

June 26, 2019

Reference Number 19-0062

Elizabeth Petenbrink
Contech, Inc.
REDACTED
Harwood, MD 20776

Dear Ms. Petenbrink:

This is in response to your appeal of the decision of the Maryland Department of Transportation (MDOT) to deny the application of Contech, Inc. for DBE certification. The U.S. Department of Transportation (DOT) is upholding MDOT's decision.

Procedural Background

Contech applied for certification on March 13, 2018. MDOT conducted an on-site visit on June 4, 2018, followed by an in-person interview with the firm's disadvantaged owner on June 25, 2018. MDOT denied the firm's application on November 26, 2018. Contech appealed to the Department on December 18, 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

MDOT denied the firm's application on both ownership and control grounds. With respect to ownership, MDOT noted that Contech was originally formed in 1988 as a sole proprietorship by Ms. Petenbrink's husband.⁴ It was incorporated in 2002 with Mr. Petenbrink as the sole stockholder. In May 2018, he returned his stock to the corporation, and the stock was reissued without consideration, with a 51 percent share going to Ms. Petenbrink and 49 percent to Mr. Petenbrink.⁵

With respect to control, MDOT compared the two principals' resumes. Mr. Petenbrink has over 37 years of experience in the masonry field. For Contech, he is responsible for field supervision, coordinating and performing the firm's masonry work, site preparation, and concrete work. Ms. Petenbrink's resume says that she is responsible for office management, and the on-site report says that she has been involved since the firm's beginnings in labor support and office management. The labor support involves such activities as delivering supplies, ordering material, cleaning up job sites, putting bricks on trucks, and picking up wheelbarrows and other items. She said that she has received on-the-job training in the firm's work from her husband.

From this, MDOT concluded that Ms. Petenbrink does not have the expertise, experience, or personal technical skills to control Contech's daily operations, or to be able to make independent decisions about the firm's core activities. Given his experience, expertise, and key role in field operations, MDOT believes, Mr. Petenbrink disproportionately controls the firm.

In response, the appeal states that, rather than just the one or two occasions on which MDOT credited Ms. Petenbrink for having worked on projects,⁶ she has worked on countless projects over the years. She also does the firm's work in regulatory compliance (e.g., OSHA rules, silica

² Id.

³ 49 CFR 26.89(f)(1).

⁴ Ms. Petenbrink said she contributed \$11,000 to the original formation of the company, while her husband contributed \$1000. However, records of this 1988 transaction no longer exist.

⁵ Since this was effectively a transfer of a controlling share of stock without consideration to Ms. Petenbrink from Mr. Petenbrink, a non-disadvantaged individual who remains involved with the company, it appears that sections 26.69(h) and 26.71(l) apply. They would require the firm to demonstrate, by the higher standard of clear and convincing evidence, that the transfer was made for reasons other than obtaining DBE certification and that the disadvantaged individual actually controls the firm. However, MDOT did not invoke these sections and made its decision on the basis of a preponderance of evidence standard with respect to control. The Department will review this case under the standard that MDOT used.

⁶ The appeal ascribes MDOT's statement that Ms. Petenbrink had only worked on one or two jobs in the field to a misunderstanding of her statements in the MDOT interview. Her statement referred, she said, only to the week preceding the interview, not to the entire history of the firm. Even accepting the appellant's understanding, however, this difference does not change our overall analysis of the case.

regulations). She purchases equipment and attends pre-bid meetings, prepares responses to bid requests, and meets owners in the field. Contech, the appeal adds, is a family business, and the Petenbrinks' son shares responsibilities in the field.

Discussion

We acknowledge that Ms. Petenbrink performs a number of important tasks for Contech. However, the experience and expertise related to the firm's core functions belong to Mr. Petenbrink, not Ms. Petenbrink, giving him a disproportionate role in controlling its activities.⁷ The evidence in the record does not support the proposition that Ms. Petenbrink is able to critically evaluate information provided by her husband and make independent decisions concerning these core functions,⁸ her office management, regulatory compliance, and assistance in field operations notwithstanding.⁹ The appeal characterizes Contech as a "family firm," and control of a firm by a family, as distinct from a disadvantaged individual in her own right, does not suffice for DBE eligibility.¹⁰

Conclusion

For the reasons stated above, the Department finds that MDOT had substantial evidence to conclude that Contech did not meet its burden of proof with respect to control. Consequently, we are affirming MDOT's denial of the firm's application.

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: Monica A. Crusse

⁷ See 49 CFR 26.71(e).

⁸ See 49 CFR 26.71(g).

⁹ Id.

¹⁰ See 49 CFR 26.71(k)(2).