



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 12, 2018

Reference Number 17-0128

Shawn R. Alexander, Principal
Twism Enterprises, LLC
d/b/a valuCADD Solutions
12110 Regency Run Court, Suite 9
Cincinnati, OH 45240

Re: Twism Enterprises, LLC Appeal of DBE Certification Denial

Dear Mr. Alexander:

Twism Enterprises, LLC d/b/a valuCADD Solutions (valuCADD) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial 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 (the Regulation).

ValuCADD submitted a Uniform Certification Application (UCA) to ODOT on April 28, 2017. ODOT conducted an On-Site Review (OSR) on May 23, 2017. On June 9, 2017, ODOT denied valuCADD's application to be a DBE because the firm did not satisfy one of the Regulation's control requirements found in §26.71(j). ValuCADD appealed ODOT's decision to the Department on July 17, 2017 and we requested ODOT's administrative record pursuant to §26.89(d). The Department concludes, based on a review of this record and your appeal, that substantial evidence supports ODOT's decision.¹

Background

You founded valuCADD, an engineering consulting firm, in 2016. (UCA at 1). You work full-time as an Electrical Design Engineer for Fosdick & Hilmer, an engineering services firm; a position described as "critical" in the OSR. (OSR at 4). You stated that your hours at Fosdick & Hilmer are from 7 a.m. to 4pm, Monday through Friday, and that you occasionally work

¹ When a firm appeals a certification denial determination, 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. §26.89(e). The Department affirms 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." §26.89(f)(1). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

weekends. *Id.* You also stated that you work between 35 and 40 hours a week, including time on Saturdays and Sundays, at valuCADD. *Id.* You explained that valuCADD operates full-time (8 a.m. to 5 p.m., 7 days a week). (OSR at 6).

Discussion

The Regulation at 26.61(b) requires the firm seeking certification to bear the burden of demonstrating to the recipient, by a preponderance of the evidence (in most instances), that it meets the requirements of the Regulation concerning group membership or individual disadvantage, business size, ownership, and control. One of the control requirements is found in §26.71(j), which states:

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

ODOT determined that you did not meet this requirement because your full-time schedule, including occasional weekends, at Fosdick & Hilmer, and the critical nature of your position there, prevent you from devoting sufficient time and attention to valuCADD as this provision requires. (Denial Letter, p. 2).

In valuCADD's appeal, you argue that Fosdick & Hilmer has allowed you to start your own business and knows that you will eventually leave that firm to run valuCADD full-time. (Appeal Letter, p. 1). However, your appeal does not address the substance of ODOT's arguments—i.e., that valuCADD operates at times that conflict with your work schedule at Fosdick & Hilmer.

Other employment, alone, does not preclude DBE certification. However, the Regulation requires that you control the applicant firm at all times it is operating. *See* §26.71(j). The record is unclear as to whether you devote sufficient time and attention to your duties at valuCADD, given your full-time work at Fosdick & Hilmer. ValuCADD appears to be a part-time, newly formed business with no contracts; however, you stated the contrary—that valuCADD is a full-time firm (operating 7 days a week), and the burden is on valuCADD (the applicant firm) to show that you, its sole owner and employee (despite your outside employment) devotes sufficient time and attention to the managing and controlling valuCADD. Therefore, substantial record evidence supports ODOT's conclusion that you have not demonstrated control of the firm for the purposes of §26.71(j).

Conclusion

We affirm the certification denial of valuCADD as a DBE under §26.89(f)(1) based on the control grounds specified above. There exists substantial record evidence to support the denial,

and the denial is consistent with applicable substantive and procedural provisions of the Regulation.² This decision is administratively final and not subject to further review. **ValuCADD may present information substantiating your control of the firm if it chooses to reapply, which it may do after June 9, 2018.** Any new evidence you present to ODOT at that time demonstrating that valuCADD operates on a part-time basis or that you are no longer employed elsewhere would positively weigh toward certifying the firm as a DBE since this appears to be the agency's only objection at the time of application. Taking this fact into consideration, ODOT would examine whether the firm meets all eligibility factors when the firm reapplies.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Program Division
Departmental Office of Civil Rights

cc: ODOT

² The Department's decision that a recipient's certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. See 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999).