

January 11, 2018

Reference Number 17-0115

Landa Page
President
Page Excavating, Inc.
REDACTED
Lucas, OH 44843-9722

Dear Ms. Page:

Page Excavating, Inc. (Page) appeals the Ohio Department of Transportation's (ODOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (the Regulation). ODOT determined that Page failed to satisfy the control requirements of Regulation §§26.71(e) and (g). After considering the full administrative record, the U.S. Department of Transportation (Department) concludes that substantial evidence supports the denial. We therefore affirm.

I. Background

On July 19, 2016, Page submitted an application for certification (UCA) as a DBE to ODOT. ODOT reviewed the documentation provided with the application and, through its contractor Baker Tilly, conducted an on-site interview on November 9, 2016. On April 13, 2017, ODOT denied Page's application on the basis of the firm's failure to satisfy the specified control requirements. Page timely appealed ODOT's decision to the Department on July 11, 2017.

II. Facts

Page is an Ohio firm specializing in excavating, site work, bridge and culvert replacements, water and sewer lines, demolition, asbestos testing and abatement, trucking and hauling, and dumpster service. UCA at 5. Your husband, Jeffrey Page, started the firm in 2001. UCA at 8. Mr. Page transferred majority control to you in 2016.¹ UCA at 7; On-site Review (OSR) at 1. The UCA identifies that you hold two licenses: Hazard Evaluation Specialist and Asbestos Supervisor. UCA at 11. Your husband holds an additional license as an Asbestos Contractor. *Id.*

The UCA specifies the essential duties of owners, officers, directors, managers, and key personnel. You and Mr. Page state that you both perform most of the underlying tasks "frequently." UCA at 10. You state in the firm's application that Mr. Page has equal

¹ ODOT did not raise §26.69(h) or §26.71(l) as bases for denial.

responsibility as you to set the firm's policy, conduct bidding and estimating, make major purchasing decisions, supervise field operations, hire and fire management and field staff, obligate the firm by contract, and purchase equipment. UCA at 11. You do not maintain that you have exclusive responsibility for any of these key indicators of control or that your responsibility for any of them exceeds that of Mr. Page. *Id.* You and Mr. Page make project selection decisions jointly. OSR at 5.

III. Authority

26.61(b) states that: “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.”

26.71(e) states that: “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(g) states that: “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.”

26.86(d) states that: “When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under §26.89.”

26.89(f)(1) states that: “The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

IV. Discussion

Disproportionate Responsibility

ODOT in part determined that you do not control Page within the meaning of §26.71(e). With regard to §26.71(e), ODOT argued that your nondisadvantaged husband, Jeffrey Page, has disproportionate responsibility for the firm's essential operations. Denial Letter at 1. There is substantial evidence in the record to support that conclusion.

You indicate that your role and responsibilities at Page are “[s]upervisor, scheduling, material ordering and scheduling, inspections of properties, EPA and ODH notifications. I also do payroll and business reports.” Landa Page Resume at 3.

Mr. Page describes his role as: “Supervisor, Equipment Operator, Scheduling, Material and Equipment Inspections.” Jeff Page Resume at 4. Mr. Page is responsible for the field work – including running the crew on-site at projects. OSR Notes at 1. As discussed above, you and Mr. Page equally share most essential responsibilities. UCA at 10-11. You and Mr. Page “jointly discuss any potential projects to bid on and collaborate on a decision.” OSR at 5.² Further, there is substantial evidence that Mr. Page, in essentially managing/running all of the firm’s projects, controls the operations (performance on projects) most essential to the firm’s generation of revenue. Accordingly, we find that substantial evidence supports ODOT’s determination that Mr. Page is disproportionately responsible for operating the firm, and we affirm it.

Overall Understanding /Directly Related Competence and Experience

ODOT also determined that you failed to meet the requirements of §26.71(g), which, in conjunction with §26.61(b), requires you to demonstrate (by a preponderance of the evidence) that you have an overall understanding of, and managerial and *technical competence and experience directly related to*, the firm’s type of business and its operations. There is substantial evidence to support ODOT’s conclusion that Page is ineligible because you failed to make your case.

Your work experience is in shipping and receiving, and running semi-trailers, for Ashland Chemical. OSR at 1. You assert that this experience, described as “good business practices, communication with customers, record keeping, human resources matters, and many other areas of operating a business” is valuable in your work with Page. Appeal Letter at 2. Though that experience may be valuable, there is nothing to indicate that it is directly related to the firm’s primary business activities. There is nothing in the record to indicate that prior to your work at Page, you acquired experience in the main areas of Page’s work, including: bridge replacements, culvert replacements, excavating and site work, concrete work, and septic installations. OSR at 1; Landa Page Resume at 4. Besides describing your experience at Ashland Chemicals, you did not provide an explanation as to if or how you came to learn the work performed by Page. There is also nothing in the record to indicate that you have learned Page’s work on the job; as discussed above, Mr. Page supervises the field work and has shared responsibility for project selection. Further, the record indicates that your work with Page is more administrative in nature; in fact, during the OSR you indicated that you and your husband switched ownership percentages specifically because you ran the office while he preferred to run the field work. OSR Notes at 1. The record does not show that you have been involved in Page’s work such that you have gained an overall understanding of the work as required by §26.71(g).

² The Appeal Letter argues that Mr. Page is essentially an “Equipment Operator” for the firm; the Record indicates that Mr. Page has much more responsibility than that. Appeal Letter at 2.

The record shows that you hold licenses to perform asbestos evaluation and abatement supervision. However, asbestos-related work is only one type of work performed by Page. You stated in the application that Page's business includes excavating, site work, bridge and culvert replacements, water and sewer lines, demolition, trucking and hauling, and dumpster service. UCA at 5. There is nothing in the record to demonstrate that you have any training or managerial and technical experience directly related to those activities. While you need not have more experience or expertise than other participants, you do not demonstrate managerial and technical competence and experience directly related to most of Page's work. Page has not shown that you have training in the firm's main activities and with no training or (as discussed above) experience, you fail to demonstrate that you have an overall understanding of the firm's work or directly-related managerial and technical competence and experience. Therefore, substantial evidence supports ODOT's conclusion that you have not demonstrated control of the firm for the purposes of §26.71(g).

III. Conclusion

The Department affirms ODOT'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.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: ODOT