

April 28, 2016

CERTIFIED MAIL
RETURNED RECEIPT REQUESTED

Reference Number: 16-0017

E. Diane Laub, SPHR
Director, Civil Rights Division
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Dear Ms. Laub:

Tamarac Land Surveying LLC (TLS) appeals the North Dakota Department of Transportation's (NDDOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After examining the entire administrative record, we conclude that the record is unclear or incomplete regarding matters likely to have a significant impact on the outcome of the case. We therefore remand under Regulation §26.89(f)(4)¹ for further proceedings consistent with the instructions below.

NDDOT's July 27, 2015 denial letter determined that TLS's disadvantaged owner's (Megan Swenson) ownership interest is not real and substantial and did not constitute a majority ownership interest in the firm. §26.69(b)(c). NDDOT also took issue with Ms. Swenson's ability to control the firm. NDDOT's denial letter provides undeveloped or no reasons/analysis to support its ownership and control grounds.²

¹ §26.89(f)(4) provides:

"If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part."

² §26.86(a) provides:

"When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and

I. Decision

The Department does not affirm certifier decisions on grounds not specified, § 26.89(f)(5), and under §26.86(a) a denied applicant is entitled to a written *explanation of the reasons* for the denial, not simply quotations of potentially applicable Regulation provisions and an exposition of facts. It is the certifier's obligation to explain itself.

In this instance, NDDOT's denial letter recounts facts determined from the firm's certification interview, but it does not analyze how the stated facts relate to any requirement of the Regulation. Specifically, after citing §§ 26.69 (b) and (c) and §§ 26.71 (d), (e), and (f), the denial letter states:

In the interview you explained that Greg performed the same duties as yours with the exception of invoicing. Your application states that you share negotiating, hiring and firing, operations, office duties, marketing, purchasing duties and are both authorized to sign for checks for any purpose. You indicated that your salaries were the same because "That's our arrangement; I guess that's what we decided to do."

In your interview you indicated that you determined that the split was established to obtain the DBE certification. To the question "Can you explain how the ownership percentages were determined for Greg and yourself?" you replied, "We basically decided we were going to go ahead to get the DBE before we started our business, so that's how we determined it."

Your initial investments are nearly equal with your \$20,000 cash investment and his \$19,200 equipment investment, and you've stated that these amounts were selected so that the firm would be eligible for DBE Certification.

Therefore, you have not demonstrated by a preponderance of the evidence that the contribution of capital to acquire your ownership interests justifies the 51 %-49% split.

3. 49 CFR §26.61 Burdens of Proof

(e) The Department must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

Therefore, your firm has not demonstrated to the Department, by a preponderance of the evidence, that the socially and economically disadvantaged owner controls the company.

other information on which the denial is based must be made available to the applicant, on request."

NDDOT Denial letter at 2-3.

Without further elaboration of NDDOT reasons, we cannot fairly make a principled determination concerning the merits of this case. The outcome of this case turns on:

1. Whether the claimed 51% ownership is real, substantial, and continuing §26.69 (c).
2. Whether Ms. Swenson's ability to control the firm is compromised by the presence of the firm's non-disadvantaged owner. *See* §26.71 (e) (disproportionate control), §26.71(f) (delegation), §26.71(g) (expertise of disadvantaged owner).

II. Conclusion

The Regulation precludes the Department from affirming for reasons not stated in the denial letter. We remand for NDDOT to clarify its apparent denial rationales under §§26.69(b), (c), and §26.71 generally.³ We ask NDDOT to consider carefully its position **in light of the arguments that TLS makes on appeal**.

We respectfully request that NDDOT, not later than June 30, 2016, either certify the firm (if it determines the firm has demonstrated eligibility) or fully address the issues described above in a new §26.86(a)-compliant denial letter.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

³ NDDOT cites §§26.71(e), and(f), and provides facts obtained from the firm's application and On-site. There is no explicit analysis of how or why the firm fails to demonstrate eligibility under any of the control provisions.

In addition, NDDOT cites the introductory paragraph contained within §26.71(d), but the record does not suggest that it takes issue with Ms. Swenson's overall governance of the firm (i.e. her ability to control the firm's board of directors). §26.71(d) is a provision that concerns a disadvantaged owner's ability to control the firm's governance. On remand, NDDOT should either drop this ground, or provide a full explanation that comports with §26.86(a) to allow the firm the opportunity to raise an adequate response to the denial ground.