



**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 28, 2019

Reference No: 18-0130

Thomas C. Wong
Managing Director
AES Services, LLC
REDACTED
Hazelwood, MO 63042

Dear Mr. Wong:

This is in response to your appeal of the decision of the Missouri Regional Certification Committee (MRCC) to deny certification to your firm, AES Services, LLC (AES). The U.S. Department of Transportation (DOT, or “Department”) affirms MRCC’s decision.

I. Procedural History

The firm applied for certification on January 4, 2018. An on-site review was conducted on March 2, 2018. MRCC denied the firm’s application through a letter dated April 30, 2018. The firm appealed to the Department through a letter dated June 25, 2018.

II. Burden of Proof and Standard of Review

(a) Burdens of Proof

As provided in 49 CFR 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

¹ 49 C.F.R. §26.89(e).

The 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

In denying the firm’s application, MRCC attached, and relied upon, the report prepared by certification analyst Larry Thurston who conducted an on-site visit to the firm on March 2, 2018. Mr. Thurston identified two sets of issues with the firm’s eligibility: (a) the firm’s independence of a related firm called Industrial Steel Fabrication (ISF),⁴ and (b) the ability of the applicant firm’s owner and sole employee, Thomas Wong, to control the firm.

(a) Independence

Mr. Thurston’s analysis determined that AES and ISF share the same facility, owned by Ted Stegeman, the owner of ISF and operations manager of AES. The actual steel fabrication work performed under AES’ contracts with customers is done by ISF workers, under Mr. Stegeman’s overall supervision. ISF, rather than AES, owns the fabrication equipment used. Heather Pawalek, an ISF employee, performs numerous administrative support tasks, including signing checks for AES. From these facts, which are not contested in the appeal, Mr. Thurston concluded that AES was not independent of ISF.

In the firm’s appeal, Mr. Wong contends that AES and ISF are separate, independent business and legal entities with separate ownership and control, executive leadership, financials, obligations, and liabilities. Through a commercial lease, which is part of the record, AES has a legal right to use ISF facilities, equipment, and staff and is obligated to compensate ISF for their use. Mr. Wong characterizes this as a normal lessor-lessee relationship, quite common for companies like AES that are young and developing. He also mentions that the two firms are in the process of negotiating a merger, citing a March 30, 2018, memorandum of understanding, also included in the record, formalizing their intent. There is no information in the record about whether the contemplated merger occurred.

² Id.

³ 49 C.F.R. 26.89(f)(1).

⁴ There is some confusing nomenclature involved in the case. AES is doing business as Industrial Steel Fabricators, as distinct from the related firm named Industrial Fabrication (emphasis added). For clarity, this decision will refer to the former as AES and the latter as ISF.

(b) Ability of Mr. Wong to control the business

Mr. Thurston's report states that Mr. Wong's education and background are in the area of finance. After working with a valve manufacturer in the early 2000s, followed by work in a furniture distributing, a home warranty company, and a financial consulting company (St. Louis Capital), using fund from the latter to purchase AES.

Mr. Thurston characterized Mr. Wong's comments with respect to his control of his management of the steel fabrication process by saying that Mr. Wong spoke only about the logistics surrounding the firm's operations. Mr. Wong, Mr. Thurston's report said, did not demonstrate that he had the ability to critically evaluate information presented to him and make decisions concerning the firm's daily operations. The report quotes Mr. Wong as saying that "I put down... Ted Stegeman as the Operations Manager because he overlooks a lot/some of the things too; he has the expertise and (is) also the previous owner of Industrial Steel Fabricators."⁵ From this, Mr. Thurston's report concludes that AES does not meet control requirements because Mr. Wong does not have the knowledge, skills and experience to control the day-to-day operation and management of AES.

In the appeal letter, Mr. Wong states he has worked in his present company for three years, learning much about the steel fabrication business, in the process developing managerial and technical competence directly related to steel fabrication. He emphasizes his broad business and management experience as well, saying that he is well-equipped with skills to evaluate information concerning AES's activities and to make independent decisions concerning them.

With respect to using Mr. Stegeman as operations manager, the appeal states that it is common practice in the industry to have someone with industry-specific experience serve in such a role. Mr. Wong cites the provision of section 26.71(f) that allows a disadvantaged owner to delegate functions of a firm to other individuals. As manager and sole owner of AES, Mr. Wong states, he is legally and financially responsible for all aspects of the company, can revoke delegations, and has hiring and firing authority.

The appeal letter also objects to the use of the quotation cited above because, he points out, it was one out-of-context selection from a lengthy on-site interview. AES requested a copy of the recording of the interview, but despite the requirement of section 26.86(a) to provide all information to a firm on which a denial was based, the recording had not been received as of the date of the appeal. A copy of the transcript of the interview was included in the record provided to the Department.

IV. Discussion

The appeal letter's contention concerning the MRCC's failure to provide an audio recording or transcript of the on-site interview is well taken. Section 26.86(a) does require a certifier to make available firm "all information on which a denial is based" to an applicant firm on request. This includes any tape or transcript of an on-site interview. Absent being able to place his comments

⁵ The reference appears to be to what this decision refers to as ISF (as distinct from AES).

or those of the certifier in context or point out where he believed the certifier may have misstated or misunderstood what he said, Mr. Wong's ability to make an effective appeal is hampered.

In this case, lack of access to the full transcript of the interview is crucial with respect to the issue of Mr. Wong's ability to manage and control AES by critically evaluating information presented to him and making independent decisions concerning the firm's work. While Mr. Wong did make the comment attributed to him in report with respect to Mr. Stegeman's expertise, he also talked extensively about his knowledge of the technical and operational sides of the business, discussion that Mr. Thurston's report does not cite.

The 90-page transcript is replete with information describing Mr. Wong's familiarity with all aspects of the business,⁶ including the machinery and software used in the fabrication process, the roles of different workers in the process, how he is able to determine if a product meets specifications, factors involved in pricing, and participate in bidding and estimating, among other things. Given this extensive information, it is difficult to see a rational basis for concluding that Mr. Wong lacks the abilities required of a disadvantaged owner by section 26.71(g).

Notwithstanding the legal separateness between AES and ISF and the lease, rate sheet, and other agreements through which AES has access to ISF facilities, the fact that the facilities, machinery, workers, technical supervision, and administrative support services are provided to AES by ISF make it difficult for AES to carry its burden of proof that, as required by section 26.71(b), it does not depend on its relationship with ISF. The regulation tells certifiers, in determining whether an applicant firm is independent, to "scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources."⁷ Renting space, use of employees, etc., between companies this closely allied goes beyond a normal, arms-length business relationship. Looked at as a whole, the intertwining of the affairs of the two companies provides substantial evidence to support MRCC's conclusion that AES does depend on ISF, in the absence of which AES would likely not be viable in the steel fabrication business.

V. Conclusion

The Department has determined that MRCC's conclusion with respect to Mr. Wong's ability to control AES is not supported by substantial evidence. However, the Department has determined that MRCC's conclusion with respect to AES not meeting independence requirements, because of its dependent relationship with ISF, is supported by substantial evidence. On the latter basis, the Department affirms MRCC's denial of the firm's application.

In so doing, we caution MRCC that when a recording of an on-site interview is made as part of the certification process, either the audio recording or a transcript of it must be made available to the applicant company on request. Failure to do so can lead to a reversal of a finding made on the basis of information in the interview and could also be an issue in a compliance review by the Department.

⁶ See for instance Transcript, pp. 4-8, 10-14, 23-27, and 38-53.

⁷ 49 CFR 26.71(b)(1)

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

Sincerely,

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

cc: Amber D. Gooding, St. Louis Lambert International Airport