

June 8, 2015

CERTIFIED MAIL  
RETURNED RECEIPT REQUESTED

Reference Number: 14-0023

Mr. Richard M. Smith,  
Law Office of Smith Cashion & Orr, PLC  
231 Third Avenue North  
Nashville, Tennessee 37201

Dear Mr. Smith:

CHW Landscaping, Inc. (CHW) appeals the Tennessee Uniform Certification Program's (TNUCP's) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After reviewing the administrative record, we conclude that substantial evidence supports TNUCP's determination that the disadvantaged owners do not control the firm within the meaning of §§26.71(e),(f), and (g). We affirm in accordance with §§26.89(f)(1).<sup>1</sup> *See generally* §26.61(b).

*Applicable Regulation Provisions*

§26.61(b) provides:

“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.”

§26.71(c) provides:

“A DBE firm must not be subject to any *formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners*. There can be *no restrictions* through corporate charter provisions, *by-law provisions*, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on

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<sup>1</sup> In the denial letter dated August 9, 2013, TNUCP cites the firm's failure to meet the requirements of §§26.71(c),(d),(e),(f),(g),(k), and (i). We find no substantial evidence to support the first two grounds, and we find the analysis relating to the last two underdeveloped. *See generally* §26.86(a).

or assignments of voting rights) *that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.* This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).” (Emphasis added.)

§26.71(d) provides:

“The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) *In a corporation, disadvantaged owners must control the board of directors.*

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.” (Emphasis added.)

§26.71(e) provides:

“Individuals who are not socially and economically disadvantaged or immediate family members 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.*” (Emphasis added.)

§26.71(f) provides:

“The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or *daily operations* of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. *The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.*” (Emphasis added.)

§26.71(g) provides that:

“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.” (Emphasis added.)*

§26.89(f)(1) provides:

“The Department affirms [the certifier’s] decision unless it determines, based on the entire administrative record, that [the] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

§26.89(f)(2) provides:

“If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department’s decision immediately upon receiving written notice of it.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

### *Operative Facts*

According to the owners, CHW Landscaping, Inc. (CHW) was incorporated in 1979 and its primary line of business relates to seeding, sodding, sod growing, erosion blanket, planting trees, and landscaping. (On-Site Review Report Dated July 23, 2013 (OSSR)). The president of CHW is Mamie L. Cox (Mamie Cox), who owns 20% of the firm’s shares. *Id.* The other disadvantaged owner is secretary/treasurer Faye Warren, who owns 40% of CHW’s shares. *Id.* The vice-president, superintendent, and non-disadvantaged owner of the remaining 40% of the firm is Tim Warren, Faye’s husband. *Id.* The three owners comprise the Board of Directors. *Id.*

CHW By-Laws, Article III-Board of Directors, Section 7(a), states: “At all meetings of the Board of Directors, each director present shall have one vote, irrespective of the number of shares of stock, if any, which he may hold.” Section 7(b) states: “Except as otherwise provided by statute, by the Certificate of Incorporation, or by these By-Laws, the action of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board of Directors...”

The Uniform Certification Application (UCA), Section 4(B), states that Mamie Cox negotiates and executes contracts, and handles office management duties (payroll, processing checks, quarterly taxes, employee relations, contracts, and other paperwork) and that Faye Warren makes financial decisions. Faye Warren also runs errands and checks meters (OSSR at 3). Tim Warren,

Faye Warren, and Greg Gilbert (another Superintendent) are in charge of estimating and bidding. Mamie Cox, Faye Warren, and Tim Warren hire and fire management, have the authority to sign company checks, make financial transactions, and sign loan agreements (UCA at 6). Tim Warren and Greg Gilbert solely control operations and production. *Id.* Mamie Cox, Greg Gilbert, and Tim Warren control marketing and sales. *Id.* Tim Warren and Greg Gilbert solely control major equipment purchases. *Id.* Mamie Cox spends 10 to 11 hours in the office daily handling general administrative duties, and Faye Warren spends 2 to 3 hours in the office daily (OSR at 3). The On-Site report states that Tim Warren spends 10 to 12 hours a day in the field.

### *Decision and Discussion*

#### *i. Formal/Informal Restrictions*

The disadvantaged business owners, Mamie Cox and Faye Warren appear to comply with the requirements set forth in §26.71(c) regarding control. We see no formal restrictions on the disadvantaged owners' customary discretion, and we do not understand which informal restrictions, if any, TNUCP finds fatal. Hence we do not affirm on this basis. *See generally* §§26.89(f)(1) and (2).

#### *ii. Board Control*

The disadvantaged owners, comply with the requirement set forth in §26.71(d)(1) and (2) regarding control. The firm is a corporation, and Mamie Cox holds the highest officer position. Three people are directors, and two of them are disadvantaged. Because of the director quorum and voting by-law provisions described above, the disadvantaged owners control the board. They can form a quorum and (one director, one vote) make any decision without the vote, assent, or even presence of the non-disadvantaged director. There being no substantial evidence that disadvantaged owners lack the power to control CHW within the meaning of §26.71(d), we do not affirm on this basis.

#### *iii. Disproportionate Responsibility for CHW's Operation*

The Department finds that non-disadvantaged individuals control CHW within the meaning of §26.71(e) (non-disadvantaged or immediate family members may be involved in a DBE firm as owners and employees, but such individuals must not exercise the power to control the firm or be disproportionately responsible for its operation).

Mamie Cox and Faye Warren do not solely control CHW. Tim Warren, the non-disadvantaged owner and superintendent controls the firm's field operations, spending 10 to 12 hours a day directly supervising the firm's actual landscape activities (UCA Section 4(B)). Tim Warren shares this responsibility and the authority to purchase major equipment with non-disadvantaged employee and co-superintendent Greg Gilbert. Messrs. Warren and Gilbert control estimating and bidding with Faye Warren's assistance. Tim Warren shares responsibility for hiring and firing management personnel, sales and marketing, signing company checks, making financial transactions, and signing loan agreements. These responsibilities evidently are critical to the firm's operational success. Non-disadvantaged individuals have power to control CHW. Mamie

Cox and Faye Warren share significant responsibilities with, or have delegated them entirely to, non-disadvantaged persons. There is substantial evidence that the firm's day-to-day and long-term decisions are not within the disadvantaged owners' control and that in crucial operational, managerial, and policy realms, CHW functions without their authority. We affirm TNUCP's determination that non-disadvantaged persons have the power to control the firm or are disproportionately responsible for its operation.

iv. *Delegation and Actual Exercise of Control*

TNUCP states that it could not reasonably conclude that Mamie Cox and Faye Warren actually exercise control over CHW's operations, management, and policy within the meaning of §26.71(f).

The UCA states that Mamie Cox negotiates and executes contracts and handles office management duties (payroll, taxes, employees, contracts, and paperwork). It also states that Faye Warren makes financial decisions, runs errands, and checks meters. Mamie Cox spends 10 to 11 hours in the office handling general administrative duties; Faye Warren spends 2 to 3 hours in the office helping with office management and matters related to financial decisions. These facts contrast with Tim Warren's 10 to 12 hour daily shifts and his focus on precisely the daily landscaping operations for which the firm seeks certification.

Non-disadvantaged employees Tim Warren and Greg Gilbert share responsibilities with Mamie Cox and Faye Warren as discussed in the previous section which are crucial to the daily operation of CHW. The fact that Tim Warren may financially obligate the firm without the consent of Mamie Cox and Faye Warren through his apparently unlimited power to sign and loan agreements and make their financial transactions shows disproportionate managerial control independent of the disadvantaged owners. Tim Warren may also hire and fire management personnel. Similarly, Greg Gilbert shares control of actual landscaping work, sales and marketing, and estimating and bidding, which also amounts to disproportionate responsibility for the firm's operations. We concur with TNUCP's conclusion relating to delegation and affirm under §26.89(f)(1).

v. *Overall understanding/Experience and Expertise/Critical, Independent Decision-Making*

The disadvantaged owners fail to demonstrate that they "possess 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" within the meaning of §26.71(g). Again, the burden of proof is on the applicant, and we find it unmet with regard to the independent decision-making requirement of §26.71(g). Mamie Cox, Faye Warren and Tim Warren are equally in charge of hiring and firing management personnel, marketing and sales, signing company checks, and making financial transactions for the firm (UCA at 6). The facts show that the three owners function jointly as a team and have equal decision-making power (OSSR at 3). The evidence demonstrates that the disadvantaged owners do not make independent decisions concerning the firm's landscaping operations. We affirm TNUCP's determination regarding this section.

*Conclusion*

We affirm TNUCP's ineligibility determination on the bases of §§26.71(e), (f), and (g) as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

This determination is administratively final and is not subject to petitions for reconsideration. CHW may reapply for certification at any time.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
External Civil Rights programs Division

cc: TNUCP