

February 20, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0107

Mr. Adrien M. Wells, Sr.
M&O Construction, LLC
[REDACTED]
Hammond, LA 70403

Dear Mr. Wells:

M&O Construction, LLC (M&OC) appeals the Louisiana Department of Transportation and Development's (LDOT&D) decertification of the firm as a Disadvantaged Business Enterprise (DBE) for failure to provide the annual no-change affidavit that the Department's DBE Regulation (49 CFR Part 26) §26.83(j) requires, which failure constitutes a failure to cooperate. One remedy for a firm's failure to cooperate is decertification. LDOT&D 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 LDOT&D provided, we conclude that substantial evidence supports LDOT&D's action and that LDOT&D followed proper procedures in decertifying the firm. There is no reversible error and we affirm the decertification. M&OC may reapply for certification with LDOT&D 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

M&OC was certified by LDOT&D several years ago. LDOT&D requested the 2013 no-change affidavit by e-mail dated August 16, 2013. The e-mail requested that the firm provide the affidavit and supporting documents by September 15, 2013. M&OC did not comply with the request.¹ LDOT&D sent the firm a certified letter dated November 7, 2013. That letter informed

¹ LDOT&D sent its request as a courtesy. The obligation to provide the annual affidavit rests exclusively with the firm. It is unavailing that firm argues on appeal that it did not receive the request. 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

the firm of LDOT&D's intent to decertify the firm for failure to cooperate and notified the firm of its right to contest the proposed action at a hearing or submit a written appeal detailing your reasons for disagreement. This letter, although sent to your address of record, was never retrieved according the U.S. Postal Service. The firm sent no representative, presented no written rebuttal, and did not phone in. LDOT&D decided to decertify the firm and so notified you by letter dated on February 18, 2014. That letter, which M&OC evidently received, stated the reason for the decertification (failure to cooperate) and notified M&OC of its right to appeal to the Department.

On appeal, you state you never received the August e-mail or the November letter. 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. LDOT&D's notice of intent, offer of a hearing, and notice of decertification substantially complied with the decertification requirements of §26.87. We therefore affirm LDOT&D'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 M&OC 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: LDOT&D

form of a business tax return). The requirement is not one the firm should find particularly burdensome to satisfy. M&OC failed to provide the information that the Regulation requires.