

June 11, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No. 14-0016

Ms. Anita Bellant
Minnesota Department of Transportation
Office of Civil Rights
395 John Ireland Blvd.
Saint Paul, MN 5155-1899

Dear Ms. Bellant:

This letter responds to the appeal submitted by Wrightson, Johnson, Haddon & Williams, Inc. (WJHW) on November 5, 2013, seeking a reversal of the August 9, 2013 decision by the Minnesota Unified Certification Program (MNUCP) to deny DBE certification to WJHW. For the reasons set forth below, the Department finds that MNUCP did not comply with the interstate certification rules at 49 C.F.R. § 26.85 when it denied DBE certification to WJHW. The DBE certification denial decision by MNUCP is remanded for (1) MNUCP's reconsideration of the information that the rule permits, and (2) a substantive decision that satisfies the requirements of 49 C.F.R. § 26.85 and, if applicable § 26.85(a). The Department directs MNUCP and WJHW to proceed in accordance with the instructions in this letter as required by 49 C.F.R. § 26.89(f)(4).¹

Background

WJHW is a Texas corporation that provides consulting and design services for acoustics, noise control, and electronic systems. The firm received its first DBE certification from the state of Texas (home state). Between 2012 and 2013, WJHW unsuccessfully applied for DBE certification in Illinois, Georgia, and Minnesota. With respect to the state of Minnesota, WJHW filed two DBE certification applications with MNUCP during November 2012 and June 2013 respectively. The firm voluntarily withdrew its first application. MNUCP denied the second application on the grounds that the firm did not meet the requirements of 49 C.F.R. Part 26.

¹ If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

Specifically, MNUCP determined that WJHW failed to show, by a preponderance of the evidence, that the disadvantaged majority owner, Cheli Myers, held the requisite control, ownership, expertise and independence from non-disadvantaged individuals required under the regulations. WJHW subsequently filed this appeal seeking to reverse the denial of DBE certification by MNUCP.

Scope and Standard of Review

Under 49 C.F.R. § 26.89(e), the Department's review of UCP decisions is based solely on the entire administrative record, including any relevant supplementary information added to the record during the course of the appeal. The Department does not conduct a de novo review or a hearing on the matter to arrive at its decision.

A UCP's decision will be affirmed unless the Department determines it is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of the DBE regulations concerning certification. 49 C.F.R. § 26.89(f)(1). Decisions unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of the DBE regulations are reversed, and UCPs must take immediate action upon receiving written notice of a reversal. 49 C.F.R. § 26.89(f)(2).

Decisions based on an incomplete or unclear record may be remanded with instructions seeking clarification or augmentation of the record before making a finding. 49 C.F.R. § 26.89(f)(4). The Department may also remand a case for further proceedings consistent with Department instructions concerning the proper application of the provisions of the DBE regulations. Id.

Discussion

At issue here is the question of whether MNUCP properly applied the governing interstate certification rules when it denied DBE certification to WJHW. Under the rules, a UCP may, at its discretion, accept an applicant firm's home state certification and certify the applicant firm, or it may choose not to accept the home state certification of the applicant firm and deny certification. 49 C.F.R. § 26.85 (b), (c). If a UCP chooses not to accept the DBE certification of an applicant firm, it must determine that there is good cause to believe the firm's home state certification is erroneous or should not apply and send the applicant firm a notice stating with particularity the reasons for its determination. 49 C.F.R. § 26.85(c), (d). In reaching this determination, the UCP should review a complete copy of the application, supporting documents, site visit report, and other information that the applicant firm provided to the home state or any other state related to the firm's certification. Id.

Additionally, a UCP may not require that an applicant firm seeking interstate certification provide information beyond that already contained in the home state's record or in the record of any other state related to the firm's certification. The rules and DOT guidance reiterate that an application for interstate certification is not to be treated as an initial application for DBE certification. *See*, 7 Fed. Reg. at 5088 (Jan. 28, 2011). An application for interstate certification should not be subjected to the scrutiny that an original application might require.

The available information in the administrative record here indicates that (1) MNUCP did not rely on the record developed by WJHW's home state of Texas in reaching a decision not to certify the firm, and (2) MNUCP did not determine there was good cause to believe WJHW's certification by Texas was erroneous or should not apply.

On the first point, there is no documentation in the administrative record showing that WJHW provided or that MNUCP requested a complete copy of the application and supporting documents Texas relied on to certify WJHW as a DBE. By not providing a complete copy of the application it submitted to Texas, WJHW failed to meet its burden of production. *See* 49 C.F.R. § 26.85 (c). Similarly, by failing to request or consider Texas' record, MNUCP failed to meet its obligation to do so, in violation of 49 C.F.R. § 26.85 (d).

Without the benefit of having the information that Texas relied on in reaching its decision to certify WJHW, it follows that MNUCP treated WJHW's interstate certification application as an initial application for DBE certification. Tab 6 of the record supports this finding as it shows that WJHW submitted an entirely new and complete application for DBE certification to MNUCP on June 13, 2013. The record shows that after submitting the application, WJHW engaged in various email, telephonic, and letter communications with MNUCP that placed an undue burden on WJHW to re-prove its DBE eligibility in violation of the interstate certification rules.

Additionally MNUCP's August 9, 2013 denial decision is silent on whether it believed Texas may have erred in certifying WJHW. MNUCP's stated grounds for denying certification to WJHW were that the firm failed to meet the requirement of 49 C.F.R. § 26.69 and 26.71 because it did not show by a preponderance of the evidence that the disadvantaged majority owner held the requisite control, ownership, expertise and independence from non-disadvantaged individuals. Nowhere does the denial letter state that Texas may have erred or that there is a reason to believe that Texas' certification should not apply in the state of Minnesota.

After a thorough review of the administrative record, it appears that MNUCP misapplied the interstate certification rules when it denied certification to WJHW. MNUCP's role was to examine Texas' records to determine whether to certify WJHW or whether there was good cause, within the meaning of 49 C.F.R. § 26.85(d), to believe that the Texas UCP certification was erroneous or should not apply in Minnesota. Instead, MNUCP failed to consider Texas's record and placed improper requests for information on WJHW.

Conclusion

For the reasons set forth above, the decision by MNUCP to deny DBE certification to WJHW is remanded for further proceedings consistent with Department instructions concerning the proper application of the provisions of the DBE regulations. Should WJHW wish to continue to pursue certification, WJHW must provide MNUCP with a copy of the completed application, supporting documents, and other information that Texas used to make its certification decision. MNUCP is directed to consider the Texas record and make a certification decision based strictly upon the record, in accordance with 49 C.F.R. § 26.85(c), (d). If WJHW provides these documents and, if upon reviewing it, MNUCP determines that it has good cause to believe the

Texas certification is erroneous or the firm is ineligible, then MNUCP and WJHW must comply fully with the requirements of 49 C.F.R. § 26.85(d), (e) and (f).

In the event of an adverse decision after these instructions have been carried out, WJHW may appeal that decision under 49 C.F.R. § 26.85 (d)(4)(vii), and may further appeal the decision to the Department within 90 days.

This decision is administratively final.

Sincerely,

Sheryl G. Williams
Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights