



**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

February 7, 2018

Reference No: 17-0139

Mr. Leo K. Lee, CEO
Advantec Consulting Engineers, Inc.
REDACTED
Irvine, CA 92620

Re: Advantec Consulting Engineers, Inc. Appeal of DBE Certification Denial

Dear Mr. Lee:

Advantec Consulting Engineers, Inc. (ACE) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial of the firm as a Disadvantaged Business Enterprise (DBE) by the Office of Minority and Women's Business Enterprises (OMWBE) pursuant to the DBE Program Regulation, 49 C.F.R. Part 26 (the Regulation). OMWBE issued its denial decision on May 17, 2017, and ACE appealed this decision to the Department on August 15, 2017. We requested OMWBE's administrative record pursuant to §26.89(d) and conclude, based on a review of this record and your appeal, that substantial evidence supports OMWBE's decision.¹

Discussion

A for-profit small business is eligible for DBE certification if it meets the following criteria: (1) The firm is "at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals;" and (2) "Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." §26.5.

The certifying agency, OMWBE, must rebuttably presume that citizens of the United States (or lawful permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found

¹ When a firm appeals a certification denial determination, the Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

to be disadvantaged by the Small Business Administration (“SBA”), are socially and economically disadvantaged. §26.67(a)(1). Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for certification as well.² §26.67(d). An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. §26.67(a)(2)(i). The definition of personal net worth is found in §26.65; and §26.67 defines how recipients are to determine this amount:

§26.65 states: “The net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.”

§26.67(a)(iii) states: “In determining an individual's net worth, you must observe the following requirements: (A) Exclude an individual's ownership interest in the applicant firm; (B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes. (C) Do not use a contingent liability to reduce an individual's net worth. (D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(K) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.”

ACE's application for interstate DBE certification included your personal net worth statement signed on May 11, 2017 listing a total net worth of REDACTED, which includes retirement savings and three properties, among other holdings. This clearly exceeds the \$1.32 million threshold specified in §26.67(a)(2)(i) for economically disadvantaged individuals to qualify for DBE certification and OMWBE issued its denial decision on this basis.

On appeal, you provided a revised personal net worth statement and allege that two adjustments place you under the \$1.32 million threshold. First, you allege you overstated the 401K retirement savings originally reported because penalties and taxes were not subtracted and second, you moved back into your Walnut Avenue property which you now consider your personal residence.

² For these situations, the certifying agency must make a case-by-case determination of whether the individual, whose ownership and control are relied upon for DBE certification, is socially and economically disadvantaged.

You do not proffer any evidence in your appeal supporting the new 401K value you offer nor substantiate the fact that you moved residences. While we acknowledge ACE's intention to remedy the eligibility deficiencies that OMWBE identified (by calling our attention to erroneous entries), it may not effectively do so on appeal in this case. The Department's role on appeal is not to consider new evidence that was not before the certifier. *See* §26.89(e). The Department does not perform a *de novo* review. Rather, it is to determine whether, based on the record at the time of the initial decision, substantial evidence supported OMWBE's decision. *See* §26.89(e) and (f)(6) (Department bases its appeal decision on status and circumstances of firm as of date of certifier's decision).

Conclusion

We affirm the certification denial of ACE as a DBE under §26.89(f)(1) because you, the firm's qualifying socially disadvantaged owner do not meet the economic disadvantage requirements of the Regulation. There exists substantial record evidence to support the denial, and the denial is consistent with applicable substantive and procedural provisions of the Regulation. This decision is administratively final and not subject to further review. **ACE may reapply to be a DBE after May 17, 2018.**³

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Program Division
Departmental Office of Civil Rights

cc: OMWBE

³There is no dispute that ACE was a DBE in Arizona, California, and Nevada when it applied for interstate certification with OMWBE, which exercised its option to not accept this certification under §26.85(b). We note that although OMWBE's May 17, 2017, denial letter offered you the opportunity to attend a hearing to respond to the agency's objections, it did not mention the firm's ability to respond solely in writing in lieu of attending a proceeding, which is a mandate found in the Department's interstate certification rule §26.85. However, this did not result in fundamental unfairness requiring the Department to reverse OMWBE's decision because you did not avail yourself of this opportunity and there is no evidence you contacted OMWBE with a revised personal net worth statement or made arguments similar to those made on appeal. *See* §26.89(f)(3). (*The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.*) We remind OMWBE however, that if ACE reapplies for interstate certification and the agency again finds good cause to deny the firm's request, the agency needs to afford ACE the ability to respond in writing and/or to request an in-person meeting with OMWBE to discuss its objections to the firm's eligibility, or both.