



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 15, 2018

Reference Number 17-0081

Ms. Leigh Byrd, President
Midwest Parking Lot Maintenance, LLC
REDACTED
Eastlake, OH 44095

Re: Midwest Parking Lot Maintenance, LLC Appeal of DBE Certification Denial

Dear Ms. Byrd:

Midwest Parking Lot Maintenance, LLC (Midwest) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the Ohio Department of Transportation (ODOT).

Midwest submitted a Uniform Certification Application (UCA) to ODOT on July 5, 2016. You and your mother Camille Reins (Vice President) formed the firm in 2014. You are Midwest's 62.5% owner and Ms. Reins owns the remaining 37.5%. (UCA p. 5). ODOT conducted an on-site interview (OSR) on August 15, 2016. On February 24, 2017, ODOT denied Midwest's application based on the firm's failure to satisfy ownership and control requirements of §§26.69(e) and 26.71(e) and (g) of the DBE program Regulation 49 C.F.R. Part 26 (the Regulation). Midwest appealed ODOT's decision to the Department on April 25, 2017, and we requested the administrative record pursuant to §26.89(d). The Department concludes, based on a review of this record and your appeal, that substantial evidence supports ODOT's decision on the grounds discussed below. It suffices for the Department to affirm on the ownership grounds mentioned herein and we need not reach a conclusion on ODOT's control determination.¹

Decision

The firm seeking certification bears the burden of demonstrating to the recipient (ODOT in this case), by a preponderance of the evidence, that it meets the requirements of the Regulation concerning group membership or individual disadvantage, business size, ownership, and control.

¹ When a firm appeals a certification denial determination, 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 affirms 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). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

See §26.61(b). In assessing whether an individual meets the eligibility criteria concerning ownership, the recipient considers the entire record facts, viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. See §26.69(a).² The majority owner(s) of the applicant firm bear the burden to demonstrate they made a real and substantial contribution of capital or expertise to acquire their ownership interests in the applicant firm. This requirement is found in §26.69(e) and states:

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

1. Contribution of Capital and Equipment

You listed a contribution of REDACTED cash and REDACTED of equipment to acquire your ownership interest in Midwest. (UCA at 7). The firm's Operating Agreement lists a similar amount REDACTED comprised of cash, equipment and services (services are addressed in this decision below). You clarify in your December 1, 2016 letter to ODOT that the equipment consisted of "many tools" to help supply Midwest trucks.

There is no proof in the record substantiating your cash or tools contributions made to Midwest. There is no supporting evidence such as bank statements, cancelled checks, or invoices. The record does not identify what equipment was provided, there are no itemized descriptions or values assigned to any items substantiating the REDACTED claimed.³ Based on the record before us, your claimed contribution is not specific or verifiable in any way and we agree that you have not met your burden of proof.

2. Contribution of Expertise and Contribution of Michael Byrd

You identify as a contribution to Midwest the ability to consult with your non-disadvantaged spouse, Mr. Michael Byrd, for his industry expertise. (Letter to ODOT, Dec. 1, 2016). You explained that appointing Mr. Byrd the firm's General Manager and his services to the company were "a main part of [your] contribution." *Id.* You assert that your husband's industry knowledge and expertise are somehow *your* capital contribution to acquire your interest in the firm.

² 26.69(a): "In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, *including the origin of all assets and how and when they were used in obtaining the firm.* All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices." (emphasis added).

³ You also did not specify, with the requisite supporting evidence, whether your cash contribution or funds with which you purchased the equipment originated from individual or joint marital assets. We note that if joint marital funds are used as a basis for ownership of an applicant firm, §26.69(i) requirements would apply. This was not raised by ODOT; however, we raise it here as a consideration in the event Midwest reapplies for DBE certification.

The Regulation in no way recognizes *another person's* knowledge and expertise, nor appointing that person to a position, as a real and substantial contribution of capital.

3. Other Claims of Contribution

a. You further allege that your contribution to Midwest consisted of running the firm's transactions through your personal account until the company started generating income. (Letter to ODOT, Dec. 1, 2016). Using a personal account for business purposes does not convert the resulting transactions into something akin to an actual contribution of capital to the applicant firm and cannot be considered "real and substantial" within the meaning of the provision.

b. You vaguely reference your services to the firm. Sections 26.61(b) and 26.69(e), the most pertinent provisions, require you to *demonstrate* that your claimed capital contributions are *real and substantial*. No provision of the Regulation recognizes past services or "sweat equity," to be a real and substantial contribution of capital. (To the extent that you might consider your services to be contribution of expertise, that argument is not before us on appeal because you failed to make it and the evidence does not support a conclusion that such a contribution satisfies the stringent requirements of §26.69(f)).

Conclusion

You do not allege in your appeal that ODOT made any reversible procedural or substantive errors when it denied Midwest DBE certification on the above ownership grounds. Instead, you address only ODOT's control findings. The Department affirms ODOT's ineligibility determination under §26.89(f)(1). Substantial evidence supports ODOT's decision that Midwest did not carry its burden of proving, by a preponderance of the evidence, that your ownership in the firm meets the Regulation's requirements.

This determination is administratively final and not subject to petitions for reconsideration.
Midwest may reapply to the DBE program after the applicable waiting period has passed, here February 24, 2018.

Sincerely,

Marc D. Pentino
 Lead Equal Opportunity Specialist
 Disadvantaged Business Enterprise Division
 Departmental Office of Civil Rights

cc: ODOT