

August 23, 2017

Reference Number: 17-0034

Erin Perkins-Watry
Foresight Planning & Engineering Services, LLC.
13875 Research Blvd., Ste. 125
Austin, TX 78750

Dear Ms. Perkins-Watry:

Foresight Planning & Engineering Services, LLC (Foresight) appeals the City of Austin's (Austin) October 10, 2016 denial of its application for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at 49 C.F.R. part 26 (the Regulation). Foresight sought certification to perform work described in North American Industry Classification System (NAICS) code 541330 (Engineering Services). Austin determined that Foresight was ineligible under Regulation §§26.71(g),(n). The U.S. Department of Transportation (Department) carefully reviewed the full administrative record and concludes that the denial is supported by substantial evidence and is consistent with the Regulation's substantive and procedural certification provisions. Though Austin cited two distinct grounds for denial §26.71(g) and §26.71(n), the Department affirms on the basis of §26.71(n), specifically §26.71(n)(1).¹

Operative Regulation Provisions/Scope and Standard of Review

Section 26.61(b) provides that the firm seeking DBE certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the Regulation's requirements concerning group membership or individual disadvantage, business size, ownership, and control. Section 26.71(n)(1) is a provision that relates to control. The provision states that "[t]he types of work a firm can perform . . . must be described in terms of the most specific available NAICS code for that type of work," and "[a] correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients." Austin based its ineligibility determination on the firm's failure to demonstrate, by a preponderance of the evidence, eligibility under §26.71(n)(1) for code 541330 in which it sought certification.

A firm that is denied certification may make an administrative appeal to the Department. §26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the recipient's decision unless it determines, based

¹The Department affirms Austin's determination to deny certification in Engineering Services based on §26.71(n)(1) alone and therefore does not express an opinion on the merits of Austin's §26.71(g) denial ground.

upon a review of the entire administrative record, that the decision was “unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [the Regulation] concerning certification.” §26.89(f)(1).

Facts

Foresight sought DBE certification for NAICS codes 236220 (Project Management), 541320 (Urban Planners’ Offices), 541320 (Urban Planning Services), 541611 (Strategic Planning Consulting Services), 541618 (Other Management Consulting Services), 541820 (Public Relations Agencies), and 541330 (Engineering Services). Foresight Planning & Engineering Vendor Information, TXDOT Diversity Management System. Austin determined that Foresight was eligible for all NAICS codes except Engineering Services. *Id.* Austin determined that “it appears the firm is providing services in other scopes related to engineering but not actually providing engineering design or consulting services.” First Denial Letter (June 3, 2016).

Austin has a state-level appeals process of which Foresight availed itself. During that process, Foresight provided additional documentation and narrative to demonstrate it satisfied the control requirements in regards to Engineering Services. For example, Foresight stated it is “best known for namely planning/public involvement and scheduling for transportation engineering projects. We have also been asked to provide project and program management training and project controls services for both professional engineering contract pursuits and for private firm business development, and Foresight has experience in these areas.” Statement of Erin Perkins-Watry: City of Austin NAICS Code Expansion Appeal Hearing, September 26, 2016.

Austin affirmed its initial decision, explaining that it “determine[d] that your firm does not meet the certification requirements established by the Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) Procurement Program to certify NAICS code(s).” Second Denial Letter (October 10, 2016).

In response to Austin’s determination, Foresight filed a lengthy appeal (Appeal Letter) to the Department on December 23, 2016. Foresight’s counterarguments relevant to §26.71(n)(1) are:

- Austin does not appear to follow the Texas Engineering Practice Act in certifying firms in Engineering Services;
- Austin has a narrow interpretation of Engineering Services;
- Austin has a contradictory and arbitrary interpretation of Engineering Services; and
- Austin applied a broader Engineering Services definition to other firms.

Appeal Letter to the Department, December 23, 2016.²

Discussion

Under §26.71(n)(1), “[t]he types of work a firm can perform . . . must be described in terms of the most specific available NAICS code for that type of work,” and furthermore, “[a] correct NAICS

² As we affirm on §26.71(n)(1) grounds, we do not address counterarguments based on §26.71(g).

code is one that describes, *as specifically as possible*, the principal goods or services which the firm would provide to DOT recipients.” (Emphasis added.) Further elucidating the application of §26.71(n)(1) is the Regulation’s Preamble, which states “[i]t is the responsibility of the DBE to provide the certifier with the information needed to make an appropriate NAICS code assignment.” 79 Fed. Reg. at 59585 (Oct. 2, 2014). As a result, it is Austin’s responsibility to assign the NAICS code that most precisely encapsulates the work/service Foresight undertakes, as shown through its submitted information.

To obtain certification for Engineering Services, Foresight must demonstrate that the following language describes its engineering work with sufficient specificity and narrowness:

[t]his industry comprises establishments *primarily engaged in* applying physical laws and principles of engineering *in the design, development, and utilization* of machines, materials, instruments, structures, processes, and systems. The assignments undertaken by these establishments may involve any of the following activities: provision of advice, preparation of feasibility studies, preparation of preliminary and final plans and designs, provision of technical services during the construction or installation phase, inspection and evaluation of engineering projects, and related services.

2017 NAICS Definition: 541330 Engineering Services (Emphasis added).

As its own statement shows, Foresight is primarily engaged in planning/public engagement, management training, and project control, in its engineering-related work. Foresight is involved in projects that touch on engineering related fields and material, but there is evidence that its involvement is incidental or indirect. For example, Foresight provides a sample Texas Department of Transportation (TXDOT) Request for Qualifications (RFQ) to demonstrate it is a firm engaged in Engineering Services. The RFQ, however, demonstrates only that Foresight bid for work related to training engineers and project managers, not performing actual Engineering Services, as the NAICS description contemplates. The RFQ states, “[t]he team must include a Technical Training Development Coordinator, as Task Leader, with a minimum of five years of experience directly related to developing and delivering training courses for engineers, project managers, or technical staff.” Professional Engineering Procurement Services Division, Solicitation Number 601CT0000001855, p.4. The RFQ further states, “[t]he course should provide different types of stake holder management techniques, traditional and non-traditional methods, and case studies showing how different types of techniques were successful or unsuccessful in transportation projects.” *Id.* p. 5. It is reasonable to conclude that Foresight’s bid highlighted expertise in project management and managerial techniques more than the capabilities described in NAICS code 541330.

Engineering Services requires that a firm engage primarily in applying physical laws and principles of engineering in design, development, and utilization capacities. Foresight admits that it does not provide or offer design services and states that it instead provides engineering consulting services. Foresight argues that because its services include *some* of the activity related to Engineering Services—such as “[the] provision of advice, preparation of feasibility studies,

preparation of preliminary and final plans and designs, provision of technical services during the construction or installation phase,” (Foresight Letter to Austin, June 13, 2016, p. 3, citing the NAICS code definition)—it qualifies for the Engineering Services code. However, Foresight ignores the fact that the Engineering Services code states “[t]he assignments undertaken by these establishments *may involve...*” *Id.* (Emphasis added). The term “may involve” highlights illustrative examples of work that a firm certified in Engineering Services may undertake but is not necessarily indicative of eligibility as an Engineering Services firm. Adopting Foresight’s position would nullify the Regulation’s requirement that Austin only certify Foresight in the most specific NAICS code. Substantial evidence supports Austin’s determination that ““it appears the firm is providing services in other scopes related to engineering but not actually providing engineering design or consulting services.” First Denial Letter (June 3, 2016). Foresight did not demonstrate its eligibility for certification in that code because the code’s definition does not narrowly describe the partially related services Foresight provides. Accordingly, we affirm the ineligibility determination.

Foresight argues that it is registered to provide engineering services—as it meets the Texas Engineering Practices Act definition of practicing engineering, carries professional liability insurance for engineering services, and is certified by the Texas Board of Professional Engineers to offer and perform engineering services. Foresight Letter to Austin, June 13, 2016, p. 3-4. However, this argument is based on the erroneous premise that other definitions/standards are interchangeable with the NAICS definition. The Regulation requires a certifier to certify based in the most specific available NAICS code, not based on alternative definitions. This argument does not state a ground for reversal under §26.89(c) or (f)(2).

The argument that Austin has an unduly narrow, arbitrary, or unequally applied interpretation of Engineering Services is similarly unavailing. We find nothing in the record that supports the assertion. *See generally* §§26.89(c) and (f)(1).

Conclusion

We affirm Austin’s denial decision based on §26.71(n)(1). Substantial evidence supports the decision, which we find to be consistent with applicable certification provisions.

This decision is administratively final and not subject to further review. Foresight may reapply for certification in Engineering Services after the appropriate waiting period if it believes it can demonstrate eligibility.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: Austin

