

December 30, 2019

Reference No. 20-0009

Kelly Short
Holston Valley Highway Services LLC
[REDACTED]
Bristol, VA 24202

Dear Ms. Short:

This is in response to your appeal of the decision of the Virginia Unified Certification Program (VUCP) to deny the application of Holston Valley Highway Services, LLC (HVHS) for certification under the Department's Disadvantaged Business Enterprise (DBE) program, governed by the rules in 49 CFR Part 26 ("the regulation"). The Department is affirming VUCP's decision as supported by substantial evidence. See 26.89(f)(1).

Procedural Background

HVHS applied to VUCP for certification on April 12, 2018. VUCP conducted an on-site interview on June 12, 2018. VUCP denied the firm's application in a letter of August 2, 2019.¹ HVHS appealed to the Department on October 2, 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 DBE 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 more likely than not 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.

¹ It is unclear why VUCP did not issue its denial letter until over 15 months after the application, and more than 13 months following the on-site review, significantly in excess of the 90 days called for in section 26.83(k) of the regulation. Timely action on applications is important to the fairness of the program.

(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..."² The Department does not make a *de novo* review of the matter...."³ 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."⁴

Issue

VUCP denied the application on grounds of both ownership and control. Our decision focuses on ownership.

According to the denial letter, the initial capital contribution to start the firm was provided by a [REDACTED] check from Cedric Short, a non-disadvantaged individual who is named in the firm's operating agreement as the 49 percent owner of the firm. Of this amount, [REDACTED] was designated as the contribution of Kelly Short, who is named as the 51 percent owner. VUCP determined that, since under the circumstances the money came from Mr. Short, not Ms. Short, HVHS did not carry it burden of proof that Ms. Short made a real, substantial, and continuing capital contribution to the firm.⁵

The appeal did not disagree with the facts presented by VUCP. However, the appeal did state that, in an attempt to correct the problems that had led to the denial, Ms. Short "made a cash deposit of [REDACTED] (54%) to the business and that amount was returned to Cedric Short..." The date of this transaction was October 2, 2019.

Discussion

Per section 26.89(f)(6) of the regulation, the Department's decision on an appeal is based on the status and circumstances of the firm as of the date of the decision being appealed⁶ (August 2, 2019, in this case). As of that date, the circumstances of the capital contributions to HVHS were as described by VUCP's denial letter. A subsequent change in those circumstances, such

² 49 CFR 26.89(e).

³ Id.

⁴ 49 CFR 26.89(f)(1).

⁵ In addition, family members gifted a tract of land to HVHS for purposes of raising funds for the company through logging. As a gift to the company, the value of this land cannot be treated as a capital contribution that Ms. Short made personally.

⁶ The rationale for this provision is that considering subsequent evidence would place the Department in the position of an initial finder of fact, rather than a reviewer of a certifier's decision based on the evidence that was before the certifier. Of course, if a firm reapplies for certification, the certifier can take changed circumstances into account in making a new decision.

as the October 2, 2019, financial transaction, is not something we can properly take into account in considering an appeal.

Given the circumstances of the firm at the time of the VUCP decision, which the appeal does not contest, VUCP was correct in finding that Ms. Short had not made a real, substantial, and continuing capital contribution to the firm.

Conclusion

The Department finds that VUCP had substantial evidence to determine that the applicant failed to meet its burden of proof with respect to ownership. Therefore, under section 26.89(f)(1) of the regulation, we are affirming VUCP's decision.

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

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Calvin M. Thweatt