

June 8, 2016

Reference Number: 16-0035

Ms. Cynthia Stephens
SnL Group, Inc
9818 Holton Way
Redding, California 96003

Dear Ms. Stephens:

SnL Group, Inc (SnL) appeals the California Department of Transportation's (Caltrans'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 Caltrans's determination. We affirm the ineligibility determination under §26.89(f)(1).

In the denial letter dated August 20, 2015, Caltrans cites the firm's failure to satisfy the requirements of §§26.69(c), (e), (f), and (i) relating to ownership¹, and §§26.71(a), (d)², (e), (f), (g), (h), and (k) relating to control. *See generally* §26.61(b). It suffices for purposes of this appeal for us to affirm on control grounds of §§26.71(e), (f), (g), (h), and (k).

Applicable Authority

§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) provides:

¹ In light of our disposition, we do not consider ownership grounds.

² Caltrans cites §26.71(d) but does not explain its rationale in accordance with §26.86(a). We therefore decline to opine on this ground.

“(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 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(f) provides:

“The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.”

§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(d) provides:

“The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.”

§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.”

§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.”

§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.”

§26.86(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, in pertinent part:

“(1) 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

SnL is a general contracting firm providing services such as sitework, demolition, excavating, paving, earthwork, installation of storm drain systems, underground utilities repair, and grading of aggregate materials (Uniform Certification Application (UCA) dated May 8, 2015). The firm was established on September 26, 2013. Id. at 9. You are the President and disadvantaged owner of the firm owning 70% of the SnL. Id. Your husband and non-disadvantaged owner, Eric L. Stephens is the Vice President and owns 20% of the firm. Id. Non-disadvantaged owner, Tim Lewis is the Responsible Managing Officer (RMO) and owns 10% of the firm. Id. at 10. Wendy Pearson is the Administrative Manager for SnL. Id. The firm employs 10 individuals: (3) laborers, (3) equipment operators, (2) truck drivers, (1) Chief Estimator/Project Manager, and (1) foreman (On-Site Review Report (OSRR) dated August 18, 2015 at 4).

The UCA indicates that you are not exclusively in charge of any particular duty or responsibility for the firm. You always handle marketing and sales and perform office management duties (billing, accounts receivable/payable, etc). Id. at 9. You share several duties and responsibilities with your husband such as setting policy for the company direction/scope of operations; making

purchasing decisions³; designating profits spending or investment; purchasing equipment; and signing business checks. Id. Tim Lewis also shares many of the aforementioned duties with you and your husband. Id. at 10. He also handles hiring and firing of management staff; hiring and firing field staff or crew; obligates contracts by business and credit; and helps you with office management duties. Id.

You never deal with bidding and estimating; field supervision and operations; or attend bid opening and lettings, which are mainly Tim Lewis's duties and responsibilities (UCA at 9- 10). Your husband also assists with field supervision and operations. Id. at 9. Wendy Pearson assists with setting policy for company direction/scope of operations; marketing and sales; hiring and firing of management staff; and hiring and firing of field staff or crew. Id. at 10.

With regard to structural drawing, plans and estimates for projects, Tim Lewis indicates that you are not able to read plans and that they are reviewed by himself and additional firm negotiator and employee, Greg Tyler (OSRR at 9). The OSRR indicates that you "trust the years of experience and assessment of Tim Lewis, Greg Tyler, and [your] husband Eric Stephens."

Your résumé shows the following positions to the present: Classroom Instructional Aide for Enterprise Elementary School District from 2004-2007; Substitute Classroom Instructional Aide for Enterprise Elementary School District from 2007-2009; Substitute Health Clerk for Enterprise Elementary School District from 2007-present; Substitute Teacher for Enterprise Elementary School District from 2009-present; Office Manager for Stephens Electrical, Inc. (your husband's firm) from 2007-present; and President for SnL Group, Inc from 2013-present.

Your husband's résumé shows the following positions: Sergeant for the United States Army from 1994-1998; Signal Man/Foreman for Union Pacific Railroad from 1998-1001; Journeyman Electrician for Industrial Electric from 2002-2004; Journeyman for Trinity Electric from 2004-2005; and President of Stephens Electrical since 2005. Your husband completed the Signalman Apprenticeship Training for Union Pacific Railroad in 2001. He also completed an Electrical Apprenticeship training program for the International Brotherhood of Electrical Workers in 2005. He is also a Licensed C-10 Electrical Contractor with 13 years of residential, commercial and industrial electrical experience. The OSRR indicates that his license is not utilized by SnL but for his own business, Stephens Electrical, Inc.

Tim Lewis's résumé shows his past positions to the present: Equipment Operator and Job Supervisor in 1995; Job Supervisor in 1999; Chief Estimator from 2002-2013; and currently RMO and Chief Estimator for SnL. His skills and experience include: operating excavators backhoe, asphalt paver, ten wheel trucks, water trucks and compactors; estimating small private jobs; installing BMP's and instructing personnel on correct measures; supervising awarded projects to ensure completion in a timely and economic manner; and ensuring safety compliance for local and state water pollution control standards. Id. Tim Lewis received a General Engineering License (#897625) after passing the California State Licensing Board examination in 2007. He also passed the General Building Contractor exam in 2009; is a Certified Erosion,

³ With regard to purchasing decisions, Tim Lewis indicates that all purchases require 2 signatures (OSRR at 7). You indicate that financial decisions are handled jointly between you and your husband. Id. at 4. The firm also uses a payroll service for employees and that the firm hires a bookkeeper for annual taxes. Id.

Sediment, Storm Water Inspector since 2012; and a Qualified Storm Water Practitioner since 2013. Id. The record and OSRR indicates that he holds the General Engineering (Class A) and General Building (Class B) Contractor's license and is the qualifying individual for the firm.

Decision and Discussion

i. Disproportionate Responsibility

The Department finds substantial evidence to support Caltrans's conclusion that non-disadvantaged individuals control SnL 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 states that non-disadvantaged minority owner, Tim Lewis mainly controls the firm's bidding and estimating; field production and operations; and bid openings and lettings, and that you never handle these responsibilities. You also share managerial duties for the firm with your non-disadvantaged husband and Tim Lewis such as setting policy for company direction/scope of operations; making major purchasing decisions; hiring and firing management staff; hiring and firing field staff or crew; designating profits spending or investment; obligating business by contract/credit; purchasing equipment and signing business checks. You therefore are not exclusively in charge of any duty or responsibility and frequently receive assistance from the non-disadvantaged owners.

Your husband's and Mr. Lewis's powers and responsibilities appear to be critical to the firm's operational success, which makes your husband and Mr. Lewis disproportionately responsible for the firm's operations with apparent power to control the firm. We affirm Caltrans's determination that non-disadvantaged persons have the power to control the firm or are disproportionately responsible for its operation.

ii. Delegation and Actual Exercise of Control

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

You share several critical managerial duties with the other non-disadvantaged owners as previously mentioned. These facts indicate that non-disadvantaged individuals substantially control the firm's field operations and management, while you deal with responsibilities not directly related to general contracting. With regard to purchasing decisions, Tim Lewis indicates that all purchases require two signatures. You also indicate that financial decisions are handled jointly between you and your husband. The firm also uses a payroll service for employees and the firm hires a bookkeeper for annual taxes. You clearly depend on Tim Lewis and your husband for the daily operations and control of the firm. You also employ outside individuals and delegate office management duties related to payroll and taxes. Substantial evidence supports Caltrans'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

Caltrans concluded that you do not control the firm within the meaning of §26.71(g), which states that a disadvantaged owner 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.”

Your résumé shows that your previous positions are completely unrelated to general contracting services. You were a former teaching aide and most of your experience stems from elementary school education assistance. Tim Lewis and your husband have experience in the general contracting industry. You have no apparent technical training or relevant pre-SnL experience other than the fact that you worked for your husband’s company as an Office Manager for Stephens Electrical, Inc. In contrast, Tim Lewis’s and your husband’s background in the general contracting industry is extensive. As previously stated, their past positions and experience are directly related to the general contracting industry, and both have licenses. Tim Lewis is the qualifying agent for the firm for he holds Class A & B Contracting licenses. Tim Lewis is mainly in charge of estimating and bidding; field production and operations; and attending bid opening and lettings. He and negotiator, Greg Lewis, read all of the plans and drawings. Your husband also assists with field supervision and operations. You even stated in the OSRR that you “trust the years of experience and assessment of Tim Lewis, Greg Tyler, and your husband Eric Stephens.”

These facts show that relevant technical expertise and experience rests with non-disadvantaged individuals. Mr. Lewis strictly handles estimating and bidding; operational field work; and attends bid opening and lettings. He controls the technical aspects required for SnL’s contracting work. Your husband often assists with field operations and is experienced in the general contracting industry. He still maintains his own separate electrical contracting firm, Stephens Electrical, Inc. We affirm, as supported by substantial evidence, Caltrans’s determination that the disadvantaged individual does not control the firm within the meaning of §26.71(g).

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 the firm must possess the required license or credential. If no such requirement exists, the certifier must not deny certification solely on the ground that the disadvantaged owner lacks the license or credential. However, the certifier may take into account the absence of the license as a factor in determining whether the disadvantaged owner actually controls the firm (§26.71(h)).

The State of California has no law requiring the disadvantaged owner herself to possess a license to own or control a general contracting firm. Tim Lewis is the licensed General Engineering (Class A) and General Building (Class B) Contractor, and he is the “qualifying agent” having the authority to bind the company with regard to compliance with applicable general contracting

codes. Caltrans validly took into account that Tim Lewis is the licensed General Engineering and Building Contractor when it determined that you do not control the firm's contracting business. The UCA indicates that Tim Lewis mainly handles bidding and estimating; field supervision and operations; and bid opening and lettings. The OSRR indicates that you do not read any of the plans or drawings related to the bids. Tim Lewis has extensive experience related to the general contracting industry such as operating excavators backhoe, asphalt paver, ten wheel trucks, water trucks and compactors; estimating small private jobs; installing BMP's and instructing personnel on correct measures; supervising awarded projects to ensure completion in a timely and economic manner; and ensuring safety compliance for local and state water pollution control standards. We affirm Caltrans's determination as supported by substantial evidence and consistent with the substantive and procedural provisions relating to certification.

v. Judgment about Control/Family Business

Given the substantial involvement of your husband in the firm's business, the certifier could not make a judgment that you yourself actually control SnL within the meaning of §26.71(k)(1), versus you and your husband acting jointly. The UCA indicates that you mainly handle office management while your husband shares critical decision making duties and responsibilities with you with regard to the firm, and assists in field operations and supervision.

Your husband assists Tim Lewis in supervising field operations and monitoring job sites. He also shares crucial management responsibilities with you such as setting policy for company direction/scope of operations; making major purchases; hiring and firing management staff; hiring and firing field staff or crew; designating profits spending or investment; obligating business by contract/credit; purchasing equipment; or signing business checks.

Your previous exposure to the general contracting industry as an Office Manager at your husband's company does not mean that you are an expert in this industry, nor does it automatically equate to control, within the meaning of the Regulation. Without your husband's expertise and knowledge and supplemental involvement in the firm, it is doubtful that SnL could function as a general contracting business. We affirm Caltrans's decision regarding control within the meaning of §26.71(k)(2).

Conclusion

We affirm Caltrans's ineligibility determination, based on §§26.71(e), (f), (g), (h), and (k) relating to control as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

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

Sincerely,

Samuel F. Brooks
Acting Lead Specialist
External Civil Rights Programs Division

cc: Caltrans