

April 12, 2017

Reference Number: 16-0171

Lenee Koch
President
LEI Airport Concessions, LLC
REDACTED
Denver, CO 80205

Dear Ms. Koch:

LEI Airport Concessions, LLC (LEI) appeals the California Unified Certification Program's (CUCP) denial of the firm's interstate application for Airport Concession Disadvantaged Business Enterprise (ACDBE) certification. CUCP denied certification due to LEI's failure to provide information pursuant to the requirements of 49 C.F.R. Parts 23 and 26 (collectively, the Regulation).

After careful review of the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), finds that the denial is supported by substantial evidence and is consistent with the Regulation's substantive and procedural provisions concerning decertification. We therefore affirm under §26.89(f)(1).¹ The record confirms, and LEI concedes, that LEI did not timely provide eligibility-related information that CUCP requested. Further, LEI's appeal fails to state a claim on which the Department can reverse CUCP's determination. *See* §26.89(c) (requirements for an appeal to the Department).

I. Facts

¹ §26.89(f)(1) states: "The Department affirms [the certifier's] 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." LEI appears to misunderstand the Department's role on appeal. Contrary to the request in LEI's appeal letter that we "review" LEI's admittedly incomplete application for certification, the Department does not review requests for certification. State certifiers make the initial certification decisions. The Department's role on appeal of a certification denial is simply to determine whether substantial evidence supports the state's determination and whether the determination is consistent with applicable substantive and procedural certification requirements. We find that substantial evidence supports the denial of certification in this case and that the denial is consistent with applicable certification standards, substantive and procedural.

The facts pertaining to the denial appear to be uncontroverted. CUCP's denial letter of August 5, 2016 states that CUCP requested and LEI failed timely to provide the following information:

- Proof of ethnicity;
- Resumes for each principal, owner and key employee;
- Proof of initial capital investment (canceled checks, front and back);
- Bank signature card or statement from your bank;
- Your Out of State application needs to be notarized;
- Current Federal 1 040 income tax forms with all schedules including Schedule C for previous three years;
- Current Federal business tax returns with all schedules for last three years; and
- Copy of Articles of Incorporat[ion] and notarized statement of personal net worth.²

The body of LEI's appeal letter states in its entirety:

I am in receipt of your denial notification dated August 5, 2016. I would like to take this opportunity to request reconsideration of our application.

I apologize for imposing upon your resources to review the incomplete package submitted. The fact of the matter is that we were premature in beginning the process without the appropriate resources in place to assemble and submit the required documentation in a timely manner. Please be assured that it was not our intention to disregard the guidelines; the timing of this pursuit was simply not in our favor.

If permitted to forgo the twelve month waiting period, we are prepared to move forward with the application procedures from the beginning, with all documentation readily available to submit.

We take tremendous pride in the quality concessionaire services we currently provide to the Denver International Airport and remain hopeful for an opportunity to expand our brand to the California market.

Please don't hesitate to contact me should you have any questions or concerns.

Thank you in advance for considering our appeal. (Emphasis added.)

LEI concedes that it failed timely to provide the requested information. LEI fails to aver that the Regulation does not require it to provide the requested information as part of an interstate certification application. Further, LEI fails to cite any authority that would permit the Department to waive the applicable waiting period for making a new application for certification. The Department received no further communication from LEI regarding its grounds for appeal.

² LEI's submission includes no argument that these items are not required to be provided under §26.85(c)(1). In the absence of such an argument, we presume that these materials are described in §26.85(c)(1)—that is, that they are contained in the original home state certification, a complete copy of which is required under §26.85 to be provided to subsequent (interstate) certifiers not certifying on the basis on the basis of §26.85(b).

II. Applicable Authority

§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).

§26.73(c) states:

DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

§26.85(c) states:

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.

(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. (Emphasis added.)

§26.86(c) states:

When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm. An applicant's appeal of your decision to the Department pursuant to §26.89 does not extend this period.

§26.89(c) states:

If you want to file an appeal, you *must* send a letter to the Department within 90 days of the date of the recipient's final decision, *including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply.*" (Emphasis added.)

§26.109(c) states:

All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly 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; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).* (Emphasis added.)

III. Decision

Uncontroverted evidence demonstrates that LEI failed to comply with CUCP's requests for certification-related information. This failure, although likely inadvertent, constitutes a failure to cooperate under the terms of §26.109(c).

The Department does not provide advice on how to appeal adverse certification decisions. The Department's role on appeal is limited to determining whether substantial evidence in the administrative record supports the certifier's decision and whether the decision was consistent with the substantive or procedural rules concerning certification. §§26.89(e) & (f). LEI's appeal letter fails to argue that CUCP made any reversible procedural or substantive errors when it denied the firm certification. Accordingly, it fails to state a claim upon which relief can be granted under §26.89(c). We regret that the Regulation does not permit a more favorable result.

There being no "full and specific" allegation of error in fact or law under §26.89(c), we conclude that substantial evidence supports CUCP's decision to deny DBE certification for failure to cooperate with requests for certification-related information under §26.109(c).

IV. Conclusion

We affirm CUCP's denial decision under §26.89(f)(1) because substantial evidence supports it and because the decision is consistent with applicable substantive or procedural provisions of the Regulation.

LEI may reapply for certification after August 4, 2017. *See* §26.86(c) (recipient may impose a waiting period of up to 12 months for reapplication; appeal of adverse decision—here, dated August 5, 2016—to Department does not extend the waiting period).

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: CUCP