

March 23, 2015

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No.: 14-0057

Debora A. Querin  
President  
Custom Repairs & Excavating, LLC  
[REDACTED]

Dear Ms. Querin:

Custom Repairs & Excavating, LLC (CRE) appeals the Ohio Department of Transportation's (ODOT) determination that CRE is ineligible for certification as a Disadvantaged Business Enterprise ("DBE") under criteria set forth at 49 CFR Part 26 (the Regulation). Having carefully reviewed the material that you and ODOT provided, we conclude that substantial evidence supports ODOT's determination, which we affirm under Regulation §26.89(f)(1).

CRE, according to the Uniform Certification Application filed June 18, 2013, is in the hauling, excavating, and materials supply businesses. UCA, sec. 3, p. 2. Incidental to this business is the repair and maintenance of the firm's equipment, which includes a dump truck, a backhoe, and a trailer. Id.; see also p. 4 (equipment also includes wire welder, car, and pick-up truck). The primarily lines of business are trucking (hauling asphalt, concrete, seed, and mulch) and selling materials (such as pipe, manholes, castings, and stone aggregates). The firm also has a shop in which it repairs vehicles and fabricates clips. On-site Review Report (ORR) (October 22, 2013) at 2.

You and your husband Donald Querin formed CRE in January 2011. According to Exhibit A to the members' Operating Agreement, you contributed approximately \$[REDACTED] in exchange for a 51% ownership interest, and Donald Querin contributed no capital in exchange for a 49% ownership interest. See also UCA, sec. 2, p. 4. You advised ODOT you and Mr. Querin "decided to start a business to get a tax write-off [and] purchased a dump truck and [your] son drove for [you]." ORR at 2. You were aware at the time you formed CRE of the benefits of DBE certification, and you sought DBE and other certifications to increase business. Id.

There is no indication anywhere in the administrative record that you, the disadvantaged owner, participate directly in any of the hauling, repair, or fabrication activities, and little to no evidence that you sell construction materials. These are the business activities for which the firm requests

certification as a Disadvantaged Business Enterprise. Your non-disadvantaged son, who drives the firm's dump truck, is CRE's only full-time employee. ORR at 4-5. You state in the ORR that you and your husband have long held full-time jobs outside of CRE and that these full-time jobs continue. You are the Assistant Controller of Underground Utilities, Inc., where you have performed bookkeeping functions for nearly 30 years. ORR at 3. You work at Underground Utilities from 7am to 3pm on week days. Mr. Querin has worked for over 25 years as a laborer and mechanic at R. A. Bores Excavating, Inc. Id. Further, you also work part-time outside CRE at Attica Raceway Park, for 8 to 10 hours per week during the March-September "season" and an hour or so a week "off-season" (October through February). ORR at 4. You further state, ORR at 5, that CRE is a full-time business that operates (hauls and sells) from 7am to 5:30pm weekdays and that its shop operates (presumably for repairs and fabrication) on weekends. ORR at 5.

ODOT denied CRE's application on grounds that you failed to demonstrate that your full-time and part-time employment outside the applicant firm do not conflict with the management of CRE or prevent you from devoting sufficient time and attention to the firm's affairs to control its activities in the work areas in which it seeks to be certified. Uncontroverted evidence in the record demonstrates that you have full-time and part-time employment during the hours in which CRE operates. As ODOT observes in its denial letter of November 8, 2013 (p.2), "Trucking for the construction industry is primarily conducted during the daytime hours. Due to her full-time employment with Underground Utilities, Debora would not be able to manage or control a company during typical operating hours of the construction industry."

Under §26.61(b), the applicant firm bears the burden of proof regarding each of the Regulation's requirements. Its failure to carry this burden with respect to any eligibility requirement, unfortunately, renders the firm ineligible. Section 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. *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." (Emphasis added.)

The uncontroverted evidence, which you provided, that CRE is a full-time business in which you work at most part-time. The rule states explicitly that part-time work in a full-time does not constitute control for purposes of the Regulation.

We are sorry that the operation of the rule appears to outrage you, but we must apply the requirement as written. Please be assured that ODOT's determination, and ours on appeal, is based wholly on the (apparently objective) information the firm provided, which in this case composes the entire administrative record. See generally §§26.71(a), 26.83(a)-(c), 26.89(e) and (f)(1). You contend in the appeal letter dated December 22, 2013, that:

"It is very apparent that the denial is solely based on the fact that I am full time employed in other business and, therefore, in the subjective opinion of [ODOT] cannot or do not have the

ability to devote sufficient time and attention to the affairs of the firm to control its activities. I find this opinion to be ludicrous since the firm consists of one (1) dump truck whose driver's [that is, your non-disadvantaged son's] direction for the oncoming work day is set the night before with any daily changes communicated to me directly at my place of full time employment for evaluation and further direction setting<sup>[1]</sup>....I find this denial, based on this subjective opinion of my inability to multitask, to be demeaning at best and discriminatory at worst since the Agency assigned to foster and nurture disadvantaged firms is limiting my upward mobility based on the Agency's opinion of what I can or cannot manage."

There is no intent to cast aspersions or to demean. The firm had the burden of proving compliance with §26.71(j) and failed to meet it. The firm's failure to introduce pertinent evidence at the time of the application does not amount to bias or malice on ODOT's part. Further, we have considered the contentions in your appeal letter, and we concur that the firm did not demonstrate, more likely than not, that it satisfies the outside employment rule.

You concede in the application and in the appeal letter that you work at most part time in the firm that seeks DBE certification. You further concede that non-disadvantaged persons perform the substance of the work (principally hauling but also fabrication, selling, and related equipment repair and maintenance) which the firm would be certified to perform. Substantial evidence supports ODOT's ineligibility determination, which is consistent with the substantive and procedural certification provisions of Part 26. Accordingly, we affirm under §26.89(f)(1).

This decision is administratively final and not subject to petitions for review. We appreciate your interest in the DBE program. The firm may reapply for DBE certification at any time.

Sincerely,

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

cc: ODOT

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<sup>1</sup> There is no such contention in the administrative record upon which ODOT based its decision. This information appears to be newly raised at the time of the appeal. ODOT, by the terms of §26.73(b), could not have considered it. Nor must we, under §§26.89(e) and (f)(6). However, for the reasons explained, the appeal arguments do not constitute grounds for reversal under §26.89(c).