

July 17, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0093

Derrick Casson, DBE Certification Manager
Economic Opportunity Division
Indiana Department of Transportation
100 North Senate Avenue
Room N750
Indianapolis, Indiana 46204

Dear Mr. Casson:

McCrea Land Surveying, Inc. d/b/a Apex Consulting & Surveying (APEX), appeals the Indiana Unified Certification Program's (INDOT) December 27, 2013 determination that it is ineligible for Certification as a Disadvantaged Business Enterprise (DBE), under the criteria set forth at 49 CFR Part 26 (the Regulation). We find that the denial provides an incomplete application of the substantive certification provisions of the Regulation. Therefore, we remand the decision under §26.89(f) (4) for further proceedings consistent with the instructions below.

INDOT cites several grounds for denying certification:

- 1) Firm is not owned by socially and economically disadvantaged individuals who possess at least 51% interests, §26.69 (b);
- 2) Ownership by a disadvantaged individuals is not real, substantial and continuing going beyond pro forma ownership of the firm, §26.69 (c);
- 3) Ownership was transferred, without consideration, from non-socially and economically disadvantaged to socially and economically disadvantaged, who has not met the higher burden of proof, §26.69 (h).
- 4) Firm is not independent, §26.71 (b);
- 5) Formal or informal restrictions limit the customary discretion of the disadvantaged owner, §26.71 (c); and
- 6) Ownership and control were transferred from non-socially and economically disadvantaged to socially and economically disadvantaged, who has not met the higher burden of proof, §26.71 (l).

We carefully considered the entire record, including the supporting document that APEX provided with its appeal.¹ We find that INDOT inadequately presented its grounds for denial, and remand the case to INDOT to further supplement its rationale concerning the narrow issue of rebuttal of noncontrol under §§26.71 (l).

Facts²

Christopher W. McCrea, a non- socially and economically disadvantaged individual, formed APEX in May 2004. The firm's primary activity is land surveying. In May 2009, Mr. McCrea sold 51% of the firm's shares for \$13,412 to Nana Opoku (a disadvantaged individual). He sold the remaining shares (49%) to Mr. Opoku for \$34,300 in March 2013.³ Mr. McCrea remains a part-time Consultant/Land Surveyor at the firm.

According to documents provided by the firm's accountant, Mr. Opoku's 2013 salary was \$42,361 (in addition to 100% of the firm's profits), while Mr. McCrea received a salary of \$29,588. A complete summary of Mr. Opoku and Mr. McCrea's 2011, 2012, and 2013 salaries and cash distributions is listed within the chart below:⁴

	Christopher McCrea		Nana Opoku	
	Salary	K1 Income	Salary	K1 Income
2011	\$ 19,615.45	\$ 12,882	\$ 29,846.17	\$ 13,408
2012	\$ 28,269.20	\$ 77.00	\$ 46,384.68	\$ 81.00
2013	\$ 29,588.75	\$ 4,746	\$ 42,361.59	\$ 34,980

Mr. Opoku worked as a CAD Designer for Karst Surveying for 12 years before he began working full time at the firm in December 2010. He is currently APEX's sole Director and Officer. His responsibilities include estimates, bidding, bookkeeping, finances, and project

¹ See §26.89 (e) ("*The Department may also supplement the administrative record by adding relevant information made available by . . . a firm.*") (emphasis added)

² The operative facts are based on the following documents contained within the administrative record: (1) Uniform Certification Application dated July 2, 2013; (2) N. Opoku Résumé (3) the On-Site Review Report of interview conducted on July 25, 2013; (4) the denial letter dated December 27, 2013; (5) DBE Appeal Letter dated March 25, 2014 and accompanying documents; (6) List of Compensation for Employees of McCrea Land Surveying dba APEX Consulting and Surveying, dated June 28, 2013; (7) McCrea Land Surveying, Inc. 2011 and 2012 Balance Sheets and Income statements (8) 2010-2012 Income Statements; and (9) the Minutes of the Board & Shareholder's Meetings.

³ Mr. McCrea and Mr. Opoku signed a Stock Purchase Agreement on March 29, 2013. However, Mr. Opoku paid for the shares in installments from May 29, 2013 to November 5, 2013. Accordingly, for Regulation purposes, Mr. Opoku became 100% owner of the firm on November 5, 2013. See Stock Purchase Agreement dated March 29, 2013; see also, accompanying documents attached to the Appeal: Memorialization of Final Payment dated November 8, 2013 and supporting checks dated 3/31/2013 - 11/5/2013.

⁴ APEX attached a letter from its accountant to its Appeal. The letter analyses the firm's tax documents and compares the difference in remuneration between Mr. McCrea and Mr. Opoku. See Jonathan Thomas, CPA Letter dated March 24, 2014. The firm provided the majority of these documents to INDOT before it issued its denial.

development. He is the only employee authorized to set salaries and hiring/firing. Mr. Opoku directs the firm's policies and procedures, and is the only employee with signatory authority.

Mr. Opoku earned an Associate degree in Architectural Engineering from Purdue University in 1999 and obtained a B.S. in Civil Engineering Technology from Purdue in 2001. He is a Licensed Professional Surveyor.

Applicable Authority

Section 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.”

The applicant firm bears the burden of proof with respect to each element of eligibility. The firm's failure to show that it satisfies a certification requirement renders the firm ineligible.”

§26.69(b) states:

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. (1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding. (2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement. (3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

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

“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 disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.”

§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 a 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 similar line of business; or
- (iii) Engaged in an ongoing business relationship with the firm, for which the individual is seeking certification.

(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.

(Emphasis added.)

§26.71(b) states:

“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.”
(Emphasis added.)

§26.71(c) reads:

A DBE firm must not be subject to any *formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners*. There can be *no restrictions* through corporate charter provisions, *by-law provisions*, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) *that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm*. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).

(Emphasis added.)

§26.71(l) states:

Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the nondisadvantaged individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual *unless the disadvantaged individual now owning the firm demonstrates to you, by clear and convincing evidence, that:*

- (1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who formerly owned and/or controlled the firm.

§26.71(i) states:

(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

Ownership

INDOT denied the firm certification on ownership grounds because of “concerns surrounding Mr. Opoku’s acquisition of majority ownership does not establish he owns at least 51% of McCrea Land Surveying.”⁵ Denial letter at 4. APEX contends that it met its burden of proving that Mr. Opoku owns 100% of APEX shares.⁶ See Appeal 2-3.

⁵ It appears that INDOT failed to seek clarifications about its “concerns” during the firm’s on-site and the period leading up to the denial letter. We remind INDOT that the Regulation affords a Recipient the ability to seek further information from a firm whenever the record appears to be incomplete or unclear about case determinative fact. In

The Department cannot affirm or reverse the denial unless a Recipient, as §26.86(a) requires, provides “the firm a written explanation of the reasons for the denial, *specifically referencing the evidence in the record that supports each reason* for the denial.” (Emphasis added).

The record indicates that APEX met the requisite burden of proof; however, we cannot opine on INDOT’s ownership conclusion because the denial letter fails to adequately present grounds §§26.69 (b)⁷, (c)⁸, and (h)⁹. In addition, mere “concern” about ownership is an insufficient reason to conclude a firm did meet the requirements of §26.69.¹⁰

We note that the record appears to contain substantial evidence to demonstrate that Mr. Opoku meets the ownership requirements of §26.69. We respectfully urge INDOT, on remand, to reconsider its position.

Control

INDOT’s denial letter concludes, “The involvement of the original owner, non-disadvantaged individual compromises the control of Mr. Opoku, as required by the regulations that govern the DBE program.” Denial Letter at 4. It also states, “Mr. McCrea’s salary is substantially more than Mr. Opoku’s.” *Id.* Apex contends that Mr. Opoku has controlled the firm since January 2011 and argues that INDOT’s conclusion on salary is meritless. See Appeal at 3.

this case, it appears that APEX was willing to provide additional information about the purchase of shares (and remuneration of its employees) if INDOT made the request. See *infra* note 6.

6 Specifically, Mr. Opoku contends, “I have provided you with all of the documentation during the 2009 and 2013 stock purchases. It is difficult for me to read a letter telling me the State does not believe I have met my 51 percent ownership when I, in fact, have purchased 100% of the company. *If you are missing documentation, please identify what else you may need.*” Appeal at 2.

7 There appears to be ample evidence in the record to demonstrate that Mr. Opoku meets the 51% ownership requirement of §26.69(b). See *supra* note 4. We also, cannot find any issue of non-voting share ownership or stock splits in the record that would call into question Mr. Opoku’s percentage of stock ownership.

8 INDOT’s denial letter omitted an analysis of §26.69(c). It is unclear what specific evidence supports INDOT’s apparent reasoning that Mr. Opoku does not share risks and profits commensurate with his ownership interest.

9 Mr. Opoku acquired his ownership in the firm via two transfers from Mr. McCrea (the firm’s former non-disadvantaged owner and current employee). INDOT’s denial letter fails to examine *all of the elements* of §26.69(h) to explain why APEX is ineligible under the provision.

INDOT does not provide an analysis of whether there was adequate consideration for the transfer of ownership shares. Notwithstanding how INDOT reached its conclusion on consideration, the denial letter also fails to explain why INDOT concludes that APEX failed to rebut Mr. McCrea’s presumption of ownership by clear and convincing evidence. See §§26.69(h) (2) (i) and (ii) (test for rebuttal of non-disadvantaged ownership presumption).

10 INDOT fails to articulate how it reached its conclusions. INDOT’s denial contains similar “analytical lapses” that are apparent within at least one previous decision. 14-0042, Blue Sky Contractor Supply, LLC, (June 17, 2015) at 7 (declining to opine on INDOT’s social and economic disadvantage ground for denial.)

We find that INDOT failed to adequately present control grounds §§26.71 (b)¹¹ and (c)¹². Because of analytical deficiencies and lack of explanation, we cannot opine on either of these grounds.

Based on our review of the case, it appears the only determinative issue is whether there is clear and convincing evidence to rebut the presumption of noncontrol under §27.71(l):

1. Was the transfer of ownership and control to Mr. Opoku made for reasons other than obtaining certification as a DBE?
2. Does Mr. Opoku actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of Mr. McCrea who formerly owned and/or controlled the firm?

The denial letter cites to §26.71(l) but fails to examine if APEX rebutted the presumption of nondisadvantaged control. On remand, INDOT should reexamine the record (particularly the firm's on-site review). If INDOT determines that firm failed to rebut the presumption, it should fully articulate its reasons for that determination by citing specific evidence in the record that supports its conclusion. Otherwise, INDOT should certify APEX.

Conclusion

We remand the matter and instruct INDOT to either certify the firm or to clarify and fully explain why it determines that the firm is ineligible no later than 90 days from the date of this decision.

If INDOT decides not to certify the firm, INDOT should narrow its analysis to §27.71 (l). The denial letter should provide APEX with a full explanation and analysis based on evidence contained within the record as §27.86 (a) requires. The letter should also consider APEX's appeal and attached supporting documentation. APEX would then have the usual 90 days within which to appeal to the Department.

This decision is administratively final and not subject to petitions for reconsideration. See §26.89(g).

¹¹ It is unclear why INDOT cited this provision. The facts presented in the denial letter, appeal, and record do not indicate that APEX has a relationship with another firm. We advise INDOT to drop this ground on remand.

¹² We are unsure where INDOT found evidence that Mr. Opoku is subject to formal or informal restrictions that limit his ability to control APEX relevant to a discussion of §26.71(c). INDOT should also drop this ground on remand.

Sincerely,

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

cc: Nana Opoku, President/CEO, McCrea Land Servicing