



**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

February 14, 2018

Reference Number 17-0107

Adrian Lawson, President  
New Dominion Construction, LLC  
17650 Possom Point Road, Suite C1A  
Dumfries, VA 22026

Re: New Dominion Construction, LLC Appeal of DBE Certification Denial

Dear Mr. Lawson:

New Dominion Construction, LLC (NDC) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the Virginia Department of Small Business and Supplier Diversity (VDSBSD).

NDC submitted a Uniform Certification Application (UCA) to VDSBSD on October 5, 2016 and the agency conducted an on-site interview (OSR) on February 17, 2017. On April 19, 2017, VDSBSD denied NDC's application based on the firm's failure to satisfy ownership and control requirements of §26.69(c) and §26.71(c), (d), (e), and (f) of the DBE program Regulation 49 C.F.R. Part 26 (the Regulation).<sup>1</sup> NDC appealed VDSBSD's decision to the Department on May 10, 2017, and we requested the administrative record pursuant to §26.89(d). The Department concludes, based on a review of this record and your appeal, that substantial evidence supports VDSBSD's decision.<sup>2</sup>

### Ownership

The Regulation at §26.61(b) requires the firm seeking certification to bear the burden of demonstrating to the recipient, by a preponderance of the evidence, that it meets the requirements of the Regulation concerning group membership or individual disadvantage, business size,

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<sup>1</sup> VDSBSD also found NDC did not meet §§26.71(c) and (d) requirements. It suffices for the Department to affirm on the ownership and control grounds mentioned herein.

<sup>2</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).

ownership, and control. VDSBSD determined that you did not meet the ownership requirements of §26.69(c), a provision that states, in part:

(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm. . .

*Examples to paragraph (c):* (i) An individual pays \$100 to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial. (ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute \$100 and \$10,000, respectively, to acquire a firm grossing \$1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1). (iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

VDSBSD reached this conclusion because you and Mr. Bryan Diseati, a non-disadvantaged individual and NDC's Vice President, each contributed REDACTED to start the firm, yet you claim the majority (51%) interest compared to his 49% ownership interest. (UCA p. 5, Operating Agreement pp. 2, 10; Denial Letter, p. 2). There were no other contributions by either Mr. Diseati or yourself. REDACTED claimed capital contribution is not commensurate with the 51% ownership interest you obtained and you provided no evidence of any additional contribution on your part to support your acquisition of a greater ownership interest than Mr. Diseati.<sup>3</sup> We find that substantial evidence supports VDSBSD's conclusion that your majority ownership is merely pro forma and that you and Mr. Diseati are, in fact, equal owners of NDC having contributed equal amounts. We agree that this arrangement is contrary to §26.69(c) requirements.

### Control

VDSBSD determined that you failed to meet the control requirements of §§26.71(e), and (f), provisions that state:

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<sup>3</sup> NDC's 8(a) Business Plan submitted to the U.S. Small Business Administration references additional paid-in capital to NDC in the amount of REDACTED from you and Mr. Diseati), two lines of credit, and a vendor credit of \$20,000 from Capital Building Supply. These amounts were not noted in the UCA nor mentioned during VDSBSD's on-site interview, and no proof of this capital contribution is contained in the record.

§26.71(e): 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.

§26.71(f): 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.

VDSBSD determined that Mr. Diseati possesses and exercises the power to control the firm's operations and there is no differentiating your respective roles. You and Mr. Diseati, share responsibility for every key area listed in the UCA, each denoting the same tasks as performed "always" or "frequently." (UCA at 9). You both sign company checks, secure lines of credit, select projects to bid on, perform estimating and take-offs, order materials, and sign contracts. (OSR pp. 5–6). You also are equally responsible for setting company direction and supervising daily field operations. (UCA, p. 9; OSR pp. 2, 6). (Many of these shared duties mirror those found in Article IV, §4.3 of the firm's Operating Agreement). Despite these duplicative responsibilities, there appears to be some variance between the entries listed on the UCA with those mentioned during VDSBSD's on-site interview. For instance, during the interview, you note that you perform the actual hiring/firing; this differs from what is entered on the UCA (i.e., you both perform this task). Also, while the UCA lists both you and Mr. Diseati supervising work in the field, you stated during the interview that it is Mr. Diseati who alone performs this work. (OSR at 6). Adding to the lack of clarity is your statement that you and Mr. Diseati do most of the work together, in your words "almost always." (OSR at 7).

Although §26.71(e) and (f) allows for the involvement of non-disadvantaged individuals in the firm and a delegation of responsibilities in the areas of management, policymaking and operations, this must be discernible to the certifier (in this case VDSBSD). It is the applicant firm's burden to clarify the respective roles of NDC's principals (you and Mr. Diseati). There is substantial evidence that you and Mr. Diseati simply share control of the firm and we agree that based on the totality of the evidence, that NDC did not demonstrate how it meets the operable provision of §26.71(e) and (f):

*"Individuals who are not socially and economically disadvantaged. . . must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm."*

*“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.”*

Substantial evidence supports VDSBSD’s conclusion that you have not demonstrated control of NDC for the above reasons.

You do not allege in your appeal that VDSBSD made any reversible procedural or substantive errors when it denied NDC DBE certification on the above ownership and control grounds. Instead, you address issues not disputed by VDSBSD such as your social disadvantage status and the company meeting the Department’s size standards to be a DBE per §26.65. You also proffer an amended Operating Agreement that you believe cures VDSBSD’s findings that NDC does not meet §26.71(c) requirements. As stated above, the Department does not conduct a de novo review on appeal, but rather makes its decision “based solely on the entire administrative record as supplemented by the appeal.” §26.89(e). The de novo review standard limits the Department’s review to the evidence and grounds presented to VDSBSD. In this case, the supplemental information from your appeal does not clarify the record presented to VDSBSD, but rather introduces non-relevant information and, in the case of a revised Operating Agreement, new information that could have been presented during the application process.<sup>4</sup> Thus, the provided information is inadmissible, and we base our affirmation on the record evidence NDC provided to VDSBSD.

## **Conclusion**

The Department affirms VDSBSD’s ineligibility determination on the stated bases because substantial evidence supports it and it is consistent with applicable rules. *See* §26.89(f)(1). This determination is administratively final and not subject to petitions for reconsideration. **NDC 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  
Departmental Office of Civil Rights

cc: VDSBSD

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<sup>4</sup> The Department is limited by the Regulation in how it reviews DBE appeals and stated in its October 2, 2014 preamble: “The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency’s decision is not ‘supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification.’ It is not an opportunity to add new factual information that was not before the certifying agency.” (79 Fed. Reg. at 59579).