April 28, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0058

Shari L. Pratt, Chair
DBE Certification Panel
Connecticut Department of Transportation
2800 Berlin Turnpike
P.O. Box 317546
Newington, CT 06131-7546

Dear Ms. Pratt:

NIA Construction Services, Inc. (NIA), appeals the Connecticut Department of Transportation's (ConnDOT) denial of NIA's interstate application for Disadvantaged Business Enterprise ("DBE") certification, under criteria set forth at 49 CFR Part 26 (the Regulation). ConnDOT denied certification for NIA's failure to cooperate, under Regulation §26.109(c), with certification-related requests.

The procedural history is as follows. NIA filed an initial application for certification on or about October 17, 2013, to which it appended much of the information that an initial application would contain. ConnDOT on October 24 requested a hefty volume of "additional information" to include 21 different categories of "checklist" documents (each category to contain numerous iterations of documents that may be difficult to find on short notice or may not exist and, presumably, have to be constructed). The October 24 letter, further, expressly directed the owner to complete a new (initial) application in its entirety ("There can be no blanks on the application and you had blanks on every page. If something is not applicable, put that.")

Further, the October 24, 2013, letter, sent via certified mail, contains numerous uses of the word **mandatory** and **must**, which, in at least two instances (p. 2) are not, in fact, mandatory for interstate applicants. The rule, for example, does not authorize ConnDOT to request a new personal financial statement, much less make one mandatory. There are numerous other examples of requests outside the scope of §26.85. See generally Document Checklist appended to ConnDOT's October 24, 2013 letter. The letter requested all of the materials requested by November 7, 2013.[1]

[1]The firm, the address of which is out of state, could not have received the letter before October 25 and likely did not receive it until several days later. Considering the volume of information requested, ConnDOT's time frame for

When the firm did not respond, ConnDOT sent a denial letter dated November 21, 2013, citing the ground that NIA had failed to cooperate and offered the firm the opportunity to present rebuttal arguments in person or by telephone but not in writing. The letter states that if ConnDOT does not hear from NIA by November 29, 2013 "the denial will stand." As November 28 was Thanksgiving Day and the 29th the Friday after, ConnDot, in our view, effectively denied NIA a meaningful opportunity to challenge the denial, even if the November 21 certified letter was duly sent on November 21 (also a Thursday). In all likelihood, NIA would not have received the notice of hearing (if anyone were working and not spending the holiday with family) until at least Monday, November 25, 2013, two business days later, and three days before Thanksgiving.

The firm did not request a hearing, either in person or by telephone. Nor did it send in the information requested. NIA explains that it compiled the requested information but in an oversight "inadvertently" failed to mail it to ConnDOT. NIA, on appeal, simply requests the opportunity to present its documentation to ConnDOT. Appeal Letter dated December 24, 2013.

The equities in this case, in no small measure due to certifier errors, merit the relief requested. We cannot conclude that ConnDOT's actions were consistent with the substantive and procedural certification provisions, particularly not those of §26.85. Hence we do not affirm under §26.89(f)(1).

In an interstate matter, normally all that the applicant need provide is proof of current certification in the home state and, if State B (Connecticut) elects not to certify without further proceedings, then also the materials specifically described in §26.85(c). There is no requirement that an interstate applicant provide State B a completely new, initial application for certification *or* the supporting documents on the initial application checklist, or updated documents not provided to other states (and thus outside the purview of the interstate certification rule) to the extent these documents are not already in the State A materials required to be produced under §26.85(c). We respectfully direct ConnDOT to desist from (a) requesting such extraneous documents and (b) calling them "mandatory." They are neither required nor normally authorized in the context of an interstate certification application.

The record that ConnDOT provided in this case shows that it received an initial, not interstate, application and that it asked for highlighted information it deemed to be missing. However, ConnDOT was not entitled to a new/initial application at all in this case. The applicant was under no obligation whatever to update such an application. In addition, ConnDOT highlighted most of the items on a Documents Checklist (which correspond to the Regulation's checklist of items that *may be requested* in conjunction with an *initial* (State A) application for certification. Section 26.85, the interstate certification provision rule, does not authorize ConnDOT to ask for any of this information (again, to the extent not contained in the §25.85(c) materials. An interstate application, in short, is not a "do-over" of the firm's initial application. ConnDOT's process was clearly contrary to the rule's requirements.

---

receipt of the information (which requires travel time on the back end, too) may have been unreasonable. The request surely did not allow any margin of error for, e.g., illness or out-of-town travel, business or personal.

We recognize that NIA may have erred as well. It could have provided the information requested, even the information that the rule does not authorize ConnDOT to request. It might have challenged ConnDOT's action by telephone or in person had it received reasonable notice of the scheduled hearing. It could have mailed the packet of documents as intended. Since NIA appears not to have provided all of the materials prescribed in §26.85(c), we do not direct ConnDOT to certify NIA under the authority of §26.89(f)(2).

Instead, we grant the parties the opportunity to correct their errors. Under the authority of §26.89(f)(4), we vacate the denial and remand the matter to ConnDOT for consideration of the materials described in §26.85(c) and only those materials. As those materials properly include documents and correspondence with New York (and possibly other states, but only to the extent prescribed in §26.85(c)) duly filed before April 28, 2015, NIA will have to update its §26.85(c) submission and provide its §26.85(c)(4) affidavit. But that is all that NIA must provide under the interstate certification rule and this decision. There will be no further updates to any §26.85(c) document.

We urge NIA to provide complete documentation described in the preceding paragraph to ConnDOT not later than June 5, 2015, and we direct ConnDOT to discharge its obligation under §26.85 to make a decision based exclusively on the §26.85(c) materials not later than July 2, 2015, with a copy of the applicable certification or denial letter to this office. We further urge the parties to work together to ensure that NIA has a fair opportunity to present its case and that ConnDOT can make its evaluation based on a complete set of §26.85(c) documents. We will not look favorably upon subsequent actions that unreasonably and impermissibly burden the applicant or a result that appears to be based on an insignificant omission or technicality.

To summarize, we vacate the denial and remand the matter for further consideration of NIA's eligibility for interstate DBE certification. When ConnDOT receives the New York materials described in that section (and any non-duplicative correspondence with another certifying state), we direct ConnDOT to make a decision on the merits, with due regard to the explicit limitations of and procedural safeguards in the interstate certification rule and without making further requests for additional information from NIA. Should NIA fail to provide the §25.85(c) documents, then ConnDOT may deny for that reason, and the firm will have the usual 90 days within which to appeal to the Department. See §§25.85(d)(2)(v), 26.89(c).

This decision is administratively final and not subject to petitions for review. Thank you for your continued cooperation.

Sincerely,

Samuel F. Brooks
Acting Lead Specialist
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: John Heard, President/CEO, NIA