

May 23, 2019

Reference Number 19-0010

Joanna Toole
Chief Executive Order
VEC Services, LLC
PO Box 10612
Knoxville TN 37939

Dear Ms. Toole:

This is in response to the appeal of VEC Services, LLC (VEC) from the decision of the Tennessee Unified Certification Program (TNUCP) decision to deny the application for DBE certification of the firm. The U.S. Department of Transportation (DOT) is upholding the TNUCP decision.

Procedural History

VEC applied for DBE certification on April 28, 2018. TNUCP conducted an on-site review on July 26, 2018. On August 8, 2018, TNUCP denied the firm's application. The firm appealed to DOT on September 25, 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

¹ 49 CFR 26.89(e).

² Id.

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.

Issue

The key issue in the case is whether the operating agreement of the firm places “formal or informal restrictions” on the disadvantaged owner’s control, contrary to section 26.71(c) of the Department’s regulations.³ Section 5.2 of this June 26, 2017, document provides that decisions, judgments, consent, approvals, or actions would be made by a majority of the members. Since there are only two members of the LLC – Ms. Toole and her non-disadvantaged husband – this provision requires unanimous consent, which the denial letter says prevents Ms. Toole from making decisions without Mr. Toole’s agreement.

In response, the appeal attached a September 1, 2018, amendment to the operating agreement, which modifies section 5.2 to say that Ms. Toole is the sole person to make decisions, judgments, consent, approvals, or actions on behalf of the company. This, the appeal argues, fixes the problem identified in the denial letter.

Discussion

The Department has consistently and frequently ruled that provisions of corporate documents that materially prevent disadvantaged owners from acting without non-disadvantaged owners’ consent are fatal to eligibility.⁴ TNUCP is correct in identifying the original section 5.2 of the operating agreement as having this flaw. It is to VEC’s credit that, in response to the denial letter, the company modified the language to clarify that Ms. Toole alone possesses the powers in question.

However, section 26.89(f)(6) of the DOT regulation provides that our decisions are “based on the status and circumstances of the firm as of the date of the decision being appealed,” in this case August 8, 2018. On that date, the original, rather than the amended, version of section 5.2 of the operating agreement remained in effect.

Conclusion

For the reasons stated above, TNUCP had substantial evidence to find that, because of the language of the original operating agreement, Ms. Toole could not control the activities of LEC. Consequently, we are affirming the TNUCP decision. We note that VEC is free to reapply to TNUCP with the amended operating agreement now in force.

³ There are also issues in the record concerning independence and other aspects of control. Because we are deciding the case based on the operating agreement language, we need not address these other matters.

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).

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: David Neese, TNUCP