

October 20, 2017

Reference Number: 17-0074

Letisia Smit
L.A. Scapes, LLC
REDACTED
Spring Hill, TN 37174

Re: DBE Certification Denial of L.A. Scapes, LLC

Dear Ms. Smit:

L.A. Scapes, LLC (LAS) appeals the Tennessee Uniform Certification Program's (TNUCP)¹ April 3, 2017, denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. Part 26 (Regulation). TNUCP determined that LAS did not demonstrate, by a preponderance of the evidence, that it satisfies the requirements of Regulation §§26.71(e), (k)², and (j). On April 5, 2017, LAS appealed to the U.S. Department of Transportation (Department). After considering the full administrative record, the Department concludes that substantial evidence supports TNUCP's decision, and we affirm on the grounds discussed below.

Facts

LAS submitted its Uniform Certification Application (UCA), on or about January 4, 2017, and TNUCP conducted LAS's On-Site Review (OSR) on February 15, 2017. LAS is engaged in landscape installation, irrigation installation and maintenance, erosion control and hardscape services. UCA at 2. You own 100% of LAS. You stated that you also work full-time for Reed Landscaping, Inc., as "Project Manager/Estimator." (UCA at 4). You indicated that you perform "everything required" for LAS "in the evening and early morning." (UCA at 4, 5). You responded "Yes" to the question whether you "work for any other firm, non-profit organization, or [are] engaged in any other activity more than 10 hours per week." *Ibid.*

You described your day-to-day duties for LAS on your résumé to include, among numerous other duties, submitting proposals, ordering materials, accounts payable and receivable, budgets, payroll, generating business policies and procedures, and "all other duties that may arise." You

¹ The Metropolitan Nashville Airport Authority (MNA), a member of TNUCP, is the certifier in this case.

² We remind TNUCP that this provision specifically states that a disadvantaged owner may control the applicant firm even though one or more of their immediate family members participate in the firm. The provision is only violated when the recipient cannot determine that the disadvantaged owner – as distinct from the family as a whole – controls the firm.

further state that you control the schedules and do payroll, and that you meet clients and develop quotes for proposals. (Appeal at 3–4).

Discussion

1. TNUCP determined that LAS did not meet the requirements of §26.71(j), which requires that a disadvantaged owner not engage in outside employment that conflicts with the management of the firm, such as part-time work for a full-time firm.³ TNUCP stated in its denial decision:

Letisia Smit is employed full-time by Reed Landscaping as a Project Manager/Estimator. During the February 15, 2017 on-site interview conducted with Ms. Smit she stated that she can devote certain hours a week to Reed Landscaping and L.A. Scapes, LLC. The Regulation at §26.71(j) states the DBE applicant cannot engage in outside employment that conflicts with the management of the DBE applicant's firm. Therefore, §26.71(j) provides the rationale for this determination. . . (Denial Letter at 2).

On appeal, you make the following assertions:

I do currently work for Reed Landscaping, Inc as a Project Manager/Estimator and I have been with Reed since July 2010. The owners of Reed Landscaping, Inc., Irish and Mark Reed are aware of L.A. Scapes, LLC and have no objections with the fact that I work for them and own a business that performs the same scope of work that Reed Landscaping, Inc performs, on a much smaller scale at this time . . . I feel that I am one of Reed Landscaping, Inc's most valuable employee [sic] and this is why they support me and have confidence that in a few years to come that I will have turned L.A. Scapes, LLC into a profitable landscape contractor.

I work for Reed Landscaping, Inc during office hours but I am able to make calls if I need to, check up on my crew's production for the day via a phone call or text. I also monitor my e-mails from my phone and ensure that I respond to my suppliers and clients in a timely manner . . . Because of what I do for Reed Landscaping, Inc and the good relationship I have with Iris and Mark Reed they do not have an issue if I had to take lunch at any given time of the day or leave if required because my work is always done, correctly and as expected.

* * *

My typical day consists of sending e-mails and contacting clients between 5:00 and 7:00 am every morning before I leave to go to work. I also work at night and most of the time only get to bed after 12:00 am. I stay motivated because I believe that the biggest

³ The full text of the provision states: "In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating."

accomplishment is to build something from nothing and to sacrifice to obtain it which in return will make one appreciate it so much more. I work most of the time and don't have much time off even weekends because weekends I meet clients discuss their needs and get working on quotes so I can submit their proposals in a timely manner. I enter all the receipts in QuickBooks, balance the bank statement basically all the required administrative work for the office.

I do payroll each Tuesday night so that the employees receive their direct deposit on a Thursday. I liaise with my CPA. I can provide proof that all the quote requests to my suppliers, coordination with clients and delivery of equipment and material is handled by me. I can supply e-mails and text copies of these things being done during the day as well. Iris, Mark, and I have also discussed the "what happens when L.A. Scapes, LLC grows and needs me full time" and we all agreed that if this happens prior to them retiring that I will give them ample notice and will spend time with my replacement.

2. TNUCP also cited §26.71(e), which provides that individuals that are not socially and economically disadvantaged may be involved in a DBE firm as employees, but that they must not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.⁴

Mr. Ashley Smit, your non-disadvantaged husband, works full-time as LAS' Site Superintendent and is the firm's only full-time employee. (OSR at 1, AS Résumé at 1). TNUCP stated: "With Ms. Smit working full-time at Reed Landscaping, it is determined that Mr. Smit is in control of the business during the majority of the day. Therefore, §26.71(e) provides the rational for this determination." (Denial at 2)

On appeal, you make the following assertions:

I disagree that Ashley Smit is in control of the business during the day. I confirmed that I trust his judgement [sic] to decide on an urgent matter on my behalf if required. Yes, he is my husband but L.A. Scapes, LLC is my business and he works for me. I know there is [sic] people out there that aren't DBE and as we would say "just riding the system" which makes me very mad because I am genuinely a true DBE. I have been in the construction industry since I graduated in 1996 and this is all I know. I have always been very determined to achieved my goals and yes, my ultimate goal is to work only for myself and this is why I am doing what I am doing and why most of my time consists of work.

I control the schedule and tell him where the crew will be working and I typically do a weekly schedule and a month look out schedule. The schedule is always adjusted and updated based on weather or site delays etc. I will also hand him a list of what will be

⁴ The full text of the provision states: "Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm."

performed what will be delivered and how many man hours the job has allocated so that they stay within the man hours allowed when I estimated the project. If any urgent matters occur on site I will be contacted and if I feel that I should be on site I will leave and head to the project. He is my site superintendent and would not be given that position if he was not able to perform the work required. Does Ashley Smit control L.A. Scapes, LLC during the day – NO he does not. I do. I can also submit text messages showing our daily communication which will clearly clarify that I am in control and aware of everything and that I am contacted during the day to resolve things if needed and that I do perform all of these duties as the owner. (Appeal Letter at 3–4).

Decision

The applicant firm, here, LAS bears the burden of demonstrating its eligibility as a DBE per Section 26.61(b).⁵

The evidence in the record indicates, and your Appeal Letter confirms, that you maintain full-time employment with Reed Landscaping, Inc. as a Project Manager/Estimator, and that this is your primary place of employment during working hours. (UCA at 4). In your Appeal Letter, you describe a “typical day” that includes sending e-mails and contacting clients for LAS in the mornings before your primary employment begins at Reed Landscaping, Inc., with additional tasks performed for LAS after your work day with Reed has ended. (Appeal Letter at 3).

The actual landscaping, irrigation, and hardscaping projects performed by LAS, however, occur during the work day, with your non-disadvantaged husband, Ashley Smit, working full-time as the Site Superintendent. (Appeal Letter at 2, 4). Mr. Smit is the only person employed full-time at LAS. (OSR at 1, AS Resume at 1). While the fact of your husband’s employment by LAS is not, by itself, dispositive evidence of your lack of necessary control of the firm during the work day, you have been unable to meet the burden of proof necessary to establish your control of LAS while also maintaining full-time employment with Reed Landscaping, Inc. *See* §26.71(j). Landscaping, hardscaping, and irrigation work generally occurs during the day, when you would be at your full-time job with Reed Landscaping, Inc., though in your Appeal Letter you note that you are available should an urgent matter arise involving LAS. (Appeal Letter at 4). By your own admission, the time you devote is the early mornings and late in the evenings.

LAS bears the burden that to demonstrate that this effort could equate to effective management of the firm during the day-time hours, i.e., at all times it is operating. While your ownership of LAS and your involvement remain unquestioned here, you have not established how you are able to control LAS field activities from afar. The record clearly indicates Mr. Smit performs this function and is disproportionately responsible for LAS’s operations.

Conclusion

⁵ This 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 Department affirms TNUCP's ineligibility determination under §26.89(f)(1) as supported by substantial evidence and consistent with the Regulation's certification provisions, including those contained in Appendix F.⁶ We affirm the determination as there is substantial evidence to support the agency's conclusion that your outside employment conflicts with management of LAS and prevents you from devoting sufficient time and attention needed to control its activities. There is also substantial record evidence to support TNUCP's conclusion that Mr. Smit, a non-disadvantaged individual, is disproportionately responsible for firm operations. *See generally* §§26.61(b), 26.71(e), 26.71(j).

This decision is administratively final and not subject to petitions for reconsideration. LAS may reapply for certification after the applicable waiting period.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: MNAA

⁶ Section 26.89(f)(1) states: "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."