January 11, 2018

Reference Number 17-0097

Catherine Baker
President
Mosaic 451, LLC
REDACTED
Suite 2050
Phoenix, AZ 85012

Dear Ms. Baker:

Mosaic451, LLC (Mosaic451) appeals the City of Phoenix's (the City) denial of certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (the Regulation). The City determined that Mosaic451 failed to satisfy the ownership and control requirements of Regulation §§26.69(a), (b), (c), (f), and (h) and 26.71(e) and (k)(2). After considering the full administrative record, the U.S. Department of Transportation (Department) concludes that substantial evidence supports the denial. We affirm.[1]

I. Background

On September 3, 2016, Mosaic451 submitted an application for certification. The City reviewed the documentation provided with the application and conducted an on-site interview on March 16, 2017. On March 29, 2017, the City denied Mosaic451's application for certification on the basis of Mosaic451's failure to satisfy the Regulation's ownership and control requirements. Mosaic451 timely appealed the City's decision to the Department on May 23, 2017.

II. Discussion

A. Scope and Standard of Review

Under §26.61(b), "[t]he firm seeking certification has the burden of demonstrating…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." Under §§26.86(d) and 26.89(c), a firm may appeal a denial of DBE certification to the Department. The Department does not make a de novo review or conduct a hearing; its decision is based

[1] We affirm on §§26.69(b), (c), (f), and (h) and 26.71(e) grounds, which are sufficient under §§26.61(b) and 26.89(f).

solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department must affirm the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1). When reviewing the administrative record provided by the recipient, the Department bases its decision on the status and circumstances of the firm as of the date of the decision being appealed. §26.89(f)(6).

B. Analysis

The City concluded that Mosaic451 did not demonstrate that it satisfies the ownership requirements of §§26.69(c), (f), and (h)(1). The City determined that Mosaic451 failed to prove that it was at least51% owned by a socially and economically and socially disadvantaged person. §26.69(b).

Section 26.69(c) requires that a socially and economically disadvantaged owner's ownership in the firm, "including their contribution of capital or expertise to acquire ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents." According to the record, you obtained your 60% ownership in the firm from your husband, Michael Baker, who had originally owned 100% of the firm (then called Lightsquare). Annual Minutes Meeting (sic), December 27, 2011 (hereafter Minutes) at 2. The Minutes note that the transfer was in exchange for "operation, sales, and financial support," not cash. *Id.*

Mosaic451 provided the City no other documentation related to the ownership transfer except an undated Register of Members and a January 1, 2015 Operating Agreement. Both contradict the Minutes. The Register references your December 27, 2011 acquisition of 6000 shares at $3.50 per unit (thus $21,000) and pronounces the acquisition "paid" without specifying other particulars. In contrast, Operating Agreement Article III states that each member has made the capital contribution described in Schedule I. Operating Agreement at 7. Schedule I shows no capital contribution at all to acquire your 60% member interest

On appeal, the firm provides us copies of a cashier's check to Michael Baker (March 13, 2013), an American Express account debit (March 18, 2013), and a withdrawal slip (Oct. 2, 2013). The amounts are REDACTED, respectively. Mosaic451 now claims, Appeal Letter at 2, that you made payments to your husband in 2013 totaling REDACTED, but the record shows no such assertion or documentation provided to the certifier. We find that Mosaic451 did not carry its burden under §§26.61(b) and 26.69(c) of demonstrating *to the City* that you made a real and substantial capital contribution (or paid a real and substantial price for your member interest). [2] We therefore affirm the City's ineligibility determination as supported by substantial evidence and consistent with applicable certification provisions.

[2] *See generally* §§26.73(b)(1), 26.89(f)(6). However, even if Mosaic451 had timely provided this evidence to the certifier, its probative value is compromised, and the City might well have discounted it. First, the debit and withdrawal do not specify a payee. Second, there is no evidence that these 2013 transactions pertain to the 2011 acquisition at all. (Please note the "to acquire" language in §26.69(c)(1).

Mosaic451 next argues that you contributed expertise that can be counted under §26.69(f) as part of your capital contribution. Appeal Letter at 3, referring to Minutes at 2. However, §26.69(f) states that when a disadvantaged owner relies on expertise as part of her capital contribution, she must demonstrate that the expertise is (i) in a specialized field; (ii) of outstanding quality; (iii) in areas critical to the firm's operations; (iv) indispensable to the firm's potential success; (v) specific to the type of work the firm performs; and (vi) documented in the records of the firm. §26.69(f)(1). The firm's records also must "clearly show the contribution of expertise *and its value* to the firm." §26.69(f)(1)(vi) (emphasis added). In addition, §26.69(f)(2) requires that you have "a significant *financial* investment in the firm." (Emphasis added.)

The §26.69(f) requirements for considering expertise as a capital contribution for Regulation purposes are stringent, and the applicant must demonstrate that it satisfies all of them for contributed expertise to count. While your expertise is in a specialized field (marketing) and may be of high quality, you do not demonstrate expertise in areas critical to the firm's operations, indispensable to the firm's success, specific to the type of work the firm performs, or documented in the firm's records as having a specific value. *See* Catherine Baker Resume. Marketing, while clearly important for the firm's success, does not appear to be an area critical to the firm's operations or specific to the information technology, security services, and consulting work the firm performs. The record does not show that you have expertise, experience, or training in information technology, computer science, software engineering, or any other field that is specific to the firm's work. In addition, there is no documentation of the value of your contribution of expertise and very little persuasive evidence of your "significant financial investment." Accordingly, the firm does not demonstrate its eligibility under §26.69(c) because you did not prove a real, substantial, and continuing capital contribution, by a preponderance of the conflicting evidence.

Thus, the transfer of your nondisadvantaged husband's 60% interest to you is a transfer without adequate consideration under §26.69(h). Section 26.69(h)(1)(i) presumes that you do not own the transferred interest because Mr. Baker "remains involved in the firm." §26.69(h)(1)(i). Section 26.69(h)(2) states that the firm can overcome the presumption only with clear and convincing evidence of (1) a non-DBE-qualifying purpose for the transfer and (2) the disadvantaged owner's actual control of the firm's management, policy, and *operations*. Clear and convincing evidence is a significantly higher standard than a preponderance, and Mosaic451 fails to demonstrate such actual control, for the reasons stated below.

The evidence indicates that the firm's business is technology-intensive and that Mr. Baker manages all technical operations. On-site Review Form (ORF) at 4. Mr. Baker explained that you provide the budget and he runs the engineering and is in charge of the product. ORF at 2. Mr. Baker "runs the engineering team and engineering operations, deliver[s] a high quality product, build[s] to suit technically, lead[s] the engineers and the 'high IQ environment'." ORF at 4. The City further observed that during the interview, "Mr. Baker would interject with answers regarding the technical aspect of the firm's operations." UCA Supplement, Other Observations from Mosaic451 On-Site. In addition, the City observed, "At one point Mr. Baker indicated that he is the leader for and handles all the engineering for the firm and Mrs. Baker mentioned that she handles the finances and administration of the firm." *Id.*

The City found that the firm did not demonstrate, by clear and convincing evidence, eligibility under §26.71(e), which states that no non-disadvantaged participant may "be disproportionately responsible for the operation of the firm." The City determined that Mr. Baker's exclusive responsibility for critical, technical functions makes him disproportionately responsible for the operation of the firm. Because substantial evidence (as noted above) supports that conclusion, we affirm it.

III. Conclusion

Substantial evidence supports the City's ineligibility determination on the grounds stated above, and the City's conclusion is consistent with applicable certification rules. We therefore affirm under §26.89(f)(1).

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

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: City of Phoenix