

November 20, 2017

Reference Number 17-0059

Terri L. Holder
Island Creek Associates, LLC
22695 Three Notch Road, Suite 1
Suite 101
California, MD 20619

Re: DBE Certification Denial of Island Creek Associates, LLC

Dear Ms. Holder:

Island Creek Associates, LLC (Island Creek) appeals the Maryland Department of Transportation's (MDOT) January 5, 2017, denial of its application for an expansion of certification as a Disadvantaged Business Enterprise (DBE) under NAICS code 54133: Engineering Services, under the standards of 49 C.F.R. part 26 (Regulation). MDOT determined that Island Creek did not demonstrate, by a preponderance of the evidence, that it satisfies the requirements of Regulation §26.71(g). On March 13, 2017, Island Creek appealed to the U.S. Department of Transportation (Department). After considering the full administrative record, the Department concludes that substantial evidence supports MDOT's decision, and we affirm on the grounds discussed below.

Facts

Island Creek submitted its expansion of services (EoS) request to MDOT's Office of Minority Business Enterprise on November 2, 2015. MDOT conducted its On-Site Review of Island Creek on June 15, 2016, and submitted its Investigative Report on August 29, 2016. You appeared on behalf of Island Creek before MDOT's Minority Business Enterprise Advisory Committee (MBEAC) on October 12, 2016. Island Creek is currently a certified DBE in Maryland under NAICS codes 541611, 541614, 541990, 561110, 561210, and 561790,¹ and is seeking expansion of certified services under NAICS codes 238220 and 541330.² EoS Request at 1. As MDOT

¹ 541611: Administrative Management and General Management Consulting Services; 541614: Process, Physical Distribution, and Logistics Consulting Services; 541990: All Other Professional, Scientific, and Technical Services; 561110: Office Administrative Services; 561210: Facilities Support Services; and 561790: Other Services to Buildings and Dwellings.

² 238220: Plumbing, Heating, and Air-Conditioning Contractor; and 541330: Engineering Services.

approved your expansion of services certification request under 238220: Plumbing, Heating, and Air-Conditioning Contractor, but denied certification under 541330: Engineering Services, the rest of this decision addresses your responsibilities with Island Creek as it pertains to engineering services.

You own 100% of Island Creek. Your day-to-day responsibilities include providing management oversight for the company, along with responsibilities associated with the administrative, human resources, and management of the company. MBEAC Transcript at 7. You state that the company provides engineering services in the areas of civil, environmental, mechanical, avionic, and system engineering, and that as the owner, you hire the engineers required as needed on a project basis. *Id.* You are not a licensed engineer, nor do you possess any educational background in engineering. MBEAC Transcript at 10. You state that you are not involved in the technical work in engineering for Island Creek, but that you are “running the company.” MBEAC Transcript at 11. You describe your role on the engineering contracts performed by Island Creek as meeting with potential clients, assessing the project, and then hiring the engineers appropriate for the type of project to be performed by Island Creek. MBEAC Transcript at 26-28. Island Creek “currently hold[s] \$90 million in contracts” related to engineering services. MBEAC Transcript at 9.

Discussion

MDOT primarily determined that Island Creek did not meet the requirements of §26.71(g) for engineering services, which requires that a disadvantaged owner must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations.³ Under §26.71(n), certification must only be granted for specific types of work in which the disadvantaged owners have the ability to control the firm, which the firm must demonstrate for each type of work by a preponderance of the evidence.⁴ MDOT stated in its denial decision:

Your duties with Island Creek appear to be in the area of administrative management, budgeting and finance, program support and requirements analysis and not in the principal area of the firm’s work, which includes engineering work. Your background in the firm’s

³ The provision states: “The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm’s operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have 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, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.”

⁴ The provision states: “You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner’s control of the firm in the additional type of work.”

industry has been related to budgeting and financial management as well as program management and analysis. However, the Regulation requires that you demonstrate control of the service in the NAICS code in question provided by your firm. "Control" refers to an individual's independent ability, knowledge, expertise or competence to perform the core or primary tasks of the firm. Firms receive certification only for the type of work in which the disadvantaged owner(s) have the ability to control. The focus of the Regulation is on your technical competence and experience directly related to Island Creek's field of operation in the NAICS code in question. While you may possess some general knowledge of the industry by virtue of the fact that you have over twenty (30) [sic] years of working experience, the record does not demonstrate that you would be able to direct field operations, or that you have the experience, expertise, supervisory experience, or personal technical skills to control the daily operations of the firm's principal activities.

You depend on others in the firm for their knowledge and expertise which is necessary to control the technical aspects of the firm's day-to-day operations. A review of the record shows that you rely on Dr. Chuck Hale, systems engineer, Scott Freda a civil engineer, and David Ludwig, an avionics engineer. These individuals are licensed engineers. Without their experience, or the experience of others, it is unlikely Island Creek would be able to accomplish its field work in this area. It is these individuals who have the personal technical experience and expertise and who hold the industry certifications required to perform the work in the requested codes. As your role is consulting based, without their knowledge, experience and expertise, you would not be able to independently control the business in its primary activities as specified in §26.71(g). These individuals control the firm's field work; whereas your business and financial experience constitutes control over the firm's internal operations more specifically, the administrative and financial management. Your experience shows that you control the firm's finances and general management; however, this is not enough to demonstrate control of the principal activities of Island Creek firm for purposes of §26.71(g). You do not have an engineering background, education, training or expertise and are not a licensed engineer. (Denial Letter at 3-4).

On appeal, you make the following assertions:

Island Creek is a wholly-owned company under my control as the sole owner and President. In this position, I provide direction within my company which meets all of the requirements and goals of this regulation. Under my direction, Island Creek has successfully performed ***within NAICS code 541330 totaling almost \$89M of additional contracted work for both the US Navy and the US Marine Corps . . . All contract work performance is rated with "very good to exceptional" Contractor Performance Assessment Ratings (CPARS).***

* * *

Additionally, as previously provided, Island Creek Associates is a SBA certified 8(a) and EDWOSB/WOSB company that **currently operates in the primary NAICS Code of 541330, as granted by the Small Business Administration (see attached letter of eligibility).** As the sole owner, I personally undergo audits each year by the SBA illustrating

both my control of the company and of the work performed under our primary NAICS 541330 in which I have been approved since December 2009 through the present. (Appeal Letter at 1-2).

Decision

The applicant firm bears the burden of demonstrating its eligibility per §26.61(b).⁵ The evidence in the record indicates that you own 100% of Island Creek, and that, among numerous other types of work, Island Creek provides and has provided engineering services described in NAICS code 541330. MBEAC Transcript at 9. You state that your firm's work on engineering services projects has been highly regarded. Appeal Letter at 1.

Certification as a DBE requires that the disadvantaged owner demonstrate managerial and technical competence and experience directly related to the activity in question, *see* §26.71(g), and certification must only be granted for the specific types of work in which the disadvantaged owner is capable of demonstrating control. §26.71(n). You concede that you have no experience or education as an engineer. *See* MBEAC Transcript at 14. While you may delegate elements of the firm's operations to non-disadvantaged participants in the business, *see* §26.71(f), you must nevertheless prove, by a preponderance of the evidence, managerial *and technical competence and experience* directly related to the firm's engineering services. The facts that MDOT relies on in its denial letter and those we present above constitute substantial evidence that the firm is ineligible for certification in the Engineering Services code, and we therefore must affirm MDOT's determination.

You stated that the company provides services in civil, environmental, mechanical, avionics, and systems engineering, and that you hire the engineers required for different types of projects on an as-needed basis. Investigative Report at 9. You described how you would typically engage on an engineering services-related project, by interacting with the customer and providing preliminary analyses and reports about the general nature of a project before hiring an engineer to provide the technical aspects of a project. MBEAC Transcript at 12-14. The record shows that, when it comes to the provision of engineering services, Island Creek relies entirely on the technical expertise of non-disadvantaged individuals, such as Messrs. Freda, Hale and Ludwig, who are licensed engineers. *See* Investigative Report at 9, MBEAC Transcript at 12-14, 30. In sum, you have not demonstrated that you "have the ability to intelligently and *critically evaluate* information presented by other participants [principally licensed engineers] in the firm's activities and to use this information to make *independent* decisions concerning the firm's *daily operations*, management, and policymaking." §26.71(g) [emphasis added].

⁵ The provision 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*." (Emphasis added.)

The firm's appeal argument that Island Creek is a Small Business Administration certified 8(a) company that currently operates within the NAICS code 541330, Appeal Letter at 1-2, is unavailing. *See generally* §26.89(c) (requiring appellant to state certifier's factual or interpretive error or omission relating to a *DBE program* certification provision). Section 8(a) certification is not a proxy for a DBE certifier's determination, nor does it automatically render a firm eligible. The DBE program requires a particularized demonstration of control, in this case, e.g., that specified in §§26.71(n) and (g). You have not shown by a preponderance of the evidence that you possess the required skills or independence relating to the firm's engineering services. Stated another way, substantial evidence supports MDOT's determination that you did not demonstrate "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, management, and policymaking," as those sections require. Accordingly, we affirm under §26.89(f)(1).

Conclusion

The Department affirms MDOT's ineligibility determination under §§26.71(g) and (n) as supported by substantial evidence and consistent with applicable certification provisions.

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

Island Creek may reapply for certification after the applicable waiting period.

Sincerely,

Samuel Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: MDOT