

April 11, 2019

Reference Number 18-0124

Jenny Allen
Civil Rights Division
Oklahoma Department of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105

Dear Ms. Allen:

Local Food Concepts, LLC (LFC) appeals the Oklahoma Department of Transportation's (OKDOT) March 27, 2018 decision to decertify LFC as an Airport Concession Disadvantaged Business Enterprise (ACDBE) and Disadvantage Business Enterprise under the standards of 49 C.F.R. parts 23 and 26 (Regulation). After considering the full administrative record, the Department reverses OKDOT's decertification, under Regulation §26.89(f)(2), as unsupported by substantial evidence and inconsistent with applicable certification provisions.

We find that OKDOT failed to carry its burden to prove that LFC is no longer eligible on the bases of Regulation §26.69(h), relating to ownership, and Regulations §§23.3, 26.5, relating to affiliation.

Procedural History

On November 8, 2017, OKDOT initiated proceedings to remove LFC's ACDBE and DBE certifications. Notice of Intent to Decertify Letter (NOI) (November 8, 2017) at 1. On January 23, 2018, LFC responded to the NOI in writing. LFC letter to OKDOT (January 14, 2018) (Response). OKDOT submitted a position statement to the hearing officer on January 31, 2018, and LFC responded to the position statement via email on February 5, 2019. The hearing officer issued the Notice of Decision (NOD), on behalf of OKDOT, on March 27, 2018, which LFC appealed to the Department on June 25, 2018.

Background

Saniya Dhala serves as the President and 100% owner of LFC, which operates several airport restaurants. OKDOT initiated decertification proceedings based on the New Jersey Unified Certification Program's (NJUCP) decision to remove LFC's ACDBE and DBE certifications.

The NOI adopts the entire findings of NJUCP's final decertification decision. *See generally* NOI. On March 27, 2018, the hearing officer issued the NOD, which provides the following explanation for the decision:

After careful review of the [OKDOT] Position Statement, and the submitted letter of appeal, this hearing officer finds no evidence offered in the response, but only statements contradicting the findings of the certifying partner, and affirms [OKDOT] Civil Rights Division decision proposing to remove Local Foods, LLC DBE and ACDBE certifications on the basis of ownership and affiliation.

NOD at 1.

Decision

The recipient bears the burden to prove, by the preponderance of evidence, that a currently certified DBE is no longer eligible for certification. §26.87(d). In this instance, OKDOT reached its determination solely based on NJUCP's decision, which provides insufficient evidence to remove LFC's certifications.¹

Ownership

Regulation §26.69(h) applies only in instances where the disadvantaged owner obtains ownership interest as the result of a gift, or transfer without adequate consideration, from a nondisadvantaged individual. §26.69(h). Here, OKDOT simply adopted NJUCP's findings without providing a factual foundation for the applicability of the rule. OKDOT offered no proof that Ms. Dhala's nondisadvantaged father previously owned LFC or that Ms. Dhala obtained her ownership interest by gift, or for inadequate consideration, from him.² Accordingly, we reverse because OKDOT failed to prove that Regulation §26.69(h) is applicable to the facts presented in this case.

Affiliation and Size

"Affiliation" is not a removal ground.³ The affiliation rules referenced in §§23.3 and 26.53 apply exclusively to determine business size, specifically whether an affiliated business is ineligible because it exceeds the size cap applicable to the DBE's business. Only excess gross receipts (or employees) constitutes a ground for decertification. OKDOT failed to even contend,

¹ We remind OKDOT that when a firm is decertified in its home state, it does not necessarily mean that the firm is no longer eligible in every state where it is certified. The rule requires the recipient to prove its own case and to explain its own reasons for decertification. §26.87(d).

² LFC provided arguments to refute OKDOT's conclusion. LFC asserted that Ms. Dhala's father never owned LFC and that he loaned Ms. Dhala money to establish the firm. Further, LFC provided NJUCP with a cancelled check to demonstrate that Ms. Dhala repaid the debt with interest.

³ *See generally* §§26.87(d), (f). OKDOT asserts only that LFC and Creative Food Group are affiliates.

much less prove, that LFC is ineligible because it exceeds the size standard. We cannot affirm under Regulation §26.89(f)(1).

Conclusion

For the forgoing reasons, we reverse the decision under Regulation §26.89(f)(2). We direct OKDOT to restore the firm's certification immediately and to amend applicable lists, databases, and directories accordingly. Please provide this Office a copy of the notice that you send the firm confirming the you have restored certification.

This decision is administratively final. Thank you for your continued cooperation.

Sincerely,

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

CC: LFC