

March 20, 2019

Reference Number 18-0072

Samuel Febres  
DBE and Small Business Development Manager  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, FL 32399

Dear Mr. Febres:

This letter responds to JDC Secure Solutions LLC's (JDC) appeal<sup>1</sup> of the Florida Department of Transportation's (FDOT) denial<sup>2</sup> of the firm's application for Disadvantaged Business Enterprise (DBE) interstate certification under the rules of 49 CFR Part 26 (the Regulation). After considering the full administrative record, we reverse<sup>3</sup> and instruct FDOT to certify JDC promptly.

## **BACKGROUND**

Jaymie LaFleur, who is presumed socially and economically disadvantaged (SED) under the Regulation, is JDC's Manager and owns 51% of the firm. Daniel Strickland, who is not SED, owns the remainder. The firm provides "sales, installation and service of intrusion security, video surveillance, and low voltage communications."<sup>4</sup> JDC received DBE certification in its home state of Louisiana (State A) in 2015.<sup>5</sup> In December 2017, the firm applied to FDOT (State B) for interstate certification.<sup>6</sup>

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<sup>1</sup> See Appeal Letter (Feb. 23, 2018).

<sup>2</sup> See Denial Letter (Jan. 9, 2018).

<sup>3</sup> See §26.89(f)(2): "If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it."

<sup>4</sup> Uniform Certification Application (UCA) at 5.

<sup>5</sup> See Disadvantaged Business Enterprise Certification Notice (May 13, 2005).

<sup>6</sup> See generally §26.85 – Interstate Certification. The record indicates that JDC complied with the requirements of §26.85(c)(1-4).

In its denial letter, FDOT recited numerous, seemingly unremarkable (and evidently not dispositive) facts, such as the date when JDC filed articles of incorporation in Louisiana; the date of the firm's name change; Mr. Strickland's experience in "electronic installation;" and the contents of handwritten application materials.<sup>7</sup>

FDOT denied JDC's application under §§26.69(c), (e), (f), (g), (h), (i) and (j) (ownership) and §§26.71(b), (c), (d), (e), (f), (g), (h), (k), and (n) (control). We reverse under §26.85(d)(2) and (4).

## DISCUSSION

Section 26.85 Interstate Certification provides (in pertinent part):

(d)(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.

(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 objections 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.

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<sup>7</sup> Denial Letter at 6-7.

(iii) The firm bears the burden of demonstrating, by a preponderance of 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.

(emphasis added)

The primary purpose of the interstate certification rule is to facilitate the process by which firms already certified in their home state can obtain certification in other states.<sup>8</sup> State B must review interstate certification applications through a narrow lens, affording significant deference to the home state decision.<sup>9</sup> However, the rule does not require State B to accept State A eligibility determinations without review; State B may deny an application *if* it identifies one or more of the “good cause” reasons in §26.85(d)(2) for doing so. The interstate certification rule does not permit State B to simply substitute its judgment for that of State A.<sup>10</sup>

Having denied JDC’s application, FDOT presumably found that Louisiana’s decision was “erroneous or should not apply” in Florida. However, FDOT cited none of the §26.85(d)(2) good cause reasons or send JDC written notice stating “with particularity the specific reasons why [FDOT] believes that the firm does not meet the [eligibility] requirements.” FDOT neither cited specific evidence supporting each reason nor offered JDC an opportunity to respond as §26.85(d)(4)(i) requires. *Compare* §§26.86(a) (requiring FDOT to “specifically” reference the evidence in the record that supports “each reason”) and 26.85(d)(4)(i) (FDOT “must offer the firm an opportunity to respond to [FDOT] with respect to [its particular, specified] reasons.”). FDOT was far less discriminating than the Regulation requires it to have been. FDOT seems to have largely second-guessed the home state’s determination. FDOT cites fully sixteen of the Regulation’s provisions without specific linkage to the various (also seemingly scattershot) facts recounted. FDOT’s lens is much wider than the rule permits, its reasons less particularized, and its evidentiary citations insufficiently specific. In short, FDOT’s processes do not facilitate interstate certification.

The due process failure alone is fatal to FDOT’s determination. An applicant firm cannot meaningfully contest an opaque rationale, and further, the Department is not the initial forum for the challenge. Although we could have resolved this appeal on §26.85(d)(4)(i) noncompliance alone, we have elected to give FDOT a more extensive discussion of the interstate certification rule’s requirements so that FDOT can amend its processes to achieve future compliance.

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<sup>8</sup> See Preamble of Final Interstate Certification Rule at 76 Fed. Reg 5088-89 (Jan. 28, 2011).

<sup>9</sup> See Interstate Certification Guidance (July 9, 2014) at 1. See also 17-0125 Foursquare Integrated Transportation Planning, Inc. (May 11, 2018), 17-0017 DES Wholesale, LLC (March 16, 2018), and 15-0044 Three Oaks Engineering, Inc. (Oct. 13, 2015).

<sup>10</sup> See *id.*

## CONCLUSION

We find that FDOT's decision is substantively and procedurally inconsistent with applicable certification rules and reverse under §26.89(f)(2). We direct FDOT to notify JDC immediately that it is certified, provide us a copy of the notice, and include the firm in applicable lists and directories of certified firms without delay.

Thank you for your continued cooperation. This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: Stone Pigman Walther Wittman LLC for JDC Secure Solutions LLC

Louisiana Department of Transportation & Development