

May 23, 2018

Reference Number 18-0068

Joe Claiborne
Senior Manager of Business Diversity Development
Memphis Shelby County Airport Authority
2491 Winchester Rd. Suite 113
Memphis, TN 38116 -3856

Dear Mr. Claiborne:

Memphis Electric, LLC (MELLC) appeals the Memphis Shelby County Airport Authority's (MSCAA) September 15, 2017 denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. Part 26 (the Regulation). After carefully reviewing the full administrative record, we find that the record is either unclear or incomplete with respect to matters likely to have a significant impact on the outcome of this case. We therefore remand for further proceedings consistent with the instructions set forth below, as permitted by §26.89(f)(4).

Donald Thomas formed MELLC in July 2016 with David and Brian Haines. Mr. Thomas contributed an unspecified amount from his personal savings and retirement account to become 51% owner of MELLC. The Haineses contributed **REDACTED** to obtain 49% ownership, which MELLC used to pay for a state license. The Haineses are employees and board members of Pyramid Electric, Inc. (PEI), which is a former DBE firm that engages in the same business activities as MELLC. MELLC obtained office space from PEI, but the firm later relocated after David Haines suggested that MELLC move to resolve concerns about the firm's independence.

MSCAA cites §§26.69(c), 26.71(b), and 26.71(m) as grounds for denial. We remand because the denial letter fails to either properly explain MSCAA reasons for citing these provisions or specifically reference the evidence on which each reason is based as §26.86(a) requires.¹ *See generally* MSCAA Denial Letter (September 15, 2017). For example, MSCAA cites the equipment rule, §26.71(m), without stating a reason for concluding that the firm does not meet the provisions' requirements. *Id.* at 2. Furthermore, the denial letter's §26.69(c) discussion merely observes that the Haineses made a **REDACTED** capital contribution to the firm, but does

¹ Section §26.86(a) states: "When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial." (Emphasis added).

not explain how Mr. Thomas' capital contribution is "insubstantial" or not "commensurate with" the value for the firm under §26.69(c)(1)-(2).² *Id.* at 2-3.

MSCAA's §26.71(b) rationale also does not entirely comport with the requirements of §26.86(a). Without further examination, the denial letter abruptly concludes that "[a]ll of Memphis Electric, LLC current contracts, employees, financial advisors and banking signature authority is in conjunction with Pyramid Electric, Inc. Memphis Electric, LLC does not show independence to operate apart from Pyramid Electric, Inc." Denial letter at 3. Unlike the denial grounds discussed above, MSCAA's §26.71(b) ground references some evidence to support a reason for denial. But MSCAA's explanation does not provide context or further analysis to show how the evidence demonstrates nonviability, which is not clear on its face.³ We remand the file for MSCAA to clarify/augment its §26.71(b) rationale. MSCAA should use the factors delineated in §26.71(b)(1)-(4)⁴ to help develop its rationale.

Accordingly, we remand the file to MSCAA to issue a new denial letter that complies with §26.86(a)—fully explaining MSCAA's position with respect to the provisions cited above and specifically referencing evidence in the record that supports each apparent reason for denial not later than June 25, 2018, with a courtesy copy of the decision to this office. The letter should consider MELLC's appellate arguments.

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: MELLC

² The Appeal asserts that the Haineses relinquished their ownership stake in MELLC after MSCAA issued the denial letter. However, the ownership change does not affect the substantiality of Mr. Thomas' contribution to the firm, which remains an outstanding issue in this case.

³ For example, we are unsure what MSCCA means by all "financial advisors," "signatory authority," and "in connection with," or how they affect MELLC's independence.

⁴ These subsections require that MSCAA scrutinize, consider, and examine MELLC's relationships with non-DBE firms, present/recent employment relationships between the applicant and non-DBE firms, whether a pattern of exclusive or primary dealings with a prime contractor exists, as well as normal industry practices. §26.71(b)(1)-(4).

