

July 22, 2016

Reference Number: 16-0050

Mrs. Delores B. Dedmon, President
DD Dedmon Trucking, Inc.
REDACTED
Kings Mountain, North Carolina 28086

Dear Mrs. Dedmon:

DD Dedmon Trucking, Inc. (DD Dedmon) appeals the North Carolina Unified Certification Program's (NCUCP'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 administrative record, we conclude that substantial evidence supports NCUCP's determination. We affirm the ineligibility determination under §26.89(f)(1).

In the Denial Letter dated October 5, 2015, NCUCP cites the firm's failure to satisfy the requirements of §26.71(b) relating to independence. We affirm on this ground. *See generally* §26.61(b).

Applicable Authority

§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(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.)

§26.89(f)(1) provides, in pertinent part:

“(1) 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

DD Dedmon is a for hire contract hauler for nonhazardous materials, aggregates, asphalt, recycled asphalt and concrete established on May 1, 2013 (Uniform Certification Application (UCA) dated September 6, 2013 at 2). You are the President of DD Dedmon and own 100% of the firm. Id. at 3. Nondisadvantaged employee and your husband, Donald Dedmon, Sr. is the Secretary and Treasurer of the firm. Id. at 4.

The Denial Letter specifies that DD Dedmon is dependent on Asphalt Paving of Shelby, Inc. (Asphalt Paving) per §26.71(b). The following facts pertain to the independence issue:

Facilities and Equipment

The On-Site Review Report (OSRR) dated December 20, 2013 at 6 indicates that DD Dedmon is located on the property of Asphalt Paving. Attachment 1 of the UCA indicates that DD Dedmon shares facilities or premises with Asphalt Paving. DD Dedmon parks its Mack dump truck in Asphalt Paving’s yard. Id. DD Dedmon utilizes Asphalt Paving’s equipment, particularly the truck stand and pressure washer. Id. Equipment needed and used for the firm’s primary work function are a truck and pressure washer (OSRR at 6).

In the Appeal Letter dated October 12, 2015 at 4, you state that, “DDDT [DD Dedmon] along with other independent and DBE contract for hire haulers use APS’ [Asphalt Paving’s] yard to

park their trucks in and the truck stand to climb up and cleanout the truck beds and none of these companies have a contract (other than verbal) nor do they pay any compensation to APS for these privileges[.] [O]ther area companies contacted do not have written agreements nor is any compensation paid for this privilege either[.] [E]quipment, DDDT a Mack 2013 dump truck is the only essential piece of equipment it requires for hauling.”

Financial Support

Donald Dedmon, Sr. guaranteed a loan for DD Dedmon’s Mack truck. On Appeal (page 4), the firm states that DD Dedmon “has a loan at Alliance Bank and Trust for the 2013 Mack Truck that Donald G Dedmon Sr, husband of Delores B Dedmon is the guarantor for the loan...” The UCA (page 5) indicates that the firm possesses only one Mack dump truck worth **REDACTED**.

You further confirm on Appeal (page 6), “Donald G Dedmon Sr. does not own any of DDT stock. Donald G Dedmon Sr is the guarantor of the **REDACTED** loan used to obtain the 2013 Mack Dump Truck. Donald G Dedmon Sr’s name is not on any of the banking accounts with Alliance Bank and Trust, Shelby, NC except the loan as a guarantor. DDDT [DD Dedmon] is the borrower with Delores B Dedmon, President.

Employees and Employer Relationships

With regard to employer or employee relationships, your husband works for Asphalt Paving and DD Dedmon (Attachment 4 of the UCA). Attachment 2 of the UCA indicates that Donald Dedmon, Sr. is the Manager of Asphalt Paving. Attachment 4 of the UCA indicates that he is the Secretary and the Treasurer of DD Dedmon.

Attachment 4 of the UCA indicates that your husband is also on DD Dedmon’s Board of Directors. The Appeal Letter on page 6 however, indicates that he is not a member of the Board of Directors or officer of DD Dedmon since February of 2014.¹

Relationships with Prime Contractors

With regard to finding work opportunities, DD Dedmon appears to find them exclusively through Asphalt Paving. *Id.* at 5. On Appeal (page 8), you state, “DDDT [DD Dedmon] along with independent and DBE contract for hire haulers is the subcontractor hauling asphalt to and millings/recycling from the job site for APS [Asphalt Paving]... My daughter and DDDT’s [DD Dedmon’s] truck would be the subcontractor spreading stone for grading projects and these tickets are turned into the office. The counties APS works for are Cleveland, Gaston, Lincoln, Cherokee and Rutherford and each of these would be listed as separate contract that we haul for.”

DD Dedmon also subcontracts with Asphalt Paving. *Id.* No other prime or subcontractors were mentioned in the record. *Id.* Haul prices are set by Asphalt Paving. *Id.* at 5. Hourly asphalt rates reportedly went through Asphalt Paving (OSRR at 6).

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).

On Appeal, page 5, it states that “we [DD Dedmon] all are and will always be dependent on whichever asphalt producing company we work for In respect to employment. In regards to how dependent we are on whichever paving contractor depends on factual data presented by the contract for hire hauling company and the person interpreting the factual data.”

Distinct Pattern or Practice

The Denial Letter at 3 alleges that since DD Dedmon’s establishment in May 2013, and during the application for DBE status, the firm “appears to have exhibited a distinct pattern or practice with Asphalt Paving of Shelby, Inc.”

You state in the Appeal Letter dated October 12, 2015 at 9 indicates: “If the consistency of a relationship between APS [Asphalt Paving] is the same for DDDT [DD Dedmon] as the DBE already certified and the independent contract for hire haulers as the potential DBE, then you can’t say there is a loss of independence of DDDT without saying the same thing about the other contract for hire companies. Therefore there is no preponderance of evidence, in my most humble opinion.”

Discussion and Decision

The applicant has the burden of proving eligibility by a preponderance of the evidence in accordance with §26.61(b). The Regulation requires the certifier to conduct a thorough analysis of all the facts in the record in light of the several independence factors pursuant to §26.71(b) (“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”).

i. Facilities, Equipment, and Financial Support

Section 26.71(b)(1) states that in determining whether a potential DBE is in fact independent, the certifier must scrutinize relationships with non-DBE firms in areas as personnel, facilities equipment, financial and/or bonding support, and other resources. NCUCP focuses on the relationship between DD Dedmon and Asphalt Paving.

DD Dedmon shares facilities and premises with Asphalt Paving. DD Dedmon parks its Mack dump truck in Asphalt Paving’s yard. DD Dedmon is located on the property of Asphalt Paving. DD Dedmon utilizes Asphalt Paving’s equipment, particularly the truck stand and pressure washer. The Mack truck and pressure washer are necessary for the firm’s primary work function.

On Appeal, DD Dedmon indicates that other companies also use Asphalt Paving’s premises and equipment. DD Dedmon reasons that because they are not the only firm using Asphalt Paving’s resources that they receive no preferential treatment. In the transcript, you indicate that the use of Asphalt Paving’s resources is within the bounds of normal truck hauling industry practice.

The Department carefully scrutinized the relationship between DD Dedmon and Asphalt Paving. It seems that DD Dedmon is “inextricably tied” to Asphalt Paving. *See* 12-0226, Tipco Engineering, Inc., February 22, 2013 at 7. Though subcontractors always depend to some degree on a prime contractor, that dependence must not impair viability under the Regulation. We find substantial evidence in the record that DD Dedmon is dependent on Asphalt Paving’s facilities and equipment. DD Dedmon is also dependent on the loan guarantee from a nondisadvantaged individual working at Asphalt Paving.

ii. Employer/Employee Relationships

Section 26.71(b)(2) states that “the certifier 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.”

The Department takes into account that Donald Dedmon, Sr. is active in both firms. His overlap between DD Dedmon and Asphalt Paving clearly indicates that both firms are inextricably tied up in each other’s affairs. Though Donald Dedmon, Sr. does not own any stock in DD Dedmon, he is the Secretary and Treasurer of the firm. As of the date of NCUCP’s decision, he is also a member of the firm’s board of directors. *See* §26.89(f)(6). At Asphalt Paving, he is the Manager. He also guaranteed the loan for DD Dedmon’s Mack truck.

The Mack truck is the main piece of equipment that DD Dedmon uses and is therefore vital to the daily operations of the firm. Donald Dedmon, Sr.’s relationship to DD Dedmon compromises the firm’s independence because he contributes to DD Dedmon’s decision making as a Director. He also ensures the firm’s primary operations as he guaranteed the Mack truck loan. Donald Dedmon, Sr. is also the Secretary and Treasurer of DD Dedmon, which suggests that his expertise and experience from Asphalt Paving benefits DD Dedmon. Further, as the Manager of Asphalt Paving and as a nondisadvantaged individual working for a nondisadvantaged firm, he may direct any projects or job opportunities that he wishes to DD Dedmon. The firm appears to be entirely dependent on Donald Dedmon, Sr.’s management of Asphalt Paving to route work to DD Dedmon within the meaning of §26.71(b)(2).

iii. Relationships with Prime Contractors

Section 26.71(b)(3) states that the certifier must examine the firm’s relationships with prime contractors in order to determine whether a pattern of exclusive or primary dealings with the prime contractor compromises the independence of the potential DBE firm.

The record indicates that DD Dedmon has a primary and exclusive relationship to a particular prime contractor, Asphalt Paving. The Appeal Letter confirms this ongoing relationship with Asphalt Paving, “we [DD Dedmon] all are and will always be dependent on whichever asphalt producing company we work for in respect to employment..”

DD Dedmon appears to be a structurally captive DBE applicant or simply an arm of Asphalt Paving. The relationship between these two firms does not pass muster under the independence

rule. It is clear that DD Dedmon needs Asphalt Paving in order to operate its business. DD Dedmon finds work opportunities through Asphalt Paving. No other prime or subcontractors were mentioned in the record. Haul prices are set by Asphalt Paving. Hourly asphalt rates reportedly went through Asphalt Paving. It is apparent from the record evidence that DD Dedmon is almost entirely dependent on Asphalt Paving within the meaning of §26.71(b)(3).

iv. Relationships Between DBE and Non-DBE Firms

Section 26.71(b)(4) states that when considering factors related to the independence of a potential DBE firm, the certifier must consider the consistency of relationships between potential DBE and non-DBE firm(s) with normal industry practice.

The Appeal Letter states, “If the consistency of a relationship between APS [Asphalt Paving] is the same for DDDT [DD Dedmon] as the DBE already certified and the independent contract for hire haulers as the potential DBE, then you can’t say there is a loss of independence of DDDT without saying the same thing about the other contract for hire companies. Therefore there is no preponderance of evidence, in my most humble opinion.”

Asphalt Paving’s shared personnel, equipment, employees and relationship with a prime contractor, as previously discussed, does not reflect a relationship that is consistent with standard industry practice, in which DBE firms and non-DBE firms typically deal with each other at arm’s length and on commercially reasonable terms. DD Dedmon’s entwinement with Asphalt Paving constitutes influence by a non-DBE firm in a manner inconsistent with the Regulation’s requirements.

In summary, there is substantial evidence to affirm NCUCP’s determination that DD Dedmon did not carry its burden of proof with respect to the Regulation’s independence provision. NCUCP’s findings are sufficient for us to affirm on the basis of §26.71(b).

Conclusion

We affirm DD Dedmon’s ineligibility determination as supported by substantial evidence and not inconsistent with the Regulation’s substantive and procedural provisions relating to certification.

This decision is administratively final and is not subject to petitions for reconsideration. DD Dedmon may reapply for certification at any time.

Sincerely,

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

cc: NCUCP