

May 23, 2016

Reference Number: 16-0021

Mark Floyd
F&P Construction, LLC
REDACTED
McKinney, TX 75069

Dear Mr. Floyd:

By letter dated October 28, 2015, F&P Construction, LLC (F&P), appeals the Texas Unified Certification Program's (TUCP)¹ July 30, 2015, denial of the firm's application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 CFR Part 26 (the Regulation). After a careful review of the full administrative record, we affirm the certifier's decision as supported by substantial evidence and not inconsistent with the Regulation's substantive or procedural certification provisions.

Factual and Procedural Background

You own 51% of F&P, and nondisadvantaged owner Patrick Peaden owns 49%. You formed F&P on November 1, 2013. Record at 99. You state that you capitalized F&P with a REDACTED cash contribution on September 12, 2014. Record at 111, 112; Appeal Letter at 1. According to the Uniform Certification Application (UCA) dated August 12, 2014, however, you contributed no capital (cash, equipment, property, or "other") while Mr. Peaden contributed REDACTED. Record at 73, 74. TUCP's Site Visit Report dated June 1, 2015, in contrast, states that you and Mr. Peaden each contributed REDACTED cash and REDACTED in equipment. Record at 51. The REDACTED on which you rely for your cash capital contribution is signed by you but drawn on the account of M&M Custodial & Consultant Services, LLC. Record at 112. There is no apparent substantiation of Mr. Peaden's capital contribution in the record. The firm's Operating Agreement dated September 15, 2014, does not disclose which members contributed what capital. Record at 102ff.

¹ The certifier is the North Central Texas Regional Certification Agency (NCTRCA). NCTRCA's actions will hereafter be attributed to the TUCP.

TUCP denied the firm's application on both ownership and control grounds. As the ownership ground is sufficient for resolving this appeal, see Regulation §26.61(b) (firm has burden of proof and must prove each aspect of eligibility, including ownership and control), we do not reach TUCP's control rationales.

Regarding ownership and evidently relying on the information you provided in the certification application and on-site interview, TUCP appears to take the position that your capital contribution to F&P is not commensurate with your claimed majority ownership of the firm. Denial Letter at 1. Although TUCP's position is not well explained, your rebuttal is that you contributed REDACTED while Mr. Peaden contributed REDACTED, for total capital contributions of REDACTED. Your position on appeal is that you contributed the majority of the firm's capital and that that substantiates your claimed majority ownership under §26.69(c). By implication, you now claim that the capital contribution information in the UCA and in the Site Visit Report is inaccurate.

Applicable Authority

Section 26.61(b) states:

"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."

Section 26.69(c) states:

"(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c): (i) An individual pays REDACTED to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute REDCTED and \$REDACTED, respectively, to acquire a firm grossing REDACTED. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a REDACTED loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.”

Section 26.89(f)(1) states:

“The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

Discussion and Decision

The evidence F&P provided TUCP is either (UCA) that you contributed less capital than the non-disadvantaged owner or (Site Visit Report) that your capital contributions were equal. Either way, you did not demonstrate that your capital contribution was greater than that of F&P's non-disadvantaged member. You indicated to TUCP at least twice that Mr. Peaden's capital contribution equaled or exceeded your own. We find no other representation concerning capital contributions in the record upon which TUCP based its ineligibility decision.

You affirmed that the UCA was “true and correct” when you filed it, and you initialed each page of, and signed, the Site Visit Report. On appeal, you would evidently disavow both in favor of what appears to be a new position. You now claim that your capital contribution exceeded that of Mr. Peaden. Unfortunately, you have not demonstrated the new assertion by a preponderance of the evidence. The REDACTED you claim as your own capital contribution did not come from an account bearing your name. It came instead from the account of a separate firm, M&M Custodial. There is no corroborating evidence, beyond your own assertion, that this capital contribution should be attributed to you at all.

Further, there is no evidence of the amount of Mr. Peaden's capital contribution other than the conflicting accounts in the record: the UCA says it is REDACTED while the site visit report states that it is REDACTED. You have similarly failed to prove that your own capital contribution was greater than that of the non-disadvantaged owner—a proposition that would substantiate your claimed majority ownership as being more than pro forma under §26.69(c).

There is substantial evidence, in the Uniform Certification Application and in the Site Visit Report, for the proposition that you did not contribute a majority of the firm's capital. We must therefore affirm TUCP's denial on that ground, namely that your capital contribution was not demonstrated to be commensurate with your claimed majority ownership, within the meaning of §26.69(c).

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

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: Elicia Mitchell, NCTRCA