



**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

February 27, 2019

Reference No: 18-0085

Sherri Bova, President
MotherTrucker, LLC
P.O. Box 296
Struthers, OH 44471
Reference No.: 18-0085

Dear Ms. Bova:

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 26, 2017. An on-site interview was conducted on December 6, 2017. ODOT denied the firm's application through a letter dated December 14, 2017. The firm's appeal to the Department was received on March 13, 2018.

II. Burdens of Proof and Standard of Review

(a) Burdens of Proof

As provided in 49 C.F.R. 26.61(b) of the rule, an applicant firm must demonstrate, by a preponderance of the evidence, that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

(b) Standard of review for certification appeals

On receipt of an applicant's appeal from a denial of certification, the Department makes its decision "based on the entire administrative record as supplemented by the appeal..."¹ The Department does not make a *de novo* review of the matter....² The Department affirms (a

¹ 49 C.F.R. §26.89(e).

² Id.

certifier's) decision unless it 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."³

This language means that the Department does not act as though it were the original decision maker in the case or substitute its judgment for that of the certifier. If the certifier's decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department will affirm the certifier's decision.

III. Discussion

(a). The ODOT denial and the firm's appeal

ODOT's denial letter asserted that the firm did not carry its burden of proof with respect to either ownership or control. The letter noted that MotherTrucker (MT) is affiliated with J.S. Bova Excavating LLC (JSB), a non-DBE firm the Bovas co-own, sharing office space, employees, storage space, and truck maintenance work. The companies' administrative work (e.g., accounts payable and receivable, payroll) is likewise comingled. There are intercompany accounts that permit JSB to pay MTL bills in some circumstances. This led ODOT to conclude that MT is not independent of JSB.⁴

ODOT also said that Ms. Bova's husband, Lewis Joseph Bova, had extensive experience in a variety of types of work relevant to the firms' operations, including driving (he has a CDL) and maintenance experience on the firms' trucks. He is also responsible to dispatching trucks. Ms. Bova's work focuses the administrative tasks the companies, such as accounting, payroll, office management, and money management. She does not go into the field.

In her appeal, Ms. Bova does not disagree with this view of the company's division of labor. However, she asserts vigorously that she plays a key role in MT. She is the face of the company, she said, and developed its logo. She knows everything about the hauling business, and she runs everything but the "boots on the ground." Until MT gets more business – for which DBE certification would help – MT cannot afford to have separate employees. While the two companies share facilities and equipment, they keep their accounts separate. MT has relationships with companies with which it does work that are separate from JSB's (the appeal attaches letters from other companies or individuals stating their regard for Ms. Bova's

³ 49 C.F.R. §26.89(f)(1).

⁴ Per 49 C.F.R. §26.71(b) "only an independent business, can be certified as a DBE." The remaining portion of the provision states: "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."

professional abilities and their desire to use MT if it is certified as a DBE). Ms. Bova is in charge of insurance, licensing, training, and licensing matters, as well as payroll and other financial and administrative tasks and making decisions concerning obtaining new equipment.

(b) The Department's analysis

It is clear from the record that, at the present time, MT and JSB are inextricably intertwined. The statements about the shared facilities and functions in the ODOT denial letter are amply supported in the record, including the documentation of the Bovas' statements in the on-site interview and the application itself. The photos accompanying the on-site interview strengthen this impression. For example, the door to their building bears the logos of both companies, the Bovas and their laptops share a desk, and pieces of equipment with the logos of each company sit next to each other in the garage. Nothing in the appeal letter controverts this relationship.

We do not minimize Ms. Bova's skills or the importance of her tasks to the business, but Ms. Bova herself, on p. 2 of the appeal letter, aptly summarizes the nature of her business when she points out that "we own our companies together as a team and pool our resources... We're just a family and believe in helping each other in our family's businesses." Section 26.71(k)(2) of the Department's regulation provides that

If you cannot determine that the socially and economically disadvantaged owners – as distinct from the family as a whole – control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though even though they may participate significantly in the firm's activities.

MT appears to be just such a case, in which the firm is run as part of a joint family enterprise the control of which cannot distinctly be assigned to Ms. Bova.

Given that MT apparently does not produce sufficient income for the principals to take salary from it, the salary differential from JSB – Mr. Bova's was roughly three times more than Ms. Bova's, according to p. 6 of the appeal – does not help her case that she has a dominant, or even equal, role in the joint enterprise.

An additional issue regarding control arises from the terms of MT's operating agreement. Prior consent of all members (i.e., Mr. Bova as well as Ms. Bova) is required for certain "major decisions," per section 5.3 of the agreement. Under section 6.4(a) of the agreement, all members must be present in order for there to be a quorum at a meeting, or, in the case of a decision taken by written communication, under section 6.4(b), all members sign off on the action.⁵ The fact that Mr. Bova, who also serves J.S. Bova Excavating LLC (JSB), a non-DBE firm the Bovas co-own, can exercise this degree of control over MT only adds to the conclusion that the applicant firm is not independent of JSB. (*See §26.71(b)(2) above*, which requires the certifier to consider

⁵ This language raises a concern that the firm also does not meet section 26.71((c) of the Department's regulation, which provides that there can be no restrictions in corporate documents "that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm." This provision was not cited by ODOT and we advise the agency, should the firm choose to reapply to examine this aspect of the case more closely.

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.” (emphasis added)

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 independence and control by Ms. Bova. Consequently, the Department affirms the ODOT decision denying the firm’s application for DBE eligibility. Because we have decided this case on the control issues, it is not necessary for us to reach the ownership issues discussed in the ODOT denial letter and the appeal.

This decision is administratively final and not subject to petitions for review. The firm may reapply to the DBE program as the applicable waiting period has passed.

Sincerely,

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

cc: Deborah M. Green