



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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DISMISSED FOR LACK OF JURISDICTION: February 11, 2014

CBCA 3359

WESTERN STATES FEDERAL CONTRACTING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jose A. Perea, Jr., Managing Member of Western States Federal Contracting, LLC, Peoria, AZ, appearing for Appellant.

Stephen F. Butera, Office of Regional Counsel, Department of Veterans Affairs, Clarksburg, WV, counsel for Respondent.

Before Board Judges **McCANN**, **SHERIDAN**, and **KULLBERG**.

**SHERIDAN**, Board Judge.

This matter is before the Civilian Board of Contract Appeals (CBCA) on motions by respondent, Department of Veterans Affairs (VA or Government), to dismiss the appeal of Western States Federal Contracting, LLC (Western States). Western States is a Delaware limited liability company (LLC), doing business as a foreign LLC in the state of Arizona. We find that we lack jurisdiction to entertain this appeal because Western States has failed to prove that it is an LLC in good standing in Delaware, the state in which it was organized.

### Background

On September 30, 2009, Western States entered into contract VA258-C-0320 with the VA for, among other things, the alteration and expansion of the fire alarm and sprinkler system at the VA Medical Center, Phoenix, Arizona. Western States was a Delaware LLC, doing business as a foreign LLC in the state of Arizona. On April 26, 2012, Western States submitted a claim to a VA contracting officer alleging 699 days of VA-caused delay and seeking \$461,706.01 in damages for extended home office overhead and \$299,146 in other delay damages. When a timely final decision was not forthcoming, Western States appealed this matter to the Board on April 29, 2013, as a deemed denial.

Mr. Jose A. Perea. filed a notice of appearance on behalf of Western States. Shortly thereafter, respondent filed a motion to strike the appearance of Mr. Perea. In its motion, the Government alleged that Mr. Perea had not proven that he met the Board's requirements for representation of the LLC and that, even if Mr. Perea could represent the LLC before the Board, the LLC needed to be in good standing in its state of formation, Delaware, in order to maintain this action. The VA argued that an LLC that is not in good standing "may not maintain any action, suit or proceeding in any court . . . until such domestic LLC . . . has been restored and has the status of a domestic limited liability company . . . in good standing." Del. Code Ann. tit. 6, § 18-1107(l) (2012).

Thereafter, Mr. Perea submitted a revised notice of appearance. Attached to the revised notice, Mr. Perea included a document that indicated that "this limited liability company is in good standing in Arizona." The VA responded, arguing that Western States should provide proof that it was in good standing in Delaware, its state of formation.

On May 29, 2013, the Board issued an order directing appellant to provide Western States' articles of organization in Delaware and proof of its status in both Delaware and Arizona. Appellant responded on June 5, 2013, by attaching a document from the Delaware Department of State Division of Corporations identifying Western States as a Delaware LLC. The document also stated that Western States had ceased to be in good standing on June 1, 2012, and had an outstanding franchise tax liability of \$981.

After receiving Western States' filing (which did not address its *current* standing in both Delaware and Arizona), the Board conducted a telephone conference on June 11, 2013, which was memorialized by an order issued that same day. During the conference, the VA indicated it would be filing a motion arguing that the appeal should be dismissed because Western States was not in good standing in Delaware when the appeal was made to the Board. The Board's order directed appellant to provide, by no later than June 17, 2013,

proof of Western States' good standing that was previously demanded in the Board's order of May 29, 2013.

On June 17, 2013, Western States, by Mr. Perea, submitted a statement that did not fully address the concerns raised in the May 29 order. Soon thereafter, the VA filed a motion to dismiss. The VA reiterated the arguments it made in its motion to strike Mr. Perea's appearance, essentially that Western States lacked standing to maintain this appeal. Appellant's response to the VA's motion did not address the LLC's standing in Delaware.

On October 24, 2013, the Board held another telephone conference to discuss the issues raised by the Government's motion to dismiss. The presiding judge explained that she saw several potential problems that needed to be resolved prior to moving forward with the appeal. The overriding issue was that Western States had not provided the Board with evidence of its good standing in Delaware. The undersigned explained that Western States' ability to maintain an action before the Board is determined by the laws of the state under which it was organized, which require it to be in good standing. The presiding judge also noted that there were steps a not-in-good-standing LLC could take to revive the LLC, and that if the LLC was revived, for purposes of this action, it would be as if the LLC had consistently remained in good standing.

Mr. Perea indicated during the telephone conference that he intended to pay the LLC's overdue taxes so as to bring the LLC into good standing in Delaware. Following the conference, the Board reiterated in an order issued the same day that the next crucial step for appellant to take on the standing issue was to file, by no later than November 15, 2013, an affidavit establishing Western States' good standing in Delaware. Appellant was also ordered to provide a certificate of good standing issued by the Delaware Secretary of State. The order warned that, if such affidavit was not timely produced, the appeal would be dismissed.

On November 15, 2013, Mr. Perea filed an affidavit addressing several issues raised during the October 24 telephone conference, but not proof of Western States' current standing in Delaware. Mr. Perea moved for an extension of time to file the Delaware certificate of good standing. The Board granted appellant's request for an extension until November 26, 2013.

After receiving no further submissions or correspondence from Western States, the Board issued an order on December 2, 2013, directing appellant to show cause by December 6, 2013, why this appeal should not be dismissed for failure to prosecute. Western States failed to respond to the Board's show cause order.

A second show cause order was issued on January 22, 2014, ordering appellant to show cause by January 29, 2014, why the appeal should not be dismissed for lack of jurisdiction or failure to prosecute. The order warned appellant that, “for the Board to have jurisdiction to address this dispute, appellant must establish that it is an LLC in good standing in Delaware, the state of its organization.” Western States has failed to respond to this order.

### Discussion

Standing is determined at the commencement of an action. *Rothe Development Corp. v. Department of Defense*, 413 F.3d 1327, 1334 (Fed. Cir. 2005). A limited liability entity’s capacity to maintain an action before the Board is determined by the laws of the state under which that entity was organized. *See TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630 (discussing the ability of a corporation to maintain an action at the Board); *see also* Fed. R. Civ. P. 17(b). As corporations and LLCs are both creatures of the state with state-given limited liability, the reasoning contained in *TAS Group* applies equally to LLCs and this case. Accordingly, the applicable law concerning appellant’s standing is the law of the State of Delaware.

In order to maintain this action and for the Board to have jurisdiction over this case, Western States needs to be an LLC in good standing in Delaware, its state of formation. *See* Del. Code Ann. tit. 6, § 18-1107(1); *Summit Commerce Pointe, LLC v. General Services Administration*, CBCA 2652, et al., 13 BCA ¶ 35,370 (dismissing case for lack of jurisdiction because appellant lacked standing to prosecute its appeal). An LLC that is not in good standing in Delaware can revive itself, bringing itself back into good standing, “with the same force and effect as if its certificate of formation had not been canceled pursuant to [Delaware law],” provided the deficiencies that caused the entity’s not-in-good-standing status are corrected. § 18-1109(c). This Board does not hastily dismiss an action when a limited liability entity lacks good standing in its state of formation. Rather, the proper course of action is to allow the appellant time to obtain good standing status. *See Systems Integration & Management v. General Services Administration*, CBCA 1512, et al., 13 BCA ¶ 35,417; *Allied Production Management, Inc.*, DOT BCA 2466, 92-1 BCA ¶ 24,585 (1991). In *Systems Integration*, the Board allowed for the revival of a Delaware corporation, using similar statutory authority and reasoning, in order to allow the contractor to maintain its action at the Board and for the case to proceed on the merits. Delaware’s corporation revival statute, Del. Code Ann. tit. 8, § 312(b), is similar to the state’s LLC statute in that each provides for revival of limited liability entities.

Western States’ proffer, made on June 5, 2013, indicates that it ceased to be in good standing in Delaware in June 2012. Thus, Western States was not in good standing when it

filed its appeal in April 2013. Further, after having been given ample opportunity to prove that it is an LLC in good standing in Delaware, Western States has failed to make this showing. Accordingly we lack the jurisdiction to consider this matter.

Decision

This appeal is **DISMISSED FOR LACK OF JURISDICTION.**

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PATRICIA J. SHERIDAN  
Board Judge

We concur:

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R. ANTHONY McCANN  
Board Judge

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H. CHUCK KULLBERG  
Board Judge