

May 27, 2016

Reference No.: 16-0003

Mr. Kenneth McGhee
Claridigm Inc.
9640 South Winchester
Chicago, Illinois 60643

Dear Mr. McGhee:

Claridigm Inc. (Claridigm), appeals the Chicago Transit Authority's (CTA's) decertification of Claridigm as a Disadvantaged Business Enterprise under rules set forth in 49 C.F.R. Part 26 (the Regulation). After examining the full administrative record, we find that there is substantial evidence upon which to affirm the decertification under Regulation §26.89(f)(1)¹.

The record reflects that CTA notified Claridigm via e-mail correspondences dated July 1, 2015²; July 6, 2015; and July 23, 2015, that Claridigm's required annual update was due along with the supporting documentation to be completed by the firm. After receiving no responses to the July 6th and 23rd e-mails, CTA sent a Notice of Intent to Decertify (NOI) on July 28, 2015, requesting the No Change Affidavit and supporting documentation and informing the firm that these documents were required in order for the firm to remain certified with the Illinois Unified Certification Program (IL UCP). CTA decertified Claridigm on August 17, 2015, for failure to provide the annual no-change affidavit and supporting documentation. The §26.83(j) requirement is mandatory and 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

¹ Section 26.89(f)(1) provides, “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.”

² The July 1, 2016 e-mail stated that Claridigm should submit a signed, dated and notarized No Change Affidavit attached to the e-mail, and the signed and dated individual and company tax returns for 2014.

A response to the July 1, 2016 e-mail dated July 6, 2016 from Ken McGhee of Claridigm indicates, “I can submit the no change affidavit. However I have requested extensions for Claridigm's 2014 tax filing and for my individual tax return. What can we submit in the interim for this?” This was the only communication from Claridigm. CTA responded on July 6th and 23rd via e-mail requesting that Claridigm submit an annual affidavit with proof of tax filing extensions. Claridigm did not respond.

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).*³ (Emphasis added.)

Section 26.109(c) provides:

“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.)

When Claridigm did not file the required affidavit and supporting documentation after receiving the first three notices, CTA validly moved to decertify the firm via NOI stating, “this agency [CTA] proposes to remove Claridigm Inc.[’s] certification as a DBE based on the criteria set forth in 49 CFR 26.109(c),” or the firm’s failure to cooperate. The NOI dated July 28, 2015, offered Claridigm an informal hearing to contest the proposed action 20 calendar days from the date of receipt of the NOI. The firm did not request a hearing or provide a written response. CTA therefore issued its Notice of Decertification (NOD) dated August 17, 2015. These actions complied with the substantive and procedural decertification rules of §26.87.

Claridigm’s appeal letter states no reversible error. CTA notified the firm of its required update via e-mail correspondences dated July 1, 2015; July 6, 2015; and July 23, 2015. Claridigm responded to the July 1, 2015 e-mail on July 6, 2016, indicating that the annual affidavit could be submitted but that the tax returns were not available. Claridigm inquired as to what could be done in the interim due to tax return extensions. CTA’s July 6th and 23rd e-mails notices requested that Claridigm submit proof of the extensions for the corporate and individual tax filings. Claridigm never submitted an annual affidavit or the tax returns’ proof of extensions. After receiving no further response from the firm with regard to the annual update and

³ The obligation to file the affidavit rests with the firm. Compliance is not contingent on actually receiving a reminder. *See, e.g.,* 15-0050, Lafayette Wholesale, LLC (November 10, 2015).

supporting documentation, CTA sent an NOI to Claridigm on July 28, 2015, notifying the firm of an opportunity for a hearing or to elect to present information and arguments in writing as an appeal. Claridigm failed to respond.

In the Appeal Letter dated September 30, 2015, you indicate that the firm went through several fiscal setbacks and lack of growth in 2014. The fiscal issues prompted the firm to file for extensions for the firm's taxes and the owner's own personal taxes. *Id.* You state, "From our understanding the tax returns were needed as part of our recertification affidavits. This month [September 2015] we filed our 2014 Claridigm Inc. taxes and my personal taxes will be filed in October 2015... We still want to pursue business as [a] DBE and IL UCP program member." The firm had an opportunity to further explain the sufficiency of their argument and to provide the requested proof of extensions to CTA. It provided no affidavit and no proof of extensions.

This Office cannot resolve a DBE firm's evident non-compliance. That is the firm's responsibility. The Department resolves appeals based on the particular issues presented, the requirements of the Regulation, and the complete administrative record. *See* §26.89(e)⁴. The standard is whether substantial evidence supports the certifier's decision and whether that decision is consistent with the Regulation. *See* §26.89(f)⁵. In this case, there is substantial evidence that the firm failed to provide the mandatory affidavit and consequently failed to cooperate.

The record shows that the decertification complied with the Regulation's substantive and procedural rules, and §26.89(f)(1) requires us to affirm it.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: CTA

⁴ Section 26.89(e) provides: "The Department makes its decision based solely on the entire administrative record as supplemented by the appeal. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may also supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party."

⁵ Section 26.89(f) provides: "As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source."