

October 27, 2017

Reference No: 17-0092

Ms. Melinda Lair, President
Outdoor Enterprise, LLC
REDACTED
Casstown, OH 45312

Re: DBE Certification Denial of Outdoor Enterprise, LLC

Dear Ms. Lair:

Outdoor Enterprise, LLC (OELLC) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the denial of certification of the firm as a Disadvantaged Business Enterprise (DBE) by the Ohio Department of Transportation (ODOT) pursuant to the DBE Program Regulation, 49 C.F.R. Part 26.

ODOT conducted an on-site interview to OELLC's offices on May 24, 2016, and issued its DBE certification denial decision on February 27, 2017, citing the firm's inability to meet the control requirements of §§26.71(e), (g), and (i). After appealing this decision to the Department on May 12, 2017, the Department requested ODOT's administrative record pursuant to §26.89(d). We conclude, based on a review of this record and your appeal, that substantial evidence supports ODOT's decision for the reasons below. We do not address ODOT's §26.71(i) conclusions.

Discussion and Decision

OELLC is a landscape contracting firm engaged in site work, hardscape, segmented retaining walls, and concrete projects. (Uniform Certification Application (UCA), p. 5, ODOT on-site report, p. 1)). ODOT determined that you did not control OELLC because you lacked experience directly related to the type of work the firm performs, and that you rely upon your non-disadvantaged husband, Mr. Andrew Lair (OELLC's 49% owner) for his expertise.

According to your résumé, you have served as OELLC's President and Office Manager since 2000, managing all H/R items, insurance, payroll, taxes, contract paperwork, and general operations. (M. Lair Résumé) You performed similar accounting/tax functions for Andrew Lair (independent contractor) from 1996 to 1999, and Rice's Landscaping from 1996 to 1998. Your previous employment includes working for Dayton Medical Imaging (1991 to 1995) as a Receptionist, Accounts Receivable, and Collections Manager; Miami Valley Door Sales as a

Secretary (1988 to 1990); and as a Traffic Court Clerk/Collections, and Accounts Representative for Miami County Municipal Courts (1987 to 1988).

Mr. Lair performs sales, design, and estimating for OELLC's landscape construction work, including deck, structures, pavers, retaining walls, and general landscaping, and excavating. (A. Lair Résumé) He was a self-employed landscape contractor from 1996 to 1999 designing, building, and installing decks, paver patios, and other outdoor structures. From 1985 to 1995, he worked at Rice's Landscaping as the firm's landscape installation foreman. (Ibid.)

ODOT's on-site report includes the following questions and a record of your responses:

9. What are the majority owner's day-to-day responsibilities?

Melinda monitors accounting functions like A/P, A/R, and payroll, while also monitoring insurance, worker's compensation, and certifications.

10. What are the non-majority owner(s)' day-to-day responsibilities?

Andrew maintains sales opportunities and provides onsite work; he also works with Melinda regarding human resource matters, including hiring and terminating employees. The production manager, Jay [Kuntz], oversees the crews.

11. Who was the firm started by and by what means (how was start up funded)? Why did you pick this industry to start a business in? Review start-up documentation.

Andrew and Melinda started the firm together with their personal savings. Andrew was previously in the landscaping business and had a passion for being outside and the industry. Melinda had previously worked in the business and office management environment. . . .

13. Who monitors jobs?

The on-site foreman monitors jobs. He reports to Jay, who then reports to Melinda and Andrew.

14. Who monitors the administrative functions (e.g. A/P, A/R, invoicing, insurance, human resources, other office functions)?

Marcia, the administrative assistant, maintains the administrative functions and prepares checks for payments. Melinda signs the checks and also authorizes different functions. Andrew has check authority as well.

15. Who has final say on policy (e.g. new and amendments) and financial (e.g. large equipment purchases, taking out loans or lines of credit in the company's name) decisions?

Andrew and Melinda share “final say” authority.

16. *Who has final say on selecting projects to bid on?*

Andrew has the final say on selecting projects to bid on.

(On-Site Interview Report, pp. 4)

As the applicant firm, OELLC bears the burden of demonstrating that its socially and economically disadvantaged owners meet the requirements for certification, including those related to control that are found, in part, in Section 26.71(g). This provision 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.” §26.71(g).

You indicated that your financial and business knowledge was as a leading force behind the decision to start OELLC but you also acknowledge that “Mr. Lair’s experience in landscape design and installation was a great asset to running a landscape business.” (Appeal, p. 1). However, you state that Mr. Lair “has more technical on-the-job knowledge” than you and that you “typically do not get involved with bidding and estimating.” (Ibid., p. 2). You stated: “this is handled by Mr. Lair and two other upper level employees. The field operations are handled by another manager, who is supervised by myself and Mr. Lair.” (Ibid).

ODOT is not disputing your ownership and involvement as OELLC’s majority owner, however, there is no support in the record that you have the technical competence or experience directly related to the firm’s operations, which is a requirement of §26.71(g). Your experience is more akin to financial, administrative, and management tasks; which are undoubtedly essential to all firms. However, as §26.71(g) states: “[g]enerally, 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(g). The principal business activities of OELLC are residential landscaping projects. For example, recent firm projects included installing sidewalks and drainage pipes; building retaining walls; excavating and installing equipment. (On-Site Review, p. 2). You did not demonstrate you possess technical competence in this type of landscaping work or that you had experience directly related to these types of activities and

projects at some time in the past. We therefore affirm ODOT's decision regarding this control element.

2. We further concur that OELLC has not met its burden of proof that you control the firm notwithstanding Mr. Lair's participation who it appears is responsible for the firm's core work (either directly or through supervision of others, such as Messrs. David Kuntz, and Jay Kuntz (also non-disadvantaged individuals)). (UCA, pp. 9, 10, M&A Lair résumés). The relevant regulation provision on this point is §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.” §26.71(e)

You allege on appeal that you are involved in many of the same areas that Mr. Lair is engaged in and that you and Mr. Lair supervise Mr. Jay Kuntz who handles the field operations. However, the record evidence indicates that Mr. Lair is disproportionately responsible for OELLC operations as demonstrated by his expertise in landscaping and the field/technical duties that are delegated to him at the firm.¹ We concur with ODOT's finding that OELLC did not meet its burden of proof regarding §26.71(e);

We affirm the certification denial of OELLC as a DBE under §26.89(f)(1).² This decision is administratively final and is not subject to petition for reconsideration. **OELLC may reapply to the DBE program on February 28, 2018.**

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Program Division

cc: ODOT

¹ Section 26.71(f) applies to this case but was not cited by ODOT. It states: “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(f). In the event the firm reapplies, ODOT should examine this aspect of the case further.

² The Department must affirm the 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.” §26.89(f)(1).