

July 17, 2017

Reference No: 17-0022

Ms. Lori J. Bird, President  
Bird Industries, Inc.  
**REDACTED**  
Bismarck, ND 58501

Re: Bird Industries, Inc. Appeal of DBE Certification Denial

Dear Ms. Bird:

Bird Industries, Inc. (BIINC) appeals the North Dakota Department of Transportation's (NDDOT) denial of its application for Disadvantaged Business Enterprise (DBE) certification, pursuant to the DBE Program Regulation, 49 C.F.R. Part 26. After careful review of the entire administrative record, we find that substantial record evidence supports NDDOT's conclusion that BIINC was unable to demonstrate that you, its socially and economically disadvantaged owner, control the firm as required by §§26.71(f) and (g). We affirm under §26.89(f)(1).<sup>1</sup>

*Procedural Background*

BIINC applied for DBE certification in December 2016, listing its scope of work as trucking, highway construction, site preparation, and crushed and broken stone mining. (Uniform Certification Application, p. 2.). NDDOT, by letter dated August 26, 2016, denied BIINC's application for failure to meet various regulatory requirements as discussed herein. On November 21, 2016, the firm appealed to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), and as with all appeals; we requested the agency's administrative record.<sup>2</sup>

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<sup>1</sup> When a firm appeals a certification denial determination, the Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

<sup>2</sup> We acknowledge your December 2, 2016, request for any supplemental information we received from NDDOT. The only material we received is NDDOT's record; the agency did not provide supplemental material.

## *Discussion*

### 1. Control Requirements of §26.71(g)

In addition to the work items noted above, you are also seeking DBE certification in trucking of bulk liquids, back-filling construction, and culvert installation. (On-site interview transcript, July 26, 2016, pp. 4, 13). The record contains pages from the firm's website describing BIINC's experience in other areas such as design-build construction of structures (hotels, medical facilities, travel centers, schools, and commercial workshops); as well as civil/heavy construction tasks involving sewer/water mains, water storage, road and pad construction, and bridge construction.

You list your skills as sales and marketing, public speaking, customer service, TERO certified, and human resources. (Lori Bird Résumé). You also indicated that you spend 20+ hours traveling to visit BIINC clients to discuss existing and potential work in addition to performing the following duties in the firm's corporate office approximately 30–35 hours a week:

“Check-in with [the] transportation dispatcher on daily truck count, schedules, and overall operations; check-in with [the] office and school supplies coordinator for daily update and assist with proposal strategies; review overhead and operations expenses against revenue generated; call on account receivables to maintain healthy cash flow; call previous clients to check for new available work; negotiate price points with clients for potential projects; travel to existing and potential clients to build the [BIINC] relationship.” (Duty Statement, Sep.18, 2015)

As the applicant firm, BIINC bears of burden of demonstrating that it meets the requirements for certification, including those related to the owner's control of the firm that are found in §26.71. (See §26.61(b)). Section §26.71(g) relates to the owner's overall knowledge of the firm's work and states:

“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(g).

NDDOT determined that you did not meet the requirements of this provision because you lack an understanding of BIINC's operations performs and rely on Mr. Payton Tivis, BIINC's general manager, and others at the firm for their expertise. NDDOT stated that you were unable to explain basic business operations, other than in general terms, during the on-site interview; and did not appear to understand how projects were bid, nor able to answer general questions about the firm (including employees responsible for supervising projects). (Denial, Aug. 26, 2016, p. 4).

Your appeal does not allege NDDOT made any reversible procedural or substantive errors when it denied BIINC DBE certification on §26.71(g) grounds. Instead, you allege that you spend countless hours meeting with new business contacts, speaking with your staff multiple times per day, and making decisions necessary to successfully run the company. You further allege that NDDOT misjudged your lack of office time and leadership of the firm, noting that it is you (not Mr. Tivis) that has the final say regarding all aspects of the company. You stated: “. . . [A]lthough the panel felt [I] *give the appearance that [I do] not have an overall understanding of the firm's operations*; the more accurate statement is that [I] ha[ve] employed professionals in the areas of expertise that is allowable under the Regulation.” (Appeal, Nov. 11, 2016, p.4).

Except for the role and control of BIINC by Mr. Tivis, these elements of the firm's eligibility (i.e., your commitment to its success and the ability to hire professionals) are not disputed by NDDOT. Your appeal focuses on your reliance of the firm's estimator and your involvement in negotiations; however, you do not address in any way your overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which BIINC is engaged and the firm's operations, which is the core of §26.71(g) that NDDOT determined that you did not meet. Your experience is more akin to administrative and management tasks. As §26.71(g) states; “[g]enerally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.” We conclude that substantial evidence supports NDDOT's denial decision and we affirm the agency's decision regarding this control element.

## 2. Control Requirements of §26.71(d) and (f)

NDDOT stated that the Mr. Payton Tivis, appears to have “actual control of the firm.” You indicated during the on-site interview that BIINC superintendents and employees work full-time on projects during the construction season and that Mr. Tivis oversees everything, everyone reports to him, but you receive daily updates from him. (On-site interview transcript, July 26, 2016, pp. 9, 17, 18). Considering your responses NDDOT concluded that you delegated day-to-day control (including firm operations and management) to Mr. Tivis, which prevents you from meeting §26.71(d) and (f) requirements, which state:

“The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. (1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president). (2) In a corporation,

disadvantaged owners must control the board of directors. (3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.” §26.71(d)

“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(f)

We agree with NDDOT’s conclusion that you have not met §26.71(f) requirements; you have not demonstrated how you control BIINC’s operations notwithstanding the obvious delegation of functions to Mr. Tivis.<sup>3</sup>

### 3. Control Requirements of §26.71(j)

NDDOT, citing §26.71(j),<sup>4</sup> concluded that you appear to “spend much of [your] time on outside business interests that prevent [you] from devoting sufficient time and attention to the affairs of the firm to control its activities.” (Denial, Aug. 26, 2016, p.3). NDDOT bases its conclusion on your travel schedule to and from BIINC’s office but does not address to what extent your visits outside of your office are for BIINC or for some other purpose. The record needs to be developed further on this point before the Department can render a decision on this element of the case. What is missing are details regarding how much time you (as opposed to Mr. Tivis) spend overseeing both BIINC’s field and office work and delineating those tasks/meetings you perform for BIINC while away from BIINC’s principal business location.

In summary, we affirm the certification denial of BIINC as a DBE under §26.89(f)(1). This decision is administratively final and is not subject to petition for reconsideration. BIINC may reapply to the DBE program after the applicable waiting period established by NDDOT.<sup>5</sup>

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<sup>3</sup> NDDOT does not explain its rationale for citing §26.71(d) and there is no indication that you do not possess the power to direct, the power to cause, or the power to make day-to-day decisions regarding BIINC. This is the focus of this provision and we do not uphold the agency’s decision on this ground.

<sup>4</sup> §26.71(j) states: “In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.”

<sup>5</sup> See §26.86(c). Recipient may impose a waiting period of up to 12 months for reapplication; appeal of adverse decision—here, dated August 26, 2016—to the Department. The Department does not extend the waiting period.

Sincerely,

Marc D. Pentino  
Lead Equal Opportunity Specialist  
Disadvantaged Business Enterprise Program Division  
Departmental Office of Civil Rights

cc: NDDOT