July 9, 2019

Reference Number 19-0083

Michael D. Bryant
Director
Civil Rights Division
Texas Department of Transportation
125 East 11th Street
Austin, TX 78701

Dear Mr. Bryant:

As you know, Axis Installations, Inc. has appealed TXDOT's March 1, 2019 denial of AI's application for interstate certification. The U.S. Department of Transportation reverses TXDOT's decision and directs that AI be certified promptly.

TXDOT gave several reasons for denying AI's application. Each is predicated on TXDOT's inability to "verify" certain aspects of the home state (Florida) certification. Interstate certification, however, does not mean that State B verifies each aspect of certification as if it were the home state. An interstate application is not an opportunity for State B to second-guess State A or express its wish that there were more or different evidence in the home state's file.

We have frequently stated that an essential goal of the interstate rule is to facilitate certification in jurisdictions beyond the home state. To that end, the rule contemplates that the home state's decision be given substantial deference. It narrows additional states' reviews to specific materials and sets higher hurdles for denial. The point is not to make DBEs already vetted in their home states re-prove eligibility to subsequent certifiers. State B's objections to interstate certification must rise, in short, to the level of "good cause" as described in section 26.82(d)(2). There are just five such reasons, and the Department's view is that an interstate denial must fall squarely under one of them. Please see the Department's formal Interstate Certification Guidance. Consistent with the preamble to the final rule, the guidance explains that good cause is a much higher standard than applies to initial applications.

TXDOT takes the position that Florida's certification is "factually erroneous or inconsistent with the requirements" of part 26 of the DBE regulations. 49 C.F.R. 26.85(d)(2)(iii) (the third of the good cause reasons) . The record shows no error of fact within the meaning of the rule and guidance, so there must be a clear, direct, objective inconsistency with a specifically identified certification rule or rules. (Again, please see the guidance for a more complete discussion.)

We do not see one. TXDOT expresses its desire to see more evidence—of initial capital, owner's PNW, participants' authority, circumstances surrounding a 2011 transfer of ownership, disadvantaged owner's experience, relative salaries, employee lists, employee titles, and so forth. The problem with TXDOT's position is that it defeats the limitations on section 26.85(c). The Department intentionally limited interstate certifiers to the materials described. Short of good cause, State B is not entitled to more or different evidence, especially not, as here, additional information in support of the owner's PNW, as reported in the home state. State B is not supposed to ask for updates or augmentation. The annual attestation should suffice.

TXDOT did not narrow its inquiry as the rule intends. It objects to fully three of the four main aspects of eligibility: disadvantage, ownership, and control. The only element of eligibility TXDOT does not challenge is business size. Our opinion is that this scattershot approach unduly burdens an interstate applicant, contrary to the rule, as the Department interprets it. The denial letter amounts to a general statement that TXDOT would have analyzed AI's submissions differently had it been the home state. TXDOT would have made different conclusions based on what it sees as insufficient evidence. TXDOT in our view expresses a difference of opinion.

We understand that the intent is to identify areas (sections 26.67, 26.69, 26.71(g)) where it maintains AI did not adequately demonstrate eligibility. The key word is "adequately." That is a judgment call, not a clear inconsistency with a specific rule. The objection does not rise to the level of "good cause." Accordingly, we cannot affirm TXDOT's decision as consistent with the certification rules. Section 26.89(f)(1).

Section 26.89(f)(2) (Department reverses when decision inconsistent with applicable certification rules) requires us to reverse and direct TXDOT to certify AI "immediately" in all work (NAICS) codes it enjoys in Florida.

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: Kristine D. Clarke, President, AI