



**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 18, 2019

Reference No: 19-0095

Ms. Ysali A. Pockman  
TDR, Inc.  
**REDACTED**  
Los Angeles, CA 90065

Dear Ms. Pockman:

This is in response to your appeal of the decision of the California United Certification Program (CAUCP) to deny Disadvantaged Business Enterprise (DBE) certification to TDR Engineering, Inc. (TDR) under the DBE Program Regulation 49 C.F.R. Part 26. After carefully reviewing the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), is upholding CAUCP's decision.

**Procedural History**

The firm applied to CAUCP for DBE certification on May 23, 2018. CAUCP conducted an on-site review of the firm on October 23, 2018 and denied the firm's application through a letter of January 2, 2019. The firm appealed CAUCP's decision to the Department on April 1, 2019.

**Burdens of Proof and Standard of Review**

(a) Burdens of Proof

As provided in 49 C.F.R. §26.61(b) of the rule, an applicant firm must, in most cases, demonstrate by a preponderance of the evidence that it meets Part 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.

However, a different burden of proof applies to ownership situations addressed by §§ 26.69(h) and 26.71(1) of the rule. Under §26.69(h), ownership interests in a business that a non-disadvantaged individual has transferred to a disadvantaged individual without adequate consideration, while the non-disadvantaged individual remains involved in the firm, are presumed not to have been made by the disadvantaged owner.

Under §26.71(l), if a non-disadvantaged who formerly owned or controlled a firm transfers ownership to a disadvantaged individual, with or without consideration, the non-disadvantaged individual is presumed to control the firm, if the transferor remains involved with the firm in any capacity. Under both provisions, the firm must show by the more stringent “clear and convincing evidence” standard both that the transfer was made for purposes other than obtaining DBE certification and that the disadvantaged individual actually controls the company, notwithstanding the continued participation of the non-disadvantaged individual who made the gift or transfer.

(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...<sup>1</sup> The Department does not make a *de novo* review of the matter...”<sup>2</sup> 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.”<sup>3</sup>

**Issues**

In the discussion of ownership, CAUCP noted that TDR’s non-disadvantaged owner, Ken Shank, transferred 200 shares of stock from himself to you (his spouse) on January 2, 2017, a date that differs from the “late 2005” date reported on page 3 of the agency’s site visit report. This transfer resulted in you becoming the facial owner of 51 percent of the firm’s stock.<sup>4</sup> There is no assertion in the application or supporting documents that this transfer was made for consideration. The appeal refers to bank records showing bank transfers being made to TDR at various times, none of which were in close proximity to January 2, 2017. This invokes the provisions of §26.69(h).

In any case, since Mr. Shank founded and previously owned TDR, and remains involved with the firm, a transfer of these shares to you, with or without consideration, invokes §26.71(l). For both reasons, then, the firm must meet the “clear and convincing evidence” standard with respect to control.

TDR is a civil engineering and land surveying firm. Concerning control, there is a marked contrast between the two principals evident in their résumés. Mr. Shanks’ résumé

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<sup>1</sup> 49 C.F.R. §26.89(e).

<sup>2</sup> Id.

<sup>3</sup> 49 C.F.R. §26.89(f)(1).

<sup>4</sup> According to the firm’s application and supporting documents, you and Mr. Shank each owned 10,000 shares of stock prior to this transfer. Because this decision focuses on control issues, we do not need to address the issue of whether, as CAUCP contends, the issuance by the firm of 10,000 shares to Ms. Pockman was unauthorized under California corporation law.

is far stronger than yours with respect to the substance of the firm's business, both in terms of technical skills and actual project accomplishments. Your résumé focuses on budget, management, sales development, marketing, negotiation, and similar business skills.

In the on-site review, you described handling contracts, clients, scheduling, marketing, billing, and bookkeeping. Mr. Shanks handles the technical and field work, including such matters as horizontal and vertical scaling, drone operation, staking, boundaries, and GPS surveys. He is a licensed land surveyor. In addition, Mr. Pockman is listed as the President of the company, with you as the CEO, leaving some uncertainty as to who occupies the top position in the firm.

Given this information, CAUCP concluded that TRD had not carried its burden of proof that you are able to control the firm's operations, which are heavily dependent on Mr. Shanks' expertise and experience in the core functions of the business. The brief, one-page appeal by the firm does not address the control issues that CAUCP used to make its decision. In addition, you present no arguments explaining how CAUCP improperly applied the Regulatory provisions or any evidence to support your assertions. (See §26.89(c)).<sup>5</sup>

## Conclusion

The Department concludes that there is substantial evidence in the record to support CAUCP's decision that the firm did not carry its burden of proof with respect to control.<sup>6</sup> Consequently, we are affirming the CAUCP decision. This decision is administratively final and not subject to petitions for review. **The firm may reapply to the DBE program after the applicable waiting period has passed.**

Sincerely,

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

cc: Marylee Miglino, CAUCP

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<sup>5</sup> When filing an appeal, the applicant firm must set forth a "full and specific statement [regarding] [...] what provisions of this Part the recipient did not properly apply." (§§26.89(f) and (c)). "The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency's decision is not 'supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification.'" (79 Fed. Reg. 59566, 59579 (Oct. 2, 2014)).

<sup>6</sup> This would be true even if the applicable standard of proof were the preponderance of the evidence, rather than clear and convincing evidence.