

February 26, 2015

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

Reference No.: 14-0128

Ms. Marquette J. Bryan  
Nelson Mullins Riley & Scarborough, LLP  
Atlantic Station  
201 17<sup>th</sup> Street, NW  
Suite 1700  
Atlanta, GA 30363

Dear Attorney Bryan:

This is in response to your June 9, 2014, correspondence on behalf of your client, CK Franklin, LLC (CKF) which appeals the Georgia Department of Transportation's (GDOT) decertification of the firm as a Airport Concession Disadvantaged Business Enterprise (ACDBE) for failure to provide the annual no-change affidavit and related information that the Department's DBE Regulation (49 C.F.R. Parts 23 and 26) §26.83(j) requires, which constitutes a failure to cooperate. One remedy for a firm's failure to cooperate is decertification. GDOT 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 GDOT provided, we conclude that substantial evidence supports GDOT's action and that GDOT followed proper procedures in decertifying the firm. There is no reversible error and we affirm the decertification. CKF may reapply for certification with GDOT after the appropriate waiting period (12 months from the date of decertification).

***Authority***

The specific authority for affirming the decertification includes the following.

§23.11: "What compliance and enforcement provisions are used under this part?: The compliance and enforcement provisions of part 26 (§§26.101 and 26.105 through 26.109) apply to this part in the same way that they apply to FAA recipients and programs under part 26."

§23.31: "What certification standards and procedures do recipients use to certify ACDBEs? (a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must

provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (*see* part 26, §26.81).”

§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*

CKF was certified by GDOT as an ACDBE in 2007. GDOT requested the 2013 annual no-change affidavit and supporting documents on March 5, 2013. In this correspondence sent to the CKF's address of record. GDOT requested the firm's response by April 12, 2013. CKF did not respond. The record contains evidence that GDOT sent the firm a reminder letter on June 3, 2013, via certified mail; however, the letter was never claimed at the U.S. Post Office. Nearly 10 months later the firm had not provided the information, prompting GDOT on March 11, 2014 to issue (again via certified mail) its intent to decertify CKF for failure to cooperate. This letter was also not picked up from the U.S. Post Office and was returned to GDOT. In this correspondence, GDOT offered the firm the ability to request a hearing by March 25, 2014, to appeal the proposed removal action; and if no response was received the decertification would become final. GDOT stated the reason for the decertification (failure to cooperate) and notified CKF of its right to appeal to the Department.

You stated on appeal that GDOT's decertification notices did not include proof of certified mailing nor proof of receipt by CKF, which you allege had no opportunity to rebut the agency's position. You stated: "Based on the regulation, CKF states that this agency cannot uphold a decertification for failure to cooperate with requests for information where it has not been established that any requests were made to the firm." However, under the terms of §26.83(j), the firm had failed to cooperate at the point it did not provide the annual affidavit and supporting documentation on time (i.e, every year on the anniversary date of its certification). It is CKF's duty to provide its annual affidavit without prompting or notice by GDOT.<sup>1</sup> This requirement is not one the firm should find particularly burdensome to satisfy nor a surprise since it has filed affidavits in the past. CKF failed to provide the information that the Regulation requires.

GDOT's notice of intent, offer of a hearing, and notice of decertification substantially complied with the decertification requirements of §26.87. As the record notes, the agency sent several certified mail requests to the firm's address, which were either ignored or never retrieved. We therefore affirm GDOT's decision under §26.89(f)(1) as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification.

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<sup>1</sup> GDOT 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).

*Conclusion*

The evidence supports conclusions that CKF no longer met the criteria for ACDBE certification and that the decertification for failure to cooperate was proper and not inconsistent with the substantive or procedural provisions of Parts 23 and 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: GDOT