

September 26, 2017

Reference Number: 17-0051

Monique Moore  
Around The Clock Rolloff, LLC  
**REDACTED**  
Cleveland, OH 44110

Dear Ms. Moore:

Around The Clock Rolloff, LLC (ATC) appeals the Ohio Unified Certification Program's (OUCP)<sup>1</sup> denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation). OUCP determined in its Denial Letter dated December 7, 2016 that ATC did not demonstrate, by a preponderance of the evidence, that it satisfies the requirements of Regulation §26.71(j). OUCP further concluded that you omitted material information in the Affidavit of Certification, which is an independent ground for certification denial. On February 21, 2017, ATC appealed to the U.S. Department of Transportation (Department). After considering the full administrative record, the Department concludes that substantial evidence supports OUCP's decision, and we affirm on both of the grounds cited.

## **Facts**

ATC submitted its Uniform Certification Application (UCA), which is dated April 25, 2016, on or about June 16, 2016 (OUCP date stamp). The UCA indicates that the firm rents dumpsters and performs demolition-related, hauling, and hazardous materials abatement activities. UCA at 5. You own 100% of ATC. UCA at 7. You stated that you perform management or supervisory functions for W-One Bros. Construction, LLC, which is another firm you own. *Id.* You identified your responsibilities at W-One as "payroll, work schedules, contract negotiations, quality assurance, manage day to day operations." *Id.*<sup>2</sup>

You responded "No" to the question whether you "work for any other firm, non-profit organization, or [are] engaged in any other activity more than 10 hours per week." *Id.* (Emphasis added.)

OUCP's contractor Baker Tilly conducted ATC's On-Site Review (OSR) on December 5, 2016. In the interview you described your day-to-day duties for ATC as "handles budgeting, filling out

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<sup>1</sup> The Ohio Department of Transportation (ODOT), a member of OUCP, is the certifier in this case.

<sup>2</sup> Your assertion is clearly in the present tense, yet on appeal you disavow it as something you did in the past. Appeal Letter at 1.

paperwork, paying bills, truck maintenance, administrative work, hiring employees, contract negotiations, and bidding.” OSR at 4. You also disclosed that you “[m]aintain[] a full-time job as a probation officer.” OSR at 6; Baker Tilly Memo to ODOT (Dec. 5, 2016) at 2.<sup>3</sup>

OUCP denied ATC’s application for certification on December 7, 2016. OUCP concluded as follows:

During the onsite review, Ms. Moore explained that she will monitor Jobs approximately five hours a week while still maintaining a full-time position as a probation officer. Ms. Moore is also 100 percent owner of another company, W-One Bros Inc. According to the application, Ms. Moore is responsible for payroll, work schedules, contract negotiations, quality assurance, and the management of day to day operations for W-One Bros Inc. Due to Ms. Moore's full time employment as a probation officer and her job duties with W-One Bros Inc., both of which would prevent her from devoting sufficient time and attention to Around the Clock Rolloff, it has been determined that Ms. Moore cannot be viewed as controlling the firm.

Denial Letter at 1.

OUCP further concluded that:

Ms. Moore did not disclose her employment as a probation officer on the application. According to the Affidavit of Certification, this is grounds for denial.

Denial Letter at 2.

### **Authority**

Section 26.61(b) states

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*. (Emphasis added.)

Section 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

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<sup>3</sup> Baker Tilly’s memorandum identifies Kurtz Bros. Inc. and A2Z Field Services as other firms you own, based on their inclusion on pertinent Schedules C to your individual income tax returns. You and your accountant explain on appeal that those firms were included on the Schedule Cs in error and that you in fact have no ownership interest in either. We assume for purposes of this appeal that your explanation is correct, and we consider only your outside employment at W-One (or possibly A2Z; see below) and as a probation office in evaluating OUCP’s control finding.

business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

The Affidavit of Certification states in pertinent part:

**A MATERIAL OR FALSE STATEMENT OR OMISSION MADE IN CONNECTION WITH THIS APPLICATION IS SUFFICIENT CAUSE FOR DENIAL OF CERTIFICATION.**

Appendix F to the Regulation, Affidavit of Certification at 1 (bolded capital letters in original).

Section 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.

## **Discussion**

OUCP cites §26.71(j), which requires that a disadvantaged owner not engage in outside employment that conflicts with the management of the firm, such as part-time work for a full-time firm. According to the record, you are employed full-time as a probation officer and also employed (the record does not disclose whether full- or part-time) at W-One, where you have substantial managerial responsibilities. UCA at 7; OSR at 6; Baker Tilly Memo at 2.

On appeal, you make substantially different assertions:

First, as stated in my denial letter, I informed Julie Fox, one of the on-site interviewers at Baker Tilly, that I am a Probation Officer. It was an oversight and not an attempt to withhold or omit pertinent information from the application. Further, it was also stated to the Interviews [sic] that I work from 6:30 am to 2:30 pm Monday through Friday.

Second, because of my flexible work schedule, I am afforded the opportunity to perform other business related activities; for example, W-One Bros. Inc. started in 2009 as a General Contracting Company that performed home preservation services for several companies including A2Z. However, for the last couple of years, I have only been working for A2Z.

I am responsible [presumably at A2Z] for driving to specific locations to take pictures with my phone of foreclosed homes and upload them while on site. These work orders, however, are sporadic, three or four times out of a given month, if that. These orders are performed after work but mainly on the weekends. I have full control over this business and manage all activities, which is only taking pictures.

Around The Clock Rolloff is another company I started. It is a Residential Demolition and Hauling Company. Residential demolition jobs are also infrequent. Around the Clock has successfully won many bids since registering as a Demolition contractor since 2014. Working downtown allows me to pull permits since Cleveland City Hall is

one block away. Demos are schedule [sic] in the late afternoons and weekends. I have one laborer to clean the streets and water-hose the house. I also have three general contractors, one to run my excavator and two drivers to drive my trucks to and from the landfill.

\* \* \*

These activities do not interfere with my regular work schedule as a Probation Officer.

Appeal Letter at 1-2.

First, there is no evidence in the record (before your apparent assertion to the contrary on appeal) that ATC operates only after 2:30 p.m. and on weekends. Even in the Appeal Letter, you suggest that ATC's excavation and hauling activities occur during the work day, when you concede you are employed full time as a probation officer. There was little to no evidence in the record upon which OUCP determined ineligibility that ATC operates only on a part-time basis.<sup>4</sup> We note that hauling generally takes place during daytime hours when you would be at your full time employment and/or working for W-One (as you stated in the UCA and OSR) or A2Z (as you state on appeal). ATC fails to demonstrate anywhere in the record that your responsibilities at ATC take precedence over your paid employment as a probation officer (or manager at one or more of the other firms mentioned). There is, in short, no preponderance of the evidence that you control ATC at all times its business operates or that your outside employment or other outside activities do not conflict with the management of ATC or prevent you from devoting sufficient time and attention to the affairs of ATC to control its activities.

OUCP determined that ATC failed to prove that your outside employment/activities do not conflict with management of ATC or prevent you from devoting sufficient time and attention to the affairs of ATC to control its activities. There being substantial evidence to support that proposition, we affirm the ineligibility determination on the basis of conflicting outside employment. *See generally* §§26.61(b), 26.71(j), 26.89(f)(1).

Second, the evidence is uncontroverted that you failed to disclose in the UCA, which affirmed by signing was "true and correct," that you work full time as a probation officer. You answered the question whether you were engaged in outside activities more than 10 hours per week "No," when the correct answer was clearly "Yes." While we understand that you corrected the error at the OSR, the Affidavit of Certification states (at the top of the document, in bolded capitals) that a material false statement or omission is sufficient cause for denial of an application for certification. Whether you have outside employment is material to eligibility. *See* §26.71(j). Contrary to your argument on appeal, *intent* is not a requirement. A false statement or omission that is material is grounds for denial. OUCP properly predicated its denial on your demonstrably false statement, and we affirm the denial on that basis also.

## Conclusion

The Department affirms OUCP's ineligibility determination under §26.89(f)(1) as supported by substantial evidence and consistent with the Regulation's certification provisions, including

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<sup>4</sup> Your assertion that you monitor jobs approximately five hours a week is not an assertion that ATC's work occurs only when you are monitoring it. See p. 2, above.

those contained in Appendix F. ATC failed to carry its burden of proving that you control ATC within the meaning of the Regulation.

This decision is administratively final and not subject to petitions for reconsideration. ATC may reapply for certification after the applicable waiting period.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: ODOT