

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

DNS-RUS Docket No. 07-0107

In re: RURAL UTILITIES SERVICE
7 C.F.R. § 3017.870 ACTION AGAINST
BLUE MOON SOLUTIONS, INC.,
MARTY HALE, and
CHRISTONYA HILL,

Appellants/Petitioners

DECISION AND ORDER

This is an appeal of an April 12, 2007 determination by James M. Andrew, the Administrator of the Rural Utilities Service, (hereafter “RUS”), to debar the Appellants/Petitioners Blue Moon Solutions, Inc., (hereafter “Blue Moon”), Marty Hale, and Christonya Hill (hereafter collectively the “Appellants”) for a period of five years, the five year period being reduced by a credit for a period of suspension, through November 8, 2010. The Petition for Review was timely filed with the Hearing Clerks Office on May 11, 2007 and the Brief of the Rural Utilities Service was filed on May 24, 2007.¹

¹ The April 12, 2007 Determination indicates that it is based upon “all evidence in the record relating to Blue Moon and the Grants, including the Respondents’ Letter, the ALJ Decision, the NAD Appeal Determination, and the NAD Director Review Determination.” Determination, page 3. The Determination also makes reference to over 6,000 pages from the NAD and ALJ proceedings. While the full 6,000+ pages have not been filed in this action, the final decisions of those proceedings are included and provide sufficient basis for review of the debarment under the regulations.

As part of a pilot grant program to provide broadband rural transmission service in rural America, RUS established the Community Connect Program in 2002. This program made \$20 million in grants available through a national competition to applicants proposing to provide broadband transmission services on a “Community-Oriented Connectivity” basis to un-served areas targeting small, rural and economically challenged communities.² On July 8, 2002, RUS published a Notice of Funds Availability (NOFA) in the Federal Register.³ Blue Moon submitted grant applications to deploy broadband services in seven rural communities located along the Rio Grande in Texas, including Falcon lakes Estates, San Ygnacio, Batesville, La Pryor, Progresso, Zapata, and Crystal City, supplying RUS with a project narrative, which provided a general overview and budget for each of the proposed projects, including a description of each phase of the project, and the cost and type of services Blue Moon would be providing.⁴

Beginning on May 16, 2003 and continuing through September 24, 2003, the Administrator of RUS notified Blue Moon by separate award letter for each of the applications that the seven Community-Oriented Connectivity Grants had been approved in an aggregate amount of \$2,698,272.00. Between August 5, 2003 and September 24, 2003, RUS mailed to Blue Moon the Grant Agreements for each of the awards, together with instructions on how to execute the agreements, a supply of the forms used to request

² The program was intended to provide a way to connect broadband services to schools, libraries, education centers, health care providers, law enforcement agencies and public safety organizations and to make the services available to residents and businesses in communities where no broadband services exist. Under the concept, small rural communities would be given a chance to benefit from advanced technologies necessary to foster economic growth, provide quality education and health care opportunities, and to increase and enhance public safety efforts by bridging the technological gap between large, metropolitan areas and rural America.

³ 67 Fed. Reg. 45079-45083.

⁴ The Appellant’s proposals provided that Blue Moon would deploy basic broadband transmission services to each location in all critical community facilities located within the proposed area free-of-charge for at least two years and would further provide basic broadband transmission service to all residential and business users free-of-charge for at least two years.

advances or reimbursements (Standard Form 270, hereafter SF270) and the instructions for completing those forms.

Between January and July of 2004, \$1,936,046.00 of Grant funds were advanced to Blue Moon based upon 14 SF270s submitted to RUS by Blue Moon. In October of 2004, the Office of the Inspector General (OIG) issued a Report entitled Summary of Survey Results - Rural Utilities Service Broadband Grant and Loan Programs. In the report, OIG identified Blue Moon as one of the companies having potential for misusing grant funds. Due to the OIG concerns, in November of 2004, RUS sent a Compliance Auditor to visit Blue Moon to perform a Grant Review Compliance Audit.⁵ The Compliance Auditor completed the compliance audit on March 18, 2005, finding \$910,829.79 (nearly half of the grant funds advanced) could not be supported with actual cost documentation.

On May 6, 2005, RUS sent Blue Moon seven letters informing it of the audit results and instructing Blue Moon to return the disallowed unsupported costs to the construction fund account. Blue Moon contested the disallowances, meeting with RUS representatives in Washington, D.C. and securing time to submit an independent audit. The independent audit, performed by Bollinger, Segars, Gilbert & Moss, LLP, was submitted to RUS on August 30, 2005 along with a letter from Blue Moon which

⁵ The Compliance Auditor made five field visits to Blue Moon, beginning in November of 2004 and ending in March of 2005. Each field visit lasted five days and at times, the Compliance Auditor was accompanied by a RUS field accountant. FOF 11, Hearing Officer's Appeal Determination.

admitted that it had difficulty in accounting for specific task assignments within each project location, but indicating that it had updated its accounting procedures.⁶

On September 30, 2005, based upon the RUS Compliance Audit, OIG issued its Audit report 09601-TE which recommended recovery of the full amounts advanced to Blue Moon and further recommended termination of the grants. On the same date, the Acting Administrator of RUS informed Blue Moon by letter that the grants were suspended, citing “serious discrepancies between the purposes for which grant funds were requisitioned and their actual expenditure by the Appellant.” FOF 23, Hearing Officer’s Appeal Determination. The September 30, 2005 letter was followed by letters dated November 9, 2005, first informing Blue Moon that the seven grants were terminated for material failure to comply with the terms of the grant agreements and additional letters suspending Blue Moon and its CEO Marty Hale from further federal contracting.

The termination of the grants was appealed to the Secretary’s National Appeals Division. Following a two week hearing, a partially favorable decision was issued by Hearing Officer Ilene J.K. Sloan on October 4, 2006, finding that RUS’s adverse determination terminating the grants was erroneous as it had failed to meet its burden of proof by a preponderance of the evidence. RUS appealed the Hearing Officer’s Decision, and on January 25, 2007, Roger Klurfeld issued a Director Review Determination which affirmed RUS’s termination of the grants, but concluded that the record did not support the demand that Blue Moon refund \$910,829.79, noting that the grant closeout process

⁶ On May 8, 2006, Blue Moon also submitted an additional audit characterized as a “Forensic Audit” prepared by Beakley and Associates, PC. RUS rejected the audit as the auditor was not properly licensed at the time of the audit and was not considered independent; however, even that audit which generally found Blue Moon to have adequate supporting data for all budgeted line items, did find that Blue Moon had submitted claims for payment which were inconsistent with and well in excess of actual costs.

had not been completed and that as part of that process Blue Moon would be entitled to recover any reimbursable cost properly incurred prior to the termination of the grants.

Blue Moon and Marty Hale also contested their suspensions, first at an agency hearing conducted on December 14, 2005, and upon receiving an adverse decision at the agency level, by an appeal to the Office of Administrative Law Judges, where the case was heard by Judge Victor W. Palmer. In upholding the suspensions in a decision dated June 20, 2006, Judge Palmer found that Blue Moon's failure to provide documentation could not be characterized as "mere carelessness or negligent bookkeeping errors," but rather it had filed false and unsubstantiated requests for grant funds to obtain more money than it was entitled to receive under the Grant award. *In re: Blue Moon Solutions, Inc. and Marty Hale*, 65 Agric. Dec. ____ (2006).

On November 8, 2006, RUS issued Debarment Letters to each of the Appellants, notifying them of RUS's intention to initiate debarment proceedings against them and to debar them for a period of five years.⁷ By letter dated December 8, 2006, the Appellants contested the proposed debarments, relying upon the findings contained in the Hearing Officer's Decision in the termination appeal. Correspondence was exchanged between the Appellants and RUS concerning a debarment hearing, and following the issuance of the NAD Director Review Determination, a hearing date was set for February 28, 2007 and the Appellants were given until February 21, 2007 to inform RUS of any new facts or evidence that they would present at the hearing. No notification of any new facts or

⁷ Christonya Hill was added to the individuals to be debarred as she was identified as Blue Moon's Chief Operations Officer (COO), she signed each of the Grant Agreements and all of the SF 270s requesting disbursement of the grant funds.

evidence was submitted by the Appellants⁸ and on February 27, 2007, RUS informed the Appellants that in absence of any new information, no genuine dispute existed as to the material facts upon which the proposed debarment was based, no hearing was required, and that RUS was canceling the hearing. On April 12, 2007, RUS issued the Debarment Determination of the three Appellants that gives rise to this appeal.

The causes for debarment are set forth in 7 C.F.R. § 3017.800:

- (a) Conviction of or civil judgment for--
 - (1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
 - (2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
 - (3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or
 - (4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

- (b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as--
 - (1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
 - (2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
 - (3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

- (c) Any of the following causes:
 - (1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;
 - (2) Knowingly doing business with an ineligible person, except as permitted under Sec. 3017.120;
 - (3) Failure to pay a single substantial debt, or a number of

⁸ Counsel for the Appellants did contact RUS to advise it that the Appellants were not available on February 28, 2007, but did not provide information as to any new facts or evidence that would be presented.

outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under Sec. 3017.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

(e) Notwithstanding paragraph (c) (1) of this section, within the Department of Agriculture a nonprocurement debarment by any Federal agency taken before March 1, 1989.

[68 FR 66544, 66563, Nov. 26, 2003, as amended at 68 FR 66565, Nov. 26, 2003]

The Debarment Letters of November 8, 2006 and the Determination of the Administrator of the Rural Utilities Service Regarding the Debarment of Blue Moon Solutions, Inc., Ms. Christonya Hill and Mr. Marty Hale of April 12, 2007 cite 7 C.F.R. § 3017.800(b)(2) and 3017.800(d) as the basis for the debarments. Relying upon all evidence of record relating to Blue Moon and the grants, including the Appellants' letters, Judge Palmer's decision of June 20, 2006, the Hearing Officer Decision of October 4, 2006, and the Director Review Determination of January 25, 2007, RUS found that (i) Blue Moon and the other named Appellants violated the terms of the Grant Agreements by submitting false SF270 certifications to RUS, (ii) persistently violated the Uniform Regulations and (iii) failed to use all grant funds for the completion of the projects. Although the Petition on Appeal's flamboyant rhetoric characterizes the debarments as: (i) the epitome of arbitrary and capricious behavior, (ii) the "ham-handed misuse of debarment as a retaliatory mace" swung at the Appellants using proceedings

plagued with pernicious problems, (iii) myopically focusing, through the use of wistful thinking, on dribs and drabs of self-serving evidence - even a cursory reading of the record amply supports all three bases for the debarment.

On the basis of the record before me, the following Findings of Fact, Conclusions of Law and Order will be entered.

FINDINGS OF FACT

1. Blue Moon Solutions, Inc. is a Delaware corporation, incorporated in April of 2002, with corporate offices located at 9924 Reese Boulevard, Lubbock, Texas 79416.

2. Marty Hale is the Chief Executive Officer of Blue Moon Solutions, Inc. and has a business mailing address identical to Blue Moon Solutions, Inc.

3. Christonya Hall is the Chief Operating Officer of Blue Moon Solutions, Inc., having a business mailing address identical to Blue Moon Solutions, Inc. Ms. Hall signed the seven of the Grant Agreements for grants awarded to Blue Moon Solutions, Inc. and also signed all of the SF270s submitted to RUS requesting payment of funds for advances and reimbursements under the grants.

4. In response to a NOFA published in the Federal Register in 2002⁹ announcing the availability of 20 million dollars in grant funds as part of the Community Connect Program, Blue Moon submitted grant applications to deploy broadband services in seven rural communities located along the Rio Grande in Texas: Falcon Lakes Estates, San Ygnacio, Batesville, La Pryor, Progresso, Zapata, and Crystal City. Each of the seven grant applications contained a general overview of and budget for the project, a

⁹ See, footnote 3.

description of each phase of the project, and the cost and type of service that Blue Moon would be providing.

5. In 2003, Blue Moon was notified by RUS that it had been awarded grants in the aggregate amount of \$2,698,272.00 for the seven locations and received for execution Grant Agreements for each of the projects as well as the appropriate forms used to request advances or reimbursements of grant funds. Blue Moon executed the Grant Agreements and returned them to RUS.

6. In correspondence sent to Blue Moon during 2003 and 2004, RUS advised Blue Moon that grant funds were available for release and instructed Blue Moon that consistent with the terms of the Grant agreements, funds could be requested by submitting SF270s with supporting documentation.

7. Between January and July of 2004, Blue Moon requested and received \$1,936,046.00 of grant funds based upon 14 SF270s submitted by Blue Moon to RUS.

8. In October of 2004, Blue Moon was identified by OIG as a company having potential for misusing grant funds in a report entitled Summary of Survey Results- Rural Utilities Service Broadband Grant and Loan Programs.

9. In response to the concerns expressed in the OIG report, in November of 2004, RUS sent a Compliance Auditor to visit Blue Moon to perform a Grant Review Compliance Audit. The Grant Review Compliance Audit continued for several months, involved five field visits to Blue Moon, and was completed in March of 2005. The Grant Review Compliance Audit found significant supporting documentation problems and concluded that nearly half of the funds advanced (\$910,829.79) were not supported with actual cost documentation.

10. In May of 2005, Blue Moon was informed of the results of the compliance audit, was provided a schedule of the disallowed items and was instructed to return the disallowed unsupported costs to the construction fund account. Blue Moon did not return the funds, but sought and received additional time to secure an independent audit of the projects. The independent audit was performed by Bollinger, Segars, Gilbert & Moss, LLP. The audit report included a scope limitation to the report based upon time and cost constraints. It indicated that the auditor was unable to obtain support for labor capitalized to plant, property and equipment in both 2003 and 2004,¹⁰ and identified unsupported costs, and concluded that “unearned” USDA Grant proceeds equaled \$254,310.¹¹ The independent auditor found no instances of noncompliance that he was required to report under the Government Auditing Standards, considered Blue Moon’s financial statements to be free of material misstatement, but identified three material weaknesses in the accounting practices. The audit report was submitted to RUS with a letter from Blue Moon which admitted that it had difficulty in accounting for specific task assignments within each project location, but indicating that it had updated its accounting procedures. Notwithstanding the findings of the independent audit, no funds covering the unsupported costs were returned.

11. On May 8, 2006, sometime after the terminations and suspensions, Blue Moon submitted an audit (the “Forensic Audit”) prepared by Beakley & Associates, PC. RUS rejected the results as the auditor was not licensed at the time of the audit and was

¹⁰ The amounts identified in the report were \$155,073 for 2003 and \$190,916 for 2004. FOF 92, Hearing Officer’s Appeal Determination.

¹¹ FOF 94, Hearing Officer’s Appeal Determination.

not considered independent by RUS.¹² That audit found that by the end of 2004, Blue Moon had received Grant funds in excess of costs by \$486,000.00, but had expended out-of-pocket and unreimbursed amounts of \$297,000.00. In 2005, Blue Moon had received \$364,000.00 of Grant funds in excess of costs, but had out-of-pocket and unreimbursed expenses well in excess of the amounts received from RUS. Moreover, he opined that as of the end of 2005, Blue Moon did not owe RUS any amount and would be entitled to recover additional reimbursement for legitimate expenses incurred which had not yet been claimed. Although RUS rejected the audit results, the Forensic Audit was given significant weight by the NAD Hearing Officer and was considered by the NAD Director in his determination.¹³

11. On September 30, 2005, RUS suspended the grants “for serious discrepancies between the purposes for which the grant funds were requisitioned and their actual expenditure” by Blue Moon. The suspension was followed on November 9, 2005 by letters for each of the seven projects terminating the grants for failure to comply with the terms of the grant agreements. Letters sent the same date suspending Blue Moon and Marty Hale from further federal contracting. Blue Moon appealed the termination, securing a partially favorable decision before the Hearing Officer entered on October 4, 2006; however, on further appeal, that decision was partially reversed by the Director Review Determination dated January 25, 2007 which found the termination appropriate, but concluded that the record did not support the demand for return of \$910,828.79 in view of the fact that the grant closeout process had not been completed.

¹² The auditor had failed to renew his license until some time afterwards. When his failure was discovered, the required fee was paid and he was reinstated “retroactively.”

¹³ It should be noted that all three of the audits found unsupported advances and that while RUS might be required to reimburse Blue Moon additional sums, the SF270s submitted by Blue Moon overstated actual costs and supporting documentation was lacking in the earlier two audits.

12. Blue Moon and Marty Hale also appealed their suspensions, first at an agency hearing and then to an Administrative Law Judge. In a decision dated June 20, 2006, Judge Victor W. Palmer upheld the suspensions, finding Blue Moon's failure to provide supporting documentation could not be characterized as "mere careless or negligent bookkeeping errors," but rather it had filed false and unsubstantiated requests for Grant funds to obtain more money than it was entitled to receive under the Grant award.

13. On November 8, 2006, RUS issued letters to each of the Appellants, notifying them of RUS' intent to initiate debarment proceedings against them and to debar them for a period of five years. By letter dated December 8, 2006, the Appellants contested the proposed debarments, relying heavily on the Hearing Officer's decision of October 4, 2006. By letter dated January 5, 2007, RUS asked the Appellants whether they desired a hearing. The Appellants responded in a letter dated January 19, 2007, contending that a hearing was required under the applicable regulations.

14. Correspondence was exchanged between the Appellants and RUS concerning a debarment hearing, and following the issuance of the NAD Director Review Determination, a hearing date was set for February 28, 2007 and the Appellants were given until February 21, 2007 to inform RUS of any new facts or evidence that they would present at the hearing. No notification of any new facts or evidence was submitted by the Appellants¹⁴ and on February 27, 2007, RUS informed the Appellants that in absence of any new information, no genuine dispute existed as to the material facts upon which the proposed debarment was based, no hearing was required and that RUS was

¹⁴ Counsel for the Appellants did contact RUS to advise it that the Appellants were not available on February 28, 2007, but did not provide information as to any new facts or evidence that would be presented.

canceling the hearing. On April 12, 2007, the Debarment Determination was issued, debarring each of the Appellants for a period of five years, but crediting them with a period of suspension, with the resulting debarment periods ending on November 8, 2010.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. For the reasons set forth in the Findings of Fact, the Appellants submitted false and overstated requisitions to RUS requesting disbursement of Grant funds, failed to maintain adequate accounting records documenting costs, requested premature advances despite regulatory prohibition of the same, and failed to complete the projects despite their certification of the same.

3. The conduct of the Appellants constitutes violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program and constitutes a cause so serious or compelling a nature that it affects the Appellants' present responsibility. 7 C.F.R. § 3017.800(b)(2) and § 3017.800(d).

4. The April 12, 2007 Determination of Debarment to debar each of the Appellants is in accordance with law, was based upon the applicable standard of evidence, and was not arbitrary, capricious, or an abuse of discretion. 7 C.F.R. § 3017.890.

ORDER

For the foregoing reasons, it is **ORDERED** that the Determination of James M. Andrew, the Administrator of the Rural Utilities Service to debar Blue Moon Solutions, Inc., Marty Hale and Christonya Hill for a period of five years, less credit for a period of suspension, with the debarment through November 8, 2010 from participation in all “covered transactions” as that term is defined in 7 C.F.R., part 3017, subpart B, is **UPHELD** and **AFFIRMED**.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
June 22, 2007

PETER M. DAVENPORT
Administrative Law Judge

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