

April 27, 2016

Reference Number: 16-0005

Ms. Candice Dollar
Robbie's AC and Heat LLC
REDACTED
Bay St. Louis, Mississippi 39520

Dear Ms. Dollar:

Robbie's AC and Heat, LLC (Robbie's) appeals the Mississippi Department of Transportation's (MDOT'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 (Record), we conclude that substantial evidence supports MDOT's determination. We affirm the ineligibility determination under §26.89(f)(1).

In its Denial Letter dated September 18, 2015, MDOT cites the firm's failure to meet the requirements of §§26.69(c) and (f) relating ownership¹; and §§26.71(c), (g), and (h) relating to control. We affirm on grounds of §§26.71(c) and (g). See §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."

§26.69(c) provides in pertinent part:

"(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

¹ In light of our disposition, we need not opine on ownership grounds.

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.”

§26.69(f) provides:

“The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.”

§26.71(c) provides:

“A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in §26.69(j)(2).”

§26.71(g) provides:

“The socially and economically *disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations.* The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or

key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.” (Emphasis added.)

§26.71(h) provides:

“If 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 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 owners actually control the firm.”

§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(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

Robbie’s performs commercial installation, maintenance, and repair for HVAC, refrigeration, heating, and electrical wiring (Uniform Certification Application (UCA) dated June 25, 2015 at 4). You are the 51% owner and Manager of the firm. Id. at 7. The nondisadvantaged 49% owner and Manager of the firm is your husband, Robert Bourgeois. Id. at 8. The On-Site Review Report (OSRR) dated September 9, 2015, indicates that you are the “Office Manager” and that your husband is the “Project Manager.”

The UCA indicates that your overall function for the firm is “administration” while Robert Bourgeois’s function is “job fulfillment.” It further indicates that you are not exclusively in charge of all of the firm’s duties and responsibilities. Id. at 9. You share the following duties

and responsibilities with Robert Bourgeois: setting policy for the direction of the company; handling major purchases; attending bid openings; hiring and firing management staff and field crew; designating profits and spending investment; and obligating business by credit or contract. Id. You are exclusively in charge of marketing and sales; office management; and signing business checks. Id.

With regard to estimating and bidding, you are seldom involved while your husband frequently handles this duty and responsibility. However, the OSRR indicates that your husband is solely in charge of estimating and bidding. Robert Bourgeois is also strictly in charge of supervising field operations and always handles equipment purchases (UCA at 9).

You state in your Appeal Letter dated October 13, 2015, “Specifically, the [Denial] letter from MDOT states that, in my application, I stated that I, ‘never,’ supervise field operations. *This is true*, in the sense that my business partner and I have an understanding that I better serve this company from the office and he better serves this company from the job site.” (Emphasis added.)

Your résumé indicates your past and current positions: Campaign Consultant for Ron Williams for US Congress from January 2012 to December 2012; Office Manager for Larry Dollar Construction from January 2013 to March 2015; and Owner for Robbie's AC and Heat, LLC since March 2015. It further indicates, “Through education and professional experience, the candidate [you have] has gained the knowledge and skills to excel in any facet of a professional office. Five combined years of professional experience has allowed the candidate [you] to manage human resources, payroll, safety training, accounts receivable and payable, contract procurement, and employee training.” These duties and skills are not technical in nature, but mainly administrative and managerial.

You state in your Appeal Letter, “Commercial contracting involves human resources, accounts receivable, accounts payable, billing, estimating, contract development, contract analysis, contract negotiation, and other miscellaneous paperwork such as, account setups with suppliers, insurance applications, licensure applications, licensure testing, and much more. All of these fall under my realm of *administrative expertise*.” (Emphasis added.)

Your husband's résumé indicates the following positions to the present: Self-Employed Contractor from June 2003 to March 2015; Tech/Installer for Triple AAA Complete A/C Heat and Electric from February 2009 to July 2010; Area Tech: Coastal Region for Virginia Refrigeration, Inc. from July 2010 to July 2012; and Owner and Operator of Robbie's AC and Heat, LLC from March 2015 to the present.

The Record indicates that your husband holds an HVAC license (UCA at 11). His résumé supports that he is an EPA certified type IT tech and is a Licensed Contractor. He trouble shoots, conducts diagnostics, repairs, installs, sizes systems for residential and commercial structure, and sizes and lays out duct work to optimize efficiency and performance. The Record also indicates that your husband is the Registered Agent for the firm on the Mississippi Limited Liability Company Certificate Corporation.

Robert Bourgeois also possesses specialized systems knowledge regarding Package Units, Electrical Furnaces, Heat Pumps, Gas Furnaces, Walk in Coolers, Walk in Freezers, Ice Machines, DC Drive Motors, Industrial Air Compressors, and Designing and laying out circuits, breakers, disconnects, and lights. Id.

The Record does not indicate that you have experience or expertise in the field at hand. MDOT therefore did not consider this in their decision making process. However on Appeal, you claim to have relevant experience and expertise in the firm's service areas. You state:

"I have worked for various commercial construction companies since I was 14. I have performed every on-site job from hauling two by fours and other materials to nailing support beams in place and operating heavy equipment to execute the mandates of the contract under which I was working. My company agreement does state that I am the administrative expert but I feel that MDOT took this to mean I have no field experience and therefore, could not operate this business on my own. I very well could operate this business successfully on my own; however, it is easier to operate with the help of my business partner who has knowledge that is valuable to day to day operations."²

The Denial Letter indicates with regard to the formal and informal restrictions of the firm:

"The two members of the company include yourself and Robert Bourgeois... The operating agreement states, 'there must be at least 75% of the Members present at a meeting for any decisions to be binding. If the minimum numbers of Members are not present at the meeting, actions may still be taken by the present Members if prior written consent of the absent Members has been obtained.'"

The Limited Liability Agreement dated June 22, 2015, indicates that you and your husband are the only voting members for the firm. It further indicates the following (with emphasis added):

"Voting

13. Each Member of a voting membership class will have a *single equal vote* on any matter within the authority of that membership class.

...

Member Meetings

31. *There must be at least 75.00% of the Members* present at a meeting for any decisions to be binding. If the minimum number of Members are not present at the meeting, actions may still be taken by the present Members if prior written consent of the absent Members has been obtained."

Discussion and Decision

i. Formal or Informal Restrictions

² "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.

You do not control the firm as indicated by the voting structure in Robbie's Limited Liability Agreement, effectively requiring the nondisadvantaged owner's vote or acquiescence and thus limiting the disadvantaged owner's discretion. *See* §26.71(c) (The DBE firm must not be subject to any formal or informal restrictions limiting the discretion of the disadvantaged owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or *other formal or informal devices*...preventing the disadvantaged owner, *without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.*)

You cannot carry out any order of business without your husband's assent. The Limited Liability Agreement indicates that you and your husband are the only members of the firm and that there is only one membership class. Provision 13 indicates that each member has one equal vote. Accordingly, you and your husband must consistently vote the same way for any action to carry. If your husband were to vote differently from you, a deadlock would ensue, and you could not resolve it. Provision 31 further supports that 75% of the firm interests must be present at firm meetings. As a result, no firm decisions can be made without your husband's vote because you only represent 51% of the firm's interests.

The Limited Liability Agreement emphasizes that, "If the minimum numbers of Members are not present at the meeting, actions may still be taken by the present Members if prior written consent of the absent Members has been obtained." Regardless of whether your husband, the nondisadvantaged owner, is present at firm meetings, his vote is needed in order to make decisions for the firm, and he must vote the same way as you. The Limited Liability Agreement provisions directly conflict with §26.71(c), prohibiting such restrictions. We therefore affirm on grounds of §26.71(c).

ii. *Experience and Expertise*

MDOT concluded that you do not control the firm within the meaning of §26.71(g), which states that a disadvantaged owner must "have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations."

The record does not indicate that you have specialized experience directly related to the field at hand, commercial installation, maintenance, and repair for HVAC, refrigeration, heating, and electrical wiring. Your duties are not technical in nature as indicated by the UCA and the OSRR, nor is your past work experience as indicated by your résumé.

The description of your responsibilities and duties for the firm is not technical in nature and not directly related to performing commercial installation, maintenance, and repair for HVAC, refrigeration, heating, and electrical wiring. As cited above, this section requires a demonstration that the disadvantaged owner, "ha[s] an overall understanding of, and managerial *and technical competence and experience* directly related to, the type of business in which the firm is engaged and the firm's operations." Your expertise generally appears to be related to non-technical functions. The evidence is insufficient to demonstrate control under §26.71(g).

On Appeal, you state that your job duties and functions are classified as “administrative expertise.” You also admit on Appeal that you never supervise field operations. You state in the Appeal Letter, “Specifically, the letter from MDOT states that, in my application, I stated that I, ‘never,’ supervise field operations. This is true, in the sense that my business partner and I have an understanding that I better serve this company from the office and he better serves this company from the job site.” *See also* UCA at 9. Though you indicate on Appeal that you have some technical experience in the construction field, this information was submitted after the final decision. Further, you do not provide support in the Record with regard to your technical knowledge of the field at hand.

Your husband’s résumé indicates that the relevant technical expertise and experience related to the field at hand, within the meaning of the Regulation, rests with him, a nondisadvantaged individual. He supervises field operations and is the Project Manager and is mainly responsible for estimating and bidding. The Record indicates that he has an HVAC license, and that he is the Registered Agent for the firm.

We therefore affirm, as supported by substantial evidence, MDOT’s determination that you do not demonstrate “an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations,” as §26.71(g) requires.

Conclusion

We affirm MDOT’s ineligibility determination on the basis of §§26.71(c) and (g) 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: MDOT