

January 30, 2018

Reference Number 17-0085

Amelia McElwain, President

REDACTED

Ottawa, OH 45875

Dear Ms. McElwain:

McElwain Industries, Inc. (MII) appeals the Ohio Department of Transportation's (ODOT) May 2, 2017 determination that the firm is ineligible for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 C.F.R. part 26 (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) affirms ODOT's decision. *See* §26.89(f)(1).

The Department affirms the decision because substantial evidence supports ODOT's conclusions that: (1) nondisadvantaged individuals possess the power to control MII, or are disproportionately responsible for the firm's operations, which §26.71(e) prohibits; and (2) you did not demonstrate the "technical competence and experience" directly related to MII's operations that is necessary to control the firm under §26.71(g).

I. Procedural History

MII applied for DBE certification on March 3, 2017, and ODOT conducted the firm's on-site interview on April 25, 2017. ODOT denied the application on May 2, 2017, and MII appealed the decision to the Department on July 17, 2017.

II. Facts

You and Richard McElwain (your nondisadvantaged husband) formed MII as equal (50-50) partners in 1983 and incorporated the firm in 1997. On-Site Review Report (OSRR) (April 25, 2017) at 2. MII performs custom steel fabrication. *See* Uniform Certification Application (UCA) (March 3, 2017) at 1. Mr. McElwain transferred a 2% ownership interest to you in 2010, and you replaced him as MII's President on October 1 2016. OSRR at 2; *see also* McElwain Industries, Inc., Directors' Minutes (October 1, 2016).

A. *MII's key employees (responsibilities and background)*

The roles and experience of MII's key employees are as follows:

Amelia McElwain (52% owner)

You are MII's majority owner, Director, President, Secretary, and Treasurer. UCA at 5. You are solely responsible for MII's human resources, office management, bookkeeping, and finances. OSRR at 5. You also meet with Mr. McElwain and Jason McElwain (your nondisadvantaged son) to review MII's production needs for the week. *Id.*

You started to work fulltime at MII in 2002. Before 2002, you worked as a Senior Training Specialist in human resources from 1988 to 2001. OSRR at 3; Appeal at 1. The appeal asserts that this position was "in a manufacturing administrative capacity, [where you worked] side by side with the President and VP of Human Resources, until they closed their local facility in 2001." Appeal at 1. The record contains limited information about your other work experience. Your résumé simply lists your employers without describing the work that you performed. *See generally* A. McElwain Résumé. Similarly, the skills section of your résumé simply states "presides over property and business affairs. Makes and manages executive decisions. Financial decisions." *Id.*

You have a bachelor's degree in Business Administration (Organizational Development), but there is no evidence that you have an educational background or certifications directly related to steel fabrication or machining.

Richard McElwain (48% Owner)

Your husband, Richard McElwain, is MII's 48% owner, Director, and Vice President. Mr. McElwain is responsible for MII's machining operations. OSRR at 4. Mr. McElwain served as MII's President from 1983 until October 1, 2016.

As a welder, millwright, and supervisor, Mr. McElwain has over 40 years of experience in steel machining and fabrication. *See generally* R. McElwain Résumé. Mr. McElwain holds a welding certification and he is a Journeyman Millwright.

Jason McElwain

Jason McElwain (your nondisadvantaged son) is MII's "Engineer." Jason McElwain runs the firm's production operations and he is solely responsible for estimating and sales. OSRR at 5. MII states that Jason McElwain is "being groomed to take ownership" of the firm. Appeal at 2.

Jason McElwain has over 15 years of experience performing fabrication, welding, and machining at several firms within the industry. *See generally* J. McElwain Résumé. His résumé lists relevant skills including: "basic hand tools & shop safety, bench layout, drill press, mill, surface grinder, minor shop maintenance, CNC G code (ISO) programming, CNC machine set-up operation, lathe, wire, EDM, and CAM system." *Id.* Jason McElwain also holds a welding certification. *Id.*

B. Denial

ODOT determined that MII failed to demonstrate that you control the operations of the firm in accordance with §§26.71(e), whereby nondisadvantaged individuals must not disproportionately control the firm's operations, and 26.71(g), which requires the disadvantaged owner to show technical competence and experience directly related to, the type of business and the firm's operations. ODOT's rationale primarily relies on your on-site interview statements to support its conclusion:

Based upon the review of the DBE application and supporting documents it appears to ODOT your husband and son are in control of the company. Their experience and expertise are more aligned to the work that MII performs, such as industrial and commercial welding and fabrication services and fabrication of parts and structures. Your expertise is more limited to office management, administration, or bookkeeping functions unrelated to the principal activities of your business. You described your daily duties on the onsite interview as human resource, office management, bookkeeping, and finances. You mentioned your duties do get delegated out. Specifically, you delegate production to your son and machining to your husband, but you all get together and go over production for the week.

....

You have no certifications, experience, nor have you undertaken any training related to the principal activities of the business. As such, ODOT believes you do not meet this test. Your husband and son have an extensive history of working in the field. You have not proven ODOT that without the presence of your husband and son, you would be able to run the business and have the ability to critically evaluate information presented by other participants in the firm's activities and use this information to make independent decisions concerning the firm's daily operations.

Denial Letter at 2.¹

III. Authority

1. §26.61(b) states:

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.

2. §26.71(a) states:

In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

¹ We find that the denial letter's §§26.69 (h)(1) and 26.71(k)(1) denial rationales are underdeveloped and not adequately presented. See §26.86(a).

3. §26.71(e) states:

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.

4. §26.71(g) 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.

5. §26.89 (c) states:

If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, *what significant fact that the recipient failed to consider*, or what provisions of this Part the recipient did not properly apply. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice.

(Emphasis added.)

6. §26.89(f)(1) states:

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

A. *MII does not satisfy the requirements of §26.71(e)*

Section 26.71(e) provides that “individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees . . . 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.”

The facts presented in this case show that you are exclusively responsible the firm’s office, human resource, and marketing activities. *See* OSRR at 5. In contrast, Richard and Jason McElwain are responsible for MII’s sales, estimating, and production/machining operations, which are key business areas that are crucial to MII’s operational success. *See id.* at 5-6. As a team, you, Richard, and Jason McElwain share responsibility for selecting projects to bid on, and together you represent the firm during contract negotiations, pre-bid, pre-construction, compliance review meetings. *Id.* at 11. These facts demonstrate that your nondisadvantaged husband and son, a 48% owner and a nonowner, respectively, have equal or greater responsibilities within MII’s essential business operations than you. In short, we find that substantial evidence supports that Richard and Jason McElwain are disproportionately responsible for MII’s operations.

Furthermore, substantial evidence shows that Richard and Jason McElwain possess or exercise the power to control the firm. For example, Mr. McElwain’s signature is required on all business checks, which means you cannot obligate the firm without his consent. *See* OSRR at 10. More importantly, Richard and Jason McElwain run MII’s fabrication and machining operations, the firm’s principal business activity, with little involvement or oversight by you. *See* UCA at 2, OSRR at 5-6. Production is a critical aspect of MII’s operations that involves manufacturing goods that its customers demand and that generate revenue for the firm. In addition, Richard and Jason McElwain have the authority to sign contracts/proposals, bids, and estimates, which are important areas of the business that generate contracts and revenue for the firm. *See* OSRR at 10. Richard and Jason McElwain’s autonomy over critical business operations shows that they at least possess the power to control the firm.

Accordingly, we find that substantial evidence supports ODOT’s determination that MII does not satisfy the requirements of §26.71(e). We affirm under §26.89(f)(1).

B. MII does not satisfy the requirements of §26.71(g).

ODOT concluded that you do not control the firm within the meaning of §26.71(g), which states in part that a disadvantaged owner 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 evidence that ODOT considered in reaching its determination (e.g., résumé, on-site interview) does not demonstrate that you have technical competence and experience directly related the firm’s operations. As noted in the previous sections of this decision, your expertise, on the evidence presented, relates to general managerial, administrative, and financial functions. The appeal contends that you obtained technical competence and experience in MII’s business operations by performing machining work “side by side” with your husband and from “years in a manufacturing *administrative capacity*, working side by side with the President and VP of Human Resources.” Appeal at 1. However, MII did not make this claim until after ODOT found

the firm ineligible on the evidence the firm did present, so ODOT obviously could not have considered it.² The Department's appellate role is not to weigh the credibility of new facts that the firm presents on appeal. Rather, certifiers make evidentiary determinations when evaluating. The Department's role is to determine whether substantial evidence supports the certifier's decision and whether the decision is inconsistent with the provisions of the Regulation's certification. §26.89(f). Here, MII's failure to bring these contentions to ODOT's attention is more a failure to demonstrate eligibility under §§26.61(b) and 26.71(g) than an allegation that ODOT erred, omitted, or misconstrued within the meaning of §26.89(c).³

The Regulation does not require that the disadvantaged owner have experience or expertise in every critical area of the firm's operations. However, MII must demonstrate that you 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." §26.71(g).

The denial letter states that "[y]ou have no certifications, experience, nor have you undertaken any training related to the principal activities of the business. As such, ODOT believes you do not meet this test." Denial Letter at 2. MII's appeal asserts that your administrative/managerial experience at MII and your general business degree provide you with the required critical evaluation skills that are required to make independent decisions on information that the technical experts bring to you. *See* Appeal at 2-3. We find that claim meritless for two reasons. First, you appear to concede in the onsite interview that you and your husband and son make weekly production decisions jointly at best and that they alone make daily decisions. You describe your sole responsibilities to exclude any that directly pertain to steel machining and fabrication daily (field, not office) operations. The UCA and onsite interview show that the nondisadvantaged participants control daily operations. The evidence therefore indicates that you do not in fact make independent decisions concerning the firm's daily operations. Second, as we explain above, §26.71(g) requires that you have technical competence and experience directly related to the firm's operations. We find no preponderance of evidence to demonstrate that you are able to critically evaluate technical information about the firm's operations and make decisions about it without the assistance of Richard and Jason McElwain.

In short, substantial evidence supports ODOT's determination that MII is ineligible under §26.71(g).

² The appeal asserts that you actually perform various production and machining duties at MII and it asserts that you have the "ultimate decisions regarding production, growth and success of the company." Appeal at 3. Apart from being raised for the first time on appeal, these assertions' probative value is doubtful. They amount to conclusions, unsupported by evidence, that proximity yields technical competence and experience. Much of the evidence ODOT actually considered undercuts them.

³ we remind MII that it is required, on appeal, to state the grounds upon which the ODOT's decision should be reversed and to provide supporting information and documentation. (The Department does not conduct a *de novo* review of the matter or hold a hearing. *See generally* §§26.89(c) and (e).) With no §26.89(c)-compliant argument on appeal, *see* §26.89(c) (appeal must include information "setting forth a full and specific statement as to ... what significant fact that the recipient failed to consider"), the Department finds no grounds for reversal. *Cf.* §26.89(f)(2).

V. Conclusion

The Department affirms ODOT's decision under §26.89(f)(1) as supported by substantial evidence and consistent with applicable Regulation provisions.

This decision is administratively final and not subject to petitions for review.

Sincerely,

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

cc: ODOT