



**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

April 17, 2019

Reference No: 18-0110

Ms. Theresa Erin  
Lindsey Roofing & Construction, LLC  
920 Country Club Lane  
Fort Worth, TX 76112

Dear Ms. Erin:

This letter responds to Lindsey Roofing & Construction LLC's (LRC) appeal of the North Central Texas Regional Certification Agency's (NCTRCA) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R Part 26 (the Regulation). NCTRCA denied LRC's application because the firm's owner did not demonstrate that the firm satisfies the ownership requirements of §§26.69(c), and (h) and the control requirement §26.71(g). After carefully reviewing the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (Department) affirms NCTRCA's ineligibility determination under §26.89(f)(1).

## **I. Procedural History**

LRC filed its Uniform Certification Application (UCA) on June 20, 2017, requesting DBE certification in 3 North American Industry Classification System (NAICS) codes: Roofing Contractors (23816); Siding Contractors (23817) and Debris removal services (562119). NCTRCA conducted an onsite review (OSR) on January 29, 2018 and determined that the firm was ineligible for DBE certification on May 2, 2018. NCTRCA determined that you, the firm's qualifying owner, did not meet several ownership and control requirements all applicants must meet, including §§26.69(c), 26.71(g) and (h). NCTRCA found that you (1) did not make a substantial contribution of capital to acquire your ownership interest in the firm, and (2) lacked expertise in LRC's area of work and do not control the firm's operations, which are delegated to Mr. Lindsey. The firm appealed its denial to the Department on May 15, 2018.

## **II. Burdens of Proof and Standard of Review**

### **(a) Burdens of Proof**

As provided in 49 C.F.R. §26.61(b) of the rule, an applicant firm must demonstrate, by a preponderance of the evidence (and in limited circumstances clear and convincing evidence), that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it is more likely than not

that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

(b) Standard of review for certification appeals

On receipt of an applicant's appeal from a denial of certification, the Department makes its decision "based on the entire administrative record as supplemented by the appeal..."<sup>1</sup> The Department does not make a *de novo* review of the matter....<sup>2</sup> The Department affirms (a certifier's) decision unless it 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."<sup>3</sup>

This language means that the Department does not act as though it were the original decision maker in the case or substitute its judgment for that of the certifier. If the certifier's decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department will affirm the certifier's decision.

### **III. Record Evidence and NCTRCA's Decision**

#### **A. Record Evidence**

In 2016, Lindsey Roofing and Old Potter Glassworks combined and established what is now the applicant firm (OSR at 2). On April 19, 2017, LRC registered its business with the Texas Secretary of State. You are the firm's 51 percent owner and its President and your non-disadvantaged husband, Dudley Lindsey, is the Vice President and the 49 percent owner. You indicated on page 5 of the UCA that your initial investment to the firm was \$0.

On November 3, 2017, NCTRCA asked that you provide documented proof of capital and contributions used to start the business, including receipts, cancelled check(s), loan agreements, bank statements, etc., for each owner. In your November 8, 2017 response, you stated:

I don't have documents for capital used, we just used household money to start the business.<sup>4</sup> This question is asking you to tell us how much money did each owner shelled out of his/her own pockets to get the business up and running for 01/01/2017. This is a new business so there will be receipts (i.e., cost for registering business with the Texas Secretary of State, purchasing business cards, office set, furniture, supplies, tools, roofing equipment etc.)

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<sup>1</sup> 49 C.F.R. §26.89(e).

<sup>2</sup> Id.

<sup>3</sup> 49 C.F.R. §26.89(f)(1).

<sup>4</sup> It is unclear from this statement if marital assets were used to capitalize the firm. This was not raised by NCTRCA in its decision.

In contrast to your statement, NCTRCA recorded on page 2 of its on-site report that your 51% ownership interest was gifted to you.

LRC specializes in new roofing, roofing replacements, sliding and glass installations and manufacturing stain glass windows. As LRC's President your current duties and responsibilities are listed in your résumé as: keeping all records of the firm, maintaining the firm file system, making decisions regarding the company's insurance programs, negotiating contractors as it relates to vendors, keep schedules for all leads, and participate in sales and execution of roofing projects. During the onsite interview, you described your duties and responsibilities as bookkeeping, ordering supplies, payroll, marketing and inspecting job sites. (OSR at 3). You also stated that you and your husband jointly make decisions on marketing, inspecting job sites and meeting clients. (Ibid). Your job-related experience from your résumé shows that you have held different positions over several years that are principally administrative and accounting related. Your most recent positions include but are not limited to:

Administrative Assistant for Remax Mena Real Estate; working with the company owners advertising and listing properties (2013–2018);

Director at Physician Hospital Organization; where you negotiated insurance contracts for the hospital and doctors, negotiated insurance payments on specific claims and served as a representative of the medical community and promoted medical care benefits. (2002–2007);

Executive Assistant for Great Clips where you performed HR duties, assisted with goal setting, budgeting and maintaining the filing system. (2013–2015); and

Chief Financial Officer for Inquest Travel Group; where you performed daily bookkeeping functions and providing weekly financial reports (2000–2002).

You hold a degree in French and Spanish language and a minor in Fine Arts from Southern Methodist University (1967–1973).

Mr. Dudley Lindsey, your husband and the non-disadvantaged owner, owned Lindsey Roofing from 1980–2016 and has co-owned LRC since 2017. (résumé) Mr. Lindsey's duties and responsibilities are listed as: securing government contracts, working with building owners, insurance adjustors and insurance claims, making sure personnel have received full reimbursement on their home/business insurance claims, and managing construction crews.

With respect to control, NCTRA noted that you and Mr. Dudley share duties including setting the direction, policy and scope of operations for the company; bidding and estimating, purchasing; marketing and sales; attending bid openings; performing office management; hiring and firing management staff (OSR at 4). In contrast, Mr. Lindsey manages LRC's construction crews; oversees the proper use of materials; oversees the completion of projects and area clean-up; and working with building owners, insurance adjustors and government contractors to secure future projects. (*Dudley Lindsey* résumé).

During NCTRCA's on-site interview, the agency asked what is your background in firm's primary scope of work; and how did you acquire your expertise and/or experience in the firm's primary field of operations. The answer recorded states:

Theresa learning about all phases of roofing for the last 2-3 years. CFO for large church in Dallas. Owned own business (Old Potter Glassworks). Hands on the job for measuring the roofs, checking for damage, helping clients pick color for new roof, make sure the nails are in the right place, use magnet machine to clean up nails once job is complete, clean up after job is complete [sic] falls under construction. No degree obtained from either owner, Dudley has 35 years of experience and Theresa has 2 ½ years of experience.

#### B. NCTRCA Decision

NCTRCA determined that you did not contribute any capital to acquire your ownership interest in LRC but rather, your husband Mr. Dudley gifted you 51% interest for no consideration. Transfers and gifts of ownership interests in a firm may form the basis for eligibility under §26.69(j) of the Regulation; however, because Mr. Dudley (a non-disadvantaged individual) remains involved in the firm (as 49% owner) after the transfer; the requirements of §26.69(h) apply. Under this provision, NCTRCA is required to presume that you do not hold these ownership interests unless the firm demonstrates by clear and convincing evidence, that (1) the transfer of an ownership interest was made for reasons other than obtaining DBE certification and (2) that you (the firm's disadvantaged owner) controls the firm, notwithstanding Mr. Dudley's continued participation.<sup>5</sup> §26.69(h)(2). NCTRCA determined you had not met either requirement.

In addition to the contrasting emphases of you and your husband résumés—administrative in your case and technical and operational in his—NCTRCA stated in its May 2, 2018 letter that you have no “overall understanding of and the technical competence directly related to the phases and types of roofing, including commercial and residential roofs that LRC specializes.” Consequently, NCTRCA said there is no evidence in the record that you have the necessary knowledge, expertise, or experience to control the firm's principal activities, or that you are able to critically evaluate and make independent decisions about those activities. (*See Denial letter*). Your control of the general management and administrative functions of the company are

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<sup>5</sup> The full text of §26.69(h) states: “(1) You must presume as not being held by a socially and economically disadvantaged individual for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift or transfer without adequate consideration, from any non - disadvantaged individual or non -DBE firm who is; (i) involved in the same firm for which the individual is seeking certification, or an affiliate of that firm. (2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you by clear and convincing evidence, that; (i) the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and (ii) the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.”

The firm's failure to prove either condition (here, condition §26.69(h)(2)(i)) means that the presumption stands, with the result that the Regulation considers you to own zero percent of LEC.

insufficient in NCTRCA's view, to demonstrate control of the firm as required by §26.71(g) of the Regulation.

#### **IV. Appeal Arguments**

On appeal, you confirm that you received your ownership interest as a wedding gift in exchange for your gift to him of a portion of your residence. Additionally, you stated that your contribution is your ability to run the front end of the business through contract negotiations, accounting and administrative work. You argue that you offer substantial expertise in the day-to-day business processes and attend pre-solicitation conferences, visiting job sites, and learning the technical side of LRC's operation; enough so to meet §26.71(g) requirements.

#### **V. Decision**

We agree that NCTRCA had substantial evidence to conclude that the firm failed to overcome the presumption of nondisadvantaged ownership under §26.71(h) and that you do not control the firm within the meaning of §26.71(g). There is no documentation that you gifted a portion of your residence to Mr. Lindsey in exchange for your 51% ownership interest. In addition, there is no support that you control the firm's management, policy, and operations notwithstanding Mr. Lindsey's participation. While under the Regulation a disadvantaged owner does not have to perform every function in a company and can delegate functions—including operational functions—to others,<sup>6</sup> the qualifying 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." (§26.71(g)). There is simply no evidence in the record concerning your technical competence or experience in the firm's area of work, which §26.71(g) requires you to demonstrate. We note that the office administration and management functions you perform are important in any firm, however, as this provision states: "generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control" for purposes of DBE eligibility.

Given the information in the record, the Department concludes that NCTRCA had substantial evidence to decide that the firm failed to meet its burden of proof concerning ownership and control. Consequently, the Department affirms NCTRCA's decision denying the firm's application for DBE eligibility. This decision is administratively final and not subject to petitions for review. The firm may reapply to the DBE program after the applicable waiting period has passed.

Sincerely,

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

cc: NCTRCA

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<sup>6</sup> See 49 C.F.R. §§26.71(e) and (f).