

June 23, 2016

Reference No.: 16-0045

Sarah Henson, Esq.  
Aerostar SES, LLC  
**REDACTED**  
Jacksonville, FL 32246

Dear Ms. Henson:

Aerostar SES LLC (Aerostar) appeals the Louisiana Department of Transportation & Development's (LADOTD) removal of the firm's Disadvantaged Business Enterprise (DBE) certification. LADOTD removed the firm's certification for failure to provide information pursuant to the requirements of the Department's DBE Regulation, Title 49 Code of Federal Regulations (C.F.R.) Part 26 (the Regulation). After careful review of the administrative record, we find that the decertification is supported by substantial evidence and is consistent with the Regulation's substantive and procedural provisions concerning decertification. We affirm. *See* §26.89(f)(1).

I. Facts

The relevant facts of this case are uncontroverted. LADOTD certified Aerostar as a DBE on February 5, 2013. It proposed to decertify the firm in May 22, 2014, for failure to submit an annual affidavit; however, Aerostar provided its affidavit and supporting documents on June 26, 2014 to avert decertification. The following year, LADOTD again sent an email reminder to Aerostar—**REDACTED**—with an attached annual affidavit form on August 13, 2015.<sup>1</sup> On August 21, 2015, LADOTD then issued its Notice of Intent to Decertify Aerostar for failure to submit an annual affidavit under §26.83(j). After receiving no response from the firm, LADOTD decertified Aerostar by Notice of Decertification to the firm on October 5, 2015. The record reflects that the certifier complied with all of the procedural decertification provisions. *See generally* §26.87 (decertification). On October 30, 2015, Aerostar submitted its appeal to the Department.

On appeal, Aerostar argues that:

We have previously requested that the LA DOT send all correspondence to our Jacksonville office in order to avoid this exact issue. More than fifty subsidiaries of Bristol Bay Native Corporation are headquartered in the Anchorage office. Without staff there, it is almost impossible to receive any mail in a timely manner.

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<sup>1</sup> The 2015 NOI purports that LADOTD forwarded Aerostar a notice of its forthcoming annual affidavit form via email on January 12, 2015. The email, however, is not contained within the administrative record

I assure you, had this correspondence been routed to Jacksonville, Florida it would have been responded to immediately. We have addressed the mail receipt problems with the Anchorage office so that this may be resolved for the future, however, we do renew our request that all future correspondence be send to [Aerostar's Jacksonville address].

Aerostar Appeal at 1.

## II. Applicable Authority

### 1. §26.89(c) states:

If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to *why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply*. (Emphasis added).

### 2. §26.109(c) states:

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).

### 3. §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).

4. §26.89(c) states:

If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, *including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply.*" (Emphasis added)

### III. Decision

In this instance, Aerostar's appeal fails to allege that LADOTD made any reversible procedural or substantive errors when it denied the firm certification. *See* 15-0147, E&K Retail (February 12, 2016) (Department's role on appeal is limited to determining whether substantial evidence supports the certifier's decision and whether the decision was consistent with the substantive or procedural rules concerning certification). The firm concedes that it did not submit its annual affidavit to the certifier as required by §26.83(j). To the extent that the firm argues that it did not submit the affidavit because it did not receive notice from the certifier, such claim is meritless. A DBE must submit an affidavit of no change each year to maintain its DBE certification. This requirement is set forth in §26.83(j), which states in part, "*If [a DBE ] fail[s] to provide [an annual] affidavit in a timely manner, [that firm] will be deemed to have failed to cooperate under §26.109(c).*" (Emphasis added). There is no Regulatory provision that requires a certifier to remind the firm of the annual requirement to submit an annual affidavit under §26.83(j). *See e.g.*, 15-0125, EXICO Incorporated (January 28, 2016) at 3 (failure to receive an email reminder to file an annual affidavit is not grounds for reversal). The weakness in Aerostar's appeal, therefore, is that it fails to recognize that the firm's annual filing obligation under §26.83j (j) exists notwithstanding the receipt of a reminder—sent as a courtesy—from LADOTD.

In addition, to the extent that Aerostar argues, "had [the written annual affidavit reminder] been routed to Jacksonville, Florida it would have been responded to immediately," we find that such a claim is unsupported by the record. First, the firm's original certification letter supports that the firm was on notice that it was required to submit an annual affidavit in February—the anniversary of its certification date—of each year. Second, LADOTD almost decertified Aerostar in 2014 for failure to submit an annual affidavit, which reinforces that the firm was aware of this requirement. The firm was compelled to submit an annual affidavit to avoid decertification. Finally, LADOTD's August 13, 2015 email reminder also gave the firm adequate notice of its impending decertification. In short, LDOTD gave the firm 6-months—from its due date in February 2015 to August 2015—to comply with the Regulation's annual filing requirement. Aerostar did not.

We conclude, therefore, that substantial evidence supports LADOTD's decision to remove the firm's DBE certification for failure to cooperate. We affirm. *See* §26.89(f)(1).

#### IV. Conclusion

We affirm the decertification under §26.89(f)(1) because substantial evidence supports it and because the decision is consistent with applicable substantive or procedural provisions of the Regulation.

Aerostar may reapply for certification after the requisite waiting period.

This decision is administratively final and not subject to further review.

Sincerely,

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

cc: LADOTD

Attch: Aerostar Certification letter dated February 5, 2013