



**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 5, 2019

Reference Number: 18-0103

Ms. Rita Gupta, CEO
Simsona Technology, Inc.
2275 Research Blvd., Suite 500

Ms. Monica A. Crusse, Chairperson
Minority Business Enterprise Advisory Committee
Maryland Department of Transportation
7201 Corporate Center Drive
Hanover, MD 21076

Dear Mses. Crusse and Gupta:

This letter responds to the April 28, 2018 appeal filed by Ms. Rita Gupta on behalf of Simsona Technology, Inc. (Simsona) challenging the Maryland Department of Transportation's (MDOT) April 3, 2018 denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). Following MDOT's October 30, 2017 on-site interview and the agency's December 6, 2017 hearing, MDOT determined that Simsona did not demonstrate eligibility under the Regulation §§26.69(b) and (c); and §§26.71(b), (e), (g), (h), (k).

We uphold MDOT's determination that Ms. Gupta did not demonstrate ownership of the firm per §26.69(b) nor control of the engineering and architecture areas of work performed by the firm within the meaning of §26.71(g).

Control

Simsona, founded in April 2017, provides information technology services, infrastructure support, systems engineering, and engineering services including drafting, scheduling, estimating, and design.¹ Ms. Gupta's is the firm's sole owner and her socially disadvantaged spouse, Mr. Rakesh Gupta is the firm's President.

1. The Department upholds MDOT's determination that Ms. Gupta has not met the control requirements of §26.71(g)² for the work the firm performs in NAICS code 54130, 5413330, and

¹ DBE Application (July 20, 2017) at 5.

² §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

541340. Her 19 years' experience, according to her résumé, is in information technology fields, having held positions as Senior IT Consultant, Senior Software Engineer, Web Designer, and Web Developer. Ms. Gupta holds a Bachelor of Science degree in Computer and Information Science.

Ms. Gupta indicated during MDOT's on-site interview, that the firm's architectural, drafting, and engineering services are performed by Mr. Gupta (who holds a civil engineering degree) and employees in India. MDOT reports (on-site interview, p. 8) that she gained knowledge of these services in the last 2 years through on-line tutorials and that Mr. Gupta was training her to use scheduling software called Critical Path Method. We agree that Ms. Gupta may have an overall understanding of these fields, however, the §26.71(g) makes clear that such knowledge, by itself, does not sufficiently demonstrate control. This provision requires she also demonstrate 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. Ms. Gupta did not provide evidence demonstrating how her information technology background equips her to operate an architectural, engineering, and drafting firm. The Department finds that substantial evidence in the record supports MDOT's §26.71(g) conclusion regarding the above NAICS codes. MDOT's decision is consistent with the Regulation's substantive or procedural provisions relating to certification; and we affirm it per §26.89(f)(1).

Ownership

Ms. Gupta lists \$5,000 cash as her initial investment to acquire your ownership interest.³ Other capitalization funds are described in a statement entitled "Simsona Technology Capitalization" that reads:

CEO, Rita Gupta capitalized the company from personal savings in the amount of **REDACTED**. CEO, Rita Gupta purchased stocks in the amount of **REDACTED** from personal savings and deposited check in the Simsona Technology, Inc. bank account. CEO, Rita Gupta deposited **REDACTED** in Fidelity Investments in the Simsona Technology, Inc. account to use it as working capital in the company. . .

Documents supporting these transactions are contained in the record and include two checks drawn on the a PenFed Credit Union account (one check with the notation "stock purchase for **REDACTED** dated April 14, 2017 and a July 3, 2017 **REDACTED** There are also two checks from a CapitolOne Bank account (the first check is dated April 28, 2017 for **REDACTED** made payable to Simsona, and the second check for **REDACTED** is dated June 26, 2017). Both checks for **REDACTED** are made payable to a Fidelity Brokerage account.

The Regulation requires a real and substantial capital contribution from the SED owner. §§26.69(c) and (e). In determining whether an asserted capital contribution derives from the SED

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.* (Emphasis added).

³ *Id.* at 7.

owner's own funds, the certifier under §26.69(a)⁴ “must consider” the origin of all assets and how they were used in obtaining ownership of the firm. MDOT determined based on the record evidence, Ms. Gupta's assertions at the on-site interview (and as she concedes on appeal) that the funds that constituted the firm's initial capitalization were derived from the PenFed Credit Union and CapitolOne accounts, which are jointly held by Ms. Gupta and her spouse Rakesh Gupta.

The Regulation permits the use of joint marital assets for an individual to gain an ownership interest in a firm, as long as the owner's spouse irrevocably renounces and transfers all rights in the ownership of the firm at the time of submitting its DBE application.⁵ The relevant provision, on this point (§26.69(i)) was not quoted by MDOT. It requires a recipient not to not count a greater portion of community property assets toward ownership that state law would recognize as belonging to the disadvantaged owners of the applicant firm, unless there is a spousal renunciation provided at the time of application. The provision states:

You must apply the following rules in situations in which marital assets form a basis for ownership of a firm: (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm. (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

Absent any proof of Mr. Gupta's renunciation and transfer of ownership interest in these assets to her *prior* to MDOT rendering a final certification decision, Simsona has not proven, by a preponderance of the evidence, that a socially and economically disadvantaged individual owns at least 51% the firm, as the Regulation requires.⁶ **(The firm may provide one if the firm**

⁴ §26.69(a): “In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.”

⁵ Otherwise, §26.69(i)(1) considers the SED spouse to have personally contributed 50% of the firm's capital and to own, at most, a 50% ownership interest.

⁶ Absent Mr. Gupta's renunciation as described in §26.69(i)(1), Ms. Gupta and her spouse would be considered to have contributed equal capital, which would not make your own capital contribution “commensurate with” the value of your 100% ownership interest under §26.69(c)(2) (“Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm”).

In other cases the Department has decided on this issue, the spouse who shares in the joint assets in question is a non-disadvantaged individual; and like here, we upheld several cases wherein there was no renunciation completed prior to or contemporaneous to the DBE application. In Simsona however, Mr. Gupta is as socially disadvantaged individual. The intent of this provision and its applicability in situations wherein a non-disadvantaged spouse

chooses to reapply for DBE certification).⁷ Substantial evidence in the record supports MDOT's ownership conclusion, which is consistent with the Regulation's substantive or procedural provisions relating to certification; and we affirm it per §26.89(f)(1).

Other Issues

1. MDOT's §26.71(g) conclusions focused exclusively on architecture, civil engineering, and drafting. However, this work applies to only 3 of the 8 NAICS codes Simsona requested. MDOT is required, per §26.71(g) and (n), to grant certification in the areas of work the qualifying SED owner, can control. (A firm may be certified as a DBE in some but not all of the work areas requested). MDOT concedes on page 12 of its determination that Ms. Gupta controls the information technology services Simsona provides. In the event the firm reapplies, which it may do after April 3, 2019, MDOT should reconsider its findings on this issue if the agency deems the firm to have met all other eligibility requirements.

2. The Department is not rendering a decision at this time concerning Simsona's independence and whether the firm meets all §26.71(b) requirements, as our findings on the ownership and control issue above is sufficient to uphold MDOT's denial decision. We raise here two points for MDOT's future consideration.

a. MDOT concluded that Simsona is not an independent business as required by §26.71(b) because of its relationship with Mr. Gupta's firm, Simsona Corporation, which operates from the same location as the applicant firm. (Ms. Gupta alleges MDOT misread the fact that Simsona is a virtual business). MDOT found that the funds to begin Simsona (the applicant firm) operations were jointly held; the engineering, architecture, and design services Simsona would be performed by Mr. Gupta; and that these same services are Simsona Corporations' primary line of work. MDOT stated: "the interrelationship between Simsona Technology and Simsona Corporation compromises its independence. The sharing of office space, employees, corporate identify, and other resources compromises the disadvantaged owner's ability to independently operate the company." (Denial, p. 9) As we find that substantial record evidence supports MDOT's conclusion that Ms. Gupta does not possess the requisite control for the architecture, drafting, and engineering codes requested; one of the questions this raises is whether Simsona is viable the other categories of work without the involvement of Simsona Corporation, a non-DBE firm, and Mr. Gupta. It is unclear precisely either's role in the information technology side of Simsona and if the items MDOT previously indicated were shared make a difference to Simsona's viability per the Regulation's requirements.

contributes marital assets is described in the Department's October 2014 rule. While we acknowledge as perfectly accurate MDOT's observation that §26.61(b) places the burden of proof on the applicant, we point out that §26.86(a) requires the certifier to explain eligibility requirements fully. The marital renunciation provision is one such area that could be raised with the applicant early on in the process. If the firm chooses to reapply for certification, this issue can easily be resolved with MDOT requesting (and the firm may provide) a renunciation document. MDOT of course, if it chooses, could request one immediately in the interest of resolving this issue expeditiously.

⁷ MDOT erroneously stated in its denial decision that the firm may reapply after 12 months from the date of final determination by [the Department] if an appeal to the Department is made. Pursuant to §26.86(c), a recipient may impose a waiting period of up to 12 months for reapplication following an adverse decision (**whether appealed to the Department or not**).

b. There may be other relationships between the applicant firm and non-DBE entities besides the one MDOT found exists with Mr. Gupta's firm, Simsona Corporation. For instance, Ms. Gupta stated during MDOT's hearing that she will call upon and supervise three consultants in India who are not affiliated with any outside firms. This is unclear as Ms. Gupta also stated that per agreement (not contained in the record) she has a payment relationship with "Mr. Goel"⁸ who lent Ms. Gupta **REDACTED** to "finance the India operation" and who provides financial support such as paying Simsona employees whom Ms. Gupta hires. (*See* hearing transcript, pp. 25–27). More information is needed regarding this relationship before an independence determination is made.

In summary, substantial evidence in the record supports MDOT's conclusions addressed above and the Department affirms MDOT's decision. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: MDOT

⁸ The name is spelled "Gough" in MDOT's hearing transcript.