

March 31, 2017

Reference Number: 16-0160

Mr. Tony Youseffi
DBE Branch Manager
Kentucky Transportation Cabinet
Office for Civil Rights and Small Business Development
200 Metro Street, 6th Floor
Frankfort, KY 40622

Dear Mr. Youseffi:

This letter responds to the May 25, 2016 letter in which the Kentucky Unified Certification Program (KYUCP) denied Cannon & Cannon, Inc.'s (Cannon) application for interstate certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, as required by §26.61(e), the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) remands the matter under §26.89(f)(4) for KYUCP's reconsideration,¹ pursuant to KYUCP's request to the Department on March 13, 2017 via teleconference.

Cannon is a DBE firm certified in its home state of Tennessee.² Angela Cannon and her husband, Harold Cannon, founded the firm in 1996. Ms. Cannon is the CEO, and Mr. Cannon, who is non-socially and economically disadvantaged under the Regulation, is President. Ms. Cannon owns 67% of the firm and Mr. Cannon owns 33%. The firm specializes in engineering consulting and field surveying.

KYUCP denied Cannon's application for DBE certification on multiple grounds of ownership and control, including Ms. Cannon's lack of entitlement to share in the firm's profits, in violation of §26.69(c)(3); Ms. Cannon's inability to control the firm because Mr. Cannon's remuneration is greater than hers, even though he spends less time working at the firm, in violation of §26.71(i)(1); Ms. Cannon's apparent non-control as distinct from her family as a whole, contrary to §26.71(k)(2) of the Regulation; and Ms. Cannon's ability to accumulate substantial wealth, in violation of §26.67(b)(1)(ii)(A).

¹ See 26.89(f)(4): "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."

² See Tennessee Unified Certification Program Certificate (Dec. 18, 2013).

During the March 13, 2017 teleconference, the Department explained to KYUCP that, rather than evaluating Cannon's application and denying it based on the reasons listed above, KYUCP should have considered the firm's application for eligibility under §26.85 (interstate certification) of the Regulation. Section 26.85 applies because Cannon is already certified by another certifying agency – specifically, by the Tennessee Unified Certification Program (TNUCP) in Cannon's home state of Tennessee. The record contains a copy of Cannon's TNUCP DBE certificate.³ Despite this, KYUCP treated Cannon as if it were a first-time DBE program applicant. KYUCP's decision did not acknowledge the TNUCP certification or any of the provisions of §26.85.

At KYUCP's request, the Department is closing Cannon's appeal file and remanding the matter to KYUCP under §26.89(f)(4).⁴ KYUCP should review the materials Cannon submitted⁵ and reconsider its position regarding Cannon's DBE application in accordance with the Regulation's interstate certification rules:

§26.85 Interstate Certification:

- (a) This section applies with respect to any firm that is currently certified in its home state.
- (b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.
 - (1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.
 - (2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.
- (c) 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 *See id.*

⁴ The Department may exercise such discretion because Cannon's opportunity to present its case has not been substantially prejudiced. *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."

⁵ The record shows that Cannon substantially complied with §26.85(c) (*e.g.*, it appears to have provided the DBE Uniform Certification Application submitted to TNUCP, all supporting documents, and affidavits of no-change).

(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.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) Determine whether there is good cause⁶ to believe that State A's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(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.

(3) If, as State B, unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

⁶ The Department cautions KYUCP that the five (5) good cause reasons listed in §26.85(d)(2) are the only grounds upon which State B may deny an applicant firm that is already certified in State A. Good cause is a higher standard than simple substitution of judgment for that of the home state. Instead, KYUCP must generally articulate something specific in the home state application that directly runs afoul one of the §26.85(d)(2) provisions.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under s§26.89 of this part.

(e) As State B, if you have not received from State A a copy of the site visit review report by a date 14 days after you have made a timely request for it, you may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, you must, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.

(f)(1) As a UCP, when you deny a firm's application, reject the application of a firm certified in State A or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, you must make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. You must enter the following information:

- (i) The name of the firm;
- (ii) The name(s) of the firm's owner(s);
- (iii) The type and date of the action;
- (iv) The reason for the action.

(2) As a UCP, you must check the DOCR Web site at least once every month to determine whether any firm that is applying to you for certification or that you have already certified is on the list.

(3) For any such firm that is on the list, you must promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, you must provide a copy of the decision to the requesting UCP within 7 days of receiving the request. As the UCP receiving the decision, you must then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

(g) You must implement the requirements of this section beginning January 1, 2012.

The interstate certification rule creates a bright-line distinction between applications for interstate certification and applications for initial certification. As KYUCP did not consider any of the provisions of §26.85, it could not exercise its discretion to certify Cannon under §26.85(b). Nor was KYUCP able to exercise its only other option: reviewing the materials described in §26.85(c) and making a determination under §26.85(d). Instead, KYUCP erroneously treated a certified DBE as a new applicant and rendered a decision that the firm was ineligible as a DBE.

The Department remands under §26.89(f)(4) for KYUCP to process Cannon's request for certification in accordance with the procedures and timelines of §26.85. As the rule states, KYUCP has discretion under §26.85(b) to accept the firm's certification from TNUCP and certify the firm as a DBE in Kentucky without further procedures or to review the §26.85(c) materials and make a determination under §26.85(d). Please inform Cannon by April 28, 2017 whether KYUCP will exercise its §26.85(b) or (c) option and provide this Office a copy of KYUCP's final decision (certification or denial letter actually sent to the firm). In the event of a new denial letter, Cannon will have the usual 90 days within which to appeal to the Department.

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: Cannon & Cannon, Inc.