



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

May 8, 2018

Reference Number 17–0151

Kenda E. Wheeler, President
K.E. Wheeler Construction, LLC
d/b/a Wheeler Grooving and Grinding
REDACTED
West Blocton, AL 35184

Re: DBE Certification Denial of K.E. Wheeler Construction, LLC

Dear Ms. Wheeler:

K.E. Wheeler Construction, LLC (KEWC) d/b/a Wheeler Grooving and Grinding (KEWC) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the Alabama Department of Transportation (ADOT).

KEWC submitted two Uniform Certification Applications (UCA) to ADOT—the first, on November 25, 2016 and the second, on January 17, 2017. ADOT conducted an on-site review (OSR) on March 2, 2017; and denied KEWC’s application on June 9, 2017, based on the firm’s failure to satisfy ownership requirements of §§26.69(a) and (c) of the DBE program Regulation 49 C.F.R. Part 26 (the Regulation). You appealed this decision to the Department on September 11, 2017, and pursuant to §26.89(d), we requested the administrative record the agency used in making its decision.¹ The Department concludes, based on a review of this record and your appeal, that substantial evidence supports ADOT’s decision.

BACKGROUND

KEWC was founded on December 2, 2015, by you and your non-disadvantaged husband, Brian Wheeler. (UCA, p. 7). You and Mr. Wheeler hold a 75 and 25% ownership interest, respectively; listing an initial capital investment to the firm of **REDACTED** (UCA Nov. 25, 2016, p. 7).² The

¹ When a firm appeals a certification denial determination, the Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was “unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.” §26.89(f)(1). The Department’s decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

² The January 2017 UCA lists a cash contribution of **REDACTED** for both you and Mr. Wheeler.

record contains a check for **REDACTED** dated March 25, 2016, made payable to the firm, drawn on your joint personal checking account.

DISCUSSION

I. Substantial Contribution of Capital and Pro Forma Ownership

The Regulation at §26.61(b) requires the firm seeking certification to bear the burden of demonstrating to the recipient (here, ADOT), by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control. Two ownership requirements all DBE must meet are found in §§26.69(a) and (c), which state in relevant part:

§26.69(a): In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

§26.69(c): (1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) 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. . .

Examples to paragraph (c): (i) An individual pays \$100 to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial.

(ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute \$100 and \$10,000, respectively, to acquire a firm grossing \$1 million. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1).

(iii) The disadvantaged owner of a DBE applicant firm spends \$250 to file articles of incorporation and obtains a \$100,000 loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

ADOT concluded that you did not meet these requirements. The agency reasoned that your **REDACTED** capital contribution to acquire your 75% minority ownership interest in KEWC was merely pro forma because this amount was equal to that of Mr. Wheeler, the firm's 25% owner. We affirm ADOT's decision; KEWC did not carry its burden under §§26.61(b) and 26.69(c) of demonstrating that you made a substantial capital contribution for your higher ownership interest.

II. Participation in the Firm and Expertise as Forms of Capital Contribution

The reasons you gave for receiving a disproportionate ownership percentage include time spent in the office and additional duties. ADOT stated in its denial letter:

When asked how was it determined that you would receive 75% ownership when you and your non-disadvantaged husband made an equal initial investment into the firm, you stated that you received your ownership interest because your “husband only does the grooving and grinding when there is a job to be done and that you work in the office as well as assist your husband with the grooving and grinding.” . . . [T]he explanation for how you received your 75% ownership was deemed insufficient as ‘work in the office’ is not considered expertise in a specialized field. (Denial Decision, p. 2)

In addition to listing your duties performed at KEWC, you address ADOT's statements in your appeal as follows:

I know every aspect of my business and I use that knowledge daily in the office and in the field. . . .As far as my financial participation, I worked the first year in my company without pay to ensure that it would survive. Had I been [sic] paid, I would have earned over **REDACTED** putting me well above the 75%. I believe the flaw in this application is that you only look at the original investment; however, I believe this paragraph shows “a promise to contribute capital.” . . .

In my capacity of “work in the office,” I would submit that as an executive in this company, I am a [sic] “specialized field” and my work should be considered as such. I spent 2 years in college to become an executive secretary (this is a specialized position), and I have over 20 years in office management. All businesses such as ours retain at least 3 positions for the work that I do. The businesses I am referring to may be much larger, but it still takes skill, knowledge, and extreme fortitude to do what I do. (Appeal, Aug. 31, 2017, p. 1).

The Regulation does not recognize contributions based on sweat equity nor work contributed voluntarily for reduced remuneration. The mere management and participation in a firm's activities does not establish a contribution of capital under the Regulation, nor does working at the firm demonstrate a promise to contribute capital as you allege. Section §26.69(c)(2) specifically lists as forms of insufficient contributions “a promise to contribute capital, . . . mere

participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.”

There is a limited exception described in §26.69(f), which involves contributions based on expertise, however, other than your statements on appeal, there is no proffer of information claiming that your skills/qualifications satisfy the other requirements of §26.69(f)—(i) expertise in a specialized field, (ii) of outstanding quality, (iii) in areas critical to the firm's operations, (iv) indispensable to the firm's potential success, and (v) specific to the type of work the firm performs; these were not documented in the firm records nor presented to ADOT. You indicated during ADOT's onsite interview that you work 5-8 hours daily in the office and you and Mr. Wheeler work 10- hour day in the field. (OSR, p. 4). Additionally, Mr. Wheeler's résumé reveals that his experience is in the specialized field that you are seeking DBE certification, whereas your résumé reveals that your work is more administrative in nature. KEWC's work is in the field performing bridge and roadway improvements and its work is not specialized in an office setting. Also, §26.69(f) makes clear that the person upon whose skills or expertise the firm relies “must have a significant financial investment in the firm,” which does not appear to have occurred in this case. Substantial evidence supports a conclusion that your expertise does not meet the requirements of §26.71(f).

Other Issues

1. The record indicates your contribution consisted in part of joint funds from your checking account. In the event the firm reapplies for certification, which it may do immediately as the appropriate waiting period has past, ADOT should analyze whether the firm meets the requirements of §26.69(l), a provision it did not cite or reference. We also note that you stated in your appeal that Mr. Wheeler “gifted” you shares to establish KEWC, however, this does not appear to be the case based on the record before us. If this is alleged in the future, please be aware of the requirements of §26.69(h).

2. ADOT inquired during its on-site interview how KEWC was initially capitalized; and the answer recorded was: “purchased a previous established business with a promissory note between previous owner and present owner.” (OSR p. 3). On May 10, 2016, KEWC purchased grooving and grinding equipment, vehicles and trailers, computers, and other items from C.P. Allen Construction for **REDACTED**. The record contains a bill of sale for these items and a promissory note for **REDACTED** signed by you on behalf of the firm made payable to C.P. Allen Construction; and KEWC proceeded to repay this note with checks drawn on the firm's account.³ KEWC had an outstanding balance of **REDACTED** on the loan at the time of its DBE certification application. (UCA, p. 11). On the record before us, it appears KEWC (not its owners) repaid C.P. Allen Construction. These facts (in addition to the alleged **REDACTED** capital contribution listed in the January 17, 2017, application) can be explored more in-depth by ADOT if the firm reapplies for certification. In so doing, we remind ADOT of its obligation to evaluate the firm's eligibility based on present circumstances and not to refuse certification based solely on historical information indicating ineligibility at some time in the past. *See* §26.73(b)(1).

³ See Promissory Note; **REDACTED**

The Department affirms ADOT's ineligibility determination on the stated bases because substantial evidence supports it and it is consistent with applicable rules. *See* §26.89(f)(1).⁴ This determination is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: ADOT

⁴ The Department's decision that a recipient's certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. *See* 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999).