

May 3, 2015

Reference Number: 16-0002

Ms. Ann Butler
The Purple Orchid Group
REDACTED
Cleveland, Ohio 44135

Dear Ms. Butler:

The Purple Orchid Group (Purple Orchid) appeals the Ohio Uniform Certification Program's (OUCP's) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After reviewing the full administrative record, we conclude that substantial evidence supports OUCP's determination. We affirm the ineligibility determination under §26.89(f)(1).

In the Denial Letter dated July 23, 2015, OUCP cites the firm's failure to meet the requirements of §26.71(j) relating to control. We affirm on the basis of §26.71(j). *See generally* §26.61(b).

Applicable Regulation Provisions

§26.61(b) provides:

"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."

§26.71(j) provides:

"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."

§26.89(a)(1) provides:

“If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms, you may make an administrative appeal to the Department.”

§26.89(f)(1) provides:

“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.”

§26.89(e) provides:

“The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.”

§26.89(f)(6) provides:

“The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

Purple Orchid specializes in carpentry, trucking (hauling), labor, and minor concrete demolition (On-Site Review Report (OSRR) dated May 7, 2015 at 2). The firm was established in 2010. Id. You are the President and own 100% of the firm (Uniform Certification Application (UCA) dated March 11, 2015 at 2 and 4).

Your duties and responsibilities for Purple Orchid include making financial decisions and transactions, contract negotiation and execution, field production and operations, signing company checks for any purpose, estimating and bidding, hiring and firing personnel management, office management, and purchasing major equipment. Id. at 3.

When you are not available at Purple Orchid, Project Manager Rick Weinmann performs your duties and responsibilities (OSRR at 5). You also permanently delegated the duty of estimating. Id. The firm employs 2 full-time employees and 3 or 4 part-time employees. Id.

In in the Appeal Letter, you claim that you are heavily involved in the bidding process. You state:

“I am fully devoted to every aspect of my company... I am a major part of the bidding process, attend bid openings, I am on the jobsite every day, and process the payment applications.”¹

The operating hours for the Purple Orchid are from 6:00 am to 4:00 pm, Monday through Sunday. Id. at 6. The UCA indicates that in addition to working for Purple Orchid, you work for Veterans Contracting as a Superintendent overseeing and supervising projects. The OSRR indicates that you engage in part-time employment for 20 hours a week at Veterans Contracting. Id. at 3. An e-mail correspondence dated July 13, 2014 in the Record shows otherwise:

“As you [Marleise Wicker]² can see, I still am working almost 40 hours with Veterans Contracting per week, but what you don’t see is that I spend at least 40 hours a week working on my own company as well.”

Differing from the e-mail correspondence with Marleise Wicker, the OSRR specifies that you devote up to 60 hours a week working for Purple Orchid (OSRR at 4).

The Record shows your W2 tax documents for Veterans Contracting and reveals that you earned REDACTED in 2014. According to the firm’s W2 tax documents, you earned REDACTED from Purple Orchid. Your employment for Veterans Contracting is not listed in your résumé.

In the e-mail correspondence to Marleise Wicker dated July 13, 2015, you further state,

“I, Ann Butler, have not drawn much money out of Purple Orchid in the past two years because I’m trying to grow my company. The more money I keep in the company’s account gives Purple Orchid the opportunity to receive a larger bonding capacity, which I can then use to enable Purple Orchid to bid with greater frequency and also allow me to bid larger projects.”³

You state on Appeal, “I would also like to add that I have a daughter that requires REDACTED We do have some nursing care which is supplemented by the state and they are a great help to me for my REDACTEDneeds, but sometimes, I personally need to leave work and help cover for the nurses. This is one of the reasons that I have my own business, to afford myself some flexibility in my daily routine, so I can better serve my REDACTED and family’s needs.” You state that your other employer is flexible with your schedule, and that that you average at least 20 to 40 hours a week working for Veterans Contracting. Id.

¹ “The Department’s decision is based on the status and circumstances of the firm as of the date of the decision being appealed.” See §26.89(f)(6). We therefore do not consider these facts in rendering our decision.

² The e-mail correspondence is between Ann Butler and Marleise Wicker, a Business Development Specialist from the Greater Cleveland Regional Transit Authority.

³ We do not consider these facts in rendering our final decision. See §26.89(f)(6).

Decision and Discussion

Standard of Review

Under the Regulation, a firm that is denied DBE certification may make an administrative appeal to the Department. 49 C.F.R. §26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is solely based on a review of the administrative record as supplemented by the appeal. *Id.* See §26.89(e). The Department will, therefore, affirm the recipient's decision unless it determines, based upon its review of the entire administrative record, that the decision was “unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [the Regulations] concerning certification.” *Id.* §26.89(f)(1).

Burden of Proof

In order to become certified under the DBE program, an applicant firm has the burden of demonstrating to the certifying agency, by a preponderance of the evidence, that it meets the required elements of “group membership or individual disadvantage, business size, ownership, and control.” *Id.* §26.61(b).

Outside Employment

Regulation §26.71(j), requires that you, the disadvantaged owner must devote sufficient time and attention to the affairs of the firm in order to control its activities (“...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”). It appears that your outside employment with Veterans Contracting interferes with your ability to manage Purple Orchid. Substantial record evidence supports OUCP’s conclusion that you do not control Purple Orchid within the meaning of the Department’s Regulation.

You engage in outside employment that interferes with your control of Purple Orchid. The firm’s hours of operation are from 6:00 am to 4:00 pm, 7 days a week. The OSRR indicates that you spend 20 hours working for Veterans Contracting a week, but in contrast, you state on Appeal that you spend up to 40 hours a week. You then state that you work from 4:00 pm until midnight for Purple Orchid.

However, you admit to working as many as 40 hours per week for Veterans Contracting, which would interfere with your daily hours at Purple Orchid.⁴ The firm’s day-time services of carpentry, trucking or hauling, labor and minor concrete demolition conflict with your day-time supervisory work for Veterans Contracting. The Record shows that when you are not present at Purple Orchid, which appears to be most of Purple Orchid’s normal business hours, a Project Manager takes over your duties. These aforementioned facts indicate that you cannot devote full-time attention to the firm.

⁴ The Veterans Contracting 2014 W2 indicates that you made about REDACTED for the firm, which suggests full-time or very nearly full-time employment. In contrast, the W2 for Purple Orchid shows that you earned REDACTED in 2014.

Substantial evidence supports OUCP's determination that you do not devote sufficient time and attention to the affairs of Purple Orchid in order to be considered as controlling its activities within the meaning of §26.71(j). You engage in outside employment working for Veterans Contracting which conflicts with Purple Orchid's operating hours. *See generally* 14-0158 Hullin, LLC (Sept. 14, 2015)⁵ and 16-0001 Nationwide Flagging Corporation (March 29, 2016)⁶. We affirm OUCP's determination that you have not demonstrated that you control the firm within the meaning of §26.71(j).

Conclusion

We affirm OUCP's ineligibility determination on the basis of §26.71(j) as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

This determination is administratively final and is not subject to petitions for reconsideration.

Sincerely,

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

cc: OUCP

⁵ "Hullin is, however, a full-time [DBE] firm, open and operating more than 50 hours per week, Monday through Saturday. Even if [the DBE owner,] Ms. Workman commits over 40 hours per week to Hullin's affairs, the Regulations provide that a '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.'" *See Hullin* at 4.

⁶ In *Nationwide*, "The crux of the matter is that you [DBE owner] concede that you have full-time outside employment, and the weight of the evidence is that your work for NFC [DBE firm] is part-time."