

October 31, 2017

Reference Number 17-0085

Ms. Clara Smith Lykins, President
Lykins Complete Site Solutions
REDACTED
Middletown, Ohio 45042

Dear Ms. Lykins:

Lykins Complete Solutions, LLC (LCSS) appeals the Ohio Department of Transportation's (ODOT) January 27, 2017 determination that the firm is ineligible for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 C.F.R. part 26 (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) affirms ODOT's decision. *See* §26.89(f)(1).¹

The Department affirms the decision because substantial evidence supports ODOT's conclusion that nondisadvantaged individuals possess the power to control the firm, or are disproportionately responsible for LCSS's operations, which §26.71(e) prohibits. Substantial evidence also supports the determination that you did not demonstrate the required "overall understanding" or "technical competence and experience" directly related to the firm's operations that is required to control the firm within the meaning of §26.71(g).²

I. Procedural History

LCSS applied for DBE certification on July 6, 2016, and ODOT conducted the firm's on-site interview on November 14, 2016. ODOT denied the application on January 27, 2017. LCSS appealed that decision to the Department on April 20, 2017 and supplemented the appeal with additional arguments on October 11, 2017.

II. Facts

You formed LCSS with James Lykins (your nondisadvantaged husband), and Carl Lykins (your nondisadvantaged brother-in-law) on March 20, 2016. LCSS primarily engages in commercial excavating.

¹ §26.89(f)(1) provides: "The Department affirms [a certifier's] decision unless [the Department] 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."

² Sections 26.71(e) and 26.71(g) are sufficient grounds for affirming. ODOT's additional §26.73(a)(2) denial ground is, in our assessment of the facts, unviable.

A. LCSS's key employees (responsibilities and background)

The roles and experience of LCSS's key employees are as follows:

Carla Lykins (60% owner)

You are LCSS's majority owner and President. You primarily perform administrative duties at the firm. You specifically described your responsibilities as, "handl[ing] accounts receivable, accounts payable, payroll, billing, invoicing, credit applications, certifications, paperwork, pre-bid meetings, [w]orker's [c]omp, licenses, and insurance." On-Site Report ("OSR") (November 14, 2016) at 4.

You obtained other experience at non-excavating firms, where your responsibilities were primarily related to finance, purchasing, and general management/decision making. *See* Carla Lykins Résumé at 1. The record does not show that you have prior experience or an educational background pertaining to commercial excavating. *Id.*

Carl Lykins (20% owner)

Your brother-in-law, Carl Lykins, is LCSS's 20% owner and Vice President. He "handles [LCSS's] estimating, pre-bid meetings, site surveying, has a commercial driver's license, operates equipment, is a laborer, and [is responsible for the firm's] vendor relations." OSR at 4.

Mr. Lykins has worked in the excavating industry for over 20 years. Prior to his tenure at LCSS, Mr. Lykins served as Chief Operational Officer for another construction firm. In this position, Mr. Lykins "create[d] operations strategy and policies, [and] communicate[d] and foster[ed] employee alignment to company goals." Carl Lykins Résumé at 1. Prior to being named COO, Mr. Lykins served as that firm's Operations Manager. As Operations Manager, Mr. Lykins "work[ed] directly with [the] CEO as well as various project managers to ensure [that the firm's] scope of work [was] carried out in a timely and efficient manner. [And he] process[ed] change order's [sic], submittals, lien release's [sic], and schedule of values." *Id.*

William Lykins, Jr. (20% Owner)

Your husband, William Lykins, is LCSS's 20% owner and another Vice President. As Vice President, he "oversees daily field operations, coordinates with other team members, orders supplies, and acts as a general laborer." OSR at 4.

Mr. Lykins has performed excavating field work for several firms since 1990.³

³ The UCA asked you to identify LCSS management personnel who control various firm activities. *See generally* UCA at 9-10. You indicated that you always control the firm in the areas of marketing and sales, office management (billing, accounts receivable/payable, etc.), and signing business checks. *Id.* at 9. You are seldom involved in bidding and estimating, bid opening and lettings, equipment purchases. *Id.* You indicate that nondisadvantaged participants William and Carl Lykins always control the firm's bidding and estimating, field operations, and equipment purchases. Carl Lykins always attends bid opening and lettings. *Id.*

B. Denial letter and appeal

ODOT determined that LCSS failed to demonstrate that you actually control the operations of the firm in accordance with §§26.71(e), whereby nondisadvantaged individuals must not disproportionately control the firm's operations, and 26.71(g), which requires the disadvantaged owner to show an overall understanding of, and managerial and technical competence and experience directly related to, the type of business and the firm's operations. ODOT's rationale primarily relies on résumés and on-site interview statements to support its conclusion.

On appeal, LCSS objects to the denial letter's conclusions, and it asserts that you have a "high level of understanding in the construction industry." LCSS Appeal at 3. LCSS specifically argues that William and Carl Lykins's "life experience in the industry does not provide them the skill to manage and operate the business and its affairs on a daily bases [sic]." *See* LCSS Supplement to Appeal (October 11, 2017) at 5. LCSS further asserts that its operating agreement proves that you maintain final authority over all management decisions.⁴ *See* Supplement to Appeal at 3. Finally, the appeal contends that you have six years of experience in commercial excavating. You specifically assert in the appeal that that:

My past business experience in starting and operating or any business has layed the foundation for operational and administrative company business. There was prior knowledge by me in the commercial excavation field, over 6 years I was introduced to reading and understanding blue prints, the grade elevations and the lineage of pipe, catch basins and many other details for planning and executing a job. needed to do a job and the type of pipe needed. I would help Bill Lykins break down a job that he was working on for other company's. I would go to job sites with him and Bill would explain the dirt elevation and how the earth needed to slope so that the water would run off, and the use of retention ponds on all new building site to collect their water run off so it doesn't go into the road. The type of curb that was put in. I could state more examples. The exposure I had gave me the confidence that I could start a commercial excavating company and be successful. The company's that I worked in and then went on to start are not in the current industry that I am seeking certification in, but my financial managerial and administrative experience controlling those key areas just a vitally important and should not be discounted because they were not experienced in construction field.

⁴ Section 5 of the operating agreement states:

The Majority owner of the Members, within the authority granted by the Act and the terms of this Agreement shall have the complete power and authority to manage and operate the Company and make all decisions affecting its business and affairs. . . . Except as otherwise provided in this Agreement, all decisions and documents relating to the management and operation of the Company shall be made and executed by the Majority owner in Interest of the Members. . . . Third parties dealing with the Company shall be entitled to rely conclusively upon the power and authority of the Majority owner in Interest of the Members to manage and operate the business and affairs of the Company.

Supplement to Appeal at 6. LCSS also asserts that, during the assessment process, “Carla Lykins also reported her enrollment in course work, available through the local union halls. *This will pair her business expertise with her use of vocabulary, specific to each type of work they will bid and conduct.*” LCSS Appeal at 2. (Emphasis added.) The appeal states that you attended one course in March 2017 and that you have scheduled additional classes. *See id.*

III. Authority

1. §26.71(a) states:

In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

2. §26.71(e) 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.

3. §26.71(g) 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.

IV. Discussion

A. *William and Carl Lykins (disproportionate control operations/power to control)*

Section 26.71(e) provides that “individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees . . . 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 facts presented in this case show that you only exclusively control the firm's office, check signing, and marketing. *See* UCA at 9-10. Contrastingly, William and Carl Lykins exclusively control LCSS's estimating, bidding, and field operations, which are areas critical to the firm's operational success. *See* OSR at 4-5. As a team, LCSS's owners share control of company policy, major purchasing decisions, profit spending/investments, and contract/credit business obligations. *See* UCA at 9-10; *see also* OSR at 5 (LCSS's owners "*collectively decide on any policy or financial decisions.*"). (Emphasis added). Furthermore, William and Carl Lykins each have vast experience (20-30 years) within the commercial excavation industry. In particular, Carl Lykins's documented experience as a former COO and Operations Manager within the commercial excavating industry refutes your claim that he lacks the skill to manage LCSS and its daily affairs. These facts constitute substantial evidence that William and Carl Lykins are disproportionately responsible for the operation of LCSS and that they possess the power to control the firm.⁵

Accordingly, substantial evidence supports ODOT's determination that LCSS does not meet the requirements of §26.71(e). We affirm under §26.89(f)(1).

B. Insufficient understanding/directly related technical competence and experience

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

While the appeal maintains that you gained sufficient experience from helping your husband perform excavating work, the record (résumé and on-site interview) that ODOT considered in reaching its determination contains no evidence of your claimed experience and skills. LCSS bears the burden of demonstrating DBE eligibility, and it fails to meet its burden in this regard. Further, LCSS did not make this claim until after ODOT found the firm ineligible on the evidence the firm did present (which is the basis of our review).⁶ Not bringing all pertinent work experience to ODOT amounts to the firm's failure to prove its case.

Your expertise, on the evidence presented, relates to general managerial, administrative, and financial functions that are not directly related to excavating. To the extent that LCSS claims that your experience running other businesses provides you with the required expertise necessary to run the firm, we find such claim to be without merit because §26.71(g) requires managerial experience that is *directly* related to the applicant's operations.

⁵ The appeal asserts that the operating agreement demonstrates that you have ultimate control over LCSS's management decisions. But as we discuss in this decision, substantial evidence supports that William and Carl Lykins are disproportionately responsible for operating the firm and that they possess the power to control the firm. Therefore, the operating agreement is merely *pro forma*.

⁶ For the same reason, we do not consider the utility of courses that you took after ODOT made its determination. *See* §26.89(f)(6).

The Regulation does not require that the disadvantaged owner have experience or expertise in every critical area of the firm's operations. However, LCSS must demonstrate that you 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." §26.71(g).

You concede that you started to take courses in excavating to "*pair [your] business expertise with [your] use of vocabulary, specific to each type of work they will bid and conduct.*" See Appeal at 2. (Emphasis added.) However, understanding terms used within the industry does not demonstrate an ability to intelligently and critically evaluate excavating information. At best, the record suggests that you are in the process of learning the required skills that will eventually enable you to make informed, independent decisions concerning your firm's bidding, estimating, and field work. The certifier, however, assesses eligibility based on the applicant firm's present circumstances. See §26.73(b)(1). LCSS has not presented evidence to demonstrate that you are presently able to critically evaluate information about the firm's operations without the assistance of Carl and William Lykins.

The record is devoid of evidence that you can "intelligently and critically evaluate [relevant] information" to make "independent decisions" about LCSS's operations, as required under §26.71(g). Substantial evidence supports ODOT's determination, which we affirm under §26.89(f)(1).

V. Conclusion

The Department affirms ODOT's decision because it is supported by substantial evidence, and because it is consistent with the Regulation's substantive and procedural provisions.

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

Sincerely,

Samuel F. Brooks
Acting Associate Director
Disadvantaged Business Enterprise Division

cc: ODOT