April 12, 2016

Reference Number: 15–0076

Ms. Teresa Berntsen, Acting Director
Office of Minority and Women's Business Enterprises
210 11th Avenue SW, Suite 401
PO Box 41160
Olympia, WA 98504-1160

RE: WHPacific Diversity Northwest, LLC Appeal of DBE Certification Denial (Alaska Native Corporations; Self-Certification)

Dear Ms. Berntsen:

WHPacific Diversity Northwest, LLC (WHPDN) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the Office of Minority and Women's Business Enterprises' (OMWBE) December 22, 2014, denial of its application for certification as a Disadvantaged Business Enterprise (DBE), under criteria set forth in the DBE Program Regulation, 49 C.F.R. Part 26 (the Regulation). The Department requested and received OMWBE's administrative record as required by 49 C.F.R. §26.89(e), which we reviewed along with the firm's April 21, 2015 appeal. This matter is remanded pursuant to 49 C.F.R. §26.89(f)(4) for the reasons set forth below.

Background

WHPDN was established in 2013 and performs engineering services. Firm officers and its Board of Directors are Alaskan native males. (Uniform Certification Application (UCA), pp. 2, 5). The firm is wholly owned by its parent company, WHPacific Inc., a Colorado firm engaged in architecture, engineering, surveying, and others services; and WHPacific Inc. is co-located with WHPDN at its Alaska location, sharing telephone, engineering related equipment, facilities, and administrative and professional staff through an administrative services agreement. (See Id. p. 3). As part of its application, WHPDN submitted a "statement of qualifications of WHPDN for certification as a DBE." This document describes WHPacific, Inc. as wholly owned by NANA Development Corporation, a for-profit arm of NANA Regional Corporation, Inc. (NANA); (NANA Development Corporation and NANA are both domestic Alaska corporations).

At various times between February 2013 and December 2014, OMWBE and WHPDN's Chief Operating Officer Hal Keever and WHPDN's attorney Andrea Greene Montag, communicated by email regarding the firm's certification from the Small Business Administration (SBA) in that agency's 8(a) and small disadvantaged business (SDB) programs. The firm repeatedly informed OMWBE that it was self-certified for the SBA's SDB program for purposes of federal contracting, registering as such via the SDB program's System for Award Management system.

In one communication, the firm included a November 5, 2014, letter from the SBA's Alaska District Office to OMWBE and the Federal Highway Administration Division Office confirming this fact. In this letter, SBA stated, among other things, that (1) the agency does not certify a small business as a SDB, but rather, since October 2008, firms were authorized to self-represent their status as a SDB; and (2) Alaska Native Corporation owned small businesses like WHPDN need not be certified as an 8(a) company to self-represent its status as a SDB.

On December 3, 2014, OMWBE explained to the firm that it would process its application under §26.73(h) rather than §26.73(i) of the Regulation because in OMWBE's view the firm did not meet all §26.73(h) requirements. OMWBE's denial of December 22, 2014 citing a failure to cooperate with the agency's requests for information, stated in part:

> According to the application OMWBE received on November 23, 2013, the sole owner of the Firm is another business, WHPacific, Inc. Both businesses share a location, engineering equipment, a telephone, and staff. WHPacific is, in ~~turn~~turn, owned by an Alaska Native Corporation (ANC) called NANA Development Corporation. The Firm likewise applied as an Alaska Native Corporation.
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> The Firm's Officers and Board of Directors are: Don Sheldon, Chairman and Board Member; Henry Homer, Treasurer and Board Member; and Joe Luther, Director and Board Member. According to the application materials the firm submitted, all of these individuals are Alaska Natives.
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> Mr. Keever indicated on the application that the Firm was currently SDB certified; but the firm was not 8a certified. According to the documentation and communication the Firm provided OMWBE, it is self-certified as an SDB with the Small Business Administration.
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> OMWBE was in contact with USDOT and FHWA from January 2014 through August 2014 in an attempt to obtain clarification regarding the SBA self-certification process and whether it meets the requirements 49 C.F.R. §26.73. The direction OMWBE received was the SBA's self-certification did not meet the standards of 49 C.F.R. Part 26. OMWBE notified the Firm that it would not qualify as an ANC under §26.73(i) in October 2014. It also notified the firm that OMWBE would move forward with analyzing the firm's eligibility for the program under 49 C.F.R. §26.73(h), including control determinations under 49 C.F.R. §26.71.
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> On December 1, 2014, the firm notified OMWBE it would not be providing any additional information to determine the firm's eligibility under 49 C.F.R. §26.73(h) or 49 C.F.R. §26.71. The firm has not cooperated with OMWBE's requests for information to determine the firm's eligibility in the program.

OMWBE cites in their entirety, the provisions of 49 C.F.R. §§26.71, 26.73, and 26.109, in its denial decision and concludes that its decision "is based on the specific grounds listed above; a business is not certifiable if any one requirement of the DBE program is not met. OMWBE reserves the right to add additional grounds for this decision."

Decision

The DBE Regulation defines the terms, "Alaska Native Corporations," "Indian Tribes," "Native Hawaiian Organizations," and "SBA certified firm."[1] Firms owned by Alaska Native Corporations, Indian Tribes, and Native Hawaiian Organizations may be eligible DBEs, even though the majority owner is not an individual but a corporate or other entity.

The Department clearly envisioned two distinct ways ANCs may be certified as DBEs. This is reflected in the structure of two provisions in the current rule. ANCs that meet all the requirements of 49 C.F.R. §26.73(i) may be certified, and those that do not still may be certifiable under 49 C.F.R. §26.73(h). The "special" rule mandated by the 2002 statutory amendment to the Alaska Native Claims Settlement Act (ANCSA) that is implemented under 49 C.F.R. §26.73(i) applies to ANCs seeking DBE certification if a direct or indirect subsidiary corporation, joint venture, or partnership entity of the ANC meets 3 requirements:

> (i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
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> (ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
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> (iii) The subsidiary, joint venture, or partnership entity *has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program*. [Emphasis added]

[1] Section 26.5 defines these terms as*: **Alaska Native Corporation*** (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*). ***Indian tribe*** means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section. ***Native Hawaiian Organization*** means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians. ***SBA certified firm*** refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

The italicized text regarding certification by the SBA mirrors the text in the statute. If an ANC-related firm does not meet all these conditions, then to be certified as a DBE the rule requires it must meet the requirements of 49 C.F.R. §26.73(h) on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations. Under this provision, such a firm must be controlled by socially and economically disadvantaged individuals, as provided in 49 C.F.R. §26.71. When the Department adopted 49 C.F.R. §26.73(i) in 2003, it stated explicitly "If an ANC-related entity did not meet all the requirements (*e.g.*, it had not been certified by SBA), then its certification would continue to be processed under §26.73(h), in the same manner as Indian Tribal firms." (See 68 FR 35552, June 16, 2003)

At the center of this appeal is the Department's interpretation of the phrase "certified by SBA" as required by the ANCSA. When the Department proposed to amend its regulations in 2001 (before the ANCSA amendment) to define the term "SBA certified firm," its focus was on clarifying the responsibilities of DOT recipients under the Memorandum of Understanding (MOU) between the DOT and the SBA.[2] The purpose of the MOU was to facilitate the recognition by DOT recipients of SBA certified firms seeking DBE certification and the recognition by SBA of DBE certified firms.[3] At that time firms permitted to participate in the SBA's 8(a) Business Development program or the SDB program were not allowed to self-certify. That occurred several years after the statute and regulatory provisions at issue in this case were adopted. Clearly, allowing a company to certify itself and giving recognition to that certification was not contemplated by the DOT in 2003 for the DBE program. By including in the definition of "SBA certified" firms whose certification by some other entity (e.g., a Federal procuring agency, a private certifier approved by the SBA, or a DOT recipient) is recognized by the SBA, the Department was merely acknowledging those certifications would be covered by the terms of the MOU. The Department did not intend to require that DOT recipients give recognition to a firm's certification of itself as a small disadvantaged business and thereby open the door to fraud or raise questions about whether the DBE program meets constitutional or statutory objectives.

In 2010 the Department proposed a number of certification related changes to the DBE program regulations. One of those changes was to modify the old 49 C.F.R. §26.85 to continue the part of the MOU concerning the treatment of SBA 8(a) certified firms. The Notice of Proposed Rulemaking deliberately omitted any reference to SDBs. In the Department's January 28, 2011 final rule, it recognized that the SBA had removed itself from the SDB certification process (i.e., the SBA has gone to a self-certification approach for SDBs), and the Department deleted the operative provisions of the MOU (codified at that time in 49 C.F.R. §§26.84 and 26.85), which had long expired and was not renewed.[4]

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[2] Department of Transportation Notice of Proposed Rulemaking published in the Federal Register at 66 FR 23208 (May 8, 2001).

[4] The MOU included reciprocal certification principles and streamlined procedures for applications for DBE certification from firms certified by the SBA, including firms owned by ANCs, Indian Tribes, and Native Hawaiian Organizations. At the time the MOU was executed, the SBA performed the certification function for SDBs and 8(a) firms. The MOU and regulation clearly contemplated some form of reciprocal certification of firms certified by the SBA or by DOT recipients, subject to additional requirements unique to the SBA and DOT programs respectively.

The Department has always maintained that applicant firms must undergo a certification process that looks at an applicant firm's eligibility to protect the integrity of the program. Firms owned by ANCs and tribal entities are no different now—under the current rule §§26.71(h) and (i)—then when the former provisions of §26.84 and §26.85 were in effect. Then as now, applicant firms bear the burden of proving their eligibility as a DBE, per §26.61(b). As stated above, at the time of the former provisions, the SBA (or an entity recognized by the SBA) was certifying firms, which the Department took to mean an examination of their eligibility prior to granting the applicant either a SDB or 8(a) designation. Because SBA no longer performs that function for firms seeking SDB certification, and instead allows firms to self-certify, the Department deleted those provisions. The Department informed OMWBE of this fact on August 27, 2014, stating that the Department does not consider firms self-certifying as SDBs to be SBA certified, as that term is understood and intended by the Department; and that an ANC would need to be certified by SBA or by an agency recognized by the SBA. OMWBE in turn notified the firm that it would be analyzing its eligibility under §26.71(h).

WHPDN correctly points out however that OMWBE did not complete this analysis and stopped assessing the firm's eligibility once it could not provide proof that it was certified by the SBA. What is required in this case is for OMWBE to fulfill its mandate under §26.73(h) and fully analyze whether WHPDN meets the size standards of §26.65 and whether the firm is controlled by socially and economically disadvantaged individuals, as provided in §26.71. In this regard WHPDN argues (appeal p. 13) that the Department could have requested a size determination for the firm pursuant to SBA regulations 13 C.F.R. §121.1002(6) and the MOU because, in its view, this was the only issue left to be determined since appropriate ownership and control was established by ANCSA and regulations. This argument overlooks the fact that the Department delegates certification responsibilities to its recipients. (See §26.81(b)).

We close the present appeal and remand this matter to OMWBE so that it may reevaluate the firm and the record as a whole, and perform an on-site visit to the firm's principal place of business and interview its principal officers as required by §26.83(c)(1). We direct OMWBE to issue a new decision to the firm within 90 days to certify WHPDN, or within the scope of §26.86(a) provisions, specifically articulate its reasons in writing why the firm is ineligible, specifically referencing the record evidence that supports each reason. If OMWBE chooses not to certify WHPDN, the firm may appeal within 90 days of OMWBE's decision to the Department under §26.89(c). 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: Christine V. Williams, Davis Wright Tremaine, LLP