

December 31, 2019

Reference Number 19-0165

Christopher F. Wilson
Northwood Office Center
2215 Forest Hills Drive, Suite 37
Harrisburg, PA 17112

Dear Mr. Wilson:

This is in response to your appeal of the decision of the Pennsylvania Unified Certification Program (PAUCP) to deny the application of your client, Traffic Control Industries, LLC (TCI) for DBE certification. The U.S. Department of Transportation (DOT) is upholding PAUCP's decision.

Procedural Background

TCI applied for certification on May 16, 2018. PAUCP conducted an on-site visit on August 30, 2018. PAUCP denied the firm's application on February 12, 2019. TCI appealed within the state system on March 27, 2019. PAUCP held an informal hearing on the matter on June 27, 2019, and affirmed its denial in a July 9, 2019, letter. TCI appealed to the Department on September 12, 2019.

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 DBE 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 to meet 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

The principal issue in the case is the ability of its disadvantaged owner, Ms. Angela McFadden, to control the firm. TCI is a small sign and traffic control company, the only other participant in which is Ms. McFadden's husband, Kevin McFadden.

PAUCP's view of the case contrasted the experience of Mr. and Ms. McFadden, as noted on their resumes. Ms. McFadden's work experience includes work with her neighborhood homeowners' association (HOA) and stints as a school nurse/health assistant, teacher assistant/substitute, and hair stylist/beauty shop manager. Mr. McFadden's resume reflected 10 years as a superintendent /estimator with a traffic control company, work in installation and hardwood refinishing, and as a superintendent/branch manager with a truck and equipment rental company, as well as 10 years as a traffic control laborer.

In terms of the division of labor within TCI, PAUCP characterized Mr. McFadden's role as including field supervision, estimating large projects, scheduling, work safety, and assembling signs. PAUCP characterized Ms. McFadden's role as focused on writing checks, estimating on smaller jobs, office management, setting the direction of the company, reviewing documents, and signing contracts.

In its appeal to the Department, as well as its appeal to PAUCP, TCI emphasized that Ms. McFadden's work with the HOA involved considerable management, contracting, and construction experience. She, rather than her husband, obtained a state Certificate of Approval for TCI and received a PennDOT Engineering and Management System account, of which she is the primary user (Mr. McFadden also uses the system). The appeal points to pp. 28-29, 35, and 49-50 of the transcript of the informal hearing, where Ms. McFadden describes her abilities with respect to sign manufacturing and placement. The appeal attached two testimonial letters from customers concerning Ms. McFadden's personal engagement in projects, including their technical aspects, and her role as primary contact for TCI. (There was another letter in the file from a seemingly disgruntled former employer of Mr. McFadden opposing the firm's certification.)

Discussion

Under section 26.71(g) of the Department's rules, it is not essential for a disadvantaged owner to have experience or expertise in every area of a firm's operations, or greater experience or expertise than other participants. However, the disadvantaged owner must have the ability to intelligently and critically evaluate information presented by other participants and use the

² Id.

³ 49 CFR 26.89(f)(1).

information to make independent decisions about the firm's daily operations, management, and policymaking.

From their background as demonstrated by their resumes, as well as their respective functions in the ongoing activities of the firm, PAUCP concluded that Mr. McFadden has the controlling role in TCI. Despite information presented by the appeal with respect to Ms. McFadden's knowledge, skills, abilities, and participation in some of TCI's substantive work, the record does not significantly address the key question posed by section 26.71(g): does Ms. McFadden in fact critically evaluate information presented by Mr. McFadden and make decisions on behalf of the firm independently of him?

Were the Department considering the facts of this case *de novo*, as if we were the initial decision maker, it is possible that we might come to a different conclusion than did PAUCP. In a field like traffic control, what is necessary to demonstrate control may differ from the situation of firms in more highly technical fields.

However, we are not the initial decision maker. Our task is solely to decide whether the certifier had substantial evidence to come to the decision that it did. The disparity in the experience of the two principals in the traffic control field, Mr. McFadden's predominant role in field operations, and the absence of evidence that Ms. McFadden evaluates information provided Mr. McFadden and makes independent decisions on the basis of that information permits a conclusion that PAUCP had substantial evidence to back up its decision that TCI did not carry its burden of proof with respect to control.

Conclusion

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

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Kathleen Padilla