

December 7, 2017

Reference Number 17-0102

Ms. Cecibel Choy-Madrid-Scruggs
Chief Executive Officer
CMS Environmental Solutions, LLC
REDACTED
Memphis, TN 38104

Dear Ms. Scruggs:

CMS Environmental Solutions LLC (CMS) appeals¹ the Memphis Shelby County Airport Authority's (Shelby County)² March 28, 2017 denial³ of the firm's Uniform Certification Application (UCA) for Airport Concession Disadvantaged Business Enterprise (ACDBE) certification, under the rules of 49 C.F.R. Parts 23 and 26 (the Regulation). After reviewing the complete administrative record, the U.S. Department of Transportation (the Department) affirms Shelby County's decision under Regulation §26.89(f)(1).⁴

FACTS

James Scruggs formed CMS in September 2016 in a transaction in which he acquired 49% ownership and his wife Cecibel Choy-Madrid-Scruggs (Ms. Scruggs) acquired 51%.⁵ Mr. Scruggs is the firm's President and Chairman of the Board of Directors.⁶ Mr. Scruggs is not

¹ See Appeal Letter (June 5, 2017).

² Shelby County Airport Authority is a member of the Tennessee Unified Certification Program (TNUCP).

³ See Denial Letter (March 28, 2017).

⁴ See §26.89(f)(1): "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."

⁵ See Membership Certificate of James A. Scruggs (Sept. 12, 2016). The record is unclear about the amount of Mr. Scruggs's initial investment to start the firm and acquire his ownership interest. The On-Site Report states that he initially contributed REDACTED; the UCA states REDACTED; and the record contains a REDACTED cancelled check from Mr. Scruggs to CMS. See On-Site Report (Feb. 28, 2017) at 2; UCA at 7; and Independent Bank Check 2306 (Oct. 28, 2016).

⁶ Mr. Scruggs also owns and operates Scruggs Equipment Co., Inc. (Scruggs Equipment). When Shelby County denied CMS's UCA, Scruggs Equipment was leasing office space to CMS for \$65/month; sharing a P.O. Box with CMS; and providing technicians to CMS on an as-needed basis. See UCA at 8 and Lease Agreement (Jan. 1, 2017). Shelby County relied on this evidence to find CMS ineligible under §26.71(b)(1-4), which states:

presumed socially and economically disadvantaged (SED) under the Regulation, but Ms. Scruggs, who is the firm's CEO, is.⁷ CMS provides environmental services.⁸

Shelby County denied CMS's UCA under ownership provision §26.69(c)(1) and control provisions §§26.71(b), (e), (f), (g), (j), and (k). On appeal, CMS claims it is now eligible for certification because it cured the defects upon which Shelby County found it ineligible.⁹ The Department affirms Shelby County's decision on the §26.69(c)(1) and §26.71(g) rationales cited, with reference to §26.73(b)(1) (certifier makes eligibility determination based on firm's circumstances as of decision date).

DISCUSSION

§23.31 What certification standards and procedures do recipients use to certify ACDBEs?

(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (*see* part 26, §26.81).

§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.)

The requirements of §26.61(b) are conjunctive. Shelby County does not dispute Ms. Scruggs's group membership or CMS's business size. However, Shelby County determined that Ms. Scruggs neither owns *nor* controls the firm.

§26.69(c)(1) states:

"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."

⁷ *See* UCA at 7.

⁸ *See id.* at 1.

⁹ *See* Denial Letter. The Department did not include the firm's curative measures in determining whether substantial evidence supports Shelby County's denial decision. *See* §26.89(f)(6): "The Department's decision is based on the status and circumstances of the firm *as of the date of the decision being appealed*." (Emphasis added.)

The firm's ownership by socially and economically disadvantaged individuals, *including their contribution of capital or expertise* to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan. (Emphasis added.)

CMS's UCA states that Ms. Scruggs invested \$7140 to acquire her 51% ownership interest.¹⁰ The record does not contain evidence of the investment, such as a cancelled check or bank statement, or information about the origin of the funds, *e.g.*, personal savings account, joint marital assets, etc.¹¹ CMS's Operating Agreement includes a table listing the members of the firm, their capital contributions, and their ownership interest. The table indicates that Ms. Scruggs holds a 51% ownership interest but made no capital contribution in exchange for it.¹² We find no documentation anywhere in the record of any capital contribution from Ms. Scruggs. Based on this document and the utter absence documentary evidence to support the UCA assertion, Shelby County concluded that CMS did not prove, by a preponderance of the evidence, that Ms. Scruggs made a real and substantial capital contribution to acquire her ownership interest and that the firm fails to satisfy the §26.69(c) ownership requirement. Substantial evidence, in the form of the Operating Agreement and the absence of corroboration, supports Shelby County's determination, which is consistent with §§26.61(b) and 26.69(c). We therefore affirm.

§26.71(g) states:

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. (Emphasis added.)

Ms. Scruggs's résumé states that she has more than 19 years of experience related to dentistry services, and became a Registered Dental Assistant in 2005.^{13,14} Her résumé only lists her

¹⁰ See UCA at 7.

¹¹ See §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).

¹² See Operating Agreement, Exhibit A (Sept. 12, 2016).

¹³ See Résumé of Cecibel Choy-Madrid-Scruggs.

¹⁴ When Shelby County denied CMS's UCA, Ms. Scruggs was working 30 hours/week as a dental assistant, in addition to her employment at CMS. See UCA at 7; see also §26.71(j), a provision under which Shelby County

experience in dentistry services. It does not include employment history, skills, or other qualifications at all related to CMS's principal business activities regarding environmental machinery. CMS did not provide evidence of how Ms. Scruggs's career in dentistry services allows her to meet any of the requirements of §26.71(g), such as an overall understanding of CMS's principal business activities or the ability to critically evaluate information and make independent decisions based on information Mr. Scruggs presents to her.

On appeal, CMS states that Ms. Scruggs satisfies §26.71(g)'s requirements because she has attended and worked at regional and national trade shows; attended live demonstrations; and viewed marketing product videos and online technical presentations.¹⁵ The appeal letter does not describe the subject matter of these activities – let alone how they relate to CMS's principal business activities or how they gave her the overall understanding, managerial and technical competence, and ability to critically evaluate information and make independent decisions that §26.71(g) requires. While an SED owner need not have experience or expertise in every critical area of the firm's operations or have greater experience or expertise in a given field than managers or key employees, CMS produced scant evidence that Ms. Scruggs has *any* experience or expertise in the critical areas of CMS's operations.¹⁶ Ms. Scruggs appears to not even perform tasks related to office management, administration, and bookkeeping functions.¹⁷ In short, substantial evidence in the record supports Shelby County's conclusion that CMS does not demonstrate eligibility under §26.71(g).

CONCLUSION

We affirm under §26.89(f)(1) because substantial evidence supports the ineligibility determination, which is consistent with applicable certification standards and procedures.

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

Sincerely,

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

cc: Memphis Shelby County Airport Authority

found CMS ineligible for ACDBE certification. *See* Denial Letter. On appeal, CMS contends that it meets §26.71(j)'s requirements because Ms. Choy-Madrid-Scruggs resigned from her dental assistant position following Shelby County's denial of the firm's UCA. *See* Appeal Letter. The Department did not include this information in its determination of whether substantial evidence in the record supports Shelby County's denial. *See* §26.89(f)(6).

¹⁵ *See* Appeal Letter at 3.

¹⁶ The UCA indicates that Ms. Scruggs supervises many of the firm's critical functions, yet CMS did not provide evidence that she actually performs those duties or where/how she gained the experience or expertise to execute them.

¹⁷ *See id.* at 9.