

August 6, 2019

Reference Number 19-0080

Mr. Frank Scopetti
Azimuth Construction Services, Inc.
REDACTED
Phoenix, AZ 85044

Dear Mr. Scopetti:

This letter responds to your appeal of the City of Phoenix's (CoP) December 28, 2018 denial of your firm Azimuth Construction Services, Inc.'s (ACS) application for Disadvantaged Business Enterprise (DBE) certification under the rules of 49 CFR part 26 (the Regulation). After reviewing the record, we affirm CoP's decision. *See* section 26.89(f)(1).

CoP denied ACS's application under multiple sections of the Regulation. We affirm based on section 26.71(b).¹

Background

You are the President and 50.1% owner of ACS and founded the firm in May 2018. You are socially and economically disadvantaged (SED) under the Regulation. ACS specializes in construction management, contracting, and consulting. Robert Zak, Richard Distler, and Michael Barter are not SED and each owns 16.3% of the firm. Mr. Zak is a Vice President of ACS as well as Secretary/Treasurer, Mr. Barter is Director of Business Development, and Mr. Distler is Vice President of Operations for Construction Management. Mr. Barter and Mr. Distler are the only two individuals on ACS's board of directors.²

¹ The rule states: "Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm. (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm. (4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice."

² *See* Uniform Certification Application (UCA) and Bylaws of Azimuth Construction Services, Inc.

In addition to his role at ACS, Mr. Zak owns construction and engineering firm The Zak Companies. ACS leases its office space from The Zak Companies and shares the space with The Zak Companies and electrical contracting firm K and F Electric. Mr. Distler and Mr. Barter are respectively General Manager and Preconstruction Manager of K and F Electric. The Zak Companies provides ACS accounting and payroll services, apparently free of charge, and will be a subcontractor to ACS.³

At ACS, Mr. Distler frequently makes major purchasing decisions, supervises field operations, and performs office management tasks. Mr. Distler and Mr. Barter frequently perform marketing and sales activities, attend bid openings and lettings, and hire and fire field staff or crew. You, Mr. Zak, and Mr. Distler frequently hire and fire management staff. You and Mr. Zak frequently designate profits, spending, or investment and sign business checks.⁴

Discussion

An applicant firm must demonstrate, by a preponderance of the evidence, that it meets each element of DBE certification eligibility. *See* section 26.61(b). This means that you bear the burden of showing that ACS's viability does not depend on its relationship with either the firm's non-SED owners or non-DBE firms such as The Zak Companies and K and F Electric. *See generally* section 26.71(b).

The facts relayed above substantially support CoP's determination that ACS is not an independent business and that its viability depends on its relationship with Mr. Barter, Mr. Distler, and Mr. Zak, all of whom own ACS, are employees of ACS, and own and/or work at The Zak Companies and K and F Electric. You have not explained how the closely intertwined relationships among you are consistent with normal industry practice.

Decision

We find substantial evidence to support CoP's denial decision and affirm it. *See* section 26.89(f)(1). This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
Appeal Team Lead
Disadvantaged Business Enterprise Division

³ *See* Intergovernmental On-Site Certification Review Form (Dec. 12, 2018) and Appeal Letter at 2; *see also* ACS's website at www.azimuthcs.com.

⁴ *See* UCA.