

May 14, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0105

Leonardo Fabio
President
LLF Construction Services, Inc.
175 Main Street, Suite 502
White Plains, NY 10601

Dear Mr. Fabio:

LLF Construction Services, Inc., appeals the Connecticut Department of Transportation's (ConnDOT) denial of its interstate application for Disadvantaged Business Enterprise ("DBE") certification, under criteria set forth at 49 CFR Part 26 (the Regulation). ConnDOT denied certification for LLF's non-cooperation with certification-related requests, ostensibly its failure to provide all of the information specified in Regulation §26.85(c).

LLF filed its application for interstate certification on or about February 28, 2014, the date of your signed, notarized Affidavit of Certification for Out-of-State Applicants. ConnDOT's form of affidavit lists the information that §26.85(c) requires (principally, a complete copy of the home state (New York) application, including all supporting materials, annual affidavits, and change notices and other correspondence). ConnDOT Affidavit of Certification for Out-of-State Applicants, Item (1).

On March 17, 2014, ConnDOT sent LLF a letter, to your attention,¹ in which it recommended denial of the firm's application. ConnDOT quotes the same language, which corresponds in substance to the language of §26.85(c); states that "[a] vast amount of mandatory items that would have been sent to your home state were not sent to [ConnDOT];" and informs you that "your failure to cooperate and send the required documents listed on the Interstate Certification Form, did not allow us to determine your eligibility for the DBE Program." The letter further advises you that you have the right "to discuss" the recommendation by telephone or in person at a meeting scheduled to occur March 26, 2014, at 11am. The letter requests that you call ConnDOT by March 24, which was the third business day following your (out of state) receipt of the letter, to confirm your participation. Otherwise (should LLF not contact ConnDOT), "the denial will stand."

¹This letter bears the stamp "LLF Construction Services RECEIVED MAR 19 2014." March 19, 2014, was a Wednesday.

There being no response from LLF, ConnDOT sent the firm a notice of denial dated April 2, 2014. That notice states: “You have been denied DBE certification for failure to cooperate.” It advises you of your right to appeal to the Department, which you did promptly, by letter dated April 14, 2014.

The appeal letter states that “[t]he vast amount of mandatory items outlined on 49 CFR 26.85, Interstate Certification are not applicable to us.” The letter contends “We did submit our home state documentation.” You concede that ConnDOT offered you the opportunity to discuss the recommended action, “but due to negligence on my part, work schedule I did not follow up.” You then “request an appeal to this decision [because LLF] has been a certified DBE in NY for over 10 years, and we have worked on various USDOT funded projects and would like to expand our operations to Connecticut, where we can make a difference.” Other than the contention that LLF did in fact submit “our home state documentation,” these are not necessarily “arguments concerning why [ConnDOT’s] decision should be reversed.”² See §26.89(c).

In a rebuttal letter dated July 16, 2014, ConnDOT is substantially clearer about what it considers LLF to have “omitted” from its interstate application:

- Personal & Corporate Tax Returns
- Bank Signature Card
- Articles of Incorporation/Stock Certificates
- Corporate By-Laws & Amendments
- Minutes of Stockholder/shareholder meetings
- Annual Update (since the firm has been certified 10 years)
- Current Annual Affidavit³

As far as the record reveals, ConnDOT never provided LLF with this accounting of what it considered missing from the interstate application. The record does suggest, however, that ConnDOT requested or considered “missing” a number of items that the Regulation does not require an interstate applicant to provide. See, e.g., LLF’s Initial Application for Certification for certification in Connecticut (which §26.85 explicitly does not require), with various fields

² Had the firm in fact provided all of the materials that §26.85(c)(1) requires, or at least made a substantial attempt to do so, we would be more inclined to read “work schedule” as an argument that ConnDOT’s notice was unreasonable in that it did not provide you sufficient response time. Instead, the firm appears to argue, erroneously, that §26.85(c) does not apply.

³Section 26.83(j) requires DBE firms to file annual affidavits of no-change with documentation of firm size/gross receipts (normally a business tax return), only. There is no further “annual update” required. The Department does not understand how the last two bulleted items differ. In interstate context the State B certifier is not entitled to new or updated material not provided to State A. Section 26.85(c) requires an interstate applicant to produce for State B a complete copy of the materials described therein and nothing more or less. At a minimum, LLF and its owner would at one or more points during the period of certification in New York have provided the home state no-change affidavits and federal business and/or personal tax returns. None appears in the record that ConnDOT provided to the Department. We must conclude that LLF did not provide ConnDOT “*all supporting documents, and any other information* you have submitted to State A or any other state related to your firm’s certification,” as §26.85(c)(1) requires (emphasis added).

highlighted by ConnDOT as “blank,” “missing,” or “not included.” ConnDOT is not entitled to a new application for certification at all; ConnDOT surely is not entitled to information and supporting documents that such a new/initial application might contain (independent of information provided in New York). See generally §26.85 and related Preamble explanation, 76 FR 5083, 5087-89 (Jan. 28, 2011); Department of Transportation, Interstate Certification Q&As, <http://www.civilrights.dot.gov/disadvantaged-business-enterprise/dbe-guidance>. The Department specified, in promulgating the rule and in related guidance, its intent that the new procedures eliminate duplicative filings and other unreasonable barriers to interstate certification. State B’s review is, by design, substantially more streamlined than the home state’s. State B’s analysis is not a full, *de novo* review; State B’s potential objections to interstate certification are correspondingly limited; the rule affords firms currently certified in their home states due process protections not generally afforded initial applicants. See generally §26.85(d).

The Department concludes that this interstate application process was flawed on both sides. We affirm ConnDOT’s denial on the ground stated.

In reaching this result, we do not endorse vague or overbroad/unauthorized requests—or very short deadlines for the firm to provide the requested information. A firm’s failure to provide information to which the certifier is not entitled is not necessarily a failure to cooperate within the meaning of the Regulation.⁴ We continue to be concerned about apparent overreach in ConnDOT’s interstate information-gathering practices and lack of specificity in its communications concerning applications for interstate certification. Combined with very short deadlines and what appears to be an emerging pattern of summary denials, ConnDOT’s treatment of interstate applicants could be viewed as being at odds with the rule’s stated objective of facilitating interstate certification. Imposing undue and unreasonable burdens on out-of-state firms would, of course, be inconsistent with the substantive and procedural rules relating to interstate certification.

Just as ConnDOT might have been more forthcoming, so might the firm. The firm was obliged under §26.85(c) to provide a complete copy of the New York application for certification, with all supporting documentation and related affidavits and (non-duplicative, substantive) correspondence since the original certification. The interstate certification affidavit that you signed attests to LLF having provided all of the §26.85(c)(1) materials while the record indicates that it did not and, further, did not substantially comply. Finally, the firm could have contested the proposed denial directly with ConnDOT.⁵ The appeal letter having conceded negligence, we do not belabor the point.

We affirm the denial for failure to cooperate as supported by substantial evidence. The firm may reapply for interstate certification at any time, as the waiting period has elapsed.

⁴ ConnDOT was entitled under §26.85(c), and the firm was required to provide, at least some of the documentation requested, before the interstate certification rule required a substantive determination. Accordingly, non-cooperation stands as a denial ground.

⁵ Again, LLF makes no argument that ConnDOT’s notice of intent deprived it of reasonable notice of the grounds or a meaningful opportunity to contest.

This decision is administratively final and not subject to petitions for review. Thank you for your participation in the DBE program.

Sincerely,

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

cc: Shari Pratt, ConnDOT