

February 27, 2017

Reference Number: 16-0146

Ramona Bernard
Director, Civil Rights Division
North Dakota Department of Transportation
608 East Boulevard Avenue
Bismarck, ND 58505-0700

Dear Ms. Bernard:

Doon Technologies, Inc. (DTI) appeals the North Dakota Department of Transportation's (NDDOT) denial of its application for interstate certification as a Disadvantaged Business Enterprise (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). At the time of its North Dakota application, DTI was certified as a DBE in its home state of New Jersey and most other states.¹ Accordingly, the interstate certification rules of §26.85 applied to NDDOT's consideration of the application. For the reasons articulated below, we reverse and direct NDDOT to certify DTI forthwith.

Discussion

NDDOT denied the firm's certification application by letter dated April 16, 2016. DTI appealed to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) by letter dated July 15, 2016.

NDDOT's denial letter fails to cite any provision of the interstate certification rule upon which the determination is based. NDDOT does not specifically articulate "good cause" within the meaning of §26.85(d)(2).² The record further reveals that NDDOT improperly sought

¹DTI is presently certified in all states other than North Dakota.

² §26.85(d)(2) specifies just five such reasons:

- (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.

information beyond that which DTI must produce under §26.85(c). The Department has found this to be error in 13-0273, Chartwell Staffing Solutions, Inc. (October 24, 2014) (footnote 4: new on-site interview in State B not authorized in context of interstate application).

After carefully reviewing the entire administrative record and carefully considering all the facts in the record viewed as a whole, as §§26.61(e) and 26.89(e) require., the Department determines that NDDOT's decision is inconsistent with substantive or procedural provisions concerning certification. *See* §§26.89(f)(1) and (2). We reverse and direct NDDOT to certify DTI without delay.³ NDDOT may avail itself of remedies under §26.87(b) should it determine that it has reasonable cause to believe that DTI is ineligible.

NDDOT neither certified the firm under §26.85(b) nor to limited itself to an evaluation of the materials described in §26.85(c).⁴ These are the only choices that the interstate certification rule

³ We do not consider the substantive control concerns NDDOT cited to be properly before us in this interstate certification appeal, as they might have been had NDDOT considered and denied an initial application. *See generally Chartwell, supra*, n.3.

We call to NDDOT's attention the following language from the Department's formal guidance:

"The Department strongly reiterates that the ultimate purpose of the interstate certification rule is to facilitate certification of currently certified firms in other jurisdictions. Accordingly, interstate certification is not automatic reciprocity in the sense that each state must honor the other states' certification decisions without review. Rather, the rule creates a rebuttable presumption such that a firm certified in its home state (State A) is eligible to be certified in other states in which it applies. Thus, the subsequent certifier's review is limited to specifically enumerated items in the rule. The rule creates a bright-line distinction between applications for interstate certification and applications for initial certification." Interstate Certification Guidance (July 9, 2014) at 1 (emphasis added). For further discussion of the Department's general views on the interstate certification provisions, please see the preamble to the final rule establishing this regulation: Office of the Secretary, "Disadvantaged Business Enterprise: Program Improvements," 76 Fed. Reg. 5083, 5087-88 (Jan. 28, 2011).

⁴The record shows that NDDOT compelled DTI to submit, in effect, to a new on-site interview (in this case via telephone and attempted videoconference, a transcript of which appears in the file) in which questions were asked related to matters already determined in the home state. Denial Letter at 2. *See* Transcript of March 4, 2016 Interview, Record at 279ff. However, subsequent certifiers, under the interstate certification rule, have no general right to conduct their own site visits or on-site interviews. *Chartwell, supra*. The interstate certification guidance explicitly provides:

"Is it acceptable to ask a DBE applying for interstate certification to provide additional items not listed in 49 C.F.R. §26.85(c)?"

No. A firm should not be required to submit additional information beyond the information identified in the rule. Stated differently, recipients may not require a DBE to supplement its home state certification package or on-site materials with information State B thinks is missing or that State B believes State A should have collected but did not. Recipients must make decisions on whether to certify a DBE from another state based on their evaluation of the information delineated in the rule. In the context of interstate certification, requests for information is limited to those items listed in §26.85(c). Section 26.109(c)'s duty to cooperate provision should not be used to request additional information from the firm beyond what is required by §26.85(c)." Interstate Certification Guidance, *supra*, at 2.

The Department generally makes clear in the preamble to the rule and in guidance that interstate certification is not intended as a series of "do-overs" by subsequent jurisdictions. The Department states repeatedly that it intends for

affords. Instead, NDDOT requested from the firm new or different information for which it lacked authority to do under the Regulation.⁵

ND's principal concern is that the firm's owner fails to re-prove in North Dakota that she "controls" the firm within the meaning of §26.71(g), relating to overall understanding of the business and directly related managerial and technical competence.⁶ However, DTI is simply a staffing company. *See, e.g.*, Record at 281-2, 384. There is little indication that NDDOT did anything but substitute its own judgment regarding control for the judgment of the home state. Substitution of judgment or mere interpretive disagreements do not rise to the level of "good cause" under §26.85(d)(2) to challenge the home state's certification.⁷

Conclusion

We conclude that requiring what amounted to a new on-site review was error in that it exceeded NDDOT's authority under §26.85. We reverse NDDOT's resulting determination under

the rule to *streamline* the process and *remove barriers* to certified firms becoming eligible to perform DBE work in other states. The rule was designed explicitly to replace a regime in which each certifier required out-of-state applicants to re-prove all aspects of eligibility, such as the disadvantaged owner's control, as if it were filing an initial application for certification. Section 26.85 indicates that the home-state on-site report is the only one to which NDDOT was entitled.

DTI alleges unprofessionalism, abuse of process, and bias on the part of the certifier. Denial Letter at 1. In light of our disposition, we need not formally opine on these allegations although the record suggests that NDDOT's interstate processes are not necessarily streamlined and barrier-reducing, as the interstate certification rule intends. *See, e.g.*, Record at 365-6 (substantially complete certification application nonetheless returned to DTI because documents provided under §26.85(c) were emailed to NDDOT rather than uploaded to its online system). *See also* Record at 141, 261, 376-78.

⁵ "As part of the certification process, the NDDOT UCP Board (Board) schedules an interview with the applicant. The Board is comprised of the Civil Rights Division Director, a Financial Management Division staff accountant, and a Subject Matter Expert. For interstate certification applicants, the Board offers a web-based meeting environment in which the applicant may use a webcam/telephone for the interview. In this case, Doon Technologies, Inc. was unable to connect to the meeting environment, thus the Board continued the interview by telephone." Denial Letter at 2. However, the rule does not authorize what amounts to a new on-site interview, and an interstate applicant need not re-prove every aspect of eligibility, including control within the meaning of §§26.71(e), (f), and (g). *See generally* Record at 383ff (home state on-site review report dated Dec. 6, 2013).

⁶ NDDOT explains at page 2 of the Denial Letter: "In Ms. Gupta's [ND] interview, it became apparent that the applicant did not have the expertise or control of the business for which she was requesting certification. Ms. Gupta's answers were vague and incomplete; she was unable to describe business operations in other than general terms. Ms. Gupta was unable to answer specific questions about the business including the number of employees and how the firm selected temporary staff for its clients." NDDOT concludes that Mr. Gupta still controls DTI despite relinquishing his shares to Ms. Gupta in 2013. *Id.* at 3. *See also* NDDOT Rebuttal dated August 10, 2016, Record at 263-4.

⁷ The Department has explained that the standards for the phrases "factually erroneous" and "inconsistent with the requirements [of the Regulation]" in §26.85(d)(2)(iii) are reasonably high and go beyond mere interpretive disagreement, State B's desire to see information that State A's file does not contain, or State B's determination that it would have explored certain eligibility-determinative facts differently and reached a different conclusion had it been the home state. Interstate Certification Guidance (July 9, 2014) at 4.

§26.89(f)(2) as “inconsistent with the substantive or procedural provisions of this part concerning certification,” specifically §§26.85(c) and (d)(2), and direct NDDOT to certify DTI as a DBE. Should NDDOT determine that it has reasonable cause to believe the DTI is ineligible, then it may pursue removal of certification under §26.87.

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
Departmental Office of Civil Rights

cc: DTI