

July 30, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 14-0130

Ms. Debra K. Browning, CEO/President
Southland Surveying & Mapping, Inc.
P.O. Box 186
[REDACTED]
Lake Butler, Florida 32054

Dear Ms. Browning:

Southland Surveying & Mapping Inc., (Southland) appeals the Florida Department of Transportation's (FDOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. Part 26 (the Regulation). FDOT determined that Southland was ineligible for certification based on ownership and control grounds. We affirm FDOT's ineligibility determination, under §26.89(f)(1), because it is supported by substantial evidence and is consistent with the substantive and procedural provisions of the Regulation that concern certification.

FDOT's denial letter cites several grounds for denial:

- 1) Ownership was transferred, without consideration, from non-socially and economically disadvantaged persons to a socially and economically disadvantaged burden, who has not met the higher, rebuttal burden of proof, §26.69 (h);
- 2) Non-disadvantaged individuals are disproportionately responsible for the operation of the firm, §26.71(e);
- 3) Disadvantaged owner lacks overall understanding of, and managerial and technical competence and experience directly related to, the firm's work or operations, §26.71(g);
- 4) Disadvantaged owner lacks a professional surveyor license, §26.71 (h);
- 5) Ownership and control were transferred from non-socially and economically disadvantaged persons to a socially and economically disadvantaged person, who has not met the higher burden of proof, §26.71 (l).

Based on review of the arguments and administrative record, we find the controlling issue in this case is whether Southland's disadvantaged owner can evaluate and make independent decisions concerning surveying and mapping operations, as §26.71(g) requires. We find that substantial

evidence supports FDOT's conclusion that the firm did not meet this burden. We therefore affirm denial based on ground 3, and find it unnecessary to explore the other grounds for denial.¹

Facts²

The relevant facts are uncontroverted. Wayne Dukes (non-disadvantaged) formed Southland on January 31, 2006.³ The firm's primary activities are Land Surveying, Mapping, GIS, and CAD drafting. You are Southland's majority owner (51%) and Mr. Dukes is the firm's minority (49%) owner.⁴ Southland filed its Unified Certification Application on December 9, 2013.

You and Mr. Dukes are Southland's only employees. Before joining the firm, you worked in the healthcare industry, and lacked experience in surveying and mapping. At Southland, you are primarily responsible for the overall management of the firm (financial management and business/marketing planning); however, you state that you are "learning" about surveying and mapping.⁵ You do not have a license in Surveying and Mapping.

Mr. Dukes handles Southland's surveying activities. He prepares and submits Southland's estimates and bids – without your approval – and is responsible for running the firm's field operations. Mr. Dukes has several years of experience either owning or managing surveying firms. He is a licensed Professional Surveyor and Mapper in Florida, Alabama, and Georgia.

FDOT issued its denial letter on February 7, 2014. The relevant portion of its determination rests on three facts from the record: (1) you are not a licensed surveyor and mapper; (2) you rely on

¹ In regards to grounds 1 and 5, our affirmation based on FDOT's conclusion that you failed to meet your burden of control under §26.71 (g) makes an analysis of grounds unnecessary. *See* §26.69 (h) (Disadvantaged owner must rebut presumption of non-disadvantaged by demonstrating control of the firm), §26.69 (l) (same).

In regards to ground 2, we do not necessarily disagree with FDOT's conclusion; however, because we conclude that Southland's disadvantaged owner relies on the firm's non-disadvantaged owner to make decisions concerning surveying, an analysis of disproportionate control is unnecessary.

Finally, we consider the lack of a license, §26.71 (h), as a factor in our discussion regarding §26.71 (g).

² The facts derive from the following sources: FDOT Denial Letter (February 7, 2014); Southland Appeal Letter (April 7, 2014) Uniform Certification Application (UCA) (December 9, 2013); FDOT Program On-site Review Report (January 29, 2014); Debra K. Browning's Résumés; and Wayne Dukes' Résumé.

³ Mr. Dukes established Southland with two other men (who left the firm in 2009) as equal co-owners.

⁴ You obtained 51% ownership of Southland on May 2, 2009. At the time, Southland was going out of business and its owners were about to dissolve the firm. Southland's other two owners were leaving the firm and Mr. Dukes decided to give you an opportunity to turn the business around. You claim that the transfer of shares did not require monetary consideration, since the firm was losing money and its owners were not receiving salary or earnings from profits. *See* Appeal at 1-2; *see also* On-site at question 1-3.

⁵ You acknowledge repeatedly that you are still learning about surveying and mapping. *See e.g.*, On-site at question 15, 21 (fieldwork, estimating, and bidding); Appeal at 7 (AutoCAD map drawing software, "field aspects" of surveying, and house deeds and land record research). It is unclear if you fully understand or are technically competent in any area of the firm's surveying operations.

Mr. Dukes' 32 years of experience in surveying; and (3) you previously worked as a Registered Nurse and have a master's degree in Leadership.

Discussion

Southland has the burden of proving, by a preponderance of the evidence, that its disadvantaged owner has "the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations." §26.71 (g). We find that you did not meet this burden.⁶

In this case, you fail to demonstrate that you are able to intelligently and critically evaluate information to make decisions about the firm's surveying and mapping operations, without Mr. Dukes' input and approval. First, your lack of a surveying license -- which you concede -- makes your decisions regarding surveying subject Mr. Dukes' approval. *See* Appeal at 4 ("[b]efore anything is signed/sealed it has [Mr. Dukes'] approval (as required by law) that everything is as it should be, and that is what I get from him.") Second, you also acknowledge in your appeal that you rely on Mr. Dukes when you make decisions concerning surveying. *See* Appeal at 2 ("Whenever important decisions have to be made, that are surveying related only; I frequently do seek an opinion from Wayne Dukes with his extensive knowledge and expertise as a surveyor.") Finally, you acknowledge that you are still "learning" surveying, which indicated that you have yet to develop the necessary ability to critically evaluate and make *independent* decisions about Southland's surveying operation.⁷

In summary, substantial evidence supports FDOT's conclusion that Southland failed to demonstrate that you have the requisite expertise to make independent decisions about the firm's daily surveying and mapping operations.

⁶ Under §26.61(b), the firm bears the burden of proof regarding the Regulation's control requirements. It is ineligible for DBE certification when it fails to meet these requirements.

⁷ You contend that your master's degree in Leadership is sufficient to meet your burden. Your degree may be evidence of your ability to manage the firm; however, it does not evidence your ability to evaluate or make decisions related to surveying.

To the extent that you argue in your appeal that you learned to draw maps on AutoCAD software, and to research deed/land records, we find no evidence of these statements in the record. *See* Appeal at 7. You failed to include these qualifications on your résumé or mention them during your firm's onsite review. Therefore, we do not consider these facts on appeal.

Conclusion

Southland failed to meet its burden of proof regarding the expertise of its disadvantaged owner under §26.71 (g). The Department affirms FDOT's denial on this ground, as supported by substantial evidence and consistent with the substantive and procedural provisions of certification.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights programs Division

cc: FDOT