

July 9, 2018

Reference Number 18-0013

Sarah Flores
President
HGI, Inc.
[REDACTED]
Toledo, OH 43611

Dear Ms. Flores:

HGI, Inc. (HGI) has appealed the Ohio Department of Transportation's (ODOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation).¹ After considering the full administrative record, the Department affirms ODOT's decision to deny certification as supported by substantial evidence and consistent with applicable certification provisions.²

Facts

You serve as President and own 51% of HGI, a business that "employs union Ironworkers who install reinforcing steel and wire mesh," and that fabricates reinforcing steel for those projects. Uniform Certification Application (UCA) at 5, 7. Your non-disadvantaged brother, Greg Myers, owns 49% of HGI and serves as Secretary. *Id.* at 8. During the on-site review, you described your mother founding the company in 1987. On-Site Review (OSR) at 3. You have owned the firm since 2004. UCA at 5. HGI was dormant from 2010 until January 2017, when you revived the business. OSR at 3.

An ODOT letter denying certification to HGI in 2009 provides additional background on the founding of the firm. According to the letter, HGI was founded with [REDACTED] in capital by your mother, Joan Myers, in 1987, but it immediately became dormant. 2009 Denial Letter at 3. In 1997, your father, Bill Myers, and brother, Greg Myers, restarted HGI as a structural steel building company and changed the ownership so that the two of them, and your mother, each owned a third of the company. *Id.* In 2004, HGI shifted from structural steel to reinforcing steel,

¹ ODOT cited § 26.61(b) and § 26.71(b)-(c) and (g) in its denial letter. The denial letter ultimately determined that you were unable to demonstrate HGI's independence pursuant to § 26.71(b)-(c), and that your role at HGI is limited to "office management, administration, or bookkeeping functions unrelated to the principle business" of the firm, pursuant to § 26.71(g).

² As discussed below, the Department affirms on § 26.71(b) grounds, and declines to comment on § 26.71(c) and (g). With respect to (g), the Department notes that ODOT spent much of its analysis comparing the job functions actually performed by Ms. Flores to those performed by Mr. Wymer and Mr. Snow. The comparison is irrelevant to whether Ms. Flores demonstrates the required abilities, experience, and competence; ODOT's analysis would have been more appropriate as a § 26.71(d) discussion.

and ownership was shifted again, with you now possessing 51% of the company and your brother Greg possessing 49%, reflecting the current ownership of the firm. *Id.* In 2004, you held another job and didn't devote your attention full-time to HGI until 2007. *Id.*

You and members of your family, including your brother and your father, also own Henry Gurtzweiler, Inc. (Gurtzweiler), a non-DBE company you describe as currently in the "structural steel" business. Appeal at 2. While Gurtzweiler also used to be involved in the reinforcing steel business, it is now strictly a structural steel company. *Id.* During the on-site review, you estimated that you currently own approximately 16% of Gurtzweiler. OSR at 6. Your brother, Greg, also owns a portion of Gurtzweiler and works there full-time, approximately 60 hours per week, as an Operations Manager/VP. OSR at 6; UCA at 8. Both you and your brother worked full-time at Gurtzweiler, where you worked on the reinforcing steel side of the business, until January 2017, when you took out a line of credit and decided to revive HGI as a reinforcing steel company. OSR at 3-4.

ODOT received your application on June 28, 2017. UCA at 5. In your application, you stated the company consists of three full-time employees, including you, Justin Snow, and Craig Wymer, while the other owner, Greg Myers, works full-time for Gurtzweiler. *Id.* at 8-10, all of whom were formerly employed by Gurtzweiler and all of whom are non-disadvantaged. Appeal at 2. HGI leases office space and its fabrication shop from Gurtzweiler, *Id.* at 6, and its equipment. Appeal at 1.

By letter dated August 18, 2017, ODOT informed you of its decision to deny HGI's application for certification as DBE. Denial Letter at 1. ODOT concluded that you failed to demonstrate the independence of HGI as a company, that your control of the firm is restricted by conditions on your leases of equipment and property, and that your experience does not provide you with the expertise necessary to make independent decisions concerning the firm's daily operations, management, and policy making. *Id.* at 4. Specifically, ODOT cited HGI's connections to Gurtzweiler, including shared ownership, familial overlap, rental and lease agreements, and employee connections in determining that it lacked the independence required for certifications. *Id.* at 2-3. ODOT also emphasized the administrative nature of your role at HGI, and the policy and management-level roles of Mr. Wymer and Mr. Snow, in determining that you lacked the control necessary for certification. *Id.* at 3-4.

In your appeal, you state that the commercial lease agreement between Gurtzweiler and HGI is a business decision due to the high payroll costs of the newer business, and highlight HGI's line of credit, back by a guarantee of your personal assets, as evidence of HGI's independence. Appeal at 1-2. You describe Gurtzweiler's focus on structural steel as fundamentally different from HGI's business of reinforcing steel, and state that the two businesses do not collaborate and are not competitors. *Id.* at 2. You describe HGI as a "spin-off" of Gurtzweiler. *Id.* As for your role at HGI, you acknowledge that you are "fulfilling administrative functions" yourself, but emphasize that doing so results in substantial personnel cost savings because you do not need to hire an administrative assistant. *Id.* at 3.

Authority

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.

Section 26.71(b) states, in relevant part:

Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

Discussion

Only an independent business may be certified as a DBE, and the Regulation describes some of the considerations that a certifier can analyze to determine independence. *See* § 26.71(b). Relationships between the applicant firm and non-DBE firms must be scrutinized, as well as relationships between employees and employers at the applicant firm and other non-DBE firms. *Id.*

HGI and Gurtzweiler share personnel, ownership, and management, and always have. Both are family businesses. *See, e.g.,* Appeal at 1-3; OSR at 6; UCA at 8. You estimated that you own approximately 16% of Gurtzweiler, OSR at 6, and you own 51% of HGI. UCA at 7. Your brother, Greg Myers, owns a portion of Gurtzweiler and continues to work there full-time in a management position, while also owning 49% of HGI. UCA at 8. While both Mr. Wymer and Mr. Snow work full-time for HGI now, until January 2017, they were full-time, long-term employees of Gurtzweiler. Appeal at 2-3; Wymer Resume; Snow Resume. In the past, your father was also an owner of HGI, while also owning Gurtzweiler, which he still owns in the present. 2009 Denial Letter at 3; UCA at 7. During times when HGI has gone dormant, such as between 2010-2017, you and your brother have returned to work full-time for Gurtzweiler, until deciding to re-start HGI. OSR at 4. There is substantial overlap in personnel, ownership, and management between the two family businesses.

Furthermore, HGI leases all of its facilities and equipment from Gurtzweiler, on a month-to-month basis. Appeal at 1; UCA at 6. HGI leases a forklift, shear, two angle benders, and one circle bender from Gurtzweiler, HGI Equipment List at 1, as well as office space and the firm's fabrication shop. UCA at 6. The property is located adjacent to Gurtzweiler's operations. UCA at 5. Both Gurtzweiler and HGI are in the steel business, though Gurtzweiler no longer specifically provides services in reinforcing steel as HGI does and instead provides structural steel services. Appeal at 2; OSR at 4.

In summary, both owners of HGI also own Gurtzweiler, one of whom still works in management there, and all employees of HGI formerly worked for Gurtzweiler. All equipment and property is currently owned and leased from Gurtzweiler. The Regulation specifically identifies areas

such as personnel, facilities, and equipment as relationships to be scrutinized when determining a firm's independence for the purposes of certification, as well as present or recent employer/employee relationships between applicants and non-DBE firms. *See* § 26.71(b)(1)-(2). While it is true that HGI has its own line of credit, and can freely terminate the rental agreement if it decides to do so, Appeal at 1, the evidence presented by ODOT of HGI's dependence on Gurtzweiler is substantial and convincing.

Conclusion

The Department affirms the ineligibility determination under § 26.89(f)(1) because substantial evidence supports ODOT's reasons for determining that HGI is ineligible and its determination is consistent with applicable certification provisions. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

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

cc: Deborah M. Green, ODOT