

March 19, 2015

Certified Mail
Return Receipt Requested

Reference No.: 14-0121

Ms. Sonya Wise, President
Anchor Transfer Service, Inc.


Tracy, CA 95377

Dear Ms. Wise:

Anchor Transfer Service, Inc. (ATS) appeals the California Department of Transportation, California Unified Certification Program (CUCP)'s April 18, 2014, determination that ATS is ineligible for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 C.F.R. Part 26 (the Regulation). We have carefully reviewed the parties' submissions, the underlying information, and the administrative record as a whole. We conclude that CUCP's decision is supported by substantial record evidence and not inconsistent with any substantive or procedural certification provision. We therefore affirm the denial of DBE certification under Regulation §26.89(f)(1).¹ **(The firm may reapply for DBE certification after the appropriate waiting period has past).**

CUCP denied the firm's certification application on grounds that the firm did not meet its burden of proof under §§26.61(b) and 26.69(b), (c), and (d). Under §26.61(b), the firm, not the certifying authority, has the burden of proving all aspects of eligibility for DBE certification. ATS' failure to prove that it meets any single requirement for certification renders the firm ineligible. We find, based on careful analysis of the entire administrative record, that the firm failed to prove by a preponderance of evidence that you as ATS' socially and economically disadvantaged owner satisfied the requirements of §26.69(b) and (c). That finding is sufficient for sustaining the denial.

Authority

The specific authority for affirming the certification denial includes the following:

¹ This provision provides that "The Department affirms [the certifier's] decision unless it determines, based on the entire administrative record, that [the] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification").

§26.61(b): The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

§26.69(a): In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices

§26.69(b): To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. (1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding. (2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement. (3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

§26.69(c): (1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan. (2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

Discussion and Decision

Documents in the administrative record show that ATS was at one time a sole proprietorship owned solely by you. ATS incorporated in January 2008, and per the uniform certification application (UCA) you submitted to CUCP in January 2014, you hold 51% shares and your non-disadvantaged husband, Mr. Jim F. Wise, owns the remaining shares. The firm's federal tax returns for 2012, specifically the K-1 form, states Mr. Wise is the sole shareholder holding 100% of the stock. According to the stock transfer ledger, you and Mr. Wise each owned 10,000 shares until March 20, 2014 when Mr. Wise assigned you 5,000 shares.

We agree with CUCP's conclusion that ATS did not meet the requirements of §26.69(b) by the preponderance of the evidence standard.² You indicated in your May 31, 2014, appeal to the Department that your ownership percentage has been corrected. However, at the time of CUCP's denial decision, ATS was owned equally by you and your non-disadvantaged spouse, and you

² The higher burden of proof required by §26.69(h) also applies in this case; however, CUCP did not address its requirements in this matter as you did not meet the preponderance of evidence standard.

have not demonstrated ownership of at least 51% of the firm, which is a requirement under §26.69(b).

Section 26.69(c), requires that a DBE firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital to acquire their ownership interests, be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The evidence in the record leaves us unconvinced that you made any contribution of capital to acquire the shares you received from Mr. Wise. The record contains no documentary evidence of this transaction other than the notation on the stock certificate of his receipt of monies. For certification purposes this is a pro forma arrangement and contrary to §26.69(c) requirements. In summary, we affirm CUCP's certification denial decision

Conclusion

The evidence supports conclusions that ATS did not meet the eligibility requirements for the DBE program and that CUCP's decision based on ownership grounds cited above is proper and not inconsistent with the substantive or procedural provisions of Part 26. We affirm. This decision is administratively final and not subject to petitions for review.

Sincerely,

Marc D. Pentino, Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: CUCP