



**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

August 2, 2022

Docket No. 22-0048

William Weisberg
1750 Tysons Boulevard
Suite 1500
McLean, VA 22102

Marc Mastronardi
Deputy Chief Engineer & Director of Construction
Georgia Department of Transportation
One Georgia Center
600 West Peachtree St, NW
Atlanta, GA 30308

Dear Mr. Weisberg and Mr. Mastronardi:

The Georgia Department of Transportation (GDOT) decertified MEM Concessions, LLC, on the ground that the presumption of economic disadvantage of MEM's owner, Michael E. Melton, had been rebutted because his ability to accumulate substantial wealth (AASW). See section 26.67(b)(1)(ii)(A) of the DBE regulation.

Before turning to the facts of this case, it is useful to review the purpose and application of the regulation's AASW provision.¹ The AASW provision is intended to provide a means for a certifier to determine whether an owner who meets personal net worth requirements "is obviously wealthy with resources indicating to a reasonable person that he or she is not economically disadvantaged...."² Certifiers are directed to make this decision on the basis of the totality of the individual's circumstances, attempting to rebut the individual's presumption of disadvantage only in the most egregious cases.³ The six factors listed for certifiers' consideration in section 26.67(b)(1)(ii)(A) are to be used as guidance, not as a mandatory "checklist." Specifically, the \$350,000 three-year average AGI factor of section 26.67(b)(1)(ii)(A)(1) is not

¹ For further guidance, we refer GDOT to the discussion of AASW in our recent decision in *Rohadfox Construction Control Corporation*, Docket No. 22-0034 (June 2022).

² 79 FR 59568-69 (Oct. 2, 2014)

³ Id.

intended to be a bright line criterion that, standing alone, negates an individual's economic disadvantage.⁴

The parties argue the issues in the case as though income above \$350,000 were decisive in determining Mr. Melton has AASW. In framing the argument this way, they miss the main point of the AASW provision, which tells certifiers to consider whether the owner's "totality of circumstances"⁵ would indicate to a reasonable person that he or she is not economically disadvantaged—in short, whether s/he is "wealthy" or has the resources to become so. Because GDOT did not make and MEM did not have the opportunity to respond to this broader analysis, the record is incomplete or unclear about matters likely to have a significant impact on the outcome. We therefore remand under section 26.89(f)(4) for further proceedings consistent with the following instructions.

On remand, GDOT should consider at least the following:

- (1) Whether the *AGI* shown on Mr. Melton's personal tax returns for 2017, 2018, and 2019, including distributions or draws from MEM, indicates wealth. (The parties agree that distributions totaled approximately [REDACTED] in 2017 and [REDACTED] in 2019.
- (2) Whether net income MEM retained (i.e., taxable income that MEM did not distribute and Mr. Melton did not withdraw) in those years is functionally the same as income "reinvested" and if so whether those amounts should be disregarded for AASW purposes.
- (3) Whether Mr. Melton's *gross assets*, which he reports on his PNW statement as being worth nearly [REDACTED], indicate AASW. Although Mr. Melton reports liabilities in excess [REDACTED] *for PNW purposes*, we instruct the parties that an AASW analysis, in contrast, properly and intentionally *disregards liabilities*. GDOT, in other words, should consider the assets, including Mr. Melton's primary residence, at full value.⁶

Because MEM is currently ineligible, we direct GDOT to process this remand on an expedited basis. Within 14 business days of the date of this letter, we direct GDOT to email MEM either a notice of reinstated certification or a section 26.87(b) notice that specifically states the reasons for and evidence upon which GDOT proposes to find that Mr. Melton has AASW. If GDOT sends a notice of intent, the NOI must offer MEM the opportunity for an informal hearing

⁴ See *Quality Testing LLC and Consultant Engineering, Inc.*, Docket Nos. 18-0185 and 18-0146 (March 15, 2019), and cases cited therein.

⁵ We reaffirm the Department's original and current intent that "totality" be understood as meaning "overall." The reasonable person and certifier to whom the preamble refers are *generally* acquainted with the owner's circumstances, based largely on what they can see. As noted in the appeal decisions to which note 4 refers, they are not expected to be expert, much less omniscient. The Department intends for them to consider the canvas as a whole, not inspect individual brush strokes.

⁶ None of the PNW exclusions applies for AASW purposes. Please see Preamble to final rule, note 2 above, and the explicit limitation in regulation section 26.67(a)(2)(iii). The real estate valuation site Zillow estimates that Mr. Melton's primary residence, located in Great Falls, Virginia, is worth in the neighborhood of [REDACTED].

consistent with the requirements of section 26.87(d), on a specified date within 14 business days of the notice. MEM may elect to attend the hearing, present written information and arguments, do neither, or do both. Regardless of MEM's election, GDOT must email a final decision on MEM's eligibility within 10 business days of the hearing date.

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

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division