

March 9, 2016

Reference Number: 16-0009

Ms. Janice Salais
Chief, Certification Branch
California Unified Certification Program
1823 14th Street
Sacramento, California 95811

Dear Ms. Salais,

Iron Lady Enterprises, Inc. (Iron Lady) appeals to the U.S. Department of Transportation Departmental Office of Civil Rights (the Department) the California Unified Certification Program's (CUCP's) removal of the firm's Disadvantaged Business Enterprise (DBE) certification under rules set forth in 49 C.F.R. Part 26 (the Regulation).

CUCP decertified Iron Lady for failure to provide the §26.83(j) annual no-change affidavit and related information. The administrative record makes clear that Iron Lady did, in fact, fail to provide the required information. After careful review of the record, however, we conclude that CUCP did not follow proper procedures in decertifying the firm without first notifying Iron Lady of its right to a hearing pursuant to §26.87(d). We, therefore, reverse pursuant to §26.89(f)(2) and direct CUCP to restore certification without delay.

Operative Facts

Iron Lady was established on March 21, 2011, and specializes in iron work, welding, general contracting, structural reinforcement, building supplies, rigging, bridge building, bridge inspection, and roadway structures (Uniform Certification Application (UCA) dated June 16, 2011 at 3).

The record indicates that CUCP initially requested, on January 26, 2015, Iron Lady's annual affidavit of no-change along with copies of applicable tax returns. Iron Lady failed to respond to the initial request. On February 19, 2015, CUCP issued a second notice requesting that the firm fill out the enclosed no-change affidavit and submit the related tax returns. Iron Lady did not respond. CUCP sent out a Notice of Intent to Decertify (NOI) on June 2, 2015, informing the firm of the requirements of §§26.73(c) and 26.109(c). However, the NOI did not inform the firm of its right to request a hearing in order for Iron Lady to present information, evidence, or objections. CUCP sent one more e-mail reminder dated August 31, 2015. After receiving no response, CUCP sent a Notice of Decertification (NOD) on September 28, 2015.

On September 30, 2015, Iron Lady appealed to the Department stating that the firm did send an e-mail response to CUCP (absent from the Record) and that “We attest that our mail containing our No Change Affidavit and evidence of our revenue and size standard eligibility was among the tens of thousands of letters that never reached their destination.”

Applicable Regulation Provisions

§26.73(c) provides:

“DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.”

§26.83(j) provides:

“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).”

§26.87(d) provides:

“*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.*” (Emphasis added.)

§26.89(f)(2) provides:

“If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. *You must take the action directed by the Department's decision immediately upon receiving written notice of it.*” (Emphasis added.)

§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).”

Decision and Discussion

CUCP's NOI did not advise the firm of its right to request an informal hearing, contrary to the requirement of §26.87(d). The evidence, therefore, supports a conclusion that the removal of the firm's certification as a DBE for failure to cooperate was inconsistent with the substantive or procedural provisions of the Regulation. We reverse and direct CUCP to restore certification without delay. CUCP may restart its decertification process for failure to file annual affidavits at any time.

This decision is administratively final and not subject to petitions for review.

Sincerely,

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

cc: CUCP