

May 17, 2019

Reference Number 18-0162

Leigh Kyle
President
Spurlock Landscape Architects



Dear Ms. Kyle:

This is in response to your appeal of the decision of the California Department of Transportation (Caltrans) to deny certification to your firm. The U.S. Department of Transportation (DOT) upholds the Caltrans decision.

Procedural History

The firm applied for certification on August 10, 2017. An on-site interview was conducted on January 26, 2018. Caltrans denied the application on May 7, 2018. The firm's appeal was sent to DOT on July 30, 2018.

Burdens of Proof and Standard of Review

Burden of proof when applying for certification. Section 26.61(b) generally requires an applicant for DBE and/or ACDBE certification to demonstrate, by a preponderance of the evidence, that it meets the requirements of 49 CFR Parts 26 and 23. 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.

Standard of review for appeals of certification denials. 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 Department does not make a *de novo* review of the matter;² rather, it affirms (a certifier's) decision unless it

¹ 49 CFR 26.89(e).

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 or substitute its judgment for that of the certifier. If a decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department affirms the decision.

Issues

The principal issue in the case is control. Caltrans cites a provision of the firm's by-laws that requires a majority of the members of the Board of Directors to constitute a quorum for a board meeting. Two of the four members of the Board are non-disadvantaged individuals, giving them the power to prevent a meeting from occurring and to block actions they oppose at any Board meeting convened. In Caltrans' view, these provisions deprive the majority owners of their customary powers concerning control of the firm and its Board of Directors, in contravention of pertinent DBE certification requirements.

The appeal replies that the by-laws relating to *shareholder* meetings provide that a majority of shares constitutes a quorum and carries a vote. Thus, Spurlock argues, the disadvantaged owners do have the power to make decisions and take action without the consent of their non-disadvantaged colleagues. They control the Board *ultimately* because, as shareholders, they can change quorum requirements or even remove directors. The firm points out that there has never been a deadlock with respect to a Board meeting.

Discussion

The by-laws concerning Board meetings give the non-disadvantaged directors the power to prevent the Board from meeting at all and, in the event of a meeting, the power to block any action the disadvantaged directors favor. These provisions preclude certification because the firm does not satisfy the requirements of sections 26.71(c) and (d) of the DBE regulations. The Department has consistently and frequently ruled that provisions that cede these powers to non-disadvantaged directors are fatal to eligibility.⁴ The mere existence of a provision—for corporations, there almost always is one⁵—that

² Id.

⁴ See, e.g., 14-0024 *Smart Associates Environmental Consultants, Inc.* (July 1, 2015), 14-0035 *Rear View Safety, Inc.* (July 6, 2015), 14-0034 *Vegas Heavy Haul, Inc.* (July 8, 2015), 15-0148 *Gideon Toal Management Services* (March 26, 2016), 16-0015 *Tollie's Landscaping and Lawn* (June 10, 2016), 16-0064 *Ryan Biggs/Clark Davis Engineering and Surveying, P.C.* (August 12, 2016), 17-0053 *D.M. Conlon Inc.* (November 21, 2017), 17-0131 *Cable Trucking Inc.* (March 26, 2018).

⁵ Otherwise, there would be little to no need for sections 26.71(c) or (d) or much of the rest of section 26.71. The Department interprets these rules to mean what they say: "There can be *no restrictions*,

permits shareholders to amend governing documents or replace directors does not cure the flaw. Only actual changes to, e.g., quorum requirements, voting rights, board composition, do. See also §26.73(b)(1). Per §26.89(f)(6), the Department's decision is based on the circumstances at the time of the decision, not actions that might take place in the future.⁶

Here, the by-law provision in question provides substantial evidence to support Caltrans' conclusion that the firm failed to meet its burden of proof⁷ with respect to control. Under the circumstances, it is unnecessary for the Department to reach the ownership or other control issues discussed in the denial letter and the appeal.

Conclusion

The Department concludes that there is substantial evidence to support Caltrans' conclusion that the firm failed to meet its burden of proof with respect to control. We further conclude that Caltrans' decision is consistent with applicable certification rules. Consequently, we affirm under section 26.89(f)(1).

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

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Marylee Miglino

through corporate charter provisions, *by-law provisions*...or assignment of voting rights[], that prevent the socially and economically disadvantaged owners, *without the co-operation or vote* of any non-disadvantaged individual, from making *any* business decision of the firm." (sec. 26.71(c) (emphasis added).)

⁶ See, e.g., 15-0138 *Norfolk Machine & Welding, Inc.* (February 24, 2016), 16-0015 *Tollie's Landscaping and Lawn* (June 10, 2016), 16-0064 *Ryan Biggs/Clark Davis Engineering and Surveying, P.C.* (August 12, 2016), 17-0053 *D.M. Conlon Inc.* (November 21, 2017).

⁷ Where a firm was formerly owned or controlled by a non-disadvantaged individual who remains involved with the company in any way, and ownership was transferred to a disadvantaged individual, section 27.71(l) applies the more stringent "clear and convincing evidence" standard with respect to control. Because Andrew Spurlock, a non-disadvantaged individual, transferred ownership to the firm's current disadvantaged owners, Leigh Kyle and Yu-Ju Lu, and remains a part owner and officer of the company, the more stringent standard applies. However, even if this were not the case, the by-law provisions in question here prevent the Spurlock from meeting control requirements under the general "preponderance of the evidence" standard.