

July 9, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No: 14-0054

Mr. Derrick Casson
DBE Certification Manager
Economic Opportunity Division
Indiana Department of Transportation
100 North Senate Avenue
Room N750
Indianapolis, IN 46204

Dear Mr. Casson:

Kentuckiana Off-Duty Police & Surveillance, Inc. (KOPS) appeals the Indiana Department of Transportation's (INDOT's) October 28, 2013, denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the DBE program regulation, 49 C.F.R. Part 26. INDOT determined that KOPS, did not meet ownership and control criteria found in the Regulation §26.69 and §26.71. We carefully considered the entire administrative record, including INDOT's denial letter and rationales as §26.89(e) requires, and determine that INDOT did not comply with the substantive and procedural requirements of the Regulation's interstate certification provision §26.85; and we remand this matter pursuant to §26.89(f)(4).

The administrative record contains an application for DBE certification, which was signed by the firm's owner, Ms. Teresa Daniel, on April 18, 2013. The application denotes that KOPS was certified in its home state of Kentucky in 2012. On April 23, 2013, INDOT informed the firm that a determination of its DBE eligibility could not be made because the firm's file was missing bylaws, Ms. Daniel's drivers' license, its current home state certification and on-site review. INDOT received proof of KOPS DBE certification from the Kentucky Transportation Cabinet along with that agency's on-site interview report held with Ms. Daniel on June 26, 2012.

The record makes clear that INDOT chose not to exercise its discretion to certify KOPS under §26.85(b), as is its prerogative. INDOT's only other option under the rule was to review the firm's materials described in §26.85(c) and make a determination under §26.85(d).¹

¹ Section 26.85, effective in January 2012, gives a recipient two options if it receives a request for DBE certification from a firm certified in its home state. The recipient (termed State B in the rule) may, upon verifying home-state certification, certify the firm *or* it may examine the home-state materials described in §26.85(c) and make a determination, subject to the explicit limitations of §26.85(d). The interstate certification rule does not provide a

Specifically, according to the requirements of §26.85(d)(3) and (4), certifiers must either certify the interstate firm or provide to it a good cause notice that complies with the requirements of §§26.85(d)(4)(i) (“notice must state with particularity the specific reasons why State B believes the firm does not meet the requirements of this part for DBE eligibility and offer the firm an opportunity to respond to State B with respect to these reasons”) and (d)(2) (stating the five possible causes for finding the home-state certification erroneous or inapplicable in State B).

INDOT did not assess whether the firm provided sufficient information that as §26.85(c) requires. Instead, INDOT issued a denial letter that in effect treated KOPS’ application as an initial one; (citing many of the same reasons INDOT denied the firm DBE certification in February 7, 2011, which predates the interstate certification rule).² INDOT’s denial letter does not acknowledge the Kentucky certification at all nor does it cite any “good cause” reasons §26.85 specifies upon which INDOT bases its determination.

If INDOT had “good cause” to believe that Kentucky’s certification of the firm is erroneous or should not apply in your State, then a denial ground of §26.85(d)(2) was available, at which point INDOT must offer KOPS an opportunity to elect to respond in writing, to request an in-person meeting with INDOT to discuss its objections to the firm’s eligibility, or both. This did not occur as INDOT directed the firm to appeal directly to the Department.³ The rule *requires* notice of intent *and* a state-level opportunity to rebut before a final decision which, if adverse, is appealable to the Department *regardless* of whether the firm chooses to respond or rebut under §26.85(d)(4)(ii).

We close the present appeal and direct INDOT to process the firm’s request for interstate certification in accordance with the procedures and timelines of §26.85. As stated above, INDOT has discretion to accept the firm’s certification from Kentucky and certify the firm in Indiana without further procedures (See, §26.85(b)). Please inform the firm within 15 days of

third option. Specifically, it does not permit State B to examine the firm’s application as if it were an initial application for certification.

² The interstate certification provision’s overarching purpose is to *facilitate*, and remove unnecessary barriers to, DBE firm participation outside their home states. *See, e.g.* 76 Fed. Reg. at 5088 (January 28, 2011). We reiterate that an application for interstate certification is not an opportunity for wholesale examination of all possible aspects of eligibility. State A (in this case Kentucky), by definition, has already made that determination; and the interstate certification rule creates a rebuttal presumption that a firm certified in its home state is eligible for certification in other states. Hence the interstate certification rule requires State B to certify unless it can state one of the specified “good cause” reasons for that certification of the firm is erroneous or should not apply in your state, and State B must, by the terms of the rule, make that decision (certify or issue a notice that complies with the requirements of §26.85(d)) within 60 days. The Department’s formal guidance on interstate certification is available at <http://www.civilrights.dot.gov/disadvantaged-business-enterprise/dbe-guidance>.

³ INDOT references a telephone call with Ms. Daniel in its denial letter and states: “As described in the application by [sic] Ms. Daniel’s résumé and confirmed by Ms. Daniel during a meeting/teleconference with a contractor and Federal Highway [Administration] staff on October 1, 2013, it is Mr. Daniel who possesses the expertise to control the operations of KOPS.” There is no record of the substance of this conversation in INDOT’s record; however, Ms. Daniel stated in her rebuttal letter that a conversation occurred. She disagreed however, that the issue of Mr. Daniels’ involvement was addressed, stating instead that the conversation focused on Department of Labor classification of personnel as flaggers for prevailing wage purposes.

this letter whether INDOT will exercise its §26.85(b) option; and provide this office with a copy of INDOT's final action (certification or denial letter actually sent to the firm).

Thank you for your continued cooperation.

Sincerely,

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

cc: Teresa M. Daniel, President, KOPS