

July 8, 2019

Reference Number 19-0060

Ryan J. Zumo
Taylor, Wellons, Politz & Duhe, APLC
8550 United Plaza Blvd., Suite 101
Baton Rouge, LA 70809

Dear Mr. Zumo:

This is in response to your appeal of the decision of the Louis Armstrong New Orleans International Airport to deny the application of your client, Kelly Industries, LLC (KI) for DBE certification. The U.S. Department of Transportation (DOT) is reversing the airport's decision.

Procedural Background

KI applied for certification on May 25, 2018. The airport conducted an on-site review on August 2, 2018. The airport denied the firm's application on October 5, 2018. The firm appealed on December 17, 2018.

Burden of Proof and Standard of Review

(a) Burden of Proof

As provided in 49 CFR 26.61(b) of the rule, a firm applying for ACDBE certification must demonstrate by a preponderance of the evidence that it meets Part 23 and 26 requirements concerning business size, social and economic disadvantage, ownership, and control. 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.

(b) Standard of review for certification appeals

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..."¹

¹ 49 CFR 26.89(e).

The Department does not make a *de novo* review of the matter....² The Department 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."³

Issues and Discussion

The airport denied the firm's application on both ownership and control grounds. The ownership issue may be dealt with quickly. Kristy Kelly founded the firm with her husband, Ryan Kelly, in 2008. Louisiana being a community property state, Ms. Kelly became a 50 percent owner at that point. By a formal act of donation in May 2015, included in the record, Mr. Kelly gave an additional one percent interest to Ms. Kelly as her separate property.⁴ This resulted in Ms. Kelly becoming the 51 percent owner. Mr. Kelly's 49 percent interest was subsequently transferred in two stages to John Melan, a non-disadvantaged individual who is now the 49 percent owner of the company. There is no basis in the record for supposing Ms. Kelly is anything but the 51 percent owner of the firm.

The primary issue in the case is control. Mr. Melan does the field supervision for the firm. Ms. Kelly, as pointed out on page 3 of the appeal, is not only the President of the company but performs, per the airport's on-site review report, 16 functions necessary to the company's operations. These include making loans, negotiating major purchases, contract administration, visiting job sites twice a week or when needed, selecting projects to bid on, preparing and negotiating contracts, scheduling, and ordering materials.

These findings from the on-site review led airport staff to make what appear to be contradictory conclusions in the "wrap-up" to that review. On one hand, Ms. Kelly dominated the conversation and demonstrated expertise and control in the office and the job site. On the other hand, the wrap-up characterized her as "essentially an office jockey" performing only administrative work, while Mr. Melan, who does field supervision, "is the engine that keeps the business going."

In its denial letter, the airport appeared to rely on the latter characterization of Ms. Kelly's role, saying that most of her functions were unrelated to the core services of the business, also noting that Mr. Melan held the firm's state licenses for construction, masonry, brick, and stone. Expertise limited to office management, bookkeeping, or administration functions unrelated to the principal business activities are insufficient to demonstrate control, the denial letter concluded.⁵

² Id.

³ 49 CFR 26.89(f)(1).

⁴ This was a transfer without consideration, but because Mr. Kelly is no longer involved with the company, 49 CFR 26.69(h) and 26.71(l) of the Department's regulation do not apply. The result that KI's burden of proof with respect to ownership and control remains preponderance of the evidence (more likely than not) rather than clear and convincing evidence.

⁵ See 49 CFR 26.71(g).

In reviewing the record, we are persuaded that the airport unnecessarily, and rather dismissively, minimized Ms. Kelly's role in the firm. Negotiating major purchases, negotiating and administering contracts, selecting contracts to bid on, estimating, scheduling, ordering materials, along with regular job site visits, are on their face activities that are related to the principal business activities of the firm, going well beyond acting as a mere "office jockey," particularly for someone who is noted as having expertise and control on the job site as well as in the office.

Field supervision is, of course, an important part of the firm's work, which Mr. Melan performs. But there is no requirement in the Department's rules that only someone who is a field supervisor can control a firm. While Mr. Melan holds field work-related licenses for the firm, it does not appear from the record that Louisiana is a jurisdiction that insists that only a license holder can control a firm, as a matter of state law.⁶

Conclusion

It is evident from the record that Ms. Kelly's role in KI is not limited to administrative, bookkeeping, or office management, duties, and that she performs numerous functions that are an important substantive part of the firm's operations. From the nature of these functions, her regular visits to job sites, and her tenure in the firm since its beginnings, it is fair to infer that, even though Mr. Melan has greater expertise in field supervision, Ms. Kelly has the ability to intelligently evaluate information he presents and to use this information to come to independent decisions.⁷

For these reasons, the Department is reversing the airport's decision. We direct the airport to certify KI immediately.

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

Sincerely,

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

cc: Philistine Ferrand

⁶ See 49 CFR 26.71(h).

⁷ See 49 CFR 26.71(g).