

December 19, 2018

Reference Number 17-0159

Ms. Sisa Colletti  
Miller Turetsky Rule & McLennan  
3770 Ridge Pike  
Collegeville, PA 19426

Dear Ms. Colletti:

This letter responds to the appeal<sup>1</sup> you filed on behalf of your client ILJ Boston, LLC (ILJB) regarding the Massachusetts Port Authority's (Massport) decision to remove<sup>2</sup> ILJB's Airport Concession Disadvantaged Business Enterprise (ACDBE) certification under the rules of 49 CFR Parts 23<sup>3</sup> and 26 (the Regulation). After considering the full administrative record, we affirm the decertification.<sup>4</sup>

### *Background*

ILJB received ACDBE certification from Massport in August 2004.<sup>5</sup> The firm is a subsidiary of APW Holdings, LLC (APW), which is a certified DBE firm. It is undisputed that Iris Goldschmidt owns 97% of APW and APW wholly owns ILJB. ILJB relies on Ms. Goldschmidt's status as a presumed socially and economically disadvantaged (SED) owner of APW for ILJB's continued ACDBE certification eligibility. APW has approximately fourteen additional subsidiaries.

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<sup>1</sup> See Appeal Letter (Sept. 21, 2017).

<sup>2</sup> See Final Adjudicatory Decision (FAD) (May 30, 2017).

<sup>3</sup> Section 23.31(a) states: "As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (*see* part 26, §26.81)."

<sup>4</sup> Section 26.89(f)(1) states: "The Department affirms your 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."

<sup>5</sup> See ILJ Boston Certification Letter (Aug. 25, 2004).

As part of a standard three-year certification review, Ms. Goldschmidt provided Massport an updated personal net worth (PNW) statement in June 2015. She also submitted a copy of the 2014 consolidated federal tax return for APW and its subsidiaries and a document that ILJB and Massport refer to as an adjusted trial balance. Ms. Goldschmidt calculated her PNW as **\$REDACTED**.<sup>6</sup> She excluded the value of her ownership interest in ILJB as well as the value of her ownership interests in APW and its additional subsidiaries. Based on the documents Ms. Goldschmidt provided, Massport calculated her PNW as **REDACTED REDACTED** and concluded that her presumption of economic disadvantage had been rebutted.<sup>7</sup> In its calculation, Massport included the value of Ms. Goldschmidt's ownership interest in APW and all subsidiaries except ILJB. In April 2006, Massport gave ILJB notice, as required by §26.87(b), that it intended to remove ILJB's ACDBE certification because Ms. Goldschmidt is not economically disadvantaged.<sup>8</sup> Massport held an informal hearing in August 2016 and issued a final notice of decertification in May 2017.<sup>9</sup>

### *Summary of Arguments*

Massport stated that it excluded ILJB from its calculation of Ms. Goldschmidt's PNW because §26.67(a)(2)(iii)(A)<sup>10</sup> requires a certifier to exclude the value of the applicant or participating firm. Massport explained that “our interpretation of the regulation is that only the applicant firm is deducted from personal net worth, and the applicant firm is ILJ Boston, formed in 2003 and certified in 2004, and that even though there is a consolidated tax return that's filed, that each firm that has an EIN numbers [sic] [is] a separate firm and counts as an affiliate towards the owner's PNW.”<sup>11</sup>

ILJB contends that the value of APW, as well as its subsidiaries, should be excluded from Ms. Goldschmidt's PNW because the firms collectively form a “unitary enterprise.”<sup>12</sup> ILJB bases its

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<sup>6</sup> See Personal Net Worth Statement of Iris Esta Goldschmidt (June 22, 2015). Section 23.3 defines “personal net worth” in part as: “[T]he net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth (PNW) does not include the following: (1) The individual's ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification [ . . . ].” This mirrors language in §26.5 and §26.67(a)(iii), which state in part: “In determining an individual's net worth, you must observe the following requirements: (A) Exclude an individual's ownership interest in the applicant firm [ . . . ].”

<sup>7</sup> See Notice of Intent to Decertify ILJ Boston (April 22, 2016). See also §26.67(b)(1)(i).

<sup>8</sup> See §26.67(b)(i) and §23.35.

<sup>9</sup> See Hearing Transcript and FAD.

<sup>10</sup> Section 26.67(a)(2)(iii)(A) states: “In determining an individual's net worth, you must observe the following requirements: Exclude an individual's ownership interest in the applicant [or certified] firm.”

<sup>11</sup> Hearing Transcript at 12.

<sup>12</sup> Appeal Letter at 11. We are aware of no exception in the Regulation for “unitary enterprises” composed of multiple business entities, and ILJB cites none.

argument on a rule for determining whether an SED person owns and controls a subsidiary through her ownership and control of that company's parent. *See* Regulation §26.73(e)(2).<sup>13</sup>

### *Discussion and Decision*

A presumed disadvantaged person who owns a majority of, and controls, an AC/DBE must remain disadvantaged for the firm to continue to be eligible. *See generally* §§26.83(i),(j) and 26.67(a). The question presented is whether Massport proved, by a preponderance of the evidence, that ILJB is ineligible because Massport, or the PNW statement she filed, rebuts Ms. Goldschmidt's presumption of disadvantage under §26.67(b) – i.e., that Ms. Goldschmidt's personal net worth (PNW) exceeds the **REDACTED REDACTED** of §26.67(a)(2). *See generally* §26.87(d).

The definition of PNW in §26.5 excludes “[t]he individual’s ownership interest in an applicant or participating DBE firm.”<sup>14</sup> Similarly, §23.3 states that a PNW calculation excludes “the individual’s ownership interest in an ACDBE firm or a firm that is applying for ACDBE certification.” The exclusion in both provisions plainly refers to *one* firm, and the principle is further emphasized in §26.67(a)(2)(iii)(A).<sup>15</sup>

ILJB is the participating firm whose ACDBE certification eligibility is under review. Thus, it is the only firm that §§26.5, 23.3, and 26.67(a)(2)(iii)(A) allow Ms. Goldschmidt to exclude from the computation of her PNW. Massport correctly included the value of Ms. Goldschmidt's ownership interest in APW and all subsidiaries except ILJB in calculating her PNW.

For the reasons explained above, we conclude that Massport's method of calculating Ms. Goldschmidt's PNW is correct. We find that Massport has proven its case by at least a preponderance of the evidence. ILJB is ineligible for ACDBE certification because Ms. Goldschmidt is not economically disadvantaged.

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<sup>13</sup> Section 26.73(e) explicitly limits its application to matters of ownership and control not at issue here. It does not address the PNW calculation or, more generally, whether an owner is disadvantaged. It states, simply and unambiguously, that *when* a disadvantaged person indirectly owns and controls a subsidiary, *then* that firm may be certified, *but only if* the firm is otherwise eligible under Part 26. Eligibility still requires that the majority owner be disadvantaged. *See generally* 64 Fed. Reg. 5096, at 5120 (Feb. 2, 1999) (“all other certification requirements, including control *by disadvantaged individuals*, and size limits, would continue to apply.”) (Emphasis added.)

Section 26.73(e) is inapposite. Sections 23.3, 26.5, and 26.67 are the provisions that govern disadvantage, including presumption, rebuttal, and PNW calculation. *See also* Official Guidance on Calculating the Personal Net Worth of Individuals that Own Multiple Businesses (Official Guidance), available at <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/313076/pnw-multiple-businesses.pdf>.

<sup>14</sup> *See* §26.5: “*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.” (italics in original)

<sup>15</sup>*See also* Official Guidance. Thus, in calculating PNW, an SED owner may not exclude the value of interests in other companies, regardless of those companies' AC/DBE or tax filing status or their contribution to the owner's overall business plan.

We affirm the decertification under §26.89(f)(1). This decision is administratively final.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: Massport