



**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

June 25, 2018

Reference No. 18-0012

Linda J. Wray
Advance Resources, LLC
REDACTED
New London, CT 06385

RE: DBE Certification Denial of Advance Resources, LLC

Dear Ms. Wray:

Advance Resources, LLC (ARLLC) 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 Connecticut Department of Transportation (CTDOT) pursuant to the DBE program Regulation 49 C.F.R. Part 26 (the Regulation).

ARLLC submitted a Uniform Certification Application (UCA) to CTDOT on January 12, 2017 and the agency conducted an On-Site Review (OSR) on July 14, 2017. On August 10, 2017, CTDOT denied ARLLC's application to be a DBE because the firm did not satisfy two of the Regulation's control requirements found in §26.71(b) and (j). ARLLC appealed CTDOT's decision to the Department on October 30, 2017 and we requested CTDOT's administrative record pursuant to §26.89(d). The Department concludes, based on a review of this record and your appeal, that substantial evidence supports CTDOT's decision regarding §26.71(j).¹ It suffices for the Department to affirm on the control grounds §26.71(j) discussed herein and we need not reach a conclusion on CTDOT's §26.71(b) decision.

Discussion

You founded ARLLC, a construction firm, in 2010 and are the firm's sole owner. (UCA, pp. 5, 7). You work as a payroll supervisor for B&W Paving and Landscaping LLC, (B&W) a firm owned by your husband, Mr. James Wray (UCA, p. 7, OSR, pp. 1, 2.) You spend 25 hours per week working for ARLLC and 20 hours per week performing payroll for B&W, which shares an office location with ARLLC. (OSR, pp. 2, 3).

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).

The Regulation at §26.61(b) requires the applicant firm to bear the burden of demonstrating to the recipient, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. One of the control requirements is found in §26.71(j), which requires in part, that the disadvantaged owner(s) devote sufficient time and attention to the firm's affairs and not engage in outside employment or other business interests that conflict with their management of their firm.²

CTDOT observed that your day-to-day duties at ARLLC are mainly administrative (billing, accounting, payroll, taxes, etc.) and that you do not visit job sites; while Messrs. Ken Golden, Jr., Bruce Bradway, and Mark Hawkins handle field work and heavy-duty equipment operations (OSR, p. 4; Statement of Key Personnel). ARLLC applied for DBE certification to perform milling, reclaiming, grading, landscaping, traffic control, small paving, and material transfer work. (Ibid., p. 2). ARLLC is a full-time operation with much of its work conducted in the field—the firm completed several large contracts and others are underway (Ibid. p. 4). We agree with CTDOT's determination because you devote only part-time effort (25 hours per week) to ARLLC, which from all indications in the record, operates full-time. This prevents you from devoting sufficient time and attention to the firm's business and the arrangement does not comport with the requirements of §26.71(j). On appeal, you do not proffer any rebuttal evidence of how you are able to manage both firms simultaneously (more importantly, how you can address ARLLC work while you perform functions for B&W). Further, you do not allege CTDOT made any reversible procedural or substantive errors when it denied the firm DBE certification on this control ground.

We affirm the certification denial of ARLLC as a DBE under §26.89(f)(1) based on the control ground §26.71(j). There exists substantial record evidence to support the denial, and the denial is consistent with applicable substantive and procedural provisions of the Regulation.³ This disposition, which closes the current appeal, is administratively final and not subject to petitions for reconsideration. **ARLLC may present information substantiating your control of the firm if it chooses to reapply, which it may do after August 10, 2018.**

Sincerely,

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

cc: CTDOT

² The full text of §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 business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating."

³ 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).