

March 31, 2020

Docket Number: 19-0150

Jamie Naquin  
Subsurface Exploration Consultants, LLC  
[REDACTED]  
College Station, TX 77845

Dear Mr. Naquin:

We address Subsurface Exploration Consultants, LLC's (SEC), appeal of the Texas Department of Transportation's (TxDOT) April 30, 2019, denial of the firm's application for Disadvantaged Business Enterprise (DBE) certification under the rules in 49 CFR part 26. TxDOT concluded that you did not prove individual social and economic disadvantage (SED) within the meaning of 49 CFR section 26.67(d). See section 26.61(b) (firm must prove it more likely than not satisfies the eligibility requirements). Having carefully reviewed the administrative before us, we affirm TxDOT's decision under section 26.89(f)(1) because it is consistent with applicable rules and supported by substantial evidence.

## Background

SEC applied for certification on March 8, 2018, relying on your status as its socially and economically disadvantaged owner. See sections 26.67 (disadvantage) and 26.69(b) (ownership requirement). You do not claim to be a member of any section 26.67(a) group whose members are presumed to be SED. Rather, you claim that you are personally disadvantaged under section 26.67(d) on the basis of a [REDACTED] [REDACTED] [REDACTED]

TxDOT denied SEC's application in May 2018. SEC appealed, and we remanded<sup>1</sup> for further analysis and a new decision. On reconsideration, TxDOT again concluded that you did not demonstrate individual social and economic disadvantage. SEC now appeals that decision.

## Scope of Review

Our function on appeal is to assess whether TxDOT's decision is consistent with applicable rules and supported by substantial evidence. Section 26.89(e) states that we do not consider the matter anew. We do not make our own determination of whether SEC is eligible. We do not substitute our judgment. We function essentially as referees in regard to the issues, arguments, and evidence raised on appeal.

Please note that SEC must prove (to TxDOT) by a *preponderance* of the evidence that it satisfies all eligibility requirements. That is the rule of section 26.61(b). In plain language, preponderance means more likely than not. TxDOT determines whether SEC did so, based on its assessment of

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<sup>1</sup> See 18-0151 Subsurface Exploration Consultants, LLC (April 5, 2019).

the evidence. On appeal, TxDOT must show that its decision is consistent with applicable rules and supported by *substantial* evidence, which is less than a preponderance. TxDOT need not show that most of the evidence supports its determination or that the evidence it cites is more persuasive than yours. Further, TxDOT need not prove that its interpretation of what particular facts mean is correct. All TxDOT has to show is that some of the evidence of SEC's ineligibility (or, more precisely, evidence that SEC has not proved eligibility, more likely than not) has significant persuasive value.

## Discussion

Section 26.67(d), read in conjunction with section 26.61(b) (burden of proof), requires the owner claiming individual SED to demonstrate that he is both socially and economically disadvantaged according to the criteria specified in Appendix E to Part 26. The appendix addresses social disadvantage and economic disadvantage in turn. Since the owner must prove that he is socially *and* economically disadvantaged, a failure to prove either one renders the firm ineligible. Our discussion follows the structure of the appendix.

### 1. Social Disadvantage

#### A. Objective Distinguishing Feature

You cite a [REDACTED] ([REDACTED], [REDACTED]) in short, as your Objective Distinguishing Feature (ODF). TxDOT does not contest that you have this ODF.

#### B. Personal Experiences of Substantial and Chronic Social Disadvantage

You must prove that you have experienced chronic and substantial social disadvantage because of your [REDACTED] (See Appendix E, Social Disadvantage, 1.) Please note that this element of social disadvantage requires you to prove causation, magnitude, and frequency. The requirement is rigorous. It is nevertheless the rule.

You provide a letter from the Department of Veterans (VA) indicating that you are 100% [REDACTED] letter explains that you suffer from [REDACTED] [REDACTED]. You elaborate that you [REDACTED], [REDACTED] in both [REDACTED]. This evidence speaks to the [REDACTED], a concern not in dispute, rather than their effect.

Some of the matters you highlight, and we discuss below, may be individual experiences that collectively support a conclusion that you demonstrate chronic and substantial disadvantage because of your disabilities. You retain the burden of proving eligibility.

#### C. Negative Impact on Entry Into or Advancement in the Business World Because of the Disadvantage

This element of social disadvantage requires you prove that your [REDACTED] had a negative impact in the spheres of Education, Employment, and Business History.

### *Education*

TxDOT observes that you earned a Bachelor of Science degree in Maritime Administration from Texas A & M University. However, you earned the degree before you became [REDACTED]. Accordingly, the evidentiary value of TxDOT's assertion is nil. On the other hand, TxDOT argues that you submitted no evidence of impediments you encountered later. It appears TxDOT is correct. While you claim that your [REDACTED] [REDACTED] TxDOT denied the SEC's application. Your claim is not evidence that TxDOT could have taken into account, and for that reason we do not. We affirm TxDOT's conclusion that you did not demonstrate that your d [REDACTED] hindered you in your pursuit of post-graduate education.

### *Employment*

You contend broadly that companies will not accommodate you because of your [REDACTED], but you offer no evidence that any specific employer denied any specific accommodation request, or even that you made one. This unsupported assertion is not evidence of impaired entry or advancement. It is not an "experience," either.

You provide a letter from [REDACTED], your supervisor at [REDACTED] (FET), stating that you were terminated due to absences and work not completed. This is evidence that you were terminated for objective reasons related to your performance, not necessarily [REDACTED].

You provide a co-worker's statement that he heard your supervisor tell you that you would not be paid for work you performed, [REDACTED]. This is evidence of negative impact because of your disadvantage.

You state you cannot work in close office spaces because of your [REDACTED]. This statement has no predicate that resonates in the rule, but we assume you offer it as a reason for your absences. If so, it is an attempt to show that your [REDACTED] caused your termination. It is nevertheless an uncorroborated assertion that TxDOT might afford little weight.

TxDOT points to undisputed evidence that you worked at [REDACTED] for four years, drew a salary that put you solidly in the middle class, and earned a promotion to Team Lead. While we concede that occasional success does not necessarily defeat a claim of negative impact, the evidence of your [REDACTED] having caused you to be terminated and become unemployed does not amount to proof of the intensity, frequency, or causal relationship that the rule requires. You do not dispute the objective facts that TxDOT cites in support of its conclusion that you did not demonstrate social disadvantage in the employment sphere. TxDOT also cites your employment at [REDACTED] Locating, LLC (TL), where you were Chief Executive Manager.

Your counterargument concerning all of this evidence is that you were fired from [REDACTED] after a few years and that you left [REDACTED] after three months. We have no reason to doubt your statements. Rather, we suggest that these statements have limited probative value. Even assuming your

allegations concerning your tenure are correct, you do not prove all elements of the test, particularly not the chronic or causal ones.

*Business History*

You cite being denied a business loan as having a negative impact on your advancement in the business world. You explain that you were denied a loan due to poor employment history and lack of collateral. You contend that you were not denied the loan because of a poor credit rating.

We do not see that the assertion helps make your case. On the one hand, a good credit rating would seem to support TxDOT's position that you do not prove negative impact. On the other hand, you insist that the institution from which you requested credit based its decision on neutral factors, ones that would almost certainly apply to all applicants. Either way, the assertion is scant proof of negative treatment because you are [REDACTED]

Our task in resolving appeals is to consider the entire record, in light of the issues in dispute, the arguments made, and the evidence adduced. We determine whether the certifier applied applicable rules properly. If so, we consider whether substantial evidence supports the determination. The answer to both questions is affirmative. TxDOT's decision is consistent with the applicable rules and prescribed guidance, and it is supported by substantial evidence.

As you did not prove any of the elements of social disadvantage, we need not consider your arguments or TxDOT's findings regarding economic disadvantage. SEC is ineligible because you did not prove section 26.67(d) individual social and economic disadvantage. We therefore affirm TxDOT's decision, as section 26.89(f)(1) prescribes.

This decision is administratively final. SEC may reapply after the waiting period runs. We wish you and your firm good fortune.

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division

cc: TxDOT