

July 28, 2016

Reference No.: 16-0056

Ms. Shelly Njirich, President
Njirich & Sons, Inc.
REDACTED
Sonora, CA 95370

RE: Njirich & Sons, Inc. Appeal of DBE Certification Denial

Dear Ms. Njirich:

Njirich & Sons, Inc. (NSI) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the California Unified Certification Program's (CUCP) denial of its application for certification as a Disadvantaged Business Enterprise (DBE), under criteria set forth at the DBE Program Regulation, 49 C.F.R. Part 26 (the Regulation). CUCP denied certification of NSI on October 2, 2015, for failure to meet the requirements of §§26.69(c), (e) & (h) relating to ownership, and §§26.71(d), (e), (g), (k) & (l) relating to control.

The Department requested the administrative record and CUCP's response to the issues raised in your appeal. We received the administrative record on February 1, 2016, which the Department reviewed along with your January 4, 2016, appeal, and we conclude that substantial evidence supports CUCP's decision. It suffices, for purposes of this appeal, to affirm on the grounds specified by CUCP pertaining to control, for the reasons set forth below.

Standard of Review

Under 49 C.F.R. §26.86(d), a firm may appeal a denial of DBE certification to the Department. The Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. 49 C.F.R. §26.89(e). The Department must affirm the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." 49 C.F.R. §26.89(f)(1). When reviewing the administrative record provided by the recipient, the Department's decision is based on the status and circumstances of the firm as of the date of the decision appealed. 49 C.F.R. §26.89(f)(6).

Discussion

Background

Section §26.61(b) of the Regulation requires that applicant firms satisfy each eligibility requirement.¹ A firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible. After a careful review of the entire administrative record, we find that substantial evidence supports CUCP's conclusion and that it is consistent with the substantive and procedural provisions concerning certification. We affirm under §26.89(f)(1).

NSI was established in 1980 and is a licensed general engineering contractor specializing in excavation and commercial and residential underground utility work. The firm also performs erosion control services such as erosion and sediment control and prevention as well as installation, maintenance and monitoring. (Uniform Certification Application (UCA) p. 5)). You are NSI's majority owner holding 90% ownership interests. Your family members working at NSI include your husband Stephen, Njirich, the firm's former owner and its current estimator; your son Cory Njirich, lead estimator and foreman; and your daughter Kimberlie Njirich, the firm's 10% owner, Board Secretary, and shop manager. Stephen Njirich and Cory Njirich are considered non-socially and economically disadvantaged individuals as those terms are defined in §26.5 of the Regulation.

According to the record, NSI incorporated in 1988. At that time, Stephen Njirich was the firm's President. When the firm incorporated, you and Stephen were issued **REDACTED** shares as community property. However, in November 2000, Stephen resigned his position as President, and you became President after resigning from the position of Secretary. Stephen Njirich gifted his **REDACTED** shares of stock to you at no cost and you became majority owner.

Because Stephen Njirich, the firm's prior owner, transferred his ownership interests to you and remains involved in the firm, CUCP correctly applied the higher "clear and convincing" evidentiary standard to your control of NSI relative to Stephen Njirich, pursuant to §26.71(l) which states:

Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:

¹ §26.61(b) states that "the firm seeking certification has the burden of demonstrating to [the recipient], 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." As explained in the Department's decision, CUCP appropriately applied the higher burden of proof standard found in §26.71(l).

- (1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

Decision

1.CUCP concluded that non-disadvantaged individuals, including Stephen Njirich who transferred his ownership interests to you, are disproportionately responsible for the firm's operation within the meaning of §26.71(e), which states:

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.

The UCA indicates that Cory Njirich “always” performs the following duties: bidding and estimating, supervising field operations, and attending bid openings and lettings. He also “frequently” hires and fires management and field staff or crew, and purchases equipment. According to his résumé, Cory Njirich has worked at NSI since 2002 and is a certified SWPPP practitioner (licensed to practice storm water pollution prevention in California). He holds several training certificates in the areas of on-site waste inspections, soil science, and safety. Cory supervises six employees and meets with state and county officials on jobs, scheduling, and work to be accomplished. His roles and responsibilities at NSI listed on his duty statement are: supervising job sites and employees; filling out contracts and compiling bids for jobs; operating heavy equipment for residential and commercial jobs; and assisting in decision-making of purchasing and hiring and employee management. During CUCP's on-site interview, you indicated that Cory does the negotiating and contract execution, and that he and Steve Magni are responsible for managing job sites, conducting tailgate meetings, and assigning daily tasks to laborers. (p. 7).

Stephen Njirich has been involved in various types of general engineering construction operations during the last 31 years. He assumed the position of lead estimator for the firm at age 24 and later held the position of general superintendent. He states in his résumé: “I specialize in development projects that are in steep, rocky, mountainous terrain and some instances require extensive blasting.” His work history describes his extensive experience estimating and managing field operations for the construction of subdivisions, shopping centers, apartment complexes, drainage structures, and airport and highway projects, to name a few. He has worked with city, county, and state agencies as well as operated heavy equipment during project construction throughout his career. He obtained the firm's general engineering contractor's license in 1983, and he is certified and licensed in Alpha Explosives. In 1998, Mr. Njirich completed the construction accounting and contract management program at the University of California, Davis. (Stephen Njirich résumé).

Although you may control the management and policies of the firm, you have not proved by clear and convincing evidence that you control its operations given the participation of Stephen Njirich, who as described above, previously owned and controlled NSI. In addition, while you are likely extremely familiar with the firm's work, the record supports CUCP's determination that Cory and Stephen Njirich possess the experience and technical expertise necessary for NSI to perform its field operations. Their background and experience render their expertise indispensable to the firm, and substantial evidence supports CUCP's determination pursuant to §26.71(e) that they are disproportionately responsible for its operations.²

2. CUCP concluded that you did not meet the control requirements of §26.71(g), which states:

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.

The On-Site Review Report dated June 26, 2015, indicates on page 6 that your duties are mainly administrative and that you are responsible for invoicing, insurance, bonding, paying bills, managing clients, schedules, contracts, purchases and scheduling meetings. When asked how you gained experience in the firm and to describe your typical day controlling the business, CUCP recorded your answer as follows:

Shelly reported NSI has been in existence since 1988. She stated her duties are primarily administrative but she will go on a large job site. . . Analyst asked Shelly what her duties are when she is on a job site. Shelly reported [she] has taken lunch to the guys and introduced herself to the new customers. Even though I have a good rapport through email it's nice to introduce yourself. She check[s] on the guys and make[s] sure they are getting their breaks. Shelly added she has flagged but she does not want to stand in 100 degree weather.

She reported she has to make sure communication is going on with the customers and foremen. She is also performing daily administrative tasks, invoicing, bills, and new bids. The main thing is to make sure the communication is open with all staff and customers. (On-Site Report, p. 12).

² Because CUCP's decision did not address §26.71(f), a provision that speaks to delegation to other participants in the firm, the Department is unable to reach a conclusion in this regard. However, in the event the firm reapplies, this aspect of the case should be examined by CUCP in greater detail.

During the on-site interview, you also indicated that you are not able to read structural drawings and that you trust Cory Njirich as the foreman to manage technical problems. (On-Site Report, pp. 13, 14). According to your résumé, you are “responsible for all aspects of the business, daily operations—billing, invoices, bonding, equipment, material purchases; contract preparation and signing; and overseeing all hiring and dismissals.” From 1988 to 1999, you served as the firm’s secretary before becoming its owner. During this time, you managed the office and performed customer service and financial duties including invoicing and billing. You were NSI’s bookkeeper from 1987 to 1988 and prior to joining NSI, you worked at an apparel store.

Your education and background experience in office administration is not related to NSI’s work in the construction field. Your past experience is administrative in nature and the record evidence shows that the relevant technical expertise and experience rests with Cory Njirich and Stephen Njirich, who possess several certification and licenses related to construction work. And it is these two individuals who possess the expertise and knowledge in excavation, underground utility work, and erosion control. Although we agree that your background in managing and controlling the firm’s office work is vital to NSI, the record supports CUCP’s decision that you have not met the requisite burden of proof under §26.71(g). As stated 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 is limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of NSI. This is insufficient to demonstrate control under §26.71(g).

We note that CUCP acknowledges the fact that you hold the firm’s license. However, it states that the Contractors State License Board (CSLB) granted the license to you based on representations rather than examination. As CUCP states:

“...[A]n exam may be waived if the qualifying individual has, for 5 of 7 years immediately preceding the application for licensure, been listed on the official records of the Board as a member of the personnel of any licensee who held a license, which was active and in good standing, in the same classification being applied for... within which the applicant applies for a license. There is no corroborating evidence that CSLB made an assessment of your abilities to control beyond the submission of [a] statement of work experience. (DBE Certification Denial, Oct. 2, 2015)

In summary, substantial evidence supports CUCP’s conclusion that NSI did not meet its burden of proof in regard to the Regulation’s requirements above. Accordingly, CUCP appropriately found that the firm is ineligible for DBE certification.³ Pursuant to Regulation §§26.89(g) and (j), this determination is administratively final and is not subject to petitions for reconsideration. NSI may reapply to the DBE program after the appropriate waiting period has passed.

³ CUCP also cites §26.71(k) as a ground for denial in its October 2, 2015 decision. This provision addresses the disadvantaged owners’ control of their applicant firm vis-a-vis the involvement of immediate family members. The provision states in part: If [the recipient] 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.” In this case, the roles of each family members are delineated and clear.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: CUCP