



**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

July 2, 2019

Reference Number 19-0049

Sarah Ward, President/CEO
Ward Architecture, PC
REDACTED
Savannah, GA 31405

Dear. Ms. Ward:

Ward Architecture, PC appeals the Georgia Department of Transportation (GDOT) October 25, 2018 decision to deny its application for certification as a Disadvantaged Business Enterprise (DBE) under the DBE Program rules 49 C.F.R. part 26 (the Regulation). After reviewing the complete administrative record, we affirm GDOT's decision solely on the basis of control.¹

Background

WAPC performs architectural and historical preservation work and applied for DBE certification in North American Industry Classification Codes (NAICS) 541310 "Architectural Services" and 541720 "Research and Development in the Social Sciences and Humanities," which by cross reference includes historic and cultural preservation research and development services.²

Your husband Joshua Ward, a nondisadvantaged individual, formed WAPC on November 9, 2010. You acquired 100% ownership of WAPC from Mr. Ward in 2014, when he left the firm to work for another architectural business. You claim that you operated WAPC by yourself from 2014 until Mr. Ward returned to work for the firm in 2017. You serve as WAPC's President, CEO, and you own 100% of the business, and Mr. Ward acts as the firm's CFO, Secretary, and Principal Architect.

You and Mr. Ward (the firm's sole employees) each have considerable experience and educational qualifications related to historical preservation. *See generally* S. Ward and J. Ward Résumés. You both share many responsibilities within the firm, including: meeting with

¹ We cannot affirm GDOT's ownership grounds for ineligibility, which we find do not satisfy §26.86(a) requirements.

² Page 5 of WAPC's Uniform Certification Application (UCA) describes its primary business activities and services:

[WAPC] . . .offer[s] architectural and historic preservation services for property owners, developers, local governments, businesses, and other firms seeking specialized expertise. Primary activities include site visits to properties, photography, measured drawings, research, and meetings with clients and reviewing agencies. These efforts result in completed applications, certifications, historic designations, reports and construction documents in compliance with local, state and federal regulations.

potential and existing clients, negotiating contracts and subcontracts, estimating and bidding, monitoring job sites, resolving serious issues in the field, signing payroll, and purchasing material. (On-Site Review Report (OSRR) pp. 4-5,8-9). However, Mr. Ward—who is a licensed architect—is solely responsible for managing all the firm’s work that requires an architectural license, which includes “submitting construction documents, performing routine site visits and working with vendors.” OSRR p. 4. With respect to remuneration, Mr. Ward earns a monthly salary of \$2,500 and you earn \$750 a month. OSRR p. 8.

In the context of control, GDOT denied certification on the basis that the firm did not prove eligibility under §§26.71 (h), (i), (k) and (l).

Burden of proof and standard of review

Section 26.61(b) generally requires an applicant for DBE and/or ACDBE certification to demonstrate, by a preponderance of the evidence, that it meets the requirements of 49 CFR Parts 26 and 23, respectively. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

On receipt of an applicant’s appeal from a denial of certification, the Department makes its decision “based on the entire administrative record as supplemented by the appeal...”³ The Department does not make a *de novo* review of the matter;⁴ rather, it affirms (a certifier’s) decision unless it 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.”

Discussion

1. In accordance with §26.71(a), GDOT considered all the facts in the record, viewed as a whole, to determine that WAPC failed to demonstrate that you control the firm. One factor GDOT considered when evaluating your control of WAPC is your lack of an architectural license, as allowed per §26.71(h)(2).⁵ It is Mr. Ward’s license that WAPC uses to conduct its architectural operations and he is the only one at WAPC who is authorized to submit construction drawings and conduct site visits on projects that require an architecture license. The denial letter observes that architecture is the firm’s primary “core area of operations,” which you dispute but fail to provide evidence to demonstrate otherwise. We find that GDOT appropriately considered your lack of a license in determining that you do not control the applicant firm for certification in NAICS code 541310.

³ 49 C.F.R. §26.89(e).

⁴ Id.

⁵ Regulation at §26.71(h)(2) states: “If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.”

2. GDOT also appropriately considered the difference in the remuneration between Mr. Ward and you as a factor to conclude that you do not control the firm, per the rules of §26.71(i)(2).⁶ Mr. Ward's monthly salary is three times higher than yours, and WAPC offers no evidence that you take any distributions from the firm as its 100% owner.

In the appeal, you acknowledge that "the pay difference is ridiculous but [I] am assured by my accountant that it doesn't really matter (for tax and income purposes) as we are married and it all gets put into on total for our household and reporting." Appeal at 5. Later in the appeal, you state that Mr. Ward receives a higher salary because he is an architect and whose work requires a higher pay rate than what you receive as a preservationist. See Appeal 7-8. Tax planning can be a consideration for differences in remuneration if "proffered" to the certifier. We see no indication that it was in this case. Similarly, WAPC's other argument, that Mr. Ward receives a higher rate because of his expertise in architecture, is a plausible assertion; and on this point, GDOT observed and properly considered the vast difference in remuneration as one factor (viewed in the context of the entire record) in determining that you do not control the firm.

3. Further, the record supports the WAPC's denial based on family control. WAPC's webpage states that WAPC was "formed as a family partnership" and Mr. Ward appears to exercise at least an equal amount of control over the WAPC's important operations (e.g., contracting, estimating/bidding, payroll) that were raised during the on-site interview. These facts support GDOT's position that it could not conclude that you, as distinct from the family as a whole, control the firm as required by §26.71(k).

We find that substantial evidence supports GDOT's conclusion that WAPC failed to demonstrate that you control the firm within the meaning of §26.71.⁷

⁶ Section §26.71(i) states: "(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. (2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual."

⁷ Although we affirm GDOT's conclusion that you did not demonstrate control by the preponderance of evidence, we note that the denial letter cites §26.71(l) but fails to articulate a rationale for denial under this provision. If GDOT properly presented its §26.71(l) ground, WAPC would have had to rebut the presumption of nondisadvantaged control by a much higher standard of "clear and convincing evidence."

We affirm GDOT's decision under section §26.89(f)(1) based on the control grounds and supporting facts as discussed above.⁸ This decision is administratively final and not subject to petitions for review.

4. We note that when the firm applied for DBE certification, 2 of the 3 largest contracts WAPC completed in the past 3 years listed in the UCA involved historic preservation and its active jobs did as well. However, it is difficult to discern from the record (including GDOT's questions posed during its on-site interview) whether the answers pertain to architecture, historic preservation, or both. It is the firm's burden of demonstrating whether it meets all the requirements of the Regulation and we remind GDOT that a firm may be certified in some but not all NAICS Codes requested. Section §26.71(n) requires a certifier describe the type of work a firm's owner can control in the most clear, specific, and detailed NAICS code, and if appropriate, apply a descriptive narrative from a classification scheme of equivalent detail and specificity. (See §26.71(n)(1) and (2)).

WAPC may reapply for certification after the waiting period expires. When it does, WAPC may proffer evidence concerning the firm's distribution of profits, describe the differentiation between your work and Mr. Ward as distinct from the family as a whole, and your ability to control the historical preservation aspect of WAPC's work performed under NAICS Code 541720 as well as architectural services (NAICS Code 541310). (GDOT did not dispute your knowledge and expertise in architecture in its denial letter). WAPC may submit any information it believes will assist GDOT with its analysis.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: GDOT

⁸ 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).