



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

Departmental Office of
Civil Rights

1200 New Jersey Avenue, SE
Washington, DC 20590

May 5, 2016

Reference Number: 16-0028

Lydia Harper
DBE Program Manager
New Jersey Department of Transportation
P.O. Box 600
Trenton, NJ 08625-0600

Dear Ms. Harper:

MC Fuhrman & Associates, LLC (MCF) appeals the New Jersey Department of Transportation's (NJDOT) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After examining the entire administrative record, we conclude that the record is unclear or incomplete regarding matters likely to have a significant impact on the outcome of the case. We therefore remand under Regulation §26.89(f)(4)¹ for further proceedings consistent with the instructions below.

NJDOT's September 16, 2015 denial letter determined that MCF's disadvantaged owner Rebecca Fuhrman did not demonstrate that she controls the firm within the meaning of §26.71(c), which prohibits certain restrictions on the disadvantaged owner's customary discretion.² The denial letter is unclear regarding what burden of proof the certifier applied to

¹ §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 At issue are operating agreement provisions relating to extraordinary business transactions such as the sale or transfer of substantially all of the firm's assets, amending the articles of organization or operating agreement, merging the company, incurring debt outside the usual course of business, changing the nature of the business, filing for bankruptcy, or entering into a transaction that creates a conflict of interest with a member. MCF argues that these situations are sufficiently unusual to be outside of the disadvantaged owner's customary discretion. In light of our disposition, we do not reach this issue.

the applicant.³ We remand for NJDOT to clarify which burden of proof it believes applies and why. *See generally* §26.86(a) (certifier must provide firm a written explanation of reasons for denial including citations to specific evidence relied upon).

Discussion and Decision

The denial letter at page 1 states: “you have not demonstrated by clear and convincing evidence that you control the financial direction of the firm without prior written consent from Michael Fuhrman (non-disadvantaged individual).” There is no citation of authority, such as §26.71(l), or supporting facts for applying the “clear and convincing evidence” standard.

Conversely, the denial letter twice on page 2 refers to the lesser “preponderance of the evidence” standard, including in NJDOT’s apparent conclusion: “Since you have not demonstrated by a preponderance of the evidence that you actually control the firm, [MCF] is not recommended for DBE certification. If you believe you have been wrongly denied DBE certification, you have the right to file a written appeal to the U.S. Department of Transportation within ninety (90) days of this letter.”

Although the Department reads the denial letter, on balance, to suggest that NJDOT applied the “preponderance” standard, MCF on appeal challenges NJDOT’s page 1 “clear and convincing” language and alleges that applying the higher standard was reversible error.⁴ Hence our remand for NJDOT to clarify its position relating to the applicable burden of proof.

We respectfully request that NJDOT clarify its position regarding the applicant’s burden of proof and the disadvantaged owner’s resulting failure to control MCF within the meaning of the Regulation. We instruct NJDOT to issue a new denial letter not later than June 17, 2016, which consistently applies that burden of proof and explains why it applies, with a courtesy copy to this Office. If MCF takes issue with the new denial letter, then it will have the usual 90 days within which to appeal the determination to the Department.

I. Conclusion

The September 16, 2015 denial letter is unclear and possibly incomplete with respect to matters likely to have a significant impact on the outcome of the case. Further, the Department does not affirm on grounds not specified. Section 26.89(f)(5). We remand for NJDOT to clarify its apparent denial rationales under §§26.61(b), 26.71(c), and (if applicable) §26.71(l).⁵ We direct

³ If the denial letter intends to impose the “clear and convincing evidence” burden of proof, it is also incomplete. There is no citation of authority for applying that evidentiary standard or citation of specific factual support for why such authority might apply.

⁴ It is possible that the single reference to clear and convincing evidence was simply an oversight, which may not rise to the level of reversible error. *See generally* §26.89(f)(3) (Department need not reverse when procedural error did not result in fundamental unfairness or substantially prejudice appellant’s opportunity to present its case).

⁵ NJDOT does not cite §26.71(l), which is the control provision that imposes a clear and convincing evidence burden of proof. We cannot determine from the facts stated in NJDOT’s denial letter whether NJDOT takes the position that this provision applies to MCF. It is entirely possible that the provision does not apply to the facts of

NJDOT to issue a denial letter that clarifies these matters, in particular stating clearly and consistently which burden of proof applies and why, not later than June 17, 2016.

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

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Brooks', with a stylized flourish at the end.

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

cc: MCF

this case, in which case NJDOT would simply clarify that, in determining the firm is ineligible, it applies the general §26.61(b) preponderance of the evidence standard.