

March 28, 2017

Reference Number: 16-0137

Mary Connell  
Chairperson, PAUCP Certification Appeals Committee  
SEPTA  
1234 Market St., 11th Floor  
Philadelphia, PA 19107

Dear Ms. Connell:

Rue Environmental, LLC (RELLC) appeals the Pennsylvania Unified Certification Program's (PAUCP)<sup>1</sup> removal of the firm's Disadvantaged Business Enterprise (DBE) certification, pursuant to the standards set forth in 49 C.F.R. Part 26 (the Regulation). After examining the entire administrative record, the US Department of Transportation, Departmental Office of Civil Rights (the Department) concludes that the decision is inconsistent with the procedural due process requirements of the Regulation. Accordingly, we reverse under §26.89(f)(2).<sup>2</sup>

Specifically, we reverse because PAUCP based its decertification solely on a ground that the proposing agency did not present within the notice of intent to decertify the firm. We direct PAUCP to restore the firm's certification immediately.

## I. Facts

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<sup>1</sup>Port Authority of Allegheny County (PAAC), a member of PAUCP, was the agency that proposed the decertification. PAUCP's DBE Certification Appeals Committee issued the final notice of decision of the firm's decertification.

<sup>2</sup> §26.89(f)(2) provides:

If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence *or inconsistent* with the substantive *or procedural provisions of this part concerning certification*, the Department reverses your decision and directs you to certify the firm.

(Emphasis added)..

David J. Rue—a non-presumptively disadvantaged male—formed RELLC on August 1, 2010. The firm performs archeological services. Mr. Rue is the firm’s 51% owner and his wife Marie Rue owns the remaining 49% interest.

RELLC received its DBE certification on February 17, 2011. Because Mr. Rue is not a member of a presumptive socially and economically disadvantaged group, RELLC sought certification based on a [REDACTED], through an individual determination of disadvantage under §26.67(d) (case-by-case determination of disadvantaged status) and Appendix E of the Regulation (guidance for individual determinations under §26.67(d)). The Port Authority of Allegheny County (PAAC) certified RELLC without obtaining a personal narrative supporting Mr. Rue’s claim of disadvantage, as required under Appendix E.<sup>3</sup> However, RELLC’s DBE eligibility was not questioned—for over 3 years—until September 24, 2014. The New York Department of Transportation (NYDOT) asked PAAC to review Mr. Rue’s disadvantaged status in light of a SBA denial letter that was contained in RELLC’s New York State DBE Application.<sup>4</sup>

PAAC initiated an investigation into firm’s eligibility in October 2014. Due to scheduling conflicts, PAAC requested that the Pennsylvania Department of Transportation (PennDOT) conduct an on-site review and interview Mr. Rue to gather evidence regarding whether he meets the social and economic disadvantage requirements on Appendix E. PennDOT obtained a narrative and conducted the on-site on February 26, 2014. During the on-site, Mr. Rue explained in detail how he qualified for disadvantaged status under Appendix E. Mr. Rue provided several documents in support of his claim of disadvantage. After the on-site, PennDOT compiled Mr. Rue’s responses with the information gathered during the on-site and issued comprehensive report of its findings to PAAC. *See generally* PennDOT Report (April 7, 2016).

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<sup>3</sup> A PAAC official who no longer employed by the agency certified the firm, which made the absence of an Appendix E narrative problematic. Mr. Rue clearly stated that he was seeking certification based on his disability when he applied for certification. However, because Mr. Rue did not submit a narrative with his application, we do not know what evidence the official relied on to make the determination and if he considered the provisions of Appendix E.

<sup>4</sup> Specifically, NYDOT’s complaint, in its entirety, states:

We received an application from Rue Environmental LLC along with supporting documentation. Mr. Rue is not in a presumed group, however Mr. Rue is claiming disadvantaged status via Appendix E. Mr. Rue submitted with his supporting documentation a SBA denial, which notes that Mr. Rue is not disadvantaged. The SBA guidelines are very similar to the DBE Regulations Appendix E. Based on the SBA’s determination and in accordance with Appendix E (exempted below), we are asking that the Port Authority of Allegheny County review Mr. Rue’s disadvantaged status given this new information and advise us so that we may make a proper decision.

NYDOT letter to PAAC (September 24, 2014) at 1.

Although NYDOT informed PAAC that the firm withdrew its New York application for DBE certification on October 17, 2014, PAAC stressed throughout the record that NYDOT’s complaint “prompted the removal of certification eligibility.” Decertification Hearing at 6. We are concerned that PAAC believed that it could not review RELLC’s eligibility until it received a complaint. The Department reminds PAUCP that should it have reason to question a firm’s eligibility, it may at any time conduct an unannounced on-site review pursuant to §26.83(h)(2) and it may also initiate decertification hearings under §26.87(b).

At the conclusion of the investigation, PAAC determined that there was reasonable cause to support the firm's ineligibility. On March 9, 2016, PAAC issued its notice of intent to decertify RELLC. PAAC's proposed removal was "on the basis that the original decision to certify the firm was clearly erroneous as set forth in 49 CFR §26.87(f)(5)." PAAC Notice of Intent (March 9, 2016).

RELLC responded to PAAC's proposed "clearly erroneous" ground for decertification in writing and during an informal hearing before PAUCP's DBE Certification Appeals Committee (the Committee).

After the hearing, however, the Committee determined that RELLC was ineligible based on a different ground, §26.87(f)(1), relating to "[c]hanges in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the [Regulation's DBE] eligibility standards." Specifically, the Committee determined Mr. Rue no longer met the social and economic disadvantage requirements of Appendix E. *See generally* PAUCP Notice of Decision (May 23, 2016).

On appeal, RELLC reaffirms its position that Mr. Rue meets the social and economic disadvantage requirements of Appendix E, and it questions the Committee's rationale for decertification. Mr. Rue notes that PAUCP "state[s] that I had showed evidence of social disadvantage up to the point of starting the company but not since. But I was certified at the start of the company, I showed how I was disadvantaged in the preceding years." RELLC Appeal at 2.

## II. Applicable Authority

### 1. §26.67(d) states:

*Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of appendix E of this part.

### 2. §26.87 states:

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities must be protected as provided in §26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

3. §26.87(d) states:

Hearing. When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

4. §26.87(g) states:

Notice of decision. Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89.

### III. Decision

The Department finds that PAUCP's decertification was procedurally deficient because it removed RELLC's DBE certification based entirely on a new decertification ground that PAAC did not raise in the notice proposing the firm's decertification or during the informal hearing.

During decertification proceedings, an independent decisionmaker that is not comprised of an office or personnel that took part in actions leading to the proposal to remove the firm's eligibility makes the final decision concerning the firm's proposed decertification. *See*

§26.87(e).<sup>5</sup> The decisionmaker's determination is limited to deciding whether the agency that proposed the decertification demonstrated, by a preponderance of the evidence, ineligibility pertaining to the grounds raised in the notice of intent. *See generally* 14-0144, Northgate Land Development (September 14, 2015) (certifier erred by presenting new grounds within the notice of decision and failed to prove its original ground for decertification). "The Department does not intend for §26.87 to operate as a chance for a fishing expedition that later enables a decisionmaker to examine an agency's entire historical course of action concerning a firm's certification and use facts so mined to support an action *not proposed by the initiating agency*." 12-0240, *Grady Excavating, Inc.* (August 18, 2014) at 7. (Emphasis added).

Decertification proceedings are intended to "provide[] important due process protections to the DBE firm, including the right to a full explanation of the reasons for the proposed action, the right to contest, and the right to be heard." 15-0113, *ADF Industries, Inc.* (January 8, 2015) at 2. "The right to be heard must be meaningful." 15-0146, *Belle Fontaine Interests, LLC* (April 25, 2016) at 5 (discussing an applicant firm's right to contest a proposed denial of interstate certification.). Deprivation of the of a firm's right to meaningfully contest a proposed decertification is an irreparable due process violation.

In this instance, the sole ground for proposing decertification articulated by PAAC on March 9, 2014, was that the firm's DBE certification was "clearly erroneous" pursuant to §26.89(f)(5). However, it was only when the PAUCP issued its final notice of decision that the certifier raised the §26.89(f)(1) "changes in circumstances" rationale and informed the firm that it was ineligible because Mr. Rue no longer qualifies as socially and economically disadvantaged.<sup>6</sup> Under §26.87, the "changes in circumstances" ground should have been communicated to RELLC in the notice that proposed decertification. RELLC would have then had the opportunity for an informal hearing, at which it could respond to the reasons for the proposal to remove its eligibility. PAUCP's procedural error substantially prejudiced RELLC because it did not have the ability to meaningfully contest the §26.87(f)(1) ground on which it was decertified.<sup>7</sup>

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<sup>5</sup> PAUCP's notice of decision states, "Part 26 requires that the Committee make its own determination based upon the aforementioned record and Section 26.87(f)." PAUCP Notice of Decision at 2. This statement slightly misstates the function as an independent decisionmaker. The Committee's function is to make its own determination that is limited to the grounds presented within the notice of intent to decertify the firm.

<sup>6</sup> The record is unclear as to the reasons why PAUCP changed the removal ground from clearly erroneous.

<sup>7</sup> The Department recognizes the unusual facts and circumstances of this case, including the absence of an Appendix E narrative and the fact that PAAC did not conduct the investigative on-site visit that produced the bulk of the evidence in this case. However, §26.87 clearly places the burden of proof on the certifier, and unusual circumstances does not obviate a certifiers duty prove its case.

In this instance, the notice of intent to decertify and the notice of decision ostensibly present conflicting grounds for decertification. Implicit in the Committee's removal of the firm's certification based on §26.87(f)(1) (change in circumstances) is its belief that the original certification was not erroneous. Thus, the Committee's notice of decision weakens PAAC's position that the decision to certify the firm was clearly wrong under §26.87(f)(5).

Furthermore, both notices take issue with the firm's achievements as a participant in the DBE Program (e.g. acquisition of contracts, the firm's expansion to wetlands evaluation work, increase in revenue), which does not comport with the Program's objective "to promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients." §26.1(f)). We view this line of reasoning as flawed.

Accordingly, we reverse PAUCP's decision because it is inconsistent with the procedural due process provisions of §26.87. *See* §26.89(f)(2).

#### IV. Conclusion

We reverse under §26.89(f)(2) and direct PAUCP to restore certification immediately, including returning the firm to applicable lists and databases of certified firms.

This decision is administratively final and not subject to petitions for review. Thank you for your continued cooperation.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: RELLC

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Finally, there is no indication that PAUCP examined evidence that supported Mr. Rue's disadvantaged status. For example, the record contains tax and statistical evidence that appears to support that Mr. Rue is economically disadvantaged. *See e.g.*, PennDOT report at 19 (Mr. Rue has a low income and personal net worth that is significantly below the Regulatory limit); *id.* at 20-21 & Attachment 18 at 1,4 (Mr. Rue's income is below the national median income for archeologists and anthropologists).