

December 30, 2019

Reference No. 20-0017

Julia T. Horton  
Horton Steel, LLC  
[REDACTED]  
Hermann, MO 65041

Dear Ms. Horton:

You appeal of the decision of the Missouri Department of Transportation (MoDOT) to deny your firm Horton Steel, LLC's (HS) application for certification under the United States Department of Transportation's ("USDOT") Disadvantaged Business Enterprise (DBE) program, under the rules in 49 CFR Part 26 ("the Regulation"). We affirm MoDOT's decision under Regulation section 26.89(f)(1) as supported by substantial evidence and consistent with applicable certification rules.

### **Procedural Background**

HS applied for certification on June 27, 2019. MoDOT conducted an on-site interview on October 2, 2019 and denied the application on November 4, 2019. HS appealed to USDOT on November 19, 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 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it more likely than not 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..."<sup>1</sup>

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<sup>1</sup> 49 CFR 26.89(e).

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 and Discussion

MoDOT denied Horton’s application on grounds of ownership and control. We focus on ownership, which is a sufficient basis for deciding the appeal.

Under section 26.69(c) of the regulation, to meet ownership requirements, a disadvantaged individual (the owner) must make a real, substantial, and continuing contribution of capital.

Ms. Horton states that HS’s original capitalization was a [REDACTED] loan from her mother to the firm. HS took on the obligation to repay it. Ms. Horton made no payments. Further, Ms. Horton makes no claim that she personally parted with anything of value in exchange for acquiring ownership. She makes clear that she took on no related obligation.

The result, in plain sight on the face of the transaction described, is that Ms. Horton made no capital contribution within the meaning of the Regulation. AI, accordingly, is ineligible.<sup>4</sup>

## Conclusion

MoDOT had substantial evidence to conclude that AI is ineligible because it did not demonstrate that its disadvantaged owner made a real and substantial capital contribution. MoDOT’s conclusion also being consistent with applicable rules, we affirm it.

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

Sincerely,

Samuel F. Brooks

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<sup>2</sup> Id.

<sup>3</sup> 49 CFR 26.89(f)(1).

<sup>4</sup> We recognize that section 26.69(c) could be clearer. It may aid understanding to highlight two clarifications we have provided in a line of appeal decisions. These principles come directly from the rule’s text, but they are not necessarily obvious. 1. Capital contributions may take the form of the disadvantaged owner’s payments or transfers to the firm *or* to third-party sellers 2. The “through a loan” language refers to loans *to the disadvantaged owner* to finance *her* capital contribution.

MoDOT’s conclusion is accurate and we affirm on that basis: “Loans made for establishment of the business must be paid back with personal funds [and this one was not].” We point out for instructional value that the overarching principle is broader and simpler. It follows from 1 and 2 above plus the “continuing” requirement:

Loans *to the firm* are not capital contributions under the Regulation regardless of who makes them.

DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: Missy Steudle