

July 2, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0053

Karla Stegen
Paragon Construction Systems, LLC
[REDACTED]
Ogden, UT 84404

Dear Ms. Stegen:

Paragon Construction Systems, LLC (PCS) appeals the Utah Department of Transportation's (UDOT) denial of its application for DBE certification, under the standards of 49 C.F.R. Part 26 (the Regulation).¹ UDOT denied certification on four grounds:

- (1) Insufficient contribution of capital to acquire ownership, §26.69(e);
- (2) Your non-disadvantaged husband's disproportionate responsibility for the firm's operations, §26.71(e);²
- (3) Failure to demonstrate control within the meaning of §26.71(f) (delegation); and
- (4) Failure to demonstrate control within the meaning of §26.71(overall understanding of, and managerial and technical competence directly related to, the firm's business, including the firm's pipeline construction operations).³

We affirm UDOT's decision on grounds (2) through (4) as supported by substantial evidence and consistent with the substantive and procedural provisions of the Regulation. See §26.89(f) (1).⁴

¹ Paragon Appeal Letter dated December 18, 2013; UDOT Denial Letter dated November 12, 2013.

² UDOT cites §26.71(d) but without the required §26.86(a) explanation. We therefore do not consider that provision as a denial ground.

³ UDOT mentions your apparent full-time outside employment but states no explicit §26.71(j) (outside employment that conflicts with disadvantaged owner's management of the firm or control of its activities) reason for denial. Had UDOT stated an outside employment rationale, our view is that the record would have supported an affirmation on that ground. However, the Department does not affirm on grounds not specified in certifier's decision. Section 26.898(f)(5).

⁴ We cannot affirm ODOT's conclusion on the first ground because an unrestricted gift from your grandmother, who is evidently not involved in the firm, counts, on the record before us, as a real and substantial capital contribution. See generally §§26.69(e), (h), and (j)(1). There is also a contribution of some \$36,000 of equipment.

Facts

PCS, according to the Uniform Certification Application of July 17, 2013 (UCA) and UDOT's On-Site Review Report of October 2, 2013 (OSSR), has four main lines of business: gas and oil pipeline construction, water and sewer pipelines, natural gas pipeline transportation, and railroad signals and electrical work. You and your non-disadvantaged husband Austin Stegen formed the firm in April 2013, shortly before applying for certification, with a gift of \$5000 from your grandmother. You own 60% of the firm, and Mr. Stegen owns 40%. You started the firm because you wanted to open a business, OSRR at 9. Mr. Stegen, however, has the relevant "hands-on" experience directly related to PCS's business, and you have relevant administrative experience. *Id.*

Mr. Stegen holds the relevant licenses and has "the physical and technical experience" to perform or oversee pipeline, signals, and electrical work. OSSR at 3. You defer to him regarding the firm's field operations—we surmise that essentially all of the firm's work necessarily occurs in the field—"because he's the professional." OSSR at 2. You and your husband hold full-time jobs outside of PCS. You work at PCS approximately 20 hours per week, during hours that are presumably outside your office hours as a full-time IRS Tax Examiner.⁵

You are PCS's CEO, and Austin Stegen is the vice president. UCA at 4; Affidavit of Certification. You describe the firm's primary activity as "pipeline construction." However, the firm's only current jobs, OSSR at 2-3, appear to relate to signals and signal maintenance. According to the résumé you supplied UDOT, you have no experience or evident expertise concerning either of those businesses and no experience relating to electrical wiring. You have worked at the IRS since 2009, first as a clerk and then as a tax examiner. Before joining the IRS, you were a customer service representative at Flying J Inc., a temporary staffer at Kelly Services, a hostess at Sizzler, and a cashier at Golden Corral. Record at 55-57. As of the end of 2011, you had completed the rough equivalent of one year of coursework (twenty-seven credits) in business administration and Spanish at Weber State University. Your résumé shows no coursework or experience in any way related to pipeline construction, railroad signals, or electrical work.

Austin Stegen's résumé, Record at 58-59, shows that he currently works as a Signal Maintainer. He was previously a signalman at MJG Inc., where he worked on various rail signal projects, including performing related electrical wiring. Mr. Stegen has served as an apprentice

The record does not reveal, and UDOT does not indicate, who owned the equipment prior to its contribution to the business. Record at 68-76. Similarly, the record is contradictory regarding whether your grandmother contributed \$5000 directly to PCS on your behalf or instead gave bonds in that amount to you and your husband jointly. For purposes of this appeal, we give the disadvantaged owner the benefit of that doubt and attribute the capital contribution to you alone. But see §26.69(i) (regarding marital property as a capital contribution).

⁵ You claim, Appeal Letter at 2, to work full-time at PCS *and* at the IRS. We do not find your claim, which contradicts your OSRR testimony (where you stated that you worked at PCS twenty hours a week), particularly credible. We note that construction occurs principally during daytime hours, which are mostly the same hours during which the IRS presumably (nothing in the record indicates otherwise) requires your presence.

electrician at Sorensen Companies from 2008 to present. The résumé shows extensive wiring experience as well as experience reading architectural prints. Mr. Stegen previously worked at a delivery driver and laborer. He is enrolled in the Electrical Program at Ogden Weber Applied Technology Center, and he holds a State of Utah Electrical Certificate. He is the qualifier on the firm's S410 pipeline license. Appeal Letter at 2.

In the UCA (at 11; Record at 38), you disclose that you share all aspects of control of the firm with Austin Stegen. You have joint responsibility, by your own reckoning, for financial decisions, estimating and bidding, negotiation and contract execution, hiring and firing, field operations, office management, sales and marketing, major equipment purchases, check signing (for any purpose), and financial transactions. You report that your own daily activities, however, consist of checking e-mails, looking online for jobs, and "trying to get with UTA to submit a bid for signaling." OSRR at 2.

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, there is substantial evidence that Austin Steger, a non-disadvantaged person, is disproportionately responsible for the firm's actual operations. Despite the 60/40 stated ownership, the application presents evidence that authority is shared fully (i.e., 50/50). Further, Mr. Steger is the relevant licensee or qualifier for the firm's work and, by your own account, has primary responsibility for field operations in the pipeline, signals, and electrical areas. We affirm UDOT's determination under §26.71(e) as supported by substantial evidence and consistent with the substantive and procedural provisions of Part 26. See generally §26.89(f)(1).

The bulk of available evidence similarly suggests UDOT could not reasonably conclude that, due to your delegation of substantial responsibilities to Austin Steger and considering your own activities as stated, you yourself (as opposed to you and your husband acting as a team) actually exercise control over the firm's *operations, management, and policy*. We therefore affirm UDOT's determination under §26.71(f).

Finally, there is no evidence that you have the requisite overall knowledge *and directly related managerial and technical competence and experience*, as you must demonstrate under §§26.61(b) and 26.71(g). There is similarly no apparent evidence that you are able to examine critically and intelligently technical information presented by Mr. Steger and make independent decisions based on that information and analysis. There is evidence that you have office-based, mostly administrative responsibilities. Consequently, we affirm UDOT's determination under §26.71(g). In doing so, it is not our intent to devalue your substantial contributions to the firm.

We simply find that PCS failed to meet its burden of proof under the provisions cited.

Conclusion

The firm failed to prove that it is eligible under the pertinent Regulation provisions described above. We affirm UDOT's ineligibility determination as supported by substantial evidence and consistent with the provisions of Part 26.

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: UDOT