

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

IN THE MATTER OF:

Yard Masters, Inc.,

Appellant,

Solicitation No. W911SA-17-Q-0078

U.S. Department of the Army
Army Contracting Command, MICC
Fort McCroy, Wisconsin

SBA No. WOSB-109

Decided: October 11, 2017

APPEARANCES

Sally Wade, for Yard Masters, Inc.

David A. Rose, Esq., Rose Consulting, Inc., for Airrus Management Systems, LLC.

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

DECISION

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 Yard Masters, Inc. (Appellant), is not a Woman-Owned Small Business (WOSB) and therefore is ineligible for award of the above-captioned procurement. Appellant argues on appeal that the D/GC clearly erred in his determination, so OHA should reverse the determination. 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, Protest, and Response

On June 1, 2017, the U.S. Army Mission and Installation Contracting Command at Fort McCoy, Wisconsin, issued Solicitation No. W911SA-17-Q-0078 for grounds maintenance services in Ogden, Utah. The Contracting Officer (CO) set the procurement aside for women-owned small businesses and designated NAICS code 561730, Landscaping Services, with a corresponding \$7.5 million annual receipts size standard, as the appropriate code for the procurement. On June 30, 2017, Appellant submitted its offer, which was signed by Bryce Wade as Appellant's President. On July 11, 2017, the CO awarded the contract to Appellant.

On July 17, 2017, Airrus Management Systems, LLC (AMS), filed a protest of Appellant's WOSB status with the CO. (Protest File at 352.) AMS alleged Appellant is not owned or controlled by one or more women. Specifically, AMS contends Bryce Wade was majority owner and President until recently, and he still exercises control over Appellant. (Protest File at 354-356.) On July 21, 2017, the CO forwarded the protest to SBA.

On July 26, 2017, Appellant responded to the protest. Appellant's response was signed by Bryce B. Wade, as Appellant's Chief Operating Officer (COO) and President. Appellant maintained it had considered reorganizing itself to qualify as a WOSB for some time. Appellant stated it registered with the System for Award Management (SAM) on March 16, 2006, and updated its status on June 29, 2017. Bryce Wade stated he is the Point of Contact (POC) for Appellant, and his wife, Sally Wade, is Appellant's Chief Executive Officer (CEO). Further, while Sally Wade is very engaged in Appellant's day-to-day business and has been for 17 years, she had appointed him to oversee Appellant's operations. (Protest File at 294-295.)

The protest response included Sally Wade's July 26, 2017 letter, in which she stated that she has been the equal business partner of Bryce Wade for 17 years. She acquired an additional 1% ownership interest from Bryce Wade to become majority owner shortly before Appellant submitted its offer on the instant procurement. She is now Appellant's CEO and majority owner. Sally Wade stated, "I made Bryce the COO where he oversees the operations and continues being the President." (Protest File at 292-293.)

Appellant submitted to the Area Office various corporate documents with its response to the protest. The Minutes for the June 14, 2017 Special Shareholders' Meeting state:

Discussion/Motion: Discussion and Change of Board of Directors

It was discussed that after attending a site visit for a Woman Owned Small Business Contract, it would be in Yard Masters favor to have Bryce Wade sell 1% of his stock to Sally Wade and have her be Chief Executive Officer and become a WOSB company.

Bryce Wade moved to appoint himself as President and Chief Operating Officer and Sally Wade as the head of the company as the Chief Executive Office of Yard

Masters, Inc. Sally seconded the motion. Both Bryce and Sally voted aye. The motion carried.

(Protest File at 40.)

The Minutes for its June 26, 2017 Corporate Meeting state:

Bryce and Sally Wade spoke about selling 1% of Bryce's stock to Sally for \$100 and appoint her CEO and appoint Bryce as COO and continue being the President of Yard Masters, Inc. Both agreed to the transaction.

(Protest File at 240.)

Appellant's corporate income tax returns for 2014, 2015, and 2016 show, under Compensation of Officers, amounts for Bryce Wade, but none for Sally Wade. (Protest File at 84, 141, 190.)

Appellant's Articles of Incorporation, dated December 29, 2005, list both Bryce and Sally Wade as incorporators, and Bryce Wade as the corporation's registered agent. (Protest File at 244-246.) Appellant's Bylaws, also dated December 29, 2005, state "The business and affairs ... shall be managed by its Board of Directors." (Bylaws § 3.1, Protest File at 255.) The officers of the corporation shall consist of a President and a Secretary. (*Id.* § 4.1, Protest File at 257.) The Bylaws describe the office of President:

The President shall be the chief executive and administrative officer of the Corporation. He or she shall preside at all meeting of the shareholders and, in the absence of the Chair of the Board, at meetings of the Board. He or she shall exercise such duties as customarily pertain to the office of President and shall have general and active supervision over the property, business, and affairs of the Corporation and over its several officers. He or she may appoint officers, agents, or employees other than those appointed by the Board. He or she may sign, execute, and deliver in the name of the Corporation notes, powers of attorney, contracts, bonds, and other obligations, and shall perform such other duties as may be prescribed from time to time by the Board or by these Bylaws.

(*Id.* § 4.6, Protest File at 258.)

The Bylaws further provide: "Other officers shall perform such duties and have such powers as may be assigned to them by the Board." (*Id.* § 4.10, Protest File at 259.) The Bylaws "may be amended or repealed by the Board at any meeting or by the stockholders at any meeting." (*Id.* § 8.7, Protest File at 262.) The Bylaws do not describe the duties of either the CEO or the COO. There are no subsequent amendments to the Articles of Incorporation or the Bylaws.

Also submitted was the Share Certificate Purchase Contract¹ dated June 29, 2017, and signed by Bryce and Sally Wade. The signatures of both were notarized. This contract states:

Sally F. Wade purchased 1% ownership of Yard Masters, Incorporated located at 3644 W. Pioneer Road, Marriott-Slaterville Utah, in the amount of \$100.00 from Bryce B. Wade. Sally F. Wade will own 51% of the total shares and Bryce B. Wade will own 49% of the total share[s].

(Protest File at 24.)

Stock Certificate No. 3, dated June 29, 2017, certifies that Sally Wade owns 51 shares of Appellant, and Stock Certificate No. 4, also dated June 29, 2017, certifies that Bryce Wade owns 49 shares of Appellant. (Protest File at 60-61.) The Stock Ledger shows that, as of June 29, 2017, Bryce Wade owns 49 shares of stock, and Sally Wade owns 51 shares of stock. (Protest File at 62.) The Stock Ledger documents that both Bryce and Sally Wade surrendered 50 shares of stock to receive the shares indicated, and that Sally Wade paid \$100.00 for her shares.

On August 22, 2017, SBA inquired if Stock Certificate Nos. 1 and 2 were available, and on the next day, Bryce Wade submitted them, both dated December 29, 2005. (Protest File at 30-31.) These certificates show Bryce and Sally Wade each hold 50 shares of stock. Appellant also submitted the Stock Ledger showing Bryce and Sally Wade each holding 50 shares of stock, with "N/A" as the amount paid for each. (Protest File at 32.)

On August 24, 2017, SBA inquired of Appellant:

Can you provide me with proof of payment Sally made to you when she purchased an additional 1% of stock ownership on June 29, 2017? The stock purchase agreement provides that she paid \$100. Examples of proof include cancelled checks or bank transfer records. Please submit the information by COB tomorrow.

(Protest File at 9.) On August 24, 2017, Bryce Wade replied:

She paid me \$100 cash of her personal money. How do you want me to show that?

(Protest File at 9.) SBA did not respond to this email.

B. Eligibility Determination

On August 25, 2017, the D/GC issued his Determination, finding Appellant is not an eligible WOSB. The D/GC noted Appellant had presented documents purporting to show a stock purchase of 1% of Appellant's stock by Sally Wade on June 29, 2017; however, when he requested evidence of the sale, such as a cancelled check or bank records, Appellant could

¹ This document is also referred to as the Stock Purchase Agreement.

provide no such evidence. The D/GC concluded that the sale did not occur and, therefore, that Appellant failed to establish that at least 51% of each class of voting stock and 51% of the aggregate of all Appellant's stock is unconditionally owned by one or more women. (D/GC Determination at 3, Protest File at 2-6.) Accordingly, Appellant is not an eligible WOSB.

Appellant had attempted to establish that Sally Wade controls Appellant and holds the highest officer position through the minutes of the Special Shareholders' Meeting held on June 14, 2017, and a copy of her resume. Appellant's Bylaws, however, do not create a CEO position. The Bylaws do identify the President as “the chief executive and administrative officer of the Corporation”, and the Special Shareholders' Meeting Minutes show Bryce Wade appointed as President, not Sally Wade. (*Id.* at 4.)

Appellant's Bylaws authorize the Board of Directors to elect officers, but there is no record that Appellant's Board ever prescribed any duties to the position of CEO. The Bylaws were not amended to establish a CEO position or assign specific duties to a CEO. Thus, Sally Wade's CEO position is not established in the Bylaws and has no assigned duties. Accordingly, the D/GC concluded that Appellant's highest officer is the President, a position held by Bryce Wade. (*Id.*) The D/GC also concluded that one or more women do not control Appellant's Board, because Appellant could not provide documentary evidence that a woman owns at least 51% of the firm. (*Id.*)

The D/GC further noted Sally Wade has not performed any duties typically associated with a highest officer position. Appellant's Bylaws authorize the President to appoint employees other than those appointed by the Board. Bryce Wade signed Appellant's Proposal and its contract documents for the instant procurement. Bryce Wade also signed Appellant's tax returns for 2014, 2015, and 2016. These tax returns identify Bryce, and not Sally, Wade as a compensated officer. The D/GC concluded a woman does not control Appellant's day-to-day business operations. (*Id.*)

Because Appellant is not owned and controlled by one or more women, the D/GC determined that Appellant is not eligible for the award of this procurement. (*Id.* at 5.)

C. The Appeal

On September 11, 2017, Appellant filed the instant appeal with OHA. Appellant argues the D/GC Determination is in error, and urges OHA to reverse it.

Appellant asserts in the appeal that Sally Wade entered into a contract with Bryce Wade to purchase 1% of Appellant and to become the majority owner. The evidence of that contract is the Stock Purchase Agreement that shows she paid him \$100 for a 1% interest. Appellant asserts SBA is discriminating against her because she is a married woman, that if she was not married to the firm's other equity holder, SBA would not have asked for additional information on the 1% share transfer. (Appeal at 1.)

Referring to the June 14, 2017 Special Shareholders' Meeting, where the shareholders decided Sally Wade would purchase 1% of Appellant in order to qualify as a WOSB, Appellant

maintains this meeting made her head of the company and CEO. (Appeal at 2.) Bryce Wade was made COO and President in name only. Appellant maintains its Bylaws § 4.6 make it clear Appellant was dividing the responsibilities typically assigned to the President. Appellant's Bylaws § 4.10 permit the Board to reassign the powers of officers as it sees fit. Appellant maintains it amended its Bylaws accordingly, and that it was clear from the discussion that Sally Wade has ultimate direction and control of the company. All in attendance agreed this was a clear change to the Bylaws, under § 8.7, permitting amendment or repeal of the Bylaws. Appellant is still waiting for its attorneys to produce the amended Bylaws. Appellant asserts it is clear to all officers, directors, and shareholders that Sally Wade runs the company. (*Id.* at 2.)

With its appeal, Appellant submitted letters, dated September 8, 2017, from Bryce and Sally Wade and from the Notary Public who acknowledged the signatures on the Share Certificate Purchase Contract, and affidavits dated September 11, 2017, from its corporate attorney and accountant.

D. AMS's Response

On September 13, 2017, AMS responded in opposition to the appeal. AMS noted that for 17 years prior to the Special Shareholders' Meeting, held just before the date for submitting offers on this procurement, Bryce and Sally Wade were equal partners in Appellant. AMS reemphasizes the point that there is no documentation of the stock transfer from Bryce to Sally Wade. On the question of control, AMS asserts Appellant failed to perform the acts necessary to make Ms. Wade the CEO and highest officer in the company. (AMS Response at 2.) AMS further asserts Appellant's proffered new evidence is inadmissible. (*Id.* at 3.)

E. SBA Response

On September 28, 2017, SBA responded to the appeal and submitted the Protest File. SBA argues the D/GC's Determination is correct, and OHA should affirm it and deny the appeal.

SBA asserts first, the D/GC properly determined Appellant had failed to establish Sally Wade owns a majority of Appellant's stock. Appellant's 2016 tax return shows equal ownership by Bryce and Sally Wade. Appellant had maintained that there had been a subsequent transfer of shares between husband and wife the day before Appellant submitted its offer. Appellant provided Stock Certificate Nos. 3 and 4 signed by Bryce Wade as President and Sally Wade as CEO. However, Stock Certificate Nos. 1 and 2 were not initially provided to SBA. The Stock Ledger initially provided appeared inaccurate, did not reflect all shares issued, or properly record all transfers. Appellant produced Stock Certificate Nos. 1 and 2 at SBA's request. These were consistent with the tax returns. (*Id.* at 5.)

The file contains multiple documents attesting to divergent facts. One set indicates Sally Wade owned 50% of the firm. This set was in existence since 2005, and is consistent with Appellant's tax returns. The other set was dated the day before the offer and includes an inaccurate stock ledger. (*Id.*) There is a sale agreement stating that the share transfer included a \$100 transfer of funds from Bryce to Sally Wade. (*Id.* at 6.)

SBA maintains it attempted to corroborate the second set of documents by asking for proof of the \$100 payment. Bryce Wade responded that Sally Wade paid him \$100 in cash. The D/GC drew an adverse inference because Appellant had not cooperated in providing the requested documentation. The D/GC had a responsibility to ensure that this rushed transaction was not a sham transaction. Appellant failed to provide evidence that the transaction occurred. The D/GC drew an adverse inference and discounted the uncorroborated set of documents — the inaccurate stock ledger, Stock Certificate Nos. 3 and 4, and the stock purchase agreement. (*Id.*)

It was Appellant's responsibility to properly execute any stock transfer and accurately record it in the Stock Ledger. The record reflects that from 2005 until the day prior to Appellant's submission of its offer a woman did not own at least 51% of Appellant. Whether the transaction was sham or sloppily executed was not for the D/GC to decide. The D/GC did properly draw an adverse inference and concluded a woman did not own at least 51% of Appellant at the time of the offer. (*Id.* at 7.)

SBA further maintains the D/GC correctly concluded that the last-minute changes Appellant adopted did not demonstrate that a woman controls it. Sally Wade did not perform the duties typically associated with the highest officer position. Bryce Wade signed Appellant's tax returns and its offer for this procurement. Bryce Wade was also the only compensated officer. (*Id.* at 7-8.)

Given the last minute nature of the abrupt change in control, the D/GC sought evidence Sally Wade really controlled Appellant. The D/GC requested information on the official acts of the corporation. All the documentation Appellant provided shows Bryce Wade executes all binding documents as Appellant's President. Bryce Wade is listed as Appellant's POC. Bryce Wade is also listed as Appellant's contact for past performance, and he signed Appellant's formal response to the WOSB protest. SBA asserts Appellant has submitted no evidence to demonstrate that Sally Wade took over day-to-day control of the firm from her husband prior to Appellant's submission of its offer for this procurement, which offer Bryce Wade executed. The D/GC accordingly concluded Appellant had failed to establish that a woman controls the concern. (*Id.* at 8.)

The D/GC further concluded a woman does not hold Appellant's highest officer position. Appellant's Bylaws create the position of President, and designate that position as the firm's highest officer. The Bylaws do not create a CEO position. Appellant's Board appointed Bryce Wade as President, and he has held the position since 2005. Bryce Wade has been paid salary for his work as an officer. Sally Wade has received distributions as a shareholder, but there is no evidence she has been paid for work performed as an officer. There is no indication that the Special Shareholders' Meeting intended to amend Appellant's Bylaws. That meeting gave Sally Wade a title, but it did not make her an officer. (*Id.* at 9.)

SBA maintains a woman must actually control a WOSB, and the firm must be able to demonstrate that control. Appellant submitted no evidence to support the claim that Sally Wade, and not her husband, actually controlled Appellant. (*Id.* at 9-10.)

SBA also objects to Appellant's proffered new evidence.

III. Discussion

A. Standard of Review and New Evidence

The standard of review for WOSB appeals is whether the D/GC's determination was based on clear error of fact or law. 13 C.F.R. § 134.708; *see Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006) (discussing the clear error standard applicable to size appeals and WOSB appeals). Consequently, I will disturb the D/GC's determination only if I have a definite and firm conviction that the D/GC erred in making a key finding of law or fact.

Appellant seeks to submit new evidence on appeal. In WOSB cases, the Judge may not admit new evidence beyond the protest file nor permit any form of discovery. 13 C.F.R. § 134.712. Accordingly, I must EXCLUDE from the record Appellant's proffered new evidence.

B. Discussion

1. Ownership

Appellant argues that the D/GC erred in finding that it is not owned and controlled by a woman. In order for a concern to qualify as an eligible WOSB, one or more women must unconditionally and directly own at least 51% of the concern. 13 C.F.R. § 127.201(a). In the case of a corporation, at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding must be unconditionally owned by one or more women. 13 C.F.R. § 127.201(f).

Here, the D/GC found that he could not conclude that Sally Wade owns 51% of Appellant's stock. There is no question that, prior to the Special Shareholders' Meeting, Bryce Wade held 50% of Appellant's stock, as he had since 2005. The critical question which will determine Appellant's ownership is, did the alleged transfer of a 1% interest from Bryce Wade to Sally Wade take place. SBA requested documented evidence of the sale, such as a cancelled check or other bank records documenting that such a transaction occurred. Bryce Wade stated he had given his wife cash. The D/GC found this to be inadequate documentation.

However, there was ample documentation. The minutes of the June 14th and June 26th meetings state that the Wades would undertake this transaction. A notarized Share Certificate Purchase Contract documented the transaction. Appellant also provided Stock Certificate Nos. 3 and 4, which document the 1% transfer from Bryce to Sally Wade, and a Stock Ledger which recorded the current state of Appellant's ownership as 51% held by Sally Wade. Upon request, Appellant produced its earlier issued stock certificates and ledger from 2005, when the company was initially formed and the ownership was equally divided between Bryce and Sally Wade. The Stock Ledger and the stock certificates appear to be in order, and show that the company was originally owned in equal shares by Bryce and Sally Wade, but that on June 29, 2017, one day before submission of Appellant's offer in the instant case, Bryce Wade transferred a 1% interest to Sally Wade, so that she became Appellant's 51% owner. The Stock Ledger shows there are 100 shares of Appellant, 51 held by Sally Wade and 49 by Bryce Wade, and that Sally Wade

paid \$100 for her additional share. While SBA alleges inaccuracies in the Stock Ledger, it fails to specifically identify any, and I can find none.

The D/GC found it a fatal flaw that Appellant could not produce a cancelled check or other documentation of the actual payment of \$100.00. That a small amount such as this was paid in cash is hardly suspicious, and it was unreasonable for SBA to insist on documentation of the payment itself, when the notarized Share Certificate Purchase Agreement, the stock certificates, and the Stock Ledger all documented the transaction and Sally Wade's ownership interest.

Accordingly, I conclude that the weight of the documentary evidence here establishes that Sally Wade, a woman, owns 51% of Appellant as of June 30, 2017, the day Appellant submitted its offer on this procurement. The D/GC's finding to the contrary was clear error.

2. Control

Another requirement for qualification as a WOSB is that the management and daily business operations of the concern must be controlled by one or more women. This means that both the long-term decision making and the day-to-day management and administration of the firm's business operations must be controlled by one or more women. 13 C.F.R. § 127.202(a). A woman must hold the firm's highest officer position. 13 C.F.R. § 127.202(b).

Appellant argues that Sally Wade is its CEO. The problem is that the Board did not formally create a position of CEO. The Bylaws were never changed to add the position of CEO. The Bylaws clearly state that the President is the corporation's "chief administrative and executive officer". Bryce Wade holds that position. The June 14, 2017 Special Shareholders' Meeting did not change Appellant's Bylaws. Nor did the June 26, 2017 Corporate Meeting. Indeed, the Bylaws were not even mentioned in the minutes of the Special Shareholders' Meeting. It is therefore clear that Appellant's highest officer position is President, and Bryce Wade, not Sally Wade, holds it. The Board may have named Sally Wade as CEO, but it neglected to formally create the position first.

Further, all actions taken on Appellant's behalf were taken by Bryce Wade. Mr. Wade had been head of the corporation for over ten years prior to the Special Shareholders' Meeting. Even after that meeting, when Sally Wade supposedly had taken control of Appellant, Bryce Wade signed Appellant's offer for this procurement. He is listed as Appellant's POC. He executed all binding documents on Appellant's behalf. Bryce Wade even signed Appellant's response to the protest. Bryce Wade is the compensated officer. Sally Wade has drawn distributions as a shareholder, but has not received compensation as an officer. It was Bryce Wade, not Ms. Sally Wade, who communicated with SBA on Appellant's behalf.

Appellant's argument that SBA is discriminating against her because she is a married woman is meritless. SBA is insisting upon the application of the plain language of the regulation, and nothing more.

Bryce Wade, not Sally Wade, holds Appellant's highest officer position, and he appears to manage the concern's day-to-day operations. Accordingly, I conclude that the D/GC did not err in finding Appellant is not controlled by a woman, and therefore, is not an eligible WOSB.²

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).

CHRISTOPHER HOLLEMAN
Administrative Judge

² I note that one or more women must also control a WOSB's Board of Directors. 13 C.F.R. § 127.202(f)(2). Neither SBA nor Appellant addressed that issue here. Indeed, the record fails to identify Appellant's directors at all.