

July 31, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 14-0061

Pat Wise
Deputy Director
Montana Department of Transportation
2701 Prospect Avenue
P.O. Box 201001
Helena, MT 59620-1001

RE: R. E. Page Construction, LLC Appeal of DBE Decertification

Dear Ms. Wise:

This matter is before the United States Department of Transportation, Departmental Office of Civil Rights (“Department”), on appeal from a determination made by the Montana Department of Transportation (“MDT”) to decertify R. E. Page Construction, LLC (“Company”) as a Disadvantaged Business Enterprise (“DBE”). Following an informal administrative hearing in accordance with 49 C.F.R. § 26.87(d), MDT determined that pursuant to 49 C.F.R. § 26.87(f), the Company experienced changed circumstances after certification that rendered it unable to meet the eligibility requirements for participation in the DBE program. Based on a preponderance of the evidence presented, the MDT determined that Mr. R. E. Page, the socially and economically disadvantaged owner of the Company, did not control the company between May 2012 and December 2012.

The Department has carefully reviewed the entire administrative record and concludes that MDT’s decision to decertify the Company pursuant to 49 C.F.R. §§ 26.87(f)(1) and (3)¹ because Mr. Page did not control the Company during the period of May 2012 through December 2012 conflicts with the substantive requirements of 49 C.F.R. § 26.73(b)(1) and is not supported by substantial evidence in the record.² Consequently, MDT’s decision is reversed as explained more fully below.

¹ Section 26.87(f) sets forth the grounds for removing a firm’s certification eligibility. Paragraph (1) provides for removal when there are changes in the firm’s circumstances since the certification that render the firm unable to meet the eligibility standards, and paragraph (3) authorizes removal based on information relevant to eligibility that has been concealed or misrepresented by the firm.

² Section 26.73(b)(1) provides that “[the certifying agency] must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack

BACKGROUND

The Company is a limited liability company primarily engaged in the business of construction, including construction of highway fences. According to the Uniform Certification Application for DBE certification filed in 2010, Mr. R. Page, the owner, attested that he is a Native American, socially and economically disadvantaged individual, who is 100% owner of the Company and exercises sole management and control of the Company. MDT granted DBE certification in May 2011. In accordance with 49 C.F.R. § 26.83(j), Mr. Page submitted annual “no change” affidavits to MDT on July 20, 2012 and April 26, 2013 respectively. With each affidavit, Mr. Page reaffirmed that no changes to the business had occurred and that he remained 100% owner and continued to exercise control of the Company. In addition, he affirmed that he would notify MDT in writing within 30 days of any changes that would impact the firm’s eligibility to remain in the MDT DBE program.

In May 2013, MDT initiated an on-site DBE compliance investigation following a complaint from Wickens Construction Incorporated (Wickens). As a result of the investigation, MDT provided written notice to the Company on June 21, 2013, of its proposal to decertify it as a DBE. In the notice, Mr. Page was informed that MDT had determined the Company did not meet the eligibility requirements to be certified and participate in the MDT DBE Program because: 1) the initial certification was based on factually erroneous information and misrepresentations submitted by the Company; and 2) changes in the Company’s circumstances since certification render it unable to meet [control] eligibility standards.

On August 15, 2013, an informal hearing was conducted and the Company was provided an opportunity to respond to MDT’s proposal to remove its DBE certification. During the one-day hearing, MDT presented witnesses who testified that Mr. Page did not exercise control of the Company during the period May to December 2012; therefore, it was ordered that the Company be removed from the MDT DBE Program.

In partial contrast to the notice of intent, the decertification notice cited changed circumstances (Mr. Driessen’s assumption of control in 2012, as described more fully below) as the sole ground for decertification. MDT’s Conclusions of Law and Order do not specifically cite as decertification grounds either initial fraud or the firm’s failure to cooperate in not timely notifying MDT of relevant changes in ownership and/or control. Accordingly, those issues are not before the Department on appeal. See generally Order at 7 (“Given its findings concerning changed circumstances, the Hearings Officer need not address MDT’s argument that inaccuracies in the Company’s initial application provide a basis for decertification.”) (Emphasis added.)

The Company filed a timely appeal with the Department dated January 3, 2014.

of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.” In addition, MDT’s finding that after December 2012, there was “nothing” for Mr. Page to control because there was no longer any sub-contracted work being performed by the Company is inconsistent with the substantive provisions of the regulations and cannot stand.

Discussion

The only issue on appeal is whether MDT properly applied the regulations to the facts in determining whether or not Mr. Page exercised control of the Company. Under 49 C.F.R. § 26.71, in order to determine if the disadvantaged owner controls the firm, the certifying agency must consider a number of factors in the record viewed as a whole. Part 26 requires the disadvantaged owner of the firm to “possess the power to direct or cause the direction of the management and policies of the firm, and to make day-to-day as well as long-term decisions on matters of management, policy, and operations.” *See* 49 C.F.R. § 26.71(d). Additionally, a disadvantaged owner may delegate various management or daily operations to others; however, the certifier must be able to reasonably conclude that the disadvantaged owner actually exercises control of the firm’s operations, management and policy. *Id.* § 26.71(f).

Part 26 also provides that certification eligibility determinations made by the certifier and by the Department in its review of decisions on appeal are to be based on present (i.e., current, not past or future, existing or happening now) circumstances and on circumstances of the firm as they existed when the certifier made its decision. 49 C.F.R. §§ 26.73(b)(1) and 26.89(f)(6). All of the certification standards set forth in subpart D of part 26 are to be applied in determining whether a firm meets the eligibility requirements for certification. 49 C.F.R. § 26.61(a).

In this instance, following an investigation and subsequent informal hearing, MDT determined that the information and evidence presented indicated the Company did not meet the eligibility requirements for DBE certification. Specifically, MDT determined that Mr. Page did not exercise control because for a specified period of time (following an injury to Mr. Page), Mr. Jeff Driessen, a non-disadvantaged person, exercised day-to-day control over the Company and was in charge of the business’ operations. In addition, Mr. Page did not have access to Company funds because they were in a bank account controlled solely by Mr. Driessen.

In accordance with 49 C.F.R. § 26.71(a), MDT was required to review all the facts in the record as a whole in determining whether or not Mr. Page controlled the Company and to base its decision on present circumstances. 49 C.F.R. § 26.73(b)(1).

While 49 C.F.R. § 26.71(f) allows a DBE owner to delegate various management, policymaking, or daily operations of the firm to other participants within the firm, a recipient must be able to reasonably conclude that the socially and economically disadvantaged owner actually exercises control over the firm’s operations, management, and policy. In this instance, MDT conducted an investigation which resulted in the finding that Mr. Page failed to meet the above stated requirements. The administrative record supports MDT’s finding that from May 2012 through December 2012, the Company was under the control of Mr. Jeff Driessen, who is not a disadvantaged individual (*See* Administrative Record pages 48-50,84,92-93,104-105,128,143,147-152,166). Mr. Dreissen negotiated the Company’s only contract as a DBE, he was responsible for field supervision, exercised day-to-day control over the Company, and had exclusive control of the expenditure of Company funds. The MDT project manager and other MDT inspectors for the only project for which the Company was the subcontractor testified that Mr. Page only visited the work site twice and at no time was he observed supervising the operations of the Company’s fencing crew.

The record indicates that during this period Mr. Page was unable to access the Company's financial accounts and had limited involvement with field operations on the Company's only contract until Mr. Driessen's dismissal. Therefore, substantial evidence in the record supports MDT's conclusion that Mr. Page did not exercise the "control" required by 49 C.F.R. § 26.71(f) from May 2012 through December 2012.

Mr. Page subsequently asserted control of the Company by firing Mr. Driessen on December 21, 2012. Furthermore, Mr. Page failed to include the fact of Mr. Driessen's participation in his annual no change affidavit to MDT dated July 20, 2012, required by 49 C.F.R. § 26.83(j).³ (*See* Administrative Record page 248).

The Company counters that pursuant to 49 C.F.R. § 26.73(b)(1), Mr. Driessen's participation in the firm is irrelevant to the issue of control because he was not an employee of the Company at the time of MDT's investigation (May 2013) or when MDT made its determination to decertify the Company on October 21, 2013. The Company further argues that pursuant to 49 C.F.R. § 26.71(b), since Mr. Page, with his wife's assistance, was in control of the business after December 2012 by assuming management responsibilities, the Company should not be decertified.

The Administrative Record supports the Company's assertion that following Mr. Driessen's dismissal, Mr. Page controlled the Company's financial decisions and management operations. The record indicates that Mr. Page submitted estimates and bids on other contracts and made personnel decisions on behalf of the Company. Thus, the determination made by MDT that the Company did not meet the certification eligibility standards at the time of MDT's decision to decertify the Company is unsupported by substantial evidence in the record and inconsistent with the substantive provisions of 49 C.F.R. § 26.73(b). The regulations recognize that a firm's circumstances may change in ways that affect the firm's eligibility. It also recognizes that deficiencies that affect one's eligibility may be corrected.⁴

³ Section 26.83(j) states: "If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been *no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements* of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns). If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c)."

⁴ We note again that MDT did not cite failure to cooperate as a ground for decertification. That ground might be one which the Department could have affirmed. *See generally* §§26.73(c), 26.109(c). The Department on appeal is limited to reviewing the grounds that MDT cited for its decertification. *See* §§26.86(a); 26.87(f) and (g); and 26.89(f)(5).

We reverse MDT's decertification of R. E. Page Construction, LLC for the reasons set forth above. We direct MDT to certify the Company upon receipt of this decision and to add the firm to the Montana Unified Certification directory of DBE firms.

This decision is administratively final.

Sincerely,

Samuel F. Brooks,
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: Logan L. Baker, Esq., Browning, Kaleczye, Berry and Hoven P.C.