December 4, 2015

Reference No: 14–0119

Ms. Shari Pratt, Certification Reviewer
Office of Contract Compliance
Bureau of Finance and Administration
Connecticut Department of Transportation
2800 Berlin Turnpike
P.O. Box 317546
Newington, CT 06131–7546

RE: Native Sons, Ltd. Appeal of Interstate Certification Denial

Dear Ms. Pratt:

Native Sons, Ltd. (Native Sons), appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights ("the Department"), the Connecticut Department of Transportation's (CONNDOT) April 2, 2014, denial of its application for Disadvantaged Business Enterprise (DBE) certification, under criteria set forth in the DBE Program Regulation at 49 C.F.R. Part 26 (the Regulation). The Department requested and received CONNDOT's administrative record as required by §26.89(e), which we reviewed along with the firm's appeal of that decision dated May 20, 2014, and the agency's July 3, 2014, response. We also supplemented the record with information obtained from the Maryland Department of Transportation [hereafter, Maryland Unified Certification Program (MUCP)] and from Native Sons. We remand this matter pursuant to §26.89(f)(4) for the reasons set forth below.

Background

Native Sons submitted a Uniform DBE certification application to CONNDOT in October 2013 noting in that document that it was certified as a DBE in Maryland, which that state granted in 2003. The record contains a summary by the MUCP dated March 25, 2003, which indicates that an on-site interview was conducted at the firm's Connecticut headquarters with the firm's socially and economically disadvantaged owner, Mr. Frank Chapman.[1] The summary acknowledges that the firm is incorporated in Connecticut and that it leases office space in Maryland. The MUCP certified Native Sons to perform work as a DBE in NAICS Code 238210 (Electrical Contractors and Other Wiring Installation Contractors).

[1] Mr. Chapman is the 70% owner, and two non-disadvantaged individuals, [redacted], each hold 15% interest in the company. They serve as Vice President and Board Secretary, respectively.

In March 2011, Native Sons requested an expansion of services to be certified as a DBE in Maryland in NAICS Code 236220 (Commercial and Institutional Building Construction—specifically, General Contactors), and 423610 (Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers). MUCP's "Expansion of Services Investigative Report" dated March 25, 2011, references an on-site conducted by a Connecticut Department of Administrative Services employee. In this report, the MUCP noted that there were not any relationships between Native Sons and other companies or individuals (in the areas of personnel, facilities, equipment, financial bonding support, and other resources) that impact the independence of the company. The MUCP also noted that the firm owns and/or leases equipment necessary to perform its work and has a warehouse and/or inventory necessary to provide materials/supplies. In addition, the MUCP found that the disadvantaged owner has the authority to make the day-to-day, as well as long term decisions for the company on matters of management, policies and operations, including financial decisions, negotiating and contract execution, field/production operations supervision, estimating and bidding, etc. In June 2011, the MUCP approved the firm's expansion of services request.[2]

CONNDOT processed Native Sons's request for certification as an original request even though the interstate certification provisions of the Regulation were in effect. CONNDOT conducted a site visit to the firm's Plainville, Connecticut location on March 11, 2014; and later on March 19, 2014, held an in-person (recorded) interview at CONNDOT's offices with Mr. Chapman. The salient facts relayed by Mr. Chapman at the interview are: (1) Native Sons has 3 offices—the Plainville "main office" location (a leased space), the Maryland office (also leased), and Mr. Chapman's home office in Connecticut; (2) McPhee Electric, a firm solely owned by the non-disadvantaged owners of Native Sons (the McPhee brothers), is co-located in the same Plainville facility; (3) 4 persons work in Native Sons's Connecticut office—(2 management personnel and 2 persons in the field); (4) Michael McPhee (one of Native Sons's owners) is the general manager of the Maryland location; (5) Native Sons owns 80% of an affiliated Washington, D.C. based company, Nations City Electric, LLC (the remaining 20% is held by Falcon Holding Company, owned by the McPhee brothers, which in turn owns other businesses in the country such as JBL, and J.R. Richards, Inc.); (6) Michael Oles is Native Sons's general manager and runs the Maryland office; (7) signatures from two owners (one of which must be Mr. Chapman) are required on checks over $5,000; (8) Native Sons at times will be the subcontractor on jobs where McPhee Electric company is a prime and will buy goods and services from this company or one of the McPhee affiliated companies, but in cases where it is not a joint venture partner or sub with McPhee Electric it does not buy goods and services from that firm; (9) Mr. Chapman considers his work at Native Sons to be full-time where his role is to make major decisions, and perform some estimating, reviewing and signing contracts for the work; and (10) Native Sons is

2 It appears that the Maryland UCP's 2003 summary of the firm as well as the 2011 investigative report is used for both Maryland's local MBE program and its DBE program. For instance, the 2003 summary references that the firm applied for both programs and in the headnote on page 4 of the document states that the MBE program was explained during the on-site visit and information was obtained relative to the ownership and managerial control of the firm. Similarly an entry on the 2011 report, in regards to the personal net worth of the disadvantaged owner for the purposes of the DBE program is marked "not applicable." Although these documents suggest that the focus was on the local program eligibility requirements, the form itself and Maryland's subsequent certification of Native Sons as a DBE (in 2003 and for code expansion purposes) is clear.

certified as a DBE in Virginia and the firm has worked as a general contractor in Maryland and Virginia.

CONNDOT denied certification in part on grounds that: (1) Native Sons's gross receipts, when combined with its affiliate [redacted], exceeded the applicable size standard in NAICS Code 238210 of [redacted] during the period of measurement (2010–2012); (2) Native Sons is dependent upon McPhee Electric, Ltd and J.E. Richards, Inc. because McPhee Electric, Ltd. trucks were at the firm's Connecticut location and there were no Native Sons equipment onsite; and (3) Mr. Chapman, is restricted in his ability to manage the operations of the firm without the cooperation of non-disadvantaged individuals; with CONNDOT referencing only the check signing limitation described above as the basis for this determination.

Native Sons's Appeal

On appeal, Native Sons disputes each finding arguing: (1) Native Sons qualifies as a small business under NAICS Codes 236220 and 423610 (areas of work that Maryland certified them) which have size standards of [redacted], respectively; (2) the firm conducts the majority of its operations in Maryland; (3) the check signing ability CONNDOT references exaggerates the importance of the firm's routine accounting control and that Mr. Chapman must always be a signatory on the checks of $5,000 or more along with one of the minority shareholders; (4) Native Sons leases a discrete portion of the building where it is located but does not lease the yard space; CONNDOT did not observe Native Sons's equipment at the time of its visit because its largest jobs currently are in Maryland (where the majority of its construction vehicles are located and its principal Connecticut operations are currently at the Mohegan Tribe complex in Connecticut; (5) Native Sons has operated independently in Maryland since 2002; J.E. Richards has operated there since 1983 before it became affiliated with McPhee Electric and had CONNDOT visited Native Sons's Maryland operations it would have seen evidence of its independence.

CONNDOT's July 3, 2014 Response

CONNDOT responded to the firm's appeal arguments in a July 3, 2014, letter to the Department explaining why it treated Native Sons as a new DBE applicant instead of applying the interstate certification rule §26.85. CONNDOT reasoned that Native Sons is a firm with a Connecticut based "principal place of business" as defined in §26.5; meaning that its home state is Connecticut.[3] CONNDOT states that all three owners have Connecticut home addresses; each firm's annual Federal tax returns lists a Connecticut address; and that per the Connecticut Secretary of State's website, the firm is a domestic/CT firm which registered in Maryland in 1997 with its "state of formation" as Connecticut and with its principal office at Mr. Chapman's home address in North Stonington, CT. CONNDOT argues that Native Sons was certified by the

3 Section 26.5 defines these terms as follows: *Home state* means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business. *Principal place of business* means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Connecticut Department of Administrative Services under the state's Small Business Program not as a DBE when it was certified by the MUCP. CONNDOT stated: "The fact that Maryland treated the firm as a Maryland firm is factually wrong." The agency adds that Mr. Chapman provided no evidence to support his statement that the firm conducts the majority of its operations in Maryland.

MUCP's August 31, 2015 Correspondence and the Firm's Response

Because of the ambiguity over the firm's DBE status, the Department posed questions to the MUCP regarding its DBE certification of Native Sons, which was shared with Mr. Chapman. The Department also shared CONNDOT's response to the firm's appeal with Mr. Chapman.

The MUCP's August 31, 2015 response to the Department's inquiry contains several points: (1) MUCP approved Native Sons's certification in 2003 for its MBE program in NAICS Code 238210 with MUCP stating after the fact that "although the firm's home state is Connecticut, [MUCP] only considered the location to the extent that it relates to the MBE program for out-of-state firms;" (2) Native Sons did not apply for DBE certification as a DBE in its January 2003 application, and therefore, MUCP did not consider or approve it for certification under DBE program requirements; (3) the agency's coding error resulted in the firm being listed in both its MBE and DBE directory (an error that was repeated when the firm later requested and received its NAICS code expansion for NAICS Codes 423610 and 236220); and (4) MUCP erroneously certified the firm as a DBE in 2003 and that it intends to remove this certification pursuant to the requirements of §26.87. On behalf of the firm, Attorney John Yavis, Jr., disputes these points from MUCP in his September 22, 2015, response, which the Department made part of the record.

The Department's Decision

1. Standard of Review: Under the Regulation, a firm that is denied DBE certification may make an administrative appeal to the Department. 49 C.F.R. §26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is based solely on a review of the entire administrative record as supplemented by the appeal. The Department may supplement the administrative record by adding relevant information made available by a recipient, a firm, or other private party, among others. The Department affirms the decision below unless it determines, based on its review of the record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." Id. §26.89(f)(1). Finally, the Department may remand the matter for further proceedings if it determines that the record is incomplete or unclear on matters likely to have a significant impact on the outcome of the case. Id. §26.89(f)(4).

2. The interstate certification provision of the Regulation seeks to *facilitate certification,* and remove unnecessary barriers to DBE firms that seek to work as a DBE in others states. *See, e.g.* 76 Fed. Reg. at 5088 (January 28, 2011). Interstate certification is not automatic reciprocity in the sense that each state must honor the others states' certification decisions without review. Rather, under the rule the firm certified in its home state (state A) is eligible to be certified in other states in which it applies. The subsequent certifiers' review is limited in scope.

There are two ways recipients may process requests for certification from an out-of-state DBE. The first way is to accept the certification afforded to the DBE from its home state and certify the firm after confirming that the firm's certification is valid in its home state. The second way is to ask the DBE to provide the information specified in §26.85(c)(1-4).

There is no dispute that Native Sons was a certified DBE in Maryland when it submitted its request for certification to CONNDOT; and unless and until the MUCP appropriately decertifies the firm, pursuant to §26.87, it continues to be certified. CONNDOT exercised its option to not accept Native Sons's certification from the MUCP. The items Native Sons is required to provide if it was submitted to the home state or was otherwise provided are enumerated in §26.85(c)(1-4). Once it receives this information, under the rule, CONNDOT must obtain MUCP's on-site report and use all the information gathered to determine whether there is good cause to believe that Native Sons's certification is erroneous or should not apply in CONNDOT. (See §26.85(d)). The reasons for making a good cause determination, specified in §26.85(d)(2), are:

> (i) Evidence that State A's certification was obtained by fraud;
> (ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;
> (iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;
> (iv) The State law of State B requires a result different from that of the State law of State A;
> (v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section

In this situation, CONNDOT took issue with the firm's DBE certification in Maryland, and treated this firm as an initial applicant because CONNDOT viewed its home state as Connecticut. From our reading of the record, CONNDOT did not ask Native Sons to provide all of the information delineated in §26.85(c)(1–4); nor did it perform what it is obliged to do under §26.85(d); i.e., certify the firm or to cite one of the 5 enumerated grounds as a good cause ground for determining that MUCP's certification was erroneous or should not apply in CONNDOT.[4] CONNDOT also did not appropriately follow the regulation's mandate found in §26.85, which is to offer the firm an opportunity to respond in writing or in person to the good cause reason the agency identified.

We close the present appeal and direct CONNDOT to process the firm's request for certification in accordance with the interstate certification procedures and timelines of §26.85. As stated above, CONNDOT has discretion to accept the firm's certification from MUCP and certify the firm in Connecticut without further procedures (See, §26.85(b)). However, if CONNDOT

[4] Interstate certification application is not an opportunity for the applicant state to reapply and prove certification. The firm need only address the specific, particularized challenges the State B certifier makes. A firm should not be required to submit additional information beyond the information identified in the rule. Certifiers may not require a firm to supplement its home state certification package or on-site materials with information State B thinks is missing or that State B believes State A should have collected but did not. On this point, see the Department's Guidance, http://www.civilrights.dot.gov/disadvantaged-business-enterprise/dbe-guidance.

chooses, it can ask the DBE to provide the information specified in §26.85(c)(1-4); [5] and make an eligibility determination pursuant to §26.85(d) (i.e., thereafter certifying the firm or specifying a "good cause" reason saying why CONNDOT believes that MUCP's certification is erroneous or should not apply in your State). If the latter, CONNDOT must offer Native Sons an opportunity to elect to respond in writing, to request an in-person meeting with CONNDOT to discuss its objections to the firm's eligibility, or both. (This did not occur as CONNDOT directed in its April 2, 2014, decision that the firm appeal directly to the Department). 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).

If CONNDOT chooses not to certify Native Sons, the firm may appeal under §26.85(d)(4)(vii), and have the usual 90 days within which to appeal to the Department. This appeal is being closed in our files. 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: Frank Chapman, President, Native Sons, LTD
Maryland Department of Transportation

5 CONNDOT's calculation of the firm's gross receipts relies upon Native Sons' 2010-2012 federal tax returns and one year's worth (2012) of gross receipts of Native Sons' affiliate Nations City Electric, Ltd. Since the time of CONNDOT's denial, several tax years have passed for both firms and Native Sons should provide its most recent returns, which we presume were submitted to Maryland during the annual "no change" affidavit process.