

January 16, 2020

Reference No. 19-0145

Clarissa Driban
Elena Marc Inc
[REDACTED]
Denver, CO 80212

Dear Ms. Driban:

You and your firm Elena Marc Inc (sic) appeal the Colorado Department of Transportation's July 8, 2019 decision to deny the firm DBE certification under the rules in 49 CFR Part 26 ("the Regulation"). We affirm CDOT's decision as supported by substantial evidence and consistent with applicable certification provisions. See Regulation section 26.89(f)(1).

Burden of Proof

Section 26.61(b) generally requires the applicant to demonstrate, by a preponderance of the evidence, that it meets all Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. A failure to satisfy one requirement, such as disadvantaged ownership, renders the applicant ineligible.

A higher standard of proof applies to transfers of ownership described in section 26.69(h). This provision applies when a non-disadvantaged owner, such as your husband, transfers majority ownership without adequate consideration. When that occurs, section 26.69(h) creates a presumption that for eligibility purposes the transferor continues to own the shares and the transferee does not. Unless Elena Marc can rebut the presumption (assuming it applies), the Regulation does not consider you to own more than 50% of the firm, which makes Elena Marc ineligible. See section 26.69(b) (disadvantaged individuals must own at least 51% of a DBE firm).

To rebut the presumption, a firm & owner subject to it must prove two things by "clear and convincing evidence." Please see the more detailed discussion below.

Department's Role on Appeal

We review the full administrative record but do not decide the matter of eligibility from scratch. The certifier makes the eligibility determination based on what the applicant provides. Our role is to determine whether the certifier's decision is supported by *substantial evidence* (a lower standard than "preponderance") and consistent with the Regulation's provisions. See sections 26.89(e), (f). We decide only the matters properly raised and generally only those sufficient to resolve the appeal. See also section 26.89(c).

Background

In 2015, you and your non-disadvantaged husband formed Elena Marc LLC as a New York firm that you owned 50/50. You operated the firm until January 2017, when you state you "closed the entity" and "transitioned [the] business over to a Colorado S-Corp." New entity, same business, same ownership, in short.

On January 15, 2019, you purchased a 5% ownership interest from your husband, for [REDACTED]. Thus, your respective ownership percentages became 55 and 45. On February 14, 2019, Elena Marc Inc (EMI) applied to CDOT for DBE certification.

CDOT determined that EMI is ineligible because your payment was inadequate, so the Regulation does not consider you to own the additional 5% interest, for purposes of eligibility. More technically, the firm is ineligible because you did not rebut the presumption that your nondisadvantaged husband retains ownership of the additional 5%.

Issues

1. Did EMI prove that \$100 was, more likely than not, adequate consideration for the 5% ownership transfer?
2. If not, does the firm demonstrate, by clear and convincing evidence, both a non-DBE purpose for the transfer and your actual control?

Discussion

You provided CDOT the firm's 2018 year-end balance sheet. The balance sheet shows about [REDACTED] of retained earnings and net assets of roughly [REDACTED]. At year-end 2018, the business had been a going concern for at least 3 years.

You assert that you paid full value for the additional shares because your accountant determined on December 6, 2018 "that the company *could be* valued at *as little as* 2 cents a share [which would make the purchased shares worth] [REDACTED]" (Our emphasis.) "Thus this proves without a doubt that I, Clarissa Driban, do indeed own 55% of [EMI]."

We respectfully disagree. First, we are not convinced this evidence is properly before us at all. (CDOT's decision would not be wrong based on evidence you first provided after the decision. See section 26.89(f)(6).) Second, even if there is no timeliness issue, your

assertion is unavailing on substantive grounds. Third, your accountant's determination is not binding on CDOT or us.

By simple multiplication, your accountant's "as little as" \$50 valuation is fair only if the entire firm is worth no more than [REDACTED]. Your [REDACTED] payment, similarly, is adequate only if EMI's enterprise value is around [REDACTED], lower if one factors in a control premium. The balance sheet information, despite your claims it is an inaccurate indicator (so, probably, is your accountant's low-ball figure), constitutes substantial evidence supporting CDOT's determination that section 26.69(h) applies to the transaction. It should go without saying that an established business with net assets of [REDACTED] and \$[REDACTED] in retained earnings—one valuable enough to justify the trouble and expense of transferring into a different entity which itself would require you to pay ongoing fees and taxes—is extremely unlikely to be worth just [REDACTED] (A potential purchaser might pay that for EMI's intangible assets alone.) But we need not speculate. There is substantial balance sheet evidence to support CDOT's determination that your \$100 payment was inadequate consideration for 5% of the company. CDOT correctly presumed that you do not own those shares.

To rebut, you must prove that you actually control EMI's management, policy, and operations; and that the share transfer occurred for reasons other than obtaining DBE certification. We find no clear and convincing evidence of a non-DBE reason for transferring the shares, and you cite none. The undisputed fact that EMI applied for DBE certification within 30 days of the transfer strongly suggests otherwise.

Substantial evidence supports CDOT's determination that you and EMI did not rebut the non-ownership presumption. EMI is ineligible because it did not demonstrate that satisfies the Regulation's ownership requirements.

Conclusion

We affirm CDOT decision as supported by substantial evidence and consistent with applicable certification standards.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: CDOT