



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

December 18, 2017

Reference Number: 16-0171

Jeff P.H. Cazeau, Esq.
DBE Direct, LLC
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Dear Attorney Cazeau:

Tarra Enterprises, Inc. (TEINC) appeals the California Unified Certification Program's (CUCP) denial of the firm's interstate application for Airport Concession Disadvantaged Business Enterprise (ACDBE) certification.¹ CUCP denied certification because TEINC failed to provide information pursuant to the requirements of 49 C.F.R. Parts 23 and 26 (the Regulation).² After careful review of the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), finds that the denial is supported by substantial evidence and is consistent with the Regulation's substantive and procedural provisions. The record confirms, and TEINC concedes, that the firm did not timely provide eligibility-related information that CUCP requested. We therefore affirm under §26.89(f)(1).³

I. Facts

TEINC is certified as an ACDBE in its home state of Florida. On January 4, 2017, CUCP issued the firm a notice of its intent to deny (NOI) TEINC's September 2016 interstate certification application because TEINC did not provide items CUCP believed are required pursuant to §26.85(c), including: tax returns for its affiliates (Host/Tarra Enterprises, AMS of South Florida, AMS-TEI Miami, and AMS-TE), a 2010 decision by the Nevada UCP denying the firm ACDBE certification, and joint venture agreements. As required by §26.85(d)(4)(ii), CUCP offered the firm an opportunity to respond in writing to the agency's proposed certification denial decision or request a meeting to discuss the agency's objections within 30 days as required under

¹ The certifier is the San Diego County Regional Airport Authority, a member of the CUCP.

² 49 C.F.R. Part 23 applies to ACDBE certification actions. §23.31(a) of that provision incorporates the standards and procedures (§§26.61-91) UCP recipients must use for making ACDBE certification decisions.

³ §26.89(f)(1) states: "The Department affirms [the certifier's] decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." The Department's role on appeal of a certification denial is simply to determine whether substantial evidence supports the state's determination and whether the determination is consistent with applicable substantive and procedural certification requirements.

§26.85(d)(4)(i),(ii). On March 14, 2017, CUCP issued its final determination, upholding its denial decision because TEINC did not respond.

II. Appeal

You appealed CUCP's decision on the firm's behalf on June 12, 2017 and argue 4 points: (1) TEINC chose not to appeal the Nevada UCP's 2010 decision because it believed that denial was meritless; (2) TEINC followed the interstate certification requirements in other states by submitting no change affidavits and correspondence; and a failure to provide a copy of the Nevada UCP's denial letter to CUCP is harmless error; (3) CUCP is not required by the interstate certification rule to review the joint venture agreements and its request for these items is not permitted; and (4) CUCP's denial letter is missing specific references to the record evidence that supports each reason for the decision as §26.86(a) requires.

III. Decision

a. CUCP chose not to verify the Florida certification and certify the firm in California as §26.85(b) allows. Instead, CUCP reviewed the interstate application under the procedures described in §26.85(c). Under this provision, TEINC is required per §26.85(d)(4)(iii) to provide certain items contained in its home state file and items submitted to other states. This provision states:

(1) You must provide to State B 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.

(2) You must also provide to State B 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) You must submit 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.

To summarize, the burden is on the applicant TEINC to provide the complete application form filed in the home state, supporting documents, affidavits of no-change, notice of changes, and correspondence from other recipients concerning the firm's certification status. CUCP informed the firm of this requirement by email on October 6 and 31, 2016; and TEIC was required to provide this information to CUCP. This includes correspondence from other certifiers (e.g., the Nevada UCP denial) and complete tax returns. As part of its annual "no-change" submission to its home state (and other states it is certified in), TEINC is required to submit documentation concerning its gross receipts and those of its affiliate firms.⁴ CUCP, having not received this information found good cause to deny the firm interstate certification and properly followed the procedural requirements by issuing a NOI.

Under the rule, TEIC bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of the Regulation's certification provisions with respect to the particularized issues raised by CUCP in its NOI—here, TEIC's failure to respond to the agency's requests. The firm is not otherwise responsible for further demonstrating its eligibility to CUCP.

You concede in your appeal (pages 2 and 6) that the Nevada UCP letter was not included in the firm's application materials to CUCP. CUCP's denial on this ground was not based on an interpretive disagreement, nothing in the administrative record demonstrates that anyone provided the information CUCP referenced nor disagreed with the request, even after the agency's NOI.⁵ A failure to submit denial decisions by other UCPs and complete tax return as part of a firm's interstate certification application is not harmless error. Accordingly, CUCP was entitled to deny interstate certification on *either* §26.85(d)(2)(v) *or* §26.73(c) grounds as we agree that the firm did not provide what was required under §26.85(c)(1) and (2). This failure constitutes a failure to cooperate under the terms of §§26.73(c) and 26.109(c), provisions CUCP cites, which state:

DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification. §26.73(c)

All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants,

⁴ The firm tax returns are missing several documents and are clearly incomplete. Section 26.83(j) states: "the affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts." Receipts of affiliates are counted when determining whether an ACDBE meets the small business size criteria and the statutory cap on the participation of firms in the ACDBE program. (*See* §23.3 definition of affiliation).

⁵ We acknowledge that CUCP did not repeat points from its NOI in its March 14, 2017, final decision upholding the removal; however, this did not result in any fundamental unfairness to TEIC or substantially prejudice its opportunity to present its case. *See* §26.89(f)(3).

and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. *Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).* (Emphasis added.) §26.109(c)

CUCP's denial was consistent with §26.85(d)(2)(iii) and we affirm under §26.89(f)(1).

b. CUCP also stated that the joint venture agreements between TEIC and these businesses were not provided with the firm's interstate certification application. You allege that CUCP is not required by the interstate certification rule to review the agreements and its request for these items is not permitted. In rebuttal, CUCP argues that it is appropriate for the agency to review these agreements because it must review how TEIC performs its work—in CUCP's view, TEIC has no operations outside of these agreements, shows no payroll or rent on its tax return, yet generates \$2.5 million in income. CUCP also argues that it must review these agreements as part of its duty to examine the firm's independence and had all this information been provided to TEIC's home state, it is safe for CUCP to assume the home state did not examine the relationships as §26.71(b) requires. It is unclear whether CUCP viewed the joint venture agreements to be missing from TEIC's home state file; CUCP does not clearly articulate this as a ground for its denial decision. We do not opine in this decision on that request.

V. Conclusion

We affirm CUCP's denial decision under §26.89(f)(1) because substantial evidence supports it and because the decision is consistent with applicable substantive or procedural provisions of the Regulation. TEINC may reapply for certification after March 14, 2018. *See* §26.86(c) (recipient may impose a waiting period of up to 12 months for reapplication. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: CUCP