

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRELL OIL COMPANY,)
)
 Petitioner,)
)
 vs.) CASE NO. 89-6162
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, K. N. Ayers, held a public hearing in the above-styled case on March 27, 1990, at Tampa, Florida.

APPEARANCES

For Petitioner: John J. Chamblee, Jr., Esquire
202 Cardy Street
Tampa, Florida 33601

For Respondent: Vernon L. Whittier, Jr., Esquire
605 Suwannee Street
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

Whether Petitioner qualifies for certification as a Minority Business Enterprise.

PRELIMINARY STATEMENT

By letter dated November 1, 1989, Terrell Oil Company (TOC), Petitioner, requested an administrative hearing to contest the denial of its application for certification as a Minority Business Enterprise. By letter dated October 24, 1989, the Department of Transportation (DOT), Respondent, notified TOC that its application for certification had been denied. As grounds for the denial, DOT alleged that the minority owner did not exercise control over the firm, and the firm does not appear to be an independent business entity. Further, DOT alleged TOC does not meet the definition of "regular dealer", and the firm failed to provide information requested by DOT.

At the hearing, Petitioner called five witnesses, Respondent called two witnesses, one of which had been called by Petitioner, and 27 exhibits were admitted into evidence.

Proposed findings were timely submitted by Respondent. Those proposed findings are generally accepted. Proposed findings not included herein were deemed immaterial to the conclusions reached.

FINDINGS OF FACT

1. Terrell Oil Company (TOC) was incorporated in 1986 with Grady Terrell, Jr., as president; Richard W. Gilliam and J. Anthony Belcher as board director members.

2. As of the time of this application, Grady Terrell owned 60 percent of the stock of the company, Belcher owned 20 percent, Gilliam owned 19 percent, and Anna Alvarez, company secretary, owned 1 percent.

3. The company was started with a \$6000 loan made by Grady Terrell, Jr., which sum was borrowed from C & S National Bank (Exhibit 16).

4. Grady Terrell, Jr., is a black male and, therefore, designated as a member of a minority and/or disadvantaged class by statute.

5. Neither Belcher nor Gilliam invested capital in TOC, but received their stock in the company for services in kind.

6. The By-Laws of TOC provide that all times at least 51 percent of the stock in TOC shall be owned by "minority individuals" as that term is defined in state and federal statutes applicable to minority business enterprises or disadvantaged business enterprises.

7. Several lines of credit obtained by TOC from C & S Bank were guaranteed by Grady Terrell, Jr. (Exhibits 9-12). No loans to TOC were guaranteed by anyone else.

8. Anthony Belcher resigned from the Board of Directors of Belcher Oil Company in 1982 and thereafter served as a consultant for approximately two years. He has not been affiliated with Belcher Oil Company since that time (Exhibit 15).

9. Grady Terrell, Jr., executed the lease for the property occupied by TOC for an office (Exhibit 6).

10. Grady Terrell, Jr., approves all major purchases, all invoices for payment, and other bills for payment except routine monthly bills for utilities, vehicle payments, etc., at TOC.

11. In connection with the line of credit with C & S Bank, TOC assigns most of its receivables to the bank for collection.

12. TOC is involved with bidding on and supplying various agencies of government (federal, state and local) with petroleum supplies.

13. To make these deliveries, TOC owns two small tank vehicles of 1500 and 2500 gallon capacities, respectively. (The record is unclear whether the 2500 gallon tank vehicle replaced the 1500 gallon truck.) When necessary to deliver larger quantities than can be hauled in TOC's trucks, a commercial carrier is utilized. In all cases, however, TOC takes ownership of the oil at the loading site.

14. TOC entered into a lockbox agreement with Belcher Oil Company in which Belcher extended TOC a line of credit to purchase petroleum products from Belcher. An arrangement was made with the bank to establish a special account

into which the customer would remit payment for product delivered and the bank would credit Belcher's account for the invoice price. This lockbox arrangement with Belcher has been inactive for several years. At one time, TOC purchased nearly all of its products from Belcher, but that is no longer true.

15. Richard W. Gilliam is the executive vice-president of Terrell. He receives no salary from TOC, but is reimbursed for out-of-pocket expenses. He has the authority to accept bids for the purchase of fuel from dealers and to execute contracts with purchasers. Gilliam has operated other businesses in the past and has considerably more experience in business matters than does Grady Terrell, Jr. However, no evidence was presented upon which a finding can be made that Gilliam is the person actually running TOC, and Grady Terrell, Jr., is but a figurehead. It is a fact that Grady Terrell, Jr., is legally in charge of, and has the authority to, fully direct the operations of TOC.

16. In addition to the tank truck(s), TOC has leased a service station where three 3000 gallon tanks are located in which TOC can store inventory if desired. Grady Terrell, Jr., also executed this lease.

17. TOC has been certified as a DBE by several governmental agencies, including the Defense Logistics Agency who contracts with TOC to deliver petroleum products to ships in Miami; and certification has been denied by more than two agencies to which applications were made.

18. No evidence was presented that TOC failed to submit all information requested by DOT.

CONCLUSIONS OF LAW

19. The Division of Administration Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

20. Section 339.0805, Florida Statutes, provides that not less than 10 percent of the amounts expended from the State Transportation Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals; and authorizes the DOT to promulgate rules to certify these small business concerns as minority business enterprises or disadvantaged business enterprises.

21. Those rules promulgated by DOT upon which the denial of certification of TOC was based included Rule 14-78.002, Florida Administrative Code, which provides in part:

(8) "Regular Dealer" means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials and supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products does not need to keep such products in stock, if the dealer owns and operates the appropriate distribution facility. Brokers

and packagers shall not be regarded as regular dealers within the meaning of these rules.

22. Rule 14-78.005(7), Florida Administrative Code, provides in part:

The ownership and control exercised by socially and economically disadvantaged shall be real, substantial, and continuing, and shall go beyond mere pro forma ownership of the firm, as reflected in its ownership documents. The socially and economically disadvantaged owner shall enjoy the customary risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of financial and managerial arrangements. In assessing business independence, the Department shall consider all relevant factors, including the date the firm was established, the adequacy of its resources, and the degree to which financial relationships, equipment leasing, and other business relationships with non-DBE firms vary from industry practice.

23. Rule 14-78.007(2), Florida Administrative Code, provides in part:

(8) In order for the additional information to be considered, the DBE shall return the requested information to the department within 30 days after receipt of the request. If the additional information is not received within 30 days, the department will process the application with the information as provided.

24. As noted in the findings above, no evidence was submitted by DOT that additional information requested was not received, or that lack of information influenced the determination that TOC did not qualify for certification.

25. The primary, if not sole, reason this application was denied by DOT was because of the belief that Grady Terrell, Jr., although the majority owner of the stock in TOC, was not actually running TOC, but that Richard Gilliam was directing the operations of TOC, and that TOC was closely affiliated with Belcher Oil Company. The evidence presented will not support such a conclusion. To the contrary, the evidence was un rebutted that Grady Terrell, Jr., has both de facto and de lure control over the operations and business activities of TOC. He is the one guaranteeing repayment of loans made to TOC, the one who approves the purchase of equipment, the one who approves payment of bills submitted to TOC, and the one responsible for all business decisions made at TOC. The only current links with Belcher Oil Company is the use of office space at Belcher Oil when Terrell is in Miami.

26. Further, Terrell is the only person assuming financial risk in the operations of TOC. He provided the start-up capital, albeit it from a bank loan, and he is the only one to obtain loans to TOC from the bank to provide operational capital.

27. Although TOC does not have facilities at which to store most of the petroleum products itself, nevertheless TOC qualifies as a regular dealer because it owns or operates the transportation facility and the product carried thereon to the purchaser. By owning the product before transferring it to the buyer, TOC is a dealer and not a mere broker.

28. From the foregoing, it is concluded that Terrell Oil Company, Inc., meets all the requirements for certification as a Disadvantaged Business Enterprise.

RECOMMENDATION

It is recommended that Terrell Oil Company, Inc., be certified as a Disadvantaged Business Enterprise.

DONE and ENTERED this 17th day of May, 1990, in Tallahassee, Florida.

K. N. AYERS
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 1990.

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