

February 15, 2019

Reference Number 18-0049

Benny F. Sloan
State Contractor Utilization Engineer
North Carolina Department of Transportation
1509 Mail Service Center
Raleigh, NC 27699-1509
Madison, WI 53707-7965

Dear Mr. Sloan:

Logan Grading, LLC (LG) has appealed the North Carolina Department of Transportation's (NCDOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation).¹ After considering the full administrative record, the Department reverses under Regulation § 26.89(f)(2) and directs NDOT to certify LG.

Facts

Jennifer Logan owns 100% of LG, which is primarily a trucking business that hauls aggregate for construction sites. Uniform Certification Application (UCA) at 5; On-Site Review (OSR) at 2.

LG submitted its application on July 10, 2017, and NCDOT conducted an on-site review on November 9, 2017. On-Site Review (OSR) at 1. According to the record, Ms. Logan's father was a mechanic and she "worked around dump trucks for a number of years" while employed by NCDOT. OSR at 2. She was employed by NCDOT as an Office Assistant from 2003 until 2014, when she took a position as a Secretary with Long Brothers of Summerfield, where she continues to work full-time. OSR at 4; Appeal at 1.

Ms. Logan established LG in 2015. UCA at 5. She has purchased three trucks for LG's use, paying off two in full and taking out a loan for **REDACTED** for the third. OSR at 5-6; UCA at 10. LG has three current employees, whom she pays **REDACTED**. OSR at 3. During the on-site review, Ms. Logan described her duties and responsibilities as Owner of LG, which include hiring and firing employees, monitoring trucks and drivers, billing, submitting bids, accounts receivable and payable, dispatching drivers, and occasionally visiting jobsites. OSR at 3, 5. She meets her drivers at the beginning of each work day to dispatch them and provide them with their

¹ NCDOT cited Regulation §§ 26.71(g)-(h) and (j) in its denial letter.

schedules, and at the end of each work day to account for hourly tickets and collect billings. OSR at 3. Ms. Logan devotes 5-6 hours per day to LG, which maintains normal operating hours from Monday to Saturday, 5am – 8pm, and winter operating hours of Monday through Friday, 6am – 4pm. *Id.* She also works full-time as a Secretary at Long Brothers of Summerfield, Monday through Friday, 8am – 4:30pm. *Id.* at 4.

By letter dated December 7, 2017, NCDOT informed Ms. Logan of its denial of her application. Specifically, NCDOT concluded that Ms. Logan is “unable to manage and control the daily operations of the applicant firm while working full-time for Long Brothers of Summerfield.” Denial at 3. NCDOT also concluded that Ms. Logan does not have any direct work experience related to hauling, and also does not hold a CDL. *Id.* NCDOT concluded that her expertise is limited to research, employee benefits, and human resource functions. *Id.* at 2.

In her appeal, dated January 3, 2018, Ms. Logan detailed her experience in the trucking and transportation industry. She explained that she has been in the trucking industry since 2003, when she was employed by NCDOT and held responsibilities including transportation budgeting, supervising employees, and allocating driver assignments, among other duties. Appeal at 1. She also described her day-to-day responsibilities with LG and the policy and operational decisions for which she is responsible. *Id.* at 2. Ms. Logan said that, because she is not currently able to pay herself a salary from LG, she needs a second job “to provide for her family.” *Id.* She dispatches her drivers in the morning before she goes to work at Long Brothers, and is with them when they return to her shop in the evening. *Id.*

Authority

Section 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.

Section 26.71(h) states:

If a state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor

in determining whether the socially and economically disadvantaged owners actually control the firm.

Section 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 the evenings and/or weekends, if the individual controls it all the time it is operating.

Discussion

NCDOT's denial letter focused on Ms. Logan's perceived lack of related technical competence/experience under § 26.71(g) and her outside employment with Long Brothers under § 26.71(j).² The Department reverses and directs that LG be certified pursuant to § 26.89(f)(2) because it finds the evidence in support of the ineligibility determination insubstantial.

Directly Related Managerial and Technical Competence and Experience

While the denial letter concludes that Ms. Logan has "no experience directly related to hauling," the record indicates that she in fact has related experience, some of it directly related to this firm's business because she acquired it on the job. Denial Letter at 2. *See also* OSR at 2; Resume at 1-2; and discussion above. For example, Ms. Logan had sufficient technical competence to evaluate which trucks would be suitable for LG's business, and those trucks, in operation for several years now, evidently *are* suitable.

Ms. Logan, in our view, has proved, by a preponderance of evidence (§ 26.61(b)), that she has the technical wherewithal and sufficient experience, including on-the-job experience, to run a hauling firm. The required technical competence and experience varies by type of firm. The hauling business primarily involves equipment purchases, personnel, compliance, bidding, contracting, dispatch, fulfillment, and managing accounts. The evidence demonstrates that Ms. Logan herself discharges all the business's key functions except driving trucks, an activity she oversees, and that LG is sufficiently successful to have and pay employees and enter into contracts that enable it to make a profit. The record demonstrates that in fact Ms. Logan's responsibilities are *not* "limited to research, employee benefits, and human resource functions," which is not an ineligibility standard anyway. Further, disadvantaged owners of trucking firms generally need not have CDLs unless they actually drive trucks. *See e.g.*, Clear Creek of Salisbury, Inc., 18-0003 (May 29, 2018) (owner did not need own CDL to control hauling firm); K-Kap, Inc., 18-0007 (May 15, 2018); *see also* J&L Steel, Inc., 13-0064 (August 23, 2013) (absence of electrician license did not impair owner's control of large electrical contracting business when she did not perform

² NCDOT also discusses her lack of a CDL, citing § 26.71(h). NCDOT properly considered the absence of the license as "contribut[ing] to the applicant's failure to prove control." For reasons elaborated more fully below, our view is that on these facts, the non-license has very little probative value.

electrical work); 13-0112 Nancy's Tree Planting, Inc. (January 10, 2014) (no home improvement contractor license needed to control commercial landscaping business).

Nothing in the record indicates that LG's primary line of work, identified as "hauling aggregate," requires uncommon technical competence (NCDOT does not challenge Ms. Logan's managerial attributes) and experience to manage. We find that the evidence demonstrates that Ms. Logan has sufficient technical competence and experience to run LG effectively. There is also no evidence that anyone other than Ms. Logan controls LG. *See* 12-0141 Turner Freight Solutions, LLP (October 24, 2012).

We conclude that NCDOT cites insubstantial evidence to permit us to affirm on § 26.71(g) grounds. *See* §§ 26.86(a), 26.89(f)(1), (2).

Outside Employment

A firm seeking DBE certification has the burden of demonstrating, by the preponderance of evidence, that a disadvantaged owner does not have 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. *See* § 26.71(j). The crux of NCDOT's decision rests on Ms. Logan's outside employment with Long Brothers of Summerfield. Ms. Logan admits that she works full-time at that firm, Monday through Friday, from 8am until 4:30pm. OSR at 4. (LG operates from 5am until 8pm during the summer months, and from 6am until 4pm during the winter. *Id.* at 3.)

The Department explained, in promulgating the rule, that "Outside employment is incompatible with eligibility *only when it interferes with the individual's ability to control the DBE firm on a full-time basis.*" 64 Fed. Reg. 5096, 5120. (Emphasis added). We have further explained that "pertinent decisions in no way obviate the recipient's obligation, under §26.71(a)³, to consider all the facts in the record as a whole." 14-0144 Northgate Land Development (September 14, 2015).⁴

The question here is whether Ms. Logan's outside employment conflicts or interferes with her ability to control LG or prevents her from devoting enough time and attention to LG's affairs to control its activities. There is substantial evidence in the record that it does not, due to the nature of LG's work as a hauling firm. This is not, in our view, a high-tech business. As noted above, Ms. Logan presents credible evidence that she performs all significant leadership, managerial, policy, and operational functions except picking up and delivering aggregate. *See* 16-0030 Dougin Logistics LLC (August 19, 2016). The evidence indicates that she can and does perform these functions and does so reasonably well, in coordination with her outside employment. We find nothing in the record to indicate a disqualifying conflict or significant pre-emption. We conclude that there is no substantial evidence to the contrary.

³Section 26.71(a) states, "in determining whether socially and economically disadvantaged owners control a firm, [the certifier] must consider all the facts in the record, viewed as a whole."

⁴ In *Northgate*, the record supported the conclusion that a disadvantaged owner's full-time employment did not interfere with the owner's ability to control the DBE firm, in part because of evidence that the owner devoted sufficient time to the applicant firm's affairs. We note, however, that this was a decertification and the certifier had the burden of proof.

Conclusion

Considering all of the facts in the record, and viewing them as a whole, we conclude that there is no substantial evidence in support of the certification denial. Hence we reverse and direct that RG be certified without delay. This decision is administratively final.

We appreciate your cooperation.

Sincerely,

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

cc: LG