

February 11, 2016

Reference No: 15–0127

Ms. Kathrina Stroud, Civil Rights Administrator
Delaware Department of Transportation
800 Bay Road
P.O. Box 778
Dover, Delaware 19903

Dear Ms. Stroud:

Parr Industries, II, Inc. (Parr) appeals the Delaware Department of Transportation's (DelDOT's) denial of its application for interstate certification as a Disadvantaged Business Enterprise (DBE) under §26.85 of the DBE Program Regulation 49 C.F.R. Part 26 (the Regulation). After a careful review of the record, we remand under §26.89(f)(4)¹ for such clarifications and related proceedings as may be required consistent with the instructions below.

The Department finds the record unclear with respect to information likely to have a significant impact on the outcome of the case. The Good Cause Notice dated March 12, 2015 and the Denial Letter dated May 6, 2015, cited §26.71(b) relating to control, but do not specifically explain why the facts cited fatally impair Parr's independence.^{2,3} See §26.85(d)(4)(i) and

¹ Section 26.89(f)(4) provides: "If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part."

² In the Good Cause Notice and Denial Letter, DelDOT also cited 13 CFR 121.103, relating to affiliation, implying a size standard violation presumably because of claimed but unexplained affiliation. DelDOT further cited §26.71(l), relating to control, in the Good Cause Notice. These ostensible grounds are equally unexplained. Although we focus this discussion on DelDOT's principal ground, independence, it applies equally to the other unexplained reasons for denial.

³ With regard to size standards, §26.65 provides: "(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$23.98 million.

§26.86(a). We remand the case to DelDOT and instruct the certifier to “scrutinize,” “consider,” and “examine” the facts of the case in accordance with the subparts of §26.71(b), explaining the reasons for denying the firm with specificity and particularity.

Operative Facts

The record indicates that the Tennessee Uniform Certification Program (TNUCP) certified the firm as a DBE on August 27, 2014, for activities described in NAICS Codes 484340 Tanker Trucking (e.g., Chemical, Juice, Milk, Petroleum), Long-Distance; 562211 Waste Treatment and Disposal; 562998 All Other Miscellaneous Waste Management Services; 562998 Tank Cleaning and Disposal Services, Commercial or Industrial; and 562998 Waste Management Services (Miscellaneous) (Metropolitan Nashville Airport Authority Letter dated August 27, 2014). Parr was certified in its home state of Tennessee prior to the application for Delaware’s interstate certification dated January 9, 2015.

The interstate certification rules therefore apply. In keeping with those rules, DelDOT sent Parr a §26.85(d)⁴ Good Cause Notice to deny the firm’s application for certification on March 12,

(c) The Department adjusts the number in paragraph (b) of this section annually using the Department of Commerce price deflators for purchases by State and local governments as the basis for this adjustment.”

⁴ Section 26.85(d) provides in pertinent part as it relates to good cause: “As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (see §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by “State A” or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is *good cause to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following: (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.*” (Emphasis added.)

2015, citing §§26.71(b) .^{5,6} The Good Cause Notice, however, merely listed facts about the firm without *explanations* relating to the aforementioned provisions:

“Par Industries II leases office space from Parr Industries. Par Industries, Inc. is owned by Don Parr, the applicant’s father;

Par Industries II leases trucks from TGC, Inc. TGC, Inc. is owned by Don Parr. TGC, Inc. also shares office space with Parr Industries;

Parr industries shares office space with Spectrum Recycling, Inc. Spectrum Recycling, Inc. is owned by Don Parr;

The applicant has a **REDACTED** personal line of credit. The noteholder is Donn Parr;

Parr Industries II uses Parr Industries, Inc. as the primary location for waste disposal;

Parr Industries II has a line of credit for the amount of **REDACTED**. The lenders are Shannon Downs and Maria Parr. Maria Parr is the spouse of Don Par and Shannon Downs is the daughter of Don Parr. The current balance on this note is **REDACTED**. This note is secured by “cash in bank on date of default” and “accounts receivable on date of default.” This relationship, when considering the other facts as a whole, raises further concerns with regard to control.”

Parr responded to the Good Cause Notice on April 8, 2015. DelDOT denied Parr’s application on May 6, 2015, reiterating lack of independence and affiliation grounds and listing the same facts above. Parr appealed on August 5, 2015.

Discussion

⁵ Section 26.71(b) provides: “Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you *must scrutinize* relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You *must consider* whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You *must examine* the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you *must consider* the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.” (Emphasis added.)

⁶ We reiterate that in light of our disposition we do not opine on the unexplained §26.71(l) or 13 CFR 121.03 grounds.

The record makes clear that DelDOT chose not to exercise its discretion to certify under §26.85(b).⁷ DelDOT's only other option under the rule was to review the materials described in §26.85(c)⁸ and make a determination under §26.85(d) for "good cause."

Section 26.85(d)(4)(i) provides that if the certifier finds good cause to believe that State A's certification is erroneous, the certifier must send a notice to the firm within 60 days from receipt of the application. *The notice must be specific and explain why the firm is not eligible. Id.* It must contain one of the five "good cause" reasons specified in §26.85(d)(2): "(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." (Emphasis added.)

⁷ Section 26.85(b) provides: "When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures. (1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A. (2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A".

⁸ Section 26.85(c) provides: "In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (see §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct."

We note that DelDot's Notice and Denial Letter did not indicate under which "good cause" reason DelDOT denied certification. We infer that DelDOT intended to make a determination under §26.85(d)(4)(iii). DelDOT listed facts related to its independence ground, presumably to show that the home state Tennessee's certification was factually erroneous or inconsistent with the requirements of this part. Good cause, we note, is a much higher standard than simple interpretive disagreement with the home state. To deny an application for interstate certification as "inconsistent with the requirements" of part 26, the State B certifier must point to something in the State A application that directly contradicts the requirements of the Regulation. Sections 26.85(d)(4) and 26.86(a) then require State B to fully *explain* its reasons for proposing to deny and then denying the application, respectively.

The Good Cause Notice and Denial Letter in this case merely listed facts and did not explain reasons for denying interstate certification with specificity and particularity. The certifier, therefore, did not comply with §26.85(d)(4)(i) or §26.86(a).⁹ It is insufficient simply to list facts about the firm and not explain how they specifically indicate, e.g., a lack of independence under the various factors of §26.71(b). Rather, the certifier "must" go through the proper analysis and "scrutinize," "consider," and "examine" each of the subparts (§26.71(b)(1)-(4)), to explain the firm's denial for lack of independence. The unexplained facts from the Good Cause Notice and Denial Letter above indicate that the notice and denial were not fully consistent with the substantive and procedural requirements of §§26.85(d)(4)(i) and 26.86(a).

Conclusion

We remand the present appeal and direct DelDOT to scrutinize, consider, and examine the facts of this case per §26.71(b). As stated above, DelDOT did not comply with §26.85(d)(4)(i), and the Denial Letter did not comply with §26.86(a), failing to explain with specificity and particularity the reasons for denying Parr's application based on lack of independence. We direct DelDOT to certify the firm or provide it a new denial letter, no later than April 18, 2016, that fully explains DelDOT's reasons, with a copy of its timely determination to this Office. In the event of a new denial letter, the applicant firm will have the usual 90 days within which to appeal to the Department.

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

⁹ Section 26.85(d)(4)(i) in pertinent part provides: "(i) *This [Good Cause] notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.*" (Emphasis added.)

Section 26.86(a) provides: "When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, *you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial.* All documents and other information on which the denial is based must be made available to the applicant, on request." (Emphasis added.)

Thank you for your cooperation.

Sincerely,

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