

March 19, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0111

Mr. Marlin Thomas
SUPRA Office Solutions, Inc.
5070 Parkside Avenue, Suite 210
Philadelphia, PA 19131

Dear Mr. Thomas:

SUPRA Office Solutions, Inc. (SOS) appeals the New York State Department of Transportation (NYSDOT) 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 C.F.R. Part 26) §26.83(j) requires, which failure constitutes a failure to cooperate. One remedy for a firm's failure to cooperate is decertification. NYSDOT 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 NYSDOT provided, we conclude that substantial evidence supports NYSDOT action and that NYSDOT followed proper procedures in decertifying the firm. There is no reversible error and we affirm the decertification. **SOS may reapply for certification with NYSDOT after the applicable waiting period.**

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

SOS was certified by NYSDOT on March 12, 2013. On January 10, 2014, NYSDOT mailed a letter to the firm’s address as a reminder that its certification anniversary date was March 12, 2014. The firm’s required annual affidavit of no change was due on March 12, 2014, which the firm failed to submit. On April 3, 2014, NYSDOT sent a letter to the firm via the United States Postal Service proposing to remove the firm’s certification for failing to cooperate. NYSDOT offered the firm an opportunity for an informal hearing or the chance to provide a written response as to why it should remain certified. NYSDOT requested a written response to the correspondence no later than April 13, 2014 or a verbal request for an informal hearing by April

10, 2014. On April 7, 2014, “Williams” signed for the April 3rd letter, yet the firm sent no representative, presented no written rebuttal, and did not phone in to request a hearing or an extension of time.

SOS did not timely comply with NYSDOT’s request.¹ NYSDOT sent the firm a certified letter dated April 17, 2014, decertifying SOS as a DBE. That letter, which SOS received, stated the reason for the decertification (failure to cooperate) and notified SOS of its right to appeal to the Department.

On appeal, you stated that the removal of DBE certification is the result of an employee who is no longer with your firm, and whose responsibility it was to oversee certification maintenance. 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. NYSDOT notice of intent, offer of a hearing, and notice of decertification substantially complied with the decertification requirements of §26.87. We therefore affirm NYSDOT 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 SOS 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.

Sincerely,

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

cc: NYSDOT

¹ NYSDOT 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. SOS failed to provide the information that the Regulation requires within the time period NYSDOT requested.