

May 23, 2018

Reference Number: 18-0002

Betsy Tunnell
President, Hilly Howl Inc.
3333 W. Nielsen Ave, #108
Fresno, CA 93706

Dear Ms. Tunnell:

Hilly Howl, Inc. (HHI) has appealed the City of Fresno's (the City)¹ denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation). The City determined in its Denial Letter dated July 3, 2017 that HHI did not demonstrate that you exercise control over the firm, pursuant to §§ 26.71(g)-(h). After considering the full administrative record, the Department affirms the City's denial as supported by substantial evidence and consistent with applicable certification provisions.

Facts

HHI submitted its Uniform Certification Application (UCA) to the City in December of 2016, UCA at 13. You indicated that HHI provides general contracting services, including electrical on high-speed rail development and contracting with school districts. On-Site Review (OSR) at 1-2. You own 51% of HHI and currently serve as President. UCA at 7. Your husband, Carl William Tunnell, owns 49% of HHI and serves as Vice President. *Id.* at 8.

HHI was established by you and Mr. Tunnell, prior to your marriage, in 1992. OSR at 1. You indicated that the firm has several California contractor licenses, all of which were obtained in 1999 and all of which are held by Mr. Tunnell. *Id.* at 6.

The City denied HHI's application on July 3, 2017. The City concluded, in part, as follows:²

Your company's work falls under categories requiring an A, B, C10, C20, and HAZ license/permit which you do not possess . . . without such, you cannot be in operational control of the company within the meaning of the law.

¹ The City of Fresno operates its DBE program as part of the California Unified Certification Program (CUCP).

² The City also concluded that you did not exercise control of HHI pursuant to the requirements of §26.71(g), which requires disadvantaged owners to 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 . . . expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control." Because the Department affirms the City's decision based on §26.71(h), we need not opine on the §26.71(g) denial ground.

In order for a Hilly Howl Incorporated Business to comply with the licensing requirements of the State of California, operational control of the business may not be exercised by an unlicensed majority owner(s). You do not possess such a license. Without such, you cannot be in operational control of the company within the meaning of the law.

Denial Letter at 2.

Authority

Section 26.71(h) of the Regulation states:

If a state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

Article 5 of California's Business and Professions Code Section 7068.1(a) states, in part:

The person qualifying on behalf of an individual or firm under paragraph (1), (2), (3), or (4) of subdivision (b) of Section 7068 shall be responsible for exercising that direct supervision and control of his or her employer's or principal's construction operations to secure compliance with this chapter and the rules and regulations of the board.

Discussion

Section 26.71(h) is very clear, that where a state law requires a particular type license to control a certain type of firm, then the socially and economically disadvantaged person(s) must be the ones in possession of that license in order for their firms to be certified as DBEs. For the general contracting work that HHI is involved with, California requires A, B, C10, C20, and HAZ license/permits, all of which are held by Mr. Tunnell, a non-disadvantaged individual. Denial Letter at 2. You confirmed that you do not hold any of the required licenses, OSR at 6, and you do not claim otherwise on appeal.

Pursuant to the laws of California, you cannot control a firm of this type within the meaning of the § 26.71(h) of the Regulation without holding those licenses yourself. HHI is therefore ineligible for certification, as the City concluded. We affirm under § 26.89(f)(1).

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

Sincerely,

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

cc: Jean Thomas-Runnels, City of Fresno