

February 20, 2015

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Reference No.: 14-0091

Ms. Kathleen Burch, President  
Atrium, Inc.  
[REDACTED]  
Lemont, IL 60439

Dear Ms. Burch:

Atrium, Inc. (Atrium) appeals the Chicago Transit Authority's (CTA) decertification of the firm as a Disadvantaged Business Enterprise (DBE) for failure to provide the annual no-change affidavit and related information that the Department's DBE Regulation (49 CFR Part 26) §26.83(j) requires, which constitutes a failure to cooperate. One remedy for a firm's failure to cooperate is decertification. CTA availed itself of that remedy and did so according to the rules of §26.87. After careful review of the administrative record, including the material that you and CTA provided, we conclude that substantial evidence supports CTA's action and that CTA followed proper procedures in decertifying the firm. There is no reversible error and we affirm the decertification. Atrium may reapply for certification with CTA at any time.

***Authority***

The specific authority for affirming the decertification includes the following.

§26.83(j): If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, 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. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns). **If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c). (Emphasis added)**

§26.87(b): “Recipient-initiated proceedings. If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.”

§26.87(d): “Hearing. When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.”

§26.87(g): “Notice of decision. Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. . .”

§26.109(c): “Cooperation. All participants in the Department’s DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; *with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment*; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).” (Emphasis added.)

§26.89(f), relating to the Department’s role in appeals of DBE certification or decertification decisions: “(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

### ***Discussion and Decision***

Atrium was certified by CTA several years ago. CTA requested the 2013 no-change affidavit and supporting documents on July 24, 2013. This correspondence requested your response within 20 calendar days of that date. Atrium did not fully comply with the request.<sup>1</sup> CTA sent the firm a reminder letter on August 14, 2013; and a handwritten notation in the file indicates CTA verbally

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<sup>1</sup> CTA sent its request as a courtesy. The obligation to provide the annual affidavit rests exclusively with the firm. Filing the affidavit is a condition of remaining certified, and it is an obligation of which the firm was fully aware. We note in this regard that §26.83(j) requires only the affidavit of no-change and documentation of the firm’s size and gross receipts (normally in the form of a business tax return). The requirement is not one the firm should find particularly burdensome to satisfy. Atrium failed to provide the information that the Regulation requires.

gave you until September 9, 2013, to submit the information. Nearly one month later the firm had not provided the information, prompting CTA on October 4, 2013 to issue its intent to decertify Atrium for failure to cooperate. CTA decided to decertify the firm and so notified you by letter dated on October 31, 2013. That letter stated the reason for the decertification (failure to cooperate) and notified Atrium of its right to appeal to the Department.

You stated on appeal you requested additional time to submit 2012 tax information because the firm was changing accountants and that the firm filed a request for extension for the 2012 returns. You also indicated that Atrium requested in writing an informal hearing. However, under the terms of section §26.83(j), the firm had failed to cooperate at the point it did not provide the annual affidavit and supporting documentation on time. CTA's notice of intent, offer of a hearing, and notice of decertification substantially complied with the decertification requirements of §26.87. We note that in CTA's letter to you, it would have accepted the firm's "properly filed tax extension." There is no indication in the record that you provided this document to CTA, nor did you provide evidence of one on appeal. In addition, there is no indication the firm requested an informal hearing as you allege. We therefore affirm CTA's under §26.89(f)(1) as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification.

### ***Conclusion***

The evidence supports conclusions that Atrium no longer met the criteria for DBE certification and that the decertification for failure to cooperate was proper and not inconsistent with the substantive or procedural provisions of Part 26. We affirm. This decision is administratively final and not subject to petitions for review.

**The firm may reapply for DBE certification as the applicable waiting period has expired.**

Sincerely,

Marc D. Pentino, Acting Associate Director  
External Civil Rights Programs Division  
Departmental Office of Civil Rights

cc: CTA