

September 11, 2017

Reference Number: 17-0067

Jonathan R. Hamby, Esq.  
Looney, Looney & Chadwell, PLLC  
156 Rector Avenue  
P.O. Box 1250  
Crossville, TN 38557

Dear Mr. Hamby:

This letter responds to the March 30, 2017 letter in which Lori Neal & Associates, Inc. (LNAI) appeals<sup>1</sup> the Tennessee Unified Certified Program's (TNUCP) denial<sup>2</sup> of the firm's application for Disadvantaged Business Enterprise (DBE) certification. TNUCP denied the firm's application pursuant to 49 C.F.R. Part 26 (the Regulation). After careful consideration of the full administrative record, the U.S. Department of Transportation (the Department) affirms.<sup>3</sup>

TNUCP denied LNAI's DBE application under control provisions §§26.71(e), (f), (i), (j), and (k).<sup>4</sup> The Department affirms under §§26.71(e) and (i).

## **FACTS**

Sole owner Lori Neal Freitag founded LNAI in 2011.<sup>5</sup> She is the firm's President, and her mother, Rita Kitchens, is Secretary.<sup>6</sup> The firm specializes in utility, water line, and sewer line construction,

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<sup>1</sup> See Appeal Letter (March 30, 2017).

<sup>2</sup> See Denial Letter (Oct. 4, 2016). TNUCP denied LNAI's first DBE application in July 2012.

<sup>3</sup> Regulation §26.89(f)(1): "The Department affirms [a certifier's] decision unless it determines, based on the entire administrative record, that [the certifier's] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

<sup>4</sup> As substantial evidence supports TNUCP's ineligibility determination under §§26.71 (e) and (i), the Department need not make a determination regarding §§26.71(f), (j), and (k).

<sup>5</sup> See Unified Certification Application (UCA). In addition to owning and operating LNAI, Ms. Freitag owns and operates firms The Money Exchange and Mainstream Marketing. Her résumé states that she manages all of The Money Exchange's daily operations as well as legal and confidentiality compliance issues. LNAI and The Money Exchange share office space. Ms. Freitag also works for an (unnamed) insurance agency and still has her insurance license. See On-Site Report (July 21, 2016). TNUCP relied on these facts in support of its conclusion that LNAI does not meet the requirements of §26.71(j) regarding a disadvantaged owner's outside employment.

<sup>6</sup> *Id.* at 9. Ms. Kitchens' role at LNAI is limited to performing "general secretarial duties." Résumé of Rita L. Kitchens.

as well as site preparation work.<sup>7</sup> Ms. Freitag's brother, Lewis Neal, joined LNAI in 2015 as the firm's Project Manager.<sup>8</sup> He is not socially and economically disadvantaged (SED) under the Regulation. Non-SED employees Apolonio Pinales and Tony Chandler manage LNAI's equipment and perform the firm's labor.<sup>9</sup>

Mr. Neal is LNAI's only truck driver, and Ms. Freitag named him as LNAI's only supervisor.<sup>10</sup> He is authorized to sign checks as a sole signatory and withdraw funds in any amount from LNAI's business checking account.<sup>11</sup> In addition, he has contractually obligated LNAI and submitted contract quotes on behalf of the firm.<sup>12</sup> Ms. Freitag shares multiple other responsibilities with Mr. Neal. Specifically, they both sign payroll and creditor checks; hire and fire employees; supervise job sites; estimate work in preparation for submitting bids; and order and purchase material.<sup>13</sup> In 2015, LNAI paid Ms. Freitag **REDACTED** for working twelve (12) months and paid Mr. Neal **REDACTED** for working seven (7) months.<sup>14</sup> As of May 2016, the firm paid Ms. Freitag **REDACTED**/month and paid Mr. Neal **REDACTED** week.<sup>15</sup>

## DISCUSSION

**Section 26.71(e): 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.**

LNAI's primary business activities consist of utility, water line, and sewer line construction, as well as site preparation work.<sup>16</sup> The record does not contain any evidence that Ms. Freitag or Ms. Kitchens can perform any of these activities;<sup>17</sup> only Mr. Pinales and Mr. Chandler (both non-SED) appear to have these abilities.<sup>18</sup> Mr. Neal, Ms. Freitag's non-SED brother, is LNAI's Project Manager and sole truck driver with the requisite CDL license. Ms. Freitag named Mr. Neal as

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<sup>7</sup> See On-Site Report (July 21, 2016) at 2.

<sup>8</sup> See Résumé of Lewis Neal.

<sup>9</sup> See DBE Application Supporting Documentation to Question #8 (May 26, 2016).

<sup>10</sup> See On-Site Report at 9.

<sup>11</sup> See First National Bank of Tennessee Account Agreement (May 19, 2015).

<sup>12</sup> See Putnam County Habitat for Humanity Contractor Agreement (Putnam County Contract) (Feb. 10, 2016).

<sup>13</sup> See On-Site Report at 4.

<sup>14</sup> See 2015 W-2 Form for Lori Neal Freitag and 2015 W-2 Form for Lewis Neal.

<sup>15</sup> See DBE Application Supporting Documentation (May 26, 2016).

<sup>16</sup> See *id.* at 2.

<sup>17</sup> See Résumé of Lori Neal Freitag.

<sup>18</sup> See DBE Application Supporting Documentation to Question #8 (May 26, 2016).

LNAI's only supervisor.<sup>19</sup> The record contains two contract quotes that Mr. Neal alone signed and submitted on behalf of LNAI—<sup>20,21</sup> directly contradicting Ms. Freitag's statement that she alone signs and submits quotes—<sup>22</sup> without any apparent objection from Ms. Freitag. In addition, Mr. Neal contractually obligated LNAI on at least one occasion – again, without Ms. Freitag's evident objection or participation.<sup>23</sup> In that instance, Mr. Neal was the only LNAI employee who signed the contract proposal form, final contract, and all the documents related to the firm's surety bond.<sup>24</sup> Mr. Neal, in short, signs LNAI checks, withdraws funds, manages all projects, hires and fires employees, and binds the firm financially and contractually.

Based on these facts, TNUCP concluded that Mr. Neal is disproportionately responsible for LNAI's operations and that he possesses and exercises his power to control the firm.<sup>25</sup> Substantial evidence in the record, as detailed above, supports TNUCP's conclusion.

**Section 26.71(i)(1): [A certifier] may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in**

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<sup>19</sup> See On-Site Report at 9.

<sup>20</sup> See Estimate for TARE, Inc. (Sept. 11, 2015).

<sup>21</sup> See Putnam County Habitat for Humanity Proposal Form (Feb 4, 2016) at 2.

<sup>22</sup> See On-Site Report at 5.

<sup>23</sup> See Putnam County Contract.

<sup>24</sup> See *id.* at 6. In its appeal to the Department, LNAI submitted an affidavit from Mr. Neal stating that he signed the contract because Ms. Freitag was out of town but that she reviewed the contract before giving him the authority to sign it. Lewis Paul Neal Affidavit (March 30, 2017). LNAI does not state why it did not provide this explanation to TNUCP during the application process.

<sup>25</sup> TNUCP relied on these same facts to support its conclusion that LNAI does not meet the requirements of §§26.71(f) and (k). We generally concur with TNUCP's analysis regarding excessive delegation but find the family business analysis deficient. We remind TNUCP that it is insufficient for a denial letter simply to observe that family members control a business. That fact in itself violates no provision of the Regulation. The certifier must then analyze the SED owner's role vis-à-vis that of other participants and determine whether it can distinguish the SED owner's role from that of the overall family as an aggregate. §§26.71(k)(1) and (2).

§26.71(f): "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(k): "(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."

**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. [A certifier] 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.**

In 2015, Ms. Freitag paid herself **REDACTED** for working twelve (12) months at LNAI and paid Mr. Neal **REDACTED** for working seven (7) months.<sup>26</sup> As of May 2016, LNAI paid Ms. Freitag **REDACTED** and paid Mr. Neal **REDACTED**/week.<sup>27</sup> Ms. Freitag stated that she paid Mr. Neal more because he is her brother and is a single father with three children.<sup>28</sup> Section 26.71(i)(1) explicitly states that certifiers may consider remunerations differences in determining control as long as the certifier takes account of the relevant context (and any explanation that the firm proffers). TNUCP apparently determined that Mr. Neal's critical operational responsibilities, his "duties" in the words of the Regulation, command a higher salary than Ms. Neal's. Substantial evidence supports TNUCP's control determination on the basis of salary differential.

In summary, LNAI did not prove, by a preponderance of the evidence, that a socially and economically disadvantaged individual controls the firm.

## **CONCLUSION**

The Department affirms TNUCP's ineligibility determination under §26.89(f)(1) as supported by substantial evidence and consistent with applicable certification provisions.

This decision is administratively final.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: TNUCP

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<sup>26</sup> See 2015 W-2 Form for Lori Neal Freitag and 2015 W-2 Form for Lewis Neal.

<sup>27</sup> See DBE Application Supporting Documentation (May 26, 2016).

<sup>28</sup> See On-Site Report at 7. LNAI's appeal letter (at 2) states that Ms. Freitag chooses to pay herself less than Mr. Neal because "she has chosen a policy and practice of reinvestment of income." As that argument was not before the certifier at the time of its determination, we do not consider it on appeal. See generally §§26.73(b)(1), 26.89(f)(6).