

July 6, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 14-0031

Dorothy Ruohonen, Owner
Talon Research, Inc.
[REDACTED]
Hancock, MI 49930

Dear Ms. Ruohonen:

This letter responds to your November 15, 2013, letter in which you appealed the Michigan Department of Transportation's ("MDOT") denial of Talon Research, Inc.'s ("Talon") application for certification as a Disadvantaged Business Enterprise ("DBE"). In its evaluation, MDOT determined that Talon failed to meet the ownership and control requirements under 49 C.F.R. Part 26 (the "Regulations"). The U.S. Department of Transportation, Departmental Office of Civil Rights ("Department"), has carefully reviewed the full administrative record and concludes that substantial evidence supports MDOT's decision. The Department, therefore, affirms MDOT's denial of DBE certification.

I. Background

A. Talon's Ownership and Structure

Talon was formed on May 26, 2010, by Dorothy Ruohonen, a white female rebuttably presumed to be a socially and economically disadvantaged individual under the Regulations.¹ Talon's DBE Certification Application ("Application"), materials attached thereto, and MDOT's on-site interviews together reveal that Ms. Ruohonen holds 100% ownership interest in Talon.² Ms. Ruohonen acquired her ownership through an initial cash dollar investment of \$5,000, drawn from a joint checking bank account at Superior National Bank & Trust Company that she shares with her husband, Jay Ruohonen, a non-disadvantaged male. (Application at 3, 6).

¹ See 49 CFR § 26.67 (requiring a reviewing agency to "rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women . . . are socially and economically disadvantaged individuals.").

² Talon began as Peninsula Drafting, Inc. ("Peninsula"), founded by Ms. Ruohonen, on September 17, 2003. Peninsula changed to Hawk Technologies, Inc. on March 24, 2005, before becoming Talon in 2010.

According to Ms. Ruohonen's on-site interview, Talon is comprised of two non-incorporated divisions: Hawk Technologies and BridgeGuard. (D. Ruohonen Interview at 3). Hawk Technologies performs services such as computer assisted drawing ("CAD"), while BridgeGuard performs infrared scoping and crack analysis of concrete bridge decks and substructure elements using thermal imaging. (D. Ruohonen Interview, *passim*). Photographs taken during MDOT's on-site visit show that all truck signage for the firm displays "BridgeGuard," not Talon or Hawk Technologies.

B. Talon's Workforce

1. *Officers and Employees*

Ms. Ruohonen³ is Talon's Chief Executive Officer ("CEO") and Secretary, while Mr. Ruohonen⁴ serves as the firm's President and Treasurer. (Application at 4). In response to an on-site interview question, Ms. Ruohonen stated that David Raasakka,⁵ a non-disadvantaged male and the firm's National Sales Manager, "operates like a [Vice President]" but Ms. Ruohonen was "not sure of [this] title." (D. Ruohonen Interview at 17). Through on-site interviews it is apparent that, amongst field technician(s) and engineer(s), there are at least three other non-disadvantaged males employed at Talon as managers or supervisors, including Frank Anderson (CAD Supervisor or Project Manager), Andrew Niemi (Application Engineer), and David Torola (Operations Manager). (D. Ruohonen Interview, *passim*).

2. *Control, Duties, and Responsibilities*

In her on-site interview, Ms. Ruohonen stated that Mr. Ruohonen serves as Treasurer of the firm because "[he] has 23 years of banking/financial experience." (D. Ruohonen Interview at 13). She also stated that she does not know her employees' wages (D. Ruohonen Interview at 2); however, Mr. Ruohonen's comments reveal his knowledge of their wages. (J. Ruohonen Interview at 2). Further, Ms. Ruohonen stated that her husband developed the operation and field procedures and policies for Talon; makes the day-to-day management decisions for the firm; handles the financial aspects of the firm, including the signing of all checks, contracts, loans, and unsecured guaranty agreements; and is responsible for the negotiation of contracts. (D. Ruohonen Interview, *passim*). Mr. Ruohonen is the contact person for Talon and his on-site comments confirm that he oversees sales, operations, accounting, contracts, proposals, and all hiring and employment issues for BridgeGuard. (J. Ruohonen Interview, *passim*). Mr. Ruohonen's comments, however, indicate that he, Ms. Ruohonen, and Mr. Raasakka are responsible for the negotiation of contracts, and that he and Ms. Ruohonen "jointly make decisions of where the business should go – strategically [but he] handle[s] the operational aspect [as Treasurer of the firm]." (J. Ruohonen Interview at 14).

³ Ms. Ruohonen's resume shows that she graduated in 1985 from Michigan Technical University ("MTU") with an Associate's Degree in Applied Science in Mechanical Design. Ms. Ruohonen possesses no engineering licenses or certifications.

⁴ Mr. Ruohonen's resume shows that he graduated in 1984 from MTU with a Bachelor of Science Degree in Business Administration and is certified as an ASNT-TC-1A Certified Thermographer.

⁵ Mr. Raasakka's resume shows that he graduated in 1991 from MTU with an Associate's Degree in Mechanical Design Engineering Technology, and in 1999 with a Bachelor of Science Degree in Mechanical Design Engineering Technology. Mr. Raasakka's resume also indicates that he is an ASNT-TC-1A Certified Thermographer.

Ms. Ruohonen responded to on-site questions that she estimates CAD projects without assistance. (D. Ruohonen Interview at 12). She admitted that she has not often personally estimated jobs in the past (D. Ruohonen Interview at 12), while Mr. Ruohonen responded that he personally estimates BridgeGuard jobs 95% of the time and Hawk Technologies jobs 40% of the time. (J. Ruohonen Interview at 12). Ms. Ruohonen responded that she reviews Mr. Raasakka and Mr. Anderson's estimates for Hawk Technologies, but does not review those estimates made by Mr. Niemi, Mr. Torola, Mr. Raasakka, and Mr. Ruohonen for BridgeGuard. (D. Ruohonen Interview at 12). Ms. Ruohonen indicated she does not personally work in the field for BridgeGuard, but does "on the CAD side." Mr. Ruohonen, at times, works in the field. (J. Ruohonen Interview at 11).

On-site interviews reveal that Mr. Raasakka earns the highest wage at Talon; works in the field; frequently estimates jobs; estimates BridgeGuard fee proposals and Hawk Technologies CAD fee proposals without assistance; and is responsible for BridgeGuard's business development, sales, calls, fee proposals, client meetings, sales and marketing events, and forecasts. (D. Raasakka Interview, *passim*). Mr. Raasakka also oversees one salesperson in both BridgeGuard and Hawk Technologies. (D. Raasakka Interview at 6).

C. Talon's DBE Certification Application

On May 23, 2013, Talon submitted to MDOT its Application, with all required materials, to become an eligible DBE under the Regulations. Talon's Application does not identify the most specific available NAICS Code for the type(s) of work the firm can perform;⁶ however, the Application states the following as the firm's primary activities: "Infrared scoping and crack analysis of concrete bridge decks and substructure elements. (Application at 12). Based on the administrative record, MDOT assigned Talon's work the NAICS Code 541380 (Testing Laboratories, Nondestructive Testing, Thermal Testing).⁷ In its Application, the firm did not indicate that it sought DBE certification for the CAD or other services it provides customers. Similarly, the MDOT decision contains no reference to any other NAICS Codes.

On July 17, 2013, pursuant to the DBE certification process described in the Regulations, MDOT performed on-site interviews at Talon; interviewees included Ms. Ruohonen and Mr. Ruohonen, and Mr. Raasakka submitted a completed on-site questionnaire to MDOT on August 2, 2013. Each interviewee signed and dated a Certification Page, signifying that answers and statements provided during their respective interview contained complete and accurate information.

⁶ See 49 CFR § 26.71(n) ("The types of work a firm can perform (whether on initial certification or when a new type of work is added) must be described in terms of the most specific available NAICS code for that type of work. [The certifying agency] may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients.").

⁷ We take official notice of the U.S. Census 2012 definition of NAICS code 541380: "This industry comprises establishments primarily engaged in performing physical, chemical, and other analytical testing services, such as acoustics or vibration testing, assaying, biological testing (except medical and veterinary), calibration testing, electrical and electronic testing, geotechnical testing, mechanical testing, nondestructive testing, or thermal testing. The testing may occur in a laboratory or on-site."

On August 21, 2013, MDOT denied Talon's Application. MDOT determined that Ms. Ruohonen failed to demonstrate, by a preponderance of the evidence, that she owned and controlled Talon, thus failing to meet the certification standards and requirements set forth in the Regulations. On November 15, 2013, Ms. Ruohonen, on behalf of Talon, filed a timely appeal of MDOT's decision with the Department.

II. Discussion

A. Standard of Review

Under the Regulations, a firm that is denied DBE certification may make an administrative appeal to the Department. 49 CFR § 26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is based solely on a review of the administrative record as supplemented by the appeal. *Id.* § 26.89(e). The Department will affirm the recipient's decision unless it determines, based upon its review of the entire administrative record, that the decision was “unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [the Regulations] concerning certification.” *Id.* § 26.89(f)(1).

B. Issues On Appeal

In order to become certified under the DBE program, an applicant firm has the burden of demonstrating to the certifying agency, by a preponderance of the evidence, that it meets the required elements of “group membership or individual disadvantage, business size, ownership, and control.” *Id.* § 26.61(b). MDOT found no issues related to individual disadvantage or business size; however, MDOT concluded that Ms. Ruohonen provided insufficient evidence establishing her ownership and control over Talon. Specifically, with regard to ownership, MDOT determined that the initial investment was a joint investment, with Ms. Ruohonen's 100% ownership reflecting a gift from Mr. Ruohonen for full ownership with no remuneration, and Ms. Ruohonen's expertise was not cause for her sole ownership. On the issue of control, MDOT found that Ms. Ruohonen lacks the necessary experience and training in the applied for NAICS Code required to run Talon, and relies on her husband and other Talon employees for technical competence and overall and daily operations. In her appeal, Ms. Ruohonen claims that MDOT's lack of sufficient ownership interest and control findings were based on inaccurate evidence, and that she does indeed possess the requisite level of ownership and control required for Talon to become DBE certified under NAICS Code 541380. In light of sufficient evidence to support MDOT's determination concerning the control issue described above, the Department need not address the purported ownership issue(s).⁸

⁸ Pursuant to the Regulations, MDOT determined that Ms. Ruohonen's ownership was not real, substantial, and continuing, going beyond pro forma ownership, and that her contributions of capital or expertise to acquire ownership of Talon were not real and substantial either. MDOT found that because Ms. Ruohonen started Talon with funds from a joint checking account shared with her husband, Mr. Ruohonen, the initial investment was a 50-50% joint investment. The record reflects that Ms. Ruohonen possesses 100% ownership of Talon, and therefore, MDOT concluded that 50% of Ms. Ruohonen's ownership interest in Talon was gifted to her by her husband, triggering a heightened burden of proof under 49 CFR § 26.69(h).

C. Analysis of Ms. Ruohonen's Control of Talon

Ms. Ruohonen contests MDOT's finding that she did not present sufficient evidence of control of Talon. To determine whether a disadvantaged owner exerts the requisite level of control of a firm, the examining agency must consider a number of factors. There must not be any formal or informal restrictions limiting the customary discretion of the disadvantaged individual, such as corporate charter or by-laws provisions or other formal or informal devices that prevent the disadvantaged owner from making a business decision without the cooperation or vote of a non-disadvantaged person. *Id.* § 26.71(c). Also, the disadvantaged owner must possess the power to direct the management and policies of the firm and make day-to-day and long-term decisions on matters of management, policy, and operations. *Id.* § 26.71(d). The disadvantaged owner must also hold the highest position in the company and, specifically, in a corporation, control the board of directors. *Id.* § 26.71(d)(1)-(2).

Further, the Regulations allow for non-disadvantaged family members to be involved in a DBE firm as a manager, employee, or officer; however, this person must not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. *Id.* § 26.71(e). Even when the disadvantaged owner delegates areas of management, policy-making, or daily operations of the firm to other persons, as permitted by the Regulations, her managerial role in the firm's overall affairs must be such that the examining agency can reasonably conclude that she actually exercises control over the firm's operations, management, and policy. *Id.* § 26.71(f). This involves a judgment about the control the disadvantaged owner exercises vis-à-vis others involved in the firm; if the reviewing agency cannot determine the disadvantaged owner—as distinct from the family as a whole—controls the firm, then the disadvantaged owner has failed to carry her burden of proving control "even though they may participate significantly in the firm's activities." *Id.* § 26.71(k)(1)-(2).

Moreover, the disadvantaged owner "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." *Id.* § 26.71(g). While she is not required to have experience or expertise in every critical area of the firm's operations, or greater experience or expertise than managers or key employees, she "must have the ability to intelligently and critically evaluate information presented by other participants . . . and 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." *Id.* § 26.71(g). Notably, the reviewing agency can only grant certification

The Department notes that when marital assets, held jointly by both spouses, "are used to acquire the ownership interest asserted by one spouse, [the certifying agency] must deem the ownership interest in the firm to have been acquired by that spouse with [her] own individual resources, *provided that the other spouse irrevocably renounces and transfers all rights in ownership interest in the manner sanctioned by the laws of the state. . . .*" *Id.* § 26.69(i)(1) (emphasis added). Accordingly, Ms. Ruohonen may avoid an ownership issue under the Regulations based on her capital contribution to acquire Talon by providing documentation evidencing Mr. Ruohonen's irrevocable renunciation and transfer of all rights in any ownership interest(s) he may have in Talon due to the initial capital investment coming from a joint checking account shared with her. *See id.* § 26.69(i)(1).

to a firm for the specific type(s) of work the disadvantaged owner has ability to control. *Id.* § 26.71(n).

Under these guidelines, MDOT determined that Ms. Ruohonen lacked the necessary field experience, supervisory experience, or sufficient training to control the firm's operations under NAICS Code 541380. Specifically, Ms. Ruohonen's formal resume, on-site responses to questions, and Talon's completed Application do not indicate any experience in thermal bridge imaging; instead, they indicate Ms. Ruohonen's background in CAD work and other areas. Further, Ms. Ruohonen produced no evidence of any relevant licenses, training, or work experience in this particular area, but instead relies on other Talon employees for technical competence as well as overall and field operations in thermal testing work. MDOT further found that Ms. Ruohonen's name, picture, likeness, and ownership information were not featured on Talon's webpages, and all truck signage depicted BridgeGuard, not Talon or Hawk Technologies. Moreover, Mr. Ruohonen's control over checks, contracts, loans, and unsecured guaranty agreements on behalf of Talon, and oversight of overall and daily operations and finances, further substantiated MDOT's finding that Ms. Ruohonen insufficiently controls Talon. MDOT concluded that Talon is a family-controlled and financially operated firm.

On appeal, Ms. Ruohonen argues, among other things, that Talon is not a family business, but rather is an expansion of Ms. Ruohonen's original efforts (in CAD work) into additional technical areas (i.e., thermal bridge imaging) based on customer needs. She states that since the firm's inception, she has served as the sole owner, incorporated the firm, bought equipment with business revenue, made all executive decisions (e.g., hiring, firing, sales, marketing, and billing), and has since grown the firm, hiring staff to supervise and manage various aspects of the business. Additionally, Ms. Ruohonen claims that, regarding the firm's purported specialization under NAICS Code 541380, Talon in fact services six (6) NAICS Codes related to Federal and state bridge inspections; however, Ms. Ruohonen does not indicate in her appeal letter which additional NAICS Codes may apply to her firm's work.⁹ Ms. Ruohonen asserts that she has built the team of specialists required for the firm's work, she is aware of every decision made by team members, and she controls end products returned to customers and all major decisions affecting the firm.

Ms. Ruohonen admits in her appeal that she has delegated select roles to her husband, but that those delegations are fully revocable by her at any time. While she has delegated key roles to Mr. Ruohonen in BridgeGuard, Ms. Ruohonen states that she has delegated virtually none of the core functions of Hawk Technologies to him and still discusses BridgeGuard's key decisions with him daily. Ms. Ruohonen, after making a decision, then "refocus[es] on the areas of [her] best expertise, the CAD services division (sic: Hawk Technologies), and the BridgeGuard CAD products that ultimately go to [Talon's] customers." Finally, Ms. Ruohonen states that she pays Mr. Raasakka a higher wage than her or her husband for a host of business and strategic reasons.

Despite these arguments, MDOT's determination that Ms. Ruohonen failed to meet the Federal eligibility standards concerning control is supported by substantial evidence. The record

⁹ The appeal does not challenge, or raise as an issue, the failure of MDOT to assign a NAICS code to the other work performed by Talon or to determine whether Ms. Ruohonen has the ability to control the type of work not covered by NAICS Code 541380. See *id.* § 26.71(n).

does not reflect any formal or informal restrictions limiting Ms. Ruohonen's customary discretion as Talon's owner and CEO, or that she lacks power to direct or cause the direction of the management, policies, and decisions of the firm.¹⁰ *See id.* § 26.71(d). The record shows, however, that Ms. Ruohonen lacks control over the firm as a result of the delineation of and actual duties performed by Talon employees. *See id.* § 26.71(e).

The Regulations permit Mr. Ruohonen to participate in Talon if it were a certified DBE firm; however, he must not possess or exercise the power to control Talon or be disproportionately responsible for its operation. *See id.* § 26.71(e). Here, Mr. Ruohonen possesses and exercises the power to control Talon as President and Treasurer, as described above, and the record reveals he is disproportionately responsible for Talon's operation. Ms. Ruohonen admitted, in response to on-site questions, that Mr. Ruohonen has developed the firm's operation and field procedures; makes the firm's day-to-day management decisions; handles the firm's finances; negotiates contracts; and signs all checks, contracts, loans, and unsecured guaranty agreements for the firm. She also admits that Mr. Ruohonen oversees sales, operations, accounting, proposals, and employment matters for BridgeGuard. This is substantial evidence that Mr. Ruohonen possesses a disproportionate amount of control over Talon's operations compared to Ms. Ruohonen, whose work is heavily concentrated in Hawk Technologies' CAD business (not covered by the Application) and other managerial and administrative areas (e.g., hiring Talon employees, computer and networking equipment maintenance, and IT).

Even if Mr. Ruohonen's duties at Talon constitute permissible delegations by Ms. Ruohonen under the Regulations, MDOT must have reasonably been able to conclude, by comparison with Mr. Ruohonen, that Ms. Ruohonen actually exercises control over the firm's operations, management, and policy. *See id.* § 26.71(f). As described herein, there is substantial evidence in the record revealing the extent of Mr. Ruohonen's duties, responsibilities, and control over Talon and BridgeGuard's daily and long-term operations, management, and policy. While Ms. Ruohonen may significantly participate in Talon's activities in several capacities, she has not carried her burden of proving control by a preponderance of the evidence. MDOT's inability to determine that she, as opposed to her and her husband, controls the firm is supported by substantial evidence in the record.

Finally, Ms. Ruohonen lacks control over Talon because she does not have the technical competence and experience directly related to the type of work in which Talon sought DBE certification, thermal bridge imaging. Ms. Ruohonen's resume, education, and experience show that she possesses skills in CAD work and managerial competence; however, managerial competence is only one of the requirements set forth in the Regulations. *Id.* § 26.71(g). Ms. Ruohonen has not sufficiently demonstrated technical competence and experience directly related to BridgeGuard's thermal bridge imaging operations, nor that she possesses sufficient knowledge to "intelligently and critically evaluate information presented by other participants" in the division (e.g., Mr. Ruohonen, Mr. Raasakka), thus allowing her to make independent decisions concerning the firm's daily operations, management, and policymaking. *See id.* § 26.71(g). Instead, the record indicates that she relies heavily, if not exclusively, on Mr. Ruohonen, Mr. Raasakka, and Talon's other non-disadvantaged employees to perform the work

¹⁰ According to MDOT, under the corporate by-laws the President is in fact the CEO and controls the firm's operations. However, the by-laws were not included in the administrative record.

associated with BridgeGuard, the division responsible for thermal bridge imaging projects. MDOT can only grant DBE certification to Talon for the specific type of work Ms. Ruohonen has the ability to control and, therefore, MDOT had substantial evidence to support its finding that Ms. Ruohonen lacked the level of control required by the Regulations.

III. Conclusion

Upon review of the administrative record as a whole, and for the above-stated reasons, MDOT's denial of Talon for DBE certification is supported by substantial evidence and is, therefore, affirmed. This determination is administratively final and not subject to petitions for reconsideration. Talon may reapply for certification as a DBE at any time, if it believes it can satisfy the eligibility requirements.

Sincerely,

Sheryl G. Williams
Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights
Department of Transportation

Cc: Michigan Department of Transportation