

July 1, 2015

CERTIFIED MAIL  
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Reference Number: 14-0024

Mr. Robert E. Murphy, Jr.  
Wadleigh, Starr, & Peters, P.L.L.C.  
95 Market Street  
Manchester, New Hampshire 03101

Dear Mr. Murphy:

The Smart Associates Environmental Consultants, Inc. (Smart) appeals the New Hampshire Department of Transportation's (NHDOT's) decertification of the firm as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). NHDOT issued a Notice of Intent to remove DBE eligibility from Smart on February 21, 2012, and issued its final decision July 10, 2013. Smart appealed to the Department by letter dated October 3, 2013. After carefully reviewing the complete administrative record, we conclude that substantial evidence supports NHDOT's determination. We affirm the decertification under §26.89(f)(1).

NHDOT cites the firm's failure to meet the requirements of §§26.71(c), (d), (f), (g) and (j) relating to control. We find that substantial evidence supports NHDOT's determination under §§26.71(c), (f), and (g), and we affirm on those grounds. *See generally* §26.89(f)(1).<sup>1</sup>

*Applicable Regulation Provisions*

§26.71(a) provides:

"In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole."

§26.71(c) provides:

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<sup>1</sup> NHDOT raises an ostensible §26.69(c) ownership issue in the Notice of Intent dated February 21, 2012 but discusses only remuneration rationales and evidence. However, remuneration is exclusively a control issue under the Regulation. See §26.71(i). There is therefore, no ownership issue before us on appeal.

“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 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).”

§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(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:

“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."*

§26.71(j) provides:

*"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."*

### *Operative Facts*

Smart is an environmental consulting business, providing services for state and federally funded transportation projects (Order on Final Hearing at 3; hereafter "Order"). The disadvantaged owner, Melissa Smart, founded the firm in 1984. *Id.* Smart initially qualified as a DBE in 1986 based upon Ms. Smart's status as a non-minority female, and by 2010 the firm was certified in eight northeastern states, with New Hampshire being classified as the home state. *Id.* at 4. Ms. Smart is the president, treasurer, and director of Smart and owns 60% of its shares. *Id.* at 3. Her husband and non-disadvantaged owner, Glen Smart, is the vice president, secretary, and a director and owns 34% of Smart's shares. *Id.* Mr. and Mrs. Smart's daughters, Catherine Smart and Jenny Smart, each hold 3% of Smart's remaining shares and neither is employed with the firm. *Id.*

The bylaws specify that for action to be taken by the board, a majority of directors must agree. *Id.* at 15. The board of directors consisted of only Melissa Smart and Glenn Smart. *Id.* As a non-disadvantaged owner, Glenn Smart had the ability to block any company action due to lack of a majority. *Id.* After the Notice of Intent and before the final decision, Melissa Smart's daughters, Catherine Smart and Jenny Smart were added as members to the board of directors in order to resolve this issue.<sup>2</sup> *Id.* at 15-16. Her daughters are both 3% shareholders, and NHDOT argues that they do not qualify as "disadvantaged owners" on the board because neither of them works for the firm or has a vested interest in the business. *Id.*

Melissa Smart is an environmental scientist (Appeal Letter at 3). Her duties and responsibilities include marketing, business direction and planning, acting as chief financial and executive officer, contracting, hiring and firing, employee relations, retention decisions, and business policies. *Id.* Glenn Smart is employed by the company as a licensed professional geologist and hydrogeologist. *Id.* He spends 50% to 70% of his time in the field, prepares proposals, supervises projects, and monitors accounts receivable and payable. *Id.* Other employees spend

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<sup>2</sup> The Department can only consider the record at the time of its determination, not subsequent changes (§26.89(f)(6)).

time in the field. *Id.* at 4. Jen Riordan, a certified wetlands scientist and professor in erosion and sediment control, spends 70% to 90% of her time in the field. *Id.* Karen Davis, a wetlands scientist, spends 50% of the time in the field and the other 50% of the time bookkeeping and financial and project reporting. *Id.* Finally, Damon Burt, a certified wetlands scientist, spends 100% of his time in the field. *Id.*

In 2003, the Social Security Agency (SSA) found Melissa Smart disabled due to illness (**REDACTED** (Order at 3). On December 31, 2003, she started receiving social security disability benefits. *Id.* An SSA ruling dated April 28, 2006, states that “in her former work as president and chief executive officer of an environmental consulting firm, the claimant [Ms. Smart] was required to concentrate, make decisions, function in a work setting, and respond to work pressures on a sustained basis. Based upon the findings with respect to her residual functional capacity, the claimant is precluded by her impairments from returning to her past relevant work.” *Id.* Within the official finding, Item No. 7 states “the claimant is unable to perform the requirements of her past relevant work.” *Id.* at 22.

Melissa Smart’s fatigue is unpredictable, which limits her to a minimal amount of work per week. *Id.* at 19. The staff calls or communicates with her once a week, and she usually calls the office once a day. *Id.* She spends about 3 hours in the office per week and spends the rest of the time at home where she frequently rests and occasionally works. *Id.* Prior to her disability, she would accommodate personnel decision making by having meetings at the office (Transcript of September 14, 2012, Hearing at 98; hereafter “Transcript”). After she became disabled, the meetings took place at her home. *Id.* at 97. The SSA found that based on Melissa Smart’s minimal presence in the office and her need to be at home, she cannot carry on the full-time duties as president and chief executive officer, including the ability to “concentrate, make decisions, function in a work setting, and respond to work pressures on a sustained basis (Order at 19).” Melissa Smart’s counsel stated that Ms. Smart was unable to engage in any billable fieldwork or regular office work. *Id.* at 22. According to Ms. Smart’s own statements, she was not able to perform her full-time position. *Id.* When asked what percentage of her time she spent in the office focusing on managerial duties such as personnel decisions and financial decisions prior to her disability, Ms. Smart answered, “Perhaps ten percent of my time (Transcript at 103).” She stated that the other 90 percent of her time, “was spent traveling, going to visit clients or participating in networking maps, following up on you know, project proposals, developing contracts.” *Id.* at 102. The SSA ruling says that her “former work as president and chief executive officer and her condition precluded her from returning to past relevant work (Order at 22).”

The by-laws dated March 1, 2012, state in Section 6.10, Delegation of Duties, that “In the absence or disability of any Officer, or whenever for any reason the Board of Directors may deem it desirable, the board may delegate the powers and duties of an officer to any other officer or officers or to any director or directors, who shall serve in such capacity at the pleasure of the Board of Directors.”

### *Discussion and Decision*

*i. Formal or Informal Restrictions*

Melissa Smart does not control the firm as stated in the corporate by-laws, conflicting with §26.71(c) which provides that the DBE firm must not be subject to any formal or informal restrictions limiting the discretion of the disadvantaged owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or other formal or informal devices...preventing the disadvantaged owner, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.

Smart's original corporate bylaws state that the "Vice-President, shall, in the absence or disability of the President, perform the duties and exercise the powers of the President." Glen Smart, the non-disadvantaged shareholder is vice-president." The firm validly changed the bylaws to say, in Section 6.06, that "The Vice-President shall perform whatever duties and have whatever powers the Board of Directors may from time to time assign."<sup>3</sup> Melissa Smart is precluded from taking on any of the company responsibilities as stated in the SSA disability ruling.<sup>4</sup> Therefore, Glen Smart or another officer must take on Melissa Smart's role and responsibilities, ultimately controlling the firm within the meaning of §26.71(c). We affirm.

*ii. Board of Directors*

The Department declines to affirm NHDOT's determination that disadvantaged persons do not control the board of directors under §26.71(d)(2).

The bylaws specify that for action to be taken, a majority of directors must agree. Because the board of directors originally consisted of Melissa Smart and Glenn Smart, the non-disadvantaged owner had the ability to block any company action. The bylaw provision, in effect, required unanimity. However, after the Notice of Intent and before the final decision, Catherine Smart and Jenny Smart, presumed disadvantaged persons, became directors. NHDOT argues that the Department can only consider the record at the time of its determination, not subsequent changes.<sup>5</sup> The firm validly changed the board composition in order to resolve the lack of majority during board meetings prior to the final decision (which is the Order; see §§26.73(b), 26.89(f)(6)). As a result, we cannot affirm NHDOT's decision under §26.71(d)(2).

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<sup>3</sup> Smart validly amended its bylaws before the final decision. We consider the firm's status and circumstances as of the date of the decision being appealed. §26.89(f)(6).

<sup>4</sup> The SSA ruling dated April 28, 2006 found Melissa Smart as disabled due to illness (fibromyalgia, chronic fatigue syndrome, elevated lead toxicity, sleep apnea, arthritis and osteoporosis). The SSA ruling also states that "in her former work as president and chief executive officer of an environmental consulting firm, the claimant was required to concentrate, make decisions, function in a work setting, and respond to work pressures on a sustained basis. Based upon the findings with respect to her residual functional capacity, the claimant is precluded by her impairments from returning to her past relevant work."

<sup>5</sup> We concur. At the time of NHDOT's decertification, however, the facts had changed, and the firm had made NHDOT aware of the new directors. NHDOT's argument that the daughters cannot be directors because they are not employees is unpersuasive.

iii. *Delegation and Actual Exercise of Control*

NHDOT determined that it could not reasonably conclude that Melissa Smart actually exercises control over Smart's operations, management, and policy within the meaning of §26.71(f).

The appeal letter dated October 3, 2013, claims that Melissa Smart's duties and responsibilities include marketing, business direction and planning, acting as the chief financial officer and chief executive officer, contracting, hiring and firing employees, employee relations, retention decisions, business policies, and marketing and sales. Ms. Smart does not engage in field work and is not able to perform her full time position due to her disability. To illustrate, she testified at the SSA hearing that she is in charge of hiring and firing, but the last layoff occurred in 2008, corroborated by other sources. The SSA ruling dated April 28, 2006, states that "in her former work as president and chief executive officer of an environmental consulting firm, the claimant was required to concentrate, make decisions, function in a work setting, and respond to work pressures on a sustained basis. Based upon the findings with respect to her residual functional capacity, the claimant is precluded by her impairments from returning to her past relevant work." Within the official finding, Item No. 7 states "the claimant is unable to perform the requirements of her past relevant work."

Glenn Smart is employed by the company as a licensed professional geologist and hydrogeologist. He spends 50% to 70% of his time in the field, prepares proposals, supervises projects, and monitors accounts receivable and payable. Another nondisadvantaged person Damon Burt, a certified wetlands scientist, spends 100% of the time in the field. These facts indicate that the nondisadvantaged individuals substantially control the company's field operations, while Melissa Smart is precluded by her disability. Ms. Smart depends on her husband, the firm's Vice President, and at least one other nondisadvantaged individual who have, the record indicates, been delegated the bulk of the firm's fieldwork. All relevant evidence supports NHDOT's conclusion that Melissa Smart does not actually exercise control over the firm under §26.71(f).

iv. *Overall Understanding/Experience and Expertise/Critical, Independent Decision-Making*

The disadvantaged owner fails to demonstrate that she has "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). The burden of proof is on the certifying agency and we find it met with regard to the independent decision-making requirement of §26.71(g).

As previously stated, Melissa Smart ostensibly has multiple duties and responsibilities for the firm. However, the evidence indicates that she does not conduct the field work which is crucial to Smart's business and that she can perform little to no office work either. During the SSA hearing, Melissa Smart's counsel claimed that she was unable to engage in any fieldwork or regular office work at all. The SSA ruling states that her "former work as president and chief executive officer and her condition precluded her from returning to past relevant work." In

contrast, her husband Glenn Smart spends 50% to 70% of his time in the field. He bills clients, prepares proposals, supervises projects, and monitors accounts receivable and payable. Additional employees with the same expertise and experience also conduct field work, and have similar responsibilities as Glenn Smart, as previously mentioned. This evidence demonstrates that disadvantaged owner Melissa Smart does not make informed, critical, independent decisions concerning the firm's daily operations. Her disability causes her to be greatly dependent on the expertise of her husband and other individuals. Substantial evidence supports NHDOT's conclusion that Melissa Smart does not control the firm within the meaning of §26.71(g). We affirm.

v. *Work Interference*

NHDOT concludes that Melissa Smart's disability interferes with her performance at work. Section 26.71(j) states that a 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."

According to her own statements to the SSA, Melissa Smart is unable to perform her full-time position. However, §26.71(j) speaks to outside employment or other business interests. We do not believe that a disability is either. Given our disposition on the control provisions above, we decline to affirm NHDOT's determination under §26.71(j). See §26.89(f)(2).

*Conclusion*

The record amply demonstrates that NHDOT's actions were consistent with the substantive and procedural certification provisions of Part 26, and substantial evidence supports NHDOT's decision. Under the authority of §26.89(f)(1), we affirm the decertification under §§26.71 (c), (f), and (g).

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

Sincerely,

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

cc: NHDOT