

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

DECISION FOR PUBLIC RELEASE

IN THE MATTER OF:

Crescent Methods, LLC,

Appellant,

RFP No. HDEC08-14-R-0006

Defense Commissary Agency.

SBA No. WOSB-106

Decided: July 27, 2015

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Christopher R. Clarke, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION¹

I. Introduction and Jurisdiction

This appeal arises from a determination by the U.S. Small Business Administration (SBA) Director of Government Contracting (D/GC) that Crescent Methods, LLC (Appellant), a joint venture, is ineligible for award of the above-captioned procurement because the managing venturer, Communication Methods, LLC (CM), is not a Women-Owned Small Business (WOSB). SBA requests that the Office of Hearings and Appeals (OHA) remand the matter for further consideration. For the reasons discussed *infra*, SBA's request is granted and the dispute is remanded to the D/GC.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After reviewing the decision, Appellant informed OHA that it had no requested redactions. Therefore, I now issue the entire decision for public release.

OHA decides WOSB appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 127 and 134. Appellant filed its appeal within 10 business days after receiving the eligibility determination, so the appeal is timely. 13 C.F.R. § 134.703.

Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On August 21, 2014, the Defense Commissary Agency (DeCA) issued Request for Proposals (RFP) No. HDEC08-14-R-0006 for shelf stocking, receiving/storage/holding, and custodial operations at the McConnell Air Force Base commissary near Wichita, Kansas. The procurement was set aside entirely for WOSBs. On October 9, 2014, Appellant submitted a timely proposal.

On May 14, 2015, DeCA notified Pure Service Corporation (Pure), a disappointed offeror, that Appellant was the apparent successful offeror. On May 18, 2015, Pure filed a timely protest of Appellant's eligibility as a WOSB. Pure alleged that there is no evidence that a woman controls Appellant.

B. Eligibility Determination

On June 23, 2015, the D/GC determined that Appellant is not an eligible WOSB. The D/GC explained that Appellant is a joint venture between CM and Crescent Resources, LLC. A joint venture may be eligible for award of a WOSB set-aside, provided that at least one of the joint venturers is a WOSB and the joint venturers do not exceed the applicable size standard. 13 C.F.R. § 127.506. In the instant case, CM, which owns 51% of Appellant, is the joint venturer upon which Appellant's WOSB eligibility status is based.

The D/GC found that CM is not an eligible WOSB. To be eligible, the D/GC stated, one or more women with managerial experience of the extent and complexity needed to run the concern must control its management and daily business operations. 13 C.F.R. § 127.202(a) and (b). In the case of a limited liability company (LLC), the regulations further require that one or more women serve as management members on a full-time basis with control over all decisions of the LLC. *Id.* § 127.202(e). The D/GC explained that CM is a Louisiana LLC, and Louisiana law does not require LLCs to have operating agreements. Because CM did not have an operating agreement, Appellant provided the D/GC with the articles of organization and initial report that CM filed with Louisiana on February 20, 2008. According to those documents, Ms. Maureen Cabrera is CM's sole member. Louisiana law provides that "the business of the limited liability company shall be managed by the members." La. Rev. Stat. Ann. § 12:1311. The D/GC determined that, based on Louisiana law, Ms. Cabrera has control over CM's management and daily business operations. (Determination at 3.)

Nevertheless, the D/GC determined CM did not satisfy the requirement that CM be controlled by a woman,² for two reasons. First, SBA regulations require a WOSB LLC to provide its operating agreement via the WOSB Repository. 13 C.F.R. § 127.300(c) and (e)(3)(ii). Because CM did not have an operating agreement in place as of the date for determining eligibility, CM provided no such operating agreement. Second, the woman upon whom the firm's WOSB eligibility is based must be devoted full-time to the business concern during normal business hours. *Id.* § 127.202(c). The D/GC determined that CM did not satisfy this requirement because, according to Ms. Cabrera's resume, she is a part-time employee of Primero Services, Inc. (PSI) and only operated CM from 2008 to 2012. Accordingly, CM is not an eligible WOSB. Because CM is ineligible, Appellant is not eligible for award of the subject procurement. (Determination at 4.)

C. Appeal

On July 2, 2015, Appellant filed the instant appeal with OHA. Appellant argues the D/GC clearly erred in finding that CM does not satisfy the control requirement. Accordingly, Appellant requests that OHA reverse the determination.

Appellant contests the D/GC's finding that CM is ineligible for lack of an operating agreement. Appellant argues that the presence of an operating agreement is not a requirement for eligibility, so the D/GC's creation of this new requirement is improper. Appellant points out that the regulations governing WOSB eligibility are in Subpart B of Part 127. However, in finding that CM was required to submit an operating agreement, the D/GC cited a regulation in Subpart C. Subpart C, Appellant argues, does not contain eligibility criteria, but rather lists the documents a self-certified WOSB must provide to the WOSB Repository. As a result, “the plain language and structure of the regulations at hand do not lend themselves to the notion’ that an operating agreement is a regulatory requirement for WOSBs.” (Appeal at 11, quoting *Matter of Constr. Eng'g Servs., LLC*, SBA No. VET-213 (2011).)

Failure to submit an operating agreement, moreover, does not automatically render a firm ineligible. Instead, it means that a contracting officer cannot accept a firm's eligibility self-certification until SBA has reviewed the matter. 13 C.F.R. § 127.301(b); 77 Fed. Reg. 1857-02 (Jan. 12, 2012); 75 Fed. Reg. 62258, 62271 (Oct. 7, 2010). An operating agreement cannot be an eligibility requirement because it would make the referral requirement unnecessary. (Appeal at 10-11.)

Next, Appellant argues that the D/GC erred in finding that Ms. Cabrera does not devote her full-time attention to managing CM during business hours. Her outside employment is permissible because it does not interfere with her ability to manage CM on a full-time basis. *See Matter of Oak Hill Rehab. Specialists, Inc.*, SBA No. BDP-154 (2001); *Matter of Raintree Advanced Mgmt. Corp.*, SBA No. BDP-407 (2011). In determining whether outside employment conflicts with a person's ability to devote her full-time attention to managing the challenged firm, SBA considers (1) the amount of time devoted to the applicant concern; (2) the amount of time devoted to outside employment and interests; and (3) the potential for conflicts

² The D/GC determined that CM satisfies the other eligibility requirements.

between an application concern schedule and time spent in outside pursuits. *Raintree* at 5 (citing *Oak Hill* at 5). Appellant argues that it described to the D/GC the nature and extent of Ms. Cabrera's work at PSI. Her position is flexible and consists of no more than 12 hours or less per week. None of this work must be completed during business hours, and it does not prevent Ms. Cabrera from devoting full-time attention to her work at CM. The D/GC's failure to dispute this evidence in finding to the contrary is clear error.

Ms. Cabrera continues to manage CM on a full-time basis. Appellant represents that Ms. Cabrera's résumé contains a typographical error when it stated that her employment at CM ended in 2012. It is clear that this point on her resume was erroneous, Appellant contends, because Ms. Cabrera stated throughout her response to the D/GC that she is CM's managing member and sole officer. Faced with this conflicting evidence, SBA had a duty to resolve the inconsistencies. *See, e.g., Mid-Continent Testing Labs., Inc.*, SBA No. SIZ-4773, at 2 (2006) (SBA must “identify unresolved conflicts in the evidence and explain how it resolves these conflicts.”)

Appellant takes issue with the fact that the D/GC did not notify CM that its eligibility was being questioned on the basis of its owner's part-time employment. To deny CM's eligibility on the basis of an uncommunicated protest ground is unfair and improper. 13 C.F.R. § 127.604(c)(1) (SBA is required to notify the protested concern of the protest and request information and documents responding to the protest.); *Size Appeal of Magnum Opus Techs., Inc.*, SBA No. SIZ-5372 (2012) (“before finding a concern other than small on grounds not found in a protest, an area office must provide notice to the protested concern of any change in focus and request a response.”)

D. SBA's Response

On July 23, 2015, SBA responded to the appeal. SBA requests that OHA remand the case to the D/GC.

SBA states that it agrees with Appellant that the record does not clearly demonstrate that the D/GC considered Appellant's statement that Ms. Cabrera's part time outside employment does not interfere with her ability to devote her full-time attention to CM.

SBA does not address Appellant's argument that the presence of an operating agreement is not a requirement for WOSB eligibility.

On July 24, 2015, Appellant indicated that it does not oppose SBA's request to remand.

III. Discussion

By requesting that OHA remand this matter to the D/GC, SBA is, in effect, acknowledging error. Therefore, “[a]s a matter of judicial economy, it is appropriate to give SBA the opportunity to reconsider its decision.” *Matter of Gov't Contracting Servs., LLC*, VET- 230, at 3 (2012) (quoting *Size Appeal of A2Z Promo Zone*, SBA No. SIZ-5365, at 1 (2012) (granting SBA's motion to remand). When the D/GC reexamines Appellant's eligibility, Appellant will

have the opportunity to make any argument it chooses to the D/GC, and may appeal an adverse determination to OHA.

IV. Conclusion

I hereby VACATE the D/GC's determination that Appellant is not an eligible WOSB, and REMAND this matter to the D/GC for further consideration.

KENNETH M. HYDE
Administrative Judge