

August 6, 2019

Reference Number 19-0057

James H. Howard  
Forentino, Howard & Petrone, P c.  
**REDACTED**  
Manchester, CT 06040

Dear Mr. Howard:

This is in response to your appeal of the decision of the Connecticut Department of Transportation (CDOT) to deny DBE certification to your client, Fibre Optic Plus, LLC (FOP). The U.S. Department of Transportation (DOT) affirms CDOT's decision for the reasons explained below.

### **Burdens of Proof and Standard of Review**

#### **(a) Burdens of Proof**

As provided in 49 CFR section 26.61(b) of the certification rules, a firm applying for certification generally 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.

However, a more stringent burden of proof applies in some cases. Under section 26.71(l), when a firm was formerly controlled by a non-disadvantaged individual, ownership or control was transferred to a disadvantaged individual (with or without consideration), and the non-disadvantaged individual remains involved in the business in any capacity, it is presumed that the non-disadvantaged individual retains control of the firm.

This presumption can be rebutted if the firm can prove by "clear and convincing evidence" that the transfer was made for reasons other than obtaining DBE certification *and* that the disadvantaged transferee actually controls the firm.<sup>1</sup>

#### **(b) Standard of review for certification appeals**

---

<sup>1</sup> The firm's burden of proving both elements allows us to resolve this appeal by analyzing only the second.

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..."<sup>2</sup>

The Department does not make a *de novo* review of the matter..."<sup>3</sup> "The Department 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."<sup>4</sup>

## **Background**

FOP first applied for DBE certification from CDOT in 2015. As the result of a 2014 reorganization, the firm was at that time owned by Donald Ballsieper, Sr., the firm's founder (24%), his son Donald Ballsieper, Jr. (25%), his wife Sylvia Ballsieper (25%), and Sylvia's daughter Jennifer Scherer (26%). Donald, Sr., provided the shares to the other three family members as a gift, without consideration. Donald, Jr., Sylvia, and Jennifer are socially and economically disadvantaged individuals; Donald, Sr., is not.

On November 25, 2015, CDOT denied the application, saying that the "clear and convincing evidence" standard applied and that FOP had failed to meet it. The Department upheld the CDOT action through a letter dated June 22, 2016. The June 22, 2016, letter contains a detailed summary of the facts of the case to that point.

In August 2017, a further reorganization of the firm took place, in which Donald, Sr., Sylvia, and Jennifer transferred all their shares to Donald, Jr., again without consideration. As a result, Donald, Jr. became the 100% owner of the company.

FOP then reapplied for certification on July 18, 2018. CDOT interviewed Donald, Jr., on September 12, 2018, and issued a denial of the application on October 11, 2018. The firm appealed on January 8, 2019. In its February 20, 2018, submission to the Department, CDOT again summarized its reasons for the denial.

## **Issues**

### Burden of Proof

For purposes of determining the proper burden of proof in this case under section 26.71(l), consideration of the details of the succession of ownership shares in the firm is not necessary. It is sufficient to note that Donald, Sr., owned the firm; his ownership ultimately transferred to Donald, Jr.; and Donald, Sr., continues to be involved in the firm.

Regarding Donald, Sr.'s continuing involvement, CDOT points to an undated document it says was submitted with the firm's application, "Key Personnel and Support Staff."<sup>5</sup> This document indicates that Donald, Sr., is FOP's C.O.O. and Project Executive.

---

<sup>2</sup> 49 CFR 26.89(e).

<sup>3</sup> Id.

<sup>4</sup> 49 CFR 26.89(f)(1).

<sup>5</sup> See administrative record, Exhibit G.

In his CDOT interview, however, Donald, Jr., asserted that his father was “no longer part of the equation” and was not a FOP employee.<sup>6</sup> When asked about the fact that Donald, Sr., holds the license that allows the company to operate, he said “I mean my dad is still with the company, but he’s not part of the company. So I guess we’re still technically under his license. But he’s not affiliated. He doesn’t do any work.”<sup>7</sup>

Even absent the description of Donald, Sr.’s role in the “Key Personnel and Staff” document, Donald, Jr.’s admission that his father is still with the company is sufficient to show that Donald, Sr., is still involved with FOP in some capacity. Consequently, the “clear and convincing evidence” standard with respect to control applies. The appeal appears to concede this point.<sup>8</sup>

### Control

To support its decision that FOP does not meet its burden of proof in rebutting the presumption that Donald, Sr., remains in control, CDOT specifically cites several facts in evidence. First, Donald, Sr., holds the key licenses for the company (“T1” and “E1” licenses), which permit it to operate under state regulations. Second, the “Key Personnel and Support Staff” document lists him as the C.O.O. for FOP. Third, the firm’s 2017 corporate income tax return, contrary to other information in the application, lists Donald, Sr., as a 60.55% owner of the firm. Fourth, a real estate company owned by Donald, Sr., SJD Property Management, LLC, owns the building in which FOP and SJD are housed and holds a business loan owed by FOP.

The appeal argues that Donald, Jr., performs a wide variety of tasks in both the business and field side of the firm’s operations, enabling him to control it. While he does not currently hold applicable technical licenses, he is studying for them, and other key employees are licensed. Connecticut does not require an owner to possess the required licenses in order to control a firm, and so the fact that Donald, Sr., and other employees hold these licenses should not preclude the firm receiving DBE certification.<sup>9</sup>

The appeal does not address the CDOT decision’s second, third, and fourth points.<sup>10</sup>

### **Discussion**

---

<sup>6</sup> Interview transcript, p. 5, lines 9-12.

<sup>7</sup> Interview transcript, p. 23, lines 14-18.

<sup>8</sup> Appeal letter, p. 3, paragraph 5.

<sup>9</sup> See generally 49 CFR 26.71(h).

<sup>10</sup> The failure of the appeal to engage with the second, third, and fourth points supporting CDOT’s decision (e.g., by arguing that the “Key Personnel and Staff” document no longer accurately represents Donald, Sr.’s role in the firm) allows those points to stand as uncontested fact.

“Clear and convincing evidence” is an intentionally high standard. Even granting Donald, Jr.’s, very active role in the company, the combination<sup>11</sup> of the four factors CDOT cites constitutes substantial evidence to support CDOT’s conclusion that FOP is ineligible because it failed to rebut the presumption that non-disadvantaged Mr. Ballsieper, Sr., remains in control.

## **Conclusion**

CDOT’s ineligibility determination is consistent with applicable certification rules, and substantial evidence supports it. 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: Shari L. Pratt

---

<sup>11</sup> We make no conclusion about the probative value of any single piece of evidence, standing alone.