

June 5, 2015

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Reference Number: 14-0007

Ms. Dawn Best
Virginia Energy and Lighting, LLC
10310 Memory Lane, Suite 2D
Chesterfield, VA 23832

Dear Ms. Best:

Virginia Energy and Lighting, LLC (VEL) appeals the Virginia Unified Certification Program's (VAUCP) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. part 26 (the Regulation). After reviewing the administrative record, we conclude that substantial evidence supports VAUCP's determination. We affirm the ineligibility determination under §26.89(f)(1).

In the denial letter dated July 10, 2013, VAUCP cites the firm's failure to satisfy the requirements of §§26.69(c),(d),(e), or (h), relating to ownership, and §§26.71(c),(d), (e),(f),(g),(k) or (l) relating to control. *See generally* §26.61(b). It suffices for purposes of this appeal for us to affirm on grounds of §26.69(c) and (e) and 26.71(e).

Applicable Authority

§26.61(b) provides:

"The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control."

§26.69(c), at the time of the decision, read:

"The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond mere pro forma ownership of the firm as reflected in the ownership documents. The owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements."

§26.69(e) provides:

“The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire the interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm’s activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of business do not render a firm ineligible, even if the debtor’s ownership interest is a security for a loan.”

§26.71(e) provides:

“Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.”

§26.89(f)(1) provides, in pertinent part:

“(1) The Department affirms [the certifier’s] decision unless it determines, based on the entire administrative record, that [the] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

The following facts are based on supporting documents in the record, particularly the Loan Agreement (LA) dated July 25, 2011, the Amended Operating and Restated Agreement (Amended OA) dated January 13, 2013, the Uniform Certification Application (UCA) dated January 18, 2013, and the denial letter dated July 10, 2013.

Thomas Epps (Epps), an individual of Native-American heritage, is President of VEL. The Amended OA shows that Epps owns 52% of the member interests in the firm. The remaining 48% of the firm is equally owned by [REDACTED]. Each of the four owners contributed [REDACTED] to start the firm. The LA states that the owners also guaranteed a [REDACTED] loan between VEL and Village Bank.

The UCA application states that Epps has several responsibilities for the firm such as making financial transactions, handling sales and marketing, opening lines of credit, hiring and firing management personnel, and negotiating and executing contracts. Epps shares responsibilities of

the firm with the other non-disadvantaged owners and members such as field/production operations; office management; and purchasing of equipment with Scotty Bryan. The UCA also states that Larry Marshall and Epps have the authority sign company checks for any purpose. The denial letter further states that the firm's Village Bank account shows Larry Marshall and Paul Ridout as authorized signatories, even though just one signature is required for a transaction. Accordingly, Larry Marshall and Paul Ridout may obligate the firm financially without Epps' knowledge, approval, or consent. Harold Bagnall and Scotty Bryan solely control the estimating and bidding for the firm.

Discussion and Decision

The firm has the burden of proving that the disadvantaged owner owns and controls the firm within the meaning of §27.69 and §27.71. The contribution of capital and ownership must be real and substantial, and the disadvantaged individual must control the firm, within the meaning of the Regulation. The usual "preponderance of the evidence" standard of proof applies in this case¹ under §26.61(b).

Ownership

The contributions of capital by socially and economically disadvantaged owners to acquire their ownership interests must be real and *substantial*. See §26.69(e). The owners made equal contributions of [REDACTED] yet maintain that they acquired member interests of 52%, 16%, 16%, and 16% in exchange for their capital. There is no evidence whatever of any additional capital contributed by Epps that would economically justify his putative 52% ownership interest. The record demonstrates that Epps got a bargain price for his member interest at the expense of the non-disadvantaged owners. As a matter of pure economics, 4 equal capital contributions would result in each member owning 25% of the firm. Epps obtained more than double the ownership for less than half the price (52% of the firm's initial capital is \$4160). Epps, in short, states that he obtained a 52% ownership interest for 25% of the total capital contributed. These facts constitute substantial evidence in support of VAUCP's conclusion that the socially and economically disadvantaged owner's capital contribution was inadequate and not commensurate with stated ownership, i.e., not real and substantial within the meaning of the Regulation. We affirm.

For similar reasons, the firm does not meet the requirements of §26.69(c). There is no preponderance of the evidence that the disadvantaged owner's ostensible 52% ownership is other than pro forma. Section 26.69(c) requires the firm's ownership by socially and economically disadvantaged individuals to *be real, substantial, and continuing, going beyond mere pro forma ownership* of the firm as reflected in the ownership documents. The provision further requires that disadvantaged owners enjoy the customary incidents of ownership, and share in the risks and profits *commensurate with* their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. The four owners are equal guarantors of the firm's debt. The

¹ Virginia cited the enhanced burden of proof provisions §§26.69(h) and 26.71(l) without §26.86 explanation or specific factual support. Accordingly, those provisions are not before us on appeal.

loan guarantee is an example of Epps not sharing risks commensurate with his claimed ownership interest.

Substantial evidence supports the proposition that Epps' claimed majority/controlling interest in VEL is not real, substantial, and continuing, going beyond pro forma ownership as reflected in the ownership documents. We affirm VAUCP's decision to that effect in accordance with §26.89(f)(1).

Control

Section 26.71(e) states that "individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. *Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.*"

The UCA shows that Epps does not solely run VEL. The UCA states that Epps has sole responsibility for financial transactions, sales and marketing, hiring and firing management personnel, and negotiating and executing contracts. Other responsibilities are designated exclusively to or shared with non-disadvantaged owners. The UCA states that Harold Bagnall and Scotty Bryan solely control estimating and bidding for the firm. Scotty Bryan shares the responsibilities of field/production operations; office management; and major equipment purchases with Epps. The UCA states that Larry Marshall and Epps are authorized to sign company checks for any purpose. The denial letter states that the firm's Village Bank account shows that Paul Ridout may also sign checks for any purpose. These facts indicate that Larry Marshall and Paul Ridout may obligate the firm financially without Epps' knowledge, approval, or consent.

The non-disadvantaged owners are disproportionately responsible for critical aspects of the firm's operations. While each has just a 16% ownership interest, some (as noted above) solely control key operational activities or can unilaterally obligate the firm for any purpose without Epps' knowledge or consent. We affirm, as supported by substantial evidence, VAUCP's determination that the disadvantaged owners possess or exercise the power to control the firm or are disproportionately responsible for its operation.

Conclusion

We affirm VEL's ineligibility determination as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

This decision is administratively final and is not subject to petitions for reconsideration. VEL may reapply for certification at any time.

Sincerely,

Samuel F. Brooks
Acting Lead Specialist
External Civil Rights programs Division

cc: VAUCP