

July 6, 2015

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Reference No. 14-0041

Ms. Becky Rundle
Rundle Construction, Inc.
[REDACTED]
Hotchkiss, CO 81419

Dear Ms. Rundle:

This letter responds to your December 2, 2014, letter in which you appealed the Colorado Department of Transportation's ("CDOT") denial of Rundle Construction, Inc., ("RCI") for certification as a Disadvantaged Business Enterprise ("DBE"). In its evaluation, CDOT determined that RCI failed to meet the ownership and control requirements of 49 CFR §26.69 and 26.71. The U.S. Department of Transportation ("Department") has carefully reviewed the full administrative record and concludes that substantial record evidence supports CDOT's decision. We therefore affirm the denial of DBE certification.

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

OWNERSHIP

The firm's DBE Certification Application indicates that you, the socially and economically disadvantaged owner, and Lance Rundle, your non-disadvantaged husband, are the 51% and 49% owners of RCI, respectively. You indicate that you are the President of the firm and Lance Rundle, serves as Vice President.

CDOT's denial letter indicates that your claim of 51% ownership interest in the firm was not real, substantial and continuing as required by the Department's Regulation. According to the record, RCI was originally established in February 1994, by Lance Rundle. The record reveals that between 1994 and 2004, Lance Rundle was the sole owner and President of the firm. CDOT's March 20, 2013, onsite report and other documents contained in the record indicate that you actually hold the position of Vice President, Secretary and Treasurer and Lance Rundle is the President of RCI.

The record further indicates that Rundle Construction, Inc. has no operating agreement and operates under the Mountaineer Excavation & Reclamation, LLC operating agreement. Mountaineer Excavation & Reclamation, LLC was incorporated March 30, 2006, and indicates that you and Mr. Rundle are equal owners of the firm in which you claim you contributed \$48,000.00 for your 50% ownership interest in the firm. However, you provided no documentation to prove that the \$48,000.00 actually came from your personal funds to acquire your 50% ownership interest.

Subsequently, in 2010, Lance Rundle transferred 1% ownership interest to you, (the qualifying individual) resulting in your 51% ownership interest in the firm. Again, you provided no documentation to show any contribution toward your 1% ownership interest. It appears that Mr. Rundle, your non-disadvantaged husband and former owner of the firm, transferred the majority ownership interest in the business to you without any form of consideration paid. The record reveals you clearly received your ownership interest in the firm as a gift or transfer without adequate consideration from Mr. Rundle your non-disadvantaged husband, who remains involved in the firm.

The record evidence indicates that while you claim 51% ownership interest in the firm, documentation submitted by the firm fails to substantiate that your ownership interest was acquired in a manner consistent with the requirements of the Regulation. Specifically, the record evidence does not reveal that you made any investment in the firm toward your ownership interest using your personal funds.

The Department notes that the firm is required to produce documents to substantiate the disadvantaged owners' contribution of capital to the firm. Pursuant to §26.61(b), the burden of proof for meeting the ownership criteria for certification rests on the applicant, not the recipient.

The record clearly indicates that you, the socially and economically disadvantaged owner, did not make any capital contribution to acquire your ownership interest in the firm using your personal funds. This is not in accordance with §26.69(c) and (e) which require that the disadvantaged owner's contribution of capital be real, substantial, and continuing. Sections §26.69 (c) and (e) state:

The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. §26.69(c)

The 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 a 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. §26.69(e)

The burden of proof for meeting the criteria for certification rests on the applicant. Moreover, the record evidence does not reveal that you made any investment in the firm using your personal funds and, therefore, did not make a substantial contribution to acquire your 51% ownership interest in the firm as required by the Regulation. This type of arrangement does not represent a real and substantial contribution pursuant to the Department's Regulation. In addition, there still exists a requirement for the applicant to produce documents which substantiates their investment in a firm for which certification is sought. Since no evidence was provided to substantiate that you made an investment to acquire your 51% ownership interest in the firm, we therefore must conclude that you failed to make a real and substantial investment in the acquisition of this business.

Substantial record evidence, therefore, supports CDOT's conclusion that your 51% ownership in RCI is not real, substantial, and continuing as reflected in the ownership documents as required by the Regulation §26.69.

CONTROL

RCI is a construction firm primarily engaged in support activities for oil, gas and coal mining operations, pipeline for water, irrigation, sewer, oil and gas construction, land subdivision, highway, street and bridge construction, poured concrete foundation, and site prep contractors.

CDOT determined that you, the socially and economically disadvantaged owner, do not possess sufficient knowledge and experience which directly relates to the firm's primary operations. A review of your qualifications reveals that your experience and expertise has primarily been in the areas of office management and administration. Specifically, your résumé indicates that prior to becoming 51% owner of RCI from 1992 to 1994, you worked for The Fort Lupton Schools, training bus drivers and drove routes for the district school. You describe your duties at RCI as: learned to be a business manager, trained to be an equipment operator, trained to run QuickBooks and built safety program and hiring program. Your skills are listed as: Equipment Operator, knowledgeable of QuickBooks, Word, Excel and Outlook and detail oriented. CDOT's on-site review and other documents contained in the record, indicate your duties at the applicant firm consist of administrative functions such as: hiring, run office, budget, safety checks, and run equipment.

Your duties at the applicant firm appear to be in the areas of office management, administration, or bookkeeping functions which appear to be administrative in nature and not in the principal area of the firm's work, which include construction work, the firm's primary line of business. Under §26.71(g), this is insufficient to demonstrate control. §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.

Your background in the firm's industry is limited, as is your role at the firm beyond office management functions and the delivery of services rendered by the firm. This is an important element of RCI's operations; however, these tasks are not sufficient to demonstrate your control pursuant to the DBE Regulation.

While you may possess knowledge of the industry by virtue of the fact of the many years working for the firm, the record evidence does not substantiate that you would be able to direct RCI's field operations, or that you have the expertise, experience, or technical skills necessary to control the daily operations of the firm's activities or to evaluate information provided by subordinates. Your experience has primarily been in the firm's administration and office management; areas that §26.71(g) specifically states are insufficient to demonstrate control of a DBE applicant firm.

CDOT determined that you, the socially and economically disadvantaged owner, disproportionately depend on non-disadvantaged individuals for their knowledge and background expertise, which is necessary to control the technical aspects of the firm's day-to-day operations. A review of the record indicates that Lance Rundle, Dennis Chilcote, and Eric Edwards, all non-disadvantaged individuals are the persons who have the technical competence and experience required to control the operations of RCI. These individuals have significant expertise in the areas of work that RCI engages in and are responsible for the field/production operations and key aspects of the firm's operations.

Section 4 of the firm's DBE Certification Application, indicates that you are solely responsible for financial decisions. Both you and Lance Rundle share the responsibility in negotiations and contract execution, purchasing of major equipment and he has the ability to sign checks and to make financial decisions in behalf of the firm. Eric Edwards and Dennis Chilcote are responsible for estimating and bidding. You share hiring/firing of management personnel with Lori Hamm, a non-owner of the firm. Lance Rundle and Eric Edwards share field/production operations supervision.

Lance Rundle's résumé details over 29 years of relative experience in the construction field. It is important to note that Mr. Rundle's résumé indicates that he has held the position of President and CEO of Rundle Construction since 1994, and has authority to control all management decisions. He lists his responsibilities as: run and maintain a safe environment for all workers; engineer and schedule for jobs and equipment; bid on potential jobs; and site management. From

1990 to 1993, he worked for Tarco as a Field Boss, where he was responsible for maintaining and micro managing job sites; field supervision; and grade checker. From 1986 to 1990, he worked for R.E. Monks Construction as an Equipment Operator, responsible for finishing clean-up projects; building sub-grade for sidewalks and asphalt and DOT Highway subgrade with preparation asphalt. Mr. Rundle also has had the following training: OSHA Standards, Soil Identification, Soil Analysis, Hazard Identification, Protective Systems, Trench Shoring, and MSHA 16 hour training above surface.

Dennis Chilcote, a non-disadvantaged individual, RCI's Superintendent and Operator has over 17 years of experience in this line of business. According to his résumé, prior to working at RCI in 2010, from 1996 to 2010, he worked for Downey Excavation, Inc. and held the following positions: Operator, Superintendent, Project Manager and Executive Vice President. His responsibilities included general field Superintendent; operational safety procedures; tracking and maintaining project progress; crew training; and coordination.

Eric Edwards, a non-disadvantaged individual, has over 17 years of experience in this field. He has worked for the firm since 2003, as a Supervisor responsible for project scheduling, subcontractor scheduling; estimating; review and revision of work tickets for processing; ordering parts needed to perform work required; and reviewing employee timecards for payroll processing. From and 1996 to 1998, he worked for Beavers Construction as a Mechanic responsible for Fleet Maintenance. From 1998 to 2003, he worked for Sickles Construction as an Operator/Supervisor responsible for site management and maintenance of equipment.

Furthermore, Mr. Rundle, and these non-disadvantaged individuals are the persons relied upon to perform the critical activities of the firm such as field/production supervision. It is important to note that, without Mr. Rundle's and the other non-disadvantaged individual's expertise and knowledge, it is doubtful that you, the socially and economically disadvantaged owner, would be able to exercise control of the firm without their input on substantive areas of the firm's operations. While you, the socially and economically disadvantaged owner, may have contributed to the success of RCI, your résumé does not substantiate that you have the knowledge, background, technical ability or expertise directly related to the construction industry, the firm's primary line of business, beyond the administrative functions. Moreover, it appears that these non-disadvantaged individuals perform all the labor and key functions of the firm while you perform all the administrative functions.

The record clearly reveals that non-disadvantaged individuals play a major role in the operation of RCI to the point where it is impossible to distinguish whether or not you, the socially and economically disadvantaged owner, actually control the firm. You have failed to meet your burden of proof that you, the socially and economically disadvantaged owner, meet the requirements the Department's Regulation regarding control.

It appears that you have delegated the firm's key activities to Lance Rundle and the other non-disadvantaged individuals for field operations supervision. It appears that their expertise is heavily relied upon to control the management, policy, and day-to-day operations of the firm. This is contrary to the requirements of §26.71(e) and (f), which state:

Individuals who are not socially and economically disadvantaged 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(e)

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy. §26.71(f)

According to your response to 49 CFR 26.71(e), (f), and (g), written in ink on CDOT's denial letter, you state (e): "Becky started the company with Lance & has been primarily involved since it conception. (f): Becky is the main decision maker for the corporation. Nothing is approved without her input & decision. (g) Becky has also ran equipment for RCI for 19 years (g)"

As indicated above, Lance Rundle and other non-disadvantaged individuals are clearly relied upon for their knowledge and technical expertise. In contrast to your administrative functions at the firm, Mr. Rundle's role at RCI is such that he possesses the power to direct the management of the firm's work. The record evidence substantiates that his knowledge and experience in this business and his role in the firm's technical operations demonstrate that he is disproportionately responsible for the day-to-day operations of the firm.

The record evidence also supports a conclusion that RCI is a family run and controlled firm. The record reveals that Lance Rundle, the non-disadvantaged owner of the firm, exercises control over the day-to-day operations of the firm in at least equal measure to the socially and economically disadvantaged owner. As the Department indicated above, without Mr. Rundle's involvement, knowledge and expertise, the socially and economically disadvantaged owner would not be able to independently sustain and control the business. This is contrary to the requirements of the §26.71, which states:

§26.71(k)(1): A socially and economically 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 socially and economically 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.

§26.71(k)(2): If you cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

According to your response to 49 CFR 26.71(k), written in ink on CDOT's denial letter, you state, "Becky bids jobs, handles all financials & also supports customer relationships. She also handles all hiring & firing."

Substantial record evidence supports CDOT's determination that you do not control the firm as required by §26.71. RCI has, therefore, failed to meet its burden of proof in demonstrating that it meets the requirements of the DBE program pursuant to §26.61(b).

In summary, the information provided cumulatively supports a conclusion that RCI 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 CDOT's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence. This determination is administratively final.

Sincerely,

Sheryl G. Williams
Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights
Department of Transportation

cc: CDOT