

August 19, 2016

Reference Number: 16-0030

Tonya Doyle-Bicy
Lansing Field Services Manager
Michigan Department of Transportation Business and Administrative Services Division
Office of Business Development
Post Office Box 30050
Lansing, MI 48909

Dear Ms. Doyle-Bicy:

Dougin Logistics, LLC (Dougin) appeals the Michigan Department of Transportation's (MichDOT) 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 examining the complete administrative record, we reverse, in part, and remand the matter to MichDOT to further supplement and clarify the record consistent with the instructions below. *See* §26.89(f)(2)¹ and §26.89(f)(4)².

MichDOT's August 19, 2015, denial letter concluded that Dougin was ineligible on three grounds: Capital Contribution, §26.69(e); Outside Employment, §26.71(j); and Independence, §26.71(b).

We reverse on the first ground relating to capital contribution because it is unsupported by substantial evidence. We acknowledge MichDOT's reasons for denial on the other two grounds and remand on these two issues because the record is unclear regarding matters likely to have a

¹ §26.89(f)(2) states:

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 [the certifier's] decision and directs you to certify the firm or remove its eligibility, as appropriate. [The certifier] must take the action directed by the Department's decision immediately upon receiving written notice of it.

² §26.89(f)(4) states:

If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to [the certifier] with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to [the certifier] for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

significant impact on the outcome and because, in the case of independence, MichDOT failed to analyze all relevant factors. *See* §26.71(b)(3) (exclusive/primary dealings with prime contractor); §26.71(b)(4) (standard industry practice). MichDOT's analysis of these elements is likely to have a significant impact on our final determination.

I. Background

Rachel Martin formed Dougin on February 27, 2013. Dougin's primary business activity is trucking, specifically the transportation of road repair materials. Ms. Martin is the firm's President and 100% owner. The firm's truck driver is the only other employee.³

Dougin filed its Uniform Certification Application (UCA) on December 14, 2014, and MichDOT conducted the firm's On-site Interview on June 23, 2015. MichDOT determined that Dougin is ineligible for DBE certification on August 19, 2015. The firm then submitted its appeal to the Department on November 16, 2015.

II. Authority

1. §26.69(e) states:

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.

2. §26.71(j) states:

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.

3. §26.71 (b) states:

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.

³ MichDOT does not question Ms. Martin's expertise. *See* §26.71(g). Ms. Martin has a Commercial Driver's License although she does not drive the firm's truck.

(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).

III. Discussion

Capital Contribution

The Regulation's ownership provision concerning a disadvantaged owner's initial capital contribution, §26.69(e), states:

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. . . . Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

In this instance, MichDOT takes issue with the sufficiency of evidence presented by Dougin to support Ms. Martin's capital contribution. We share some of MichDOT's concerns regarding the source of Ms. Martin's original capital contribution, which she used to purchase the firm's first truck. However, the record is uncontroverted that Ms. Martin sold the firm's first truck and obtained a **REDACTED** loan from her credit union to purchase the firm's new truck for **REDACTED**. MichDOT takes issue with Ms. Martin's inability to account for the **REDACTED** difference between the cost of the new truck and the amount of the loan. Ms. Martin contends that she made a **REDACTED** down payment on the truck and that she used **REDACTED** loan to pay for the outstanding balance on the truck.

Irrespective of the source of the **REDACTED** down payment, MichDOT does not dispute that the **REDACTED** loan is a real and substantial contribution that is commensurate with Ms. Martin's ownership interest. The record indicates that Ms. Martin is the firm's sole owner and

there is no evidence that another individual contributed capital to the firm. We remind MichDOT that the general burden of proof for an applicant firm is preponderance of the evidence. Here, we find that Ms. Martin’s documented loan from her credit union and her statements to the certifier that she provided the **REDACTED** down payment—which the loan terms appear to corroborate—are sufficient to meet the evidentiary burden.

Substantial evidence therefore supports that Dougin’s disadvantaged owner made a real and substantial capital contribution that is commensurate with her ownership interest in the firm. We reverse. *See* §26.89(f)(2).

Outside Employment

A firm seeking DBE certification has the burden of demonstrating, by the preponderance of evidence, that a disadvantaged owner does not have 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* §26.71(j)

In 1999, the Department added the following examples to the outside employment provision: “*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.” §26.71(j) (Emphasis added).⁴

Despite the clarification added to the rule, we cautioned in the 1999 preamble: “Outside employment is incompatible with eligibility *only when it interferes with the individual’s ability to control the DBE firm on a full-time basis.*” Preamble to the Final Rule Fed. Reg. 5096, 5120 (May 30, 1997). (Emphasis added).

Accordingly, the Department has held that in demonstrating control, the disadvantaged owner of a DBE firm must devote substantial time and attention (during working hours) to the day-to-day operations of the business. If an individual holds another job that requires a full-time commitment or is involved in other outside business activities that prevent him/her from devoting sufficient time and attention to the DBE firm to control its activities, then that individual generally does not control the DBE business within the meaning of §26.71(j).

⁴ The additional language was not intended as a bright-line addition to the existing outside employment rule. *See e.g.*, Notice of Proposed Rule Making Fed. Reg. 29548, 29570 (May 30, 1997), explaining that:

in response to issues that have been raised in certification appeals and in questions to DOT staff, the SNPRM adds a paragraph saying that to be viewed as controlling a firm, a disadvantaged owner cannot engage in outside employment or business interests that prevent the individual from devoting enough time and attention to his duties with the firm. For example, it is *unlikely* that an individual could control a full-time firm while he spent only part of his or her time working with the business.

(Emphasis added).

Nevertheless, “pertinent decisions in no way . . . obviate the recipient’s obligation, under §26.71(a)⁵, to consider all the facts in the record as a whole.” 14–0144, Northgate Land Development (September 14, 2015);⁶ *see also*, §26.71(a) (“[i]n determining whether socially and economically disadvantaged owners control a firm, [the certifier] must consider all the facts in the record, viewed as a whole.”)

The appropriate question in this case is whether the record as a whole contains substantial evidence to support MichDOT’s position that Ms. Martin’s outside employment conflicts with her ability to control Dougin during the firm’s hours of operation.

MichDOT’s denial rationale centered on Ms. Martin full-time outside employment.⁷ It failed, however, to scrutinize Ms. Martin’s outside employment within the context of the facts and circumstances concerning the firm’s operations. As Dougin argues on appeal:

Any and all duties and decisions other than driving are handled and completed myself. The answer of 20+ hours was referring to how many hours a week I spend creating and shipping out invoices, entering that information into my accounting software and inspecting my vehicle.

I own one tractor, if I did not have a full-time job I would not be able to pay my bills which was disclosed within the personal net worth statement to the Department of Transportation in detail during and prior to my on-site interview on June 12, 2015.

Dougin Appeal at 2.⁸

⁵§26.71(a) states, “in determining whether socially and economically disadvantaged owners control a firm, [the certifier] must consider all the facts in the record, viewed as a whole.”

⁶ In *Northgate*, the record supported the conclusion that a disadvantaged owner’s full-time employment did not interfere with the owner’s ability to control the DBE firm, in part because of evidence that the owner devoted sufficient time to the applicant firm’s affairs. We note, however, that this was a decertification and the certifier had the burden of proof.

⁷ The Denial letter concludes that:

Ms. Martin stated in her onsite questionnaire responses that Dougin Logistics, LLC operates 24 hours a day, 7 days a week. She also states that she works 20+ hours a week on Dougin Logistics, LLC operations. However, Ms. Martin works a full time 40 hours per week job for Piper Trucking, Inc. as a billing clerk. Therefore, it appears that she is unable to attend to any management or administration business as it relates to Dougin Logistics daily operations during the day. This requires her to depend on her employee to manage those issues and decisions.

Denial at 2.

⁸ Dougin’s statements are consistent with her statements during the on-site interview, in which she described her duties as including payroll billing, scheduling and dispatching, working on equipment if needed, and keeping track of the firm’s financial journal. Twenty hours a week may be sufficient to perform these duties.

There is evidence that Ms. Martin devotes sufficient time to the firm. She is the only person who “is authorized to commit to jobs, dispatch, all of which can be done to [sic] the 20 hours a week she designates to the firm.” Obtaining jobs and dispatching trucks, which is the work performed by Ms. Martin, is critical work performed by the firm. The responsibilities delegated by Ms. Martin to the firm’s trucker, such as driving, appear permissible under §26.71(f) (delegation).

Dougin raises persuasive arguments based on facts contained within the record. MichDOT should consider Dougin’s arguments and the relevant facts and circumstances contained within the record as a whole. If the certifier again determines that the firm is ineligible, it should fully explain its rationale in accordance with §26.86(a).⁹ We remand. *See* §26.89(f)(4).

Independence

The Regulation’s independence provision, Section §26.71(b), requires that “[o]nly 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.*” (Emphasis added). The provision’s subsections set forth a four-prong test for assessing a firm’s viability in relations to other firm(s). *See generally*, §§26.71(b)(1) - (b)(4). Overall, the essence of the independence provision is that an applicant firm’s must not depend on non-DBE firms to the extent that, if the relationship were severed, the applicant firm would not be viable.

The record reveals that MichDOT neglected to analyze §§26.71(b)(3) - (4) although Dougin’s appeal makes specific arguments that are relevant to these provision. We cannot make a principled determination on independence until MichDOT provides a full analysis of independence that includes these provisions. We remand. *See* §26.89(f)(4).

IV. Conclusion

We direct MichDOT, no later than November 15, 2016, to provide a new, complete and Regulatory-compliant decision on the issues pertaining to §26.71(b) and §26.71(j). The decision should address each of Dougin’s appellate arguments concerning outside employment and independence. MichDOT may conduct further proceedings and gather additional information to reach its conclusion if it chooses to do so.

⁹ The crux of §26.71(j) is that “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.*” (Emphasis added.) In this instance, MichDOT appears to use the example as a bright-line rule that always prevents a disadvantaged owner from having full-time outside employment. We read the rule somewhat more narrowly. A certifier must make a determination on control after considering the facts and circumstances of a particular case viewed as a whole.

Sincerely,

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

cc: Dougin