February 27, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0055

Carrie Clevenger
President
Mrs. C, Inc.
[redacted]

Dear Mrs. Clevenger:

Mrs. C, Inc. (MCI) appeals the Virginia Department of Minority Business Enterprise (VDMBE) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. Part 26 (the Regulation). VDMBE denied MCI's application primarily on grounds that the firm failed to demonstrate that it satisfies the several control provisions of §26.71 specified in VDMBE's denial letter dated October 1, 2013.[1] We affirm VDMBE's ineligibility determination because substantial evidence supports it and the decision is not inconsistent with the substantive or procedural certification provisions of Part 26. See §26.89(f)(1) (Department affirms ineligibility determinations if supported by substantial

[1] Primarily §§26.71(b) and (k). Given our disposition on these two bases, we need not consider VDMBE's other control and ownership grounds. We appreciate your vigorous rebuttal of VDMBE's determination, but you make no argument that any of VDMBE's substantive conclusions made on the basis of the Regulation was in any way in error. You state no specific, reversible error. Accordingly, we cannot reverse VDMBE's decision, which the administrative record fully supports.

We understand that you consider yourself discriminated against, and we are concerned about the advice you attribute to VDMBE. If VDMBE officials told you that it is hard for a white woman to qualify, Appeal Letter at 1l, then they misled you if their meaning was that white women are subject to burdens that other disadvantaged owners are not. Under the Regulation, it is no harder and no easier for a white woman-owned firm to qualify than it is for firms owned by any other type of owner presumed to be socially and economically disadvantaged under §§26.5 and 26.67(a). The Regulation is entirely neutral regarding different classes of presumed disadvantaged owners. The Regulation requires certifiers to be similarly impartial and to apply the rules consistently to all applicant firms.

Proof of eligibility is entirely fact-based. The burden is on the firm to demonstrate that it satisfies the Regulation's requirements. Contrary to your allegation on appeal, it is your obligation, not VDMBE's, to structure your business so that it is eligible and to make a corresponding proffer to the certifier. VDMBE's function is to analyze the facts that you present and make an eligibility determination. A firm's failure to demonstrate eligibility—as occurred here—*requires* the certifier to deny the application. VDMBE, as it advised you, has no obligation to advise you how to re-arrange your affairs so as to become eligible. VDMBE, like the Department on appeal, is an arbiter not an advisor.

evidence and not inconsistent with certification provisions).

MCI has the burden of proving by a preponderance of the evidence that it is independent of non-DBE firms and that the disadvantaged owner, as distinct from the family as a whole, controls the firm. MCI did not carry its burden on either ground.

The record confirms the following to be the operative, undisputed facts. While we may not agree with each and every conclusion that VDMBE draws from them, we fully concur with the conclusions VDMBE draws under the independence and family business provisions, based on VDMBE's citations of specific factual support, under §26.86(a), in its denial letter and on our own analysis of the entire administrative record. We derive these facts from the information the firm provided VDMBE.

You formed MCI in June 2012 and applied for DBE certification in March 2013. MCI's business is bulk hauling. Your husband Luther and son Ronnie, by your own report, are immediate family-member, non-owners who are involved in the business in some capacity. Either of these non-disadvantaged persons can sign MCI checks for any purpose. Bank signature cards identify both individuals as being "of [MCI]." MCI owns no equipment for use in its bulk hauling business, holds no pertinent licenses, and has no employees.

Ronnie Clevenger owns a non-disadvantaged bulk hauling business called RC & Sons (RCS). RCS owns dump trucks and employs drivers. MCI states that it will lease RCS trucks pursuant to a lease agreement for the "cost of insurance & 10% of income." The lease agreement purports further to explain the arrangement in Appendix B thereto, but MCI provided VDMBE no such Appendix B. Instead, you explained (by phone) that the lease is essentially one-sided and at-will: MCI owes no lease payment whatever if it does not use RCS trucks. RCS pays for vehicle insurance and maintenance. There is no record of MCI ever having made a payment for using the trucks.

You further testified (on-site interview) that two RCS employees, "John and Steve," would operate the vehicles. The bulk-carrier operating permit you submitted to VDMBE is in the name RCS. Your husband and son have commercial driver's licenses (as presumably must John and Steve), but according to you, they do not work for MCI. You stated that Ronnie Clevenger (again, an owner of RCS but not an employee of MCI) personnel (presumably also from RCS) involved in MCI's operations.

These facts are uncontroverted. They demonstrate that MCI depends on non-disadvantaged firm RCS for facilities, equipment, insurance, personnel/employees, and "other resources." They demonstrate a tightly intertwined relationship with a non-DBE firm such that it is objectively difficult to distinguish MCI's business from that of RCS. It is a fair conclusion, based upon these facts and the blood relationship between owners and apparent employees of both firms, that you intend for MCI simply to be the DBE alter-ego of RCS. Further, the terms of the lease with RCS, as you yourself represent them, appear to be unusually favorable to MCI and inconsistent with standard (arm's length) industry practice. (Again, it was the firm's burden to demonstrate otherwise.)

VDMBE concludes, based on these uncontroverted facts, that MCI would not be a viable business without the resources of RCS. Substantial evidence supports that conclusion, and we therefore affirm the denial under §26.71(b).

You and your family testified during the on-site interview, that the firm was founded by and compose of your "family." Your son Ronnie would supervise the firm's hauling activities, and, according to your husband Luther, anyone in the family (yourself, Ronnie, or Luther) has authority (whether independent or co-extensive or simply shared) to make and sign contracts in the name of the firm. VDMBE concluded, based on this information and that elaborated above, that MCI "is a family run firm, rather than being controlled by you, the sole disadvantaged individual involved." We find that substantial evidence supports VDMBE's conclusion under §26.71(k), and we affirm it.

CONCLUSION:

This appeal turns entirely on the firm's failure to meet its burden of proof with respect to §26.71(b) and (k). Failure to satisfy the requirements of either provision is a sufficient ground for denial and for affirmation of the denial on appeal. The Department affirms, as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification, VDMBE's determinations relating to both provisions. MCI, on this record, is ineligible for certification. The denial stands.

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

Sincerely,

Samuel F. Brooks
Acting Lead Specialist
External Civil Rights Programs Division

cc: VDMBE