

June 22, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0043

Kimberly A. Kidner
President
Union Industrial Contractors, Inc.
P.O. Box 1718
Ashtabula, Ohio 44005-1718

Dear Ms. Kidner:

Union Industrial Contractors, Inc. (UIC) appeals the Ohio State Department of Transportation's (ODOT) denial of its application for DBE certification, under the standards of 49 C.F.R. Part 26 (the Regulation).¹ ODOT denied certification on four grounds:

- (1) Insufficient contribution of capital to acquire ownership, §26.69(e);
- (2) Transfer of ownership from a non-disadvantaged owner to disadvantaged owner, §26.69 (i);
- (3) Outside employment that conflicts with control of the firm, §26.71(j); and
- (4) Lack of overall understanding of, and managerial and technical competence and experience directly related to, the firm's work or operations, §26.71(g).

We affirm ODOT's decision as supported by substantial evidence and consistent with the substantive and procedural provisions of the Regulation. See §26.89(f) (1). We cannot affirm ODOT's conclusion on the first three grounds. However, we find that there is evidence to support ODOT's conclusion that UIC failed to demonstrate that the firm meets the requirements of §26.71(g).

¹ See DBE Unified Certification Application (UCA Application) (February 11, 2013); ODOT Denial Letter (October 23, 2013).

Facts²

UIC's primary area of activity is commercial construction on highways, bridges, and sewer lines. Roger Cochran and Larry Locke formed the firm in 1978. Mr. Locke retired in 1992 and sold his shares back to the company. Between 1997 and 2001, Mr. Cochran gifted 48 shares each to you and your brother, Ryan Cochran. He also transferred 12 shares during this time to Dwayne Fischer.³ Mr. Cochran retired in 2008. On 12/19/2012, you purchased 2 shares from Mr. Fischer for REDACTED REDACTED per share). After this purchase, you became the majority owner of UIC. At the time that you applied for DBE status, you owned 51% of the firm and Ryan owned 49%. UIC's complete history of share ownership is contained within the table below:

UIC Share Ledger						
Date	Larry L	Roger C	Ryan C	Kimberly K.	Dwayne F	Company Treasury
Jul-78	250	250				0
Jul-92	-250	0				250
	0	250				
12/15/1997		-72	36	36		
		178	36	36		250
5/20/1999		-12	4	4	4	0
		166	40	40	4	250
5/17/2000		-6	2	2	2	0
		160	42	42	6	250
5/17/2001		-18	6	6	6	0
		142	48	48	12	250
10/20/2008		-142	0	0	0	142
		0	48	48	12	392
12/19/2012			0	2	-12	10
Present	0	0	48	50	0	402

The experience and job responsibilities of UIC's key employees are as follows:

Kimberly Kidner

You are UIC's President, Treasurer, and Equal Opportunity Officer. As you state in your appeal, you "focus primarily on the financial aspects of the business, while delegating the field work to [your] team members." You are responsible for UIC's bookkeeping, cash flow, and safety policy. Prior to joining UIC, you worked at various banks, where your responsibilities included bookkeeping, training, and business development. You obtained a B.S. in Business

² The facts derived from the following sources: Uniform Certification Application (UCA) (February 11, 2013); ODOT Program On-site Review (A&B) (September 24, 2013); Kimberly A. Kidner Resume; Ryan Cochran Resume and Dwayne Fischer Resume.

³ It is unclear why Mr. Cochran gifted 12 shares of the corporation to Mr. Fischer. We assume, however, that the gifts were for Mr. Fischer's contribution to the firm.

Administration and a MBA from Lake Erie College.

Ryan Cochran

Your brother Ryan is UIC's Vice President, Project Manager, Superintendent and Estimator. According to your on-site interview, Ryan decides which jobs to bid on, performs all estimates for proposals, and then runs the job project after UIC receives a contract.⁴ Ryan has worked at UIC since 1986.

Dwayne Fisher

Mr. Fischer is UIC's General Superintendent. He served as Vice President and part owner of UIC until 2012. Mr. Fischer has worked at UIC since 1983. Mr. Fisher manages the firm's field operations, including labor schedules, equipment, and materials. He also helps Ryan with bidding. Prior to joining UIC, Mr. Fischer worked for 6 years at other construction firms.

Ryan and Mr. Fischer are both able to read and understand blueprints. They also perform labor for projects and manage subcontractors.

Discussion

Under the Regulation, a firm bears the burden of proving, by a preponderance of the evidence, that it meets the Regulation's control requirements. § 26.61(b). A disadvantaged owner must have "technical competence and experience *directly* related to, the type of business in which the firm is engaged and the firm's operations." § 26.87(g) (emphasis added). Disadvantaged owners may delegate responsibility. However, the owner must show that she is able to critically analyze information provided by employees to make *independent* decisions about the firm's daily operations. *Id.*

In this case, your appeal and the record fail to demonstrate that you have an overall understanding or technical competence and experience in the highway, sewage or bridge construction. There is no evidence that you supplemented your lack of technical education with practical work experience in construction. In addition, there is no evidence that you become technically competent by obtaining construction certifications. You also failed to demonstrate that you are capable of analyzing critically the type of information required to make independent decisions about the firm's daily operations. Based on your background, it appears that you are unable to make decisions concerning UIC's core area of operations without the advice of Ryan or Mr. Fischer.⁵

⁴ The record reveals that Marc Fischer, Mr. Fischer's son, also works at the firm. He assists Ryan with creating estimates for proposals and running jobs. He will assume these responsibilities once he is fully trained and competent. See On-site A&B at 8.

⁵ The issues of disproportionate control and delegation (§§26.71 (e), (f)) were not cited in ODOT's denial letter. Therefore, the issue is not before us on appeal. We consider the work and competence of Ryan and Mr. Fischer only to support our reasoning, based on our review, that you are incapable of making decisions about UIC's fieldwork

You stated in your appeal that “[w]ithout no financial viability, there would be no field work. There would be no company.” We agree. We recognize the substantial contributions that you made towards not only the firm’s financials, but also in compliance, safety, and healthcare. There is evidence that you have been instrumental to the firm’s success. We also acknowledge that you are the only owner to have actually purchased shares in the company. The Regulation, however, requires that you have technical competence *and* experience in highway, bridge, and sewer line construction. You fail to demonstrate the requisite technical competence and experience.⁶

Conclusion

You have not shown technical competence and experience directly related to UIC’s construction operations. Nor have you shown “the ability to *intelligently* and *critically* evaluate information presented by other participants in the firm's [field work] and to use this information to make independent decisions concerning the firm's daily operations.” §26.71 (g). Therefore, we affirm ODOT’s denial.

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

Sincerely,

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

cc: ODOT

without their help.

⁶ See 13-0268, Orange Coast Analytical, Inc., at 4-5 (significant administrative and managerial contribution alone are insufficient to meet the requirements of §26.71(g)).

We discussed the purpose behind the 26.71(g) in great length in the May 30, 1997 Preamble to the final Regulation. Failure to prove that you meet this section’s criteria calls into question whether you actually control the organization. See Fed. Reg. Vol. 62 at 29569 (May 30, 1997).