

May 10, 2017

Reference Number: 17-0001

Ms. Carol Echols
President
E & E Trucking, LLC
REDACTED
Montgomery, Alabama 36110

Dear Ms. Echols:

E & E Trucking, LLC (E&E) appeals the September 23, 2016 Alabama Department of Transportation's (ALDOT) denial of the firm's application for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at 49 C.F.R. Part 26 (the Regulation). ALDOT determined that E&E failed to meet the requirements of §§26.71(e) and (g) of the Regulation. The U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) carefully reviewed the full administrative record and concludes that the denial is supported by substantial record evidence and is consistent with the Regulation's substantive and procedural certification provisions on control. Therefore, the Department affirms on the bases of §§26.71(e) and (g).

Scope and Standard of Review

Under §26.61(b), "[t]he firm seeking certification has the burden of demonstrating to the [certifier], by a preponderance of the evidence that it meets the requirements of this part concerning . . . ownership, and control. The firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible." A firm that is denied DBE certification may make an administrative appeal to the Department. §26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the recipient's decision unless it determines, based upon a review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [the Regulations] concerning certification." §26.89(f)(1).

Operative Facts

According to the Unified Certification Application and the On-Site Review Report of August

22, 2016, E&E's primary line of business is dump trucking. (Uniform DBE Certification Application (UCA): Introduction.) E&E seeks certification under NAICS Code 484220: Specialized Freight (except Used Goods) Trucking, Local. (*Id.* at Background.) The disadvantaged owners are you, as owner and managing member, and Ms. Gisele Echols, as owner and member; each of you owns 50% of the firm. (*Id.*)

E&E has six employees, including Michael Echols, your husband, and Mr. Billy Echols, husband of Gisele Echols. (*Id.* at Sect. 2, Quest. 3.) According to the record, Michael Echols dispatches the trucks, while Billy Echols maintains the trucks. (*Id.*) Michael and Billy Echols are brothers who each have a 50% ownership in EEM LLC and a 33% ownership of Alabama RV & Storage LLC. You work at Alabama RV & Storage LLC (Alabama). (Carol Echols Résumé). And E&E shares office space with Alabama. (UCA: Sect. 3, Quest. 3a and 3b.)¹

The record indicates that Michael Echols is responsible for the jobsites and dispatching the trucks while Billy Echols maintains the trucks. (*Id.*) Michael and Billy Echols also play a role in hiring and termination decisions, while Michael Echols works and prepares bids/quotations in the firm's name. (*Id.*) Additionally, the UCA shows that you sometimes supervise field operations but never attend bid opening and lettings. (UCA: Sect. 4, Quest. (B)(2).) You have approximately twenty years of experience working for companies engaged in some form of trucking and freighting, mostly in an administrative role, (Carol Echols Résumé), while Ms. Gisele Echols has little to no experience with trucking and freighting (Gisele Echols Résumé).

The Denial Letter reasons that E&E is not compliant with §26.71(g). It states that "[a] review of Ms. Carol Echols' qualifications reveals that her experience and expertise are primarily administrative functions [and] Ms. Carol Echols may be involved in the day-to-day operations of the business, however, her resume [sic] does not substantiate that she has the technical ability to control the daily critical operations of this type of business."² (ALDOT Denial Letter at 2.) Regarding compliance with §26.71(e), ALDOT states: "The record reveals that the individuals associated with this firm who possess the ability to control the day-to-day [sic] activities of an open top dump carrier are . . . [Mr. Michael Echols and Mr. Billy Echols]. ALDOT concludes: "An inference can be drawn that due to their experience in areas related to activities critical to the firm, the two non-disadvantaged individuals and non-owners of E&E Trucking, LLC have substantial authority over the firm's operations." (*Id.* at 3.)

In response to ALDOT's denial letter, E&E filed an affidavit, which argues that ALDOT's control conclusion is erroneous for the following reasons:

I [Carol Echols] have extensive experience in the trucking industry – E&E Construction Co., Inc. (1990-2002), Coosada Trucking Company, Inc. (1994-2002), GROSouth, Inc.

¹ Michael Echols also owns a 49% interest in MCK Trucking, LLC (MCK).

² ALDOT also addresses silent partner Ms. Gisele Echols' noncompliance with §§26.71(e) and (g). In the interests of brevity and simplicity, we address the application of the rules to you with the understanding that the discussion and conclusion apply also to your partner, who the record shows has less experience and control, and a lesser overall role in E&E, than you have.

(2003-2011), CMX LLC (2003-2015), MCK LLC (2004-Present), E&E trucking LLC (2015-Present);

Until 2015, I was a partner holding a one-third ownership interest in trucking company CMX LLC (“CMX”) with Gisele Echols and Donna Matthews, The Alabama Department of Transportation awarded CMX with DBE certification during my time as a member;

After the separation, CMX was recertified by the Alabama Department of Transportation as a DBE trucking company. E&E Trucking operates with equipment obtained from the separation from CMX, serves the same customers as CMX, and I perform the same employment functions for E&E Trucking that Donna Matthews performs for CMX; and

To reiterate, the only difference between E&E Trucking and CMX is the company name. Both companies operate identical equipment in the same industry, serving the same customers, and I perform identical job functions for E&E trucking as Donna Matthews performs for CMX. In fact, I believe I possess greater industry knowledge than Donna Matthews because I have experience both driving and maintaining truck equipment in addition to managerial experience.”

(Affidavit of Carol Echols.)

Discussion

ALDOT determined that the disadvantaged owners of E&E—you and Ms. Gisele Echols—did not meet the requirements under §§26.71(g) and (e). Section 26.71(g) requires, in part, that the disadvantaged owners 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 rule further provides that “[g]enerally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.”³

Section 26.71(e) states that “[i]ndividuals 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,” but it precludes such individuals from possessing or exercising the power to control the firm, or being disproportionately responsible for the operation

³ §26.71(g) states in full: “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.”

of the firm.

§26.71(g)

Your résumé shows extensive years working in the trucking field, but most of the experience is administrative. You were an office clerk at Coosada Trucking Co. Inc. (1994-2002); a bookkeeper at Echols & Echols Construction Co. Inc. (1990-2004); an office clerk at GROSouth, Inc. (2003-2011); a payroll clerk at Alabama Motor Coach, Inc. (2003-2012); a member at CMX (2003-2015); a managing member at MCK (2004-Present); an office clerk at Alabama (2012-Present); and a managing member at E&E (2015-Present). (Carol Echols Résumé.)

At E&E and MCK, you attest to being a partner/member but provide a job description that is administrative in nature.⁴ Regarding your experience as a member at CMX, you describe your duties as “[j]oined in making financial and equipment purchase decisions. In the early years I was responsible for the payroll and all payroll reports.” *Id.*

As stated above, the Department does not conduct a de novo review on appeal, but rather makes a decision “based solely on the entire administrative record as supplemented by the appeal.” §26.89(e). In this case, the appeal argument (per your affidavit) appears to be simply that having worked in the industry in any capacity affords you the relevant managerial and technical competence and experience directly related to the dump trucking business. We disagree based on the evidence presented.⁵ Your résumé is filled with administrative experience, but the experience and expertise required under §26.71(g) are not evident. Your résumé contains just one line (relating to CMX) highlighting decision-making. However, it is sufficiently general such that ALDOT would have to presume to conclude that your job description demonstrates the type of decision-making, technical, managerial, and evaluative skills required by §26.71(g).

As the Regulation states, “The firm seeking certification has the burden of demonstrating to the [certifier], by a preponderance of the evidence that it meets the requirements of this part concerning . . . control.” §26.61(b). The totality of evidence in the record does not demonstrate the independent ability, knowledge, expertise, or competency required to control E&E’s dump trucking business within the meaning of the Regulation. Further, the record is devoid of examples demonstrating your clear and specific involvement in E&E’s key business operations. We therefore affirm ALDOT’s ineligibility determination as supported by substantial evidence.

⁴ The description for E&E is as follows: “Oversee the day to day operations of the office. Maintain all business records. Responsible for billing, accounts receivable, accounts payable, bank reconciliations, payroll and all payroll taxes and reports, work comp and all audits, diver drug screens, driver files, insurance and all audits, haul rates, haul contracts, and office supplies.” (Carol Echols Résumé.)

The description of MCK duties is exactly the same as the E&E description: “Oversee the day to day operations of the office. Maintain all business records. Responsible for billing, accounts receivable, accounts payable, bank reconciliations, payroll and all payroll taxes and reports, work comp and all audits, diver drug screens, driver files, insurance and all audits, haul rates, haul contracts, and office supplies.” (Carol Echols Résumé.)

⁵ Further, to the extent you argue that E&E should be certified because CMX is certified and you have more trucking experience than CMX’s owner, the argument is misplaced. CMX’s certification is not at issue here, and therefore we cannot properly make the comparisons that you would draw. At issue in this case is simply whether the evidence adduced supports E&E’s eligibility.

§26.71(e)

The Echols brothers appear to control E&E's key trucking operations. The record shows Michael Echols is responsible for the jobsites and dispatching the trucks while Billy Echols maintains the trucks. (UCA: Sect.3, Quest. (B)(1); *see also* ALDOT Denial Letter p.2-3.) Michael and Billy Echols also play a role in hiring and termination decisions, while Michael Echols works and prepares bids/quotations in the firm's name. (Uniform On-Site Inspection and Owner Interview Report State of Alabama: Question 27.) Additionally, the UCA shows that you never attend bid opening and lettings. (UCA: Sect. 4, Quest. (B)(2).)

We find that the Echols brothers, on the record before us, are disproportionately responsible for the firm's operations. They are non-disadvantaged, non-owners who solely control critical E&E functions like attending bid opening and lettings, maintaining the trucks, and responsibility for the jobsites and dispatching the trucks. Further, you share with the Echols brothers key managerial functions such as hiring and firing, supervising field operations, and making bids and quotations on behalf of the firm. The evidence indicates that you rely on them to manage the firm's key operational functions and that you are reliant on their experience and expertise. Substantial evidence supports ALDOT's conclusion that Michael and Billy Echols are disproportionately responsible for E&E's trucking operations, and we affirm it.

Conclusion

We affirm ALDOT's certification denial decision based on the control grounds specified above. Substantial evidence supports the denial, and the denial is consistent with applicable substantive and procedural provisions of the Regulation.

This decision is administratively final and not subject to further review.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: ALDOT