

March 9, 2018

Reference No.: 17-0079

Phillip Yelder
Director of Human Relations
City of Kansas City, Missouri
4th Floor, City Hall
414 East 12th Street
Kansas City, MO 64106-2795

Dear Mr. Yelder:

DBF Flooring, LLC (DBF) appeals the City of Kansas City, Missouri's (COKC)¹ January 26, 2017 denial of DBF's application for interstate certification as a Disadvantaged Business Enterprise (DBE) under the rules of 49 CFR Part 26 (the Regulation). A careful review of the administrative record shows that COKC did not follow the interstate certification rules of §26.85, and we therefore reverse the decision and direct COKC to certify DBF without delay. *See* §26.89(f)(2).²

The pertinent facts are uncontroverted. DBF indicated on page 1 of its application that it was certified in its home state and that it attached a copy of its Kansas (KUCP) certificate. DBF Uniform Certification Application (UCA) at 1; *see* §26.85(b)(1) (an interstate applicant is only required to provide a copy of its home state certification to apply for interstate certification). COKC, as the certifying agency, was therefore aware of its obligation under the §26.85(a) to process the application pursuant to the interstate certification rules. *See* §26.85(a) (the interstate certification rules apply "with respect to any firm that is currently certified in its home state.")

Section 26.85 gives a subsequent certifier (State B) just two processing options: (1) State B may certify the firm after the certifier has verified that the firm is certified in its home state (State A); or (2) State B must request that the applicant firm provide the information described in §26.85(c) and then it must determine whether there is good cause to believe State A's certification is erroneous or should not apply in State B. §§26.85(b), (c), (d). COKC chose neither option. It entirely disregarded the interstate certification rule. Specifically, COKC did

¹ COKC is a member of the Missouri Unified Certification Program.

² §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 or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

not certify the firm without further inquiry, request that DBF provide the information described in §26.85(c), issue a good cause notice or offer the firm an opportunity to respond.

Section 26.85 facilitates interstate certification by significantly streamlining the process and narrowing the scope of State B's review, as compared with the more exhaustive eligibility evaluation that an initial application triggers. 76 Fed. Reg. at 5088.³ The rule intentionally limits State B's evaluation to essentially the information in State A's file and an accompanying affidavit. *See* §25.85(c). The rule does not permit prospecting for other or new information whether through document requests, new on-site interviews, or otherwise. COKC violated the rule when it requested information not described in §26.85(c), most obviously (but probably not exclusively) when it subjected the firm to a new site visit and interview. *See, e.g.*, §§26.85(c)(4)(ii), (d)(1); *see generally* 13-0273, Chartwell Staffing Solutions, Inc. (October 24, 2014) at fn. 4 (State B has no right under the interstate certification rule to conduct its own on-site interview), 16-0146, Doon Technologies Inc. (February 27, 2017) at fn. 4 (accord); *see also* Interstate Certification Guidance at 2.⁴

We reverse and direct certification under §26.89(f)(2). We conclude that COKC's decision is plainly "inconsistent with the substantive or procedural provisions of this part concerning certification," within the meaning of §§ 26.89(f)(1) and (2). We express no opinion on substantive eligibility—other than to observe that the interstate certification rule affords the home state's determination substantial, but not complete, deference. Should COKC's apparent reservations rise to the level of reasonable cause to believe DBF is ineligible, then it must pursue removal of certification under §26.87.

This decision is administratively and not subject to reconsideration.

³ The theory is that it is unduly burdensome to require an applicant already certified as a DBE to reprove each aspect of eligibility in subsequent applications when it has already fully demonstrated eligibility in the home state. In promulgating the interstate certification rule in 2011, the Department explicitly chose to replace a regime under which subsequent certifiers had authority to treat all applications as original ones.

⁴ Specifically, the 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 used to request additional information from the firm beyond what is required by §26.85(c).

Interstate certification Guidance (July 9, 2014) at 2. (Emphasis added.) The Department's official Interstate Certification guidance is available at:

<https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-guidance>

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights

cc: DBF