

May 15, 2019

Reference Number 18-0174

Edward R. Jackson
Jackson, Fikes, and Wakefield
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P.O. Box 748
Jasper, AL 35502

Dear Mr. Jackson:

This is in response to your appeal of the decision of the Alabama Department of Transportation (ALDOT) decision to deny the application for DBE certification of your client, TerraPro LLC. The U.S. Department of Transportation (DOT) is upholding the ALDOT decision.

Procedural History

TerraPro applied for DBE certification on February 5, 2018. ALDOT conducted an on-site review on April 3, 2018. On June 18, 2018, ALDOT denied the firm's application. The firm appealed to the Department on September 26, 2018.

Burden of Proof and Standard of Review

Burden of proof when applying for certification. Section 26.61(b) 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 Part 26. 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 to meet 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 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."

¹ 49 CFR 26.89(e).

² Id.

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 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 key issue in the case is whether the firm’s 51 percent owner, Michelle Richburg, made a contribution of capital or expertise that is “real, substantial, and continuing, going beyond *pro forma* ownership of the firm.”³ According to both ALDOT and the appeal, Ms. Richman did not make any contribution of equity to acquire her 51 percent stake in the firm. Rather, she joined as a guarantor⁴ on certain loans that the original, non-disadvantaged owners of the firm had taken out, becoming jointly and severally liable with them for 51 percent of the remaining loan balances. In the on-site interview, the firm acknowledged that there was no money exchanged for percentage of ownership, and said that 51 percent ownership was obtained by expertise.⁵ ALDOT determined that these factors were insufficient to carry the firm’s burden of proof with respect to ownership.

The appeal argues that, given her expertise and ability in managing the business, and her important contribution to its viability, she meets the six “contribution of expertise” criteria of section 26.69(f)(1). With respect to the requirement of section 26.69(f)(2) that someone relying on contribution of expertise “must have a significant financial investment in the firm,” the appeal argues that Ms. Richman’s taking on a guarantor role with respect to 51 percent of existing loan balances constitutes such an investment.

Discussion

In its preamble to the February 2, 1999, final rule that established the expertise provision of present section 26.69(f), the Department said that “Situations in which expertise must be recognized for this purpose are limited. The expertise must be outstanding and in a specialized field; everyday experience in administration, construction, or a professional field is unlikely to meet this test.”⁶

³ 49 CFR 26.69(c)(1).

⁴ See Cross-Indemnification Agreement, p. 2. While this agreement makes reference to TerraPro’s indebtedness through “several notes,” Addendum F to the firm’s application lists her as a guarantor only on a series of loans from the Bank of Walker County, not on loans from Kubota Credit Corporation, Synovus Bank, GM Financial, or Ally.

⁵ On-site interview report, p. 3.

⁶ 64 FR 5118. See also 62 FR 29567, May 30, 1997, and 57 FR 58292, December 9, 1992, for commentary with respect to the proposals that led to the final rule. Of note, the 1992 preamble stated that “By specific to the type of business, we mean the expertise must relate to the substance of the type of work performed by the firm (e.g., in computer engineering, systems analysis, or software design for a computer firm, in use of explosives for demolition firm) rather than generic business administration experience...”

From Ms. Richman's resume, her work history prior to employment by TerraPro focused on office management at a trucking company and a coal company. The resume's description of her work with TerraPro specifies "daily office management," though it also mentions other duties, such as the overall financial wellbeing of the company and attending pre-construction meetings.

Without denigrating the value of Ms. Richman to TerraPro, her contributions are in the area of general administrative work and, perhaps, construction, rather than the much more specialized types of expertise called for in the Department's rules. Moreover, her becoming an additional guarantor to some of the firm's loans did not infuse additional capital into the company; it merely redistributed the responsibility for repaying existing debt. (We note that the obligation to pay on the guarantee is wholly contingent.) As such, it cannot realistically be considered a "significant financial investment" in the firm, as required by section 26.69(f)(2).

Conclusion

For the reasons stated above, the Department finds that ALDOT had substantial evidence in the record to decide that TerraPro failed to meet its burden of proof with respect to ownership. Because the Department is deciding the case on the basis of ownership, it is not necessary to reach the control issues raised in the denial and appeal. The Department therefore affirms ALDOT's decision.

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: John L. Huffman