

February 12, 2018

Reference Number: 17-0121

Rojelio Rodriguez, Sr.
Triple Diamond Trucking LLC
REDACTED
South Elgin, IL 60177

Dear Mr. Rodriguez:

Triple Diamond Trucking LLC (TDT) appeals the June 22, 2017 determination by the Illinois Department of Transportation (IDOT) that the firm is ineligible for Disadvantaged Business Enterprise (DBE) certification under criteria set forth in the DBE Program Regulation at 49 CFR Part 26 (the Regulation). After a careful review of the administrative record, we affirm. *See* §26.89(f)(1)¹ of the Regulation.

I. Background

You formed TDT (a trucking firm) in July 2015 and you are the firm's sole owner. TDT filed its Uniform Certification Application (UCA) on December 19, 2016. IDOT conducted the firm's on-site interview on January 26, 2017, and determined that that TDT was ineligible for DBE certification on June 22, 2017. The firm appealed to the Department on July 17, 2017, and IDOT submitted its response to the firm's appeal on August 4, 2017.

Your responsibilities at TDT include administrative work, bidding, estimating, and dispatching. Your son is TDT's sole truck driver. You also work as a full-time employee for Midwest Grading, Inc. (Midwest), which is a non-DBE construction firm. *See* TDT On-site Review Report (January 26, 2017) (OSRR) at 2. TDT had only worked on Midwest projects at the time that IDOT issued the denial letter. *Id.* at 4.

IDOT concluded that TDT is not an independent firm based on uncontroverted evidence. The denial letter specifically states:

[b]ased on submitted documentation, (e.g., invoices) and statements you made during the firm's January 21, 2017,² on-site interview, *all jobs performed by the*

¹ §26.89(f)(1) provides: "The Department affirms [a certifier's] decision unless [the Department] determines, based on the entire administrative record, that [the certifier's] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

² IDOT actually conducted the on-site interview on January 26, 2017. *See generally* OSRR.

*applicant firm have been completed for Midwest Grading Incorporated (Midwest), a non-DBE firm with whom you are currently employed. In fact, you stated your employer, Midwest, encouraged you to start a trucking business and as needed they would utilize your firm for trucking services. This arrangement allows your firm to perform trucking services when you are not working for Midwest in your role as an employee. You also stated that when you are not available to drive for your firm Rojelio Rodriguez, Jr., your son, drives the firm's vehicle in your absence, as requested by Midwest. By your own admission, as relayed in an e-mail dated February 10, 2017, you noted that since inception, all trucking work completed by your firm has been with Midwest. Your relationship with Midwest appears to go beyond what is considered standard industry practice. It is because of your employee/employer relationship that you were afforded this opportunity; and therefore, this arrangement compromises the independence of Triple Diamond Trucking LLC. (Denial Letter at 2. (Emphasis added.))*³

II. Decision

Section §26.71(b) states that “only an independent business may be certified as a DBE.” An independent business is defined as “one the *viability of which does not depend on its relationship with another firm or firms.*” §26.71(b). (Emphasis added.) The provision contains four subsections which set forth relevant factors for determining a firm's viability.

(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.

In the appeal, you assert that TDT “is an independent business[.] I have my own personnel [*sic*], office, parking space, equipment, and financial support and have provided all documents on my application.” Appeal at 4. Nonetheless, you do not dispute that you work for Midwest and TDT. The denial letter took particular issue with the fact that “Midwest, encouraged you to start a trucking business and as needed they would utilize your firm for trucking services.” Denial Letter at 2, *see also* OSRR at 2. In short, IDOT properly scrutinized the relationship between the two firms in terms of shared personnel (yourself), as required by §26.71(b)(1).

(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.

Your employment at Midwest—TDT's sole source of business and revenue—creates an inherent conflict of interest, which, by itself, compromises the firm's independence. You acknowledge that Midwest is your “primary source of income, medical insurance and retirement plan.”

³ IDOT also determined that TDT did not satisfy the requirements of §26.71(j). We decline to opine on IDOT's §26.71(j) ground in light of our disposition on independence.

(Appeal at 3). But you provide no evidence or argument that explains how you balance your personal financial dependence on Midwest against and the business interests of TDT. The evidence presented in this instances suggests that TDT acts at the behest of Midwest because of your employee-employer relationship.⁴

(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.

Midwest is a prime contractor and the sole source of work for your firm. (See OSRR at 4–5). TDT’s success clearly depends on its relationship with Midwest. TDT’s appeal simply asserts that “[t]here is no exclusive or primary dealings with prime contractor. If the price is right for both firm’s we work together period” Appeal at 4. However, the burden is on the TDT to prove that it is an independent firm, however, TDT offers no proof that its pattern of exclusive dealings with Midwest does not compromise the firm’s independence. Rather, substantial evidence shows that TDT would have no work or revenue without the business that Midwest channels to the firm. Thus, substantial evidence supports that TDT’s exclusive (100%) dealings with Midwest—your employer—compromises the independence the firm’s independence.

(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.

IDOT determined that TDT’s relationship with Midwest “appears to go beyond what is considered standard industry practice. It is because of your employee/employer relationship that you were afforded this opportunity.” (Denial Letter at 2).

The facts presented are uncontroverted. Midwest provides 100% of the jobs that TDT works on, and the firm has not established transportation agreements with other prime contractors. The denial letter’s states that “[a]lthough you stated you conduct business for your firm on an on-call basis, it is contrary to standard industry practice *for a trucking firm to operate as previously described (when your employer is in need of trucking service)*.” Denial letter at 3. (Emphasis added.) We agree that this arrangement is not indicative of a normal business relationship between two independent firms.⁵

⁴ IDOT did not raise the issue of affiliation based on an identity of interest. See generally §26.5(1)(iii).

⁵ You argue on appeal at page 4:

Unfortunately, that is how it works. when you sign up with brokers, [q]uarries that sell aggregates, and excavating companies. You work on an on-call basis unfortunately my firm is at the bottom of the list and might get a call if they get to the bottom of the list. This is the reason I am trying to get certified under different programs so that my firm can have the opportunity to get sub-contract on a state funded job. . .As of today[,] my firm has not have the opportunity to work on a state funded job.

TDT’s argument that it aspires to work with other prime contractors in the future is unavailing because DBE eligibility is based on present circumstances. §26.73(b)(1). Here, TDT presently performs all of its work for a non-DBE firm that employs its disadvantaged owner, which is not normal practice within any industry. The evidence

In summary, TDT bears the burden to prove that it is an independent firm “the *viability of which does not depend on its relationship with another firm or firms.*” §26.71(f)(1). Your relationship with Midwest demonstrates that TDT does not meet this requirement. There is simply no evidence to support that TDT is self-sufficient and an independent firm. Accordingly, we find that substantial evidence supports IDOT’s conclusion that MII does not satisfy the requirements of §26.71(b). We affirm under §26.89(f)(1).

III. Conclusion

We affirm the ineligibility determination on independence grounds because IDOT’s conclusion is supported by substantial evidence.⁶ IDOT’s conclusion is also consistent with the substantive and procedural provisions of the Regulation.

This decision is administratively final and not subject to petitions for review. TDT may present information substantiating the firm’s independence if it chooses to reapply, which it may do after June 22, 2018.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantage Business Enterprise Division

cc: IDOT

presented in this case, however, does not demonstrate that TDT and Midwest have a normal (arm-length) voluntary business relationship. Rather, the evidence shows that the firm, since its inception, has relied on the advice, financial support, and work provided by Midwest, which is substantial evidence that TDT’s viability is dependent on the relationship.

Our disposition in this case in no way disturbs the Department’s holding in 13-0184-*Maximus Trucking* (September 10, 2014) (voluntary exclusive dealing with a prime contract does not comprise a firm’s viability).

⁶ The Department’s decision that a recipient’s certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. *See* 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999).