

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

IN THE MATTER OF:

Joint Information Network,

Appellant,

Solicitation No. N66001-17-R-0029

U.S. Navy
Naval Information War Center

SBA No. WOSB-113

Decided: April 7, 2021

APPEARANCE

Jihong Jin, President, Joint Information Network, San Diego, California, for Appellant

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 Joint Information Network (Appellant) did not meet the Women-Owned Small Business (WOSB) concern eligibility criteria at the time it submitted its offer on the subject 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 the 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

On December 1, 2016, the U.S. Navy Naval Information Warfare Center (NIWC) issued Solicitation No. N66001-17-R-0029 (RFP) for continued software engineering and database services in support of SSC Pacific in Integrating the SSC Atlantic Contracting Data Base with the SSC Pacific Contracting Data Base. The solicitation was awarded directly to a WOSB on a

sole source basis. The Contracting Officer (CO) assigned the solicitation under North American Industrial Classification System code 541512, Computer Systems Design Services, with a corresponding \$30 million annual receipts size standard. Appellant submitted its offer in response to the RFP on December 16, 2016. On January 23, 2017, the CO awarded the sole source contract to Appellant. The contract period of performance expired on April 17, 2020, however, the contract is not closed and a final voucher has not been paid. (CO Memorandum, at 1.)

B. Protest

On October 10, 2020, the CO initiated a protest of Appellant's WOSB status, arguing the concern is not at least 51% owned and controlled by one or more women who are United States citizens. The CO contends Appellant improperly misrepresented its WOSB status at the time of offer and throughout the entire performance of the contract. (Protest File, Ex. 2, page 2.)

The CO relies on “Red Flags Concerning a NIWC Pacific Contractor's Self-Certification as a Woman-Owned Small Business (WOSB) and Eligibility for Its Sole-Source Award,” (IG Report) authored by the NIWC Office of Inspector General (OIG). According to the IG Report, Dr. Yanhe Jin, a male, formed Appellant as a sole proprietorship in 2001. (*Id.*, at 2.) In March 2016, Appellant filed a Fictitious Business Statement showing Dr. Jin and his daughter, Ms. Jihong Jin, as partners of Appellant. In June 2016, Ms. Jin certified Appellant as a WOSB and signed as President of Appellant in the System for Award Management (SAM). (*Id.*, at 3.)

Appellant's original Partnership Agreement (PA1), dated March 20, 2016, appeared inconsistent with Appellant's business practices, as it indicated the purpose of the partnership was real property ownership, and management, where a supermajority would consist of at least five partners. (*Id.*) However, Appellant is not a real estate firm and the only partners are Dr. and Ms. Jin. Further, PA1 indicated the capital contributions of the firm were 60% from Ms. Jin and 40% from Dr. Jin, where Ms. Jin confirmed with the OIG she made zero contributions to the partnership. (*Id.*) On or about April 10, 2019, Appellant executed an Amended Partnership Agreement (PA2) that retained the real property language, changed the capital contributions to 51% from Ms. Jin and 49% from Dr. Jin. However, Ms. Jin stated she made no capital contributions to the partnership and the partnership agreement was “just paper.” (*Id.*, at 4.) Based on its findings, the Navy OIG recommended the CO file a status protest with SBA.

C. Response to Protest

On February 1, 2021, Appellant was notified by SBA their eligibility as a WOSB for Solicitation No. N66001-17-R-0029 had been challenged. (Protest File (PF), Ex. 3, page 1.) SBA's notice included a request for Appellant's partnership documents. (*Id.*)

In response to the protest, Appellant supplied its tax information, an explanation in lieu of full-time devotion letter, an explanation in lieu of meeting minutes, an explanation in lieu of separate voting agreement, a capability statement, a fictitious business statement, a copy of PA1, a copy of PA2, a copy of Ms. Jin's passport, and a copy of Ms. Jin's resume. (PF, Ex. 5.)

On March 20, 2016, Appellant executed PA1. The agreement provides that Ms. Jihong Jin is 60% owner of Appellant and Dr. Yanhe Jin is 40% owner of Appellant. The agreement also states:

In the general conduct of the Partnership business, all the Partners shall be consulted and the advice and opinions of the Partners shall be obtained so much as is practicable. However, for the purpose of fixing and harmonizing the policies and practices of the Partnership and of securing uniformity and continuity in the conduct of its business, the general management of the Partnership business shall rest solely in the Managing Partners. The Managing Partners shall be: Jihong Jin, 5954 Oceanview Ridge LN, San Diego, CA 92121 (President). Yanhe Jin, 5954 Oceanview Ridge LN, San Diego, CA 92121 (Vice President).

...

Except as otherwise provided herein, no Partner shall make any contract for and on behalf of the Partnership without the prior approval of the other Partners. All contracts shall be made in the name of the Partnership and in the case of any disagreement as to the making of any contract or assumption of any obligation by the Partnership, such contract or obligation shall not be made or executed except as directed by a supermajority of the Partners; further, no Partner shall release nor cancel any indebtedness or obligation due the Partnership, except on full payment thereof, or upon the mutual agreement of all the Partners, nor shall any Partner give, extend, or guarantee credit to or for any person, firm, corporation without the consent of all the Partners, nor at any time shall any Partner sign the firm name nor pledge the firm's credit nor in any other manner act as surety or guarantor in any paper, bill, bond, note, or draft or other obligation whatsoever, nor assign pledge, mortgage, sell or otherwise dispose of, any Partnership property or any interest therein or do anything or permit any act whereby the Partnership's money, interest, or property or its interest therein, may be liable to seizure, attachment, or execution, except upon mutual consent of all the Partners.

(*Id.*) On April 10, 2019, Appellant executed PA2, though the first paragraph of the agreement states, "THIS AGREEMENT is made and entered into at San Diego, California, this 20th day of March, 2016..." This agreement provides that Ms. Jihong Jin is 51% owner and the sole Managing Partner of Appellant, and Dr. Yanhe Jin is 49% owner of Appellant. (*Id.*)

D. Eligibility Determination

On February 19, 2021, the D/GC determined Appellant was not an eligible WOSB for Solicitation No. N66001-17-R-0029. The D/GC found Appellant does not satisfy the eligibility requirements for a Women-Owned Small Business (WOSB) concern set forth in 13 C.F.R. §§ 127.200 — 127.202. (Eligibility Determination, at 5.) The D/GC concluded it is unclear that a woman controlled all decisions of Appellant at the time of self-certification, solicitation, and award/performance of the contract. (*Id.*)

In the determination, the D/GC found that Appellant does meet the requirements of ownership under 13 C.F.R. § 127.201, because Ms. Jin unconditionally owns at least 51% of Appellant. (*Id.*, at 4.)

The D/GC then turned to the requirement in 13 C.F.R. § 127.202 that Appellant be controlled by one or more women. In reviewing PA1, the D/GC found that Ms. Jin did not control Appellant at the time of offer “because the partnership agreement vests general management with both Managing Partners.” (*Id.*, at 4-5.) The D/GC then examined PA2 executed in 2019 and found that Ms. Jin shared control of the firm until she was appointed the sole Managing Partner in 2019 under PA2, which occurred after the time Appellant submitted its offer on the subject solicitation. (*Id.*, at 5.) Thus, the D/GC determined that Appellant does not meet the eligibility requirements to qualify for the WOSB Program and may not continue to represent itself as a WOSB concern eligible under the WOSB Program in SAM.

E. Appeal

On March 8, 2021, Appellant filed a timely appeal with OHA, asserting it did not agree with the D/GC's conclusion and disputing D/GC's findings.

First, Appellant argues during the self-certification, solicitation, award, and throughout the performance of the contract, Appellant represented itself as a WOSB in good faith. (Appeal, at 8.) Appellant stated, “we believed that Jihong having at least 51% ownership and the highest position in the company (President) was sufficient to indicate absolute control.” (*Id.*) Appellant explains that it understood that Dr. Yanhe Jin being listed as a Managing Partner was allowable “as long as the final decision authority lay in the hands of Jihong Jin.” (*Id.*) Appellant states Ms. Jin has been the only individual managing the concern's daily operations and business decisions.

Appellant recertified its WOSB status in SAM every year following its initial self-certification in 2016 and upon learning of the points of ambiguity regarding the control of Appellant previously raised by SBA, the partnership agreement was amended and revised. (*Id.*, at 9.) When Appellant did not receive any additional notices regarding its WOSB status, the concern assumed the reasons for the proposed ineligibility had been resolved and continued to perform under the contract. (*Id.*)

Appellant argues it amended the language in the partnership agreement to identify Ms. Jihong Jin as having sole control over the concern in its 2019 amendment.

Appellant notes that the CO lodged this protest after the contract was completed and after the concern ceased business operations on October 8, 2020. Appellant contends the underlying protest is untimely and questions why the CO lodged the protest to SBA nearly four years after Appellant received the contract award. (*Id.*, at 10.)

III. Discussion

A. Standard of Review

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.

B. Discussion¹

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. The D/GC also concluded that Appellant is 51% owned by Ms. Jihong Jin, a woman, as required by 13 C.F.R. § 127.201(a). There was no indication Ms. Jin's ownership interest is anything other than direct and unconditional. 13 C.F.R. § 127.201(a)-(b).² I find no error in the D/GC's conclusions regarding direct and unconditional ownership.

The D/GC's key finding that Appellant was not an eligible WOSB hinged on the control requirements set out in 13 C.F.R. § 127.202. The applicable regulation requires 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). In a partnership, one or more women must serve as general

¹ It is worth noting that the CO filed his protest on October 2, 2020, but SBA failed to notify Appellant of the protest and request a response until February 1, 2021, and did not issue the D/GC's determination until February 19, 2021. PF, Exs. 1,2,3. The regulation requires SBA to notify a protested concern of a protest within five business days from the date of the notice of the protest (13 C.F.R. § 127.604(c)(1)) and issue a determination within 15 business days (13 C.F.R. § 127.604(d)). While SBA's failure to comply with the procedural regulation here does not constitute reversible error, it does show the Agency as lacking the rigor in following its own regulations it expects the small businesses which are the objects of its assistance, and who can be harmed by excessive delays, to have.

² 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.*)

partners with control over all partnership decisions. 13 C.F.R. § 127.202(d). Men may be involved in the management of the subject concern, but no male may exercise actual control or have the power to control the concern. 13 C.F.R. § 127.202(g).

PA1, the initial partnership agreement in place at the time Appellant submitted its offer in response to the subject procurement, identifies both Ms. Jihong Jin and Dr. Yanhe Jin as Appellant's Managing Partners. This required both Dr. Jin's and Ms. Jin's approval for all of Appellant's business decisions. Under PA1, Ms. Jin could not make any contract for and on behalf of Appellant; could not cancel any indebtedness or obligation due to Appellant; could not give, extend, or guarantee credit to or for any person, firm, corporation; could not sign the firm name nor pledge the firm's credit nor in any other manner act as surety or guarantor in any paper, bill, bond, note or draft or other obligations; could not assign, pledge, mortgage, sell or otherwise dispose of any Partnership property or any interest therein or do anything or permit any act whereby the Partnership's money, interest, or property or its interest may be liable to seizure, attachment, or execution without the consent of Dr. Yanhe Jin, a male. (PF, Exhibit 5, PA1 at ¶ 8).

Appellant contends the fact Ms. Jihong Jin was at least a 51% owner of Appellant and held the highest position in the concern was sufficient to establish ownership and control to meet the eligibility requirements under 13 C.F.R. § 127.200. However, Dr. Yanhe Jin legally had the power to control Appellant, as PA1 required the assent of both Managing Partners of the firm for all business decisions. Appellant argues, upon learning of the discrepancy between control of the concern under PA1, and the requirements of SBA's regulation, it promptly revised its Partnership Agreement to reflect that Ms. Jihong Jin possessed sole control in Appellant as its only Managing Partner. However, at the time Appellant submitted its offer in response to the subject procurement on December 16, 2016 and until April 10, 2019, Dr. Yanhe Jin had the power to control Appellant, which the regulations explicitly prohibit. *See* 13 C.F.R. § 127.202(g). Thus, Appellant did not meet the eligibility requirements as a WOSB concern at the time the concern submitted its offer, when it was awarded the contract, and for much of the duration of contract performance. Therefore, I conclude Appellant has failed to establish any error of fact or law in the D/GC's determination, and that I must affirm it.³

I must note, however, that the effect of the D/GC's determination and my decision here⁴ may not apply to the instant procurement. The regulations provide guidance to contracting officers on how to proceed once a determination has been issued on a concern's WOSB status,

³ If Appellant believes in good faith that it has cured the reasons for its ineligibility, it may request an examination under the procedures at 13 C.F.R. § 127.405. 13 C.F.R. § 127.604(f)(4).

⁴ OHA's rule on WOSB appeals is consistent with the rule on WOSB protests in stating that, “[i]f OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders.” 13 C.F.R. § 134.704.

yet none of the scenarios presented apply here. Once the D/GC has made its determination that a concern is not a WOSB:

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders.

13 C.F.R. § 127.604(f)(2). According to the protest, the contract expired on April 17, 2020, nearly six months before the protest was lodged, but the contract is not closed and a final voucher has not been paid. Thus, it is unclear if the instant procurement can, at this point, be affected by Appellant's WOSB status, or lack thereof, because Appellant was awarded the contract and Appellant fully performed the contract prior to the CO's filing the protest.

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