

March 16, 2017

Reference Number: 17-0117

Jamir A. Davis
Executive Director
OCRSBD
REDACTED
Frankfort, KY 40601

Dear Mr. Davis:

DES Wholesale, LLC dba Diversified Energy Supply (DES) has appealed the Kentucky Transportation Cabinet's (KYTC) denial of its application for interstate certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation).¹ After considering the full administrative record, the Department reverses under §26.89(f)(2) and directs KYTC to certify DES forthwith.

Facts

Allison de Agüero owns 100% of DES, which brokers petroleum and fuel. She is a disadvantaged individual who serves as the firm's president. At the time of DES's 2012 home state (Georgia) certification, her disadvantaged husband Fernando de Agüero owned all of DES and served as president. On November 1, 2014, Mr. de Agüero sold her 100% of the company, and, according to his resume, left DES to serve as President of Mansfield Power and Gas, LLC. Mr. de Agüero returned to the company as Chief Operating Officer in 2016 but did not reacquire ownership.

DES submitted its interstate certification application to KYTC on June 22, 2016. By letter dated September 16, 2016, KYTC requested a host of information apparently not in the home-state file. KYTC notified DES on November 23, 2016, and again on January 13, 2017, that it had good cause not to certify DES. DES elected to respond in writing, and submitted documentation on February 3 and 4, 2017, that pertained to Mrs. de Agüero's ownership of the firm. KYTC alleged that the information provided was insufficient because it did not include a new Georgia Department of Transportation (GDOT) on-site investigation and interview with Mrs. de Agüero as the owner of the firm.² GDOT had interviewed Mr. de Agüero and performed an on-site investigation when he was the owner before certifying DES in 2012. Denial Letter at 3. GDOT

¹ KYTC cited Regulation §26.85(d)(2)(ii) and (iii) as its denial grounds. KYTC, however, did not cite the former ground in its good cause notice to DES. As DES had no notice of, or opportunity to respond to, that reason, KYTC cannot rely on that ground in its denial letter. Accordingly, the issue is not properly before us on appeal

² We find no such requirement in §26.85, and KYTC cites none.

reluctantly conducted a new on-site investigation and interview with Mrs. de Agüero on March 1, 2017, and submitted the documentation to KYTC. *Id.* KYTC denied interstate certification by letter dated April 17, 2017.³

KYTC's §26.85(d)(2) good cause notice (we consider the later notice the operative one) stated that KYTC had good cause to deny certification because of conflicting information in DES's Kentucky and Georgia applications.⁴ Specifically, the interstate application showed Mrs. de Agüero to be the firm's sole owner and president while the home-state application showed her husband in these positions; therefore GDOT's certification was "factually erroneous" or inconsistent with the Regulation because GDOT declined to perform an interview with Mrs. de Agüero as the current owner.⁵ Good Cause Letter 01/13/17 at 1-2. According to KYTC, GDOT was unable to accurately determine control⁶ of the firm based on e-mail correspondence between the two state agencies pertaining to §26.71(k)(2) in December 2016. *Id.* at 2. After GDOT conducted a new on-site investigation and interview on March 1, 2017, KYTC cites "new information" that demonstrates that Mrs. de Agüero does not control the firm pursuant to §§26.71(g) and (k)(2). KYTC focused on the March 13, 2016 Kentucky application, where she marked that Mr. de Agüero "seldom" supervises field operations, because she "always" supervise them.⁷ Denial Letter at 2. However, in the March 1, 2017 on-site interview, Mrs. de Agüero stated that Mr. de Agüero monitors job sites and that she monitors administrative functions. KYTC also highlights her statement about making decisions about major problems on projects in concert

³ KYTC cites no reason for its substantially delayed determination versus applicable timelines. Interstate certification is an abbreviated, limited inquiry that does not require applicants to submit information beyond that contained in the home-state file (or in correspondence with other state certifiers or the Department) at the time of the interstate application. *See generally* §§26.85(c), (d). The rule generally requires States B to afford home-state certifications substantial deference. *See* §26.85(d)(2). The Department may reverse adverse interstate certification decisions resulting from State B's impermissible requests for information not in the home state's (or other certifier's) file. *See generally* §§26.85(c); 26.89(f)(2); 16-0046 Doon Technologies, Inc. (Feb. 27, 2017) (new on-site interview impermissible under interstate certification rule where firm not applying for NAICS codes in which it is not certified in home state); 13-0273 Chartwell Staffing Solutions, Inc. (October 24, 2014) (similar).

⁴ Conflicting information is not itself one of the five good cause reasons State B must cite under §26.85(d)(2).

⁵ There is similarly no rule requiring a new home-state on-site review, so Georgia's failure to conduct one by definition cannot be good cause for KYTC to deny certification under §26.85(d)(2)(iii). The obvious change in ownership is at best "new information" not available to GDOT at the time it certified the firm because in 2012 the change hadn't happened yet. However, we doubt that this new information "show[s] that the firm does not meet all eligibility criteria." Both the preamble to the final rule and the Department's formal guidance issued under it require a direct contradiction of a specific certification requirement. While we need not see that KYTC cites such a contradiction.

⁶ Preamble and guidance state that mere differences of opinion or substitutions of judgment do not rise to the level of factual error or "inconsistent with."

⁷ An interstate application contains no such expanded control section, nor did the 2011 Georgia UCA. KYTC apparently required DES to file a new Uniform Certification Application (which is the title of the document KYTC required, and its content conforms with that of the Appendix F UCA, which has existed only since 2014) in contravention of §26.85(c), and used information gained from this impermissible source to deny DES's interstate application. Requiring an interstate applicant to submit what amounts to an initial application in State B is an independent ground for reversal.

with her chief operating officer, who is Mr. de Agüero. *Id.* at 2-3.⁸ KYTC focuses its denial letter from April 17, 2017 on this new information, stating that “there is a rebuttable presumption of control” due to Mr. de Agüero’s participation in this capacity at the firm, and that GDOT “erroneously determined that you, as distinct from the family as a whole, control the firm.” *Id.* at 3.⁹

Authority

Section 26.85(d) states in pertinent part:

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(2) Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(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.

(4) If, as State B, you have determined that there is good cause to believe that State A’s certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

⁸ This information being ill-gotten, KYTC may not rely on it in denying certification. Hence we reverse in part (see next page) based on our finding that there is no substantial evidence to support KYTC’s decision.

⁹ In the good cause letter, KYTC cites GDOT’s statements that “DES Wholesale is pretty much a family-owned business” and that “both Mr. and Mrs. Agüero are directing [sic] involved in the affairs of the firm” as evidence of §26.85(d)(2)(ii) factual error or inconsistency, presumably with §26.71(k). (The denial letter seems to allege an additional error/inconsistency under §26.71(l).) Although we need not decide the underlying issue because KYTC first cites its “new information” ground in the denial letter, we observe that §26.71(k) explicitly requires Georgia’s “judgment.” KYTC’s objection therefore amounts to a quarrel with Georgia’s judgment, not that the firm does not meet all eligibility criteria.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objection to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

Discussion

The purpose of the interstate certification rule is to *facilitate* certification of currently certified firms in other jurisdictions. While it is not automatic reciprocity, KYTC's review is limited to specifically enumerated items in the rule. There is a bright-line distinction between applications for interstate certification and applications for initial certification.

KYTC neither certified DES under §26.85(b) nor limited itself to an evaluation of the materials described in §26.85(c).¹⁰ These are the only choices that the interstate certification rule affords. Instead, KYTC requested new or different information, described above, for which it lacked authority under the Regulation. We therefore reverse KYTC's denial as (1) procedurally and substantively inconsistent with the requirements of §§26.85(c) and (d), and unsupported by substantial evidence permissibly obtained.

¹⁰The record shows that KYTC compelled DES to provide information new or different from that contained in home state file or otherwise described in §26.85(c) and submit to a new on-site interview, in contravention of the simple affidavit requirement of §26.85(c)(4)(ii). Although §26.85(d)(1) permits KYTC to request any "any updates to the site visit review," the provision, taken in context of the overall rule, refers to documents in the home state file at the time of the request, not ones to be created later. *See, e.g.*, §26.85(e). As we noted in 16-0146 Doon Technologies, Inc. (Feb. 27, 2017), subsequent certifiers, under the interstate certification rule, have no general right to conduct their own site visits or interviews or to compel the home state to do so. Section 26.85 indicates that the original Georgia on-site report is the only one to which KYTC was entitled. Further, the Department's formal 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 [sic] 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.

The record before us shows that control is a matter already demonstrated and decided in the home state. KYTC clearly differs with Georgia's determination, but under the rule, it may not simply substitute its own judgment for that of the home state. Substitution of judgment or mere interpretive disagreements concerning how the Regulation should apply to an agreed set of facts generally do not rise to the level of "good cause" under §26.85(d)(2).¹¹ We reverse for the additional reason that KYTC fails to articulate "good cause" within the meaning of the Regulation.

Notwithstanding KYTC's valiant attempt to shoehorn ill-gotten information into the rule's "factually erroneous" or "inconsistent with" language, we find no such error or direct inconsistency. As for the contention that "new information" from GDOT's second on-site review requires a different result, we answer that the information is from an impermissible source and cannot form the basis for a good cause notice that predates it—and that in fact KYTC's good cause notice did not cite §26.85(d)(2)(ii) as a ground.¹²

Conclusion

We reverse under §26.89(f)(2) and direct KYTC to certify DES without delay. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

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

cc: DES

¹¹The 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 construed facts differently and reached a different conclusion had it been the home state. Interstate Certification Guidance (July 9, 2014) at 4.

¹² Because of, e.g., the §26.85(d)(2) and (4) due process requirements, the Denial Letter may not rely on a ground not stated in the good cause notice.