February 21, 2019

Reference Number 18-0129

Helen Porter
Porter Construction Co., Inc.
P.O. Box 923
REDACTED
Marianna FL 32447

Dear Ms. Porter:

This is in response to your appeal of the decision of the Georgia Department of Transportation (GDOT) to deny certification to your firm. The U.S. Department of Transportation (DOT) is reversing GDOT's decision and directing GDOT to certify the firm.

I. Procedural History

The firm applied for certification on January 30, 2018. This was an interstate certification application, the firm having previously been certified in Florida. The most recent on-site interview conducted in Florida occurred in 2013. GDOT denied the firm's application through a letter dated April 2, 2018. The firm timely appealed to the Department.

II. Burden of Proof and Standard of Review

(a) Burdens of Proof

As provided in 49 CFR 26.61(b) of the rule, an applicant firm must demonstrate, by a preponderance of the evidence, that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets the eligibility criteria.

(b) Standard of review for certification appeals

On receipt of an applicant's appeal from a denial of certification, the Department makes its decision "based on the entire administrative record as supplemented by the appeal…[1]

[1] 49 CFR 26.89(e)

The Department does not make a *de novo* review of the matter…."[2] The Department affirms (a certifier's) decision unless it determines, based on the entire administrative record, that (the certifier's) decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part (emphasis added) concerning certification."[3]

This language means that the Department does not act as though it were the original decision maker in the case or substitute its judgment for that of the certifier. If the certifier's decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department will affirm the certifier's decision.

III. Basis for Denial and Appeal

The sole basis for GDOT's denial is that Helen Porter, the owner of the firm, had an average Adjusted Gross Income (AGI) on her Federal income tax returns of **REDACTED** over the 2014-2016 period. This, GDOT said, indicated that she was able to accumulate substantial wealth (AASW). Consequently, the denial letter said, her presumed disadvantaged status is rebutted.

It is clear from documents in the record that Ms. Porter's AGI was the only factor GDOT used in making its decision. An April 1, 2018 GDOT summary worksheet in the record lists "owner's adjusted gross income exceeds $350,000" as the only reason for the decision. A handwritten March 16, 2018 on a page of the firm's personal financial statement says "based on adjusted gross income…we cannot certify." There is no mention in the record of any other factors that GDOT considered.

In the appeal letter, the firm points out that, over the same three-year period, the average re-investment and payment of income taxes was **REDACTED**, which if subtracted from the average AGI would net out at $304,447, under the **REDACTED** figure mentioned in the regulations.[4]

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[2] Id.

[3] 49 CFR 26.89(f)(1)

[4] While the Department is deciding this case on the procedural grounds discussed below, we note that a bright-line, single-factor determination that an individual is not economically disadvantaged solely because her three-year average AGI is above $350,000 is generally inconsistent with the Department's regulations. The language and preambles of the Department's regulations and the Department's certification appeal decisions make clear that denying someone eligibility because of AASW is intended to rest on a "totality of the circumstances" test and used only in "egregious" cases. See 79 FR 59568-69; October 14, 2014. See also *17-0025 Epic Land Solutions (*June 12, 2017), at 5-6, *citing* 16-0166 *Global Engineering Solutions* (March 31, 2017) and 15-0113, *ADF Industries Inc.* (January 8, 2015). See also 17-1048, *Reiner Contracting, Inc.* (June 6, 2018) at p. 5 ("The six factors in 26.67(b)(1)(ii)(A) are not a checklist or litmus test for certifiers to examine in an AASW analysis. They are simply examples of the type of evidence that certifiers can evaluate….No single factor or number is likely determinative of an owner's AASW….Again, the proper inquiry is whether the *totality of the owner's economic circumstances* (emphasis in original) indicates that she is presently wealthy or has AASW.") Particularly in the case of an LLC or S corporation, like Porter Construction, in which company income is passed through to the owner's personal tax return, it is a best practice to consider factors that may mitigate high AGI.

IV. Discussion

In an interstate certification case, certifiers are obliged to comply with the procedural provisions of section 26.85 of the Department's regulation. The principal purpose of this provision, which entered Part 26 in 2011, was to reduce barriers and administrative burdens standing in the way of DBE firms certified in their home state from becoming certified in other states.[5] To achieve this purpose, the regulation in section 26.85(c) sets very specific limits on the information a firm certified in "State A" can be required to provide in order to become certified in "State B."

(c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.

(1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.

(2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.

(3) If you have filed a certification appeal with DOT (see §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.

(4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

We provide the information above and below to guide certifiers how generally to make a proper AASW assessment: thoroughly, infrequently, and almost always in analyzing an initial application or the continuing eligibility of a firm already certified in the certifier's state. Our view is that in *interstate* certification cases State B will rarely if ever prevail based on an AASW objection. The analysis is sufficiently subjective that it would be a very unusual case in which State B could persuasively argue that State A's decision was wrong, contrary to the regulations, inapplicable in State B, or that the firm is no longer eligible—in short, that it was not simply substituting its judgment for that of the State A certifier. See generally section 26.85(d)(2) and related Department guidance. It is also our view that AASW analyses in States B will rarely, if ever, further the purposes of the interstate certification rule.

[5] See 76 FR 5088-89; January 28, 2011.

(i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

These are the only items a firm is required to provide to State B, and they are the only items State B is authorized to request or require from a firm. Tax information or returns that are not part of State A's record on the firm, including tax information or returns from tax years subsequent to State A's most recent collection of tax data, are not among the items a State B is permitted to request or collect. To request or require additional information from the firm seeking certification, about taxes or other matters, goes directly counter to the main purpose of section 26.85: reducing administrative burdens and barriers to out-of-state firms.

GDOT's calculations and decision concerning Ms. Porter's AGI were based on tax returns and tax data from 2014-2016, information that was not part of Florida's record on Porter Construction.[6] Under section 26.85, GDOT is not authorized to acquire this data.[7] GDOT cannot base its decision on information it was not authorized to require; the information is, in the time-honored legal phrase, "fruit of the poisonous tree."

There is an additional way in which GDOT exceeded its authority under the regulation. Section 26.85(c) does not authorize State B to require an interstate applicant to file a new Personal Net Worth (PNW) statement, one of the administrative burdens that section 26.85 is intended to remove for such applicants. The affidavit of no change required under section 26.85(c)(1) affirms to State B that PNW information submitted to State A remains accurate. Yet GDOT did require Porter to complete such a document, dated January 30, 2018.

Compounding the error, GDOT added a fourth page to the PNW statement that calls for providing AGI information. Doing so violates the provisions of section 26.67(a)(2)(ii), which mandates that certifiers must "use the DOT personal net worth form provided in Appendix G to this part without change or revision." Adding a page is surely a revision.

One of the duties of a State B is to determine whether there is good cause to believe that State A's certification is erroneous or should not apply in State B. Section 26.85(d)(2) lists the only five grounds on which State B can make such a determination:

> *(i) Evidence that State A's certification was obtained by fraud;*

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[6] GDOT denial letter, p. 2, 4th paragraph under "Findings."

[7] GDOT required 2014-2017 tax information from Porter Construction through a "Uniform Application Supporting Documents Checklist" dated February 16, 2018. GDOT should correct its form, as applied to interstate certification, to remove requirements to submit information that section 26.85(c) does not authorize certifiers to collect.

(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.

The reason GDOT cited for finding good cause to believe that Florida's certification of the firm is not applicable to Georgia is that "the adjusted gross income information used by GUCP was not available to Florida at the time of certification." This statement may be an attempt to reference the section 26.85(d)(2)(ii) authorization of a "good cause" finding based on "new information, not available to State A at the time of certification, showing that the firm does not meet all eligibility criteria."

This provision is not intended to authorize a fishing expedition for updated information that State B is not otherwise entitled to seek from the firm. To so interpret the provision would undermine the purpose of the entire section: a State B could require an interstate firm not only to provide new tax information, but a new PNW statement, a new application form, new and revised lists of property, information on contracts obtained since State A's most recent on-site review, a new site visit, new interviews with owners and key employees, and so on. This interpretation of what the rule permits is entirely at odds with the text and with the Department's stated intent.

While State B may wish to gain more recent, updated information, the rule forbids it when that information is not in State A's or another state's file. State B may permissibly contact State A and request that State A obtain additional information, but such a request does not toll the rule's time limits, and State A is under no obligation to act unless section 26.87(b) applies.

V. Conclusion

Because of the procedural errors made in the case, the Department, as provided in section 26.89(f)(2), is reversing GDOT's decision. GDOT is directed to immediately certify the firm. In addition, GDOT should promptly make necessary modifications in its interstate certification procedures to avoid similar errors in the future.

This decision is administratively final and not subject to petitions for review.

Sincerely,

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

cc: Kimberly A. King