



**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

March 26, 2019

Reference Number 18–0122

Ms. Michelle Kogler, CEO
Kogler Enterprises
REDACTED
Oakhurst, CA 93644

Dear Ms. Kogler:

Kogler Enterprises (Kogler) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the City of Fresno, a member of the California Unified Certification Program (CUCP). The Department affirms CUCP's decision.

I. Procedural History

Kogler applied for certification in February 2018, and CUCP conducted an on-site interview on March 16, 2018. CUCP denied the application on April 6, 2018, determining that you, Kogler's qualifying disadvantaged owner, did not meet the control requirements §§26.71(e), (f), (g) and (h) of the DBE program regulation, 49 C.F.R. Part 26. Kogler appealed this decision to the Department on May 24, 2018, and we requested the administrative record pursuant to §26.89(d).

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

¹ 49 C.F.R. §26.89(e).

Department does not make a *de novo* review of the matter....”² 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.”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. Control Issues

Kogler performs heavy highway, civil, airport, pipeline and building construction, and commercial and home building and you are the firm’s 51% owner (Uniform Certification Application (UCA) p. 5, On-Site Interview Report (OSR), p. 1). The principal issue in the case is whether you, the firm’s disadvantaged owner, controls it.⁴

According to the CUCP’s decision, your background and experience is in clinical settings and administrative experience (writing, training, and developing programs) in the health care industry. There is no reference in your résumé of you having expertise, skills, or a background in the construction field; rather your work history is in logistics, supply chain management, and small business management. CUCP concluded that you did not possess an overall understanding and technical background either through education or experience directly related to heavy construction and did not meet the requisite burden of proof under §26.71(g)⁵. Furthermore, CUCP found that you operate (virtually) a business in Utah, Infinite Potentials Health and Wellness, on average 20 hours per week; and you are out of state taking care of your parents--managing Kogler from afar. In CUCP’s view, it is unclear when you spend time at Kogler or what role you play in the firm.

In contrast, CUCP concluded that you have delegated operational oversight of the firm’s field work to Kogler’s 49% non-disadvantaged owner, Dennis Kogler, by virtue of his construction

² Id.

³ 49 C.F.R. §26.89(f)(1).

⁴ Certification must be granted to a firm only for the specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. 49 C.F.R. §26.71(n).

⁵ 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.”

expertise.⁶ You stated you manage the firm from afar (phone work, bookkeeping, contacting state agencies, etc.) while you are assisting your parents. (OSR, p. 8). Mr. Kogler possesses 39 years' experience in the construction management industry, has performed heavy civil and highway projects (including runway jobs); holds the firm's "A" General Engineering license; and is the licensed qualifier for the firm. CUCP citing §26.71(h)⁷ determined that the State of California requires the person who owns and controls a construction management firm to be licensed; and in Kogler's case, Dennis Kogler holds this license. It is he CUCP believes, has the requisite ability to provide the core construction services without which the business would not be viable. He is primarily responsible for estimating and bidding because of his expertise and "always" supervises field operations. (OSR pp. 8, UCA, p. 9). You described his expertise as follows:

[H]aving passed the test and done the work, excuse me done the certification and gotten his license Dennis has had to have that. But more than that he also has over 35 years of heavy highway heavy civil construction. Both airports, roads, trains. He's worked on railways before. He's done general contracting building. He's got electrical, he's also had electrical licenses. So, there's a lot of expertise that he brings. He's been quality inspector for heavy civil projects and for pipeline as well. So, he has really the very background and the expertise more than my engineering background. (OSR, p. 11)

CUCP reported that you both make financial decisions, perform negotiating and contract execution, and purchasing of equipment. You described your expertise as engineering, logistics, procurement, and telecommunications. (OSR, p.11). You perform Kogler's marketing and sales and when asked whether you perform quality control and inspection to ensure work is being carried out according to specifications, you indicated you rely heavily on Mr. Kogler because of his expertise. Mr. Kogler you stated, would also handle changes to work orders and

⁶ The relevant provisions on this point are Sections 26.71(e) and (f), which state:

"Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm." 49 C.F.R. §26.71(e).

"The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy." 49 C.F.R. §26.71(f).

⁷ §26.71(h)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."

specifications during the project phase of construction, but that you would follow through with the process with the contractor you are working with. (Id. at 17)

On appeal, you confirm that you travel back and forth from Utah to California often, managing, and coordinating care for your parents with help from your brothers, but dispute CUCP's reference to your outside business taking away from your ability to run Kogler. You allege that you and Dennis Kogler perform day-to-day scheduling for on-site projects and that he "works with the crews." If questions are raised by subcontractors and Mr. Kogler is involved in other on-site projects, you allege the subcontractors also contact you; and that you and he talk several times a day when you are out of town. These discussions involve project management, project acquisition, contracts, scheduling, planning, hiring, team management, procurement, etc.—all functions of an owner/CEO. You allege CUCP failed to consider your background in real estate and property appraisals; and your engineering experience; which consists of 5 years employment at Quest Telecommunications in the small business and engineering departments. According to you, these positions were technical and logistical in nature, and required an understanding of the assets, resources, personnel, and machinery in the field. You further allege that you spent several months on a highway job, wherein Mr. Kogler explained the details of the work, interfaced with the crews, learning blueprints and the methods to build bridges. Once Kogler opened in 2014, you claim 4 years of experience running the business and, jointly, with Mr. Kogler, performed estimating, project acquisition and management, contracts, scheduling, planning, hiring/firing, procurement, and other duties.

IV. Decision

The Department does not minimize the importance of your contributions to the firm; and we agree that the finance and administration functions you perform are necessary to the success of any business, whatever its products or services. However, the expertise related to the success of this specific heavy construction firm resides with Mr. Kogler, who has training and experience in that field. (Kogler lists asphalt paving, grading, removing dirt, installing pipelines and sewer systems as part of its portfolio (OSR, p. 5)) Mr. Kogler's expertise is necessary for the decisions in the field and more likely than not, it is he who would make the decisions that will determine how a particular job is to be completed because of his expertise in the firm's core construction work and his licensure.⁸ His expertise, experience, and operational oversight of field operations is uncontroverted; and many of his administrative duties are shared with you. CUCP had sufficient evidence to conclude that he is disproportionately responsible for Kogler's operations and we agree with the agency's §26.71(e) finding. In addition, based on the record, substantial evidence supports CUCP's §26.71(f) conclusion, we agree that the agency could not reasonably conclude that you actually exercise control over the firm's operations, management, and policy.

⁸ CUCP stated in its denial decision that "*the State of California requires the person who owns and controls a construction management firm to be licensed. In order to control the firm, Ms. Kogler. . . would need to possess the required license. Ms. Kogler does not possess the license; it is Mr. Kogler who holds the license for the firm.*" CUCP's statement appears to be at odds with the State's contractor license law, which provides a qualifier for a limited liability company may be a responsible managing member or manager, and RMO or RME, who in this case is Mr. Kogler as the license holder and qualifier. Per §26.71(h), this is a factor to consider in determining whether the disadvantaged owners actually control the firm. See page 17 at <http://www.cslb.ca.gov/Resources/GuidesAndPublications/LawReferenceBook2019.pdf>

Section §26.71(g) unequivocally states that the disadvantaged owner need not prove that he/she has greater expertise and experience than other participants in the firm; the focus is rather on the disadvantaged owner's abilities and attributes and whether they, more likely than not possess them. Thus §26.71(g) requires an owner to demonstrate two critical things: (1) an overall understanding of, and managerial and technical competence and experience directly related to the type of business the firm engages in and its operations and (2) 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. CUCP had sufficient basis in the evidence to conclude that you did not meet your burden of proof; you did not demonstrate technical competence and experience directly related to the firm's activities and operations, and your daily responsibilities are more akin to administrative functions. As §26.71(g) states: "Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control."

IV. Conclusion

Given the information in the record, the Department concludes that CUCP had substantial evidence to decide that the firm failed to meet its burden of proof concerning the control findings discussed above.⁹ Consequently, the Department affirms the CUCP's decision denying the firm's application for DBE eligibility under §26.89(f)(1).¹⁰ This decision is administratively final and not subject to petitions for review. The firm may reapply to the DBE program after the applicable waiting period has passed.

Sincerely,

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

cc: CUCP

⁹ CUCP makes this final conclusory statement in its denial decision: "[T]he ownership and control of Kogler is not real, substantial, continuing, and independent because it is dependent on the viability [of] its relationship with another firm or firms for its success." We agree with CUCP's control conclusions as explained in the Department's decision here, however, not for the reasons this sentence suggests. There is no indication CUCP found issue with Kogler's independence as defined by §26.71(b) or that your ownership is not "real, substantial, and continuing" as that phrase is used in §26.69(c). The firm's ownership and independence are not at issue before us.

¹⁰ The Department's decision that a recipient's certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. *See* 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999). In the event the firm reapplies, Kogler may present information demonstrating its eligibility, including the information you submitted on appeal indicating you are working toward obtaining your contractor's license.