

July 16, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 14-0085

Ms. Carolyn Bell
DBE Certification Manager
Mississippi Department of Transportation
P.O. Box 1850
Jackson, MS 39215-1850

Dear Ms. Bell:

This is in reference to Powers Hill Design's (PHD) appeal of the Mississippi Department of Transportation's ("MDOT") December 5, 2013, denial of the firm's request for certification as a Disadvantaged Business Enterprise ("DBE") under criteria set forth in the DBE Program Regulation, 49 CFR Part 26.

Per our phone conversation via telephone on July 9, 2015, We remand the file to MDOT because prior to seeking DBE certification in Mississippi, PHD was certified as a DBE in Tennessee, thereby requiring MDOT to comply with the substantive and procedural requirements of the Regulation's interstate certification provision §26.85; and we remand this matter pursuant to §26.89(f)(4).

Additionally, MDOT based its certification denial on §26.86(a) of the Regulation. This provision requires recipients to specifically reference the record evidence that supports each reason for the denial. Implicit in this requirement is an obligation to accurately evaluate the record as a whole, identify areas of certification deficiency, and properly inform the firm of your findings.

MDOT denied PHD certification citing Section 26.71(h) which states: "If a state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the required license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged individuals actually control the firm."

You state in the denial letter: “Mississippi law requires that a firm have a professional engineer’s license to operate an engineering firm within the state, and the regulations have been consistently interpreted and applied to require that the owner of the firm must be the individual in possession of that license.”

SEC. 73 13-43 of the Mississippi Code states:

As of January 1, 2005, no corporation, firm or partnership may engage in the practice of professional engineering in this state unless it has been issued a certificate of authority by the board. In order to qualify for a certificate of authority, a corporation, firm or partnership must have at least one (1) Mississippi-licensed professional engineer as a principal officer, partner or designated principal engineer of the firm who has management responsibility for such practice and who makes significant technical and/or contractual judgements on behalf of the firm which would affect the firm’s professional reputation and liability.

The record information reveals that Steven Hill, the non-disadvantaged owner, is the principal in PHD with the relevant technical experience and also holds the firm’s Professional Engineering license. It appears that the firm does meet the requirement to conduct business in the State of Mississippi. However, the mere absence of a license does not constitute control or the denial of certification.

The DBE program is governed by Federal Law. The licensure requirement may place disproportionate responsibility in the hands of the non-disadvantaged owner (e.g., he exercises control over engineering operations). The DBE program neither contemplates nor sanctions this degree of control by the non-disadvantaged owner. Section 26.71(e) states that non-disadvantaged individuals “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 operations of the firm.” It would appear that Nisha Powers, the socially and economically disadvantaged owner, could not secure the type of engineering work the firm pursues but for the credentials and licensure of the non-disadvantaged owner.

The Department also notes that the socially and economically disadvantaged owner has a Civil Engineering Degree and may possess the requisite knowledge, ability, and expertise to control the firm. MDOT’s denial letter alludes to the facts that might constitute evidence of the firm’s failure to satisfy the requirements of §26.71(e) and (g), but does not state these provisions as a reason for concluding that the firm is ineligible or otherwise analyze how these provisions might apply to the facts presented.

The record makes clear that MDOT chose not to exercise its discretion to certify PHD under §26.85(b). In choosing not to certify PHD under §26.85(b), MDOT’s only other option under the rule was to review PHD’s materials, as described in §26.85(c), and make a determination under §26.85(d). The Regulation requirements of §26.85(d)(3) and (4), requires certifiers to either certify the interstate firm or provide the firm with good cause notice that complies with the requirements of §§26.85(d)(4)(i). MDOT did not assess whether PHD provided sufficient information required by §26.85(c), but instead issued a denial letter that treated PHD’s

application as an initial application. MDOT's denial letter does not acknowledge the Tennessee certification, and the denial letter does not cite any "good cause" reasons under §26.85 upon which MDOT based its decision.

We request that MDOT comply with the substantive and procedural requirements of the Regulation's interstate certification provision §26.85; and we remand this matter pursuant to §26.89(f)(4).

This file is being closed in our records and the firm's owner Nisha Powers, has been notified of this action via a copy of this letter. Thank you for your continued cooperation.

Sincerely,

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

cc: Powers Hill Design