

February 24, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0002

Attorney Joseph A. Delafield
Whitney Bank Building
3401 Ryan Street, Suite 307
Lake Charles, LA 70605

Dear Attorney Delafield:

This letter responds to the September 20, 2013 correspondence by your client, MPB Construction, LLC (MPBC), appealing the Louisiana Department of Transportation and Development's (LDOT&D) August 14, 2013, denial of the firm's application for certification as a Disadvantaged Business Enterprise (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). LDOT&D denied MPBC's application on the grounds that the firm's socially and economically disadvantaged majority owner and President, Ms. Pepper Shay, did not demonstrate control of the firm as required by §26.71.¹ We affirm LDOT&D's decision because substantial evidence in the administrative record supports the denial.^{2,3}

Pertinent Facts

MPBC's Uniform Certification Application (UCA) filed with LDOT&D in May 2013, sets forth the following pertinent facts. MPBC was established in July 2010, and is engaged in municipal and public works construction, pipeline work, and directional drilling (UCA, p.2). Ms. Shay and her non-disadvantaged husband, Michael K. Shay, own 51% and 49% of MPBC, respectively.

Michael Shay is MPBC's Vice President, and is solely responsible for the firm's estimating and bidding; and field/production operations supervision (UCA p.5). He assists Ms. Shay with financial decisions; negotiating and contract execution; marketing/sales; and purchasing of major equipment (UCA p.5). Mr. Shay is authorized to sign company checks and make financial transactions on behalf of the firm. (UCA p.5). Ms. Shay is solely responsible for managing MPBC's office. (UCA p. 5)

¹ Regulation §26.61(b) requires that applicant firms satisfy each eligibility requirement. The firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

² As regulation §26.89(f)(1) requires.

³ We base our decision solely on the entire administrative record, per §26.89(e).

Ms. Shay's résumé in the record states that she "manages all aspects of [MPBC's] operations. . . accounts receivable, accounts payable, human resources, payroll, insurance, policies and procedures, budgeting, finance and marketing." From November 2008 to October 2011, she worked as an office assistant at JCE Healthcare, where she assisted the chief financial officer and accounts payable manager. She reviewed and posted bills and handled vendor relations, among other duties. She co-owned Cad-Son Construction, LLC from October 2009 to April 2010, where she managed accounts payable and receivables, payroll, human resources, vendor relations, financing, budget, and insurance. Ms. Shay was a medical billing clerk from November 2003 to February 2008 with DeQuincy Memorial Hospital. She lists her "core qualifications" as the following: operations management; sound judgment; complex problem solving; account management; vendor sourcing; administrative skills; budgeting; customer relations; expense control; policy/program development; computer-savvy; branding, marketing; risk management; purchasing management.

Michael Shay, according to his résumé, is a "accomplished Louisiana Licensed contractor with demonstrated expertise in the areas of operations, finance, and staff management within the commercial construction field." He writes that he is also "results-oriented with the ability to coordinate multiple projects and teams simultaneously, coupled with the skill to effectively manage staff of all levels and diverse backgrounds." His title at the firm is "President of Operations/Chief Estimator" with duties including estimating, project management, and field supervision. Mr. Shay lists several water line extension, replacement, and relocation projects he has worked on behalf of MPBC. He lists similar projects accomplished for his firm, Cad-Son Construction, LLC, during 2003–2010. From 1998–2003 and from 1989 to 1996, Mr. Shay was a heavy equipment operator/foreman for F.D. Shay Contractors where he oversaw jobs, time and material keeping. For a two year period (1996-1998), he was inspector for the Northern Border Project with Willbros in Houston Texas.

LDOT&D's on-site interview with Ms. Shay occurred on July 24, 2013 at the firm's home office. She confirmed many of the office related duties at MPBC she listed on the UCA and stated the firm employees 4 laborers and 4 equipment operators. Michael Shay hires and fires employees, supervises field operations, and is on the job site daily; whereas Ms. Shay visits the job-site monthly or on an as-needed basis. (On-Site Report, p. 5). Mr. Shay is responsible for scheduling, ordering materials, and is the firm's primary contract signer, with Ms. Shay "often signing as a witness." (On-Site Report, pp. 6, 7)

LDOT&D cited §§26.71(e), and (g) in its DBE certification denial decision, referencing the firm's failure to demonstrate sufficient control, namely: (1) Ms. Shay lacks sufficient experience to control critical areas of the firm's primary operations; (2) she relies upon Mr. Shay, the non-disadvantaged 49% owner, for his knowledge and background to control the technical aspects of MPBC's operations; and (3) Ms. Shay's experience is primarily in office administration and billing with no prior experience in the firm's industry.

Rebuttal

In your appeal of September 17, 2013, you highlight the Shays' respective operational and office related duties. You stated:

“While I fully understand the experience of Michael Shay. . .in operations of construction equipment, Michael Shay does not and has not managed the financial aspects of either Cad-Son or MPBC which include management of accounts payable, receivables, payroll, employee relations, and human resources, budget and insurance. Further, vendors of both Cad-Son and MPBC exclusively contact Pepper Shay for negotiations and purchase orders, and payment of accounts payable. With every respect to Michael Shay, equipment operations is a very small part of management of MPBC (and previously Cad-Son). It was, in the case of Cad-Son, and is, in the case of MPBC, that Pepper Shay is responsible for management [of] day-to-day operations and the continued existence of MPBC. Absent Pepper Shay's operations and management of MPBC, there would be no MPBC.” (Rebuttal Letter, Sept. 17, 2013)

Discussion

§26.61(b): The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

Control

§26.71(a): In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

§26.71(e): Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

§26.71(g): The socially and economically disadvantaged owners must have 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. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have 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. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

The firm bears the burden of demonstrating by a preponderance of evidence per §26.61(b) that Ms. Shay, as the majority disadvantaged owner, possesses an overall understanding of and managerial and technical competence and experience directly related to MPBC's line of work, which is a requirement of §26.71(g). Ms. Shay introduced no evidence that this is the case. Accordingly, LDOT&D appropriately determined that the firm is ineligible for certification; and we affirm under §26.89(f)(1).

The pertinent experience and knowledge of public works construction, pipeline work, and directional drilling rests with the non-disadvantaged owner, Michael Shay. She failed to make a showing that she is in fact equipped to critically evaluate information presented by him in this type of work and use that information to make independent decisions concerning MPBC's daily operations, management, and policymaking, particularly not in field operational elements.

Substantial evidence supports a determination that Mr. Shay's participation and expertise are indispensable to the firm in the work that the firm has been engaged in so far and that he controls the operational activities for which the firm seeks certification. We affirm LDOT&D's conclusion under §26.71(e) that the firm is ineligible because a non-disadvantaged individual (Michael Shay) is disproportionately responsible for MPBC's operations. There was substantial evidence; all of it provided by the firm and Ms. Shay, that her duties are primarily administrative/financial and that her experience and understanding relate primarily to accounting and sales, not field/production operations. Mr. Shay has more substantial duties, as specified in the UCA, résumés, and on-site report (estimating, bidding, field supervision).

There is abundant evidence of shared control responsibilities and delegation to Mr. Shay, a non-disadvantaged person, who is responsible for day-to-day operations and field supervision. We find that Ms. Shay's managerial role in the firm's overall affairs, as the owners themselves described in the application materials, is not such that the LDOT&D reasonably could conclude that she actually exercises control over the firm's operations, management, and policy. The core functions of this firm are undoubtedly in the non-disadvantaged owner's hands, from estimating and bidding to field supervision.

Substantial evidence supports LDOT&D's conclusion that MPBC did not meet its burden of proof.

CONCLUSION:

The Department affirms, as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification, LDOT&D's determination that MPBC is ineligible for certification as a DBE. We reach this conclusion based on the firm's failure to satisfy the requirements of §§26.71(e) and (g).

This decision is administratively final and not subject to petitions for review. **MPBC is able to reapply to the DBE program at this time as the applicable waiting period has passed.**

Sincerely,

Marc D. Pentino, Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: LDOT&D