



**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

January 11, 2023

Docket No. 22-0066

Kimberly Newcomer  
Slate Communications LLC  
[REDACTED]  
Fort Collins, CO 80526

Zoe DeMuth-George  
Civil Rights Certification Specialist  
Colorado Department of Transportation  
Civil Rights & Business Resource Center  
2829 Howard Place  
Denver, CO 80204-2305

Dear Ms. Newcomer and Ms. DeMuth-George:

The Colorado Department of Transportation (CDOT) denied the DBE application of Slate Communications LLC (SC) on grounds of ownership and control.

SC was founded by Kimberly Newcomer, Ryan Burke, and Claire Bouchard in 2013. Each owned one-third of the company and made equal capital contributions to it. The firm was a certified DBE in 2015-16.<sup>1</sup> Subsequently, Ms. Bouchard left the company, and the remaining principals bought her out for a cash payment.<sup>2</sup> Following this 2017 buyout, Ms. Newcomer and Mr. Burke were designated as SC's 51 percent and 49 percent owners of SC, respectively.

CDOT asserts that Ms. Newcomer and Mr. Burke did not make cash contributions to the company to account for the portion of the company each owns, beyond their original one-third ownership, since the cash payments were technically made to the corporation.. This meant, for CDOT, that Ms. Newcomer did not make a personal real and substantial contribution for the 17.67 percent of SC she acquired to make up her current 51 percent ownership.

CDOT's characterization of the financing of the restructuring of SC's ownership is at odds with the evidence in the record, which, as noted above, speaks of a cash payment from Ms. Newcomer

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<sup>1</sup> Interview at 2:40. CDOT provided a video recording of the Ms. DeMuth-George's interview with Ms. Newcomer and Mr. Burke, which has been very helpful in considering this case. We regard providing such a video as part of the administrative record in a certification appeal as a best practice that we would recommend to certifiers generally.

<sup>2</sup> Interview at 2:40, 4:35 and 5:37.

and Mr. Burke to Ms. Bouchard.<sup>3</sup> This cash payment, through which the present owners bought their controlling interest in the firm, fulfills the intent of section 26.69(c) of the regulation for investment by the disadvantaged owner. The record contains substantial evidence demonstrating a legitimate basis for assigning 51 percent ownership to Ms. Newcomer and 49 percent to Mr. Burke.<sup>4</sup> Under the circumstances, the company has proved ownership by a preponderance of the evidence.

With respect to control, CDOT does not contest the assignment to SC of two of the three NAICS codes for which it applied. Nor does CDOT disagree that Ms. Newcomer performs an important series of functions Ms. Newcomer performs for the company as a whole (e.g., financial management, budgeting, marketing, business development, client relations, contract management<sup>5</sup>)

The control portion of CDOT's decision focuses solely on the ability of the Ms. Newcome to control the work of the firm with respect to a NAICS concerning graphic design.<sup>6</sup> CDOT said that, with respect to graphic design, Ms. Newcomer does not control the firm because Mr. Burke is disproportionately responsible for the SC's operations. In this regard, CDOT asserts that "During the onsite interview, Ryan Burke stated that he is responsible for overseeing all of the firm's graphic design work. You [i.e., Ms. Newcomer] confirmed this, and stated that you do not partake in any of this work, beyond giving final approval on projects."<sup>7</sup>

This assertion is also contrary to the evidence in the record.<sup>8</sup> Mr. Burke does act as the creative director of the company, with respect to content creation, photo and video production, and graphic design.<sup>9</sup> He performs all his functions, however, as a "direct report" to Ms. Newcomer,<sup>10</sup> whose overall management responsibilities apply equally to the graphic design component of

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<sup>3</sup> There is no evidence in the record to the contrary.

<sup>4</sup> In the appeal, Ms. Newcomer states that "As CEO, I have more responsibility and management control over the organization as a whole. This is demonstrated through my additional roles of Business Development (determining which clients we work for, what type of work we do, and what we charge) and Finance Director (determining our cash flow policies, reserve policy, investment strategies, etc.). Ryan does not have managerial control over either of those two business areas. My name and social security number are tied to Slate Communications' credit cards and financial accounts, increasing my personal financial risk at a level higher than Ryan's."

<sup>5</sup> Interview at 6:33, 6:54, and 12:50-13:47.

<sup>6</sup> CDOT does not question Ms. Newcomer's control with respect to the other two NAICS codes for which SC applied.

<sup>7</sup> Decision letter, p. 2.

<sup>8</sup> Having reviewed the interview in its entirety, we did not find statements by either Mr. Burke or Ms. Newcomer that characterized their roles in the way stated in the decision.

<sup>9</sup> Interview at 13:56.

<sup>10</sup> Interview at 6:00.

SC's business as to the other work the company performs.

In response to Ms. DeMuth-George's question to Ms. Newcomer about whether there were any areas of the firm's operations in which she is not directly involved, Ms. Newcomer replied "Now...there are things that we produce that I don't clearly do, but...I'm aware of and involved and am a part of all of it."<sup>11</sup> As teamwork is generally essential to the operation of a small business (SC has eight employees and two owners), Ms. Newcomer's testimony satisfies the requirements of section 26.71(g) of the regulation.

For these reasons, we conclude that CDOT's decision is inconsistent and unsupported by substantial evidence. Consequently, we reverse under section 26.89(f)(2) of the regulation and direct CDOT to certify SC immediately in all the NAICS codes for which it applied.

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

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division

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<sup>11</sup> Interview at 35:03-35.25.