

July 9, 2015

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Reference Number: 14-0092

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Dear Mr. Panther:

Archer Plumbing, LLC (Archer) appeals the Tennessee Department of Transportation's (TDOT's) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After reviewing the full administrative record, we conclude that substantial evidence supports TDOT's determination. We affirm the ineligibility determination under §26.89(f)(1).

In the denial letter dated January 8, 2014, TDOT cites the firm's failure to meet the requirements of §§26.69(c) and (i) relating to ownership and §§26.71 (e), (f), (g), (h), and (k) relating to control.¹ It suffices for the purposes of this appeal for us to affirm on the control grounds, §§26.71 (e), (f), (g), (h), and (k). *See generally* §26.61(b).

Applicable Regulation Provisions

§26.61(b) provides:

“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.”

§26.69(c) at the time of the decision, read:

¹In light of TDOT's failure to make arguments regarding §§26.69(e) (capital contribution) and (h) (transfer from non-disadvantaged person still involved), these ownership grounds are not properly before us on appeal. See generally §§26.86(a) and 26.89(f)(5).

“The firm’s ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond mere pro forma ownership of the firm as reflected in the ownership documents. The owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by substance, not merely the form, of arrangements.”

§26.69(e) provides:

“The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.”

§26.69(h) provides:

“(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;
- (ii) Involved in the same or a similar line of business; or
- (iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.”

§26.69(i) provides:

“You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.”

§26.71(e) provides:

“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.”

§26.7(f) provides:

“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(g) provides:

“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(h) provides:

“If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of

the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.”

§26.71(k) provides:

“(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.”

§26.89(f)(1) provides:

“The Department affirms [the certifier’s] decision unless it determines, based on the entire administrative record, that [the] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

Archer Plumbing Heating and Air, LLC was started in June 2003 by William Archer, a licensed plumber (Denial Letter Dated January 8, 2014 (Denial Letter) at 2). The On-Site Review Report (OSRR) dated November 18, 2013, shows the firm was renamed Archer Plumbing, LLC (Archer) in July 2003. *Id.* at 2. William Archer’s wife, Deborah Archer, is Chief Manager of the firm and owns 51% of its shares while her son Jonathan Sweeney, who is the Secretary and Treasurer of the firm, owns 49%. *Id.* at 1. The firm functions primarily as a subcontractor but does subcontract its work to other firms for blasting and boring (OSRR at 5).

The record shows that Archer subcontracts its work to RGAAnderson, Company, Inc. (RGA), a firm for which the point of contact is William Archer. The Appeal Letter dated April 2, 2014 (Appeal Letter) states that pursuant to the Licensing Act, Tenn. Code Ann. §§62-6-101, *et. seq.*, the individual or corporation engaging in contracting (plumbing) must have a license.² Mr.

² **Tenn. Code Ann. §62-6-103. License requirement Recovery of expenses by unlicensed contractor.** (a)(1) Any person, firm or corporation engaged in contracting in this state shall be required to submit evidence of qualification

Archer's only function with regards to the firm, according to the appellant, is to act as the "qualifying agent" (OSRR at 5). The personal tax returns for the years 2010, 2011, and 2012 for Archer show that Mr. Archer is the Contractor and that Ms. Archer is the Manager (Denial Letter at 3).

Deborah Archer's father was a plumber and a facilities manager for different companies, which Ms. Archer argues exposed to her to the industry (OSRR at 7). Her father conducted buildouts with contractors. *Id.* Ms. Archer's résumé shows that her positions, prior to becoming the owner of Archer, are related to administration (Social Services Assistant for the State of Tennessee 1975-1978; Accounts Receivable Supervisor for Georgia/Durango boot from 1980-1984; Assistant to the President for Morning Surf, Inc. 1984-1988; Payroll Assistant from 1988-1990 and Administrative Manager from 1990-1996 for Martha White Foods; Executive Assistant for Management Resources, Inc. from 1996-1998; Facilities Manager for Doane Pet Care from 1998-2004).

Jonathan Sweeney's résumé shows the following positions: Fuser & Laborer for J&B Road Boring 1996-1998; Field Manager for Sullen Construction Company from 1998-2003; and Secretary /Field Manager for Archer Plumbing 2003-present. Mr. Sweeney has a license for Septic System installation and repair. *Id.* He has the following responsibilities: coordinating and overseeing jobs between contractors, engineers and crews on pipelines, pump stations, underground utilities; calling on contractors, and municipalities regarding rural water and gas systems; working with different contractors and municipalities on leak surveys and leak repairs of water and gas lines; and working with different builders on installing all indoor plumbing, water lines, sewer lines, and septic systems on commercial and residential jobs. *Id.*

Ms. Archer's duties and responsibilities for the firm include making financial decisions and transactions, estimating and bidding, contract negotiation and execution, hiring and firing management personnel, office management, marketing and sales, purchasing major equipment, and signing company checks for any purpose (Tennessee Uniform Certification Application (UCA) dated September 10, 2013 at 5).

Ms. Archer performs office management duties such as accounts receivable and payable, paying bills, answering the phone, handling business tax, and completing payroll (OSRR at 7). The OSRR indicates that Mr. Sweeney reviews Ms. Archer's bids and gives her input when hiring and firing management personnel. She and Mr. Sweeney share the responsibility of signing company checks for any purpose, and he is solely in charge of field production and operations (UCA at 5). Mr. Sweeney monitors job sites and works about 8 to 9 hours a day from 6:30-3pm (OSRR at 7). Ms. Archer spends 15-20% in the field, and her son handles the "physical part" of the work. *Id.* at 3. He has a crew that "does the rough in" and "picks up the materials." *Id.* Ms.

to engage in contracting, and shall be licensed as provided in this part. It is unlawful for any person, firm or corporation to engage in or offer to engage in contracting in the state, unless the person, firm or corporation has been duly licensed under this part. Any person, firm or corporation engaged in contracting, including a person, firm or corporation that engages in the construction of residences or dwellings constructed on private property for the purpose of resale, lease, rent or any other similar purpose, shall be required to submit evidence of qualification to engage in contracting and shall be licensed. *It is unlawful for any person, firm or corporation to engage in, or offer to engage in, contracting as described in this subdivision (a)(1) unless the person, firm or corporation has been duly licensed under this part.* (Emphasis added.)

Archer states that he “gets materials for septic systems, sewer lines, rough in on houses, go[es] to job sites to make sure jobs are getting done.” He is licensed in Septic System installation and repair.

Decision and Discussion

i. Disproportionate Responsibility

The Department finds substantial evidence to support TDOT’s conclusion that non-disadvantaged individuals control Archer within the meaning of §26.71(e) (non-disadvantaged or immediate family members may be involved in a DBE firm as owners and employees, but such individuals must not exercise the power to control the firm or be disproportionately responsible for its operation).

The UCA states that Mr. Sweeney exclusively controls the firm’s field production and operations, handles the physical aspect of the projects while Ms. Archer handles management. Ms. Archer shares the responsibility and the authority to sign checks for any purpose with her son allowing him to independently, financially obligate the firm. The UCA states that Ms. Archer is exclusively in charge of estimating and bidding, but she indicates that her son assists by reviewing her bids. The UCA states that Ms. Archer is exclusively in charge of hiring and firing management personnel, but she states that Mr. Sweeney gives her input as to the qualifications of workers.

Ms. Archer states that Mr. Archer is only involved as a “qualifying agent” for the firm because he is the licensed plumber. However, Mr. Archer’s name appears on the subcontract agreement as a point of contact and on the couple’s personal tax returns from 2010-2012 as the Contractor, while Ms. Archer appears as the Manager indicating that he has more responsibilities for the firm than that of a “qualifying agent.” Mr. Sweeney’s and Mr. Archer’s powers and responsibilities appear to be critical to the firm’s operational success, which makes Mr. Sweeney and Mr. Archer disproportionately responsible for the firm’s operations with apparent power to control the firm. We affirm TDOT’s determination that non-disadvantaged persons have the power to control the firm or are disproportionately responsible for its operation.

ii. Delegation and Actual Exercise of Control

TDOT determined that it could not reasonably conclude that Ms. Archer actually exercises control over the firm’s operations and management within the meaning of §26.71(f).

Ms. Archer handles office management related activities for the firm. Her exclusive duties and responsibilities include making financial decisions and transactions, estimating and bidding, contract negotiation and execution, hiring and firing management personnel, office management, marketing and sales, purchasing major equipment, and signing company checks for any purpose. She shares several of these responsibilities with her non-disadvantaged son, and her non-disadvantaged husband is the firm’s qualifying plumber.

These facts indicate that non-disadvantaged individuals substantially control the firm's field operations and management, while Ms. Archer deals with responsibilities not directly related to plumbing. Ms. Archer depends on her son, employees, subcontractors, and her husband who are non-disadvantaged individuals. The record indicates that fieldwork is handled by and delegated to non-disadvantaged individuals. Substantial evidence supports TDOT's conclusion that Ms. Archer does not actually exercise actual control over the firm's operations and management under §26.71(f).

iii. Experience and Expertise

TDOT concluded that Ms. Archer does not control the firm within the meaning of §26.71(g), which states that a disadvantaged owner 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."

Ms. Archer's résumé shows that her previous positions are related to office management. Ms. Archer's father and husband are/were plumbers, but Ms. Archer is not, and she has no apparent technical training or relevant pre-Archer experience. In contrast, Mr. Sweeney's background in the plumbing industry is extensive. As previously stated, his past positions and experience are directly related to the plumbing industry, and he has a license for Septic System installation and repair. Mr. Sweeney is solely in charge of field production and operations. Ms. Archer states that he "gets materials for septic systems, sewer lines, rough in on houses, go[es] to job sites to make sure jobs are getting done." Ms. Archer also states that her husband, Mr. Archer (licensed plumber), is not active in the company other than the fact that he is a "qualifying agent" for the firm. However, he was the point of contact on the subcontract agreement for RGA. On the personal tax returns for the years 2010, 2011, and 2012, Ms. Archer was listed as Manager and Mr. Archer as Contractor.

These facts show that relevant technical expertise and experience rests with non-disadvantaged individuals, Mr. Sweeney and Mr. Archer. Mr. Sweeney handles the operational field work, controlling the technical aspects required for Archer's plumbing work. Ms. Archer shares decision-making power and evidently does not make independent decisions concerning the plumbing operations. Mr. Archer, in addition, appears to be more involved in the firm than just a qualifying agent based on the facts. We affirm, as supported by substantial evidence, TDOT's determination that the disadvantaged individual does not control the firm within the meaning of §26.71(g).

iv. State License

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the disadvantaged owner of the firm must possess the required license or credential. If no such requirement exists, the certifier must not deny certification solely on the ground that disadvantaged owner lacks the license or credential. However, the certifier may take into account the absence of the license as a factor in determining whether the disadvantaged owner actually controls the firm (§26.71(h)).

The State of Tennessee has no law requiring the disadvantaged owner herself to possess a license to own or control a plumbing firm. The Contractor Licensing Act, Tenn. Code Ann. §§62-6-101, *et. seq*, does not specify that the owner of a firm be licensed, but that the individual, corporation or firm engaged in the contracting be licensed. Mr. Archer is the licensed plumber and his function with regard to Archer is to act as the “qualifying agent” having the authority to bind the company with regard to compliance with applicable plumbing codes. TDOT validly took into account that Mr. Archer is the licensed plumber and that Mr. Sweeney has a license in Septic System installation and repair, when it determined that they and not Ms. Archer, effectively control the firm’s contracting business. The UCA indicates that Mr. Sweeney exclusively handles field operations and monitors the job sites daily. The OSRR states that Ms. Archer spends 15-20% of time in the field, but that her son handles the physical aspect of the work. Mr. Sweeney has extensive experience related to the plumbing field such as working with different contractors and municipalities on leak surveys, repairs of water, and gas lines. He works with different builders to install all indoor plumbing, water lines, sewer lines, and septic systems on commercial and residential jobs. We affirm TDOT’s determination as supported by substantial evidence and consistent with the substantive and procedural provisions relating to certification.

v. Judgment about Control/Family Business

Given the substantial involvement of Ms. Archer’s family members in the firm’s business, the certifier could not make a judgment that Ms. Archer herself actually controls Archer within the meaning of §26.71(k)(1), versus Ms. Archer and her family acting jointly. The OSRR indicates that Ms. Archer mainly handles office management while Mr. Sweeney principally handles and oversees actual plumbing contracting work for which Archer seeks DBE certification. Mr. Sweeney, not Ms. Archer is licensed in Septic System installation and repair; he supervises field operations and monitors job sites daily. Mr. Sweeney also shares crucial management responsibilities with Ms. Archer. Mr. Archer is the point of contact for the RGA subcontract agreement, and his name is on past personal tax returns showing that he is the Contractor for the firm indicating his substantial involvement.

Ms. Archer’s exposure to the plumbing industry does not mean that she is an expert in the plumbing business, nor does it automatically equate to control, within the meaning of the Regulation. Without Mr. Sweeney’s expertise and knowledge or Mr. Archer’s license and involvement in the firm, it is doubtful that Archer could function as a plumbing contracting business. We affirm TDOT’s decision regarding control within the meaning of §26.71(k)(2).

Conclusion

We affirm TDOT's ineligibility determination on the basis of §§26.71(e), (f), (g), (h), and (k) relating to control as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

This determination is administratively final and is not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: TDOT