

April 13, 2016

Reference Number: 16-0011

Mr. Scott F. Brown  
Niebler, Pyzyk, Roth & Carrig LLP  
N94 W17900 Appleton Avenue, Suite 200  
P.O. Box 444  
Menomonee Falls, Wisconsin 53052

Dear Mr. Brown:

JT Rams, LLC (JT Rams) appeals the Wisconsin Unified Certification Program's (WUCP'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 WUCP's denial. We affirm the ineligibility determination under §26.89(f)(1).

In the Denial Letter dated July 13, 2015, WUCP cites the firm's failure to meet the Social Disadvantage requirements of appendix E and §26.67(d).<sup>1</sup> The applicant does not demonstrate that it satisfies the third element of Social Disadvantage, adverse impact on entry into or advancement in the business world. We therefore affirm WUCP's denial under §26.89(f)(1).

*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." (Emphasis added.)

§26.67(a) provides:

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<sup>1</sup> The Denial Letter does not cite §26.67(d), which states that an individual may be deemed socially and economically disadvantaged on a case-by-case basis and specifies that, "...*In making these determinations, use the guidance found in appendix E of this part.*" (Emphasis added.) The Denial Letter, however, makes clear that the rationale for denial is that the applicant fails to demonstrate that it meets the Social Disadvantage requirements of appendix E of the Regulation. See generally §26.61(b) (applicant's burden of proof applies to each element of eligibility).

“Presumption of disadvantage. (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.”

§26.67(d) provides:

“Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.”

“Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage  
Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

- (1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.
- (2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.
- (3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations... ”

§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*

JT Rams performs roof inspections, maintenance and repairs (Uniform Certification Application (UCA) dated December 11, 2014 at 2). Jonas Thull is the 100% owner of the firm and is a Caucasian male. *Id.* at 3. JT Rams is a subsidiary of JT Companies, LLC, a holding company (On-Site Review Report (OSRR) dated February 26 and March 5, 2015 at 1; Addendum to the DBE Application, Exhibit A).

The Appeal Letter dated October 9, 2015, indicates that Mr. Thull was “socially isolated throughout childhood” due to his being forced to work for his father at a young age in order to keep the family roofing business afloat. It further indicates that Mr. Thull’s social disadvantage “stems from circumstances completely out of his control.” Mr. Thull’s distinguishing feature is that he endured an incredibly traumatic childhood, resulting in certain emotional/social deficits that hinder his ability to succeed in business. *Id.* at 2. Mr. Thull claims that his personal,

traumatic childhood experiences, chronicled in his narrative statement, have impaired his entry into or advancement within the business world. Id.

In his Narrative Statement submitted with his DBE Application dated December 11, 2014, Mr. Thull describes what he considers to be the distinguishing feature related to his Social Disadvantage, his traumatic childhood. He states:

“About around the 5<sup>th</sup> grade, I started to realize my family wasn’t the loving, caring, close-nit [sic] group of people it should be. I would go to friends’ houses and see their parents getting along, helping one another, eating dinner as a family, doing chores as a family, and just plain spending time as a family. The situation at my parents’ house was complete opposite. This really embarrassed me to the point at which I didn’t want any of my friends coming to play, or sleep over at my house. So, that’s what happened, I stopped having friends come over to play, and I started to really keep to myself and do my own thing... It was a very lonely time for me growing up and ended up making it hard for me to talk to people. This in turn still haunts me today when I have to see and talk to customers, vendors, general contractors, etc.”

In the response to the initial notice to deny (NTD) dated April 30, 2015, Mr. Thull attempts to discuss the second element of social disadvantage, “personal experiences of substantial and chronic social disadvantage in American society,”

“Working with vendors and employees is all too often strained. For instance when dealing with vendors like REDACTED, where I gave him [owner of REDACTED a PO [Purchase Order] for a project on the basis of good pricing and having the material available. He delivered the initial order and when I called back to release the balance of materials he told me that didn’t have any more in stock...I lost my temper and yelled at him and told him that he accepted my PO and better damn well get those materials delivered. He threatened not to do business with me in the future.”

In his Narrative Statement, Mr. Thull further elaborates that his family life contributed to his social disadvantage. He claims that his lack of a “close-nit” [sic] family contributed to having few friends and seclusion, “I sometime feel that they [prospective customers] think I am ‘weird’ or that I am not knowledgeable when I talk about their roofing problems or possible solutions to their roofing problems.” Id.

Concerning the third element of social disadvantage, “negative impact on entry into or advancement in the business world because of the disadvantage,” Mr. Thull focuses on the appendix E elements education, employment and business history.

*i. Education*

With regard to education Mr. Thull indicates in his Narrative Statement, "I was never encouraged to take business classes or even go to college. In fact, college was looked down upon from my parents. Needless to say, I ended up attending college at Waukesha County Technical College and graduated with an associate degree in Police Science."

ii. *Employment*

The NTD indicates that, “For the first 3 years I worked for dad, I had the jobs at the bottom but I was only 15 when I started. By the time I was 18 dad had me working as a laborer on the roofs.” *Id.* at 4. By age 22, Mr. Thull became a Crew Leader. *Id.* By age 24, Mr. Thull then progressed to Crew Management Leader (Foreman) and Supervisor, Repair Department for his father’s company. *Id.*

Mr. Thull’s résumé shows the following positions: Warehouse Attendant for JT Roofing, Inc. from 1999-2002; Roof Work Laborer for JT Roofing Inc. from 2002 to 2006; Crew Management Leader for JT Roofing Inc. from 2006 to 2009; Crew Management Leader, Supervisor Repair Department and Sales for JT Roofing Inc. from 2009 to 2011; and Owner for JT Rams LLC from 2011 to the present.

iii. *Business History*

Mr. Thull claims that he had difficulty obtaining credit when starting his business (Narrative Statement at 2). However, he has obtained credit lines from some vendors. *Id.* He indicates, “...Bank First National accepted and obtained a small line of credit of REDACTED. This does help but is not nearly enough for me to gain some capital and start really taking off and expanding my business.” *Id.* at 3. A supplier, Roofer’s Mart gave Mr. Thull a REDACTED credit line. *Id.* at 2.

The NTD indicates with regard to bonding, “Luckily my insurance man was able to get me REDACTED of bonding in June of 2012. Don’t get me wrong, it was a start, but woefully short of what was needed. *But I kept trying and I was able to convince R&R [bonding source] to take another look and they finally came to the table with REDACTED in late April 2013.*” (Emphasis added.)

In the Denial Letter, WUCP indicates that Mr. Thull did not meet the criteria for a socially disadvantaged individual focusing on the third element of social disadvantage, “negative impact on entry into or advancement in the business world because of the disadvantage.” WUCP specifies:

“1. The applicant has not submitted any evidence that his claimed social disadvantage had a negative impact on his education. In fact, the applicant does not even make this claim. The applicant does not make any assertions that he has ever been denied equal access to institutions of higher education, has been excluded from social and professional associations or has been denied any educational honors he had rightfully earned.

2. The applicant has not submitted any evidence that his claimed social disadvantage had a negative impact on his employment. In fact, the applicant does not even make this claim. The applicant does not make any assertion that he has ever been denied unequal [sic] treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment. The applicant does not claim to have been on the receiving end of any retaliatory or discriminatory behavior by an employer or labor union. Also the applicant did not claim to have faced any social

patterns or pressures, which have channeled him into non-professional or non-business fields.

3. The applicant has not submitted documentation or sufficient evidence that his claimed social disadvantage has had a negative impact on his business history. Although the applicant does claim that his firm has had unequal access to credit, and bonding, he provided no evidence of this other than anecdotes due to the newness of the business.”

### *Discussion and Decision*

An applicant not presumed to be disadvantaged can make an individual showing of social and economic<sup>2</sup> disadvantage under §26.67(d) and appendix E to Part 26. The three elements that an applicant must prove for Social Disadvantage under appendix E are: (A) an objective distinguishing feature contributing to social disadvantage, (B) personal experiences of substantial and chronic disadvantage experienced in American Society, and (C) negative impact upon entry into or advancement in the business world focusing on education, employment and business history. *Id.* The applicant assumes the burden of proving disadvantage by a preponderance of the evidence. *See* §26.61(b).

### *Social Disadvantage*

#### *No Negative Impact on Entry or Advancement in the Business World*

Mr. Thull attempts to address the third element of Social Disadvantage, negative impact on entry into or advancement in the business world due to disadvantage. He attempts to elaborate on the subparts of the third element, claiming to have suffered adverse impact on his education, employment, and business history.

#### *i. Education*

Mr. Thull’s claimed childhood difficulties did not impair Mr. Thull’s ability to obtain an education and graduate from Waukesha County Technical College. The record shows no evidence of Mr. Thull experiencing adversity or difficulty in obtaining higher education. The Narrative Statement merely states that Mr. Thull’s family did not encourage him to seek higher education and that it “was looked down upon.”

#### *ii. Employment*

Mr. Thull’s résumé shows a continuous work history. It does not appear from the record that Mr. Thull’s difficult childhood has hindered or adversely affected his employment. The facts indicate that he started working for his father at a very young age, and, by the time he was 22, he became a Crew Leader. By age 24, he progressed to Crew Management Leader (Foreman) and

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<sup>2</sup> In light of our decision, we need not examine economic disadvantage as it pertains to appendix E. Similarly, although we focus, like Mr. Thull on appeal, on the third element of social disadvantage, we express no opinion on the whether Mr. Thull satisfies the other two elements (objective distinguishing feature and personal experiences of substantial and chronic social disadvantage). The applicant must demonstrate that it meets all of the eligibility requirements. A failure to satisfy one of the several elements of social and economic disadvantage renders the firm ineligible under §§26.61(b) and 26.67(d).

Supervisor, Repair Department for his father's former company. He now runs his own roofing business.

*iii. Business History*

Mr. Thull claims to have encountered difficulty in obtaining credit and bonding but that he nevertheless secured credit and bonding. Mr. Thull claims that the line of credit was insufficient. Further, he obtained bonding regardless of the difficulty. We note that it is not unusual for start-up businesses to experience some difficulty in obtaining credit and bonding. There is no credible claim that Mr. Thull's claimed difficulties stem from any form of social disadvantage, as opposed to simply being a new business with a limited track record.

In summary, the applicant firm failed to prove its case for social disadvantage under appendix E. Substantial evidence supports WUCP's determination. We affirm.

*Conclusion*

We affirm WUCP's ineligibility determination as supported by substantial evidence and not inconsistent with pertinent certification provisions.

This decision is administratively final.

Sincerely,

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

cc: JT Rams, LLC