

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

IN THE MATTER OF:

C & E Industrial Service, Inc,

Appellant,

Solicitation No. W911SG18B0008

U.S. Army Mission and Installation
Contracting Command

Fort Bliss, Texas

SBA No. WOSB-112

Decided: April 8, 2019

APPEARANCES

Corina Valles, Vice President, C&E Industrial Service, Inc., Sunland Park, New Mexico,
for Appellant

Edmund Bender, Esq., Office of General Counsel, U.S. Small Business Administration,
Washington, D.C.

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 C&E Industrial Services, Inc. (Appellant) did not meet the Women-Owned Small Business (WOSB) concern eligibility criteria at the time it submitted its offer on a solicitation. Appellant requests the Office of Hearings and Appeals (OHA) reconsider D/GC's determination. For the reasons discussed *infra*, the Appeal is DENIED and D/GC's determination is AFFIRMED.

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 July 21, 2018, the U.S. Army Mission and Installation Contracting Command (MICC) issued Solicitation No. W911SG-18-B-0008, for the rebuild of four parking lots at the White Sands Missile Range in New Mexico. The solicitation was a complete set-aside for WOSB. The Contracting Officer (CO) assigned the solicitation North American Industrial Classification System code 238990, All Other Specialty Trade Contractors.

On September 11, 2018, the CO issued notice to all offerors that Appellant was the apparent awardee. Ideals, Inc., an unsuccessful offeror, filed a size protest with the CO on September 20, 2018. The protest was filed eight business days outside of the filing requirement of five business days and was thus untimely. 13 C.F.R. § 127.603(c)(2). The CO adopted the protest as his own, rendering it timely. 13 C.F.R. § 127.603(c)(3). (Protest File (PF), Ex. 2, pg. 20.)

The size protest alleged Estella Hernandez and Corina Valles do not own Appellant. (PF, Ex. 3, at 5.) The protest noted, according to the System for Award Management (SAM), the owner of Appellant is Isidro Valles, while the titles of the other individuals are listed as “Mrs.” or “Office Manager.” (*Id.*) The protest alleged officer managers and bookkeepers are not qualified as owners of construction firms. (*Id.*)

B. Response to Protest

On October 25, 2018, Appellant was notified by SBA their eligibility as a WOSB for Solicitation No. W911SG18B0008 had been challenged. (Protest File, Ex. 2, page 5.) In the notice, numerous documents were requested. (*Id.*)

On October 29, 2018, Appellant notified SBA they disputed the protest, and argued Appellant was eligible for the award because they met the requirements under FAR 19.1503(b)(3). (PF, Ex. 6, at 1.)

On October 30, 2018, Appellant supplied its By-laws, invoices, time sheets, resumes and passports for its owners, board minutes, stock information, and insurance information. (PF, Ex. 6.) Appellant notified SBA it did not have voting agreements, buy/sell agreements, joint venture information, or any current financial obligations. (PF, Ex. 6, at 3.) The State of New Mexico, Construction Industries Division issued a license to Appellant, with Isidro Valles as the “qualifying person.” (PF, Ex. 6, at 73.)

Appellant's By-laws, adopted on September 15, 2000, provide for four directors of the corporation. (*Id.*, at 16.) The By-laws designate Joe Hernandez as secretary, Estella Hernandez as President, Corina Valles as Vice-President, and Isidro Valles as treasurer. (*Id.*, at 17, 57.) Joe Hernandez, Estella Hernandez, Corina Valles, and Isidro Valles each owned 125 shares of stock in Appellant upon formation of the concern in 2000. (PF, Ex. 6, at 28, 36, 42, and 48.) On January 7, 2004, Appellant issued Estella Hernandez and Corina Valles an additional 5 shares of

stock each. (PF, Ex. 6, at 88-90.) On March 22, 2006, Appellant issued Ms. Hernandez and Ms. Valles another 5 shares each. (*Id.*) After this final issue of stock Ms. Hernandez and Ms. Valles each held 135 shares. In total, Appellant's women shareholders hold 270, or 51.9%, of Appellant's 520 outstanding shares. (*Id.*)

Appellant's By-Laws provide that a majority of shares of the corporation entitled to vote and present at the shareholders' meeting (either in person or by proxy) constitutes a quorum. (*Id.*, at 61.) Any corporate action may be authorized by a majority vote. (*Id.*) The By-laws further state the business and affairs of the corporation would be managed by the Board of Directors. (*Id.*, at 63.) A majority of the directors constitutes a quorum for the transaction of business at Board of Directors meetings. (*Id.*, at 64.) The By-laws provide that any director may be removed with or without cause at any time by the shareholders. (*Id.*, at 55.) The President is the principal executive officer of the corporation and shall supervise and control all the business of the corporation, subject to the control of the Board of Directors. (*Id.*, at 67.)

Appellant also submitted job descriptions for its officers. Estella Hernandez, Appellant's President, is responsible for appointing department heads and assigning/delegating responsibilities, as well as analyzing operations and determining areas where cost reduction or improvement is warranted. (PF, Ex. 6, at 120). Corina Valles, Appellant's Vice President, assists the President in the discharge of her duties and handles the general overview of administrative and field operations and completing monthly and quarterly reporting. (*Id.*) Ms. Valles's duties also include preparing budgets and analyzing financial statements. (*Id.*) Joe Hernandez, Appellant's Secretary, is to perform daily work site inspections and monitor suppliers. (*Id.*) Isidro Valles, Appellant's Treasurer, is responsible for conducting the financial affairs of the corporation as directed by the Board. He reviews financial statements, directs the activities of departments concerned with the production of the company's products, directs administrative activities, prepares staff work schedules, and assigns specific duties. (*Id.*)

Appellant submitted resumes for its four officers. Estella Hernandez's resume describes her as "finance organizer," who oversees "written, oral and e-commerce business," co-manages billing and banking, and assists in handling contracts and legal contingencies, along with employee orientation and recognition. (PF, Ex. 6, at 122.) Ms. Hernandez spent a combined twelve years as a school bus driver and has a commercial driver's license (CDL). (*Id.*)

Ms. Valles's resume describes her experience of being co-owner (with her husband) of a plumbing company for six years where she "played the role of the entire administrative staff" including handling "office and financial responsibilities." (*Id.*) Ms. Valles's resume also noted she co-manages banking, bookkeeping and accounting responsibilities for Appellant. (*Id.*) Ms. Valles also spent several years as a bus driver. (*Id.*)

Isidro Valles's resume describes 28 years of experience in welding, commercial fabrication, construction, plumbing, heating and cooling, and over seventeen years of experience in business ownership, management, and supervision. (PF, Ex. 6, at 124.) He further lists eight years of experience as the owner of a commercial and residential plumbing company. (*Id.*) Mr. Valles lists New Mexico and Texas business licenses, along with other licenses. (*Id.*)

Joe Hernandez's resume describes twenty-five years of industrial construction experience, with ten of those years spent in management and supervision. (PF, Ex. 6, at 125.) The resume specifically includes descriptions of his experience as a supervisor at a machinery and fabricating firm, and a supervisor at a construction company. (*Id.*)

C. Eligibility Determination

On January 31, 2019, the D/GC determined Appellant was not an eligible WOSB for Solicitation No. W911SG18B0008. D/GC found Appellant does not satisfy the eligibility requirements for a Women-Owned Small Business (WOSB) concern set forth in 15 U.S.C. § 637(m) and 13 C.F.R. § 127 *et. seq.* (Eligibility Determination, at 5.) D/GC concluded the record demonstrated that the woman owners lacked the “management and technical expertise” to run the firm and found the firm is managed by Joe Hernandez and Isidro Valles, the husbands of the purported owners, who have decades of managerial and technical experience and expertise and were previous business owners. (*Id.*)

The D/GC noted Appellant provided passports proving both Estella Hernandez and Corina Valles were women and U.S. citizens, satisfying the requirements of 13 C.F.R. § 127.200(b)(2). (*Id.*) The D/GC found Estella Hernandez and Corina Valles each own 25.50% of the outstanding shares in the firm, as evidenced by tax returns and stock certificates, with no conditions imposed on either's ownership interest. (*Id.*) The combined ownership interest of the two women owners is 51%, which meets the ownership requirements of 13 C.F.R. § 127.201(a). (*Id.*) The D/GC further found there was no indication that Ms. Hernandez's and Ms. Valles's ownership interests were subject to any condition that might cause or potentially cause either of their ownership interests to go to another, and thus their ownership was unconditional. (*Id.*, at 3.)

The D/GC focused on whether the management and daily business of the company was controlled by one or more women, which the regulations require of a concern to qualify as a WOSB. (13 C.F.R. § 127.202(a)). The D/GC explained a woman or women must conduct both long-term decision-making and day-to-day management and administration of the company to comply with 13 C.F.R. § 127.202(a). (*Id.*) The D/GC further pointed out SBA regulations (13 C.F.R. § 127.202(b)) require a woman hold the highest officer position in the concern and possess managerial experience necessary to run the concern. (*Id.*) The woman manager need not have the technical expertise or licenses required to control the concern so long as she can demonstrate she has managerial and supervisory control over those who possess the required licenses or expertise. (*Id.*) If a man possesses the required license and has an equity interest, D/GC explained, he may be found to control the concern under 13 C.F.R. § 127.202(b). (*Id.*) Men may be involved in management of the concern, or be a stockholder, but may not exercise actual control or have power to control the concern based on 13 C.F.R. § 127.202(g).

The D/GC found that, based on a review of the Ms. Hernandez's resume, it did “not appear she had the managerial experience to the extent and complexity need to run the concern.” (*Id.*, citing 13 C.F.R. § 127.202(b).) Isidro Valles, however, has twenty-eight years of direct experience in construction, including seventeen years in business ownership, management and supervision, before Appellant was formed. (*Id.*, at 4.) In contrast, Ms. Hernandez had little to no experience in the construction services field prior to Appellant's formation. (*Id.*) Ms. Hernandez

does have several years' experience in performing billing and contract administration. (*Id.*) She earned her CDL, but in all her work experience was not the same type performed by her husband, Joe Hernandez, who had two decades of management experience in construction services before forming Appellant company with his wife. (*Id.*)

The D/GC found Appellant's By-laws listed position descriptions but did not identify who held the positions. (*Id.*) The D/GC found Appellant's By-laws failed to mention the number of directors, chairman of the board, Board members, and the effective date of the By-laws. (*Id.*) While Ms. Hernandez is the majority shareholder and President, the D/GC found she does not appear to control the Board. The D/GC stated it is clear from the record “Joe Hernandez and Isidro Valles carry out the day-to-day operations of managing a complex and highly technical construction business.” (*Id.*) Further, “[i]t does not appear from the record that Estella Hernandez has the skill, knowledge, or experience to oversee [Appellant's] complex projects. She does not have the experience to put together the bids or manage the projects that are awarded.” (*Id.*) The D/GC concluded it appeared Ms. Hernandez has a limited role as manager of the core aspects of the business, and because this lack of managerial experience, “it is reasonable to assume that day-to-day management duties are performed by Joe Hernandez and Isidro Valles in violation of 13 C.F.R. § 127.202(g).” (*Id.*)

D/GC found that while Appellant provided information purporting to show that Ms. Hernandez and Ms. Valles have the power to control the firm, the evidence demonstrates they do not have the management capability and technical expertise to manage the firm and neither is managing day to day operations. Rather, Appellant's day to day management is overseen by Joe Hernandez and Isidro Valles, who each have two decades of “industry technical and management experience in technical services.” (*Id.*)

The D/GC also emphasizes that Appellant's By-laws provide for four Directors with equal voting rights, contrary to the requirements of 13 C.F.R. § 127.202(f)(2). (*Id.*) Appellant's amended By-laws allow for the breaking of deadlocks by the majority vote of the shareholders, and the removal and replacement of Directors by a simple majority. (*Id.*) The D/GC found those provisions for overcoming deadlock did not meet SBA's requirements and thus a woman does not control the Board of Directors. (*Id.*)

D/GC emphasized that while Appellant's corporate documents identify Ms. Hernandez as President, the highest officer position, that position is “merely illusory” and the business appears to be run by Joe Hernandez and Isidro Valles. (*Id.*) The D/GC concluded “one or more women do not conduct the daily business operations and long-term decision-making of [Appellant] and as such Appellant does not meet the control requirement of 13 C.F.R. § 127.202 and is therefore not an eligible WOSB concern. (*Id.*)

D. Appeal

On February 6, 2019, Appellant filed a timely appeal with OHA, asserting it did not agree with D/GC's conclusion and disputing D/GC's findings.

First, Appellant notes SAM identifies Isidro Valles as owner and CFO and the point of contract for field operations for government projects but argues this does not establish Mr. Valles is Appellant's sole or main owner. (Appeal, at 1.)

Appellant next addresses D/GC's conclusions regarding eligibility and control. (*Id.*) Appellant points out that a woman manager need not have the technical expertise or license required to run the business if she can demonstrate she has control over those who do. (*Id.*) Appellant argues that despite D/GC's conclusion Estella Hernandez had little to no experience in the construction service field before establishing Appellant company, Estella Hernandez and Corina Valles ran Appellant as a successful business for over 18 years. (*Id.*) Appellant pointed out Ms. Valles has managerial experience from running her own plumbing business before forming Appellant. (*Id.*) Appellant argues Ms. Hernandez does more than bookkeeping, as D/GC concluded, and she has acquired skills and knowledge over 18 years of running Appellant's business operations. (*Id.*)

Appellant further contends the two women owners are responsible for “upper management decision making” and day-to-day operations and administrative functions of Appellant. (*Id.*) Appellant argues the women owners oversee department heads, including Accounting, Estimating, Human Resources, Quality Control, and Safety. (*Id.*) Appellant argues that by overseeing those departments, Ms. Hernandez and Ms. Valles “administer the profit and loss margins and forecast their business needs accordingly by developing the proper strategies to increase revenue and efficiency.” (*Id.*, at 1-2.)

With its appeal, Appellant submitted new evidence. This includes Ms. Hernandez's resume, a certificate of completion showing Ms. Hernandez completed a Strategic Planning Course, Ms. Valles's resume, a filed management chart for the firm, an organizational chart from the firm, and two letters from a CPA and an insurance firm attesting to Appellant's ownership, and reputation in the industry. These items were not presented to SBA when D/GC reviewed the protest.

E. SBA's Response

SBA responded to the appeal, requesting D/GC's determination be affirmed, and objecting to the admission of Appellant's new evidence. (SBA Response, at 1-2)

First, SBA argues OHA may not admit evidence beyond the written protest file in WOSB appeals. (*Id.*, at 3, citing 13 C.F.R. § 134.712.) Appellant attempted to submit evidence outside the written protest file, SBA contends, including updated resumes, management charts, letters from associates, and a certificate for management training. (*Id.*) SBA insists since these documents were not provided to D/GC at the time of the determination they should not be admitted as evidence nor considered in the appeal. (*Id.*)

Turning to the merits, SBA argues D/GC did not make an error of law or fact, and the determination should be affirmed as D/GC correctly concluded Estella Hernandez and Corina Valles do not control Appellant and Appellant is thus not an eligible WOSB. (*Id.*, at 5.) SBA explained 13 C.F.R. § 127.202 requires one or more women control the management and daily

business operations of the WOSB, hold the highest officer position, and control the board of directors. (*Id.*, at 3.)

SBA relies on 13 C.F.R. § 127.202(b), which requires the woman owner to have “managerial experience of the extent and complexity to run the concern.” (*Id.*) The D/GC's review of Estella Hernandez and Corina Valles's resumes did not indicate either had the managerial experience required by SBA regulations. (*Id.*, at 4.) SBA contends Ms. Hernandez had prior experience as a bus driver for a charter school and her experience as Appellant's President was limited to financial duties. (*Id.*) Ms. Valles lacks experience in the construction energy and spent twelve years prior to forming Appellant as a bus driver, and her duties as Vice President of Appellant are primarily financial in nature. (*Id.*) In contrast, Joe Hernandez and Isidro Valles have decades of direct experience in construction services, including, prior to Appellant's formation, seventeen years of business ownership, management and supervision. (*Id.*) For this reason, SBA argues, it was reasonable for the D/GC to conclude Ms. Hernandez and Ms. Valles do not have the management capability and technical expertise to manage the firm, and Mr. Hernandez and Mr. Valles oversee the day to day management of the firm based on their experience in construction services. (*Id.*)

SBA also contends D/GC's conclusion that Estella Hernandez and Corina Valles did not control Appellant under 13 C.F.R. § 127.202(f) was reasonable. (*Id.*) SBA noted Appellant's By-laws state the corporation has four directors with equal voting rights, Estella Hernandez, Corina Valles, Joe Hernandez, and Isidro Valles. (*Id.*) The amended By-laws allow for the removal and replacement of Directors by a simple majority. (*Id.*) SBA explained the regulations require that one or more women own at least 51 percent of voting stock and have the percentage of voting stock necessary to overcome any super majority voting requirements. (*Id.*, citing 13 C.F.R. § 127.202(f).)

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). OHA will disturb the D/GC's determination only if the judge has 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; *In the Matter of Yard Masters, Inc.*, SBA No. WOSB-109 (2017), at 6. Accordingly, I must EXCLUDE from the record Appellant's proffered new evidence.

B. Analysis

The eligibility requirements for a concern which seeks to qualify as a woman-owned small business are found at 13 C.F.R. § 127.200(b). First, the business must be a small business

as defined by the regulations at 13 C.F.R. Part 121, and the concern must be “[n]ot 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)(1)-(2).

Here, the D/GC did not take issue with Appellant's size. Further, both Ms. Hernandez and Ms. Valles produced passports demonstrating they were both women and U.S. citizens. The D/GC found Mrs. Hernandez directly owned 25.5% of Appellant, and Mrs. Valles directly owned 25.5% of Appellant. Appellant is thus 51% owned by women, as required by 13 C.F.R. § 127.201(a). There was no indication Ms. Hernandez and Ms. Valles's ownership interests are anything other than direct and unconditional. 13 C.F.R. § 127.201(a)-(b).¹ I find no error in D/GC's conclusions regarding direct and unconditional ownership.

The D/GC's key finding was that Appellant was not an eligible WOSB hinged on the control requirements set out in 13 C.F.R. § 127.202. The applicable regulation states that to qualify as a WOSB, the management and daily operations of a concern must be controlled by one or more women. 13 C.F.R. § 127.202(a). The regulation further details the requirements of control. A woman must hold the highest officer position in the company and “must have managerial experience of the extent and complexity needed to run the concern.” 13 C.F.R. § 127.202(b). The regulation further explains the woman manager “need not have the technical expertise or possess the required license to be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.” (*Id.*) The regulation further provides that if a man possesses the required license and has equity interest in the company, he may be found to control the company. (*Id.*)

Estella Hernandez is the President of the concern, so a woman holds the highest position in the concern as required by 13 C.F.R. § 127.202(b). The issue, however, is whether Ms. Hernandez and Ms. Valles have the managerial experience and technical expertise necessary to run Appellant. The four factors for determining whether a disadvantaged individual for an SBA program possesses “managerial or technical experience and competency” to control the applicant concern are “(1) the characteristics of the applicant concern; (2) the disadvantaged individual's education and employment history, including supervisory experience, as opposed to that of the non-disadvantaged individuals involved in the firm's management; (3) the disadvantaged individual's role at the applicant concern; and (4) the extent of non-disadvantaged individuals' involvement in the operations of the applicant concern.” *In the Matter of Potomac Wave Consulting, Inc.*, SBA No. EDWOSB-104, at note 3 (2014) citing *Matter of V&M Precision Machining & Grinding*, SBA No. SDBA-153 (2002).

¹ SBA regulations require both unconditional and direct ownership of at least 51% of the concern by one or more women. 13 C.F.R. § 127.201; *In the Matter of Yard Masters, Inc.*, SBA No. WOSB-109 (2017). OHA has explained that unconditional ownership means the qualifying woman must have an ownership interest not subject to arrangements that could potentially cause ownership to go to another. *In the Matter of Crystal Clear Technologies, Inc.*, SBA No. WOSB-108 (2016). Direct ownership means a woman owns the stock directly, not through another entity or trust. (*Id.*)

For the first element, I find, as the D/GC concluded, the concern is in the business of construction services. Next, the education, employment history, and supervisory experience of the women owners, Ms. Hernandez and Ms. Valles, should be considered in comparison with those non-disadvantaged officers or managers, namely Mr. Hernandez and Mr. Valles. Ms. Hernandez has experience in transportation and possesses a CDL, and Ms. Valles similarly has experience in the transportation field. Both women list financial and administrative duties performed at Appellant. In comparison Mr. Hernandez and Mr. Valles both have decades of experience in construction management and supervision. This is not to say Ms. Hernandez and Ms. Valles do not have managerial experience, but rather, they do not have significant managerial experience and technical expertise in the construction services field, particularly in comparison to the two male shareholders.

Here, Ms. Hernandez and Mrs. Valles have more limited experience in the construction field, while Mr. Hernandez and Mr. Valles have extensive experience, far more than Ms. Hernandez and Ms. Valles. I therefore find the D/GC was correct in concluding the women owners lacked the adequate managerial experience and expertise to run the concern. While Ms. Hernandez and Ms. Valles do perform administrative and financial tasks, they must also participate in the long-term decision making and day-to-day management to be found to be in control of the company. A significant part of the day-to-day management, the field operations, are run by Mr. Hernandez and Mr. Valles. Moreover, the business license for Appellant lists Mr. Valles as the qualifying individual. There is no indication that either Ms. Hernandez or Ms. Valles has supervisory control over the individual who holds the important business license, Mr. Valles, or over those with technical expertise, Mr. Hernandez and Mr. Valles. I find D/GC did not err in concluding Appellant's woman owners lacked the managerial experience and technical expertise to run the concern, and as such, Appellant was ineligible for the WOSB program.

However, I find that the D/GC erred in finding that Appellant fails to meet the requirement of the WOSB regulations that in the case of a corporation, one or more women must control the Board of Directors. 13 C.F.R. § 127.202(f). The regulation gives two ways for women to be found to be in control of the Board. First, women must comprise the majority of directors through actual numbers or weighted voting. 13 C.F.R. § 127.202(f)(2). Alternatively, one or more women must own at least 51% of all voting stock, be on the Board, and have the percentage of voting stock necessary to overcome any supermajority voting requirements. 13 C.F.R. § 127.202(f)(1). Appellant's amended By-laws provide for four Directors, two of whom are men, and two are women. Appellant's amended By-laws allow for the breaking of deadlocks by the majority vote of the shareholders, and the removal and replacement of Directors by a simple majority. Ms. Hernandez and Ms. Valles together own 51% of Appellant's stock, are on the Board, and have the power to remove and replace Directors. Accordingly, Appellant meets the test for women to control its Board under 13 C.F.R. § 127.202(f)(1), and the D/GC erred in concluding it did not.

Nevertheless, I conclude the D/GC did not err in finding the women shareholders lacked the necessary managerial experience and expertise to run the concern, and therefore Appellant is not an eligible WOSB.

IV. Conclusion

For the above reasons, D/GC's determination is AFFIRMED and the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.227(b)(5).

CHRISTOPHER HOLLEMAN
Administrative Judge