

July 6, 2016

Reference Number: 15-0070

Ms. Kimberly A. King, Director
Equal Opportunity Division
Georgia Department of Transportation
600 West Peachtree Street, 7th floor
Atlanta, GA 30308

Dear Ms. King:

Tomberlin & Tomberlin Construction, LLC (T&T) appeals the Georgia Unified Certification Program's (GUCP) December 29, 2014 determination that T&T is ineligible for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at 49 CFR Part 26 (the Regulation).¹ After a careful review of the administrative record, we cannot affirm GUCP's decision as supported by substantial evidence or consistent with substantive or procedural provisions relating to DBE certification. *See* Regulation §26.89(f)(1).²

We remand under §26.89(f)(4) because the evidence is unclear with respect to matters likely to have a significant impact on the outcome of the case. We direct GUCP to reconsider its position in light of the arguments presented on appeal and the instructions below and, within 60 days, either to certify the firm or produce a new, more fully reasoned denial letter on the matter of whether T&T has demonstrated that it is independent, within the meaning of §26.71(b).³

¹ 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 . . . control. §26.61(b).

² §26.89(f)(2) states: "If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it."

³ To the extent that GUCP intended to state grounds described in §§26.71(j) (outside employment that conflicts with or prevents the disadvantaged owner from controlling the applicant firm) or (k) (family business in which disadvantaged owner has not demonstrated that she, as distinct from the family as a whole, controls the firm), we find the denial letter insufficiently explains such additional reasons for the firm's ineligibility, in contravention of the requirements of §26.86(a). As we do not consider GUCP to have properly framed any such "grounds" for denial, we do not consider them to be before us on appeal. We do not believe the "family business" is, on these facts, a fruitful issue for GUCP to pursue because we do not see other family members involved *with T&T*. Please see page 5 for our directions concerning outside employment.

I. Procedural History

T&T filed the present Uniform Certification Application (UCA) on September 29, 2014.⁴ GUCP conducted the firm's on-site review on November 20, 2014, and notified the firm that it was ineligible for DBE certification on December 29, 2014. T&T timely appealed its denial to the Department on March 26, 2015.

II. Background

T&T was formed on July 27, 2009. At the time of formation, T&T was owned 51% by Mrs. Tomberlin, a white female; 24.5% by Franklin Tomberlin, a white male and Mrs. Tomberlin's father-in-law; 12.25% by Reg Tomberlin (Mrs. Tomberlin's husband and the owner of Tomberlin Trucking and Tomberlin Farms); and 12.25% by Frank Tomberlin, who is Mrs. Tomberlin's son and the owner of Mill Creek Trucking.

T&T's business is "for hire" hauling of aggregates for road construction projects, recycling of concrete and sale of the same to the public as base for road paving projects or as a crusher run land alternative, land clearing, excavation, and pond building. T&T is a hauling, construction, and excavation company.

In June of 2014, Mrs. Tomberlin bought out the other three owners' ownership interests based on a fair market value determination made by T&T's accountant, which was established by T&T's 2012 business tax returns. The accountant determined the fair market value to be REDACTED. As a result, Mrs. Tomberlin paid a total of REDACTED in three separate checks, to purchase Franklin Tomberlin's 24% interest REDACTED, Reg Tomberlin's 12.25% interest REDACTED, and Frank Tomberlin's 12.25% interest REDACTED in Applicant. At the time of application, T&T had eight total employees and average total receipts under \$1 million over the previous three years.

GUCP's denial focused on the question of whether T&T was sufficiently "independent" to satisfy the requirements for DBE certification. Regulation §26.71(b) defines an "independent business" as "one the viability of which does not depend on its relationship with another firm or firms." Since T&T's formation, Mrs. Tomberlin's duties, as identified in the certification application, have been to provide coordination with the equipment and trucking supervisor on current and future projects, determine appropriate construction methods, oversee all aspects of day-to-day operations, handle all decisions, including, but not limited to, purchasing, hiring, and firing, managing T&T's financial affairs, taking customer orders, and managing job schedules. Therefore, T&T maintains that Mrs. Tomberlin is actively involved in all aspects of T&T's business operations. T&T's gross receipts have grown from REDACTED in 2011 to REDACTED in 2013, an increase of more than REDACTED.

⁴ GUCP denied a previous T&T application for certification on October 5, 2010. GUCP's objections to certification at that time centered on ownership, disproportionate control, delegation, and experience or expertise directly related to T&T's business.

GUCP's basis for the determination that T&T was not sufficiently separate from Tomberlin Trucking (Trucking) was the fact that Applicant and Trucking share, among other things, office space. While accurate, the office sharing relationship is not as simple as is depicted in the denial letter. T&T's business office is located at 418 Second Street in Rhine, Georgia. T&T leases a portion of this office space from Trucking pursuant to a lease agreement under which T&T pays Trucking the sum of REDACTED annually for the office space. The lease amount was determined by an independent appraisal performed by Dan Hester in June of 2014. Mr. Hester is a Certified General Real Estate Appraiser in the State of Georgia. While the Trucking Company pays for the dedicated telephone line coming into the office, T&T pays the bill for the dedicated fax line to the office. T&T otherwise pays its own utilities, according to bills provided in the record.

GUCP also based its opinion upon a belief that T&T "shares a stock yard with Mill Creek Trucking." This determination appears to be incorrect and not based on any hard facts in the record. The majority of T&T's equipment, when not being used on a jobsite, is stored in the "rock/aggregate supply yard," which is located on a separate parcel of property located *behind* property owned by Mill Creek Trucking. It is unclear from the record who owns the relevant property, though T&T claims it. The rock/aggregate yard does not have an assigned address, but sits directly behind the REDACTED address. When Mrs. Tomberlin was questioned about this, she responded with the above facts and said that the closest physical address was REDACTED Oak Grove Church Rd.

T&T owns the majority of its equipment, but it does supplement its assets with other equipment owned by other entities. T&T has entered into a written Equipment Rental Agreement with Tomberlin Farms dated October 13, 2013, for lease of a John Deere 624 Loader and John Deere 700 Bulldozer. In exchange for the lease of the equipment, T&T agrees to make all monthly payments owed by Tomberlin Farms to John Deere Financial, which financed the purchase of the equipment by Tomberlin Farms. This information was provided to the Georgia Department of Transportation in connection with the application.

Finally, the denial letter appears to conclude that all of T&T's work projects come from Tomberlin Trucking. This is inaccurate, and is directly contradicted by the facts. Notably, over the course of 2012 through 2014, T&T contracted with CWJ Farms, which is unrelated to T&T or to Tomberlin Trucking. T&T provides invoices to several other parties, as part of its application, that are unrelated to T&T or to Tomberlin Trucking.

III. Decision

GUCP's independence determination is, in our view, unsupported by substantial evidence, but the evidence is unclear regarding matters likely to have a substantial impact on the outcome of the case.

GUCP's decision—as it pertains to independence—states:

The GUCP application and onsite interview responses indicate that Tomberlin & Tomberlin Construction, LLC shares an office space, office equipment, and a

telephone line with Tomberlin Trucking Co, Inc. During the onsite visit, photos taken of the sign outside of the building reflect the names of Tomberlin & Tomberlin Construction, LLC and Tomberlin Trucking Co. During the onsite interview, Shelley [Mrs. Tomberlin] indicated, in response to question 46, that Tomberlin & Tomberlin Construction, LLC stores its equipment at REDACTED Oak Grove Church Rd., Rhine Georgia. A web search found the property to be associated to Mill Creek Trucking, which is identified in the GUCP application as being owned by Shelley's son, Franklin H. Tomberlin

During the onsite interview, Shelley Tomberlin was asked to provide a copy of the three largest active contracts listed on the GUCP application (E.R. Snell, McCarthy Enterprises, and Pete Lowery contracts). Follow up requests for copies of the said agreements were made, but the documents were not received. The GUCP application indicates Tomberlin & Tomberlin Construction, LLC is performing hauling for Tomberlin Trucking on all three (3) projects.

As recorded on the GUCP application, Shelley Tomberlin is also currently employed by Tomberlin Trucking Company as an Estimator with the business relationship defined as, *"Search for projects and perform job estimation on prospective projects to bid on. Also, Tomberlin & Tomberlin will perform hauling for Tomberlin Trucking Co. by the hour or by the ton, depending on the job. Tomberlin Trucking Co. at times performs hauling of crushed concrete for Tomberlin and Tomberlin Const. Both parties are issued 1099 's for their services."*

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A clear separation between Tomberlin & Tomberlin Construction, LLC, and Tomberlin Trucking Co, Inc. was not demonstrated. Although, Shelley Tomberlin draws a salary from her father-in law's business (Tomberlin Trucking), she contends she does not work many hours with his business. However, the firm is in a similar line of business as her own; and the two firms share contracts, mailing address, office space, equipment, employees, and telephone lines. Tomberlin & Tomberlin Construction, LLC further shares a stock yard with Mill Creek Trucking...

GUCP Denial at 1-2.

The Regulation's independence provision—Section §26.71(b)—sets forth that, “[o]nly an independent business may be certified as a DBE.” An independent business is “one the *viability of which does not depend on its relationship with another firm or firms.*” (Emphasis added). The provision's subsections set forth a four-prong test for assessing a firm's viability in relation to other firm(s):

(1) In determining whether a potential DBE is an independent business, you *must scrutinize* relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

A. Personnel

The record reflects simply that Mrs. Tomberlin works for both T&T and Trucking. The evidence is that her hours at Trucking are minimal and do not conflict with her work at T&T. There is no other evidence of shared personnel between T&T and another firm.

B. Facilities and Equipment

T&T's leasing arrangement with Trucking also appears to affect the firm's independence. Although T&T shares the facility with Trucking, it appears to pay fair market rent for the privilege. Nothing in the Regulation prevents renting from a non-DBE firm.

T&T demonstrates that other than the firms' shared phone line and possibly office equipment, it pays its own utilities.

We make our decision based on the record viewed as a whole. There is no substantial evidence that T&T's facility's lease, considered alone, impairs its independence. A shared telephone line and fair market value rent, in our view, are, on the totality of facts before us, insufficient for a finding that T&T is not viable, but for its relationship with Trucking. GUCP must look to the other independence factors, as discussed below, which are not optional.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

GUCP failed to explore meaningfully whether Mrs. Tomberlin's part-time work at Trucking compromises T&T's independence. We remand for GUCP to provide the required §26.86(a) explanation in a new, more fully reasoned denial letter. We would appreciate learning GUCP's position on whether Trucking and T&T are competitors in the same line of business and whether Mrs. Tomberlin's work for both firms presents an inherent conflict of interest that impairs T&T's independence.

GUCP may, if it wishes, choose to consider Mrs. Tomberlin's outside employment an independent denial ground under §26.71(j). If GUCP pursues that course, it must explain how Mrs. Tomberlin's work for Trucking conflicts with her management of T&T or prevents her from devoting sufficient time and attention to its affairs to satisfy §26.71(j).

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

GUCP implies, but does not quite say, that T&T has a pattern of primary dealings with Trucking. We cannot determine from the record before us whether Trucking is a prime contractor at all. We therefore remand for GUCP to develop more fully this component of its independence rationale, taking due account of and specifying actual facts in the record. Pertinent facts that we

find are that T&T worked for Trucking on only two of three of its largest contracts and that it worked for other parties on a number of other contracts. We cannot determine from the record before us that there is a “pattern” of exclusive or primary dealings with a prime contractor, which compromises T&T’s independence.

(4) In considering factors related to the independence of a potential DBE firm, you *must consider* the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

Neither party makes any apparent argument pertinent to this factor. We direct GUCP, on remand, to advise the Department on whether T&T’s relationship with another hauling firm is consistent with normal industry practice.

In summary, there is insufficient evidence to affirm GUCP’s determination that T&T did not demonstrate independence, and the evidence remains unclear regarding matters likely to have a substantial impact on the outcome of the case.

IV. Conclusion

We remand for GUCP to make a fully §26.86(a) compliant determination consistent with the instructions in this letter. We request that GUCP either certify the firm (if on review it determines T&T is eligible) or produce a new, more fully reasoned denial letter not later than September 9, 2016—in either case, with a courtesy copy to this office.

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

Sincerely,

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

cc: T&T