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

April 12, 2019

Reference Number: 18–0134

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Dear Attorney Ryan:

Synergy Earth Systems, LLC (SES) appeals the Alabama Department of Transportation's (ALDOT) April 9, 2018 determination that SES is ineligible for certification as a Disadvantaged Business Enterprise (DBE) under the criteria set out at 49 C.F.R. Part 26 (the Regulation). ALDOT determined that SES did not demonstrate eligibility under Regulation §§26.69(c), (e), (h) and 26.71(f)-(g), provisions relating to ownership and control, respectively. We affirm on the basis that SES failed to demonstrate 51% real and substantial disadvantaged ownership and failed to overcome the presumption of nondisadvantaged ownership (*See* §§26.61(b), 26.69(c), and 26.69(h)).[1]

Background

The pertinent facts are uncontroverted. Robert Mattox established SES in 2005 and transferred 20% ownership to Sean Wokasien, a non-disadvantaged individual, in 2010. On May 31, 2017, Mr. Wokasien purchased Mr. Mattox's remaining ownership interest via a wire purchase for [redacted].[2] On this day, the firm submitted a "Domestic Limited Liability Company Amendment" that states: "Robert M. Mattox assigned all his interest in [SES] to Sean Wokasien so that Sean Wokasien is the sole member of [SES]." To fund the purchase, Mr. Wokasien obtained a loan for [redacted] (also dated May 31, 2017) from Oakworth Capital Bank (Mr. Wokasien was the sole borrower). ALDOT noted in its denial decision that [redacted] from a brokerage account owned by the Wokasiens was used as collateral.

Mr. Wokasien assigned 51% ownership in SES to Ms. Wokasien on the same day he purchased Mr. Mattox's remaining interest by filing a second "Domestic Limited Liability Company Amendment." This document lists as a "previous amendment" the membership interest transfer from Mr. Mattox to Mr. Wokasien.

[1] We do not opine on ALDOT's control grounds because our disposition is sufficient to affirm the decision under §§26.61(b) and 26.89(f)(1).

[2] Mr. Wokasien also issued a promissory note to Mr. Mattox for [redacted]

After the transfer, the Wokasiens amended the Oakworth Capital Bank loan agreement on July 25, 2017, making Ms. Wokasien a co-obligor; and removed Mr. Wokasien from the brokerage account used as collateral for the loan (establishing Ms. Wokasien as the account's sole owner). SES applied for DBE certification on October 18, 2017.

Per §26.83, ALDOT conducted an on-site interview on January 9, 2018 and inquired how the company was initially capitalized and how each owner received his/her share of ownership in SES. ALDOT concluded that Ms. Wokasien's 51% ownership is *pro forma* because there was no evidence that Ms. Wokasien contributed any capital to satisfy the requirements of §26.69(c). ALDOT further determined that Mr. Wokasien gifted/transferred this ownership interest to Ms. Wokasien and that SES failed to overcome the presumption of ownership by a nondisadvantaged individual under §26.69(h).

The appeal objects to ALDOT's finding arguing that Ms. Wokasien had in fact made a financial contribution and did not acquire her ownership interest from her husband as a gift or transfer without adequate consideration. SES argues that (1) the transactions between the parties (Wokasiens and Mattox) occurred simultaneously; (2) Ms. Wokasien meets the Regulation's ownership requirements because the capital funds in the Wokasiens' jointly held brokerage account ([redacted] were pledged as collateral for the Oakworth Capital Bank loan; (3) Mr. Wokasien renounced his ownership in these funds; and (4) Ms. Wokasien is a guarantor on the firm's bond agreement as of March 2017.

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. §26.89(e). The Department does not make a *de novo* review of the matter…." *Id.*

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." §26.89(f)(1).

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.

Decision

1. The record evidence demonstrates that Ms. Wokasien did not make a capital contribution to acquire her 51% ownership; rather, her ownership was transferred to her from Mr. Wokasien, at the same time he had purchased 80% of the firm from Mr. Mattox with loan proceeds he obtained. Your appeal argument that Ms. Wokasien's contribution was the collateral used for Mr. Wokasien to obtain the loan to pay Mr. Maddox is unsupported in the record and unpersuasive as

is your argument that without Ms. Wokasien's pledge of collateral and bond guarantee, the purchase of SES would not have occurred.

First, the record is unclear whether the Wokasiens' funds were used as collateral at all in connection with the Oakworth Capital Bank loan.[3] Second, your argument ignores the fact that Mr. Wokasien, not his wife, entered into the transaction to purchase the firm, and was the sole borrower on the loan; and it was Mr. Wokasien who paid Mr. Mattox. Third, collateral protects a lender in the event that the borrower defaults on a loan obligation; collateral is not, as the appeal asserts, means for Ms. Wokasien—who was not a borrower under the original loan agreement—to claim "direct and substantial financial contribution" to the firm. *See* Appeal at 2. Unlike a direct payment or evidence that one makes payments on a loan with his or her own funds, a pledge of collateral is not equivalent to making a real contribution.

Similarly, SES' argument that Ms. Wokasien signed individually as an indemnitor of the firm's bond obligations reflects a financial commitment and not a gift also fails. A pledge to be a guarantor on a bond in order for the firm to acquire work is in essence a promise to repay funds in the event SES defaults on a project. This does not constitute a "real" contribution under the under §26.69(c), but rather a promise contingent on a future event, which is insufficient.

In short, SES simply fails to show that Ms. Wokasien acquired her 51% ownership interest through a direct financial/capital investment into the firm, or that she made subsequent contributions to substantiate her ownership interest. Therefore, the firm fails to carry its burden of proof under §26.69(c).

2. There is ample evidence in the record that instead of capitalizing the firm with a real and substantial contribution, Ms. Wokasien received her 51% ownership interest from Mr. Wokasien, who made this transfer for no consideration. Transfers and gifts of ownership interest in a firm may form the basis for eligibility under §26.69(j) of the Regulation; however, because Mr. Wokasien (a non-disadvantaged individual) remained involved in the firm (as 49% owner) after the transfer; the requirements of §26.69(h) apply. Under this provision, ALDOT is required to presume that Ms. Wokasien does not hold these ownership interest unless the firm demonstrates by clear and convincing evidence, that the transfer of an ownership interest was made for reasons other than obtaining DBE certification and that Ms. Wokasien controls the firm, notwithstanding Mr. Wokasien's continued participation.[4] §26.69(h)(2).

The changes that Ms. Wokasien made to loan and bank documents after she acquired her ownership and shortly before SES applied for DBE certification, were unavailing attempts to make it appear as though her ownership was real and substantial. The record supports ALDOT's

[3] The loan document executed in July does not specify the Schwab account as collateral or security. Rather, the document notes that Oakworth Capital Bank is granted "a continuing lien and security interest in all collateral described in any security instruments delivered by Borrower to Bank from time to time. Such security instruments include, without limitation, that Pledge and Security Agreement from Borrower to Bank, Amended and Restated Security Agreement from Borrower to Bank and Security Agreement from Synergy Earth Systems, LLC to Bank. Collateral securing other indebtedness with Bank shall also secure this Note."

[4] The firm's failure to prove either condition (here, condition §26.69(h)(2)(i)) means that the presumption stands, with the result that the Regulation considers Ms. Wokasien to own zero percent of SES.

conclusion that SES failed to make a "clear and convincing" showing that the transfer occurred for a non-DBE purpose. Accordingly, we agree that ALDOT had substantial evidence to conclude that the firm failed to overcome the presumption of nondisadvantaged ownership.

Conclusion

Substantial evidence supports ALDOT's conclusion that SES failed to demonstrate eligibility on the basis of Regulation at §§26.69(c) and (h). We therefore affirm under §26.89(f)(1). This decision is administratively final and not subject to petitions for reconsideration. SES may reapply for certification, as the as the applicable waiting period has elapsed.

Sincerely,

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

cc: ALDOT