

October 16, 2017

Reference Number: 17-0088

Ms. Tara Hickin
President
Landmark Professional Group, Ltd.
P.O. Box 324
Huntsburg, OH 44046

Dear Ms. Hickin:

This letter responds to the May 11, 2017 letter in which Landmark Professional Group, Ltd. (Landmark) appeals¹ the Ohio Unified Certification Program's (OUCP) denial² of Landmark's Uniform Certification Application (UCA) for certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, pursuant to §26.61(e) of the Regulation, the U.S. Department of Transportation (the Department) affirms OUCP's decision, as required by §26.89(f)(1).³

FACTS:

Tara Hickin founded Landmark in 2012 and is the firm's sole owner and President.⁴ Landmark performs land surveying and "related services."⁵ Ms. Hickin's husband Andrew Hickin has been Landmark's Survey Group Manager⁶ since 2012. Mr. Hickin is not socially and economically disadvantaged (SED) under the Regulation.

In 2008, Ms. Hickin founded Earth's Bounty Trail Mix, Ltd. (Earth's Bounty), a natural and organic foods business that she ran until 2012.⁷ As President of Earth's Bounty, she primarily

¹ See Appeal Letter (May 11, 2017).

² See Denial Letter (March 23, 2017).

³ See §26.89(f)(1): "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

⁴ See Unified Certification Application (UCA) at 1 and 7.

⁵ *Id.* at 1.

⁶ The UCA labels Mr. Hickin's position at Landmark as Survey Group Manager. Mr. Hickin's résumé states his position as Professional Land Surveyor and Principal. See Résumé of Andrew Hickin.

⁷ See Résumé of Tara Hickin and On-Site Report (March 8, 2017) at 2.

developed recipes and designed and maintained the firm's e-commerce website.⁸ Earth's Bounty ceased operation in 2012, the same year in which Ms. Hickin founded Landmark. Her résumé emphasizes that her professional experience stems "from the creation of a successful online enterprise that required proficiency in website design, marketing, and sales as well as business management and employee training."⁹

Landmark's UCA and accompanying documents state that as President of Landmark, Ms. Hickin directs the firm's marketing and promotional activities; makes financial decisions; manages human resources; participates in contract negotiations and proposal writing; maintains compliance with state and federal programs; and oversees accounts payable, accounts receivable, and "all other office operations."¹⁰ Ms. Hickin's résumé does not indicate any prior professional experience or education related to land surveying.

As Landmark's Survey Group Manager and Principal, Mr. Hickin bids on and estimates projects; supervises field operations; and attends bid openings and lettings.¹¹ He also manages employees; communicates with clients to ensure that projects are accurately executed; maintains equipment and arranges equipment repairs.¹² His résumé states that he has 16 years of land surveying experience on public, commercial, and residential projects. He has prepared boundary and topographic surveys and participated extensively in construction staking and layout.¹³ He has a Bachelor of Science degree in Surveying and Mapping; an Associate Degree in Civil Engineering Tech; and is a licensed Professional Surveyor.¹⁴

OUCP denied Landmark's application for DBE certification under control provisions §§26.71(g), (h), and (k) of the Regulation. The Department affirms under §§26.71(g) and (k).

DISCUSSION:

Section 26.61(b) states:

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.)

⁸ See Résumé of Tara Hickin.

⁹ *Id.*

¹⁰ See *id.*

¹¹ See UCA at 10.

¹² See ODOT Phone Interview Transcript (March 22, 2017) at 2.

¹³ See Résumé of Andrew Hickin.

¹⁴ See *id.*

Section 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*.

(Emphasis added.)

Overall Understanding

During a telephone interview with OUCP, Ms. Hickin stated that she has 18 years of land surveying experience, as that has been the duration of her observation of Mr. Hickin's land surveying career.¹⁵ She did not provide any examples of her own, direct land surveying experience. OUCP concluded that Ms. Hickin's mere observation of Mr. Hickin's career does not equate to her having had any of her *own* land surveying experience.¹⁶ Simply bearing witness to her husband's experience or expertise does not demonstrate that she has an overall understanding of the type of business in which Landmark is engaged or that she has an overall understanding of the firm's operations.

Directly Related Experience or Expertise

Prior to starting Landmark, Ms. Hickin's only professional experience was owning and operating Earth's Bounty. In that capacity, Ms. Hickin focused on developing recipes and designing and maintaining the firm's e-commerce website.¹⁷ She described herself as Earth Bounty's "creative talent."¹⁸ OUCP determined that this experience and expertise is "completely unrelated" to that necessary for controlling a surveying firm.¹⁹ Landmark provided no evidence that Ms. Hickin has experience or expertise directly related to Landmark's operations.²⁰

Intelligently and Critically Evaluate Information

¹⁵ See ODOT Phone Interview Transcript at 2.

¹⁶ See *id.*

¹⁷ See Résumé of Tara Hickin.

¹⁸ *Id.*

¹⁹ See Denial Letter.

²⁰ Recipe development, design, and maintenance of an e-commerce website, and "creative talent" are not areas (critical or otherwise) of Landmark's operations.

Section 26.71(g) does not require a firm's SED owner 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. Landmark contends that Ms. Hickin's role for the last three years as Landmark's President has given her sufficient land surveying experience for her to control the firm. However, Ms. Hickin stated that Mr. Hickin monitors all the job sites and "pretty much runs the projects" because "he understands what's going on."²¹ At Landmark, Ms. Hickin directs the firm's marketing and promotional activities; makes financial decisions; manages human resources; participates in contract negotiations and proposal writing; maintains compliance with state and federal programs; and oversees accounts payable, accounts receivable, and "all other office operations."²² Landmark did not provide evidence that performing these duties has conferred upon Ms. Hickin the ability to intelligently and critically evaluate information presented by other participants in Landmark's activities and to use this information to make *independent* decisions concerning the firm's daily operations, management, and policymaking.

Substantial evidence in the record supports OUCP's determination that Landmark has not demonstrated DBE eligibility under §26.71(g).

Section 26.71(k) states:

(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.*

(Emphasis added.)

Section 26.71(k) permits an SED owner's immediate family members to participate in the firm, as long as an SED individual, as distinct from the family as a whole, actually controls the firm. Mr. Hickin participates in Landmark as the Survey Group Manager, Principal, and licensed Professional Surveyor. He bids on and estimates projects; supervises field operations; and attends bid openings and lettings.²³ He also manages employees; communicates with clients to

²¹ See ODOT Phone Interview Transcript at 2. ODOT did not evaluate Landmark's DBE eligibility under §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."

²² See *id.*

²³ See UCA at 10.

ensure that projects are accurately executed; maintains equipment and arranges repairs.²⁴ Ms. Hickin explained that she only visits job sites when she wants to understand the scope and time frames of the work being performed.²⁵ In light of Mr. Hickin's significant responsibilities at Landmark, OUCP concluded that Ms. Hickin does not control the firm herself, as distinct from her and her husband acting jointly.

Substantial evidence in the record supports OUCP's determination that Landmark did not carry its burden of proof under §26.71(k) of the Regulation.

CONCLUSION:

Substantial evidence supports OUCP's determination that Landmark did not prove eligibility under §§26.71(g) and (k), as §26.61(b) requires. OUCP's determination is consistent with applicable certification standards. We therefore affirm under §26.89(f)(1).

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

Sincerely,

Marc Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: OUCP

²⁴ See ODOT Phone Interview Transcript at 2.

²⁵ See *id.*