

May 13, 2019

Reference Number 18-0134

Tammy Burns
Majority Owner
Burns Excavating, LLC

[REDACTED]

Dear Ms. Burns:

Burns Excavating, LLC (BELLC) appeals the Ohio Department of Transportation's (ODOT) July 10, 2018 determination that BELLC is ineligible for certification as a Disadvantaged Business Enterprise (DBE) under the criteria set out at 49 C.F.R. Part 26 (the Regulation). ODOT determined that BELLC did not demonstrate eligibility under §§26.69(a), (b), (c), (e), (i) and (h)(1).¹ We affirm on the basis that BELLC failed to demonstrate that your claimed ownership is real, substantial, and continuing, due to no contribution of capital. *See* §§26.61(b), 26.69(c), and (e).

I. Background

You and your nondisadvantaged husband, Lorren Burns, formed BELLC on January 1, 2018. You own 51% of BELLC and Mr. Burns holds the remaining 49% ownership interest. You claim that your initial contribution of capital to acquire your ownership was [REDACTED] in cash and a backhoe worth [REDACTED].² Mr. Burns owned the backhoe before he renounced his interest in it and transferred ownership of the backhoe to you on February 22, 2018. The On-Site Review Report (OSRR) states that you used the [REDACTED] to pay off existing debt on the backhoe, and your Personal Net Worth (PNW) statement dated March 20, 2018, lists the backhoe as your personal asset. BELLC OSRR (June 25, 2018) at 30, T. Burns PNW Statement (March 20, 2018) at 3.

The OSRR also states that you and Mr. Burns paid [REDACTED] towards a down payment for a business loan that BELLC used to purchase other equipment. You claimed that the down payment was an additional contribution of capital. As proof of the purported contribution, you gave ODOT a copy of a cashier's check, dated May 17, 2018, for [REDACTED], of which you

¹ We do not opine on ODOT's other ownership grounds because our disposition on §§26.69(c) and (e) grounds are sufficient to affirm the decision under §§26.61(b) and 26.89(f)(1).

² You received the [REDACTED] as a gift from your father. ODOT appears to take the position that your receipt of the money as a gift precludes it being a capital contribution, which is incorrect. *See* §26.69(j).

claimed that [REDACTED] came from you and Mr. Burns' joint checking account and that the remaining \$3,100 came from BELLC's funds.

II. Decision

BELLC bears the burden of proving that your 51% ownership, including the contribution of capital to acquire your ownership interest, is real, substantial, and continuing, going beyond *pro forma* ownership of the firm as reflected in ownership documents. §§26.69(c) and (e).

The record indicates that BELLC failed to demonstrate that you made an actual contribution of capital to acquire your ownership interest. We find no evidence that you, more likely than not, transferred ownership of the backhoe to the firm.³ BELLC's failure to establish your claimed contribution of equipment means that the [REDACTED] payment you made to the equipment owner's creditor (OSRR statement noted above) is not a real and substantial capital contribution either. Similarly, there is little evidence that you actually used your own money, instead of the firm's money, for the down payment on the business loan that BELLC used to purchase other equipment.⁴ Accordingly, there is no preponderance of the evidence that you made any capital contribution that the Regulation considers "countable" or "qualifying." Without such a capital contribution, your ownership is not real, substantial, and continuing, either.⁵ As a result, BELLC is ineligible for certification.

III. Conclusion

Substantial evidence supports ODOT's conclusion that BELLC is ineligible. We therefore affirm under §26.89(f)(1).

This decision is administratively final and not subject to petitions for reconsideration. BELLC may reapply for certification, when the applicable waiting period has elapsed.

Sincerely,

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

³ BELLC only produced evidence that Mr. Burns renounced his interest in the backhoe and transferred the asset to you.

⁴ Even if we assume, for the sake of argument, that you actually paid a portion of the down payment as a contribution to acquire an ownership interest, your real and substantial ownership would be no more than 50% since you claim that the money came from a joint account. *Cf.* §26.69(b) (firm ineligible unless disadvantaged ownership at least 51%).

⁵ The firm provides tax and business documents to demonstrate that you own 51% of BELLC. While you may well "own" this interest in the conventional sense, the Regulation explicitly requires a demonstration that your ownership satisfy additional requirements. Here, BELLC does not demonstrate that the ownership interest you claim is other than *pro forma*, within the meaning of §26.69(c)(1).

cc: ODOT