

January 9, 2020

Reference Number 19-0147

John L. Huffman
DBE Unit Supervisor
Alabama Department of Transportation
1110 John Overton Drive
Montgomery, AL 36110

Dear Mr. Huffman:

We address Gulf South Asphalt, LLC's (GSA) July 16, 2019 appeal of the Alabama Department of Transportation's (ALDOT) May 7, 2019 denial of the firm's application for Disadvantaged Business Enterprise (DBE) certification under the rules of 49 CFR Part 26 (the Regulation). ALDOT denied GSA's application on the basis of control-related sections 26.71(e), (f), (g), and (m). After reviewing the record in its entirety, we reverse ALDOT's decision as unsupported by substantial evidence or inconsistent with pertinent Regulation provisions. *See* section 26.89(f)(2).

Background

Sole owner Kelly McKean formed GSA in 2017. The firm engages in repairing and paving asphalt/concrete, sealcoating, and parking lot striping. Ms. McKean and Ms. Sandy Samuels, both socially and economically disadvantaged (SED) under the Regulation, are the firm's only officers. Ms. McKean's non-SED cousin Michael McKean has been GSA's Director of Sealcoat Operations since the firm's founding.¹ SED individual Derek Young became Asphalt Partner in October 2018.²

Ms. McKean earned a Bachelor of Science degree in Chemical Engineering in 1992 and in 1996 she earned a Master of Business Administration degree. For 15 years prior to forming GSA, Ms. McKean outsourced financial services and marketing for independent equity research analysts and alternative fund managers.³ Mr. McKean owned and operated GSA's predecessor entity from 2007-2017. Mr. Young has more than 10 years of asphalt paving experience.

¹ *See* Résumé of Mike McKean.

² *See* Résumé of Derek Young.

³ *See* Résumé of Kelly M. McKean, CFA.

Ms. McKean and Ms. Samuel share check signing authority. Ms. McKean sets salaries, hires and fires staff and contractors, visits job sites, manages sales of sealcoat, asphalt, and striping services, manages work crews, ensures the satisfactory completion of projects, handles phone calls, and manages the trucking and job estimate schedules.⁴ Mr. McKean estimates/negotiates sealcoat jobs, maintains equipment, supervises sealcoat personnel, and is the lead foreman on sealcoat jobs. Mr. Young maintains equipment, coordinates jobs, and is the lead foreman on asphalt jobs. Mr. Young and Mr. McKean both supervise field operations and visit job sites daily. Mr. McKean performs the estimates for sealcoating jobs and Mr. Young performs estimates for the asphalt/concrete jobs. Mr. McKean owns the necessary equipment for GSA to perform sealcoat work.

Discussion

ALDOT determined that GSA does not meet the requirements of sections 26.71(e), (f), and (g) because Ms. McKean relies excessively on Mr. Young and Mr. McKean to control the “technical aspects” of GSA’s operations⁵ and that it is “doubtful” that she could direct and manage the firm’s field operations without involvement from Mr. Young and Mr. McKean. ALDOT also found that Ms. McKean does not have an overall understanding of, and managerial and technical competence and experience directly related to, GSA’s primary business activities. ALDOT concluded that Ms. McKean’s duties are primarily administrative in nature because she uses what ALDOT characterizes as her extensive experience in sales to manage GSA’s sales operations. Finally, ALDOT found that GSA does not meet the requirements of section 26.71(m) because Mr. McKean owns the sealcoating equipment that GSA uses. ALDOT concedes that GSA owns the necessary equipment for asphalt/concrete paving activities.

I. Involvement of Non-SED Individuals, Power to Control, Disproportionate Responsibility

Section 26.71(e) permits involvement from non-SED individuals or immediate family members, as long as those individuals do not possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. As Mr. Young is SED, it is only the involvement of Mr. McKean that is relevant for determining whether GSA meets the requirements of section 26.71(e). Mr. McKean estimates and negotiates sealcoat jobs, maintains equipment, supervises sealcoat personnel and is the lead foreman on sealcoat jobs. There is no evidence that he can independently enter into contracts or otherwise obligate the firm. Further, the record indicates that Mr. McKean’s involvement is limited, mostly if not entirely, to just one of the several services GSA provides.

⁴ She shares check signing authority with Ms. Samuels (only), and she is learning how to estimate jobs. See Uniform On-Site Inspection and Owner Interview Report (On-Site Report) at 5-7 and Résumé of Kelly M. McKean, CFA.

⁵ Denial Letter at 3.

Based on these facts, ALDOT concludes that the nature and extent of Mr. McKean's participation makes the firm ineligible. We find that ALDOT fails to support its conclusion with substantial evidence.

First, there is no power to control or exercise control. Mr. McKean cannot control GSA, in our view, without power to write checks, take out loans, buy equipment, set policy, hire or fire employees, make investment or distribution decisions, and so forth. Second, there is no disproportionate responsibility. The rule does not say that involvement (even if significant or exclusive) in one area of a firm's operations indicates disproportionate responsibility for operating the firm as a whole. Based on the record before us, we agree with GSA that the evidence of what Mr. McKean's role is cannot be reasonably construed as substantial evidence of disproportionate responsibility. Third, and for these reasons, we cannot conclude that ALDOT's denial is consistent with the terms of section 26.71(e).

II. Delegation of Authority

Section 26.71(f) allows an SED owner to delegate authority, provided that the delegation is revocable, the SED owner retains the power to hire and fire individuals to whom authority has been delegated, and the SED owner has a managerial role in the firm's overall affairs that allows a certifier to reasonably conclude that the SED owner actually exercises control over the firm's operations, management, and policy. Like all business owners who have employees, Ms. McKean delegates responsibilities. ALDOT cites no evidence that her delegations to Mr. McKean and Mr. Young are irrevocable. The record confirms that Ms. McKean has the power to hire and fire Mr. McKean and Mr. Young. Multiple documents in the record show that Ms. McKean is actively involved in a broad variety of GSA's activities, demonstrating that she has the managerial role the rule requires. ALDOT's argument that Ms. McKean would not be able to operate GSA without Mr. McKean or Mr. Young's participation is speculative at best. Moreover, hiring employees with technical expertise beyond that of the owner is common in any line of business.⁶

ALDOT's finding that Ms. McKean does not meet the requirements of section 26.71(f) does not address delegation, which is the essential focus of section 26.71(f).⁷ ALDOT does not articulate an adequate section 26.71(f) rationale that we can affirm. *See* sections 26.86(a) and 26.89(f)(1). We find no substantial evidence to support ALDOT's conclusion that GSA does not meet the requirements of section 26.71(f).

III. Overall Understanding, Technical Competence, Ability to Make Independent Decisions, Administrative Duties

⁶ *See* 18-0006 Midwest Signal & Light, Inc. (July 9, 2018). Further, the record shows that Ms. McKean has the power to hire and fire Mr. McKean and Mr. Young.

⁷ We also point out that an SED owner need not prove that she actually performs, or can perform, every activity. *See* 13-0064 DBE J&L Steel, Inc. (Aug. 23, 2013).

Section 26.71(g) requires an SED owner to have an overall understanding of, and technical competence and experience in, the firm's principal business activities, make independent decisions based on information that others present to her, and not have a role that primarily focuses on administrative tasks. GSA concedes that Ms. McKean is responsible for the firm's administrative and sales operations. The on-site report states, and ALDOT does not dispute, that Ms. McKean coordinates asphalt shipments and the movement of equipment between jobs, purchases materials, assembles crews, bids on jobs, and negotiates contracts. GSA contends that Ms. McKean would not be able to perform these functions absent an overall understanding of, and technical competence and experience in, GSA's principal business activities. We find GSA's argument persuasive, and we find no substantial evidence to the contrary.⁸ We cannot affirm ALDOT's decision that GSA is ineligible on section 26.71(g) grounds.

We do not find substantial evidence to support ALDOT's conclusion that Ms. McKean does not meet the requirements of section 26.71(g).

IV. Ownership of Equipment

Section 26.71(m) provides that in determining whether a firm is controlled by an SED owner, a certifier may consider whether the firm owns equipment necessary to perform its work. GSA uses sealcoating equipment owned by employee Mr. McKean. The firm asserts, and the record confirms, that it owns a paver, 2-foot milling head, tack wagon, two rollers, skid steer, crack fill machine, two trailers, striping machine, and two pickup trucks. In determining whether Ms. McKean controls GSA, ALDOT permissibly considered that Mr. McKean owns the equipment that the firm uses for sealcoating jobs. However, there is no dispute that GSA owns the majority of the equipment necessary to perform its work. section 26.71(m) does not prohibit a firm's use of employee-owned equipment. Substantial evidence does not support ALDOT's conclusion that GSA's use of equipment owned by Mr. McKean and is necessary for only one component of the firm's work compromises Ms. McKean's control of the firm.

Conclusion

We reverse ALDOT's decision under section 26.89(f)(2) and direct ALDOT to certify GSA without delay and add the firm to applicable lists and databases.

This decision is administratively final and not subject to petitions for review. Thank you for your continued cooperation.

⁸ McKean need not have a hands-on role or experience with respect to every project in order to comply with section 26.71(g). *See, e.g.*, 19-0114 Foundation Mechanics, LLC (Sept. 18, 2019); *see also* 13-0122 Nancy's Tree Planting, Inc. (Jan. 10, 2014). The "overall understanding" and "independent decision making capacity" components are more general.

Sincerely,

Samuel F. Brooks
Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Gulf South Asphalt, LLC