



**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 26, 2018

Reference No: 18-0115

Jeff P.H. Cazeau  
14 NE 1<sup>st</sup> Avenue  
Suite 502  
Miami FL 33132

Dear Attorney Cazeau:

This is in response to your appeal of the decision of the Broward County Office of Economic and Small Business Development (OESBD) to deny Disadvantaged Business Enterprise (DBE) certification to your client, Demcon Group, LLC. The U.S. Department of Transportation (DOT) affirms OESBD's decision.

**I. Procedural History**

Demcon originally applied for certification to OESBD in 2016. The agency denied the application through a letter dated March 28, 2016. Demcon then reapplied on November 3, 2017. Following a February 8, 2018, on-site review report, OESBD again denied the firm's application, this time through a letter dated March 9, 2018. The firm appealed to DOT on June 5, 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.

However, a different burden of proof applies to ownership situations addressed by section 26.69(h) of the rule. This provision concerns ownership interests in a business that a non-disadvantaged individual has transferred to a disadvantaged individual without adequate consideration, while the non-disadvantaged individual remains involved in the firm.

In such a case, the firm must show by the more stringent "clear and convincing evidence" standard both that the transfer was made for purposes other than obtaining DBE certification and that the disadvantaged individual actually controls the company, notwithstanding the continued participation of the non-disadvantaged individual who made the gift or transfer.

One question that has arisen in the course of the 2016 and 2018 reviews of the firm's application by OESBD is whether the higher standard of proof of section 26.69(h) applies. When Demcon was created in September 2011, the firm's operating agreement listed Carlos Mormeneo, Gary Lowe, and David Mittler as co-owners. In January 2013, Mr. Mittler assigned his membership interest to his wife, Joni Mittler, without consideration. There is no information in the record indicating that Mr. Mittler remains involved in the company as an owner or otherwise. In March 2017, Ms. Mittler gave Mr. Mormeneo an irrevocable general proxy authorizing him to vote and act for her in matters affecting the company. This proxy did not transfer her ownership interest to him, however.

Given that Mr. Mittler assigned his ownership interest to his wife in 2013, well before Demcon's initial DBE application in 2016, and that the record does not show Mr. Mittler as having a current role in the corporation, section 26.69(h) does not apply based on this transaction. Moreover, since the 2017 proxy given by Ms. Mittler to Mr. Mormeneo is a transfer of voting rights, not of an ownership interest from a non-disadvantaged individual (as a woman, Ms. Mittler is presumptively disadvantaged), section 26.69(h) does not apply as a result of this transaction either. Consequently, only the "preponderance of the evidence" standard of proof of section 26.61(b) applies to consideration of the firm's ownership and control.

#### (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..."<sup>1</sup>

The Department does not make a *de novo* review of the matter..."<sup>2</sup> The Department affirms (a 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."<sup>3</sup>

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. Ownership Issue**

The record is clear that Mr. Mormeneo and Ms. Mittler, both presumptively disadvantaged individuals, each own one third of Demcon. Together, they own two thirds of the firm. This exceeds the regulatory requirement for at least 51 percent ownership by disadvantaged individuals. As noted above, the higher standard of proof established in section 26.69(h) does not apply. In any case, there is no doubt that Demcon meets the ownership requirements of section 26.69.

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<sup>1</sup> 49 C.F.R. §26.89(e).

<sup>2</sup> Id.

<sup>3</sup> 49 C.F.R. §26.89(f)(1).

#### IV. Control Issues

Whether Mr. Mormeneo controls Demco is at the heart of the case. There are several control issues involved.

##### a. Control by only one of two disadvantaged owners

By definition, a DBE is a firm “whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it”<sup>4</sup> (emphasis added). Mr. Mormeneo asserts that he controls the business. Ms. Mittler does not make such an assertion, and it is clear from the record that she does not play a controlling role in the firm. Her lack of a controlling role is not decisive, however. As long as Ms. Mormeneo, being one of the disadvantaged owners, is found to control the firm, then the firm meets regulatory control requirements.

##### b. Possession of the firm’s license

Mr. Lowe, a non-disadvantaged individual, holds the General Contractor License for Demcon. Mr. Mormeneo does not hold such a license. From this fact, OESBD infers that Mr. Lowe, rather than Mr. Mormeneo, should be regarded as controlling the firm.

The controlling regulatory provision concerning this issue is section 26.71(h), which states:

*If 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.*

Under this provision, lack of a license by a disadvantaged owner automatically dooms an application only if state law specifically says that only the possessor of such a license is authorized to control a firm in a given line of work.

In its May 2016 denial letter, OESBD states that “The State of Florida Department of Business and Professional Regulation, per Section 489.105(3), requires Demcon Group, LLC to hold a General Contractor License to perform demolition services. The license is a critical element for the company to be able to operate. The license is held by Earl Gary Lowe.” This point is alluded to again in the agency’s March 2018 denial letter. As interpreted by the certifier, then, the state statutes require Demcon as a company to hold the license, rather than Mr. Mormeneo as an individual. As a Federal agency, it is not our role to interpret state law. Consequently, we defer to the certifier’s interpretation, under which it is not appropriate to deny certification to Demcon solely because Mr. Mormeneo does not personally hold the license. However, his lack of

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<sup>4</sup> 49 C.F.R. 26.5, definition of “disadvantaged business enterprise, paragraph (2).

licensure, vs. Mr. Lowe's holding of the license – and the expertise that doing so implies – may be taken into account when determining who controls the firm.

(c) Sufficiency of Mr. Mormeneo's technical competence and expertise

The appeal letter correctly states that a disadvantaged owner, to be regarded as controlling a firm, need not have experience or expertise in every critical area of the firm's operations and that what is needed is the ability to intelligently and critically evaluate information presented by other participants in the firm, using it to make independent decisions concerning the firm's activities.<sup>5</sup> However, the appeal is incorrect in arguing that an assertion by a disadvantaged owner that he meets this requirement shifts the burden of proof to the certifier to refute the owner's statement.<sup>6</sup> There is no burden shift in a certification proceeding: the burden of demonstrating that the firm meets all requirements stays with the applicant throughout. In an initial application case, as distinct from a decertification case, the certifier never has the burden of showing that the disadvantaged owner does not control the firm.

In his affidavit supporting the appeal, Mr. Mormeneo states that he has learned much about the company since he became an owner in 2012 and that he has learned all the technical aspects of the business and controls it in every way. However, Mr. Mormeneo does not come forward with evidence, other than this general assertion, to prove the point. While the affidavit cites the section 26.71(g) language concerning being able to intelligently and critically evaluate information provided by other participants and make independent decisions on the basis of the information, neither in the affidavit nor elsewhere does Mr. Mormeneo provide evidence showing that he can do so or that he has done so in any specific instance. Absent evidence, assertions standing alone do not meet an applicant's burden of proof.

This is not to say that Mr. Mormeneo lacks a meaningful role in the company. He stated that his background and responsibilities focused on accounting, taxes, and business decisions in general, adding that he had a criminal justice degree and had experience in brokerage firms.<sup>7</sup> In the current, revised operating agreement, he is listed as the Managing Member.<sup>8</sup> He has signatory authority with respect to the company's bank accounts and has the power to hire and fire employees. He signs contracts and approves estimates. Generally, Mr. Mormeneo claimed broader responsibilities within the firm during the 2018 on-site interview than he did in the corresponding interview in 2016.

However, in responding to both the 2016 and 2018 on-site interview questions, Mr. Mormeneo, agreed that Mr. Lowe is responsible for project management, field operations, and oversight.<sup>9</sup> As

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<sup>5</sup> 49 C.F.R. 26.71(g).

<sup>6</sup> Appeal letter, p. 5, first full paragraph.

<sup>7</sup> Id. at Item 22.

<sup>8</sup> Mr. Lowe held that title under the original operating agreement. There is nothing in the record explaining the reason for the change.

<sup>9</sup> 2016 and 2018 on-site interview forms, Item 32.

noted above, Mr. Lowe possesses the contractor's license for the firm, attesting to his competence in the field, as well as significantly more years of experience in the firm's core business activities than Mr. Mormeneo. The oversight of these functions by Mr. Lowe, rather than Mr. Mormeneo—who did not claim education or experience relating to Demcon's primary functions—provides substantial evidence to support the certifier's conclusion that Mr. Lowe is disproportionately responsible for the operation of the firm.<sup>10</sup>

#### **IV. Conclusion**

Given the information in the record, we conclude that there is substantial evidence to support the proposition that the firm did not meet its burden of proof to show that Mr. Mormeneo controls the firm. While Mr. Mormeneo's responsibilities in the period between 2016 and 2018 may have increased, the continued crucial, disproportionate importance of Mr. Lowe's functions and the lack of evidence supporting Mr. Mormeneo's assertions with respect being able to intelligently and critically evaluate information provided by other participants and make independent decisions on the basis of the information, militate against his ability to meet this burden of proof under sections 26.71(e) and (g).

Because we are deciding the case on this basis, we do not need to reach other control issues raised in the OSEBD decision and the appeal (e.g., whether Mr. Mormeneo, given his involvement with another company, has sufficient time to devote to controlling Demcon).

This decision is administratively final and not subject to petitions for review. Demcon may reapply to the program after the applicable waiting period has passed.

Sincerely,

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

cc: LDOT

cc: Sandy-Michael McDonald  
Broward County, Office of Economic and Small Business Development

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<sup>10</sup> 49 C.F.R. 26.71(e)