

May 15, 2018

Reference Number 18-0007

David N. Neese, Director
Small Business Development Program
Civil Rights Office
Tennessee Department of Transportation
Suite 1800, James K. Polk Building
505 Deaderick Street
Nashville, TN 37243

Dear Mr. Neese:

By letter dated October 18, 2017, K-Kap, Inc. (KKI) appeals the Tennessee Department of Transportation's (TNDOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (the Regulation). After carefully reviewing the full administrative record, we reverse under Regulation §26.89(f)(2) and direct TNDOT to certify KKI.

This is a close case in which both parties could have articulated their positions and explanations better.¹ TNDOT cites §§26.71(h) and (j) as its denial grounds. As you know, TNDOT may consider the owner's lack of an applicable license in evaluating the disadvantaged owner's control.² TNDOT does that but fails to express any persuasive rationale (or supporting evidence)

¹ TNDOT made the initial miscalculation in partially misapplying applicable provisions to the facts presented (and in missing opportunities to ask pertinent clarifying questions at the on-site inspection and interview). *See generally* §§26.71(h), (i); 26.86(a). KKI compounded the error, possibly inadvertently, when it responded directly to two of TNDOT's arguments as stated and when it ignored an incomplete explanation.

² The license rule speaks to whether state law *requires* the owner to have a particular license in order to own and control, in this case a hauling company. If not, then TNDOT may consider whether the owner lacks *such a license*. We are not convinced that a CDL is "such a license" or that Ms. Bridges' failure to have one when she does not drive the firm's trucks has much probative value. *See generally* 13-0064 J&L Steel, Inc. (August 23, 2013) at n.6 (owner need not be a licensed electrician when she does not perform electrical work); 13-0112 Nancy's Tree Planting, Inc. (January 10, 2014) at n.2 (no home improvement contractor license required for a commercial landscaping business; decertification case in which certifier stated insufficient evidence of conflict or prevention resulting from §26.71(j) outside employment).

for why the 100% owner's (Paula Bridges) failure to have a commercial driver license (CDL) impairs her control.³ It is not enough, in our view, for TNDOT simply to state that Ms. Bridges has no CDL. That fact is uncontested. What is missing is an explanation why the non-license (in part) leads TNDOT to conclude she does not control the firm. *See generally* 17-0113 Tectonic Group International (March 22, 2018) at n. 3 (failure to explain); 17-0123 Peak Electric, Inc. (February 1, 2018) at n.5 (conclusion without explanation). While §26.61(b) requires the applicant to demonstrate eligibility, §26.86(a) requires the certifier to proffer an explanation that resonates in some regulatory requirement and cite supporting evidence. *See Tectonic, supra*, at n.5 (Department reads §26.86(a) to require the certifier "to state actual reasons and connect those reasons to supporting evidence"). We find that TNDOT does not quite do either. Accordingly we cannot affirm the §26.71(h) denial decision as fully consistent with applicable certification rules or supported by substantial evidence.

Next TNDOT cites Ms. Bridges' outside employment under §26.71(j). TNDOT notes that Ms. Bridges owns and operates a two-location funeral home, as she freely admits.⁴ Again, the firm has the burden of proving each aspect of eligibility, but only by a preponderance of the evidence. Ms. Bridges indicates in the on-site report (OSR) that she spends 15% of her time attending to the funeral business and 80% of her time managing KKI. That evidence suggests a non-conflict. While TNDOT might have used the interview as an opportunity to ask Ms. Bridges to explain

³ Ms. Bridges states both in the application (UCA) and at the on-site interview (OSR) that she alone is responsible for all of the indicia of control. She further states that her responsibilities at KKI are estimating, dispatching, overseeing daily operations, and accounting—which appear to cover the range of regular KKI activities other than driving. Ms. Bridges need not have a CDL to perform these activities, just as she need not have a CDL to control a trucking firm. *See* 13-0122 Nancy's Tree Planting, Inc. (January 10, 2014) (disadvantaged owner need not personally perform all tasks associated with the business to control a particular activity, particularly in lower-tech fields of activity); 13-0106 EIDEAS, Inc. (December 30, 2013) at 2; 13-0073 C2PM, Inc. (November 7, 2013) (disadvantaged owner need not prove she can personally perform activities to control line of business). The Regulation requires the owner to prove her control, and we find a preponderance of evidence, mostly uncontested, that she does.

⁴ TNDOT also takes issue with Ms. Bridges' ownership of a property rental business, albeit without alleging any conflict or prevention related to KKI. Instead TNDOT simply notes Ms. Bridges' disclosure of that ownership on her personal net worth (PNW) statement and the number of properties. (TNDOT does not attempt to rebut Ms. Bridges' presumption of social and economic disadvantage.) The record reveals no attempt by TNDOT to clarify the nature of Ms. Bridges' involvement, e.g., at the site visit and interview. The Department intends for the site review to give the certifier a chance to explore areas of concern that the application and supporting documents raise. Because TNDOT, as far as the record indicates, did not communicate its concerns to Ms. Bridges, she likely had no idea that TNDOT required more proof of eligibility. We find it unfair to KKI, though likely permissible, for TNDOT to guard its cards until it wrote the denial letter. The object is to determine whether the firm is eligible—not trick the applicant into believing it provided everything necessary. *See Avery Trucking, infra*. The certifier makes better decisions when it has sufficient evidence for a fully informed determination. It appears that TNDOT relied exclusively on the application materials and let opportunities for clarification (interview, email, etc.) slip by.

TNDOT's failure to ask but one outside employment-related question puzzles us. Surely if TNDOT did not consider it burdensome for KKI to provide in excess of 700 pages of documents then it should not have been burdensome for TNDOT to ask a few off-template questions (amount of time spent, extent and frequency of activities and the relationship to KKI responsibilities) when it was already interviewing Ms. Bridges. There being no explanation of an actual §26.71(j) conflict or prevention in the denial letter, KKI does not address this matter on appeal and we consider it no further. TNDOT fails to apprise us adequately of what its position is under §26.86(a).

further, perhaps which hours of the day she spends overseeing each business, TNDOT appears never to have challenged the assertion or given KKI an opportunity to respond. *See* 17-0160 Blurock, LLC (April 27, 2018) (owner who provided certifier receipt for capital contribution could not forecast certifier would later (denial letter) challenge adequacy; owner's case sufficient under §26.61(b); certifier cited virtually no pertinent evidence supporting contrary conclusion); 12-0140 Turner Freight Solutions, LLP (October 24, 2012) (no §26.71(j) conflict or abuse potential where all disadvantaged owners managed firm at least part time and at least one managed it at all times when it operated: "The Department does not intend for its Regulation to operate as a 'gotcha' provision that stresses technicalities over substance to deny certification to firms that have demonstrated eligibility."); *cf.* 14-0114 Avery Trucking, LLC (July 27, 2015) (certifier decision affirmed when it cited evidence each disadvantaged owner had outside job requiring at least 32 hours of weekly time).

TNDOT alleges prevention⁵ if not conflict but does not explain how the evidence cited (number of employees, gross receipts) is relevant to §26.71(j), which focuses on time and attention (matters Ms. Bridges did address). We cannot conclude that TNDOT explains an adequate denial ground under §26.86(a), supported by specifically cited, substantial, relevant evidence. Hence we reverse TNDOT's determination as not fully consistent with applicable rules or supported by substantial evidence. We direct TNDOT to certify KKI without delay.⁶

Thank you for your continued cooperation. This decision is administratively final.

Sincerely,

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

cc: KKI

⁵ Denial Letter at 3: "[a] review of this documentation in its totality does not allow Ms. Paula Bridges to be able to control the daily activities at K-Kap with Four Oaks Funeral Home, Inc. having over twice the number of employees and almost double the average annual gross receipts over a comparable three year period."

⁶ *See* §26.89(f)(2). Please note that our decision is a determination that KKI made a better case for eligibility (preponderance of the evidence) than TNDOT made for ineligibility (adequate and accurate explanations of grounds supported by substantial evidence). We consider and decide only the issues properly presented on appeal. Ensuring overall and continuing eligibility remains TNDOT's responsibility. In this regard, we remind TNDOT of its rights and responsibilities under §§26.83(h) and 26.87(b).