



**U.S. Department of  
Transportation**

Office of the Secretary  
Of Transportation

Departmental Office of Civil Rights  
1200 New Jersey Avenue, S.E., W76-401  
Washington, DC 20590

December 3, 2021

Docket No. 21-0045

William A. Kirk  
K&L Gates LLP  
1601 K Street NW  
Washington DC 20006

Dear Mr. Kirk:

Cielo Concessions, Inc., appeals the Massachusetts Port Authority's (Massport) decision to decertify it for failure to cooperate (FTC).<sup>1, 2</sup> We affirm Massport's decision as consistent with applicable certification rules and supported by substantial, uncontroverted evidence.<sup>3</sup>

Cielo is the minority partner in seven joint ventures (JVs) with SSP America.<sup>4</sup> Cielo derives 99.3% of its revenue from these JVs.<sup>5</sup> In the course of a scheduled three-year review of Cielo's eligibility, Massport asked Cielo, in June 2019, to provide the JV agreements (JVAs).<sup>6</sup> Cielo

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<sup>1</sup> See 49 CFR secs. 26.87(f)(6), 26.73(c), 26.109(c).

Section 26.73(c): "DBE firms and firms seeking certification shall cooperate fully with [recipient] requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground denial or removal of certification."

Section 26.109(c): DBEs "are required to cooperate promptly and fully with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility, and/or suspension and debarment..."

<sup>2</sup> The decertification hearing officer determined that Massport proved Cielo ineligible on three independent bases: secs. 26.71(b) (independence), 26.71(m) (equipment), and 26.73(c) and 26.109(c) (FTC). Our affirmation on the basis of FTC suffices for resolving this appeal. See generally secs. 26.87(f), 26.89(e).

<sup>3</sup> See sec. 26.89(f)(1). See also secs. 26.87(b)-(g). See generally sec. 23.31(a) (part 26 certification rules and standards apply to ACDBEs.)

<sup>4</sup> SSP America is a division of SSP Group, a global "food travel" company that operates airport concessions in 35 countries on six continents. <https://www.foodtravelexperts.com>.

<sup>5</sup> Cielo reported [REDACTED] of gross income in 2018.

<sup>6</sup> JVAs typically specify some or all of the following: the JV's business; each parties' rights, responsibilities, and roles; amounts, sources, and proportion of financial contribution, debt, and other capitalization; contributed property

declined.<sup>7</sup> Citing Cielo’s noncompliance, Massport notified Cielo on April 24, 2020, of its intent (NOI) to decertify, the reasons for the proposed action, and Cielo’s right to respond.<sup>8</sup> On October 20, 2020, Massport notified Cielo of its final decision (NOD) to remove certification.

Cielo concedes that it did not provide the JVAs.<sup>9</sup> It nevertheless asks us to find that it cooperated fully and promptly with Massport. Cielo contends that it properly withheld the JVAs because they are not relevant. The argument not only lacks merit; it strains credulity. The nature of Cielo’s relationship with its larger, well capitalized, non-disadvantaged, exclusive business partner—including a multitude of related transactions with and among Cielo and its owners, investors, lenders, and others—bears directly and obviously on all four pillars of ACDBE eligibility: disadvantage, ownership, control, and business size. See generally secs. 26.65, 26.67, 26.69, 26.71.

We affirm the decertification for FTC as supported by substantial evidence and consistent with applicable rules.

This decision is administratively final.

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division

cc: Massport

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and human capital; capital accounts; profit allocation; income distribution; indemnity; default events and consequences; and termination. Despite the appellant’s various attempts to change the subject, the record is clear that Massport requested the JVAs so that it could reasonably determine whether their terms compromised Cielo’s eligibility. Massport’s request was well within bounds.

<sup>7</sup> At this point, section 26.87(b) required Massport (“you must”) to move to decertify Cielo.

<sup>8</sup> The NOI specifies that Massport proposed to decertify Cielo based on reasonable cause to believe that: (1) Cielo’s presumed disadvantaged owners’ capital contributions and ownership are insubstantial under sec. 26.69; (2) The owners are not in fact economically disadvantaged within the meaning of sec. 26.67; (3) Cielo lacks the equipment and other resources necessary to perform the work for which it is certified; (4) Cielo is not “independent,” within the meaning of sec. 26.71(b); and (5) Cielo did not cooperate with requests for information, as secs. 26.73(c) and 26.109(c) require. The documentary evidence demonstrates that the certification review, NOI, NOD, and related proceedings complied with applicable rules, including those relating to due process, which Massport applied generously. See generally, e.g., secs. 26.83(h) (certification reviews and removal); 26.87(b) (e.g., reasonable cause, notice, contents, right to contest), (d)-(g) (hearing, related procedures and participation, burden of proof, permissible grounds, NOD requirement, etc.); 26.73(c) and 26.109(c) (see sec. 26.87(f)(6)).

<sup>9</sup> Appellant’s counsel stated at Massport’s hearing that he “assumed” Massport had “received” at least the Boston Logan JVA in 2016. The hearing officer, however, determined that Massport “repeatedly and convincingly argued that it had not,” and we concur that all available evidence is to the contrary. Cielo does not claim to have provided any of the JVAs in response to Massport’s 2019 request.

Cielo’s claim that Massport was somehow obliged to prove relevance to Cielo’s satisfaction before decertifying is fanciful. We find no such rule in part 23 or 26, and Cielo cites none.