



**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

September 11, 2020

Docket No. 20-0094

Robert Highsmith
Small Business Certification Specialist
Colorado Department of Transportation

[REDACTED]
Denver, CO 80204-2305

Dear Mr. Highsmith:

This is in response to an appeal of the decision of the Colorado Department of Transportation (CDOT) to deny the application of Adrenaline Pump'N, Inc. (AP), a concrete pumping firm, for DBE certification. CDOT denied the application on the basis of control.

CDOT's denial pointed to the role of AP's 49 percent non-disadvantaged owner Nick Austin, who at the time of the firm's application worked substantially more hours for AP than did its 51 percent disadvantaged owner Ty Hawkins. Mr. Austin has significantly more experience than Mr. Hawkins in concrete pumping operations. Mr. Austin is trained to operate AP's Putzmeister truck-mounted concrete pump while Mr. Hawkins is not. Moreover, CDOT said, Mr. Hawkins worked full-time for another firm, Lucky 7 Company, LLC. Under the circumstances, CDOT concluded, Mr. Austin had a disproportionate role in controlling AP.

In the appeal letter, Mr. Hawkins states that at the time of the application and on-site interview, AP had little business, resulting from the economic slowdown incident to the Covid-19 pandemic. This accounted for the low number of hours he was spending working for AP at that time, he said. More recently, AP has obtained a large contract that will result in his spending substantially more time on AP's project, including driving the pump truck (he has a CDL) and doing pumping work alongside Mr. Austin. He asserts that at the time of the application, many of Mr. Austin's hours were working as a sub for Lucky 7, rather than working on pumping for AP.

The key to understanding this case is the relationship between Lucky 7 and AP. Mr. Hawkins owns both. The two firms are affiliates which work closely together. Mr. Hawkins and Mr. Austin appear to work varying numbers of hours for the two firms, depending on workload. On behalf of Lucky 7, Mr. Hawkins loaned AP the money used to purchase the Putzmeister.

CDOT's DBE directory shows that CDOT certified Lucky 7 as a DBE in several NAICS codes. Among them is NAICS code 238110, concerning poured concrete foundation and structure contractors. The description of this code includes concrete pouring, finishing, and pumping. This is the same NAICS code in which AP applied for certification.

In order to certify Lucky 7 in NAICS code 238110, CDOT would have had to conclude that Mr. Hawkins can control a firm in that code. CDOT's conclusion that he could not control AP in the same NAICS code is therefore puzzling. Mr. Hawkins chose to place the pump equipment in AP rather than expand Lucky 7's capacity. We see no DBE regulation that precludes this choice.

The record as a whole indicates that Lucky 7 and AP function as essentially a joint enterprise. It does not make sense, in our view, to certify one of the corporate entities in that enterprise in a particular NAICS code while denying certification to the other in the same code, when the same individuals are involved in the intertwined work of the companies. See generally 12-0141 Turner Freight Solutions LLP (Oct. 24, 2012) (single business entity but similarly difficult to discern the potential abuse of the regulation's control rules).

We conclude that CDOT lacks substantial evidence to deny AP's application. Hence we reverse the denial and direct CDOT to certify the firm, as section 26.89(f)(2) prescribes.

This decision is administratively final.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Ty Hawkins