

February 1, 2018

Reference Number 17-0123

Deborah M. Green
Administrator
Office of Small & Disadvantaged Business Enterprise
Ohio Department of Transportation
1980 W. Broad Street, Mail Stop 3270
Columbus, Ohio 43223

Dear Mr. Ms. Green:

Peak Electric, Inc. (Peak) appeals the Ohio Department of Transportation's (ODOT) May 12, 2017, removal of NAICS code 238310 from Peak's Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R. part 26 (the Regulation). For the reasons below, we reverse under Regulation §26.89(f)(2) and direct ODOT promptly to restore Peak's certification in code 238210.

Background

On February 9, 2017, ODOT informed Peak that it proposed to remove NAICS code 238210 from Peak's DBE certification.¹ ODOT stated that the reason was that a recent ODOT audit had determined that NAICS code 238210 "does not align with the requirements outlined in 49 CFR §26.71(n)(1) and (3)." The NOI specified no evidence in support of ODOT's reason. *But see* §26.87(b) ("The statement of reasons for the finding of reasonable cause *must specifically reference the evidence* in the record on which each reason is based.") (emphasis added). The NOI summarizes the requirements of §§26.83(i) and (j) without stating any reason based on either provision. The NOI advised Peak of its right to a state-level appeal but did not "give the firm an opportunity for an informal hearing," as §26.87(d) requires. *See* NOI at 2; *see also* §26.87(d)(3) (firm *may elect* to present information and arguments without going to a hearing but need not do so). ODOT instructed Peak instead that the "appeal must be filed in writing." NOI at 2.

When Peak did not respond within the 30 days allotted, ODOT notified Peak by letter dated May 12, 2017 (NOD), of its final decision to remove code 238210. NOD at 1. The NOD advised

¹ Notice of Intent (NOI). The proposal did not affect Peak's certification to perform work, as a DBE, described in NAICS codes 423610 and 423120. *Id.* at 1. Both of those codes pertain to wholesale distribution. Code 238210 pertains to (electrical) contracting and installation.

Peak that “ODOT's decision is based on the same grounds^[2] as stated in its [February 9, 2017] certified letter.” *Id.* Finally, the NOD notified the firm of its right to appeal³ the final decision, see §§26.87(g) and 26.89(a)(1), to the Department.

Discussion

ODOT's NOI and NOD are fatally flawed, substantively and procedurally, and ODOT's underlying decertification process is similarly deficient. Neither fully complies with applicable substantive or procedural certification rules, most obviously the requirements of §26.87. That section in part ensures due process to firms subject to decertification actions. Its requirements are designed to confer meaningful rebuttal rights. As noted above, §26.87(b) (regarding the NOI) requires an explanation of any and all reasons for the proposed action and citations to specific evidence in the record that supports them. The NOI cites no such evidence in support of the stated ground of insufficient “alignment” under §26.71(n)⁴ and, in our view, also fails adequately to “explain” that “reason.” Section 26.87(d) requires the certifier to give the firm an opportunity for an informal hearing. ODOT explicitly provided contradictory information when it stated, incorrectly, that Peak must rebut, if at all, in writing. Section 26.87(g), like §26.87(b), requires ODOT to refer to specific evidence in support of all reasons. ODOT refers to none that is substantial.⁵ Section 26.87(f) requires a statement of a 26.87(f)(1) reason for the certifier's action; ODOT specifies none. Section 26.71(g) (regarding the NOD), like subsection (b), requires both an explanation of the reason and specific references to supporting evidence. Again, ODOT's letter omits a full explanation and fails to cite evidence specifically pertinent.

Conclusion

² As further explained above and below, the NOI and NOD state only one ground.

³ The NOD accurately states that Peak may appeal to us but misstates the time within which Peak must appeal and this Division's name and location. We respectfully request that ODOT immediately change its denial/decertification letter boilerplate to conform with the actual §26.89(c) requirement and to facilitate appeals by including more accurate addressee information, as follows:

This decision may be appealed to the U.S. Department of Transportation (USDOT). Any appeal to USDOT must be in writing and must be sent within 90 days of the date of this letter. Please see 49 CFR §26.89(c) for appeal letter content requirements and send your appeal (if any) to:

U.S. Department of Transportation
Departmental Office of Civil Rights
Disadvantaged Business Enterprise Division
1200 New Jersey Avenue, SE, Room W78-103
Washington, DC 20590

⁴ If ODOT's intention was, in addition, to explain reasons arising under §26.83, the NOI and NOD simply fail to do that, *and* they cite zero evidence in support.

⁵ The only arguably supporting fact that ODOT refers to is that its audit concluded that Peak does not meet the requirements of §26.71(n) with respect to the allegedly nonaligned code. That is not a properly a supporting fact. It is a conclusion without an explanation.

ODOT, in short, cites no substantial evidence in support of its ineligibility determination, and its decision is inconsistent with applicable Regulation provisions, substantive and procedural. Accordingly, we reverse under §26.89(f)(2) and to direct ODOT's immediate reinstatement of the removed NAICS code.

This disposition is administratively final and not subject to petitions for reconsideration.

Final Note

It is the certifier's province, not ours, to determine overall eligibility. We do not conduct an independent, *de novo* review. *See generally* §26.89(e). This letter offers no opinion on whether Peak is in fact eligible for certification in the disputed code. We decide only that ODOT did not provide substantial evidence of ineligibility and that ODOT's decertification decision and processes were non-Regulation compliant. Should ODOT have reasonable cause to believe that Peak is ineligible for any work code, or to be certified at all, then §26.87(b) *requires* it to pursue decertification, starting with providing notice that explains reasons, cites supporting evidence, and accurately apprises Peak of its hearing/rebuttal rights.

Sincerely,

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

cc: Lenora McIntyre, President, Peak Electric, Inc.