

May 11, 2016

Reference Number: 16-0025

Debra Clark, Director
Office of Business & Workforce Diversity
Illinois Department of Transportation
2300 South Dirksen Parkway Room 319
Springfield, Illinois 62764

Dear Ms. Clark:

Gayton Enterprises, LLC (Gayton) appeals the Illinois Department of Transportation's (ILDOT'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).

In the Denial Letter dated August 5, 2015, ILDOT cites the following grounds for denying certification:

- 1) ILDOT determined that the disadvantaged owner does not own the majority interest of its firm, §26.69(b);
- 2) The disadvantaged owner's capital contribution is not commensurate with the stated ownership interest, §26.69(c);
- 3) The firm is not independent, §26.71(b); and
- 4) A nondisadvantaged member disproportionately controls the firm, §26.71(e).

We have carefully considered the full administrative record and determined that ILDOT's decision is unsupported by substantial evidence or inconsistent with the procedural and substantive provisions of this part concerning certification. ILDOT, further, failed to make available to the appellant the requested information and documents upon which ILDOT based its decision, contrary to the requirements of §26.86(a). We therefore reverse and direct ILDOT to certify Gayton without delay.

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(b) provides:

“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) 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 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.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.”

§26.71(b) provides:

“Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you *must scrutinize* relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You *must consider* whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You *must examine* the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you *must consider* the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.” (Emphasis added.)

§26.71(e) provides:

“Individuals who are not socially and economically disadvantaged or immediate family members 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 operation of the firm.”

§26.86(a) provides:

“When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.”

§26.89(f)(2) provides:

“If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.”

§26.89(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

Gayton specializes in mechanical and vacuum sweeping along with concrete production for large paving projects (On-Site Review Report (OSRR) dated February 3, 2015 at 1). The firm was established on November 7, 2014 (Uniform Certification Application (UCA) dated November

20, 2014 at 2). Gayton is a limited liability company of which Thomas A. Gayton is the President owning 51% of the firm. Id. at 3-4. A nondisadvantaged firm, Silent Four LLC (SF), owns 49%. Id. at 4. The UCA specifies that Mr. Gayton is of Hispanic descent. Id.

The Denial Letter indicates that Mr. Gayton “failed to substantiate an investment commensurate with your [his] majority interest.” He and SF each made a capital contribution in the amount of REDACTED to the firm. UCA at 7. The Operating Agreement (Exhibit B), signed by Mr. Gayton and SF’s manager, Robert G. Krug, in November 2014, confirms the initial capital contribution amounts.

On November 2, 2015, the Appeal Letter indicates that, with regard to real and substantial contributions, “ILDOT conveniently ignores the REDACTED [filing fee] that Mr. Gayton paid to the Illinois Secretary of State...” Mr. Gayton paid for the filing fee via credit card as evidenced by a copy of the state filing receipt, processed November 7, 2014.

The Appeal Letter further shows that ILDOT ignores “nearly REDACTED he [Mr. Gayton] loaned the Firm less than 60 days after starting the business.” Mr. Gayton loaned REDACTED to the firm according to an undated copy of an online bank statement in the Record. The wiring transfer of the loan occurred on December 31, 2014, according to Exhibit E in the Record, signed and dated February 2, 2015, by Mr. Gayton. He indicates that this loan amount is purportedly proof of initial capital investment.

After the firm received ILDOT’s Denial Letter, Gayton’s counsel requested a copy of the “evidence in the record that support[ed] each reason for denial” pursuant to §26.86(a), but was unsuccessful (Denial Letter at 2). “ILDOT failed to comply with the regulations governing the DBE program (or the Illinois Freedom of Information Act (FOIA), for that matter).” Id. The request for information (Exhibit I) from Becker & Poliakoff dated October 18, 2015, specifies:

“Ms. Barbara Brush
DOT Admin. Bldg., Room 300
Springfield, IL 62764 - 0002

Re: FOIA Request on Behalf of Thomas A. Gayton and Gayton Enterprises, LLC

Dear Ms. Brush:

This firm represents Thomas A. Gayton and Gayton Enterprises, LLC (collectively, the "Applicants"). The Applicants were denied Disadvantaged Business Enterprise ("DBE") certification by the Illinois Department of Transportation ("ILDOT"), Certification Section, Bureau of Small Business Enterprises on August 5, 2015.

In order to appeal ILDOT's decision we seek a copy of ILDOT's entire file pertaining to the Applicants. In particular, we seek 1) a copy of your onsite report, 2) copies of any and all correspondence to and from the Applicants (via email, letter or any other format), 3) any internal correspondence or memoranda concerning this file, and 4) any other documents responsive to this request. Be advised that the above request is made pursuant

to the and the rules governing the DBE Program, specifically, 49 CFR §26.89 (f) as well as the Illinois Freedom of Information Act, 5 ILCS 140.

It is my understanding that the Applicants' previous request for a copy of the pertinent documents was denied. I wish to make it clear that under the Code of Federal Regulations which governs the U.S. Department of Transportations' DBE program ILDOT is required to provide the documents..."

Discussion and Decision

Ownership

Substantial evidence indicates that Mr. Gayton's claimed 51% ownership in Gayton is real and substantial and that it is not pro forma. See §§26.69(b) and (c). The record demonstrates that Mr. Gayton contributed more capital than the nondisadvantaged owner, which substantiates his claimed majority ownership.

ILDOT took issue with capital contributions not being commensurate with stated ownership percentages. ILDOT took the position that equal capital contributions should mean 50/50 ownership. The operating agreement indicates that each owner contributed REDACTED cash to the firm. As a result, each owner would hold the same amount of interest in the firm or 50% of the firm. Mr. Gayton would therefore not be the majority owner because his share would be equal to that of the nondisadvantaged owner's due to the same amount of contribution. He would therefore not share in the "risks and profits commensurate with [his] ownership interest" and his interest would not be "real and substantial going beyond mere pro forma ownership," per §26.69(c). ILDOT's analysis considered only the capital contributions noted in the operating agreement.

However, Mr. Gayton also paid REDACTED for the State filing fee and loaned the firm REDACTED. While the loan is, by definition, not a capital contribution but, rather, debt, Gayton argues that these additional amounts should be considered capital contributions. The filing fee, which the record shows Mr. Gayton to have paid, is clearly an amount that Mr. Gayton contributed on the firm's behalf. It is an additional capital contribution, and it is substantiated. The filing fee plus the REDACTED cash referenced in the operating agreement yields a total capital contribution of REDACTED, which, on the facts before us, is real and substantial and commensurate with Mr. Gayton's claimed majority ownership of Gayton. See §26.69(c)(2). Thus, Mr. Gayton's claimed majority interest is real and substantial going beyond pro forma ownership pursuant to §§26.69(b) and (c). We reverse ILDOT's decision in accordance with §26.89(f)(2).

Control

With regard to control, ILDOT simply cites §§26.71(b) and (e) on page 3 of the Denial Letter, but provides no evidentiary support from the Record. *See* §26.86(a). With regard to independence, the letter recites §26.71(b)(1) (only) and then mentions facts ostensibly irrelevant to the provision.¹ We find no clear rationale under §26.71(b) for why Gayton is not viable, but for the participation of a nondisadvantaged person or firm. The Appeal Letter makes clear that the appellant, similarly, cannot make out a plausible denial rationale based on independence. ILDOT, contrary to the provision's "must" language, evidently failed to consider all of the independence factors found at §§26.71(b)(1), (2), (3), and (4).

Similarly, the certifier does not provide a clear rationale relating to disproportionate control. It simply refers to §26.71(e) on the last page of the Denial Letter. ILDOT provides no explicit "explanation" and fails to cite specific evidence in support of its would-be rationale.

ILDOT therefore fails to comply, in its denial letter, with the requirements of §26.86(a), with respect to independence and disproportionate control. We find that these control-related denial grounds are not supported by substantial evidence or are not consistent with the underlying certification provisions, substantive or procedural, and we reverse under §26.89(f)(2).

Request for Evidence

Section 26.86(a) indicates that, "All documents and other information on which the denial is based must be made available to the applicant, on request." After Gayton received the Denial Letter on August 5, 2015, the firm's attorney requested a copy of the "evidence in the record that support[ed] each reason for denial" on October 18, 2015. ILDOT did not submit the requested documents to the firm's attorney. The certifier's failure to provide the underlying information and documents is directly contrary to a substantive and procedural requirement in the Regulation.

¹ The Denial Letter recites facts about the firm's Purchase Agreement with SF. The Denial Letter focuses on terms of the Purchase Agreement such as established payment dates and the open-endedness of the document. *Id.* These facts and reasons have no apparent bearing on the viability of Gayton. ILDOT, in any event, does not appear to specify facts or rationales directly pertinent to the four independence factors it "must" address under §26.71(b)(1)-(4).

Conclusion

The Department reverses ILDOT's decision under §26.89(f)(2) as unsupported by substantial evidence or inconsistent with substantive or procedural provisions relating to certification and directs ILDOT immediately to certify Gayton as a DBE.

This decision is administratively final and not subject to petitions for reconsideration. Thank you for your continued cooperation.

Sincerely,

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

cc: Gayton