

July 2, 2019

Reference Number 19-0084

Joslyn Maike
President
Arizona Monitoring Services, LLC
REDACTED
Phoenix AZ 85002

Dear Ms. Maike:

This is in response to your appeal of the decision of the City of Phoenix to deny DBE certification to Arizona Monitoring Services, LLC (AMS). The U.S. Department of Transportation (DOT) is upholding the city's decision.

I. Procedural History

The firm applied to the city for DBE certification on July 5, 2018. The city conducted an on-site review of the firm on December 3, 2018. Phoenix denied the firm's application through a letter of January 2, 2019. The firm appealed to the Department through a letter of March 13, 2019.

II. Burden of Proof and Standard of Review

(a) Burdens of Proof

As provided in 49 CFR 26.61(b) of the rule, an applicant firm must demonstrate by a preponderance of the evidence that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

(b) Standard of review for certification appeals

On receipt of an applicant's appeal from a denial of certification, the Department makes its decision "based on the entire administrative record as supplemented by the appeal..."¹

The Department does not make a *de novo* review of the matter..."² The Department affirms (a certifier's) decision unless it determines, based on the entire administrative record, that (the

¹ 49 CFR 26.89(e).

² Id.

certifier's) decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."³

III. Issue

AMS is 51 percent owned by Joslyn Maike and 49 percent owned by her husband, Rex Marsh. Phoenix determined, based on the individuals' resumes and statements they made during the on-site interview, that Mr. Marsh had greater technical expertise and knowledge than his wife in the firm's core business areas. He is the project manager and works on data management, project initialization and completion, and public relations. He has greater experience in field matters. He has authority to accept and make decisions about new projects, set up equipment for data collection, and the ability to do the financials and pay bills.

On the other hand, Phoenix viewed Ms. Maike as being focused more on administrative duties like regulatory compliance, taking care of legal documents, and providing reports. She can run and make changes in the company, she is reported as saying in the interview. The city also noted that she works full time as a principal of a school. She works at AMS on weekends and 2-3 hours a day while employed at the school. Both she and her husband can sign checks, review projects, and have input into major decisions for the firm.

The interviewer's impression was that Mr. Marsh had greater knowledge and technical expertise and would answer most questions about those aspects of the firm, while Ms. Maike answered questions and was more knowledgeable about AMS's administrative functions. Mr. Marsh is the only operating worker for the firm.

Phoenix ultimately viewed AMS as a family-run firm not primarily controlled by Ms. Maike.

In the appeal, Ms. Maike emphasized her role in using technical software and Bureau of Mines standards to analyze data and create reports. All reports, surveys, and data analysis most go through her before being sent to clients. Her school job is with a small charter school which gives her the flexibility to work on AMS business, as needed. Moreover, her evening and weekend working hours are those during which the bulk of the firm's work, much of which is with homeowners, is performed. Ms. Maike works more hours in the firm than Mr. Marsh, the appeal added. The appeal also stated that Ms. Maike is responsible for all of the firm's decisions.

IV. Discussion

From the record, it appears evident that both Ms. Maike and Mr. Marsh play key, complementary, sometimes overlapping, roles in the firm. For example, Mr. Marsh records seismograph data from an explosion, while Ms. Maike analyzes the data. On equipment purchases, Ms. Maike authorizes the purchase but Mr. Marsh makes the decision about what type of equipment is needed. She works on weekends and evenings, around her school job. He is available to work when she isn't. Both can sign checks for the firm. They regularly consult with one another on a wide variety of AMS matters.

Per section 26.71(k)(2) of the Department's rule, if a certifier "cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the

³ 49 CFR 26.89(f)(1).

firm, then the socially and disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities." AMS is such a case. Both Ms. Maike and Mr. March participate significantly in the firm's activities, but the record does not contain sufficient evidence that Ms. Maike controls the firm on her own, as distinct from the couple controlling the firm jointly.

Conclusion

For the reasons stated above, the Department finds that the City of Phoenix had substantial evidence to conclude that AMS, as a family-controlled firm, did not meet its burden of proof with respect to control. Consequently, we are affirming the city's denial of the firm's application.

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

Sincerely,

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

cc: Brenda E. Dominguez