

July 2, 2019

Reference Number 19-0059

Monica A. Crusse  
Maryland Department of Transportation  
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Hanover, MD 21076

Bruce E. Kauffman, Esq.  
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Dear Ms. Crusse and Mr. Kauffman:

This is in response to the Thomas Construction Group, LLC's (TCG) January 16, 2019 appeal of the Maryland Department of Transportation's (MDOT) October 25, 2018 denial of the firm's request to add seven North American Industry Classification System (NAICS) codes to its Disadvantaged Business Enterprise (DBE) certification under the rules of 49 CFR part 26 (the Regulation). After reviewing the record, we affirm in part and reverse in part. *See* sections 26.89(f)(1) and (2).

## **I. Facts**

Charles Thomas is the sole owner and President of TCG, a construction firm and certified DBE in Maryland with eight NAICS codes. The codes encompass residential remodeling, construction management, roofing, siding, cable and fiber network installation, low voltage electrical work, flooring, and architectural drawings and design.<sup>1</sup>

In February 2018 Mr. Thomas requested MDOT to add seven NAICS codes to TCG's DBE certification. The MDOT Minority Business Enterprise Advisory Committee (MBEAC) investigated and evaluated TCG's eligibility for the new NAICS codes in March and June 2018. The MBEAC conducted a hearing in November 2018 at which Mr. Thomas explained how he has the ability to control the work in the requested codes.

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<sup>1</sup> The NAICS code numbers are 236118, 236220, 237310, 238160, 238170, 238210, 238330, and 541512. Full descriptions of the codes are available at <https://www.census.gov/eos/www/naics/>.

Mr. Thomas's résumé shows that he has at least 20 years of construction-related experience, primarily as a project manager. He holds a Maryland State home improvement license. At TCG he performs contract negotiations; estimating; on-site construction management; project coordination and monitoring; marketing; sales and financial management; and coordination with superintendents, project managers, and subcontractors to ensure accurate budgets and timely project completion.

The codes Mr. Thomas requested relate to concrete foundation and structure (code 236118); decorative glass and mirror installation, mirror installation, window pane or sheet installation (code 238150); bathroom plumbing fixtures, sanitary ware installation, cooling and heating systems installation, duct work, kitchen sink and hardware installation (code 238220); building fireproofing, building insulation, ceiling tile installation, drywall finishing (code 238310); concrete construction, finishing, pouring, pumping, repair, and resurfacing (code 238150); paint and wallpaper stripping, ceramic tile installation, granite interior installation, marble or stone installation, tile finishing (code 238340); and wood manufacturing of door trims, molding, and floor baseboards (code 321918).<sup>2</sup>

To support his assertion that he can control the work in NAICS code 236118 Mr. Thomas gave the MBEAC a detailed explanation of the relevant extensive on-the-job training he gained during his three years at firm VSL. As evidence of his ability to control the work in NAICS codes 238150, 238220, 238310, 238220, and 238310 Mr. Thomas provided the MBEAC subcontract invoices showing that TCG constructed and expanded walls; patched, replaced, skimmed, and painted walls; installed wood blocking; installed mirrors, tiles, and counter tops; patched and painted walls; and installed an air filtration system. Regarding code 321918, Mr. Thomas explained that subcontractor Marta Ali oversees all aspects of the work.

MDOT denied TCG's NAICS code requests under section 26.71(n) of the Regulation on the ground that Mr. Thomas did not adequately prove that he meets the control requirements of section 26.71(g).<sup>3</sup> See section 26.61(b) (burden of proof).

### III. Discussion

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<sup>2</sup> Full descriptions of the codes are available at <https://www.census.gov/eos/www/naics/>.

<sup>3</sup> Section 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." (emphasis added)

Section 26.71(n) states in relevant part: "You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work."

MDOT found that Mr. Thomas does not meet the control requirements of section 26.71(g) because he does not have the credentials, expertise, and skills to critically evaluate and make independent decisions about the work in the requested NAICS codes. MDOT particularly objects to Mr. Thomas not personally performing any of the physical work. MDOT omitted from its citation of section 26.71(g) the sentence that states that a socially and economically disadvantaged (SED) owner need not have experience or expertise in every critical area of a firm's operations, or greater experience or expertise than key managers or employees.

We note first that there is no language in section 26.71(g) indicating that an SED owner must physically perform particular tasks in order to demonstrate that the owner can control the work.<sup>4</sup>

Regarding NAICS codes 236118, 238150, 238220, 238310, 238150, and 238340, the record as a whole shows that, more likely than not, Mr. Thomas has an overall understanding of, and technical and managerial competence directly related to, the relevant work and that he can make independent decisions after critically evaluating information that is presented to him.<sup>5</sup> MDOT did not address whether Mr. Thomas's role is limited to office management or administrative tasks, and we see no evidence that it is. We do not see substantial evidence to support MDOT's finding that Mr. Thomas does not meet the requirements of sections 26.71(g) and (n) in the context of NAICS codes 236118, 238150, 238220, 238310, 238150, and 238340. Thus, we reverse.

Regarding NAICS code 321918 (wood manufacturing) Mr. Thomas conceded at the MBEAC hearing that Ms. Ali handles all aspects of the work. He presented virtually no evidence that he has an overall understanding of activities related to wood manufacturing, the required technical and managerial competence, or the ability to make independent decisions based on a critical evaluation of information presented to him by Ms. Ali. Substantial evidence supports MDOT's finding that Mr. Thomas did not meet his burden of showing that he can control the work related to code 321918, per sections 26.71(g) and (n). Thus, we affirm.

#### IV. Conclusion

We direct MDOT to add NAICS codes 236118, 238150, 238220, 238310, 238150, and 238340 to TCG's DBE certification and to do so without delay. MDOT should update applicable lists, databases, and so forth.

This decision is administratively final and not subject to petitions for review. Thank you for your continued cooperation.

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<sup>4</sup> See, e.g., 13-0064 J&L Steel and Electrical Services, Inc. (Aug. 13, 2013) (Disadvantaged owner need not prove that she herself can perform every task that the firm as a whole performs; certifier's decision reversed) and 13-0122 Nancy's Tree Planting, Inc. (Jan. 10, 2014) (Disadvantaged owner need not actually operate equipment in order to control the operations, management, and policies of the firm; certifier's decision reversed). See also 13-0012 US Structural, Inc. (June 21, 2013) at note 4; 13-0106 EIDEAS, Inc. (Dec. 30, 2013) at 2; 13-0073 C2PM, Inc. (Nov. 7, 2013) at 4.

<sup>5</sup> See, e.g., MBEAC Hearing Transcript (Nov. 21, 2018); Résumé of Charles Thomas; and Subcontract Agreement of Thomas Construction Group, LLC and Gleneig Construction, Inc. for Hillcrest Elementary School.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division