March 17, 2017

Reference Number: 16-0146

Katherine Williams
Civil Rights Program Manager
Colorado Department of Transportation
Office of Certification
4201 East Arkansas Avenue, Room 150
Denver, CO 80222

Dear Ms. Williams:

JP and Concepts Co. (JPCO) appeals the Colorado Department of Transportation's (CDOT) 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 2015 Colorado application, JPCO was certified as a DBE in its home state of Florida and approximately 25 other states. For the reasons stated below, we reverse and direct CDOT to certify JPCO without delay.

Background

JPCO applied for interstate certification in Colorado (for the third time)[1] in February 2015. CDOT assigned the case to multiple analysts, who each requested extensive amounts of information from JPCO and its owner, in addition to materials specifically described in the pertinent interstate certification rule, §26.85(c). The supplemental requests included an updated personal financial statement, updated personal and business tax returns, JPCO bids and proposals, tax assessments, current inventory, proof of insurance, the owner's proof of source of contributed capital, the value of pensions, résumés of Advisory Board members, equipment lists and titles, wage reports, further information concerning materials and supplies and bonding capacity, further information concerning JPCO's contractual relationships with other firms, purchase orders, contracts, invoices, promissory notes, equipment and property leases, shareholder and Board meeting minutes, and lists of all of the firm's employees, past and present, together with those employees' complete employment applications.

By letter dated April 14, 2016, CDOT notified JPCO of its good cause intent under §26.85(d)(4) to deny certification. CDOT's notice of intent (NOI) states five reasons[2] for proposing to deny certification:

[1] CDOT denied the firm's 2009 and 2012 applications on equipment and independence grounds.

[2] CDOT mentions an additional reason relating to the firm's failure "to disclose further information" on employees and bonding capacity, "which was necessary to evaluate the dependence or independence of the firm." NOI at 4. As there is no formal proposal to find that the firm is ineligible on §26.71(b) independence grounds, the Department considers this reason to be an additional illustration of Reason 5, failure to cooperate.

1. The disadvantaged owner does not control the firm's board of directors under §26.71(d)(2).
2. The disadvantaged owner does not control the firm's work as a railroad contractor and track materials supplier (§§26.71(g) and (n)).
3. JPCO does not possess the equipment necessary to perform work as a railroad contractor (§26.71(m)).
4. The home state erred in certifying JPCO as a merchant supplier of railroad equipment under NAICS Code 423860.
5. JPCO failed to cooperate under §26.73(c).

JPCO responded to the reasons articulated in CDOT's good cause notice by letter dated May 11, 2016, enclosing supporting documents. Regarding Reason 1, JPCO noted that its by-laws at Part A §3 provide for the firm to have just one director, who is its 100% owner JoAnn Forance. JPCO stated that it had an Advisory Board consisting of Ms. Forance and several non-voting members. JPCO further stated that by-law §19 authorized non-voting Advisory Board members and that JPCO "decided that an Advisory Board would be of more benefit to the Company." Rebuttal at 8. (JPCO later explained that advisory boards permit more flexibility and are generally more cost effective than formal boards of directors.) The clear implication was that JPCO's Advisory Board meets in place of its Board of Directors and subsumes its functions. Accordingly, JPCO argued, Ms. Forance, the only voting director, "is in control and makes all final decisions." *Id.*

CDOT issued its denial letter on June 10, 2016. CDOT's letter states three reasons for denying certification:

1. The disadvantaged owner does not demonstrate that she controls the board of directors under §26.71(d)(2).[3]
2. JPCO has established a pattern of conduct demonstrating an attempt to evade the requirements of the DBE program (§26.73).[4]
3. JPCO does not sufficiently demonstrate that its owner controls JPCO 's work as a merchant wholesaler of track material supplies (§§26.71(g) and (n)).[5]

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[3] CDOT appears to argue both that the firm has no board of directors and that Ms. Forance does not control the board that does not exist. Denial Letter at 3. We believe that CDOT means that Ms. Forance contradicts herself in answers to CDOT's questions and thus has not proven that she controls the firm's board. The Department's view is that JPCO adequately explained that its Advisory Board is the functional equivalent of a board of directors, and substitutes therefor, and that Ms. Forance, as the only voting member, controls that Board—thus satisfying the regulatory requirement. JPCO provided specific evidence in the form of by-law provisions to support its claim.

[4] This was not a ground for proposing to deny interstate certification stated in CDOT's NOI. JPCO did not have the opportunity to challenge it under §26.85(d)(4). Accordingly, we do not consider Reason 2 to be properly before us in the appeal of CDOT's denial of interstate certification.

[5] Although CDOT attempts to cast Reason 3 as a §26.85(d)(2) good cause reason for denying interstate certification, as explained further below, we view this reason as largely an interpretive disagreement with the home state certifier over whether Ms. Forance's experience with JPCO and with her father's/brother's railroad company in the 1980s

On August 29, 2016, JPCO appealed to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department).

Decision

The record, considered as a whole, reveals that CDOT improperly sought information beyond that which JPCO must produce under §26.85(c). The Department has found this type of request to be error in, *e.g.*, 13-0273, Chartwell Staffing Solutions, Inc. (Oct. 24, 2014) (footnote 4: new on-site interview in State B not authorized in context of interstate application) and 16-0146, Doon Technologies, Inc. (Feb. 27, 2017) (subsequent certifier may not request new information not described in §26.85(c) relating to owner's control of firm).

After carefully reviewing the entire administrative record and considering all the facts in the record viewed as a whole, as §§26.61(e) and 26.89(e) require, the Department determines that CDOT's decision is inconsistent with substantive or procedural provisions concerning certification. *See* §§26.89(f)(1) and (2). We reverse under §26.89(f)(2) and direct CDOT to certify JPCO forthwith. CDOT may avail itself of remedies under §26.87(b) should it determine that it has reasonable cause to believe that JPCO is ineligible—but it may not require an interstate applicant to re-prove, in effect, all aspects of eligibility, as if the firm were filing an initial application for certification.

Discussion

Interstate Certification

CDOT neither certified the firm under §26.85(b) nor limited itself to an evaluation of the materials described in §26.85(c).[6] These are the only choices that the interstate certification rule

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equips her with the requisite overall understanding, competence, and experience directly related to JPCO's railroad supply business. To the extent that CDOT maintains that Ms. Forance's duties are limited to administrative and non-operational tasks, Denial Letter at 5, it fails to cite the appropriate provision, which is §26.71(g).

[6]The Department 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 that it intends for 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. The interstate certification guidance 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

affords. Instead, CDOT requested from the firm numerous types of new or different information for which it lacked authority to request under the Regulation.

CDOT requested that JPCO's owner provide an updated personal financial statement, updated personal and business tax returns, bank account signature cards, current market value and mortgage balance on owner's personal residence, current inventory, proof of insurance, proof of source of contributed capital, value of pensions and insurance policies, composition of JPCO's Board of Directors, résumés of Advisory Board members, stock certificates and transfer ledgers, equipment lists and titles, wage reports, further information concerning materials and supplies and bonding capacity, further information concerning JPCO's contractual relationships, purchase orders, contracts, invoices, promissory notes, equipment and property leases, shareholder and Board meeting minutes, and lists of all of the firm's employees, past and present, together with those employees' complete employment applications.[7] CDOT appears to have requested at least as much "supplemental" information as might accompany an original application for certification. CDOT's collection and deliberative processes consumed a total of 16 months for this application alone.

In contrast, the purpose of the interstate certification rule is to *facilitate certification* and remove unnecessary barriers to DBE firms that seek to work as a DBE in other states. *See, e.g.*, 76 Fed. Reg. at 5088 (Jan. 28, 2011). Interstate certification is not automatic reciprocity in the sense that each state must honor others states' certification decisions without review. Rather, under the rule, a firm certified in its home state is presumed to be eligible for certification in other states in which it applies. The subsequent certifier's review is, however, narrower in scope than would be the case for an original application for certification. The Regulation explicitly limits the scope of review for interstate certification to the information described in §26.85(c)(1-4):

> (1) …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.

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used to request additional information from the firm beyond what is required by §26.85(c)." Interstate Certification Guidance (July 9, 2014) at 2.

[7] *See, e.g.* information request numbers 1, 2, 3, and 4 dated April 29, July 23, September 28, and October 21, 2015. *See also* 2015 Interstate Application, Screenshot of CDOT Electronic Application System, including Q&A; JPCO Memo to Reviewer dated October 23, 2015, alleging undue burden: "I have provided an extraordinary amount of data since March 12 and I am seriously concerned that your scrutiny may be misguided. Please do not cause JPCO a hardship of hiring extra personnel to meet your deadlines and/or to dig through five past years of records for more and more minor details."

CDOT sought, among other things, clarification concerning the composition of JPCO's Board of Directors. This narrow inquiry is acceptable in our view. The firm's minutes of meetings from the 2000s (showing several apparently non-disadvantaged board members) presented a fact-based good cause reason for CDOT to express its intent to deny certification as a DBE. Concerning board control, CDOT's request to clarify information described in §26.85(c)(1) is not unduly burdensome or inappropriate.

(2) …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) …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.

Recipients may not require a DBE to supplement its home state (State A) certification package or on-site materials with information which an out-of-state certifier (State B) believes to be 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. *See* §26.85(c); Interstate Certification Guidance (July 9, 2014) at 2.

Control of Board of Directors

Based on meeting minutes either contained in the home state file or collected in JPCO's previous applications, CDOT identified good cause to challenge JPCO's home state certification as erroneous or inconsistent with the Part 26 certification requirements. CDOT took the position that JPCO did not adequately prove that its disadvantaged sole owner controls the firm's Board of Directors. JPCO countered with documentation that its Board comprises just one director, with one vote, and several non-voting advisory members. It is not outcome-determinative, in the Department's view, that JPCO may not have rigidly observed corporate formalities since its inception, for the certifier must evaluate the eligibility based on the firm's "present circumstances." §26.73(b)(1). JPCO adequately demonstrates on appeal that JPCO's Board consists primarily of non-voting advisory members and that Ms. Forance has the only vote. CDOT's objection, in light of the evidence presented, amounts to a question about nomenclature: whether what JPCO calls an Advisory Board is in fact its Board of Directors. We find that it is. There appears to be no fact-based challenge to the underlying assertion, based on by-laws §§3 and 19, that Ms. Forance is the only director and has the only vote. *See, e.g.*, JPCO Answers to CDOT Information Request #1 (April 29, 2015): "**NO BOARD OF DIRECTORS.**

ADVISORY BOARD MEETS AND I TAKE THEIR ADVICE UNDER CONSIDERATION. I HAVE THE ONLY DECIDING VOTE." We conclude that JPCO has shown, by a preponderance of the evidence (i.e., more likely than not), that Ms. Forance controls the Board of Directors, within the meaning of §26.71(d)(2).

Attempts to Evade the Requirements of the DBE Program

As noted above in footnote 4, we do not consider this interstate denial ground to be properly before us on appeal because CDOT did not include it in its NOI and JPCO had no opportunity to respond under §26.85(d)(4)(ii). We decline to opine on the merits.

Lack of Control under §§26.71(g) and (n)

CDOT's concern appears to be that JPCO's owner fails to re-prove that she has the wherewithal to control the firm within the meaning of §§26.71(g) and (n), relating to overall understanding of the business and directly related managerial and technical competence.[8] The interstate certification rule, however, does not technically require that the firm re-prove its eligibility. It requires instead that JPCO submit a copy of its home state application for CDOT's review.

CDOT, in part, takes issue with differences in résumé entries provided in JPCO's 2012 and 2015 applications. The 2012 application is, under the present circumstances rule of §26.73(b)(1), not before us in the present appeal. *See also* §26.89(f)(6). All that we need consider is the information in JPCO's 2015 application and 2016 appeal. We reject the differences in résumé entries as constituting a good cause ground for challenging the home state certification as erroneous or inconsistent with the certification standards.

CDOT further relies on information in a home-state on-site report, from which it draws different conclusions than the Florida certifier does:

> CDOT has previously determined that you, as the disadvantaged owner, are unable to control the firm's work as a railroad contractor. In making our determination, CDOT considered the on-site report provided by your firm's certifying home agency, the Florida Department of Transportation (FDOT). That report noted your duties and responsibilities as being "associated with books and records, search for projects, secure insurance, look-over plans and specifications, and other administrative work."

Denial Letter at 5. Available evidence, considering the record as a whole, indicates that CDOT is merely substituting its own judgment regarding control for the judgment of the home state. Substitution of judgment or interpretive disagreements do not themselves rise to the level of "good cause" under §26.85(d)(2)to challenge the home state's certification.[9]

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[8]CDOT cites only §26.71(n), but its discussion of résumés and managerial experience indicates that CDOT also disputes the home state's determination that the firm satisfied the requirements of subsection (g).

[9]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. Interstate Certification Guidance (July 9, 2014) at 4. The rule requires that State B identify clear

Conclusion

We primarily conclude that requiring what amounted to a new, original application for certification was reversible error in that it greatly exceeded CDOT's authority to request information under §26.85 and placed undue burdens on the interstate applicant. We reverse CDOT's determination under §26.89(f)(2) as "inconsistent with the substantive or procedural provisions of this part concerning certification," specifically §§26.85(c) and (d), and direct CDOT to certify JPCO as a DBE. Should CDOT determine that it has reasonable cause to believe the JPCO is in fact ineligible, then it may pursue removal of certification under §26.87.

We further conclude that JPCO met its burden of proof with respect to denial letter Reason 1; that Reason 2 is not properly before us on appeal; and that Reason 3, as explained in CDOT's denial letter, does not amount to §26.89(d)(2) good cause for denying interstate certification.

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: JPCO

error in the home state certification or specific inconsistency with the certification standards. From the voluminous record before us, we cannot determine that such clear error or inconsistency with the certification rules exists in this case. If so, it was incumbent on CDOT under §26.85(d) to specify the nature of the error or inconsistency. We might infer that CDOT intended to say (and explain why) the Florida certification is inconsistent with §26.71(g), but CDOT did not actually do so, as the rule requires. *See generally* Denial Letter.