

April 5, 2019

Reference Number 18-0151

Michael D. Bryant
Director
Civil Rights Division
Texas Department of Transportation
200 E. Riverside Dr.
Austin, TX, 78704

Dear Mr. Bryant:

Subsurface Exploration Consultants, LLC (SEC) appeals¹ the Texas Department of Transportation's (TxDOT) denial² of the firm's application for Disadvantaged Business Enterprise (DBE) certification, under the rules of 49 C.F.R. Part 26 (the Regulation). TxDOT denied SEC's application under Appendix E of the Regulation. After reviewing the record in its entirety, we remand under §26.89(f)(4).³

Background

Jamie Naquin co-founded SEC in February 2018 and owns 51% of the firm. He is a U.S. Army service disabled veteran.⁴ SEC performs services such as subsurface utility engineering, surveying, data management, and vacuum excavation.⁵ Mr. Naquin does not claim membership in any of the groups whose members are presumed socially and economically disadvantaged (SED) under the Regulation.⁶ His claim is one of individual social and economic disadvantage as described in §26.67(d), a determination for which Appendix E in the Regulation provides

¹ See Appeal Letter (undated and unpaginated). The record confirms that the appeal is timely.

² See Denial Letter (May 29, 2018).

³ See §26.89(f)(4): "If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part."

⁴ The record is unclear about the date of Mr. Naquin's discharge from the Army.

⁵ See Uniform Certification Application (UCA) at 5.

⁶ See §26.67(a): *Presumption of disadvantage*. You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. See also §26.5.

guidance.⁷ He contends that he is SED under Appendix E because he has multiple disabilities, including a **REDACTED**.⁸ Mr. Naquin earned a Bachelor of Science degree in Maritime Administration from Texas A&M University prior to the onset of his disabilities.⁹ Mr. Naquin has been deemed completely and permanently disabled.¹⁰

Decision

We remand under §26.89(f)(4). Mr. Naquin contends that TxDOT did not consider all the evidence he submitted and misconstrued much of it.¹¹ Having reviewed the full record, we tend to agree.¹² TxDOT's denial letter makes, at best, scant reference to the evidence Mr. Naquin provided. *See* §26.86(a).

Instructions

We direct TxDOT to reevaluate Mr. Naquin's Appendix E eligibility and issue a new decision based on the *totality of the evidence presented*. An applicant's inability to provide examples of all three elements of Social Disadvantage I.(C), i.e., education, employment, and business history, does not automatically result in ineligibility. We remind TxDOT that the evidentiary standard for demonstrating Appendix E eligibility is "preponderance of the evidence," and not the more stringent "clear and convincing" standard. We instruct TxDOT to take special heed of Appendix E Social Disadvantage sections II and III, regarding individuals with disabilities. We expressly advise TxDOT that we believe that Mr. Naquin has already submitted more than enough information for TxDOT to properly render a decision.

Conclusion

⁷ *See* §26.67(d) (in pertinent part): *Individual determinations of social and economic disadvantage*. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. (italics in original)

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⁹ *See* Résumé of Jamie Naquin. Given the timing, TXDOT improperly relied on Mr. Naquin's Bachelor of Science degree to conclude that he has not been denied equal access to institutions of higher education.

¹⁰ *See* Letter from Dept. of Veterans Affairs (Jan. 22, 2018) and Medical Letter from Michael Perez, DO.

¹¹ *See* Appeal Letter at 1. Mr. Naquin also claims that TxDOT discriminated against him because of his race (white) and disability. Consideration of Mr. Naquin's allegations of discrimination is outside the scope of our review.

¹² *See, e.g.*, Social Disadvantage Narrative of Jamie Naquin (unpaginated and undated); Letter to TxDOT Civil Rights Office from Jamie Naquin (March 7, 2018); Email from Extraco Bank to TxDOT (April 20, 2018 at 8:48 a.m.); Email from Bernard Specialties, Inc. to TxDOT (April 20, 2018 at 9:04 a.m.); and Medical Letter from Michael Perez, DO.

We remand for TxDOT to reevaluate SEC's DBE program eligibility based on Mr. Naquin's evidence of individual disadvantage, in a manner consistent with these instructions. We direct TxDOT to notify SEC of its eligibility determination by April 30, with this Office copied.

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

Sincerely,

Samuel F. Brooks
Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Subsurface Exploration Consultants