

July 5, 2019

Reference No: 19-0077

Jenna D. Schierbaum
Schierbaum Excavating, Inc.
REDACTED
Opdyke, IL 82872

Dear Ms. Schierbaum:

This is in response to your appeal of the decision of the decision by Illinois DOT (IDOT) to deny certification to Schierbaum, Inc. The U.S. Department of Transportation (DOT) is remanding IDOT's decision for further proceedings consistent with this letter.

I. Procedural History

The firm applied to IDOT for DBE certification on January 24, 2018. IDOT conducted an on-site review of the firm on May 21, 2018, followed by a phone interview with IDOT on July 12, 2018. IDOT denied the firm's application through a letter of November 30, 2018. The firm appealed to the Department on February 22, 2019. IDOT replied to the firm's appeal letter on March 15, 2019.

II. Burden of Proof and Standard of Review

(a) Burdens of Proof

An applicant firm must demonstrate by a preponderance of the evidence that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control.¹ 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

¹ 49 CFR 26.61(b).

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."² The Department does not make a *de novo* review of the matter...."³ 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."⁴

Issues

Schierbaum Excavating was formed in 1999, with Ms. Schierbaum designated as the 51 percent owner and her husband as the 49 percent owner. IDOT denied the firm's application on grounds of both ownership and control.

Ownership

The ownership issue, IDOT asserts, arises because the original, 1999, capitalization of the firm was based on the Schierbaums' contribution of \$5000 in jointly owned assets, consisting of several trucks and other pieces of equipment. Since the record contained no evidence that Mr. Schierbaum had ever renounced his share of the assets, IDOT determined, Ms. Schierbaum could not claim a capital contribution supporting her facial 51 percent ownership, since her share of the joint assets could only count as 50 percent of the capital contribution.

In the appeal, the firm said that banking records relevant to the 1999 transaction longer existed. Moreover, in 1999, both Mr. and Ms. Schierbaum turned over the \$5000 worth of equipment involved to the corporation. This, in the firm's view, constituted a renunciation by Mr. Schierbaum of his interest in the property. In IDOT's reply to the appeal, the agency argued that this action did not constitute a renunciation of title to the property in the sense intended in the Department's regulation.⁵

Control

IDOT's denial letter notes that Ms. Schierbaum provided two resumes, one for her work at the applicant firm and another for her work in various law firms. From these resumes and her responses in the on-site interview, as IDOT understood them, IDOT concluded that Ms. Schierbaum worked principally in an administrative capacity for the applicant firm, with her husband, whose resume included significant construction experience, having more responsibility for the firm's core activities. IDOT concluded that Ms. Schierbaum does not have the knowledge or expertise to critically evaluate the technical operations of a construction firm. ODOT referenced a July 12, 2018, phone call in which she gave answers unsatisfactory to ODOT and allegedly interrupted the questioning stating that she

² 49 CFR 26.89(e).

³ Id.

⁴ 49 CFR 26.89(f)(1).

⁵ See 49 CFR 26.69(i)(1).

wanted to withdraw from landscaping and fencing categories. Moreover, IDOT said, both principals have authority to make financial decisions on behalf of the firm.

The appeal vigorously disagrees with IDOT's analysis, emphasizing Ms. Schierbaum's lengthy experience in operating the applicant firm; stating that her part-time for some periods with law firms did not prevent her from controlling the applicant firm; that she has run jobs for the firm in the field; that she controls multiple functions for the firm; that during the July 12, 2018, phone call, an IDOT staff member was unprofessionally aggressive toward her; that IDOT misunderstood her responses to what she characterized as this unprofessional questioning; and that IDOT exaggerated her husband's role in the firm. As a general matter, the appeal argues that IDOT did not make an objective evaluation of the firm's eligibility.

Discussion

With respect to control, the Department is very concerned about the appellant's allegation that she was treated in a highly unprofessional manner by a member of IDOT's staff during the July 12, 2018, phone call. Ms. Schierbaum memorialized her concern about this matter in an email to IDOT on the same day, which is part of the record of the case. IDOT relied on some of the matters discussed during this call in its denial letter. In its response to the firm's appeal, IDOT continued to rely on some of this same material. While in the absence of a recording of this call, the Department cannot determine whether Ms. Schierbaum's allegations are accurate, we believe it is significant that in its reply to her appeal, IDOT did engage with or deny Ms. Schierbaum's allegations about the conduct of this phone call.

With respect to ownership, it should be noted that the Schierbaums formed the company in 1999 using joint funds, but it did not apply for DBE certification until 2018.⁶ Meanwhile, in 2017, it had been certified as a WBE by the Illinois state program. It is reasonable to believe, given this history, that it the firm did not fully understand that an additional step – formal renunciation of a portion of ownership in the firm by the non-disadvantaged participant -- was needed for DBE certification or what is involved in a such a renunciation.

Conclusion

Because of a credible concern about the objectivity of the proceedings and because the firm, in fairness, should have the opportunity to make, if it chooses, an adjustment to its ownership structure in order to conform to the regulations, the Department is remanding this case to IDOT with the following instructions:

1. Immediately upon receipt of this decision, notify the applicant firm that, in order to address the ownership issue identified in this case, it may adjust its ownership structure (e.g., via a formal renunciation of a portion of Mr. Schierbaum's interest in the company or a purchase by Ms. Schierbaum, for consideration, of an additional portion of Mr. Schierbaum's stock). If the firm wishes to pursue its application, this adjustment should occur within 21 days of IDOT's notice.

⁶ In this context, we call the parties attention to section 26.73(b)(1), with respect to the role of historical information vis-à-vis the current situation of a firm.

2. Conduct a new assessment of Ms. Schierbaum's ability to control the firm. For both the firm and IDOT, this should focus on whether Ms. Schierbaum, given her experience with the firm and role in its operations, has the ability to intelligently and critically evaluate information presented to her by other participants in the firm and use this information to make independent decisions concerning the firm's daily operations, policies, and management.⁷ For example, can Ms. and Mr. Schierbaum present examples of situations in which Mr. Schierbaum brings Ms. Schierbaum issues concerning a project, she and her husband consider options, and then she makes a final decision?
3. It is essential that the fairness of the certification process be above reproach. For this reason, the IDOT staff members involved in the decision under appeal (i.e., Jill Glisson and Lincoln Blackwell) must be recused from further participation in the case.
4. IDOT's re-evaluation of the firm's eligibility and new decision must take place within 30 days of the date on which the firm notifies IDOT that it has made the adjustments to its ownership structure described above.

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: IDOT

⁷ See 49 CFR 26.71(g).