

May 7, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14-0160

J. Pete Laney, Esq.
The Law Office of J. Pete Laney
Westgate Building
1122 Colorado Street
Austin, TX 78701

Dear Mr. Laney:

Your client GK Construction, LLC (GK) would appeal the Texas Unified Certification Program's (TUCP) removal of the firm's DBE certification. There is no decertification before us to consider. GK remains certified as a DBE in Texas and will so remain "until and unless" TUCP properly removes certification. 49 CFR §26.83(h) (no reapplication or recertification requirement). See also §§26.87 (decertification procedures) and 26.89(a) (1) (a DBE firm "whose eligibility is removed" may appeal to the Department).

TUCP's letter of April 3, 2014, is in error. It refers to the firm's "application for certification." However, a DBE firm cannot be compelled to reapply for certification or be "recertified." 49 CFR §26.83(h). At most, TUCP's letter can be read as a notice of *intent* to decertify. Assuming the letter is such a notice, it quite properly (p.2) offers the firm an opportunity to respond in an informal hearing with "information and arguments concerning why your firm *should remain certified*." (Our emphasis.) See §26.87(d).

TUCP's letter mistakenly characterizes a direct appeal to the Department as an "alternative" to contesting the proposed action at the UCP level. There is no appeal to the Department until the UCP issues a final decision. See §§26.87(g) and (k), 26.89(a). In this case, there has been no final decision. See April 3, 2014, Notice of Intent at 2 ("If the decision is to remove your firm's DBE eligibility, such removal will be effective upon the issuance of written notice of decision."), §26.87(g); see also Texas UCP DBE Directory, which, at this writing, shows that GK is duly certified as a DBE firm in Texas.

In short, TUCP did not properly remove eligibility (decertify) under §26.87. There is no final decision or notice of it. We dismiss the intended appeal without prejudice as either premature or

moot (see below) and direct TUCP, not later than May 29, 2015, to take final action on this matter, which has been pending for over a year.

TUCP may withdraw its notice of intent (rendering the appeal moot) or it may pursue decertification anew (in which case the appeal is premature). If TUCP chooses the latter course, however, it must produce a new notice of intent (again setting forth its rationales and specific evidence, as §26.87(b) requires) and provide GK a new §26.87(d) opportunity (the first having been flawed, as described above) to offer information and arguments against the proposed decertification. We ask that TUCP supply this office a copy of its withdrawal letter or new notice of intent, as applicable. Should TUCP fail to act by May 29, 2015, the Department will consider the 2014 notice void and the matter concluded.

We remind TUCP of the requirements of §§26.83 and 26.87 and, to the extent TUCP requires currently certified firms to “reapply” or become “recertified,” we direct it immediately to desist. Section 26.83 permits periodic certification reviews, but otherwise DBE firms need only provide §26.83(i) affidavits for changes affecting eligibility and annual §26.83(j) affidavits of no-change (with documentation of business size/gross receipts, only).

This decision is final and not subject to petitions for reconsideration.

Sincerely,

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

cc: Veronica Briseno Lara, TUCP