

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

DECISION FOR PUBLIC RELEASE

IN THE MATTER OF:

Crystal Clear Technologies, Inc.,

Appellant

RE: Valdez International Corp.

U.S. Department of the Air Force
38 CEIG/LGCC
Tinker AFB, Oklahoma
Solicitation No. FA8773-15-R-8007

SBA No. WOSB-108

Decided: November 9, 2016

APPEARANCES

Joseph M. Goldstein, Esq., Andrew E. Schwartz, Esq., Shutts & Bowen LLP, Fort Lauderdale, Florida, for Crystal Clear Technologies, Inc.

Robert S. Gardner, Esq., Colorado Springs, Colorado, for Valdez International Corp.

Christopher 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 Small Business Administration (SBA) determination denying the protest filed by Crystal Clear Technologies, Inc. (Appellant), against Valdez International

¹ I originally issued this Decision under a Protective Order. See 13 C.F.R. § 134.205. After reviewing the original Decision, counsel for Valdez informed OHA he had no requested redactions. Therefore, I now issue the entire Decision for public release.

Corp. (Valdez). SBA determined that Valdez is an eligible women-owned small business (WOSB). For the reasons discussed *infra*, the appeal is denied.

SBA's Office of Hearings and Appeals (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 March 13, 2015, the U.S. Department of the Air Force, 38 CEIG/LGCC, at Tinker AFB, Oklahoma (Air Force), issued Solicitation No. FA8773-15-R-8007 as a competitive WOSB set-aside under North American Industry Classification System (NAICS) code 517110 with a corresponding 1,500 employee size standard. Amendment 001, issued on March 24, 2015, extended the initial offer deadline to April 27, 2015. On September 9, 2016, the Air Force issued a notice that Valdez was the apparent successful offeror. On September 15, 2016, Appellant, a disappointed offeror, filed a protest challenging Valdez's WOSB eligibility. The Air Force forwarded the protest to SBA's Office of Government Contracting in Washington, D.C., for an eligibility status determination.

Appellant asserted a WOSB must be at least 51% owned and controlled by one or more women who are United States citizens, citing 13 C.F.R. § 127.102. Further, the regulations require that at the time a concern submits an offer on a specific contract reserved for competition among WOSBs, it must be registered in the System for Award Management (SAM) and have a current representation posted there that it qualifies as a WOSB and have provided the required documents to the WOSB Program Repository. (Protest at 4, citing 13 C.F.R. § 127.300(a).) Appellant further argued award under contracts set aside for WOSBs may be made only to WOSB concerns eligible under the WOSB program. (*Id.* at 4-5, citing FAR 52.219-30.)

Appellant asserted that on or about October 29, 2014, Valdez uploaded FAR and DFARS certifications and representations into SAM, covering the period October 29, 2014 to October 29, 2015. Appellant submitted copies of the representations. These consist of statements on a form with boxes for the concern submitting information to check. These show Valdez checked the box that it is a WOSB, and checked the box that it is not a WOSB eligible under the WOSB program. Appellant maintained Valdez has made the same representations in two more annual FAR and DFARS representations and certifications. (*Id.* at 5-6 & n.3.)

While Valdez represented itself as a WOSB, this certification is insufficient to qualify it for award because it fails to address U.S. citizenship and other eligibility requirements. (*Id.* at 6.) Further, while Valdez's SAM profile shows it is a women-owned business, it does not show it is a women-owned small business. (*Id.* at 7.) An advanced search on SAM for WOSBs using Valdez's DUNS number yields no results. (*Id.*)

Appellant asserted the RFP incorporated FAR 52.219-30, FAR 52.204-7, and DFARS 252.204-7004. Appellant argued that when a solicitation includes FAR 52.204-7, the Government must use an offeror's FAR 52.219-1 SAM representations and certifications. (*Id.* at 8.) The RFP also specifically provided that concerns have to represent on SAM that they are eligible WOSB concerns at the time they submit their offers. (*Id.* at 8.) An offeror's SAM representation that it is not eligible for a set-aside is essentially an admission of that fact by the offeror. (*Id.* at 9-10, citing *Size Appeal of OER Services, LLC*, SBA No. SIZ-5757 (2016).) Appellant concluded that because Valdez has not represented in SAM that it is an eligible WOSB, it is not eligible for the award of the instant contract.

On September 27, 2016, Valdez responded to the protest. Valdez included with its response the statement of Clark W. Dyer, its Senior Vice President. Mr. Dyer stated Valdez properly uploaded its certification as a WOSB to the Program Repository, together with all required documents, on February 3, 2014. Mr. Dyer stated the SAM system failed to auto-populate the blocks for FAR 52.219-1 in the manner expected. Valdez is a small business for some NAICS codes, and not for others. Valdez did not and cannot directly check the box in FAR 52.219-1. The SAM system auto-populated it and input a generalized entry which failed to correctly represent Valdez's qualifications. Mr. Dyer states the incorrect certifications were due to clerical error, a problem with the SAM interface, or a combination of both. (Dyer Statement, September 27, 2016.)

Valdez argued the error does not change the fact that it is an eligible WOSB, and was on the date it submitted its proposal. The documentation it submits establishes Christine E. Valdez owns 100% of the concern, is a U.S. citizen, is President of the corporation and manages and controls its daily operations. (Response to Protest at 3-4.)

Valdez further asserted an error in its certification does not render it ineligible for the WOSB program nor disqualifies it for the award. Valdez asserts it affirmatively certified its status as a WOSB when it submitted its proposal and provided earlier certification and documentation to the WOSB Program Repository. Valdez is deemed to have certified its status by submitting its offer. (*Id.* at 4-5, citing 13 C.F.R. § 127.700(b).)

Valdez maintained OHA has permitted offerors to present evidence of their original intent as to certification after award, and has accepted explanations for clerical errors in certifications. (*Id.* at 5, citing *Size Appeal of Ceres Environmental Services, Inc.*, SBA No. SIZ-5342 (2012).) Valdez also represented that it certified its status in its proposal. (*Id.* at 6.) Valdez further asserted Appellant's reliance on *Size Appeal of OER Services, LLC*, SBA No. SIZ-5757 (2016) is misplaced, because that case merely addressed the issue of protest specificity. (*Id.* at 7.) Finally, Valdez argued Appellant's contention that a failure to provide all necessary certifications renders a firm ineligible for award is belied by 13 C.F.R. § 127.301(b), which provides a contracting officer may refer a firm to SBA to verify eligibility in the case of doubt or missing documentation. (*Id.* at 8.)

B. Eligibility Determination

On October 4, 2016, the Director of Government Contracting (D/GC) issued his determination denying the WOSB eligibility protest and finding Valdez eligible as a WOSB. The D/GC noted that Valdez provided all applicable documents to the WOSB Repository. These included an unexpired passport for Christine Valdez, Valdez's articles of incorporation and amendments, together with its by-laws, copies of the front and back of Valdez's stock certificates, the stock ledger, and a resume for each officer and director. Valdez also provided the D/GC with its response to the protest allegations and a copy of its proposal.

The D/GC first found that Ms. Valdez owns 100% of all outstanding stock, and there are no conditions on her ownership interest. Accordingly, Valdez meets the ownership requirement for a WOSB. (Determination at 2.) Valdez's by-laws provide that the President will be Chief Executive Officer and have general supervision, direction, and control of the business affairs of the corporation. Ms. Valdez is President. Ms. Valdez thus has the highest officer position and has, according to her resume, nearly 20 years of management experience. Ms. Valdez controls the management and daily operations of Valdez. (*Id.* at 3.) Ms. Valdez is also the sole member of the Board of Directors, and thus controls the Board. (*Id.*)

The D/GC therefore concluded that Valdez is 51% owned and controlled by one or more women, and is therefore an eligible WOSB. The D/GC denied the protest. (*Id.*)

C. The Appeal

Appellant filed its appeal on October 11, 2016. Appellant emphasizes that the WOSB regulations authorize contracting officers to restrict competition or to award sole source contracts to eligible WOSBs. (Appeal at 2.) Appellant reasserts its argument from its protest. A WOSB must be at least 51% owned and controlled by one or more women who are United States citizens, citing 13 C.F.R. § 127.102. Further, the regulations require that at the time a concern submits an offer on a specific contract reserved for competition among WOSBs, it must be registered in SAM, have a current representation posted there that it qualifies as a WOSB, and have provided the required documents to the WOSB Program Repository, citing 13 C.F.R. § 127.300(a). (*Id.* at 3.) A concern must update its SAM representations and certifications as necessary. (*Id.* at 3, citing 13 C.F.R. § 127.300(f).) Appellant further argues that awards under contracts set aside for WOSBs may be made only to WOSB concerns eligible under the WOSB program, citing FAR 52.219-30. (*Id.* at 3-4.)

Appellant repeated the assertion made in its protest that on or about October 29, 2014, Valdez uploaded FAR and DFARS certifications and representations into SAM, covering the period from October 29, 2014, to October 29, 2015. Appellant re-submitted copies of the representations, which show Valdez checked the box that it is a WOSB, and checked the box that it is not a WOSB eligible under the WOSB program. Appellant maintains Valdez has made the same representations in two more annual FAR and DFARS representations and certifications. (*Id.* at 4-6.)

Appellant continues to maintain that while Valdez represented it is a WOSB this certification is insufficient to qualify it for award because it fails to address U.S. citizenship and other eligibility requirements. (*Id.* at 5.) Further, Valdez's SAM profile shows it is a women-owned business; it does not show it is a women-owned small business. (*Id.* at 6-7.) An advanced search on SAM for WOSBs using Valdez's DUNS number yields no results. (*Id.* at 7.)

Appellant argues that FAR 19.202-5 establishes there is a recognized difference between representing status as a women-owned small business and WOSB eligible under the WOSB program. Appellant argues that neither Valdez's representation that it was a WOSB at the time of its offer or its ability to qualify as an eligible WOSB under the WOSB program materially alters the requirement to have correctly represented its status and certification in SAM at the time of the offer. (*Id.* at 7.)

Appellant repeats its assertion made in its protest that the RFP incorporated FAR 52.219-30, FAR 52.204-7, and DFARS 252.204-7004. Appellant argues that when a solicitation includes FAR 52.204-7, the Government must use an offeror's FAR 52.219-1 SAM representations and certifications. (*Id.* at 8.) The RFP also specifically provided that concerns must represent on SAM that they are eligible WOSB concerns at the time they submit their offers. (*Id.* at 9.) By submitting an offer, Valdez confirmed the representations and certifications in SAM had been reviewed and they were current, accurate, complete and applicable to the solicitation, yet now Valdez maintains they were not. (*Id.* at 9, citing FAR 52.204-8(d).)

Appellant maintains Valdez did not acknowledge it was a WOSB eligible under the WOSB program in its SAM representations and certifications and therefore cannot be considered as registered as a WOSB under the WOSB program. (*Id.* at 10, citing FAR 52.204-13.) Valdez was not represented as a WOSB on SAM at the time it submitted its offer, possibly because it had not placed all the required documents in the WOSB Program Repository as required by 13 C.F.R. § 127.300(a). (*Id.*)

Appellant argues the D/GC's decision is clearly erroneous as a matter of law. The D/GC failed to acknowledge the legal requirement that Valdez be represented as an eligible WOSB at the time it submitted its offer, and to have uploaded the required documents to the WOSB Program Repository as of that date. The plain language of 13 C.F.R. § 127.300(a) clearly requires this, and the D/GC ignored this requirement. (*Id.* at 11.) The D/GC's failure to consider whether Valdez had met the requirements is an error of fact. While the D/GC accepted that Valdez had merely committed clerical errors, Section K of the RFP required as a matter of responsibility that offerors ensure the accuracy of their SAM representations. (*Id.* at 11-12.) The Air Force should have excluded Valdez as a non-responsible offeror. (*Id.* at 12.)

Appellant maintains that checking the correct box is, in fact, an eligibility requirement of the WOSB program, and Valdez did not qualify for admission to the program at the time it submitted its offer. A material part of a concern's eligibility for award is submission of all documents and adherence to all requirements in accordance with the RFP. Valdez has failed in this regard, and so is not eligible for award of the instant procurement. (*Id.* at 12-13.)

On October 20, 2016, after reviewing the Protest File under the Protective Order, Appellant filed a Supplemental Appeal. Appellant argues that nothing in the record or in Valdez's response to the protest explains why a clerical error in SAM relieved Valdez of the requirements of 13 C.F.R. § 127.300(a) and the RFP that Valdez's SAM representations be accurate at the time it submitted its proposal. (Supplemental Appeal at 1-2.) The record does not show how Valdez “accidentally” represented to the Government for years that it was not a WOSB. (*Id.* at 2.)

The Protest File contains nothing to show the D/GC considered whether Valdez did have all of its required documents uploaded into the WOSB Repository, or a proper certification at the time it submitted its proposal. (*Id.*) Appellant reiterates its argument that 13 C.F.R. § 127.300(a) requires a concern have a current SAM representation on file at the time it submits its offer, and Appellant failed to do so here. (*Id.* at 3-4.)

Appellant distinguishes *Size Appeal of Ceres Environmental Services, Inc.*, SBA No. SIZ-5342 (2012) from this case. There, OHA overturned an area office's reliance on a concern's ORCA representations when those representations had not been made at the time the concern submitted its offer. Here, Valdez's SAM representation that it is not eligible was on file on the date it submitted its offer. (*Id.* at 6.)

Appellant asserts Valdez did not merely forget to have a certificate in its bid, or fail to have the NAICS code in its SAM profile, but failed to comply with a regulatory mandate. (*Id.* at 7.) Appellant points to *Nationwide Value Computer, Inc.*, B-411190 (Comp. Gen. June 11, 2015). There, the contracting officer found the protestor ineligible because it had certified on SAM that it was not a small business under the applicable NAICS code. GAO found this determination was appropriate, and denied the protest. (*Id.* at 8.)

D. Valdez's Responses to the Appeal and Supplement

On October 20, 2016, Valdez responded to the original appeal. Valdez again points to Mr. Dyer's statement in support of its contention that incorrectly checked boxes are either a clerical error or a problem with the SAM interface. (Response to Appeal at 2.) Valdez asserts it is an eligible WOSB concern, and Appellant does not challenge the D/GC's finding that Valdez met the eligibility requirements. (*Id.* at 3-4.) Valdez maintains the certification is not controlling here; the actual facts of eligibility are. Erroneous or omitted checking of representation boxes does not disqualify an eligible concern. The regulation on eligibility makes no reference to certification or SAM. (*Id.* at 4-5.)

Valdez argues it certified its status and eligibility as a matter of law upon submitting its proposal. (*Id.* at 5.) Appellant's argument is contradicted by 13 C.F.R. § 127.301(b), which permits a contracting officer to refer a concern to SBA to verify its eligibility for award in cases of doubt or missing documentation. (*Id.* at 6.) Appellant's submission of its proposal is deemed to be certification of its status. (*Id.* at 6, citing 13 C.F.R. § 127.700(b).) OHA has permitted offerors to submit evidence of original intent as to certification after award and accepted an offeror's explanations for clerical errors. (*Id.* at 7, citing *Ceres, supra.*)

Valdez further argues that an offeror effectively certifies a bid upon submission. Valdez made a number of representations of its status in the body of its proposal, which are deemed to be certifications. (Response to Appeal at 7-8, citing 15 U.S.C. § 632(w)(2)(a), 13 C.F.R. § 127.700(b)(2).) Valdez maintains Appellant's contention, that Valdez's alleged failure to provide all required documents and certifications to verify its eligibility renders Valdez ineligible, is contradicted by 13 C.F.R. § 127.301(b), which provides a contracting officer may refer a concern to SBA to verify its eligibility. (*Id.* at 8-9.) Valdez also asserts Appellant's non-responsibility argument is out of place here. (*Id.* at 10.)

On October 26, 2016, Valdez responded to the supplemental appeal. Valdez essentially recapitulates its earlier arguments. Valdez asserts an incorrect or erroneous certification or representation is not dispositive of the question of WOSB eligibility. The regulations provide that an incomplete or questionable certification calls for the contracting officer to refer the matter to SBA. The regulation recognizes a concern might fail to provide all the required documents or other information calling its eligibility into question, and provides for a referral to SBA to resolve that question. (Supplemental Appeal at 2, citing 13 C.F.R. § 127.301(b).)

Valdez further asserts it properly uploaded its certification and the required documents to the WOSB Program Repository. Valdez denies Appellant's assertion that Valdez has provided no explanation for the erroneous certification, because Mr. Dyer's statement provided just that. The SAM system fails to correctly populate the blocks, and the user cannot directly check the correct box. (*Id.* at 3.)

Valdez distinguishes *Nationwide Value Computer, Inc.*, B-411190 (Comp. Gen. June 11, 2015) because there the protestor cited to no other information within the bid and on which the contracting officer could have relied for representation or certification. Nor did the protestor there rely on any statute or regulation under which certification was deemed. (*Id.* at 4.)

Valdez maintains Appellant confuses programmatic certification requirements with eligibility requirements and ignores that Valdez's proposal submission constituted a deemed certification. (*Id.* at 5.)

E. SBA Response

On October 20, 2016, SBA responded to the appeal. SBA notes the regulations and the Small Business Act require that in order to be eligible for award of a contract set aside for WOSBs a concern must be owned and controlled by a woman who is a U.S. citizen. (SBA Response at 3, citing 15 U.S.C. § 637(m) and 13 C.F.R. § 127.200 *et seq.*) One or more women who are U.S. citizens must directly and unconditionally own at least 51% of the firm. Valdez meets these requirements. (*Id.* at 3-4.)

SBA asserts Appellant is attempting to add eligibility requirements beyond those in the statute and regulations. The regulations set out the eligibility requirements. Appellant is not pointing to eligibility requirements, but to programmatic requirements. SBA expects these requirements to be met, but a concern which fails to meet them is not ineligible for award.

Rather, the concern's eligibility may be questioned. (*Id.* at 4-5, citing 75 Fed. Reg. 62258, 62275 (Oct. 7, 2010).)

SBA asserts Appellant's argument that a claimed failure to check the correct box is grounds to find a concern ineligible for award is simply wrong. The online database Appellant mentions contains two boxes for representing that a concern is a WOSB. One box is for SBA's WOSB contracting program, the other is for a separate data collection issue. The database is a means of certifying contract eligibility, but it is not the only means. The Small Business Act and SBA's regulations allow for "deemed certifications" of small business size and status. (*Id.* at 6- 7, citing 15 U.S.C. § 632(w)(2); 13 C.F.R. § 127.700(b).) SBA also argues that GAO has found that a proposal which included information that a firm is an eligible Service-Disabled Veteran-Owned Small Business Concern constituted a "deemed certification." (*Id.* at 8, citing *Quality Services Int'l, LLC*, B-410156; B-410156.2; B-410156.3 (Nov. 3, 2014).)

SBA argues Appellant has mistaken grounds for a protest for eligibility requirements. SBA reviewed Valdez's documentation and the D/GC properly concluded that Valdez met the eligibility requirements for the WOSB program. (*Id.* at 9.)

III. Discussion

A. Jurisdiction and Standard of Review

WOSB eligibility appeals are decided by OHA pursuant to the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 127 and 134. OHA reviews the D/GC's decision to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.708; *see also Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard that is applicable to both size appeals and WOSB appeals). OHA will overturn the D/GC's determination only if Appellant proves that the D/GC made a patent error based on the record before him.

B. Analysis

SBA's regulations set forth the eligibility requirements for the Women-Owned Small Business Federal Contract Program at 13 C.F.R. Part 127, Subpart B:

Qualification as a WOSB. To qualify as a WOSB, a concern must be:

- (1) A small business as defined in part 121 of this chapter; and
- (2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.

13 C.F.R. § 127.200(b).

The regulation discusses in detail the requirements for direct and unconditional ownership, and how partnerships, corporations, and LLCs must meet the 51% requirement.

Unconditional ownership means the qualifying woman must have an ownership interest not subject to any arrangements which might potentially cause ownership benefits to go to another. 13 C.F.R. § 127.201(b). Direct ownership means the qualifying woman must own 51% of the concern directly, not through another entity or trust. 13 C.F.R. § 127.201(c). In the case of a corporation, at least 51% of each class of voting stock outstanding and of all outstanding stock must be owned by one or more women. 13 C.F.R. § 127.201(f). The regulation also discusses in detail the requirement that the management and business operations must be controlled by one or more women. 13 C.F.R. § 127.202(a). A woman must hold the highest officer position and must have management experience of the extent and complexity needed to run the concern. 13 C.F.R. § 127.202(b). In the case of a corporation, one or more women must control the Board of Directors. 13 C.F.R. § 127.202(f).

Appellant found that there were defects in Valdez's certifications. Accordingly, it filed a protest. In response to the protest, the D/GC issued a determination which found that Ms. Valdez owns 100% of all of Valdez's outstanding stock, without any conditions on her ownership interest. He further found that Ms. Valdez is Valdez's President, CEO, and sole member of the Board of Directors. In addition, he found Ms. Valdez's resume reflects that she has over 20 years of management experience, and therefore she has the experience necessary to run the concern. The D/GC thus concluded that Ms. Valdez owns and controls Valdez, and that Valdez meets the eligibility requirements to be a WOSB. My review of the record supports the D/GC's findings, and Appellant, whose counsel has had access to the record under the Protective Order, disputes not one of these findings.

Instead, Appellant maintains the D/GC's determination is in error, and the errors in Valdez's certification render it ineligible for award, regardless of the fact that Valdez actually meets the eligibility requirements. Appellant's argument is based on regulations in 13 C.F.R. Part 127, Subpart C, Certification of EDWOSB or WOSB Status. These regulations require that a concern must be registered in SAM, have a current representation posted on SAM that it qualifies as a WOSB, and has provided the required documents to the WOSB Repository at the time it submits an offer on a procurement reserved for WOSBs. 13 C.F.R. § 127.300(a). These certifications must be updated as necessary. 13 C.F.R. § 127.300(f). However, these are all certification requirements. They are not eligibility requirements, which are discussed in Subpart B. The FAR and DFARS clauses Appellant cites (FAR 19.202-5, 52.204-7, 52.204-8, 52.219-1, 52.219-30, DFARS 252.204-7004) all relate to data collection and reporting requirements, SAM, the representations and certifications offerors must make on the procurement, and the notice of set-aside or the WOSB program. These clauses require certain certifications be made by an offeror. They are not themselves the regulations on eligibility, which are contained in Subpart B. They do not provide that a defect in the certifications renders a concern ineligible for award.

OHA's jurisdiction extends to appeals of WOSB protest determinations under 13 C.F.R. Part 127. 13 C.F.R. § 134.102(s). An interested party may protest an apparent successful offeror's WOSB status. 13 C.F.R. § 127.600(b). A challenge to a concern's WOSB status must present credible evidence that a concern may not be owned and controlled by one or more women who are U.S. citizens. 13 C.F.R. § 127.602. Thus, the subject of the protest and any subsequent appeal to OHA is whether the challenged concern met the substantive eligibility requirements set forth in 13 C.F.R. Part 127, Subpart B. Subpart B further provides that a protest

may be filed if the concern has failed to provide all of the required documents, as set forth in 13 C.F.R. § 127.300. *Id.* When an offeror has failed to provide all of the required documents, a contracting officer shall refer the concern to SBA for an eligibility determination. 13 C.F.R. § 127.301(b).

The WOSB regulations thus make clear that the issues before the D/GC and OHA in a WOSB case are the substantive issues of whether the challenged concern is owned and controlled by one or more women who are U.S. citizens. Valdez has clearly met these substantive requirements, and Appellant makes no allegation that Valdez has not. OHA's role is to determine whether there has been clear error in the D/GC's determination.

Appellant rather insists that SBA elevate form over substance, and find that errors in a concern's certification render it ineligible for award. However, the regulation makes clear that any defects in a concern's certifications are grounds for a protest to question whether that concern is actually an eligible WOSB, and that protest may be made either by another offeror or the contracting officer. The regulations do not provide that these defects render a concern ineligible as a WOSB, but rather that the D/GC examines whether the concern is owned and controlled by women who are U.S. citizens. The regulations provide this is the substantive issue which is the subject of the D/GC's determination, and which OHA must review. The only consequence in the regulation of a defect in certification by a concern is that it opens that concern's status as a WOSB to a substantive review by SBA. The regulation does not state that it renders the concern ineligible. Eligibility is determined on the issues of ownership and control.

Further, as SBA points out, the regulations provide that by submitting an offer for a procurement limited to WOSB concerns, Valdez is deemed to have certified its status as a WOSB. 13 C.F.R. § 121.700(b)(1). This deemed certification subjects Valdez to penalties if it misrepresents its status. 13 C.F.R. § 121.700(e). Valdez thus certified itself as a WOSB by submitting its offer for this procurement.

Appellant's reliance on *Size Appeal of OER Services, LLC*, SBA No. SIZ-5757 (2016) is misplaced. There, the fact that the challenged concern's SAM profile listed it as other than small for the relevant NAICS code was found to be specific grounds for a size protest. It merely resulted in a size determination, not a finding that the concern was not an eligible small business. That is the case here. Valdez's flawed certification resulted in the D/GC undertaking a WOSB status determination. It does not, by itself, render the concern ineligible.²

Similarly, in *Nationwide Value Computer, Inc.*, B-411190 (Comp. Gen. June 11, 2015), GAO found the CO acted reasonably when it found ineligible a concern whose SAM profile affirmatively represented that it was not small for the applicable NAICS code, and there was no other information on which the contracting officer could have relied for a representation or certification. Here, there are the deemed certification and Valdez's affirmative representations of

² Valdez's reliance on *Size Appeal of Ceres Environmental Services, Inc.*, SBA No. SIZ-5324 (2012) is misplaced, because it does not hold that an offeror may present evidence of their original intent as to certification after award. *Ceres* dealt with a concern that did not certify itself as small for an unrestricted procurement. The case is not apposite here.

its WOSB status with its offer that support its status. In any event, the D/GC determined Valdez's status after examination of the record. *Nationwide* is inapposite here.

Appellant's contention that Valdez is not a responsible offeror may not be considered here; that issue is solely within the purview of the Contracting Officer. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 23 (2011).

Appellant's argument is ultimately meritless. Appellant relies on the certification requirements to argue Valdez is ineligible. However, the certification regulations provide that the result of defective certification is not a finding the subject concern is ineligible, but that an eligibility determination must be conducted by the D/GC. In making that determination, the D/GC is to consider whether the concern is owned and controlled by women who are U.S. citizens, not whether the certifications and representations are accurate. That is what the D/GC did here, and he determined Valdez is an eligible WOSB. Appellant has failed to establish any error by the D/GC, and therefore I must deny its appeal.

IV. Conclusion

For the above reasons, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.227(b)(4); *Matter of Potomac Wave Consulting, Inc.*, SBA No. EDWOSB-104 (2014).

CHRISTOPHER HOLLEMAN
Administrative Judge