

November 7, 2017

Reference Number 17-0089

Cathy Warren, President
CGW Trucking, LLC
REDACTED
Lancaster, OH 43130

Dear Ms. Warren:

In an undated letter, CGW Trucking, LLC (CGW) appeals the Ohio Unified Certification Program's (OUCP) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation). After considering all of the facts in the record, including the firm's arguments on appeal, the U.S. Department of Transportation (Department) affirms OUCP's decision.¹ The Regulation does not permit a more favorable result because CGW did not demonstrate that a socially and economically disadvantaged (SED) individual made her own real and substantial capital contribution in exchange for her ownership of the firm.²

OUCP also denied CGW's application on control grounds described in §§26.71(b), (g), and (k).³ CGW appealed on both ownership (capital contribution) and control grounds.

¹ See §26.89(f)(1): "The Department affirms [a certifier's] decision unless [the Department] determines, based on the entire administrative record, that [the certifier's] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." We affirm because there is substantial evidence to support OUCP's conclusion that Ms. Warrant failed to demonstrate CWG's eligibility under §§26.69(c)(2) and (e). Although the Denial Letter (March 27, 2017) fails to cite these provisions, the narrative makes the denial ground sufficiently clear to satisfy the §26.86(a) requirement. Cf. §26.89(f)(5) (Department does not affirm on grounds not specified in certifier's decision.)

² See §26.61(b): "The firm seeking certification has the burden of demonstrating to [the certifier], 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." (emphasis added.) See also §§26.69(e) (SED owner must make real and substantial capital contribution), 26.69(c)(2) (SED owner's capital contribution must be commensurate with value of ownership interest obtained), and 26.69(i) (only half of capital contributed from joint or marital funds can normally be attributed to SED spouse unless non-SED spouse irrevocably renounces and transfers all rights in ownership interest in manner sanctioned by state law). This last bar to eligibility can be cured with Mr. Warren's signed, notarized, and Ohio-law compliant assertion that he irrevocably renounces, and transfers to Ms. Warren, any ownership interest that he may have in CGW under Ohio law. Substantiality of capital, and thus of SED ownership, remains an aspect of eligibility that the applicant must prove, by a preponderance of the evidence.

³ Denial Letter at 2-3. OUCP's independence rationale is that Scioto Ready Mix, CGW's main or possibly sole client, sold a truck to CGW and allows CGW to store equipment on Scioto's premises. OUCP fails to analyze factors (b)(2)-(4) or to explain the relevance of the truck purchase, which is not equipment "sharing." To the extent that OUCP reasons that CGW derives all or most of its revenues from one client, that fact is simply not

Facts

CGW's business is hauling, pick-up, and delivery of asphalt and aggregates such as gravel, sand, and concrete. Spouses Cathy and David Warren formed the firm on August 9, 2013, with Ms. Warren owning 90% and Mr. Warren owning 10%. At some later time (scores of pages in the record are simply blacked out⁴), Ms. Warren purchased Mr. Warren's share for **REDACTED** (total). As a result, Ms. Warren, at the time of CGW's application for DBE certification, owned 100% of CGW.

At the on-site interview conducted by OUCP contractor Baker Tilly on March 1, 2017, Ms. Warren provided a copy of a cancelled check in the amount of **REDACTED**. This check, made out to Mr. Warren, apparently is the consideration for the purchase of his shares in CGW. Ms.

determinative of independence, as we explain in 13-0184 Maximus Trucking (Sept. 10, 2014). All firms "depend" on their clients for revenue.

OUCP's §26.71(g) rationale speaks more to Mr. Warren's experience than to the SED owner's, and it is primarily that Ms. Warren has "not passed [he]r Commercial Drivers Licensing exam and possess[es] no hands-on truck driving experience related to the principal activities of the business." OUCP does not explicitly conclude that Ms. Warren's expertise is *limited to* office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm, and even if it were, that conclusion does not necessarily mean (note the word "generally" in the provision) that she lacks §26.71(g) control.

The §26.71(k) argument essentially restates the §26.71(g) rationale that Mr. Warren, not Ms. Warren, drives CGW's truck. OUCP fails to contend (or provide evidentiary support) that the Warrens' responsibilities are so intertwined as to preclude a control determination, which is what §26.71(k)(2) requires. Otherwise, §26.71(k)(1) requires OUCP to "make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business."

Without more, we are unpersuaded that OUCP makes its case on any of these grounds based on the standards of substantiality of evidence and/or consistency with underlying certification rules. *See* §§26.86(a), 26.89(f)(1). *See also* 13-0122 Nancy's Tree Planting, Inc. (Jan. 10, 2014) (SED owner's inability to personally operate earth moving equipment did not preclude her control of landscaping business); 13-0073 C2PM, Inc. (Nov. 7, 2013) at 6 (permissible delegations).

As Ms. Warren states, Appeal Letter at 1:

My ability to own, operate and make all decisions within the business of CGW is solely mine. I am not going to get a divorce in order to survive. The Commercial Driving License is on my radar right now and see in the near future to have one. That does not mean I will be driving a truck or need to drive a truck. That's why I hire truck drivers. I'm sure that the people saying I need to have a CDL within your DOT organization don't have CDL's yet govern over those that do? There are millions of businesses in America that are owned and the owners or board members cannot do what their own company does, i.e. fly airplanes, captain ships or cook hamburgers. To say I need to be able to drive a truck is [mis]construed.

We likewise find no Regulation provision that explicitly requires an owner with managerial/operational control to perform all underlying business activities herself. *Cf.* §26.71(f) (certain delegations permitted); *see* 13-0064 J&L Steel (Aug. 23, 2013) at 2-3 (consistent with §26.71(f), owner need not personally perform all of the business's activities, possess relevant license, or operate applicable equipment).

⁴ Further, the bulk of what OUCP presents as the firm's Uniform Certification Application (UCA) is simply blank, and the UCA itself is clearly not the one the Department requires OUCP to use as of late 2014 (i.e., the one found at Appendix F of the Regulation). *We remind OUCP that using the unaltered 2014 UCA is mandatory.*

Warren also provided a receipt for the purchase of a laptop computer and printer, which she identified as the couple's initial contribution of capital. OUCP explains (Denial Letter at 2) that:

During the onsite review, you were asked to explain the firm's initial contributions. You explained that you and Mr. Warren combined funds to purchase a computer and printer to start the business. However, you were unclear on the split of funds contributed by you and Mr. Warren. *Therefore, ODOT can only assume the split was 50/50 because you are husband and wife. [paragraph break omitted.] The uncertainty of total funds contributed by each individual prevents ODOT from determining that the socially and economically disadvantaged owner has contributed sufficient funds to start the company.* (emphasis added.)

The Appeal Letter neither disputes nor augments this account; it appears to concede that the capital contributions were from joint, not separate, funds. *See generally* §§26.61(b), above, and 26.89(c) (regarding what an appeal must contain). Regarding capital contributions, the Appeal Letter states:

Yes monies from our joint checking account was used to get the ball rolling. We are talking about pennies. Until I decided to start over without Greg of course we had combined monies, we're married. I'm sure no one reaches out and hopes for a break somewhere to help them get started, right?

OUCP's Denial Letter and Baker Tilly's report indicate that Mr. Warren, often accompanied by Ms. Warren, performs CGW's driving/hauling functions while Ms. Warren performs substantially all of the other work required to run the business.

Authority

Section 26.69(c)(2) states:

Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

Section 26.69(e) states:

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Section 26.69(i) states:

You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

Section 26.71(b) states:

Only 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.

(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.

(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.

(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.

(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.

Section 26.71(f) states:

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, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and

economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

26.71(g) states:

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.

Section 26.71(k) states:

(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

Section 26.86(a) states:

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

Section 26.89(c) states:

If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to *why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply*. The Department may accept an appeal filed later than 90 days after the

date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice. (emphasis added.)

Section 26.89(f)(3) states:

The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

Discussion

We analyze OUCP's stated control-based rationales above and find the evidence cited in their support (or their consistency with applicable certification rules) insufficient for an affirmation on any of those bases. See generally note 3, above, and accompanying text.

Although we doubt that the Appeal Letter states reversible error (see §26.89(c), above) with respect to SED ownership (which includes the requirement that SED owners contribute real and substantial capital),⁵ we nevertheless explain our reasons for affirming OUCP's denial below.

The Regulation's standards for DBE certification are rigorous, and the applicant has the burden of demonstrating eligibility under all of them, including the ownership rules. §26.61(b). The Regulation requires a real and substantial capital contribution *from the SED owner*. §26.69(e). In determining whether an asserted capital contribution derives from the SED owner's own funds, the certifier under §26.69(a) "must consider" the origin of all assets and how they were used in obtaining ownership of the firm. OUCP concluded that CGW did not meet its burden with respect to capital contributions because Ms. Warren could not demonstrate that the source of funds used to purchase shares or contributed property was non-marital and, impliedly, because Mr. Warren did not execute a §26.69(i) renunciation of interest.

Our scope of review on appeal is limited to determining whether substantial evidence supports the certifier's decision and whether that decision is consistent with applicable substantive and procedural certification provisions. §26.89(f)(1). We conclude in this case that OUCP's decision (that the SED owner did not demonstrate that she herself contributed real and substantial capital⁶) satisfies both requirements. Accordingly, we affirm it.⁷

Conclusion

The Department affirms OUCP's ineligibility determination under §26.89(f)(1) as supported by substantial evidence and consistent with the Regulation's certification provisions. CGW failed to carry its burden of proving that Ms. Warren made a Regulation-compliant capital contribution,

⁵ The Appeal Letter effectively concedes the issue, which itself might require us to affirm on the basis that the appellant states no claim upon which we can grant relief.

⁶ Again, a spousal renunciation can correct the §26.69(c)(2) "commensurate with" problem but does not necessarily resolve the concomitant issue of substantiality.

⁷ We find that §26.89(f)(3) does not require a different result because the Denial Letter, as quoted above at pp.2-3, adequately states the reason for denial, and OUCP's failure to use the proper UCA did not result in fundamental unfairness to CGW or substantially prejudice its opportunity to present its case.

and it evidently provided OUCP no spousal renunciation of interest. The result is that half of Ms. Warren's ownership interest cannot be counted for eligibility purposes and the firm consequently is ineligible for certification.

This decision is administratively final and not subject to petitions for reconsideration. CGW may reapply for DBE certification after March 26, 2018.

Sincerely,

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

cc: OUCP