

November 20, 2017

Reference Number 17-0086

Deborah Green, Administrator
Office of Small and Disadvantaged Business Enterprise
1980 West Broad Street, MS3270
Columbus, OH 43223

Dear Ms. Green:

Martin Concrete & Trucking, Inc. (MCT) appeals the Ohio Department of Transportation's (ODOT) April 3, 2017 determination that the firm is ineligible for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 C.F.R. part 26 (2014) (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) closes this appeal and remands the matter under Regulation §26.89(f)(4)¹ for ODOT's complete reassessment of eligibility in conformity with the instructions in this letter.

Synopsis

We remand because ODOT's process was inconsistent with the requirements of §26.83(c)(2), and ODOT's failure to have MCT complete the correct application form precluded it from obtaining information intended to be useful for a proper control determination under the 2014 Regulation based on all pertinent evidence. We also remand because ODOT's denial letter leaves us unable to determine that substantial evidence² supports the decision or that ODOT properly applied §§26.71(e) and (f), the provisions upon which ODOT primarily bases the denial.³ To remedy these lapses, we direct ODOT to begin the process anew, using the correct

¹ Section 26.89(f)(4) states: "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.*" (Emphasis added.)

² See generally §§26.86(a), 26.89(f)(1).

³ See generally §26.89(f)(2) states in pertinent part: "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." ODOT also cites §26.71(d) regarding power to control but provides no evidence to support the firm's failure to satisfy any of that provision's specific requirements. See generally §26.86(a).

Uniform Certification Application (UCA) and conducting a new on-site review, then re-evaluating whether MCT's 100% owner "controls" MCT within the meaning of the Regulation⁴ and rendering a new, Regulation-compliant decision within 45 days of receiving the new UCA.

Background

K.P. Martin, MCT's sole owner, formed the firm around 1973. UCA at 4.⁵ MCT applied for DBE certification on or about May 25, 2016. Affidavit of Certification.⁶ ODOT's contractor Baker Tilly conducted the firm's on-site review on November 16, 2016. ODOT denied the application on April 3, 2017.⁷ MCT appealed that decision to the Department on April 20, 2017 and supplemented the appeal with additional arguments on October 11, 2017.

Denial Bases and Appeal Arguments

ODOT's denial letter cites no evidence from the UCA any other document the firm provided; instead, it relies exclusively on Baker Tilly's observations at the on-site review. The letter states in pertinent part:

"To be viewed as controlling a firm, ODOT must be able to reasonably conclude that the socially and economically disadvantaged owner actually exercises control over the firm's operations,

⁴ The administrative record reveals no business size, economic disadvantage, or ownership issue to be in dispute.

⁵ The record shows that ODOT's standard UCA, for multiple reasons (principally but not exclusively related to control) previously explained to ODOT, is not the one that the Regulation requires, and its included standard Affidavit of Certification erroneously requires the owner to aver that his "personal net worth does not exceed \$750,000." Neither document would be in error had ODOT used the forms that appear in Regulation Appendix F. We note that as of November 3, 2014, certifiers *must* use the Appendix F documents *without change or revision*, 79 Fed. Reg. 59566, 59570, 59598 (October 2, 2014), and that the PNW cap changed to \$1.32 million on February 28, 2011. 76 Fed. Reg. 5083 (Jan. 28, 2011). Please see also §26.89(d), which requires the certifier to provide the Department a "complete" administrative record.

⁶ ODOT stamped the UCA "received" on that date. Mr. Martin signed the Affidavit on May 19, 2016. Due to the amount of time passed since the firm's initial capitalization, the lack of dispute concerning the substantiality Mr. Martin's long-term ownership, clear evidence in the record that MCT is a small business, evidence that Mr. Martin's PNW is well below the present cap, and ODOT's denial letter raising only the control issues stated above, we find those control issues to be the only eligibility issues that remain in dispute. We further find, under §26.89(f)(4), that resolution of those issues will have a material effect on the outcome of this matter.

⁷ It is somewhat unclear from the record why ODOT took over 10 months to render its April 3, 2017 decision. ODOT completed its initial review of the application by June 6, 2016 and on that date requested from MCT the additional documents ODOT deemed necessary to complete its evaluation. MCT apparently produced those documents by July 12, 2016. *See* Information Request Dated June 6, 2016 (stating that non-provision/explanation by July 12 would result in a denial of the application); *but see* Baker Tilly October 28, 2016 Information Request; MCT January 13, 2017 Letter to ODOT. The record ODOT submitted to the Department contains what appears to be complete documentation (other than the required UCA: the one ODOT provided us is incomplete as well as in error), *see* Regulation Appendix F (checklist of required documents), and the denial letter cites no failure to cooperate. Accordingly, we consider the most-recent-available (presumably 2016) tax returns, forms 1120S and (owner) 1040, plus a new PNW statement from Mr. Martin, to be the only documents that MCT must provide to make the file complete. We urge MCT to provide those (and only those) documents with its new, Regulation-compliant application.

management, and policy. After the onsite interview was conducted, it was clear you were uninformed regarding much of the operations, management, and policy of the company, and there was even a point where you were so disinterested that you fell asleep in the middle of the interview. Mr. Robert Martin answered the majority of the questions regarding the company and its management. Therefore, it was determined Mr. Robert Martin is in control of MCT.

You started MCI 43 years ago, are the sole owner, but now you are considered more of an employee than an owner. It was explained in the onsite interview there is a plan in place for Mr. Robert Martin to take over MCT once you retire. At this current point in time, Mr. Robert Martin, who does not possess ownership in MCT, is more informed about the company's operations and future operations than you are....

During the onsite interview, when discussing the NAICS Codes the company is applying for, Mr. Robert Martin explained, "The company does not do much concrete work anymore, but they used to do some work for the City of Dayton." Mr. Robert Martin further explained he has been with the company for two years and hopes to resurrect the concrete division when he assumes leadership. It is clear he has control of the direction and longterm decisions of the company. It was also explained during the onsite interview, that Mr. Robert Martin will be taking over operations of MCT in the future, but it *already appears he has*. Although the socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, ODOT is not able to reasonably conclude you actually possess control of the firm's operations, management, and policy." (Emphasis added.)

On appeal, MCT counters that:

"Mr. K.P. Martin has been in business for forty-six (46) years and prior to this meeting, K. P. had just come from a job. Robert Martin is an extremely intelligent and well spoken individual. He is very involved with the business but he is currently just a part time employee. Robert has a fulltime job at Avery Dennison. Although we do not disagree that Robert Martin answered the majority of the questions and that there is a plan for Robert to take over once K.P. retires, that is not the situation at the moment. Both K. P. and Robert believe that this interview could have been handled differently and that K. P. apologizes for his inappropriate appearance as to seeming disinterested. Unfortunately, he was just very tired from the job he had just completed that morning. Both men have a great respect for the business and understanding of the operations, management and policy. They do not wish for this one incident to reflect poorly on them or the company....

In considering the factors of the Code of Federal Regulations 49 CFR 26.71, K.P. Martin is in control. Section 26.7 1(d) states the socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

K.P. has been directing this company for forty-six (46) years as I stated previously. He has years of experience and has helped Robert to understand the business. K.P. has complete control

and he is the one who has the financial responsibility for the business. He is the one to reap the profits or suffer the losses.”

Discussion and Decision

As explained above, ODOT’s failure to use the required 2014 UCA without alteration contravenes §26.83(c)(2) and likely precludes it from making a principled, control-based eligibility decision that is §26.71(a)-compliant, as all pertinent facts do not appear to be in the record. We remand so that ODOT can expeditiously provide, and MCT complete, the required 2014 UCA, attaching only the new documentation specified above.

We have difficulty relying exclusively on ODOT’s on-site review conclusions because (a) there is no analysis of any control-related information in pertinent documents MCT provided (including the UCA, which itself is faulty, as described above) and no substantial evidence supporting adverse decisions on the grounds stated; (b) the on-site review relies appears to rely exclusively on impressions that are not dispositive; and thus (c) the denial letter, in our view, does not comply with §26.86(a) requirements. ODOT cites no evidence in support of its conclusion that K.P. Martin is “more of an employee than an owner” and little to support a conclusion that Robert Martin “knows more” about the business (a proposition, which, standing alone, also is not necessarily determinative, under uncited §26.71(g)). We do not view the observations that Robert Martin answered most of the questions⁸ or that K.P. Martin nodded off during the interview to be dispositive, particularly in light of the appellant’s explanation above.

For the “appearance” that K.P. has already transferred control to Robert, ODOT relies only on those observations (that K.P. was sleepy and Robert answered more questions) and Robert Martin’s statements regarding his future plans for the company. However, §26.73(b)(1) precludes an eligibility determination that is not based on the firm’s present circumstances. We acknowledge that §26.71(d) requires *the disadvantaged owner* to possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day *as well as long-term decisions* on matters of management, policy and operations but note that ODOT does not analyze what K.P. Martin’s current powers are. The fact that the applicant bears the burden of proof under §26.61(b) does not relieve the certifier of its obligations under §§26.71(a) and 26.86(a). If the firm produced no pertinent evidence (which in fact it did, e.g., in the Memo described below), ODOT might have said so or cited a resulting failure to cooperate as a ground for certification denial.

We find that ODOT’s April 3, 2017 denial letter fails to state affirmable denial grounds under either §26.71(e), under which nondisadvantaged may not possess or exercise the power to control the firm, or be disproportionately responsible for its operation, or §26.71(f), regarding permissible delegations of authority, because ODOT cites no evidence (extent of Robert’s powers, conditions and extent of K.P.’s delegation) in the record (including the UCA, which itself is flawed as noted above) that might support its conclusions. In particular, ODOT cites no evidence regarding what *K.P. Martin’s managerial role is*, which might support its conclusion that his role is insufficient under the last sentence of §26.71(f). Please compare the Baker Tilly

⁸ MCT concedes that both brothers are well informed about the business and states, moreover, that only K.P. works for MCT full time, which is a relevant fact under §26.71(j).

On-Site Review Memo to File (Nov. 15, 2016), which contains multiple, specific references to areas in which K.P. Martin appears exclusively to control the firm, e.g. Q&A's 9, 10, 11, 15, 18, and 29, and thus tends to undercut ODOT's conclusion. ODOT's denial letter further fails to discuss any of *Robert Martin's* current responsibilities. The denial letter is therefore deficient under or inconsistent with §§26.86(a), 26.71(e), and 26.71(f), and we cannot affirm its ineligibility conclusion under §26.89(f)(1).

Despite the evident unfairness of a delayed resolution of outstanding issues material to the outcome, we remand for ODOT to begin its examination of MCT's eligibility anew, using the proper UCA, conducting a new on-site interview that probes information provided that may be pertinent to the unresolved §26.71(e) and/or (f) issues, and issue a new decision, which, given the limited review that remains, we respectfully request be issued within 45 days of the date ODOT receives the newly completed 2014 UCA with the documents enumerated above. We further request that ODOT expedite its review of the new application and send this Office a courtesy copy of its timely determination (whether certification or denial letter). In the event of a new denial letter, MCT will have the usual 90 days within which to appeal.

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

Thank you for your attention and cooperation.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Rebecca Barthelemy-Smith, for MCT