

April 26, 2019

Reference Number 19-0003

Gina Proulix
President, G&D Hauling, LLC
405 East Broad Street, Ste. 211
Fuquay Varina, NC 27526

Dear Ms. Proulix:

This is in response to G&D Hauling's appeal of the decision of the North Carolina Department of Transportation (NCDOT) to deny the firm's application for DBE certification. The U.S. Department of Transportation (DOT) is upholding the NCDOT decision.

Procedural History

G&D applied for certification to NCDOT on October 19, 2017. Through a letter of July 3, 2018, NCDOT denied the firm's application. The firm appealed on September 25, 2018.

Burdens 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

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

¹ 49 CFR 26.89(e).

² Id.

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.

Issues

This case turns on whether the firm has carried its burden of proof that Ms. Proulix controls the firm. While NCDOT agrees that she has 51 percent ownership of the company, it contends that her husband, Donald Proulix, a non-disadvantaged individual, who is a 49 percent owner of the firm, has equal power to control the firm. While Ms. Proulix has the title of President, the firm’s Operating Agreement⁴ shows both her and her husband to be Class 1 Members, giving them collective control. They are the only Members listed in the Operating Agreement. Both have the power to bind the firm in contracts.⁵ Several actions must be taken by unanimous consent,⁶ preventing Ms. Proulix from acting independently.

The corporate documents do not demonstrate that Ms. Proulix has “preeminence” in the firm’s affairs over her husband, in NCDOT’s view. Nor do they differentiate the degree of control each possesses. On this basis, NCDOT argues that Ms. Proulix has not carried her burden of proof with respect to control.

In the appeal, the firm notes that Ms. Proulix is the president of the firm, while Mr. Proulix is vice-president. She also holds several other management-related titles at the firm. The appeal concedes that the operating agreement has not been changed since the firm was founded. The appeal adds that Ms. Proulix manages books, payables, payroll, contracting, financing, insurance, employee relations, and hiring and firing, without seeking approval or permission from Mr. Proulix. Mr. Proulix’s duties focus on the fleet tracking system, security system, overseeing drivers, scheduling and dispatching the firm’s trucks, and ensuring that the jobs the firm has been hired to do are covered.

Discussion

Section 26.71(c) of the Departments regulations provide, in relevant part, that

A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different

³ 49 CFR 26.89(f)(1).

⁴ The NCDOT decision attributes this fact to the firm’s Articles of Organization, but the material actually appears in the Operating Agreement.

⁵ See Operating Agreement, paragraph 13.

⁶ See Operating Agreement, paragraphs 54-55.

classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.

The provisions of paragraphs 54-55 the Operating Agreement discussed above have the effect of restricting Ms. Proulix's ability to make a variety of business decisions without unanimous consent of Members, i.e., without Mr. Proulix's consent. This fact, standing alone, prevents Ms. Proulix from carrying her burden of proof with respect to control.

While both Ms. Proulix and Mr. Proulix play important and different roles in the company, both are Class 1 Members with equal privileges and both can bind the company through contracts. As noted in 26.71(k)(2), if a certifier cannot determine that "the socially and economically disadvantaged owners - as distinct from the family as a whole - control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities." This appears to be such a situation.

Conclusion

NCDOT has substantial evidence to conclude that the firm has not carried its burden of proof with control by its disadvantaged owner. For that reason, the Department is upholding NCDOT's denial of certification to the firm.

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: Benny F. Sloan, Jr.