

July 6, 2018

Reference Number 18-0005

Ms. Nicole Miller
President
Wildcat Drilling, Inc.
[REDACTED]

[REDACTED] Ms. Miller:

This letter responds to Wildcat Drilling, Inc.'s (Wildcat) appeal¹ of the City of Phoenix's denial² of the firm's application for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 C.F.R. Part 26 (the Regulation). After reviewing the entire record, we affirm City of Phoenix's decision under §26.89(f)(1).³

Facts

You and your husband, Dustin Miller, started Wildcat in February 2016. The firm specializes in drilling soil borings for foundation designs.⁴ You are Wildcat's President and Accounting Manager, and Mr. Miller is the Driller and Vice President.⁵ To acquire your claimed 51% ownership interest, you contributed [REDACTED] from your joint checking account with Mr. Miller.⁶ He contributed [REDACTED] from the same account and claims 49% ownership interest.⁷

¹ See Appeal Letter (Aug. 30, 2017).

² See Denial Letter (Aug. 11, 2017).

³ See §26.89(f)(1): "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."

⁴ See Uniform Certification Application (UCA) at 2. Mr. Miller holds the required Well Drillers license for performing soil borings. See *id.* at 8.

⁵ See *id.* at 5.

⁶ See §26.69(i).

⁷ See UCA at 4.

Your résumé states that as Wildcat's Accounting Manager, you manage accounts payable and receivable; balance and track finances; reconcile accounts; write proposals and coordinate projects; and prepare invoices.^{8,9} Your résumé makes no mention of your title or responsibilities as Wildcat's President. Prior to joining Wildcat, you acquired 22 years of work experience with job titles such as Receptionist/Assistant, Accounting Manager, and Office Manager.¹⁰ Your duties in those positions included scheduling appointments, collecting payments, verifying insurance coverage, and answering phone calls.¹¹ Your résumé does not indicate that you have prior employment, education, or training related to drilling soil borings. In contrast, Mr. Miller has more than 20 years of experience coordinating and drilling borings for foundation design for public and private sector projects.¹² His résumé states that he is Wildcat's "Current Owner" and that he is "responsible for all operations of drilling aspect of the company with a A-4 Drilling license and register of contractor license."¹³

City of Phoenix denied Wildcat's DBE application under ownership provision §26.69(e) and control provisions §§26.71(g) and (k). We affirm based on §26.71(g).

Discussion

Section 26.71(g) 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.

Based on your responses during the on-site visit and information in your résumé, City of Phoenix concluded that you do not control Wildcat within the meaning of §26.71(g). City of Phoenix explained that your role at Wildcat is limited to administrative functions and that you are unable to control the firm's "core, critical functions."¹⁴

⁸ See Résumé of Nicole Miller.

⁹ See Appeal Letter at 2. See also On-Site Report (Aug. 8, 2017) at 4.

¹⁰ See Résumé of Nicole Miller.

¹¹ See *id.*

¹² See Résumé of Dustin Miller.

¹³ See *id.*

¹⁴ Denial Letter.

You argue simply that your role at Wildcat exceeds accounting and administrative duties because as the firm's majority shareholder, you control the board of directors.¹⁵ You do not address the specific requirements of §26.71(g), such as an overall understanding of, and managerial and technical competence directly related to Wildcat's primary type of business. You do not present arguments about your ability to intelligently and critically evaluate information and make independent decisions regarding the firm's primary business activities.

Section 26.71(g) mandates that you have an overall understanding of, and managerial and technical competence, related to Wildcat's primary type of business and operations. Prior to joining Wildcat, you acquired 22 years of experience in office management, administration, and bookkeeping functions.¹⁶ None of these activities are directly related to the boring business. You do not explain how your past positions allowed you to gain an overall understanding of, and managerial and technical competence directly related to, Wildcat's primary business of drilling soil borings for foundation designs.

Section 26.71(g) does not require you to have experience or expertise in all areas critical to Wildcat's operations. Nor does §26.71(g) require you to have greater experience or expertise than Mr. Miller or any of Wildcat's other key participants. However, you do not demonstrate *any* directly related experience or expertise.

Section 26.71(g) requires you to be able to render independent decisions based on an intelligent and critical evaluation of information that Mr. Miller or other participants in the firm may present to you. No evidence suggests that you could do so. Further, by your own admission, you make scant, if any, independent decisions.¹⁷ For example, you do not establish policies for Wildcat's scope of operations, select projects on which to bid, determine what equipment Wildcat should purchase, verify pre-bid paperwork, or make field decisions.¹⁸ You do not monitor job costs.¹⁹ You provide no evidence that you can independently make any related decisions without Mr. Miller's input.²⁰

There is instead ample evidence that your expertise is limited to office management, administration, or bookkeeping functions unrelated to Wildcat's primary business functions. As Wildcat's Accounting Manager, you manage accounts payable and receivable; balance and track finances; reconcile accounts; transcribe proposals and coordinate projects; and prepare

¹⁵ See Appeal Letter at 3.

¹⁶ See Résumé of Nicole Miller.

¹⁷ See UCA at 5-6.

¹⁸ See On-Site Report at 4-5.

¹⁹ See *id.* at 4-5.

²⁰ See §26.71(k).

invoices.^{21,22} Section 26.71(g) makes clear that such expertise is insufficient for demonstrating that you control the firm. Last, we point out that control of the board of directors²³ is not a criterion for demonstrating expertise beyond administrative functions, office management, or bookkeeping.

Conclusion

We affirm under §26.89(f)(1). Substantial evidence supports City of Phoenix's decision that Wildcat did not prove, by a preponderance of the evidence, that a socially and economically disadvantaged individual controls the firm.²⁴

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

²¹ See Résumé of Nicole Miller.

²² See Appeal Letter at 2. See also On-Site Report (Aug. 8, 2017) at 4.

²³ We withhold judgment on whether you control the board of directors.

²⁴ See §26.61(b): "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."