



**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

February 6, 2023

Docket No. 22-0096

Kasia Kokoszka  
Fabyanske, Westra, Hart & Thompson, P.A.  
333 South Seventh Street, Suite 2600  
Minneapolis, MN 55402

Jeffrey A. Weinhausen  
Certification and Contract Specialist  
Metropolitan Airports Commission, Office of Diversity, Equity, and Inclusion  
6040 28th Avenue South  
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Dear Ms. Kokoszka and Mr. Weinhausen:

The Minnesota Unified Certification Program (MNUCP) denied the DBE application of AVM Construction LLC on the basis that the firm failed to meet requirements of the Department's DBE regulation for 51-percent owner Michelle Biggs' ownership and control.

In 2018, Ms. Biggs' husband, Andy Biggs, gave her a 50 percent interest in AVM. He remains involved in the operations of the firm. Consequently, the provisions of section 26.69(h)(1)-(2) apply.<sup>1</sup> As MNUCP did not challenge the gift as made for reasons other than obtaining certification, the controlling issue is whether, as section 26.69(h)(2)(ii) requires, AVM has carried its burden of proving, by clear and convincing evidence, that Ms. Biggs actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of the non-disadvantaged transferor. If not, the regulation presumes that Ms. Biggs does not own the 50% that Mr. Biggs gave her. The rebuttal bar is high. Firms clear it infrequently

In considering whether a firm has made this required showing, a certifier properly uses the same analysis it uses to determine control issues generally. This, the usual provisions of section 26.71 apply. While, contrary to the appeal's assertion,<sup>2</sup> MNUCP can take differences in the

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<sup>1</sup> The appeal concedes this point at pages 21, 25, and 26. This concession notwithstanding, the appeal attempts to argue, at p. 23-24, under section 26.73(b)(1), that MNUCP is precluded from considering the [REDACTED] gift. We do not agree. This relatively recent gift of the bulk of Ms. Biggs' stake in the company is not a historical curiosity; it is an integral part of the firm's present circumstances.

<sup>2</sup> Appeal, p. 30.

remuneration of key personnel in the company into account under section 26.71(i)(1), we view section 26.71(g) as the key to a decision in this case.

To refute MNUCP's determination that AVM failed to show that Ms. Biggs met the requirements of this provision, the appeal argues, at length, that Ms. Biggs is amply qualified to control the company and in fact does so. This argument is based primarily on declarations made by AVM's principals, documents which, though relevant, are inevitably self-serving.

The appeal goes beyond reliance on these declarations, however, to challenge MNUCP's decision-making process, arguing that that MNUCP did not make inquiries necessary for a determination under section 26.71(g).<sup>3</sup> The rule calls upon certifiers to investigate thoroughly the roles of and relationships among a firm's principals to determine whether the disadvantaged owner has "an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations" and "the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking."<sup>4</sup>

The appeal has pointed out areas in which MNUCP did not make this inquiry in sufficient depth.<sup>5</sup> For this reason, we find that the record of the case is incomplete or unclear with respect to matters likely to have a significant impact on its outcome. We are therefore remanding the case to MNUCP under section 26.89(f)(4) of the regulation.

On remand, we instruct MNUCP to conduct further interviews with Ms. Biggs, Mr. Biggs, and Michael Klun, the non-disadvantaged, 49-percent owner of AVM. The interviews should occur on or before a date 30 days from the date of this letter, giving the firm at least 10 days' advance notice of the date of the meeting, exploring in depth the roles of key participants and the firm's decision-making process.

MNUCP, as always, must assess the reliability and probative value of the principals' answers and pertinent documentary evidence. Within 21 days of the date of these interviews, we direct

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<sup>3</sup> See Appeal at 7-8, 11, 14-17, 31, 33.

<sup>4</sup> This is a line of inquiry that certifiers should regularly pursue in cases involving the ability of a SEDO to control a firm. While there is no regular template or questionnaire for such inquiries, the following are examples of topics for discussion that could be useful in such situations. What is the specific experience that a SEDO has gained over time that enables the SEDO to make independent decisions on the core activities of the company? What degree of oversight does the SEDO exercise concerning the tasks that other key participants perform? With respect to activities involving their areas of expertise, do other key participants bring issues or options to the SEDO's attention, which the SEDO then considers and regarding which makes reasonable, independent decisions? Have situations occurred where the SEDO has overruled or modified recommendations that other key participants have made? Are there situations or areas of the firm's work in which other key participants operate or make decisions autonomously, without involving the SEDO in the substance of the work? In responding to such questions, it would be very helpful for company personnel to describe specific examples on current or past projects that illustrate the nature of their working relationship.

<sup>5</sup> See footnote 3 above.

MNUCP to issue a new decision concerning whether AVM has demonstrated that the firm meets the requirements of section 26.71(g) at the level of clear and convincing evidence, as required by section 26.69(h)(2)(ii).

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

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division