

August 23, 2017

Reference Number: 17-0056

Amber Roberts
President
ACR Hauling, Inc.
REDACTED
Gray, GA 31032

Dear Ms. Roberts:

ACR Hauling, Inc. (ACR Hauling) appeals the State of Georgia Unified Certification Program's (GUCP) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (the Regulation). GUCP determined that ACR Hauling failed to satisfy the ownership and control requirements of Regulation §§26.69(b), (c), and (i) and 26.71(b), (j), and (m). After considering the full administrative record, the U.S. Department of Transportation (Department) concludes that substantial evidence supports GUCP's decision that the firm is ineligible for DBE certification.¹

I. Background

On July 22, 2016, ACR Hauling submitted an application for certification as a DBE to GUCP. GUCP reviewed the documentation provided with the application and conducted an on-site interview on October 20, 2016. On December 16, 2016, GUCP denied ACR Hauling's application for certification on the basis of ACR Hauling's failure to satisfy the Regulation's ownership and control requirements. ACR Hauling timely appealed to the Department on March 15, 2017.

II. Discussion

a. Scope and Standard of Review

Under §26.61(b), "[t]he firm seeking certification has the burden of demonstrating...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." Under

¹ Given the sufficiency of our determination on the grounds stated below, we do not reach or opine on GUCP's other grounds for denial.

§§26.86(d) and 26.89(c), a firm may appeal a denial of DBE certification to the Department. The Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department must affirm the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was “unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.” §26.89(f)(1). When reviewing the administrative record provided by the recipient, the Department bases its decision on the status and circumstances of the firm as of the date of the decision being appealed. §26.89(f)(6).

b. Analysis

Control

Independence

GUCP concluded in part that you failed to meet the control requirements of §26.71(b), which requires that a DBE be independent. GUCP found that ACR failed to demonstrate its independence from Roberts Timber Company, a non-DBE firm that your husband partly owns and where you currently work. The Regulation articulates a four-part test to assess a firm’s independence.

Section 26.71(b)(1) directs the certifier to “scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.” ACR Hauling has no employees (other than yourself) and no equipment. Uniform Certification Application at 6; On-site Report at 2-3, 6. You indicate in your application and site visit that ACR Hauling will rely on contractors with regards to both drivers and trucks. On-site Report at 2. However, Roberts Timber Company owns the equipment necessary for your hauling work and the record shows that at the time of GUCP’s decision, ACR Hauling had completed a single job for which ACR Hauling relied on Roberts Timber Company for the use of drivers and trucks. On-site Report at 5, 7-8. There is substantial evidence, therefore, that ACR Hauling relies on a non-DBE firm’s personnel and equipment to perform its work.

Section 26.71(b)(2) directs the certifier to consider whether relationships between the applicant’s disadvantaged owner and a non-DBE firm or its owner compromise the applicant’s independence. In this case, your husband, William Roberts, is a part owner of Roberts Timber Company – the same company at which you work and the only company from which you have contracted equipment and drivers. In addition, according to GUCP’s on-site interview notes, you are relying not only on Roberts Timber Company’s equipment and drivers to fulfill your contracts, but on connections from your position at Roberts Timber Company to contract with trucks and drivers to fulfill your firm’s contracts. On-site Report at 5; GUCP Interdepartmental Correspondence at 2. Further, Roberts Timber Company employs you full-time and pays you a salary. Accordingly, Roberts Timber appears to be in a position to control ACR Hauling’s work. There is substantial evidence that your relationship with Roberts Timber Company and its non-disadvantaged owner compromises ACR Hauling’s independence.

Section 26.71(b)(3) directs the certifier to 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. There does not appear to be such a pattern in this case. However, while we appreciate that ACR Hauling is in its infancy as a firm, and has only had one contract, at the time of GUCP's decision, that contract was with your husband's firm. Based on the record that was available to the certifier at the time of the decision, your firm relied exclusively on your husband's firm's equipment and resources in order to complete work.

Finally, §26.71(b)(4) requires the certifier to consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice. There is no evidence in the administrative record that it is standard industry practice for a hauling company to contract with other firms for trucks and drivers.

The burden is on the applicant firm to demonstrate that the owner has sufficient control, and ACR Hauling has not met that burden. Substantial evidence supports GUCP's conclusion that ACR Hauling did not demonstrate that it could conduct its business without the resources of Roberts Timber Company.

Outside Employment

GUCP's denial letter also 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 at Roberts Timber Company and, at the time at which GUCP's decision was made, you devoted only two hours per week to ACR Hauling. On-site Report at 3, 5. We find no evidence, however, that ACR Hauling operates only on a part-time basis. Furthermore, hauling generally takes place during daytime hours when you would be at your full-time employment with Roberts Timber Company. It is not clear that your responsibilities at ACR would take precedence over your paid duties at Roberts Timber Company. There is, in short, no persuasive evidence that you control ACR Hauling at all times its business operates or that your work at Roberts Timber Company does not conflict with the management of ACR Hauling or prevent you from devoting sufficient time and attention to the affairs of the firm to control its activities.

III. Conclusion

The Department finds that substantial evidence supports GUCP's ineligibility determination and that its decision is consistent with applicable certification rules. We therefore affirm.

This determination is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead

Disadvantaged Business Enterprise Division

cc: GUCP