Bodart, who holds [XXXX] shares. (CF, Exhs. 281 and 294.) [XXXX] owns [XXXX] shares, a [minority] interest. (*Id.*) [Business Concern 1] does not presently hold any ownership interest in Superior. (*Id.*) Mr. Bodart serves as Superior's President and CEO, whereas [XXXX] is Vice President/Chief Operating Officer. (CF, Exhs. 248, 251, and 267.) Mr. Bodart is a service-disabled veteran. (CF, Exh. 311.) [XXXX] is neither a veteran nor a service-disabled veteran. (CF, Exh. 314.)

The Case File contains Superior's Second Amended and Restated Bylaws (Bylaws), dated March 8, 2018. (CF, Exh. 293.) The Bylaws state that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the Corporation managed under the direction of, the Board of Directors." (*Id.* § 4.1.) The Board elects the President, who "serve[s] as the chief executive officer of the Corporation and, subject to the direction and control of the Board of Directors, shall supervise and control the business and affairs of the Corporation." (*Id.* § 5.6.) The Board consists of five Directors, a majority of which must be service-disabled veterans. (*Id.* §§ 4.1 and 4.2.) Mr. Bodart is a Director and cannot be removed as long as he remains a shareholder. (*Id.* §§ 4.3 and 4.4.) Mr. Bodart must be present at any meeting of the Board of Directors in order to establish a quorum. (*Id.* § 4.12.) Further, only those Directors who

are service-disabled veterans are entitled to vote. (*Id.*) Non-service-disabled veterans “shall have no voting rights related to any action by the Board of Directors.” (*Id.* § 3.10(b).) The Bylaws state that, so long as Mr. Bodart remains a shareholder, his vote “shall be counted as [XX] votes, and the vote of each of other Director shall be counted as [XXXX].” (*Id.* § 4.12(b).)

CVE verified Superior as an SDVOSB on April 10, 2018. (CF, Exh. 329.)

Accompanying its response to the initial protest, Superior offered the first sworn declaration from Mr. Bodart. (Superior Response, Exh. 6.) Mr. Bodart avers that he alone “control[s] and direct[s] Superior's day-to-day operations.” (First Bodart Decl. ¶ 5.) Superior does not share any personnel, equipment, or facilities with [Business Concern 1] or StatSource, but instead rents a temporary office from StatSource and rents one piece of equipment from [Business Concern 1]. (*Id.* ¶ 6.) Superior has no subcontracting agreements with StatSource or [Business Concern 1] for the manufacturing of eyeglasses. (*Id.* ¶ 8.) Superior does not receive quantity discounts for purchasing supplies from [Business Concern 1], nor does it receive discounts for shipping through [Business Concern 1]. (*Id.* ¶ 9.) Superior owns and controls all of the personnel, equipment, and facilities used to manufacture eyeglasses for its contracts, including the instant procurement. (*Id.* ¶ 10.)

As part of its response to the initial protest, Superior submitted a document titled Substituted Promissory Note, dated November 1, 2017. (Superior Response Exh. 8.) This document does not appear in the Case File. The Substituted Promissory Note memorializes StatSource's agreement with [Business Concern 1] to pay the principal amount of \$[XXXX] and interest as part of the purchase price of [Business Concern 1's] stock in Superior. (*Id.* at 1.) The document outlines the schedule of payment. (*Id.*) In the event of a default, the entire balance outstanding becomes immediately due and payable. (*Id.* at 3.) Furthermore, the Substituted Promissory Note is binding upon the successors of the debtor and lender. (*Id.*)

In response to the initial protest, Superior also submitted a Pledge Agreement, dated November 1, 2017, which memorializes an agreement between StatSource and [Business Concern 1]. (Superior Response Exh. 9.) This document also does not appear in the Case File. The Pledge Agreement states that all of the [XXXX] shares of Superior that [Business Concern 1] sold to StatSource are pledged securities. (*Id.* at 1.) [Business Concern 1] has a first lien upon the pledged securities. (*Id.* at 2.) [Business Concern 1] will be granted the right to vote the pledged securities in the event of a default. (*Id.* at 2-3.) Dividends and distributions of the pledged securities related to the liquidation or distribution of the pledged securities shall be paid to [Business Concern 1]. (*Id.* at 3.) StatSource shall not sell, assign, transfer, convey, or otherwise dispose of the pledged securities without the prior written consent of [Business Concern 1]. (*Id.*) In the event of a default, pledged securities will transfer to [Business Concern 1] and [Business Concern 1] shall have the right to vote on the pledged securities. (*Id.* at 4.)

Superior submitted a Stock Transfer Agreement dated January 29, 2018 to CVE. (CF, Exh. 281.) This Stock Transfer Agreement was entered into as part of the transfer of stock from StatSource to the current owners of Superior, including Mr. Bodart. (*Id.*) The document states that the Substituted Promissory Note is secured by a first lien on the outstanding stock according to the Pledge Agreement, a first lien on all personal property of Superior, and a first lien on all

real property of Superior. (*Id.* at 1.) The current owners of Superior assumed the obligations of StatSource to [Business Concern 1] under the Substituted Promissory Note and other loan documents. (*Id.* at 1, 3.)

A resume for Mr. Bodart was submitted to CVE on February 15, 2018. (CF, Exh 248.) It states that Mr. Bodart has been the President and CEO of Superior since November 2017 and has been the President and CEO of StatSource since January 2018. (*Id.*) A letter to CVE dated March 6, 2018, states that Mr. Bodart works approximately [XXXX] per week for Superior and [XXXX] per week for StatSource. (CF, Exh. 278 at 1.) The normal business hours of Superior are Monday through Friday 7:00 a.m. to 3:30 p.m. for the day shift, and 3:30 p.m. to midnight for the night shift, with additional hours on Saturday and Sunday as necessary. (*Id.*) Mr. Bodart works for Superior Monday through Thursday from [XXXX], Friday from [XXXX], and additional hours on Saturday and Sunday as necessary. (*Id.* at 2.) An updated resume for Mr. Bodart was submitted with Superior's response to the initial protest. (Superior Response Exh. 10.) According to his updated resume, Mr. Bodart now works exclusively for Superior. (*Id.*)

The Case File does not contain a copy of the “[Agreement].” However, Superior provided a copy of the Agreement in response to OHA's request for information. Section II.F, *supra*. The Agreement is between [Business Concern 1], Superior, and StatSource, which at that time was the owner of Superior. ([Agreement] at 2, 13.) According to the Agreement, Superior “will source from [Business Concern 1] and its affiliates certain of Superior'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 [XXXX], ending on [XXXX]. (*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 Superior's then-existing VA contracts, Superior will source from [Business Concern 1] “the majority of the volume of Superior's purchases of lenses, frames, contact lenses and consumables” if offered by [Business Concern 1], and at least [XX]% of ophthalmic laboratory services. (*Id.* § 3(b).) For Superior's future VA contracts, Superior will source from [Business Concern 1] the majority of the volume of Superior's purchases of lenses, frames, contact lenses, and consumables, and the “maximum permitted dollar volume of Superior'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, [Superior need only purchase] the maximum volumes that can be sourced from [Business Concern 1] without jeopardizing Superior'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).) Superior was required to provide a monthly report to [Business Concern 1] regarding Superior'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 [Business

Concern 1] may make cost-of-living adjustments and may increase prices as a result of “circumstances beyond [Business Concern 1's] direct control,” such as a change of economic conditions. (*Id.* § 3(e).)

Pursuant to the Agreement, Superior must notify [Business Concern 1] in writing prior to bidding on any Government contract that requires a fixed-price bid, and [Business Concern 1] must agree in writing to any such fixed pricing, prior to the submission of the bid, insofar as Superior desires that [Business Concern 1] also commit to fixed pricing. (*Id.*)

The Agreement stated that Superior must obtain [Business Concern 1's] written approval prior to assigning the Agreement. (*Id.* § 9(a).) Any attempt to assign or transfer the Agreement without [Business Concern 1's] approval would constitute default. (*Id.* § 6(b)(iii).) Furthermore, Superior “must obtain [Business Concern 1'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 Superior”; the sale or transfer of [XX]% or more of Superior's assets (as measured either by book value or by market value); the sale or transfer of [XX]% or more of the ownership interest in Superior; the merger of Superior with another entity, after which the current owners of Superior hold less than [XX]% of the merged entity; and if Superior “ceases to be a SDVOSB.” (*Id.*)

On October 20, 2020, [Business Concern 1], StatSource and Superior signed a document entitled “Termination of [Agreement].” Section II.F, *supra*. The document stated that “this Termination of [Agreement] terminates the Agreement and all rights and obligations between and among the Parties relating to the Agreement effective as of January 29, 2018.” (Termination at 1.)

### III. Discussion

#### A. Burden of Proof

As the protested firm, Superior 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, Superior submitted its proposal on September 23, 2020 and the instant protest was filed on October 8, 2020. Sections II.A and II.B, *supra*. Therefore, OHA must examine Superior's eligibility as of those dates, using the substantive ownership and control regulations contemporaneously in existence.

### C. Analysis

Superior has persuasively rebutted the bulk of the allegations raised in the protest and the supplemental protest, and has persuasively shown that it is, presently, an eligible SDVOSB. Nevertheless, the record reflects that the “[Agreement]” was in effect as of September 23, 2020 and October 8, 2020, the relevant dates for determining eligibility, and this Agreement impermissibly interfered with Mr. Bodart's control over Superior. The protest therefore must be sustained to that extent.

Superior has demonstrated that it is majority ([XX]%) owned by Mr. Bodart, a service-disabled veteran. Section II.H, *supra*. Although Protestor alleged that [Business Concern 1] continues to hold an ownership interest in Superior, as shown by Superior's current ownership structure, [Business Concern 1] does not own any Superior stock, and has not held any ownership interest in Superior since 2017. *Id.* Because [Business Concern 1] holds no ownership interest in Superior, the presumption at 13 C.F.R. § 125.13(i)(5) does not apply here. Under this rule, there is a presumption that a service-disabled veteran does not control a concern when “[a] non-service-disabled veteran individual or entity, having an equity interest in the concern, provides critical financial or bonding support.”

Protestor further alleges that [Business Concern 1] controls Superior through the Loan Documents associated with [Business Concern 1's] sale of Superior stock to StatSource in November 2017. Protestor claims that these Loan Documents show that Mr. Bodart is not in charge of the management and daily business operations of the concern. A review of the Loan Documents, though, shows that they provide rights to [Business Concern 1] only in the event that Superior defaults on its debt. Section II.H, *supra*. No provisions of the Loan Documents grant [Business Concern 1] any control over the day-to-day operations of Superior, unless and until Superior defaults on the debt. *Id.* The mere fact that Superior is indebted to [Business Concern 1] does not enable [Business Concern 1] to control Superior. I therefore conclude that the Loan Documents do not give [Business Concern 1] control over Superior. *Cf., Size Appeal of Lukos, LLC*, SBA No. SIZ-6047 (2020); *Size Appeal of Alex-Alternative Experts, LLC*, SBA No. SIZ-4974 (2008).

Further, the Pledge Agreement does not place impermissible restrictions on Mr. Bodart's ownership of Superior. Although the Pledge Agreement provides that Superior's owners, including Mr. Bodart, may not transfer their stock without [Business Concern 1's] permission, the Pledge Agreement represents a pledge of stock as collateral. Section II.H, *supra*. SBA regulations stipulate that “[t]he pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, 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. Accordingly, Mr. Bodart retains unconditional majority ownership of Superior, notwithstanding the Pledge Agreement.

Protestor additionally alleges that Superior is unduly reliant on [Business Concern 1], and this reliance allows [Business Concern 1] to control Superior. As evidence, Protestor points to a [machine] leased by Superior from [Business Concern 1], and [XXXX] software leased by Superior from [Business Concern 1]. However, leasing a single [machine] does not demonstrate



that Superior depends on [Business Concern 1], and Superior has explained that it is capable of providing reflective coating lenses without use of this machine. Sections II.C and II.H, *supra*. Additionally, Superior has explained, [XXXX] is commercially-available software licensed on an arm's-length basis. *Id.* I therefore see no merit to Protestor's allegations that Superior is unusually reliant upon [Business Concern 1] as a result of leasing the [machine] and the [XXXX] software.

Protestor also alleges that Superior is excessively reliant upon [Business Concern 1], because Superior purchased some \$[XXXX] in optical products and services from [Business Concern 1], pursuant to the [Agreement] created in the course of the November 2017 sale. While it is true that the [Agreement] does contain provisions contemplating such purchases, Superior has produced sworn declarations averring that such purchases did not actually transpire. Section II.F, *supra*. More specifically, according to the sworn statements, although Superior did make substantial purchases of lenses and optical products from [Business Concern 1] from November 2017 to February 2021, such purchases were not made under the [Agreement] but instead were based on which supplier offered Superior the most attractive pricing. *Id.* There is no evidence in the record that contradicts these statements, and OHA must “give greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” 13 C.F.R. § 134.1011. As such, this portion of Protestor's allegations is unconvincing.

Protestor observes that there is a rebuttable presumption that a service-disabled veteran does not control a firm if that individual is not located within a reasonable commute to the firm's headquarters or job-site locations. 13 C.F.R. § 125.13(l). In the instant case, Protestor maintains, Mr. Bodart does not control Superior because he does not reside within a reasonable commute to Superior's headquarters. Superior has explained, though, that Mr. Bodart leases an apartment within a fifteen-minute commute to Superior's Ocean Springs, Mississippi facility. Section II.C, *supra*. The presumption at 13 C.F.R. § 125.13(l) therefore does not apply. Similarly, the record does not support the conclusion that Mr. Bodart does not control Superior due to other part-time employment. Other employment creates a rebuttable presumption that a service-disabled veteran does not control the firm when the service-disabled veteran is not able to work for the firm during normal working hours. 13 C.F.R. § 125.13(k). Superior has demonstrated, however, that Mr. Bodart works more than full-time for Superior during normal business hours, and no longer works for StatSource at all. Section II.H, *supra*. As such, the presumption does not apply.

Protestor also contends that Mr. Bodart lacks the experience and expertise necessary to run Superior. A service-disabled veteran must have managerial experience of the extent and complexity needed to run the concern. 13 C.F.R. § 125.13(b). Here, Protestor argues, Mr. Bodart's past experience was developed in different industries than the one in which Superior operates, and Mr. Bodart has no expertise in eyeglass manufacturing. However, a service-disabled veteran need not personally have required technical expertise to be found to control a concern, if the service-disabled veteran can demonstrate ultimate managerial and supervisory control over those who possess such expertise. *Id.* Mr. Bodart's resume shows multiple years of experience in roles with managerial responsibilities. Section II.H, *supra*. Furthermore, Mr. Bodart is Superior's President and controls Superior's Board of Directors, and so holds the

ultimate managerial and supervisory control over those who possess technical expertise. *Id.* I therefore cannot conclude that Mr. Bodart lacks the experience necessary to run Superior.

Protestor's strongest allegations relate to the [Agreement]. Although Superior contends that the [Agreement] was “effectively terminated” in January of 2018, before the relevant dates to determine eligibility, this argument is based on the “Termination of [Agreement]” document, dated and signed on October 20, 2020, which purports to retroactively terminate the [Agreement]. Sections II.F and II.H, *supra*. Superior's argument fails because the [Agreement] itself makes clear that the [Agreement] has a [XXXX] “Initial Term,” expiring in [XXXX], which could “only be shortened in accordance with the termination provisions herein.” Section II.H, *supra*. No such termination occurred until October 20, 2020. *Id.* As such, while I agree with Superior that the [Agreement] has now been terminated, the [Agreement] nonetheless was in effect as of September 23, 2020 and October 8, 2020, the relevant dates for determining eligibility in this case.

As Protestor observes, the [Agreement] is problematic for Superior, because the Agreement placed restrictions on Mr. Bodart's ability to fully control Superior which are incompatible with status as an SDVOSB. The [Agreement] required that Superior obtain “[Business Concern 1's] written approval” prior to any “Change of Control,” defined by the Agreement as any “change in possession, directly or indirectly, of the power to direct or cause the directing of the management or policies of Superior,” any sale or transfer of [XX]% or more of Superior's assets, any sale or transfer of [XX]% or more of Superior's stock, any merger resulting in a change of ownership of [XX]% or more, and any change of Superior's SDVOSB status. Section II.H, *supra*. Such restrictions plainly interfere with Mr. Bodart's ability to make all business decisions and exercise complete control over Superior under 13 C.F.R. § 125.13, as Mr. Bodart would have to obtain the consent of [Business Concern 1], a non-SDVOSB, before implementing these decisions. Although SBA regulations permit that “SBA will not find that a lack of control exists where a service-disabled veteran does not have the unilateral power and authority to make decisions in ‘extraordinary circumstances,’” the regulations further stipulate that “[t]he only circumstances in which this exception applies are those articulated in the definition.” 13 C.F.R. § 125.13(m). “Extraordinary circumstances” are defined in the regulations as meaning only five particular situations: (1) adding a new equity stakeholder; (2) dissolution of the company; (3) sale of the company; (4) the merger of the company; and (5) company declaring bankruptcy. 13 C.F.R. § 125.11. The restrictions in the [Agreement] go beyond these five permitted scenarios. A change in management or in policies, for instance, or a sale of assets, are not “extraordinary circumstances” as defined by SBA regulations. Accordingly, the [Agreement] improperly restricted Mr. Bodart's control over Superior.

The [Agreement] also placed additional improper restrictions on Mr. Bodart's ability to fully control Superior. The [Agreement] required that Superior purchase large amounts of optical supplies and services from [Business Concern 1]. Section II.H, *supra*. Superior emphasizes that [Business Concern 1] chose not to enforce these requirements, although Superior acknowledges that Superior nevertheless did purchase substantial quantities of lenses and optical products from [Business Concern 1] from November 2017 to February 2021. Section II.F, *supra*. Even if not enforced, though, the very existence of these requirements, in effect as of the relevant dates for determining eligibility, would have interfered with Mr. Bodart's independent business decision-

making, as [Business Concern 1] could have demanded Superior's compliance at any time. Superior maintains that [Business Concern 1] could not have enforced the [Agreement] if doing so would have jeopardized Superior's status as an SDVOSB. Section II.F, *supra*. The text of the Agreement, however, stated that Superior's purchases from [Business Concern 1] would not be required "if such amounts are not permitted under any given [VA] contract." Section II.H, *supra*. It therefore is not evident that Superior could have refused [a Business Concern 1] demand to purchase optical supplies and services under the Agreement, unless compliance would have caused Superior to be in breach of a VA contract. As Protestor observes, the [Agreement] also contained a provision requiring Superior to obtain advance permission from [Business Concern 1] prior to bidding on any fixed-price government contracts. Section II.H, *supra*. Again, by requiring the consent of [Business Concern 1], a non-SDVOSB, in such situations, the [Agreement] impermissibly restricted Mr. Bodart's ability to fully control the long-term decision-making and day-to-day management of Superior.

#### IV. Conclusion

Due to provisions in the [Agreement], Superior has not shown that it was fully controlled by Mr. Bodart as of September 23, 2020 and October 8, 2020, the relevant dates for determining eligibility. The protest therefore is SUSTAINED to that extent, and Superior is not an eligible SDVOSB for the instant procurement. Superior has persuasively shown that the [Agreement] is now no longer in effect, and that Superior is presently majority-owned and fully controlled by Mr. Bodart, so the protest is otherwise 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