



**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

July 27, 2020

Docket Number 20-0058

Ms. Missy Stuedle
Interim Director
External Civil Rights Division
105 West Capitol Avenue
P.O. Box 270
Jefferson City, MO 65102

Dear Ms. Stuedle:

S&E Bobcat, Inc. (S&E) appeals the Missouri Department of Transportation's (MODOT) March 27, 2020 denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. Part 26 (the Regulation). After carefully reviewing the full administrative record, the U.S. Department of Transportation (the Department) reverses in part and remands in part the decision as provided under Regulation sections 26.89(f)(2) and (4).

Background

Elizabeth and Steven Armstrong founded S&E in 2002. Ms. Armstrong owns 51% of the company, and her husband owns 49%.

S&E applied for certification on December 17, 2018. MODOT denied S&E's application on June 5, 2019. S&E appealed, and we remanded¹ for further analysis and a new decision. On reconsideration, MODOT again concluded that S&E is ineligible, resurrecting various rationales we rejected and misapplying several certification rules in the same ways as before.

S&E now appeals that decision.

Discussion

The only viable reason for denying certification, of the multitude proffered, concerns Ms. Armstrong's initial capital contribution 18 years ago.² See sections 26.69(c) and (i); 26.89(f)(1), (2), and (4).

¹ 19-0136 S&E Bobcat, Inc. (January 30, 2020).

² We find no substantial evidence for any of the control grounds cited, and we consider MODOT's invocation of Regulation section 26.73(a)(2) egregious. There is no evidence of "attempts to evade or subvert the intent or requirements of the DBE program." It is MODOT that misunderstands the intent and operation of the half-dozen

MODOT concludes that Ms. Armstrong's 51% ownership is not real and substantial under sections 26.69(c) and (i). The rationale is that Ms. Armstrong cannot produce evidence of a contribution of her own money in 2002 and there is no spousal renunciation in the record.

Ms. Armstrong states that original bank records documenting the source of what she claims is a contribution of her own, non-marital property no longer exist. That is a reasonable answer. While MODOT has technical support for its action, we agree with Ms. Armstrong that it is unreasonable for MODOT to insist on having non-existent documentation. A transaction 18 years ago has at best attenuated relevance to present-day eligibility. Insisting on the letter of the 26.69(c) rule in this case violates the spirit of that rule and the letter of another, the "present circumstances" rule of section 26.73(b)(1). The inquiry is whether S&E is eligible now.

MODOT correctly cites section 26.69(i) for the proposition that without proof of a contribution of separate property, or Mr. Armstrong's rule-compliant renunciation and transfer, MODOT may not consider Ms. Armstrong to own more than 50% of S&E. We suggest, however, that the Regulation applies to real-world situations. Those situations include scenarios, like this one, with little to no abuse potential. See, for example, 12-0141 Turner Freight Solutions, LLP (Oct. 24, 2012). The Department does not intend for technicalities to impede sound program administration or deprive applicants of a fair, relatively speedy, accurate determination.

We instruct MODOT to give S&E the opportunity to remedy its capital contribution problem. Otherwise, we consign S&E to eternal ineligibility, regardless of the merits of its application, which is hardly a result we intended in crafting the capital contribution, marital property, and present circumstances rules. We are not saying that MODOT's decision on the capital contribution issue is clearly erroneous as a purely technical matter divorced from context. We are saying that decisions should not be made in a vacuum and determining eligibility are not a purely mechanical exercise. The Regulation gives certifiers sufficient discretion to avoid results that are manifestly unjust. We intend for them to exercise it. See also Curative Measures During ACDBE/DBE Certification Application Process (Oct. 7, 2019).

We therefore direct MODOT to certify S&E immediately upon its submission of Mr. Armstrong's legally effective renunciation and transfer to Ms. Armstrong of at least 1% of the total, original capital contribution and any ownership interest in the company deemed to result from it—which is to say that at least a 1% ownership interest must be formally transferred to Ms. Armstrong—as long as S&E provides MODOT that document by August 28, 2020.

We do not intend for MODOT to reject an otherwise rule-compliant renunciation on another technicality. To insure against that result, we direct MODOT within 10 days of this letter to provide Mr. Armstrong a form of renunciation it has determined to be effective and sufficient.

control rules it cites. See generally section 26.89(f)(2). We admonish MODOT against so casually leveling a significant and unjustified charge, one that MODOT should understand rises almost to the level of fraud.

Conclusion

We reverse MODOT's decision under section 26.89(f)(2) and direct MODOT to certify S&E upon its submission of Mr. Armstrong's rule-compliant renunciation and transfer not later than COB August 28, 2020.

This decision is administratively final.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: S&E