

February 11, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number.: 05-0031

Ms. Janet M. Wright
Chief Executive Officer
Thurman-Bryant Electrical Supply Company
309 West 21st Street
Chattanooga, TN 37408

Dear Ms. Wright:

This is in response to the appeal that you filed on behalf of your firm Thurman-Bryant Electrical Supply Company ("TBESC"). We have carefully reviewed the material from the Chattanooga Metropolitan Airport Authority ("CMAA") as well as information you provided and concluded that the denial of the firm's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial record evidence.

Your appeal is denied based upon our determination that substantial evidence supports CMAA's conclusion that your contribution of capital to acquire ownership interest in the firm was not real, substantial, and continuing within the meaning of the Regulation.

Your appeal is also denied based upon our determination that substantial evidence supports CMAA's conclusion that you do not control the firm as required by the Department's Regulation.

The specific reasons for the denial of your appeal include the following:

OWNERSHIP

According to the Regulation at §26.61(b), 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.

The Regulation at §26.69(c) provides in part, that contributions of capital or expertise by the disadvantaged owner to acquire an ownership interest in the participating DBE business be real and substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents.

The Regulation at §26.69(e) states that, contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

According to the firm's August 2004 DBE certification application, you are the 53 percent owner of the business which was originally established in 1952 as Thurman-Logan Electric Supply Company, Inc. Your husband Gregory Wright, a non-disadvantaged individual and the firm's President, is the 36 percent owner; and ----- and -----, also non-disadvantaged individuals, own the remaining shares. The record indicates that you were elected Chief Executive Officer of the firm on February, 3, 2002. According to the firm's meeting minutes for that day:

This meeting was called to discuss the recent unfortunate death of -----, a board member and stockholder of the corporation. By his will, his ownership of 123 shares of stock were past[ed] to his daughter, Janet Wright, along with 100 shares of stock owned by his wife -----; making Janet Wright the majority owner of the corporation. In an act to consolidate the ownership of the company, Janet Wright, with the agreement of Greg Wright, converted 232 shares of stock into her name, currently held in the name of Janet and Greg Wright; and converted 313 shares of jointly held stock into the name of Greg Wright.

You state in your December 2, 2004, rebuttal letter to CMAA "this business was never inherited; every single share of stock was purchased, over time, through a Buy/Sell Agreement established 20 years ago. It was my father's wish that I purchase the shares in my name so that I would have control."

The Regulation §26.69(c) requires that the disadvantaged business owner's contribution to acquire their ownership interest in the firm be real, substantial, and continuing going beyond pro forma ownership of the firm as reflected in ownership documents. There is no indication that you purchased your shares from your father. While the firm's stock ledger indicates your shares, the Regulation requires a clear showing of your contribution of capital or expertise to establish your ownership interest in the firm. Based upon the firm's February 3, 2002, meeting minutes, it appears that your acquisition of the majority of the firm's shares was pro forma and not made with any type of consideration. This type of arrangement is not considered a real and substantial contribution under the Regulation §26.69(e). Substantial record evidence therefore

supports CMAA's determination that your ownership in the firm does not meet the requirements of the Department's Regulation.

CONTROL

The Regulation at §26.5 states, in part that, a DBE is a for-profit business whose management and daily business operations are controlled by one or more disadvantaged individuals who own it.

The Regulation at §26.71(g) requires a disadvantaged owner to have technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. The disadvantaged owner is 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 disadvantaged owner 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.

The Regulation at §26.71(j) requires that 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.

The Regulation at §26.71(k) states in part that, a disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the disadvantaged owner exercises vis-à-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members. If you cannot determine that the disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities

The record indicates that you do not possess sufficient knowledge and experience which directly relates to the firm's primary operations and do not control its critical activities on a day-to-day basis.

1. The record indicates that non-disadvantaged individuals associated with TBESC have many years of experience in the critical aspects of its operations. Your résumé indicates that you

graduated from the ----- with a Bachelor of Science degree in Business Education. Since that time, you have worked for the -----, the -----, and the ----- . In 1977, you received a Master's Degree in Education from the ----- . You stated in your résumé that you "have been actively involved in [TBESC] since 1982, both in an advisory capacity as a board member and as an operation manager."

Gregory Wright's résumé indicates that he graduated from the ----- with a Bachelor of Arts Degree in Economics, and subsequently took employment with the ----- . In 1977, he obtained a Master's Degree in Banking from ----- and became manager of TBESC in 1980 where he later obtained the position of President and holds that same position today.

2. The record also indicates that non-disadvantaged individuals associated with TBESC assist in management and supervision of key operations of the firm. TBESC supplies wholesale electrical equipment. According to CMAA's September 17, 2004 on site-report you and Gregory Wright share responsibility to negotiate financing, contracts, bonding and insurance; make loans for the firm and sign loan agreements; set salaries for personnel; hire and fire employees; sign contracts, notes and leases for equipment; and establish policies and procedures for the company. The outside sales staff estimates work in preparation of submitting a bid or quotation in the firm's name; and Gregory Wright negotiates billing disputes with prime contractors. According to the firm's DBE application, -----, a non-disadvantaged individual, is the firm's purchasing agent.

3. Lastly, the record indicates that you devote 2 to 3 hours per week to the firm, while Gregory Wright works normal business hours. The on-site report indicates that you are a full-time teacher with the -----, a situation, as you describe in your December 2, 2004, letter to CMAA was created out of financial necessity.

In your November 29, 2004 rebuttal letter to CMAA, you addressed the issue of your control of the firm and your qualifications by stating:

. . . The management and daily business operations control is done by me; this was directly stated in our application and owner interview. I am the majority stockholder in the company and maintain a majority of the voting rights; I hold the highest management position in our company and on the board of directors; and I, specifically confirmed a long list of duties and responsibilities, as being under my decision making ability. In any business environment, these facts constitute control . . .

Since 1980 (24 years), I have been directly involved with every aspect of my company, holding officer status and dealing with all day-to-day activities. . . I have both a college Bachelor of Science and Master's Degree, which must represent a capacity of knowledge and learning capability to assist me in the operation of this business.

My other position poses no conflict with management of the firm. Very obviously there is no clash between hostile or opposing ideas. Nor does the time spent prevent me from devoting sufficient time to the firm to control its activities. During the interview process, I very clearly stated that I come in during normal business hours, not to mention the fact that we (management) often work daily until 7:00 or 8:00 at night. What is not discussed at work is certainly done at home; similar to anyone, in another business, who operates out of his house or someone who is controlling more than one operation, and can not do so during the normal business day. As long as management is aware of all activities, has a reasonable and sufficient amount of time to understand current situations and demands, proper decisions are made in the complete control of the company. . . .

How can one not make a distinction as to control where the ultimate decision making responsibility is in the hands of the individual who has the greatest ownership interest, who holds the highest officers in the company, and who takes an active roll in the day-to-day operation? In any company, that is what sets each one apart, and as such, a position can not or should not be challenged unless you have been given reason to think otherwise. This distinction separates me from my husband, my children, my parents, any other family member, or any employee of my company.

Based on the record evidence, you have not met your burden of proof in establishing control of the firm. As stated above, TBESC supplies electrical equipment. It does not appear from the record that you possess education or experience in the area of business that TBESC is engaged and it is not clear from the record or the points you raised in your rebuttal letter whether you possess the technical competence and experience in this type of work. Although you may have a working knowledge and understanding of the industry, it is unclear to what extent your teaching background enables you to run an electrical supply business. Such factors are necessary to support your claim of control over the firm. Furthermore, your husband Gregory Wright, a non-disadvantaged individual, is the person relied upon to perform crucial firm activities and is present at the business on a daily basis. Although you indicated in your November 29 and December 2, 2004, rebuttal letters that you “have been directly involved with every aspect of [the] company” and devote time to the business after hours and work at home, there is no indication of your role with the firm which is distinct from that of your husband. With his involvement in nearly all aspects of the firm, your ability to oversee the direction of its activities and exercise control as required by the Department’s Regulation is clearly inhibited given your absence from the firm. The Department therefore, disagrees with your assertion that as long as you, the manager, are aware and understand the firm’s activities, you are able to make proper decisions in complete control of the company. The focus of the Regulation is on “actual” control of the firm; and substantial evidence supports CMAA’s conclusion that you lack the technical competence and experience in this type of work as required under the Department’s Regulation.

The Regulation §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.” According to the record, you are employed full time at ----- . This would appear to limit your ability to devote sufficient time and attention to the affairs of TBESC.

Lastly, Article IV section 5 of the firm’s bylaws defines the President as:

The President shall be the chief executive officer of the corporation, he shall preside at all meetings of the stock holders and directors, he shall have general and active management of the business of the corporation, and shall see that all orders and resolutions of the Board are carried into effect. He shall be ex officio member of all standing committees, and shall have the general power and duties of supervision and management normally vested in the office of the President of the corporation.

There is no provision for a Chief Executive Officer (the title you hold) in the bylaws. Although the bylaws allow for the election of additional officers, the title of Chief Executive Officer as the head of the firm contradicts the above bylaw provision which specifies that it is the President of the firm which holds the duties of this position. In addition, it appears that your husband, a non-disadvantaged individual, is the person who actually controls the day-to-day activities of the firm and makes management decisions. Substantial evidence therefore, supports CMAA’s decision that you lack control of the firm as defined by the Department’s Regulation.

OTHER ISSUES

CMAA is not required under the Regulation to afford you a hearing following an initial decision denying the firm DBE certification.

In summary, the information provided cumulatively supports a conclusion that TBESC does not meet the criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on CMAA’s Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: CMAA