

September 18, 2019

Reference Number 19-0114

Jennifer Kelecus
Foundation Mechanics LLC
2860 South River Road, Suite 120
Des Plaines, IL 60018

Dear Ms. Kelecus:

This is in response to your appeal of the decision of the Chicago Transit Authority (CTA) to deny the application of Foundation Mechanics LLC (FM) for DBE certification. The U.S. Department of Transportation (DOT) is reversing CTA's decision.

Procedural Background

FM applied for certification on April 9, 2018. There was an onsite visit in June 2018. CTA denied the firm's application on March 13, 2019. FM appealed to the Department on April 30, 2019.

Burden of Proof and Standard of Review

(a) Burden of Proof

As provided in 49 CFR 26.61(b) of the rule, a firm applying for ACDBE certification 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

Issues and Discussion

CTA denied FM's application on both ownership and control grounds.

Ownership

CTA questioned Ms. Kelecious' claimed 67 percent ownership on the basis of uncertainties in the documentation of her ownership. In particular, CTA mentioned the absence of mention in a revocable trust agreement of her 51 percent ownership in the firm or the additional 16 percent ownership which had been transferred to her by Ms. Kelecious. CTA also pointed to a discrepancy in the record concerning the bank from which Ms. Kelecious' initial [REDACTED] capital contribution to the company was derived.

The absence of mention of Ms. Kelecious' 51 percent ownership⁴ in the revocable trust document, which the appeal credibly argues was established solely for estate planning purposes, does not undermine the applicant's assertion of ownership in the firm. Moreover, for purposes of meeting Part 26 ownership purposes, having 51 percent ownership is enough. Whether Ms. Kelecious should also be credited with an additional 16 percent does not matter with respect to ownership. The appeal argues that a discrepancy in the documentation of the bank the firm was using does not affect the substance of Ms. Kelecious having made the initial [REDACTED] deposit to start the firm, which CAUCP does not contest. We agree.

Control

In its denial letter, CTA contrasts the background and experience of FM's female owner, Jennifer Kelecious, with that of her husband and co-owner, Jonathan Kelecious, and Dana Harder, a female key employee,⁵ with respect to the company's functions. Ms. Kelecious' education and prior experience were in the health care industry and with a storage systems company. Mr. Kelecious, on the other hand, has an engineering degree and 11 years of experience in heavy construction. Ms. Harder has seven years of experience as a construction project manager and supervisor.

CTA cites examples from two contracts FM had with the Illinois Tollway, which list Ms. Kelecious as a contact only for financial statement purposes, in one case, and authorizing Mr. Kelecious and Ms. Harder to sign a variety of documents, in the other case. In CTA's view, these examples support an inference that Ms. Kelecious' participation in actual contracts is more limited than theirs.

³ 49 CFR 26.89(f)(1).

⁴ There is no uncertainty about Ms. Kelecious' ownership of 51 percent of FM, going back to its founding in 2011. See "Record of Certificates Issued and Transferred," which records the 51/49 percent division of ownership between Jennifer and Jonathan Kelecious for both 2011 and 2015.

⁵ As a woman, Ms. Harder herself is a presumptively disadvantaged individual, to whom the provisions of 49 CFR 26.71(e) would not apply.

In the appeal, FM contends that the firm has evolved from its beginnings in areas like foundation repair to large contracts for municipalities⁶, with Ms. Kelecus having been the driving force and strategist behind its diversification. While she employs industry professionals like Mr. Kelecus and Ms. Harder, she is the only person in FM who makes any large financial or operational decisions. She has the final say with respect to budget review, work flow, bonding capacity, personnel resources, bidding and contracting, and pricing. In acting as a CEO, the appeal argues, Ms. Kelecus maintains overall control of the operation while properly delegating lower order functions – like those mentioned on the Tollway contracts that CTA cited – to employees under her ultimate supervision.

We understand CTA's point that, at the time FM was founded, the construction experience of Mr. Kelecus and Ms. Harder were highly important to its success. But we find persuasive the appeal's argument that, as the company has grown and diversified, with the several additional key employees mentioned on the FM website and the wide variety of contracts it has completed, Ms. Kelecus' CEO-style leadership places her in overall control of the company's operations, even if she does not take an on-site, hands-on role in any given construction project. The weight of the evidence does not support the proposition that Ms. Kelecus fails to meet the requirements expressed in section 26.71(g) for being able to make independent decisions on behalf of the company.

Conclusion

For the reasons stated above, the Department finds that CTA did not have substantial evidence to find that FM failed to meet its burden of proof under 49 CFR 26.61(b) with respect to ownership and control. Consequently, we are reversing the CTA decision under 49 CFR 26.89(f)(2). We direct CTA to immediately certify FM.

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: JuanPablo Prieto, CTA

⁶ On its website (www.foundationtech.com), FM characterizes itself as a general contractor that provides construction management and subcontracting services, with a primary focus on heavy/civil construction. The website advertises several subspecialties that FM performs for various types of clients.