October 24, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 13-0273

Albert Titus, Executive Director
North Central Texas Regional Certification Authority (NCT)
624 Six Flags Drive, Suite 100
Arlington, TX 76001

Dear Mr. Titus:

Chartwell Staffing Solutions, Inc. (CSS), appeals NCT's denial of its application for interstate certification as a Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R. Part 26 (the Regulation). At the time of the Texas application in 2013, CSS was certified as a DBE in its home state Pennsylvania.[1] Accordingly, the interstate certification rules of §26.85 applied to NCT's consideration of the application. NCT denied the firm's certification application by letter dated June 25, 2013. CSS appealed to the Department by letter dated September 9, 2013.

NCT's denial letter cites no provision of the interstate certification rule upon which the certifier bases its determination. The record further reveals that NCT did not specifically articulate "good cause" within the meaning of §26.85(d)(2)[2], provide the notice that §26.85(d)(4)(i) requires, give CSS the opportunity to rebut NCT's reasons for denying certification as §26.85(d)(4)(ii) requires, make a final decision described in §26.85(d)(4)(v), or comply with any other provision of the interstate certification rule (including not requiring the firm to supply anew each and every document on Texas's checklist for new DBE applicants). It appears that NCT ignored the interstate certification rule—which is not optional—in its entirety. After carefully reviewing the entire administrative record, the Department determines that NCT's decision is inconsistent with substantive and procedural provisions concerning certification. *See* §§26.89(f)(1) and (2); *see also* §26.85(g) ("You must implement the requirements of this section beginning January 1, 2012.") We reverse and direct NCT to certify CSS forthwith.[3]

---

[1]See, e.g., Pennsylvania Department of Transportation (PDOT) letter to CSS dated August 22, 2012. CSS states that the reason it sought certification in Texas is that it opened a small Dallas-area office in March 2013.

[2]Section 26.85(d)(2) specifies just five such reasons.

[3]Section 26.89(f)(2). To reach this decision, we carefully considered all the facts in the record viewed as a whole, as §§26.61(e) and 26.89(e) require. As the foregoing should make clear, we do not consider the substantive control concerns cited to be properly before us in this interstate certification appeal, as they might be had NCT considered

The current administrative record and those in recent appeals prompt the Department to express its concern about NCT's failure to apply the certification rules as written. The record suggests that NCT applied improper standards of review and that its processes did not facilitate a fair, rule-based, reasonable (and not unduly burdensome) assessment of the firm's eligibility. NCT neither certified under §26.85(b) nor limited itself to an evaluation of the materials described in §26.85(c).[4] These are the only choices that the interstate certification rule affords. NCT instead

---

and denied an initial application for certification. In this case, those considerations are at best fruit of the poisonous tree because they arose, as we discuss further below, from NCT's unauthorized inquiries outside the boundaries of the Regulation. However, were this an appeal of a denial of an initial application for certification, we might well find the appellant's reading, as outlined in the appeal letter, of the significance of underlying facts persuasive. NCT's letter quotes various certification rules verbatim but fails, as §26.86(a) requires, to provide reasons that are applicable to this case (including its interstate context), particularly relevant, or supported by specific and substantial evidence that is properly in the record.

NCT may find it helpful to review carefully the rule itself, the preamble, and the Department's formal guidance, available at http://www.civilrights.dot.gov/disadvantaged-business-enterprise/dbe-guidance. We call to NCT's attention the following language from the Department's guidance:

"*The Department strongly reiterates that the ultimate purpose of the interstate certification rule is to facilitate certification of currently certified firms in other jurisdictions.* Accordingly, interstate certification is not automatic reciprocity in the sense that each state must honor the other states' certification decisions without review. Rather, *the rule creates a rebuttable presumption such that a firm certified in its home state (State A) is eligible to be certified in other states in which it applies. Thus, the subsequent certifier's review is limited to specifically enumerated items in the rule. The rule creates a bright-line distinction between applications for interstate certification and applications for initial certification.* For further discussion of the Department's general views on the interstate certification provisions, please see the preamble to the final rule establishing this regulation: Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 Fed. Reg. 5083, 5087-89 (Jan. 28, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/pdf/2011-1531.pdf." (Emphasis added.)

[4]For example, NCT Specialist (contractor) Priscilla Puentez on May 15, 2013, requested from the Pennsylvania certifer a copy of the Pennsylvania Unified Certification Program's On-site Review Report for the site visit and interview with the firm's owner conducted on July 31, 2012. Section 26.85(d)(1) authorizes such a request. The interstate certification rule, however, *contains no authority for compelling a separate, new, local* (Texas) site visit and interview, which is precisely what NCT appears to have done (the firm claims over its objection and on threat of denial should the firm fail to comply. NCT cites §26.83 in error as authority for requiring the second (Texas) site visit; in fact, there is no specific authority in the situation described for compelling out of state owners to come to Texas for another interview. Section 26.83 merely states the general certification rule, conspicuously unheeded in recent NCT denials, that an initial (not interstate) certifier must conduct a site visit. The Pennsylvania Department of Transportation's 2012 site visit satisfied that requirement.

Subsequent certifiers, under the interstate certification rule, in fact have no general right to conduct their own site visits, much less to represent that such local visits and interviews (in this case, the record shows a process more akin to a legal summons followed by adversarial questioning) are somehow required. The Department makes clear in the preamble to the rule and in its interstate certification guidance, that interstate certification is not intended as a series of do-overs by subsequent jurisdictions. Rather, the Department states repeatedly that it intends for the rule to *streamline* the process and *remove barriers* to certified firms becoming eligible to perform DBE work in other states. The rule was designed explicitly to replace a regime in which each certifier required out of state applicants to re-prove all aspects of eligibility, as if they were filing an initial application for certification.

CSS alleges undue burden, unprofessionalism, abuse of process, intimidation/adversarial tactics, irrelevance of certain information requests, and apparent lack of impartiality on the part of the certifier. See Appeal Letter at 1-2.

requested from the firm newer or different information and in some cases made requests for which it clearly lacked authority under the Regulation.[5]

Relevant correspondence indicates that NCT's principal concern is that the firm's 100% owner does not directly administer the Irving, Texas, office. For example, NCT expresses concerns, hardly outcome-determinative, about an agent having signed a short-term lease for shared office space when the landlord would not accept a faxed signature from the owner in Pennsylvania. NCT further "question[s] who is responsible for the daily operations of the firm in Texas while Ms. Schneider-Kidan is living in Pennsylvania."[6] We believe that the proper inquiry under §26.71 is whether Ms. Schneider-Kidan controls the firm, and the home state determined she does. In any event, NCT's letter contains no explicit §26.85(d)(4) contention of error/inapplicability or any clear identification of one of the five "good cause" reasons in

---

See also Denial Letter at 2. The administrative record substantially supports the allegations.

Some of NCT's information requests are marginal, even if this were an initial application. See, for example, Ms. Puentez's e-mail requests time stamped 11:35 a.m., 11:53 a.m., and 12:27 p.m., all on Tuesday, May 21, 2013 (e.g., "copy of last three [lease] payments" regarding a Pennsylvania business address, "proof of April and May's payments" on shared executive space in Irving, Texas—if such immediately contemporaneous "proof" were actually required, no application would ever be complete or remain so for long; further, there is no requirement that a DBE be current on lease payments). The requested documents do not appear to be probative of any valid eligibility matter (leases are not a requirement of certification). We count approximately 40 individual documents requested in this series of post-application follow-on information requests. Some requests are desires mischaracterized as requirements ("Jamie Diaz and Jason McCue resume [sic] must include Chartwell Staffing and current duties in detail"). Others are intrusive or offensive ("proof of ethnicity" of fully five non-owners). More crucially, none of the 40-odd requests is explicitly authorized in §26.85(c). The purpose of the exercise is to ascertain eligibility under the applicable rules, not invent requirements that cannot reasonably be satisfied.

We invite NCT to intervene to adjust course. We will entertain a request that we remand for NCT's prompt reconsideration all appeals currently pending before the Department. Going forward, we encourage NCT to adhere scrupulously to rule text and spirit with an overall objective of making accurate eligibility assessments while minimizing undue burdens on applicants. The records in recent appeals at least suggest that NCT structures its processes to increase the likelihood of failure, regardless of merit, a posture at odds with perceived fairness and impartiality. The Department believes that impartiality, reasonableness, and fidelity to the rule enhance program integrity while cellular-level "inquisition" (NCT's word choice, Denial Letter at 2) around points marginally relevant if relevant at all, does not.

[5]An interstate applicant need not re-prove every aspect of eligibility (see, e.g., Request #1 on May 21, 2013: "Proof of $5000.00 withdrawal from IRA account with TD Ameritrade"); it must address only the specific, particularized challenges the State B certifier makes. The burden of proof remains with the applicant, but §26.85(d)(4)(i) requires the certifier to choose and explain its reasons. It is only these specific objections to which the applicant must respond under §26.85(d)(4)(ii). Here, CSS need not re-substantiate every aspect of eligibility already proved to the satisfaction of the Pennsylvania UCP. The preamble to the final rule and the Department's guidance pertaining to the rule clarify that State's B's objections must be targeted, fact-based, and not merely conclusory.

[6] Denial Letter at 2. Doubt is not §26.85(d)(2) "good cause." Contrary to NCT's implication, there is no requirement that a DBE firm's owner maintain exclusive authority to execute contracts. Nor, obviously, can a firm's sole owner simultaneously be present in more than one office. It may be impractical, and it is surely not required, for her to maintain a residence in each state in which the firm does business. NCT appears to overlook the rule's purpose of facilitating DBE firm access to new markets. NCT fails, in any case, to "cite something in State A's certification that contradicted a provision in the regulatory text of Part 26." 76 Fed. Reg. 5083, 5089 (January 28, 2011).

§26.85(d)(2).[7] The State B certifier may not avoid the question of whether State A certified in error, simply by posing a different question.

Regardless of whether NCT's objections might constitute good cause if properly presented, NCT failed to issue the written notice that §26.85(d)(4)(i) requires or offer the firm an opportunity to respond. These are reversible errors. The omissions deprived CSS of pre-denial notice of the specific, particular reasons NCT may have challenged the Pennsylvania certification and of the opportunity to respond. They further deprived CSS of the additional due process protections specified in the remainder of §26.85(d). The §26.85 requirements are specifically enumerated and reasonably clear.[8] The evidence indicates that NCT substantially failed to adhere to them.

CONCLUSION:

We reverse NCT's determination under §26.89(f)(2) as "inconsistent with the substantive or procedural provisions of this part concerning certification" and direct NCT to certify CSS without delay. This decision is administratively final and not subject to petitions for review.

Thank you for your continued cooperation.

Sincerely,

Samuel F. Brooks, DBE Appeal Team Lead
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: Christopher D. Montez, Esq., for CSS

[7]The Department has explained that the standards for the phrases "factually erroneous" and "inconsistent with the requirements [of the Regulation]" in §26.85(d)(2)(iii) are reasonably high and go beyond mere interpretive disagreement, State B's desire to see information that State A's file does not contain, or State B's determination that it would have explored certain eligibility-determinative facts differently and reached a different conclusion had it been the home state. See Department's Interstate Certification Guidance (July 9, 2014) at 4.

[8]The Department published the final rule in January 2011 and required implementation the next year ("You must implement the requirements of this section beginning January 1, 2012."). Compliance is not optional. The provision requiring a state-level opportunity to challenge a proposed adverse finding ("must offer the firm an opportunity to respond to State B with respect to these reasons"), before State B reaches a §26.85(d)(4)(v) final decision, is unambiguous.

NCT compounded the due process and regulatory noncompliance by refusing to provide CSS with the materials upon which it based its decision, despite the firm's explicit request for those materials, in contravention of the §26.86(a) requirement. We remind NCT that the §26.86(a) provisions are mandatory.