

March 18, 2019

Reference Number: 18-0071

Janice Salais
Office of Business and Economic Opportunity
California Department of Transportation
1823 14th Street
Sacramento, CA 95811

Dear Ms. Salais:

This letter addresses Subsurface & Tunnel Engineering, LLC's (Subsurface) appeal¹ of the California Unified Certification Program's (CUCP) November 28, 2017 denial² of the firm's application for interstate certification under the rules of 49 C.F.R. part 26 (the Regulation). After reviewing the record in its entirety, we remand CUCP's decision.³

I. Background

Subsurface is a Maryland-based firm founded and solely owned by Mohamed Younis. The Maryland Department of Transportation (MDOT) certified Subsurface as a DBE. In Subsurface's DBE application and supporting materials submitted to MDOT,⁴ Mr. Younis indicated that he is Black American, a group whose members are presumed socially and economically disadvantaged (SED) under the Regulation.⁵ During the eligibility evaluation, MDOT asked Mr. Younis to

¹ See Appeal Letter (Feb. 16, 2018).

² The California Department of Transportation is the UCP member that made the decision.

³ Section 26.89(f)(4) states: "If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part."

⁴ See, e.g., Affidavit of Certification (April 16, 2016).

⁵ Section 26.5 states in relevant part: "*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it. (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged: (i) **"Black Americans," which includes persons having origins in any of the Black racial groups of Africa.**" (bold emphasis added) (italics in original). Mr. Younis's economic disadvantage is not at issue on appeal.

provide evidence supporting his claim that he is Black American.⁶ In response, Mr. Younis submitted information such as a signed and sworn affidavit dated June 7, 2016, stating that his racial ancestry is rooted in the Sub-Saharan countries Ethiopia and Eritrea; examples of employment discrimination that he attributes to his Black American status; and photos of his father and one of his daughters, whose appearance Mr. Younis described as “African/black.”⁷ MDOT apparently examined the evidence at a meeting with the agency’s Minority Business Enterprise Committee (MBEC) on July 6, 2016, and subsequently concluded that Mr. Younis satisfied his burden of proving, that more likely than not, he is presumed SED. MDOT certified Subsurface as a DBE on October 14, 2016.

In February 2017 Subsurface applied to CUCP for DBE interstate certification. *See generally* §26.85.⁸ In November 2017 CUCP denied Subsurface’s application, stating that it had “good cause” to believe that MDOT’s certification of the firm was “factually erroneous” and/or “inconsistent with” the Regulation’s requirements.⁹ CUCP explained that Mr. Younis did not meet his burden of proving, that more likely than not, he is presumed SED because he was born in Egypt (evidenced by his passport), did not establish that he holds himself out as a member of the Black or African American group, and that he is not commonly regarded as a member of the Black or African American group.

II. Issue

Applicant firms seeking initial certification bear the burden of demonstrating to the recipient, by a preponderance of the evidence (except in limited circumstances, a higher “clear and convincing” burden), that it meets all eligibility requirements, including the owner’s group membership or individual social and economic disadvantage, business size, ownership, and control. *See* §26.61(b). Subsurface’s DBE certification issued by MDOT attests that the firm met this burden to that agency’s satisfaction. The issue before us is whether CUCP’s disagreement with MDOT’s decision to certify Subsurface is consistent with the Regulation’s interstate certification rule at §26.85. *See generally* §26.89(f)(2).

III. Discussion

We note first that the principal purpose of the interstate certification rule is to reduce barriers and administrative burdens that impede DBE firms certified in their home state from becoming certified in other states.¹⁰ The interstate certification rule does not require out-of-state

⁶ Recipients have the authority under §26.63 to make individual determinations on a case by case basis for persons who are not members of any listed presumptive groups. MDOT’s request was reasonable in this case because under the Regulation, no one is presumed to be socially and economically disadvantaged because of Egyptian nationality.

⁷ *See* Evidence of Minority Status/Socially and Economically Disadvantaged (June 7, 2016).

⁸ CUCP did not exercise the option in §26.85(b) of accepting MDOT’s certification decision and certifying Subsurface without further procedures. CUCP chose instead to follow the procedures in §26.85(c). CUCP and Subsurface complied with their respective obligations under §26.85(c). Neither party argues otherwise.

⁹ Note, CUCP states the opposite in the subsequent sentence in the same paragraph: “Although you hold yourself out to be a Black American [...]” Denial Letter at 2.

¹⁰ *See* Preamble of Final Interstate Certification Rule at 76 Fed. Reg 5088-89 (Jan. 28, 2011).

certifiers/State B to accept home-state decisions without review. The interstate certification rule allows State B to deny an application if it believes State A's certification is factually erroneous or should not apply in State B. The enumerated "good cause" reasons listed in §26.85(d)(2) are:

- (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.

However, we have consistently held that out-of-state certifiers/State B, e.g., CUCP/California, should afford significant deference to State A's decision.¹¹

Section 26.85(d)(2)(iii) is the "good cause" reason that allows State B to deny interstate certification if State A's decision was "factually erroneous" or "inconsistent with" the Regulation's requirements. State B can rely on this reason for denying interstate certification if it determines that State A's decision "directly contradicts a provision in the regulatory text."¹² We emphasize that the phrases "factually erroneous" and "inconsistent with" impose a much more rigorous standard than mere interpretive disagreement.¹³ State B may not simply substitute its judgment for that of State A nor offer conclusory statements; it rather must identify a fact-based objection to the home state's decision.¹⁴

From our reading of the record, what sparked CUCP's inquiry of Mr. Younis's SED status was derived from a notation on MDOT's on-site report that Mr. Younis's passport indicated his birthplace as Egypt and a single sentence in the report that states "Minority/Social and Economic

¹¹ See, e.g., 17-0125 Foursquare Integrated Transportation Planning, Inc. (May 11, 2018) and 17-0117 DES Wholesale, LLC (March 16, 2018).

¹² *Id.* at 5089.

¹³ See Interstate Certification Guidance (July 9, 2014) at 4.

¹⁴ *Id.* See also, explanatory preamble text at 76 Fed. Reg. 5088-5089 (Jan. 28, 2011). As the Department stated in guidance: "State B would have to cite information in the home state's certification material or other material submitted by the DBE that directly contradicts a provision in the regulatory text or simply gets wrong a critical fact. For example, suppose State B reviews the documentation used by State A to certify the firm and finds a fact about the firm that renders it ineligible, or State B notices or finds that the home state based its decision on what is clearly a misapplication by the home state of Part 26. In these cases, State B could find good cause to begin a proceeding to deny interstate certification. For example, a mathematical mistake the correction of which results in disadvantaged owners who claimed collective 51% ownership actually owning under 51% of the firm constitutes good cause to find the State A certification factually erroneous."

Status is in question;” and in Mr. Younis’ response, he confirmed that both he and his father were born in Alexandria, Egypt. CUCP acknowledges that it reviewed the evidence Mr. Younis gave MDOT, e.g., signed and sworn affidavit, family photos, MDOT’s investigative report, etc.¹⁵ CUCP also took a step further, as evidenced by an internal CUCP memorandum by the Caltrans analyst who spoke with the Chairperson of Maryland’s Minority Business Enterprise Advisory Committee (MBEC). The memorandum describes the MBEC’s meeting with Mr. Younis on July 6, 2016, during which he provided evidence of his membership in the presumptive Black American group. The memorandum also states that the MBEC was persuaded by Mr. Younis’ evidence and that MDOT would not have certified him without sound evidence.¹⁶ CUCP conceded that Mr. Younis holds himself out to be Black American.¹⁷ Nonetheless, CUCP found that Mr. Younis’s claim of being Black American is “without merit” based solely it appears on his passport entry noting Egyptian.¹⁸ CUCP explained that those facts gave CUCP “good cause” to believe MDOT’s decision to certify the firm was “factually erroneous” and/or “inconsistent with” the Regulation’s requirements.

The record demonstrates that CUCP required Mr. Younis to re-demonstrate his certification eligibility as if he were an initial applicant. CUCP looked at the same evidence as MDOT, found it unpersuasive, and then reached its own, different conclusion without citing any factual errors. As explained above, the interstate certification rule does not allow CUCP to simply substitute its judgment for MDOT’s in this manner.

IV. Conclusion

We remand the above-captioned matter to your office under §26.89(f)(4) so that CUCP can to clarify its objections, specifically under §26.85(d)(2)(iii)—“factually erroneous or inconsistent with the requirements of the Regulation,” and render a new eligibility determination within 30 days taking into account the Department’s observations above and all requirements of §26.85. If Subsurface demonstrates eligibility, CUCP must certify the firm without delay. If not, CUCP must provide the applicant a new denial letter that avoids the mistakes of the original, speaks directly to unproven aspects of eligibility, and otherwise conforms with §§26.85 and 26.86(a) and other applicable certification rules. In the event of a new denial letter, Subsurface will have the usual 90 days within which to appeal to the Department. This decision is administratively final under and not subject to petitions for review.

Thank you for your continued cooperation.

¹⁵ See Denial Letter at 2. MDOT stated clearly in its investigative report that Mr. Younis submitted (and that agency accepted) a “written, notarized affidavit . . . where he states that his origin is rooted in the horn of Africa, which is known now as Ethiopia/Eritrea. It indicates his Ethiopian/Eritrean heritage as well as a narrative of incidents where he was subjected to prejudice which has impeded his career advancement.”

¹⁶ See Internal Memo Re: #44111 Subsurface & Tunnel Engineering, LLC–Reconsideration Hearing (Sept. 25, 2017).

¹⁷ See Denial Letter at 2. CUCP made the concession immediately after stating the contrary.

¹⁸ *Id.* at 2-3; see also Résumé of Mohamed Younis.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: Subsurface & Tunnel Engineering, LLC and MDOT