

February 29, 2016

Reference Number: 15–0121

Ms. Janine L. Rhee  
Chief Procurement Officer  
City of Chicago  
Office of compliance  
121 N. LaSalle Street  
Chicago, IL 60602

Dear Ms. Rhee:

T. Castro Produce Co. (TCP) appeals the City of Chicago Department of Procurement Services's (City) June 22, 2015 determination that the firm is ineligible for certification as an Airport Concession Disadvantaged Business Enterprise (ACDBE) and as a Disadvantaged Business Enterprise (DBE), under the criteria set forth in 49 CFR Parts 23 and 26 (the Regulation). After a careful review of the administrative record, we reverse. *See* §26.89(f) (2).<sup>1</sup>

Specifically, we find—contrary to City's determination—that TCP provided the requisite narratives to support its Appendix E application. The record also suggests that City unduly delayed the processing of the firm's DBE application. We reverse the denial because it is unsupported by substantial evidence and because it is inconsistent with the substantive or procedural provisions of the Regulation.

I. Procedural history

TCP filed its first Uniform Certification Application (UCA) in November 2011, and City determined that the firm was ineligible for certification a year later, on November 6, 2012. TCP failed to appeal the decision within the requisite 90-day deadline. *See generally*, §26.89 (c) (denied applicant must appeal within 90 days of recipient's final decision).

---

<sup>1</sup> §26.89(f) (2) states:

If the Department determines, after reviewing the entire administrative record, that [the recipient's] decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses [the] decision and directs [the recipient] to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

The matter before the Department, in this instance, arises from TCP's second UCA, which it filed on August 6, 2014. City conducted the firm's on-site interview on November 10, 2014, and on June 22, 2015—seven months after the on-site—City again determined that the firm is ineligible for certification. TCP appealed to the Department on July 28, 2015.

## II. Facts

The facts of this case are uncontroverted. Thomas Castro and Thomas Prinske—who are both **REDACTED** Caucasian males—established TCP on January 11, 1993. TCP distributes fresh fruits, vegetables, and other grocery items. *See* TCP On-site Report (November 10, 2014) at 2, 6.<sup>2</sup> Mr. Castro and Mr. Prinske each own 50% interest in TCP.<sup>3</sup>

TCP's owners seek certification based upon an individual determination of disadvantage. *See generally*, §26.67(d) (case-by-case determination of disadvantaged) and 49 CFR 26 Appendix E (guidance for individual determination). They are not members of a presumed socially and economically disadvantaged group. *See generally*, §§26.5 (membership in one of the enumerated groups) and 26.67(a)(1) (presumption of disadvantage).

City's grounds for denying the firm's first application centered on its opinion that TCP failed to demonstrate that its owners qualify as disadvantaged based on an individual showing under Appendix E of the Regulation. Specifically, City was primarily concerned with the lack of documented evidence supporting Mr. Castro's and Mr. Prinske's narratives in relation to Appendix E Part 1- §(1)(b) (education,<sup>4</sup> employment,<sup>5</sup> business history<sup>6</sup>) and Part 2 (lack of

---

<sup>2</sup> TCP seeks certification within the following NAICS codes:

424410 – General Line Grocery Merchant Wholesaler  
 424420 – Packages Frozen Food Merchant Wholesaler  
 424430 – Dairy Product (except dried or canned) Merchant Wholesaler  
 424440 – Poultry and Poultry Product Merchant Wholesaler  
 424480 – Fresh Fruit and Vegetables Merchant Wholesaler  
 424490 – Other Grocery and Related Products Merchant Wholesaler

<sup>3</sup> The UCA lists Mr. Prinske as 100% owner, but TCP concedes that Mr. Castro and Mr. Prinske were 50% co-owners of the firm at the time that City rendered its decision on June 22, 2015.

<sup>4</sup> In regards to education barriers City concluded:

Mr. Prinske and Mr. Castro have detailed how their disabilities made the prospect of obtaining a college education difficult and in their view, not realistic. However, T. Castro Produce has not provided evidence of any specific social patterns or social pressures which discouraged Mr. Castro or Mr. Prinske from pursuing a professional or business education. I therefore find that T. Castro Produce has failed to demonstrate by a preponderance of the evidence that either Mr. Castro or Mr. Prinske has been denied equal access to institutions of higher learning or vocational training.

City November 6, 2012 Denial Letter at 4.

<sup>5</sup> In regards to social barriers in employment City concluded:

Neither Mr. Prinske nor Mr. Castro has detailed any specific examples where either was treated unequally in hiring, promotions or other aspects of professional advancement, as compared to

comparative data to establish Economic Disadvantage).<sup>7</sup> TCP's untimely appeal argued that City incorrectly subjected the firm to a higher burden of proof and disregarded the probative value of Mr. Castro's and Mr. Prinske's narratives. *See generally*, TCP Appeal (July 28, 2015).

TCP filed its present UCA, and seeks certification again, based on an individual determination of Social Disadvantage. It referenced and provided City with the same narratives from its 2011 application.<sup>8</sup> In addition, TCP provided evidence concerning the firm's economic position in comparison with a firm that performs the same business activities within the state.

---

individuals who were not disabled. Neither has demonstrated that they have experienced retaliatory or discriminatory behavior by an employer or labor union. Mr. Prinske has recounted several jobs where he was dismissed as a result of being unable to read certain items. However, it appears from his description of these jobs that the ability to read was an essential function of the job. Neither Mr. Prinske nor Mr. Castro has provided evidence that demonstrated specific social patterns or pressures that channeled them into non-professional or non-business fields. Accordingly, I find that T. Castro Produce has failed to demonstrate by a preponderance of the evidence that either Mr. Castro or Mr. Prinske has experienced unequal treatment or discriminatory behavior with respect to their employment histories.

*Id.* at 6.

<sup>6</sup> In Regards to barriers in Business history, City concluded in part that, "T. Castro Produce has recounted two instances where the firm was allegedly denied loans. However, T. Castro Produce has submitted no documentation to support these allegations." *Id.* at 7.

<sup>7</sup> Specifically, City concluded:

Pursuant to the Regulation, T. Castro Produce has the burden to establish, by a preponderance of the evidence, that its ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. T. Castro Produce has not presented any evidence regarding its access to capital *and* credit opportunities as compared to the access to capital and credit opportunities enjoyed by others in the same or similar line of business who are not disadvantaged. Nor has T. Castro Produce made any Comparison between T. Castro Produce's general financial condition and the financial condition of others in the same or similar lines of business who are not disadvantaged. . . .

Appendix E also requires the City to consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary Industry classification, or if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals. As stated above, T. Castro Produce bore the burden to demonstrate that it was economically disadvantaged. However, T. Castro Produce has submitted no information regarding the financial profiles of other small businesses in any related line of business. Therefore, I cannot make a determination that T. Castro Produce is economically disadvantaged. Viewing T. Castro Produce's financial position by itself supports a finding that the firm is not economically disadvantaged. Over the past three years, the business has consistently earned over **REDACTED** dollars per year, with annual profits of at least **REDACTED** dollars per year.

*Id.* at 9-10

<sup>8</sup> The narratives that TCP submitted in the original application are located in the same section of the case file as the firm's 2014 application materials. We, therefore, presume that the firm resubmitted the narratives when it filed its present UCA.

Finally, TCP expressed that there were no significant certification related changes to the firm's circumstances. The firm reminded City of the Regulation's requirement that a recipient must make its eligibility decision within 90 days of receiving all pertinent information, and TCP offered to provide any additional information to expedite the certification process.<sup>9</sup> City requested and obtained additional information—over 40 documents—on October 21, 2014 and November 11, 2014.

On April 7, 2015, City determined that the firm demonstrated that it meets the certification requirements of the Regulation and found that the firm is eligible pending the outcome of its owners' individual determinations of Social and Economic Disadvantage. *See* City Certification Summary Report (April 7, 2015). However, on June 22, 2015, City again determined that the TCP failed to demonstrate that Mr. Castro and Mr. Prinske qualify as disadvantaged under §26.67(d) and the Appendix E guidance. Specifically, the denial letter states:

At the time of the submission of the present application for DBE/ACDBE certification, neither Thomas Castro, or Thomas Prinske submitted information to the City of Chicago in accordance with making an individual showing of qualification pursuant to the requirements of Appendix E, therefore, failing to meet the burden of demonstrating social and economic disadvantage.

City Denial Letter (June 22, 2016) at 3.

### III. Standard of Review

Under 49 C.F.R. §26.89(c)), a firm may appeal a denial of DBE certification to the Department. The Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. 49 C.F.R. §26.89(e). The Department must affirm the certifier's decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." 49 C.F.R. §26.89(f)(1). When reviewing the administrative record provided by the recipient, the Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed. 49 C.F.R. §26.89(f)(6).

---

<sup>9</sup> Specifically, in a letter to City—dated August 4, 2014—the firm stated:

The Applicants continue to believe that they meet the requirements to be certified as an ACDBE Company and hope that upon further examination you will agree. However, we also understand that there have not been many significant changes to the Company or the application since the Applicants filed the initial application. We therefore, understand that in all likelihood you will again find the Company ineligible. Our only request is that if you choose to deny certification you do so within the 90 days provided in 49 CFR §26.83 (k). Should you deem that there is additional information required we ask that you copy us on any requests to the Applicants so that we can assist in expediting the process.

#### IV. Discussion

Substantial evidence supports that City erred in its June 22, 2015 determination. The pertinent issue in this case involves a question of fact. City contends that TCP failed to submit the requisite narratives to demonstrate that the firm meets the requirements of Appendix E.<sup>10</sup> TCP contends that the firm submitted the appropriate documentation and that the firm met its burden. The narratives are in the record as provided by City.

We agree with TCP to the extent that the record reflects that the firm did submit narratives and other pertinent information to City. TCP sufficiently demonstrated that it meets the substantive provisions of Appendix E. We conclude that City must certify the firm in the interest of justice because it did not provide the firm proper due process as required by the Regulation and other civil rights provisions—and because we find no just reason to affirm or remand the case.

1. The record contradicts City’s claim that the firm failed to submit Mr. Castro and Prinske’s narratives.<sup>11</sup>

The administrative record contains narratives and additional economic data from Christina Foods, Inc.—the only comparable firm in the state—to support TCP’s claim that it is economically disadvantaged in comparison to similarly situated firms.<sup>12</sup> *See generally*, record at §8 14-19 (T. Castro Narrative dated September 15, 2012); record at §8 20-27 (T. Prinske Narrative dated September 15, 2012).

Furthermore, the letter the firm submitted clearly indicated that the firm was applying under Appendix E and specifically referenced the previous narratives. City should have inferred that the firm intended to rely on those narratives to support its Appendix E application. *See generally*, TCP letter re *ACDBE Application of T. Castro Produce* (August 4, 2015).

Finally, assuming *arguendo* that the firm failed to provide the requisite narratives and support to demonstrate that it meets Appendix E, City should have requested the information after the firm submitted its UCA. Considering the substantial amount of additional supplemental information that City obtained from the firm, we are unsure why City would neglect to request the alleged missing narratives.

---

<sup>10</sup> Based on that finding, City declined to conduct a full Appendix E analysis and consider the merits of whether Mr. Castro and Prinske qualify under an individual determination of Social and Economic Disadvantage.

<sup>11</sup> We note that the Regulation only requires that a firm provide a narrative for Economic Disadvantage.

<sup>12</sup> We are unsure why City found that TCP failed to submit narratives. Perhaps it believed that the firm was required to update the information when it filed its recent UCA. There is no regulatory requirement that prevents a firm from resubmitting narratives when it applies again for certification under Appendix E.

Moreover, the record supports that the firm submitted the same information to challenge the merits of the City’s decision on appeal. *See*, TCP August 4, 2014 letter to City ( TCP’s attorney states, “We therefore, understand that in all likelihood you will again find the Company ineligible. Our only request is that if you choose to deny certification you do so within the 90 days provided in 49 CFR §26.83 (k). Should you deem that there is additional information required we ask that you copy us on any requests to the Applicants so that we can assist in expediting the process.”)

We therefore conclude that City's determination is unsupported by substantial evidence. We reverse the decision. *See* §26.89(f)(2).

2. In addition to the incorrect finding that TCP did not submit narratives, the Department takes issue with other actions by City that are inconsistent with the procedural and substantive procedures of the Regulation. These are not necessarily independent grounds for reversal, but they are admonishments to the certifier.

a. We take issue with City's delayed processing of TCP's UCA. A certifier must render a decision within 90 days of receiving all the supporting information from the firm, or elect to take a one-time 60-day extension, "upon written notice to the firm, explaining fully and specifically the reasons for the extension." *See* §26.83(k).<sup>13</sup> There was no written notice to the firm in this case. We, therefore, question why the firm's second application process lasted over 10 months.

b. We also take issue with the onerous supplemental information that City requested from the TCP—although TCP complied with the requests. One of the guiding principles of the Regulation is to help remove barriers to the participation of DBEs in DOT- assisted contracts. §26.1(e). In this instance, City requested information wholly unrelated to the only matter it found to be at issue—including, e.g.:

- "Signed copies of all service agreements held [TCP] or letters of engagement (if any) with outside consultants and/or temporary employees, e.g. financial/accounting, legal/attorney etc. If no agreements exist, pleas [sic] provide copies of the most recent invoice for services rendered."
- "a complete inventory list that includes items representing each certification category and the approximate value of the inventory"
- "Annual market forecasts for the amount of product in each specialty area that the vendor plans to sell annually and their purpose [sic] customers."

Ringold Financial Management Services (on behalf of City), Information Received but Needs Clarification or Update (October 21, 2014) at para. 24, 30, 33.<sup>14</sup>

We find that the information was unduly burdensome and contrary to the provisions of the Regulation. *Cf.* §26.67(a)(2)(ii) (certifier should not request an unduly burdensome amount of information to confirm the presumption of disadvantage); *See, e.g.,* 12-0002, Green Clean

<sup>13</sup> The entire applicable portion of §26.86(k) states: "If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension."

<sup>14</sup> City retained Ringold to help assist the certifier with certifications. *See generally*, City Retainer Letter (October 2, 2014).

California Inc. (August 13, 2013) (The Department cautions against unduly burdensome requests for information concerning Applicant owner's presumption of disadvantage).

c. City neglected to conduct a full Appendix E analysis in its June 22, 2014 denial letter. We presume that City would have reached a similar conclusion as it did when it denied the firm in 2012. We acknowledge that TCP made strong arguments and produced substantial evidence.

The owners' narratives appear to meet the firm's burden of making an individual showing of Social Disadvantage under the Departments interpretation of Appendix E.<sup>15</sup> Contrary to City's interpretation of the Regulation, TCP is not required to submit documentary evidence to support its owners' narrative statements. *See*, 14-0174, Trademasters Service Corporation (December 7, 2015) at fn. 14 and at 7.

Furthermore, TCP appears to have met its burden of demonstrating economic disadvantage, including evidence of its financial position compared to another firm that performs the same business to demonstrate the effect of diminished credit capital and credit opportunities. *But see* 14-0174, Trademasters Service Corporation (December 7, 2015) at notes 29, 47 (certifier may conduct comparison through the Risk Management Association Annual Statement Studies Financial Ratio Benchmarks and census data).

d. TCP's certification journey began in 2011. City's substantive and procedural errors have created undue barriers to the firm's certification. We are mindful of the disabled status of the firm's owners. We therefore also reach our decision considering our obligation to remove unnecessary barriers faced by qualified individuals with disabilities in federally funded programs. Section 504 of the Rehabilitation Act of 1973 (codified as 29 U.S.C. 794) states:

No otherwise qualified individual with a disability in the United States. . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.<sup>16</sup>

---

<sup>15</sup> TCP makes a strong argument that the narratives are sufficient to demonstrate that it met the evidentiary, preponderance of evidence burden of social disadvantage.

<sup>16</sup> In Appendix E, we reaffirm the non-discriminatory/equal access principles of Section 504 and the American Disabilities Act. We state:

II. [T]he Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. *It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.*

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, *recipients should look carefully at individual showings of disadvantage by individuals with disabilities*, making a case-by-case judgment about whether such an

We are obligated to ensure that Mr. Castro and Mr. Prinske do not face further delay or barriers to obtaining ACDBE and DBE certification.

V. Conclusion

We reverse the denial and direct City to certify the firm as an ACDBE and DBE under the authority of §26.89(f)(2).

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
External Civil Rights Programs Division

cc: TCP

---

individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

(Emphasis added.)

Thus, in instances where an applicant firm is owned and controlled by individuals with disabilities, we review the recipient's determination with a *particular scrutiny* to ensure that it adheres to the precepts of the Section 504 and the ADA.