

June 11, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0030

Shari L. Pratt, DBE Certification Manager
Division of Contract Compliance
Bureau of Finance and Administration
Connecticut Department of Transportation
2800 Berlin Turnpike
Newington, CT 06131

Dear Ms. Pratt:

Kormex Metal Craft, Inc. (Kormex) appeals the State of Connecticut Department of Transportation's (ConnDOT) denial of its interstate application for certification as a Disadvantaged Business Enterprise (DBE), under the criteria set forth at 49 C.F.R. Part 26 (the Regulation). After a careful review of the record, we reverse under §26.89(f)(2) for the reasons below and direct ConnDOT to immediately certify Kormex as a DBE and assign the firm the same North American Industry Classification System Code as in the home state.

The record indicates that Kormex applied for DBE interstate certification with ConnDOT in September 2011. At the time of its application, Kormex was certified in its home state of Illinois and in Alabama, Indiana, Louisiana, and North Carolina. On April 24, 2012, ConnDOT found the firm ineligible because its majority owner, Ms. Grace Whang, did not possess the requisite control of Kormex as the Regulation requires, with the agency citing §26.71(d), (e), (f), and (g) as reasons. ConnDOT affirmed this decision on July 20, 2012 after discussing its denial reasons with Ms. Whang. Kormex appealed to the Department on December 19, 2012, and we issued a remand letter on August 9, 2013. The remand requested that ConnDOT review Kormex's application in light of the interstate certification rules specified in §28.85.

ConnDOT issued a second ineligibility determination on August 23, 2013 ("denial letter"). This time, ConnDOT's reasoning centered on §26.69(b) and its requirement that to be eligible as a DBE, a firm must be at least 51% owned by socially and economically disadvantaged individuals. Kormex appealed the denial letter on November 18, 2013. ConnDOT calculated that Ms. Whang owned 260 of the 510 shares issued and outstanding, which is 50.980391% and less than the 51% as required by the Regulation. ConnDOT concludes "because Grace Wang is

the sole person who submitted both individual tax returns and a Personal Financial Statement, Grace Wang is the sole DBE applicant.” (ConnDOT denial, Aug. 23, 2013, pp. 2–3).

ConnDOT acknowledges that three other socially disadvantaged owners hold the remaining shares in the firm. All of the firm’s owners, in fact, are presumed to be disadvantaged. ConnDOT appears to reason that because the record does not contain personal financial statements for the other owners (a “fact” that cannot be verified on the record before us) their economic disadvantage was not established. We are concerned that ConnDOT’s posture may amount to an unwarranted shift of the burden of proof. There is no indication that any certifier, in fact, rebutted the §26.67(a)(1) presumption. See generally §26.67(b).¹

Similarly, the interstate certification rule creates a rebuttal presumption that a firm certified in its home state is eligible for certification in other states, as Kormex has been found to be several times.

ConnDOT neither rebutted the owners’ presumed disadvantage nor did it specifically articulate a “good cause” reason that Kormex’s home state certification was erroneous. (In fact, ConnDOT’s decision does not acknowledge the Illinois certification at all nor the provisions of §26.85).² We find that ConnDOT’s decision as explained to be inconsistent with substantive or procedural certification provisions, in particular those of §26.85, which is the provision the Department previously directed ConnDOT to review with special care.

Based on the administrative record before us, we must reverse under §26.89(f)(2) and direct ConnDOT to certify Kormex immediately and add the firm to the relevant lists and databases. If ConnDOT has a reasonable basis to question the firm’s eligibility, then it should make further inquiries and initiate a §26.87(b) proceeding if warranted.

This decision is administratively final. Thank you for your continued cooperation.

¹ We fully agree that section 26.67(a)(2) requires personal financial statements from all owners upon whom the firm relies for eligibility. If ConnDOT’s contention were that it need not certify the firm because the original certification was inconsistent with the Regulation, within the meaning of §26.85(d)(2)(iii), we might reach a different result. However, we find no such rationale in ConnDOT’s denial letter. Grace Wang cannot be the “sole applicant” in an interstate certification application; however, as DBE firms by definition (not their individual owners) file such applications.

² One of the questions and answers in the Department’s Interstate Certification guidance is:

What is meant by good cause under §26.85(d)(2)?

The interstate certification rule creates a rebuttable presumption that a firm certified in its home state (State A) is eligible to be certified in other states in which it applies. . . State B may only deny a DBE applying for interstate certification if State B has good cause to believe that State A’s certification of the firm is erroneous or should not apply in State B. There are five reasons set out in the rule that may constitute good cause to deny a request for interstate certification. Based on the regulatory record and the purpose and intent of the interstate certification provision, we interpret the words “may include” in section §26.85(d)(2) as words of containment (not open ended) that limit the basis for denial to one or more of the delineated reasons. These are the only five reasons on which State B may base its good cause determination.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Departmental Office of Civil Rights

cc: Kormex Metal Craft, Inc.