



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

October 2, 2019

Reference Number 19-0139

Seth Sandler
Superior Skilled Trades, LLC
975 Eyster Blvd., Suite 103
Rockledge FL 32955

Re: Denial of DBE Certification of Superior Skilled Trades, LLC

Dear Mr. Sandler:

This is in response to your appeal of the decision of the Greater Orlando Aviation Authority (GOAA) to deny the application of Superior Skilled Trades, LLC (SST) for DBE certification. The U.S. Department of Transportation (the Department) affirms GOAA's decision under §26.89(f)(1).

Procedural Background

SST applied for certification on December 11, 2018. GOAA staff subsequently conducted a phone interview with Mr. Sandler, but did not conduct an in-person site visit to the firm's offices. GOAA denied the firm's application on June 20, 2019 and SST appealed to the Department on July 8, 2019.

Burdens of Proof and Standard of Review

Burdens of Proof

As provided in 49 C.F.R. §26.61(b) of the rule, an applicant firm must demonstrate, by a preponderance of the evidence (and in limited circumstances clear and convincing 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.

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..." §26.89(e)). The Department does not make a *de novo* review of the matter...(Ibid). 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. (§26.89(f)(1)).

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

GOAA denied SST's application on the basis of ownership. Mr. Sandler admittedly did not make a capital contribution to the formation of the firm, rather relying on what Exhibit A to the firm's Operating Agreement called an "in-kind contribution of knowledge, expertise, industry experience, sales leads, and labor." Consequently, GOAA analyzed SST's application under the provisions of section 26.69(f), pertaining to situations in which "expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership." This section, as the preamble to the Department's February 2, 1999 rule states, requires that an individual claiming a contribution of expertise "must have a significant financial stake in the company. The regulation focuses on entrepreneurial activity, not simply expertise."¹

GOAA accepted SST's assertions that it met the requirements of paragraph (f)(1) of section 26.69(f). However, in view of the absence of a financial contribution from Mr. Sandler, GOAA concluded that SST did not meet the requirements of paragraph (f)(2), which requires "the individual whose expertise is relied upon must have a significant financial investment in the firm."

The appeal replies that a financial contribution from R.L. Wendt, LLC, a 49 percent owner of SST, meets this requirement. Wendt, owned by Jamie Madden and Blaine Moon, who both became members of SST's Board of Directors, provided what Exhibit A to the Operating Agreement characterizes as "\$ [REDACTED] seed capital loan to the Company." This loan, the appeal argues, is "no different than if a bank or the Small Business Administration loaned money to Mr. Sandler to help a small business get started." In this connection, the appeal points to section 26.69(c)(4), which states that "Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan."

The appeal also contests the process followed by GOAA, in which GOAA staff conducted a phone interview rather than an in-person site visit. This prevented Mr. Sandler, the appeal argues, from fully and clearly responding to the staff's questions.

Discussion

Section 26.83(c)(1)(i) of the Department's regulation requires a certifier to "perform an on-site visit to the firm's principal place of business." The appeal is therefore correct in arguing that GOAA staff should have done so, rather than relying on a conference call. However, given that the only issue in this case is one of ownership, involving the acceptability of Mr. Sandler's

¹ 64 FR 5118; February 2, 1999.

contribution of expertise under section 26.69(f), which can be decided on the basis of documents in the record, we do not believe it is necessary to remand the case to GOAA to address this flaw in its process. We caution GOAA to ensure, in the future, that it does comply with section 26.83(c)(1)(i). In other types of cases (e.g., a case in which the key issues surround the disadvantaged owner's control of the firm), the absence of a site visit could be crucial to the case's outcome.

The appeal's reference to section 26.69(c)(4) is relevant, but unfortunately for SST undermines, rather than supports, its case. It concerns loans "from financial institutions or other organizations that lend funds in the normal course of their business." Neither R.L. Wendt LLC, nor its two owners individually, are such an institution. Rather than being a bank or venture capital firm, Wendt's owners are personal business acquaintances of Mr. Sandler who chose to provide a loan to SST and become members of its Board. Contrary to the appeal's argument, this loan SST from private individuals who wish to invest in the firm, via their LLC, is distinct from a bank or SBA loan to a disadvantaged owner and, as such, is not covered by section 26.69(c)(4).

It should be emphasized that the loan was made "to the Company," as the Operating Agreement states, rather than to Mr. Sandler in his personal capacity. This further buttresses GOAA's conclusion that Mr. Sandler himself did not have a significant financial investment in SST.

Conclusion

For the reasons stated above, the Department finds that GOAA had substantial evidence to conclude that SST did not meet its burden of proof with respect to ownership, with specific reference to the requirement of section 26.69(f)(2) for Mr. Sandler to have a significant financial investment in SST. GOAA's determination is consistent with applicable certification standards and we affirm the decision under §26.89(f)(1).² This decision is administratively final and not subject to petitions for review. **SST may reapply to the DBE program after the applicable waiting period has passed and at that time present information demonstrating its eligibility.**

Sincerely,

Marc D. Pentino
Associate Director
Disadvantaged Business Enterprise Division

cc: George I. Morning

² The Department's decision that a recipient's certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. See 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999).