

January 31, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 05-0006

Ms. Rita Nelson, Chief
Office of Certification
California Unified Certification Program
Department of Transportation
Civil Rights – MS 79
1823 14th Street
Sacramento, CA 95814

Dear Ms. Nelson:

This is in response to an appeal of Disadvantaged Business Enterprise (DBE) certification denial concerning BusTex Corporation (“BusTex”). We have carefully reviewed the material from the California Unified Certification Program (“CUCP”) and BusTex. We have concluded that CUCP’s decision is inconsistent with the substantive certification requirements of the Department’s DBE regulation, 49 C.F.R. Part 26, (“the Regulation”). For the reasons set forth below, we reverse CUCP’s decision and direct CUCP to certify BusTex.

BACKGROUND

BusTex is certified as a DBE in its home state, Colorado and applied for DBE certification with the CUCP in August, 2002. In June 2003, the CUCP denied the firm’s application for the DBE program and filed a third party challenge to the Colorado Department of Transportation’s (“CDOT’s”) certification under the Regulation §26.87(a). In response, CDOT conducted an on-site visit of the firm and concluded that the firm continued to meet the eligibility requirements as specified under the Regulation. The Department subsequently remanded CUCP’s DBE denial back for further consideration; and, in a separate decision, denied CUCP’s third party challenge. In both decisions, the Department addressed the firm’s eligibility for the program.

It is surprising that the CUCP again denied the firm in July, 2004, after the Department’s remand given the fact that both of the Department’s determinations addressed matters that appear not to have changed since the original denial and third party challenge. The substantive issues involve the contribution of capital to start the firm by the disadvantaged owner, Ms. Pauline Booth; her control of the firm given the involvement of her husband W. John Booth, a non-disadvantaged individual; and the firm’s independence from -----, a British Corporation, which provides fabrics which BusTex distributes. (The Department notes that since

CUCP did not deny the firm based on independence grounds in its July 2004 action, it will not address the issue here). Since these issues were thoroughly addressed by the Department in its previous decisions, the Department will look to the additional information CUCP now claims supports its assertion that the firm is ineligible.

OWNERSHIP

In its July 20, 2004 certification denial letter, CUCP cited much of the same record evidence and used the same argument it presented in its previous denial action to support its claim that Ms. Booth's contribution of capital could not be considered real, substantial, and continuing within the meaning of the Regulation §26.69(c) and §26.69(e). In its July 20, 2004, letter CUCP added the following:

[Ms. Booth's] May 14, 2004 letter addressed to [CUCP] states, "the total 5,000 shares issued to me was valued at \$500.00 per share issue not per share, therefore the total 5,000 shares were valued at \$500.00." In contrast, a statement in your rebuttal letter to the [Department] which stated [an] investment of \$1,500.00 in BusTex stocks, shows inconsistencies. Additionally, the following information and cancelled checks show other monies that were invested for you and your husband's joint checking account into BusTex:

- January 25, 2002 – ----- \$880 was drawn from the joint account and made payable to the law firm of -----.
- March 17, 2002 – ----- \$750.00 paid to -----, an attorney.
- April 4, 2002 – Bank draft for -----.
- June 15, 2002 – -----.

Additional substantiating evidence indicates:

- A promissory note dated December 31, 2002, reflects both you and your husband loaned BusTex the sum of \$21,031.
- BusTex opened an account with ----- Bank on February 19, 2002 and the signature card is under the names of Pauline Booth and W. John Booth.
- According to your Employee W-2 Wages Summary 2002, your income was ----- and your husband's income was ----- . Therefore, it is obvious that Mr. Booth contributed most of the monies in your joint checking account.

Even with this new information, the Department disagrees with the CUCP's conclusion. The Regulation §26.69(c) and §26.69(e) refer to a specific point at which disadvantaged owners acquire their ownership interest in a DBE firm. Recipients must determine if a person's contribution of capital or expertise matches the timing of the business start-up and could reasonably be considered legitimate. In its decision denying CUCP's third party challenge, the Department stated:

. . . During the firm's incorporation, Ms. Booth was issued 5,000 shares of common stock which she invested \$1,500.00 from a joint checking account for organizational costs and other expenses. An additional \$3,000.00 was invested

for the required US fabric testing. Ms. Booth was the sole shareholder and director with no employees. The firm operated out of her home in -----, Colorado. BusTex is a distributor of bus seating fabric. The record also reveals that Ms. Booth earned an average of ----- per year from 1998-2001. This may substantiate that even though the monies were derived from a joint checking account that she also contributed to the account, making it reasonable to conclude that she these funds may have been derived from her individual assets. CDOT certified BusTex on June 18, 2002. In December 2002, Ms. Booth gifted her non-disadvantaged husband, John Booth, 2,450 shares of stock in BusTex. In addition, Ms. Booth has loaned BusTex over \$40,000. According to the record, these funds have not been repaid. The record does not contain substantive record information to support your findings that the ownership interest of the disadvantaged owner is not real and substantial as required by the Department's Regulation.

Ms. Booth was the sole owner at the time of the firm's inception. CUCP denied the firm based on its two assumptions concerning the source and nature of funds Ms. Booth used to start the firm. CUCP reasoned that because the funds were transferred from a joint account and that Mr. Booth earned substantially more than Ms. Booth that Mr. Booth contributed the most to the joint account and the monies could not be considered as deriving from her personal funds alone. In its July, 2004, decision, the CUCP cited checks used to pay for firm items/expenses drawn on the joint account. Yet it appears that the CUCP again ignored the possibility that Ms. Booth contributed monies to this joint account; and the CUCP seems to place too heavy an emphasis on the disparate salaries between the two individuals. In the Department view, recipients' duties include assessing a firm in its totality, which means a fair interpretation of the ownership and control by a disadvantaged owner. In terms of contribution of capital, funds from a joint account should not automatically be excluded from consideration since it is conceivable that both persons can contribute to an account. (The Department notes that if Mr. Booth was an owner of the firm at its inception, Ms. Booth, would have had to provide a greater showing of individual contribution).

CUCP also cites the existence of a promissory note wherein the Booths loaned BusTex \$21,031.00 to support its claim that Ms. Booth's contribution of capital was not in accordance with the Regulation. In certain instances, loans used to capitalize a firm are not considered as meeting the requirements of the Regulation. The difference here, however, is that Ms. Booth may have used her own funds to first capitalize the business without her husband and, as the Department stated above, there is no indication that these funds were paid back. CUCP's analysis on this point is therefore, in error.

Given the above, CUCP's determination concerning Ms. Booth's ownership of the firm is therefore, inconsistent with the Regulation.

CONTROL

In its July 20, 2004, denial letter to Ms. Booth, CUCP stated:

Your firm provides importing and distribution of seating fabric and interior design services. Your duties include bookkeeping, generating monthly financial statements, petty cash, wages, and data processing. In addition, in your letter

dated September 2, 2003, you stated, “on behalf of -----, I made telephone sales calls, attended trade shows with the purpose of promoting sales of passenger and driver seats to the bus and industry.” Your responsibilities with USSC and other previous jobs were administrative in nature. According to your letter September 2, 2003, you stated, “Mr. Booth and myself now do the interior design work together, he does a little more than myself as he is technically better.” This indicates that the non-disadvantaged husband is the person whose expertise is relied on to make the company a success.

The Department addressed this point in its response to CUCP’s first denial: “Our concern with [CUCP’s] analysis is that the socially and economically disadvantaged owner performed these duties and responsibilities prior to and continued after her husband joined the firm.” Similarly, the Department stated in its determination concerning CUCP’s third party challenge:

. . . substantial record evidence reveals that the socially and economically disadvantaged owner holds the highest officer position and is responsible for contacting customers; new contacts, sales; work out fabric choices for clients; establish contacts with bus body builders; ordering; freight management, day-to-day office details; invoicing; travel-visit customers and trade shows to promote products. The record does not support your determination that the socially and economically disadvantaged owner does not possess the requisite managerial or operational control to make independent and unilateral business decisions.

Since CUCP appears to rely on the same reasoning it put forth in its first denial and the third party challenge without presenting any new information; it either misunderstood or chose to disregard the obvious implications the Department made in its two determinations described above that Ms. Booth controls the firm. CUCP’s decision is thus unsupported by the record evidence.

In summary, CUCP’s decision is not supported by substantial record evidence; and the Department reverses CUCP’s decision and directs it to certify BusTex. This appeal is being closed in our files.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: BusTex