



**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 26, 2020

Docket No. 20-0095

Jonathan E. Pasterick
Hillman, Brown, & Darrow, P.A.
221 Duke of Gloucester Street
Annapolis, MD 21401-2500

Dear Mr. Pasterick:

This is in response to your appeal of the decision of the Maryland Department of Transportation (MDOT) to deny the application of your client DeVere Weatherization and Construction Services, LLC (DWC) for DBE certification. MDOT determined that DWC failed to meet its burden of proof with respect to ownership, control, and business size.

Ownership

MDOT's letter states that DWC's 55 percent owner, Michelle Griffith, made her initial \$1650 contribution of capital from a bank account she shares with her husband. Under the Department's DBE rules, the disadvantaged owner may claim at most 50% of a capital contribution of jointly owned assets unless her spouse irrevocably renounces and transfers all rights in the ownership interest in a manner effective under state law.¹ There having been no renunciation made at the time of MDOT's decision – it is mentioned for the first time in the appeal - MDOT's decision to credit Ms. Griffith with a contribution of only [REDACTED] was not erroneous. Half of the total capital contribution is not commensurate 55 percent ownership.² It is consistent with no more than 50% ownership. Thus DWC did not demonstrate that it meets the requirements of section 26.69. See section 26.61(b) (applicant must prove eligibility by a preponderance of the evidence).

Control

Corporate Documents

¹ 49 CFR 26.69(i)(i).

² 49 CFR 26.69(c). The appeal cites a South Carolina administrative law decision for the proposition that a renunciation document dated after a certifier's adverse decision but before a state-level administrative appeal should be considered a timely correction. However, South Carolina administrative decisions are not binding on either MDOT or the U.S. Department of Transportation, and they do not override a clear provision of the federal DBE program regulation.

MDOT cites several provisions of DWC's operating agreement that it considers fatal to the application. Among them is Section 3.5, which provides that a quorum for a meeting of the members consists of members holding 85 percent of the membership interests. Sections 3.6 and 3.7 require a vote representing two-thirds of the membership interests to take action on behalf of the corporation. These provisions prevent Ms. Griffith from acting without the cooperation of one or more of the non-disadvantaged members, an arrangement the regulation forbids.³ There is no dispute that these were the OA provisions in effect at the time of MDOT's decision. MDOT applied the rules correctly, and the evidence supporting its decision is all but unassailable. See generally sections 26.73(b)(1) and 26.89(f)(6) (status and circumstances at time of decision govern; past circumstances or the possibility of a future change do not—either under these provisions or decisions cited in note 3).

Independence

Only an independent business may be certified as a DBE.⁴ The regulation requires certifiers to consider an applicant's relationships with non-DBE businesses with respect to personnel, facilities, and other resources. Certifiers are also to examine present or past employer-employee relationships to determine whether they compromise the applicant's independence.

Ms. Griffith's resume notes that she worked for DeVere Insulation Home Performance (DIHP), a subsidiary of DeVere Insulation (DVI), as a sales representative from 2009-2013 and sales manager from 2013 to the present. DVI's owners are Christopher Rzepkowski, Robert DeVere, and Gerald Parker, none of whom is presumed disadvantaged, and each of whom owns 15% of DWC.

DVI and DWC are intertwined in several other ways. According to the on-site report, DWC shares office, conference room, storage, and warehouse space with DVI. Ms. Griffith works for DWC and DIHP from the same office in the DVI facility, and the firms share accounting services. MDOT relates that Ms. Griffith said she would use DIHP for insulation work on at least some of DWC's contracts.⁵

From these facts, MDOT concluded that DWC was not independent of DVI. Given the ownership ties between DVI and DWC, the personal and business ties between Ms. Griffith and DWC with DVI, and the fact that Ms. Griffith is DVI's subsidiary's employee, we find that MDOT had substantial evidence to conclude that DWC is ineligible because it is not an independent, as section 26.71(b) requires.

³ See, e.g., 14-0024 *Smart Associates Environmental Consultants, Inc.* (July 1, 2015), 14-0035 *Rear View Safety, Inc.* (July 6, 2015), 14-0034 *Vegas Heavy Haul, Inc.* (July 8, 2015), 15-0148 *Gideon Toal Management Services* (March 26, 2016), 16-0015 *Tollie's Landscaping and Lawn* (June 10, 2016), 16-0064 *Ryan Biggs/Clark Davis Engineering and Surveying, P.C.* (August 12, 2016), 17-0053 *D.M. Conlon Inc.* (November 21, 2017), 17-0131 *Cable Trucking Inc.* (March 26, 2018), 19-0010 *VEC Services LLC* (May 2019).

⁴ 49 CFR 26.71(b).

⁵ Certification would permit Ms. Griffith's non-disadvantaged employer to convert non-DBE work into DBE work partly performed by a non-DBE. The relationship suggests a captive DBE.

Size

Because of the relationships between DWC and DVI discussed above, MDOT concluded that the firms were affiliated. Since DVI, including DHIP and other affiliates,⁶ had average gross receipts for 2016-2018 that exceeded applicable section 26.65 size standards, MDOT determined that the DWC was not a small business.⁷ The appeal disputes MDOT's determination, arguing that the two firms cannot be affiliated because the two firms work mostly in different NAICS codes, do different types of work, and have separate assets, accounts, and business plans.

Section 26.65 states that Small Business Administration (SBA) rules govern affiliation (13 CFR Part 121). Those rules tell certifiers to consider the totality of the circumstances. The SBA has frequently determined that under these rules firms may be affiliated even though they are in different lines of business.⁸

Among the factors DOT can use in judging the "totality of the circumstances" are the shared services, assets, employees, and other contractual relationships discussed in the preceding section. In addition, the use of similar entity or trade names shows an intent to identify each with the others and to give the general public the impression that the firms are related. "DeVere" is the firms' common brand. These relationships and attributes are substantial evidence of affiliation under DOT and SBA regulations correctly interpreted and applied. DWC is ineligible because it is not a "small business."

Looking at the totality of all the circumstances affecting the DWC-DVI relationship, we find that MDOT had substantial evidence to determine that the firms are affiliated. As a result, DWC does not meet the business size requirements of section 26.65 of the Department's regulation.

Summary

By the terms of section 26.89(f)(1), we affirm on multiple grounds.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Monica A. Crusse

⁶ See on-site report, p. 4.

⁷ 49 CFR 26.65(a) and (b).

⁸ See for instance *Size Appeal of A.M. Kinnney Associates*, SBA No. SIZ-4401 2000 WL 722635, May 15, 2000; citing *American Electric Co. v. United States*, 270 F. Supp. 689, 691-92 (D. Haw. 1967); *Size Appeal of ETS Analytical Services, Inc.*, No. 4157, at 4 (1996); *Size Appeal of IMDT, Inc.*, No. 4121, at 3-4 (1995); *Size Appeal of Ambulance Services Corporation*, No. 3830, at 4 (1993).