

April 25, 2016

Reference Number: 16-0004

Ms. Christen Neeley
Freeman Curb & Gutter, Inc.
P.O. Box 775
Hampstead, North Carolina 28443

Dear Ms. Neeley:

Freeman Curb & Gutter, Inc. (Freeman) appeals the North Carolina Department of Transportation's (NCDOT'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 full administrative record (Record), we conclude that substantial evidence supports NCDOT's determination. We affirm the ineligibility determination under §26.89(f)(1).

In its Denial Letter dated September 25, 2015, NCDOT cites the firm's failure to meet the requirements of §§26.69(h) and (i) relating ownership¹; and §§26.71(e), (f), (g), and (i)² relating to control. We affirm on grounds §§26.71(e), (f), and (g). *See* §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(h) provides:

¹ In light of our disposition, we need not opine on ownership grounds.

² The Denial Letter simply notes that your salary is lower than your husband's. As far as the Record reveals, NCDOT did not consider §26.71(i) in the context of relative responsibilities, normal industry practices, the firm's policy concerning reinvestment of income, or any explanations the firm offered for a salary differential. We decline to opine on this ground.

“(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.”

§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.”

§26.71(f) provides:

“The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.”

§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(i) provides:

“(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.”

§26.86(a) provides:

“When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you 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. All documents and other information on which the denial is based must be made available to the applicant, on request.”

§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

Freeman performs concrete construction (installation of concrete curb and gutter, sidewalks, driveways, and wheelchair ramps) (Uniform Certification Application (UCA) dated February 5, 2015 at 2). You are the 51% owner and President of the firm. Id. at 3. The nondisadvantaged 49% owner and Vice-President of the firm is your husband, Jeffrey Neeley. Id.

The UCA indicates that you are not exclusively in charge of all of the firm’s duties and responsibilities. Id. at 4. You share the following duties and responsibilities with Jeffrey Neeley: making financial decisions, contract negotiation and execution, hiring and firing management, purchasing major equipment, signing checks for any purpose, and making financial transactions. Id. You share the duty and responsibility of office management with Richie Balderson. Id.

Jeffrey Neeley is strictly in charge of estimating and bidding. Id. Jeffrey Neeley and Tommy Hancock (field supervisor) are in charge of field production and operations. Id.

Your résumé indicates that your past positions are unrelated to the firm’s current services: Bookkeeper for Dirt Etc, Inc from May 2006 to December 2012, handling invoicing, accounts receivable, accounts payable, payroll, tax preparation, and bank reconciliations; and Director of Christian Education for Topsail Presbyterian Church from July 2006 to July 2013, serving the church by overseeing all Christian education programs (Sunday school, youth programs, and Bible Studies). These duties are not technical in nature, but mainly administrative and managerial.

Jeffrey Neeley’s résumé shows the following positions to the present: Laborer, Supervisor, Company Superintendent, and Estimator of Freeman since 1997. He recently became part owner

and Vice President of the firm in 2014. Id. His experience includes concrete finishing, form setting, and curb machine operation. Id.

The Denial Letter dated September 25, 2015 indicates, “Differences in remuneration observed between the disadvantaged owner and the non-disadvantaged owner also contribute to the failure to demonstrate control. During the site visit, Christen Neeley stated that she is paid REDACTED per year and that her husband and non-disadvantaged owner of the firm, Jeffrey Neeley, is paid REDACTED per year.” This information is verified in the On-Site Review Report dated May 11, 2015 at 3.

Discussion and Decision

i. Disproportionate Responsibility

The Department finds substantial evidence to support NCDOT’s conclusion that non-disadvantaged individuals are disproportionately responsible for the firm’s operation within the meaning of §26.71(e) (non-disadvantaged or immediate family members may be involved in a DBE firm as owners and employees, but such individuals must not exercise the power to control the firm or be disproportionately responsible for its operation).

The UCA indicates that Jeffrey Neeley exclusively controls estimating and bidding. Jeffrey Neeley and the Field Supervisor, Tommy Hancock, control the firm’s field operations and production. You share the responsibilities of contract negotiation and execution, hiring and firing management personnel, signing checks for any purpose, and making financial transactions with your husband, allowing him to independently, financially and contractually obligate the firm.

Jeffrey Neeley’s responsibilities appear to be critical to the firm’s operational success, which makes him disproportionately responsible for the firm’s operations. We affirm NCDOT’s determination that a nondisadvantaged individual has the power to control the firm or is disproportionately responsible for its operations.

ii. Delegation and Actual Exercise of Control

NCDOT determined that it could not reasonably conclude that you actually exercise control over the firm’s operations, management, and policy within the meaning of §26.71(f).

You are mainly responsible for the firm’s administrative activities. The preponderance of the evidence indicates that you share several control-related responsibilities with your nondisadvantaged husband. The firm also employs an individual to assist you with office management.

Your husband actually controls the firm’s estimating and bidding and shares the responsibility of field operations and management with the firm’s Field Supervisor. You do not exclusively

handle any responsibilities of concrete construction (installation of concrete curb and gutter, sidewalks, driveways, and wheelchair ramps). You depend on your nondisadvantaged husband who is responsible for field work and critical operations. Substantial evidence supports NCDOT's conclusion that you do not actually exercise actual control over the firm's operations and management under §26.71(f).

iii. Experience and Expertise

NCDOT concluded that you do not control the firm within the meaning of §26.71(g), which states that a 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."

The record does not indicate that you have specialized experience directly related to the field at hand, which is concrete construction (installation of concrete curb and gutter, sidewalks, driveways, and wheelchair ramps). Your duties are not technical in nature as indicated by the UCA, nor is your past work experience as indicated by your résumé.

Your husband's résumé indicates that the relevant technical expertise and experience related to the field at hand, within the meaning of the Regulation, rests with him, a non-disadvantaged individual. He is also the Vice-President for the firm, and former Laborer, Supervisor, Company Superintendent, and Estimator of Freeman.

The description of your responsibilities and duties for the firm is not technical in nature and not directly related to performing concrete construction (installation of concrete curb and gutter, sidewalks, driveways, and wheelchair ramps). As cited above, this section requires a demonstration that the disadvantaged owner, "ha[s] 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." Your expertise generally appears to be related to non-technical functions. The evidence is insufficient to demonstrate control under §26.71(g).

We therefore affirm, as supported by substantial evidence, NCDOT's determination that you do not demonstrate "an overall understanding of, and material and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations," as §26.71(g) requires.

Conclusion

We affirm NCDOT's ineligibility determination on the basis of §§26.71(e), (f), and (g) 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.

Sincerely,

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

cc: NCDOT