

June 23, 2015

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Reference Number: 14-0052

Mrs. Emily Joyce Dowdy White, President
Pandora Electrical, LLC
4345 Commerce Drive SW Suite C
Atlanta, Georgia 30336

Dear Mrs. White:

Pandora Electrical, LLC (Pandora) appeals the Georgia Department of Transportation's (GDOT'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 GDOT's determination. We affirm the ineligibility determination under §§26.89(f)(1).

In the denial letter dated September 10, 2013, GDOT cites the firm's failure to meet the requirements of §26.69(i) relating to ownership, and §§26.71(e), (g), (h), and (k) relating to control.¹ We affirm the grounds. *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."

§26.69(c) in pertinent part provides:

"(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the

¹ Section 26.69(i) is a counting provision rather than a requirements such as substantiality of ownership (§26.69(c)) or capital (§26.69(e)). The denial letter fails to state specific §26.69(c) or (e) grounds.

application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan..."

§26.69(e) provides:

"The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan."

§26.69(i) provides:

"You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification."

§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(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.*” (Emphasis added.)

§26.71(h) provides:

“If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. *However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.*” (Emphasis added.)

§26.71(k) provides:

“(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.”

§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(g) provides:

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

Operative Facts

Pandora Electrical, LLC (Pandora) is an electrical contracting company established in September 2010 (Uniform Certification Application (UCA) dated May 31, 2013). You are the President of Pandora and own 100% of the firm’s shares (On-Site Review Report (OSSR) Dated July 15, 2013 at 2). The Vice-President and Licensed Electrical Contractor of Pandora is your husband, Adam White. *Id.* at 2 and 4. You and your husband initially capitalized the firm by contributing \$10,000 of marital savings and \$10,000 of marital equipment. *Id.* at 3. The firm has not made any changes in ownership according to the Schedule A (application form) dated May 31, 2013. *Id.* and UCA at 7.

Your resume shows that your previous positions relate to office management (Data Entry Specialist for Hoya (Eagle Optics) (2000-2003); Office Administrative Assistant for Xtreme Optics (2004-2006); After Care Assistant for North Baptist Academy (2006-2009); and Office Administrator for Pandora Electrical, LLC (2010-present)). You completed your education at the International School of Skin and Nails in 2005.

Adam White’s resume shows the following positions to the present: Site Project Manager 2008 for the Allison Smith Company; Field Supervisor/Foreman for Inglett and Stubbs International 2007-2008 & 2008-2009; Field Supervisor and Foreman for Inglett and Stubbs International 2009; Field Supervisor/Foreman QTS Metro for Inglett and Stubbs LLC in 2010; and Manager of Operations for Pandora Electrical, LLC from 2011 to the present. Mr. White has experience in electrical installation training, miscellaneous upgrades to existing equipment, close-out documentation, product research, analyzing/reviewing field installation techniques, designing and building electrical systems, loading calculations, future planning/expansion coordinating, control systems, generators, European/US transformers, ATS/MTS installations, secure voice/data nipper/zipper systems, secondary installs for 13800v site transformers, electrical testing, generators/switching, underground feeder installation, UPS systems, CH/Siemens Switchgear, site grounding, low voltage controls, planning, development project cost analysis, and manpower distribution. Mr. White’s education directly relates to the electrical contracting industry (Panduit Cabling Certification (2005); IBEW apprenticeships Electrical Technology Degree (2001-2006); OSHA -10, 30 (2007); State of Georgia Class 2 Non-Restricted Electrical License-EN215818 (2010); State of Georgia Unrestricted Low Voltage Electrical License LVU406308 (2011); West Georgia Technical College/Marketing Management (Summer 2013)). Adam White is a licensed electrical contractor.

Your duties and responsibilities for the firm include signing creditor checks, contracts, and notes; monitoring administrative functions; setting salaries for personnel; establishing policy and procedure; deciding when to halt projects; and handling sales and marketing (OSSR at 3-4; UCA at 11). Adam White is solely in charge of estimating and bidding, contract negotiation, and contract execution (UCA at 11). He is the field operations supervisor, and monitors job sites with the general manager, Lance Johnston (OSSR at 4). You and your husband both negotiate financing, bonding, insurance, and loan agreements (*Id.* at 3-4; UCA at 11). You share the authority to sign payroll and creditor checks and to purchase major equipment. *Id.* You both are in charge of hiring and firing employees (UCA at 11).

Discussion and Decision

i. Ownership

The UCA and OSSR show that you own 100% of Pandora. However, these documents also show that you and your husband contributed **REDACTED** of marital funds and **REDACTED** of marital equipment to initially establish the firm. Marital assets were used and the record does not indicate your husband's renunciation and transfer of rights in ownership of Pandora. The company has not made any changes in ownership according to the Schedule A (application form) dated May 31, 2013. Therefore you and your husband jointly own the firm within the meaning of §26.69(i). However, absent in the Denial Letter are arguments related to §§26.69(c) and (e). The Department cannot affirm for reasons not stated, namely substantiality of ownership and capital contribution. See §26.89(f)(5).

ii. Disproportionate Responsibility

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

You do not solely control Pandora. Your husband, the non-disadvantaged employee and Vice-President of the firm is exclusively in charge of estimating and bidding, contract negotiation, and contract execution. He is the field operations supervisor, and monitors job sites with the general manager, Lance Johnston. You and your husband both negotiate financing, bonding, and insurance; make loans; sign loan agreements; share the authority to sign payroll and creditor checks; and purchase major equipment. You both hire and fire employees.

Non-disadvantaged individuals disproportionately control Pandora. The fact that your husband exclusively handles estimating and bidding, contract negotiation and contract execution shows that he greatly controls the firm's daily operations. You take no part in field operations, a necessary component to the daily running of the firm. Your husband is the field operations supervisor which shows that he has disproportionate control over the firm's operations. Lance Johnston, general manager and non-disadvantaged employee, assists your husband with monitoring job sites, buttressing GDOT's conclusion that you do not control the firm's

operations. The stated responsibilities between you and your husband show that Adam White independently has the power to financially obligate the firm and manage its employees. Given the substantial evidence, the Department affirms GDOT's determination that non-disadvantaged persons are disproportionately responsible for the firm's operations.

iii. Experience and Expertise

You fail to demonstrate that you 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" within the meaning of §26.71(g).

Your resume shows that your previous positions relate to office management and data entry from 2000 to the present. In contrast, your husband's work history in the electrical contracting field is extensive as his resume shows from 2008 to the present (Site Project Manager; Field Supervisor; and Manager of Operations). His duties exemplify the expertise and experience related to the industry such as product research, dealing with underground feeder installation, designing and building electrical systems, and loading applications. Regarding the duties and responsibilities for Pandora, you and Adam White are equally in charge of negotiating financing, bonding, and insurance; making loans; signing loan agreements; signing payroll and creditor checks; and purchasing major equipment.

These facts show that relevant technical expertise rests with non-disadvantaged individual, Adam White, who is a licensed electrical contractor. He handles all the electrical related components of the company. He therefore controls the technical aspects required for Pandora's electrical work because he has the expertise and experience in this field. We affirm, as supported by substantial evidence, GDOT's determination that you do not control Pandora's operations.

iv. State License

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the disadvantaged owner of a DBE firm must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the certifier must not deny certification solely on the ground that the person lacks the license or credential. However, the certifier may take into account the absence of the license or credential as one factor in determining whether disadvantaged owner actually control the firm (§26.89(h)).

There does not appear in the record to be a law requiring the disadvantaged owner herself to possess an electrical license to own or control an electrical contracting firm. GDOT validly took into account that your husband holds the Low Voltage Unrestricted Electrical License, when it determined that he not you, effectively controls the firm's contracting business. He exclusively handles the estimating and bidding for the firm, and monitors the job sites. He performs various technical duties related to the electrical contracting field such as close-out documentation, analyzing/reviewing field installation techniques, and designing and building electrical systems.

We affirm GDOT's determination as GDOT did not deny certification solely on the ground that you do not possess relevant licenses.

v. *Judgment about Control/Family Business*

Given the substantial involvement of non-disadvantaged individuals in Pandora's business, the certifier could not make a judgment that you as the disadvantaged business owner, control the firm within the meaning of §26.71(k)(1), versus you and your husband acting jointly. The OSSR states that you have been involved in the electrical contracting business since only 2010. Your previous experience relates to office management. It further states that besides your role as President, you sign creditor checks, contracts, and notes; monitor administrative functions; set salaries for personnel; establish policy and procedure; decide when to halt projects; and handle sales and marketing.

Your husband's work history in the electrical contracting industry is extensive. His resume shows previous and current positions directly relating to the electrical contracting business. Adam White is solely in charge of estimating and bidding. He is also the field operations supervisor, negotiates contracts, and executes contracts. He and Lance Johnston monitor job sites.

You have not distinguished your operational responsibilities sufficiently from those of your husband for GDOT to conclude that you control the firm. We affirm GDOT's decision regarding control within the meaning of §26.71(k)(2).

Conclusion

We affirm GDOT's ineligibility determination on the bases of §§26.71(e), (g), (h), and (k) 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. Pandora may reapply for certification at any time.

Sincerely,

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

cc: GDOT