

July 27, 2016

Reference No. 16-0036

Attorney J. Martin Regan
Lewis Thomason, PC
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REDACTED
Memphis, TN 38103

RE: Interstate DBE Certification Denial of Powers Hill Design, LLC

Dear Attorney Regan:

Powers Hill Design, LLC (PHD) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the Mississippi Department of Transportation's (MDOT) September 17, 2015, determination that PHD is ineligible for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at the DBE Program Regulation, 49 C.F.R. Part 26.

The Department requested the administrative record and MDOT's response to the issues raised in the firm's appeal dated November 15, 2015. We received the administrative record on January 29, 2016, which the Department reviewed along with the appeal. After a careful review of the administrative record, we affirm MDOT's decision as supported by substantial evidence and consistent with substantive or procedural provisions relating to DBE certification. *See* Regulation at §26.89(f)(1) and (3).¹

Background

PHD, a civil engineering and consulting firm certified as a DBE in its home state of Tennessee, was denied certification by MDOT on December 5, 2013. The firm appealed to the Department, which remanded the matter to MDOT on July 16, 2015, so that it may comply with the

¹ §26.89(f)(1) states: "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

§26.89(f)(3) states: "The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case."

requirements of the Regulation's interstate certification provision found in §26.85, specifically to certify PHD or provide the firm with good cause notice that complies with the rule.

MDOT's September 17, 2015 decision addresses the same points raised previously by the agency in regard to the state's professional licensure requirements and how those requirements are not met by the firm's 51% owner, Nisha Powers (a socially and economically disadvantaged individual) and co-owner Steven Hill, a non-disadvantaged individual owning 49% of the firm. Ms. Powers' background is in civil engineering consulting and project management and Mr. Hill holds professional engineering licenses in Arkansas, Louisiana, Mississippi, and Tennessee. In its decision, MDOT cites the following portion of the Mississippi Code relating to the practice of engineering:

As of January 1, 2005, no corporation, firm, or partnership may engage in the practice of professional engineering in this state unless it has been issued a certificate of authority by the Board. In order to qualify for a certificate of authority, a corporation, firm, or partnership must have at least 1 Mississippi-licensed professional engineer as a principal officer, partner, or designated principal engineer of the firm who has management responsibility for such practice and who makes significant technical and/or contractual judgments on behalf of the firm which would affect the firm's professional reputation and liability. (Miss. Code Ann. §73-13-43)

MDOT acknowledged that PHD meets the requirements to conduct business in Mississippi because Mr. Hill is a professional engineer licensed in the state. However, the agency concluded that because Ms. Powers (the disadvantaged owner) does not hold a professional engineer license from the State of Mississippi, she is dependent upon Steven Hill to operate the business in Mississippi. In MDOT's view, this vests Mr. Hill with disproportionate control over the engineering services provided by the company. MDOT stated Ms. Powers could not sign off on engineering design plans and could not exercise control over this critical deliverable for PHD clients. MDOT concluded:

This puts [her] at the mercy of Mr. Hill's professional opinion and even if [she] disagreed [she] would not be in position to take over the design and issue revised stamped plans to your client. The statute above clearly states that in order for Mr. Hill to qualify as the license holder he must have management responsibility for such practice and make significant technical and/or contractual judgments on behalf of the firm which would affect the firm's professional reputation and liability. That being the case, a non-minority individual appears to have the power to significantly direct the firm's professional reputation and liability. (Denial Decision, Sep. 17, 2015, p. 2)

MDOT concluded that PHD had not met its burden of proof that Ms. Powers controlled the primary functions of engineering for the firm, citing both §§26.71(e) and (g). MDOT offered the firm an opportunity to provide rebuttal information within 30 days; however, this did not occur and the firm appealed to the Department.

November 19, 2015 Appeal

You allege on appeal that MDOT failed to comply with the substantive and procedural requirements of the interstate certification regulation §26.85 because the agency (1) made no reference to PHD's certification in Tennessee and (2) provided nothing more than a regulatory ground for its denial without giving any explanation or reason for finding Tennessee's determination to be factually erroneous or inconsistent with the requirements of the rule. You further allege that MDOT made a "mere interpretive disagreement" with Tennessee regarding the level of control Ms. Powers must have under the regulation or how its own state statute differs from those of Tennessee, a reason which is insufficient to deny certification.² Lastly, you opine that Ms. Powers exercises control of PHD and it is not a prerequisite of the regulation §26.71(h)³ that the disadvantaged owner possess a particular license to control their firm.

The Department's Decision

In this matter, MDOT chose not to certify PHD as a DBE in its state, which is an option available to it under the interstate certification provision §26.85(b). The record before us indicates that MDOT complied with its responsibility under §26.85(d) when it determined that good cause existed to believe PHD's certification in Tennessee should not apply in Mississippi. One of the permissible reasons for making a "good cause" determination found in §26.85(d)(2)(v), is that the state law of State B (here, Mississippi), requires a different result from that of the state law of State A (Tennessee). It is clear that MDOT interpreted its statute on the practice of engineering (Mississippi Code §73-13-43, above) to effectively require the socially and economically disadvantaged owner to be a licensed engineer in their state (otherwise; the non-disadvantaged partner is in control because the firm cannot practice in the state without him/her). Accordingly, the failure of Ms. Powers to hold that license is good cause for Mississippi to refuse to accept the Tennessee certification decision.⁴ MDOT complied with

² On this point you reference the preamble to the interstate certification provision (76 F.R. 5083, 5089) that states: "The Department cautions that by saying that a ground for objection is that State A's certification is inconsistent with this regulation, we do not intend for mere interpretive disagreements about the meaning of a regulatory provision to form a ground for objection. Rather, state B would have to cite something in State A's certification that contradicted a provision in the regulatory text of Part 26."

³ This provision states: "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."

⁴ The Department made this point in the preamble to the interstate certification rule, providing the following example and discussion that is applicable to this case:

"For example, if State B objected to the firm's State A certification on the basis that State B's law required a different result, State B would say something like '*State B Revised Statutes Section xx.yyyy provides only that a registered engineer has the power to control an engineering firm in*

the Regulation's substantive and procedural rules, and §26.89(f)(1) requires us to affirm it. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: MDOT

State B, and the disadvantaged owner of the firm is not a registered engineer, who is therefore by law precluded from controlling the firm in State B'. . .

The final rule also gives, as a ground for objecting to a State A certification, that a State B law “requires” a result different from the law of State (*see* the engineering example above). To form the basis for an objection on this ground, a difference between state laws must be outcome-determinative with respect to a certification.” (76 Fed. Reg. 5089, Jan. 28, 2011)