April 21, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0150

Isaac P. Austin, Jr.
President
Austin Construction Group Corporation
[redacted]
East St. Louis, IL 62007

Dear Mr. Austin:

Austin Construction Group Corporation (ACG) appeals the Illinois Department of Transportation's (IDOT) decertification of ACG as a Disadvantaged Business Enterprise ("DBE") under criteria set forth at 49 CFR Part 26 (the Regulation).

IDOT removed the firm's certification for failure to cooperate under Regulation §26.109(c), specifically a failure to file the annual affidavit that §26.83(j) requires. The administrative record shows that IDOT twice requested the affidavit, on February 5, 2014, and March 6, 2014. When the firm failed to provide the affidavit, IDOT sent a Notice of Proposed Decertification (May 6, 2014, according to the letter in the administrative record at Tab 4; May 20, 2014, according to IDOT's letter of July 17, 2014, at Tab 3), which clearly states the reason for the proposed action and the firm's right to contest it in person or in writing. When the firm neither contested the action nor provided the required affidavit, which IDOT advised was due April 1, 2014, IDOT removed the firm's certification by letter dated July 17, 2014.[1]

IDOT was entitled to remove certification under the rules of §§26.83, 26.87, and 26.109. The requirement to file the annual affidavit of no-change rests entirely with the firm, and failure to file it timely is explicitly a ground for decertification.

The Appeal Letter of August 1, 2014, states no information or arguments that constitute reversal grounds. See generally §26.89(c). You explain:

1 We have carefully reviewed the entire administrative record, as we must on appeal. Tabs 3 and 4 contain United States Postal Service return receipts that you signed on March 7, 2014, and July 18, 2014, attesting to your receipt of IDOT's March 6, 2014, and July 17, 2014, letters. There is no allegation on appeal that you did not receive the May 2014 Notice of Intent. Rather, as we discuss below, the firm's contention is that a closed bank account prevented its owner from filing the no-change affidavit.

> "Our failure to file the required Annual Report of any change in company status was necessitated due to our corporate banking account being terminated. Please note that this was lack of work/bid non accepted or won problematic [sic]. Thusly no earned income was available to maintain minimum banking obligations. Having not won any bid though diligently pursuing all applicable avenues." Appeal Letter at 1.

The affidavit of no-change, however, is merely the disadvantaged owner's sworn statement that there have been no changes since the preceding certification anniversary date that affect the firm's eligibility to continue to be certified. It does not depend in any way on having an active bank account or active contracts.

Section 26.83(j) states:

"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.)

Section 26.87 states, in pertinent part:

"(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.

* * *

(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."

Section 26.89(f) states, in pertinent part:

"(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."

Section 26.109(c) states:

"*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.)

Although we are sympathetic to ACG's business concerns, we lack power under the Regulation to reverse a decertification that occurred, as this one did, in conformity with applicable certification rules, substantive and procedural, as set forth above. We affirm IDOT's decertification as supported by substantial evidence, as §26.89(f)(1) requires.

ACG could have avoided this result by responding to IDOT and providing the §26.83(j) affidavit (which is mandatory). ACG's remedy now is to reapply for certification, which ACG may do any time after July 16, 2015.

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

Sincerely,

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

cc: IDOT