

July 27, 2015

CERTIFIED MAIL  
RETURNED RECEIPT REQUESTED

Reference No.: 14-0120

Ms. Ruby Smith  
DBE Program Manager-Operations  
Bay Area Rapid Transit District  
Office of Civil Rights  
330 Lakeside Drive  
Oakland, CA 94612

Dear Ms. Smith:

North American Fence and Railing, Inc. (NAFR) appeals San Francisco Bay Area Rapid Transit District's<sup>1</sup> denial of its application for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at 49 CFR Part 26 (the Regulation). After a careful review of administrative record, we find that the denial letter is unsupported by substantial evidence and inconsistent with the substantive provisions of the Regulation. We therefore reverse under §26.89(f) (2) and direct BART to certify the firm.

BART cites four grounds for denying certification:<sup>2</sup>

- 1) Ownership by a disadvantaged individuals is not real, substantial and continuing, going beyond pro forma ownership of the firm, §26.69 (c);<sup>3</sup>

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<sup>1</sup> BART is a member of the California Unified Certification Program (CUCP). It sent notice of its determination by letter dated March 31, 2013 (denial letter).

<sup>2</sup> BART's rationale for denial mainly discusses independence issues created by a non-operative firm. We therefore find no facts to suggest that NAFR does not operate as an independent firm. Moreover, BART fails to specifically cite to §26.71(b) or conduct an appropriate independence analysis under §§26.71 (b) (1)-(4). We therefore decline to consider the issue of independence.

<sup>3</sup> The denial letter conflates the Regulation's remuneration provision with the provision on ownership. §26.69(c) relates to the profits of ownership, while §27.71(i) concerns remuneration within the context of control. See 13-0005, Bryant Associates at fn 2 (remuneration for services rendered is and an issue of control and not ownership). Therefore, we decline to consider BART's ownership ground for denial.

- 2) Disproportional remuneration, §26.71 (i)(2);<sup>4</sup> and
- 3) Firm has exhibited pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program, §26.73 (a) (2).<sup>5</sup>
- 4) Non-disadvantaged individuals are disproportionately responsible for the operation of the firm, §26.71(e).

We reject rationales 1-3, as either clearly inconsistent with the provisions of the Regulation or inadequately presented. In regards to the fourth ground, BART concludes that the firm's Estimators possess the ability to control the operations of NAFR. However, we find that BART's conclusion is unfounded and ignores or misstates relevant evidence from the record.

Facts:<sup>6</sup>

NAFR filed its Uniform Application for Certification (UAC) in April 2012. Kira Comini formed the firm on March 9, 2011. Ms. Comini owns 100% of NAFR and is the firm's sole Director and Officer. NAFR's primary business activity is fence contracting. It provides mainly commercial chain-link and ornamental iron fence & gate installation.

Section 4 of the UAC indicates that Ms. Comini maintains control over each area of the firm's operations.<sup>7</sup> During the firm's on-site visit (which was neither recorded or transcribed) Ms. Comini explained that 5 Estimators handle all "small project" estimates, bids, and contract execution, while Ms. Comini gets involved in larger contract opportunities. In addition, the On-site Questionnaire states "[f]or new work, [Ms. Comini] speaks to the Estimator to process the

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<sup>4</sup> In addition to the analytical deficiencies concerning remuneration at supra note 3, we note that §26.71 (i)(2) on applies to situations where there is a former non-disadvantaged owner who is still employed at a firm applying for DBE certification. This circumstance is not present in this case. Accordingly, we cannot affirm under §26.71 (i)(2).

<sup>5</sup> To the extent that BART relies on §26.73 (a) (2), we find that it failed to adequately present the ground. See §26.86(a) (the recipient must provide "the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial.")

<sup>6</sup> The facts presented by NAFR and BART date back as far as 2003. We, however, are bound to limit our decision to only the relevant facts and arguments that concern the firm's present DBE application. See §26.83 (eligibility is based on present circumstances and not historical information.)

<sup>7</sup> Specifically, Ms. Comini indicates that she is responsible for the firm's: (1) financial decisions; (2) Estimating and bidding; (3) Negotiation and Contract Execution; (4) hiring and firing of management personal; (5) Field/Production Operations Supervisor (along with the firm's Superintendent, Oscar Amezquita); (6) office management (along with administrative assistant Mary Vargas); (7) Marketing/Sales; (8) Purchasing of major equipment; (9) Purchasing of major equipment (10) Authorized to sign company checks (for any purpose); (11) Authorized to make financial transactions.

new job, over see (sic) updates and problems that come up, troubleshoot problems, create schedule, collect project payments, and go on job site.”<sup>8</sup>

BART at some point after the on-site visit determined that it was necessary to obtain additional information regarding Ms. Comini’s ability to control NAFR’s operations. In an undated internal memo contained in the record, BART indicated that the following information was necessary to determine the firm’s eligibility for certification:

In the site visit, Ms. Comini indicated that some [employees] have the power to execute contracts and conduct other business on behalf of NAFR.

- A. Obtain resumes and descriptions of the role of these key employees<sup>9</sup> in the firm are [sic]
- B. Identify what the threshold and rules established by Ms. Comini for these employee’ activities are to ensure that they do not exercise the power to control the firm and do not have disproportionate control over the firm's operations. Obtain verifying documentation of these policies at NAFR and documentation of when these policies were implemented.
- C. Determine what portion of the firm’s annual sales are handled by Ms. Comini and what contracts are handled by her staff. Calculate what portion of the \$1.5M in 2011 sales by NAFR were handled by her staff and not Ms. Comini.

By letter dated December 17, 2012, BART requested the résumés of Ms. Comini and the firm’s five estimators (Frank Boss, Sean Johnson, Steven Mathews, Michael Sweaney and Chris Colby). It also requested “a list of contracts (indicating contract scope, contract and client) for each employee.”<sup>10</sup>

Ms. Comini responded to the inquiry by letter on December 28, 2013 and stated:

Frank Boss, Sean Johnson, Steven Mathews, Michael Sweaney and Chris Colby are estimator/project managers. Their responsibilities include estimating costs on fence projects, preparing submittals, and correspondence. They go to job sites to review site conditions and discuss needs with potential customers. I have attached each of their resume’s. *They do not have “clients” – all clients belong to*

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<sup>8</sup> BART did not interview the firm’s Estimators or other key employees during the on-site visit. BART also failed to probe Ms. Comini’s statements about her role in the firm’s operations.

<sup>9</sup> The bulk of the firm’s primary activity (installing fences) involves fieldwork. BART, however, inexplicably failed to examine whether there is evidence that NAFR’s Superintendent, Oscar Amezcua (presumably a ‘key’ employee), controls or is disproportionately responsible for the firm’s operations.

<sup>10</sup> The letter does not request a copy or an explanation of the firm’s policies, rules, or concerning contracting threshold of Estimators.

*North American Fence & Railing Inc. aka myself (Kira Comini). I assign projects to estimators/project managers based on the scope of work and work load (sic) at the time. I have attached a listing of the company's clients and projects. I have also attached my own work experience statement. I have been in the fence business for 26 years now.*

(Emphasis added).

The relevant portions of the résumés of NAFR's "key employees" are:

- **Ms. Comini** (President) – “Responsibilities include sales & marketing, placing orders, signing/negotiating contracts, scheduling work crews, hiring/firing of employees, and all accounting/personnel. Applied for and received SBA financing for equipment purchases and working capital.”
- **Christopher G. Colby** - Estimator/Project Manager
- **Michael Swaney** (Estimator/project manager) - “Responsibilities include estimating costs on fencing projects. Assisting customers with project design and planning. Take-offs of plans and specifications. Project job walks and site reviews. Shop drawings and submittals.”
- **Steve Matthews** (Sales/Estimator/Project Mgr.) – “Bid new Projects, Oversee projects in progress, Interface with current and new suppliers.”
- **Sean Johnson** (Fence Estimator) – “Responsible for estimating costs of fencing material and labor. Visit job sites for layout meetings during inspections.”
- **Frank Bloss** (Estimator) - Duties include: Estimating of public and private bids, project management of jobs, processing RFI's, change orders, submittals, shop drawings, plan room take offs, working with crews, ordering materials.

NAFR also submitted, as BART requested, contract value and responsible Estimator for each of the firm's jobs.

Bart determined that NAFR was ineligible for certification on May 31, 2013 and the firm filed its appeal on August 29, 2013.

### Decision

A firm applying for DBE certification bears the burden of proving by the preponderance of evidence that its non-disadvantaged employees do not disproportionately control the operations of the firm.

BART concludes that the firm's five non-disadvantaged Estimators are disproportionately responsible for the firm's operations since they are responsible for "estimating and bidding, negotiating, field operations/production, and signing of contracts." NAFR contends that Ms. Comini has absolute control of the firm. It argues that BART misstates the authority and involvement of the Estimators; particularly that it omitted the fact that Ms. Comini limits the contractual authority of her Estimators and that the Estimators are not involved in other key areas of the company's operations. She offers as evidence of this control, the fact that she limits the contractual authority of her Estimator's. We agree.

We find that BART failed to consider evidence regarding control of the firm's operations *as a whole*.<sup>11</sup> The weight of BART's conclusion seems to rest on its belief that the firm's Estimators manage NAFR's contracts. However, contract management is only a portion of the firm's operations and does not equate to disproportionate control of NAFR's entire operations.

Furthermore, the evidence is uncontroverted that Ms. Comini maintains control while delegating certain authority to her estimators. Contrary to the absolute language in the denial letter, we find substantial evidence supports that the Estimators' authority is limited to "low risk" jobs.<sup>12</sup> Ms. Comini also has the authority to hire and fire these Estimators. In addition, the record indicates she has sole signatory authority to purchase or lease materials/equipment and it is undisputed that Ms. Comini directs the firm's managerial and administrative duties.

In summary, BART fails to consider all of the relevant facts and circumstances – as a whole – concerning control of NAFR operations. BART's denial overstates the power of the firm's Estimators, who have limited authority within a small portion of the firm's operations.

## **CONCLUSION**

We Reverse the denial in accordance with §26.89(f)(2) and direct CUCP to certify the firm and place it onto California's list of certified firms without further delay.

We find that BART's denial is unsubstantiated by the evidence within the record. We also find that NAFR has met its burden of proof under the Regulation.

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<sup>11</sup> See §26.71(a) ("In determining whether socially and economically disadvantaged owners control a firm, [a Recipient] must consider *all the facts in the record, viewed as a whole.*")

<sup>12</sup> BART failed to investigate the frequency and extent to which Ms. Comini gets involved in the estimating, bidding and contracting portion of the firm's operations. It also failed to determine the exact limits and thresholds the firm's Estimators. We must therefore consider as uncontroverted evidence, Ms. Comini's statements that she limits Estimator estimating, bidding, and contractual authority to small jobs.

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

Thank you for your cooperation.

Sincerely,

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

cc: Kira Comini, NFR