

March 6, 2015

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No.: 14-0069

Pamela Murphy  
President  
Landmass Hauling, LLC  
P.O. Box 1113  
Sykesville, MD 21784

Dear Ms. Murphy:

Landmass Hauling, LLC (LH) appeals the Maryland Department of Transportation's (MDOT) denial determination that LH 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 MDOT provided, we conclude that substantial evidence supports MDOT's determination, which we affirm under Regulation §26.89(f)(1).

Section 26.73(b) requires the certifier to base its eligibility determination on the firm's "present circumstances," those in existence at the time of the certification decision. On appeal, the Department similarly bases its decision on the status and circumstances of the firm as of the date of the decision being appealed. Section 26.89(f)(6). The date of MDOT's denial decision is December 20, 2013.

MDOT denied LH's application in part on grounds that you had full-time (and part-time) employment outside the applicant firm, which outside responsibilities either conflicted with the management of the LH or prevented you from devoting sufficient time and attention to the affairs of LH to control its activities. Substantial evidence in the record demonstrates that you had a full-time job and a part-time job which required your attention during at least some of the hours of LH's operation. It was LH's burden as the applicant to demonstrate that there was no conflict.

You concede in the firm's appeal letter of January 22, 2014, that there was indeed a conflict but counter that:

"As of January 16, 2014, I no longer work for Benchmark Management, Inc. which was my full time employment. *I now devote* a majority of my time working for [LH]. I spend my day doing

the daily paperwork required along with accounts payable, receivable, payroll and taxes.”  
(Emphasis added.)

A post-decision change in facts does not constitute error under §26.89(c) and is not generally a reversal ground under §26.89(f). The remedy, if LH believes it has cured the eligibility deficiencies MDOT identified, is to reapply for certification, which LH may do at any time.

Under §26.61(b), the 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. LH failed to demonstrate that it met the requirements of §26.71(j). The Regulation therefore required MDOT to conclude that the firm is ineligible and requires the Department to affirm the denial of DBE certification.

In light of this disposition, the Department need not and does not reach MDOT’s other §26.86(a) grounds for concluding that LH is ineligible.

This decision is administratively final and not subject to petitions for review. We appreciate your interest in the DBE program.

Sincerely,

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

cc: MDOT