

February 21, 2019

Reference Number 18-0082

Bobi Kinsey
President,
Kinsey Excavating & Trucking LLC
REDACTED
New Philadelphia, OH 44663

Dear Ms. Kinsey:

This is in response to your appeal of the decision of the Ohio Department of Transportation (ODOT) to deny certification to your firm. The U.S. Department of Transportation (DOT) affirms ODOT's decision.

I. Procedural History

The firm applied for certification on October 30, 2017. An on-site review was conducted on December 5, 2018. ODOT denied the firm's application through a letter dated December 14, 2017, and the firm timely appealed.

II. Burden of Proof and Standard of Review

As provided by 49 CFR 26.61(a) and (e), an applicant for DBE certification has the burden of demonstrating to the certifier, by a preponderance of the evidence, that it meets all eligibility criteria, including those related to control. In reviewing a certification appeal, the Department, as provided in 49 CFR 26.89(e) and (f), reviews the entire administrative record and affirms the certifier's decision unless we determine that it is unsupported by substantial evidence or is inconsistent with the Department's rules.

III. Facts and Discussion

In determining that the firm did not meet its burden of proof with respect to control, ODOT noted from the firm's application and the on-site interview report 49 percent owner Eric Kinsey, husband of 51 percent owner Bobi Kinsey, has experience with respect to heavy equipment operation and onsite supervision, and is a CDL driver who can drive the company's dump trucks when needed. He has been doing water and sewer work and oil and gas work for 25 years. He oversees the firm's field work and is also a member of the operators' union.

The on-site interview report also noted that an employee, David Dwyer, the firm's Superintendent, has several key responsibilities including estimating, overseeing employees and safety, job costing, restoration, correspondence with subcontractors and project managers, bonding, drafting bids, and marketing.

Bobi Kinsey has worked as a bank teller and does bookkeeping, accounting, signing checks, and other financial work for the company. ODOT cites the on-site interview for the proposition that she is not involved in the company's field operations, and she does not have experience or expertise in the substantive work of the business. The on-site report relates that the company's policies and procedures are established "between everybody."

While Ms. Kinsey has formal responsibility for overseeing all operations (in addition to accounting, billing and receipts), ODOT concluded, referencing 49 CFR 26.71(g), that she did not show that she has the ability to intelligently and critically evaluate information presented by other participants in the company and use this information to make independent decisions concerning the firm's daily operations, or managerial experience directly related to the firm's business activities. The ODOT denial letter also alludes to the last sentence of paragraph (g), which provides that expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm generally does not suffice to demonstrate control.

In her appeal letter, Ms. Kinsey states that her experience in dealing with business through her bank job and her business management degree gives her the ability to evaluate the current situation of her business and make decisions to help it grow. She asserts she has the ability to perform contract negotiations, evaluate personnel and equipment needs, and keep projects within budget. As a union contractor, she adds, she can always obtain qualified, skilled workers as needed. Neither in her appeal letter nor as reflected in the on-site interview report, however, does she explain how she is able to intelligently and critically evaluate information from other participants (e.g., Mr. Kinsey with respect to field operations, Mr. Dwyer with respect to his various responsibilities) and make independent decisions based on that information.

IV. Conclusion

Given the information in the record, the Department concludes that ODOT had substantial evidence to decide that the firm failed to meet its burden of proof concerning control by Ms. Kinsey. Consequently, the Department affirms the ODOT decision denying the firm's application for DBE eligibility. Because the Department upholds ODOT's decision based on control, it is unnecessary for the Department to reach the issues concerning ownership and differences in remuneration discussed in the ODOT denial letter and Ms. Kinsey's appeal.

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

Sincerely,

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

cc: Deborah M. Green

