

February 15, 2017

Reference Number: 16-0111

Mr. Timothy K. Stackhouse, President
Polished Clean Janitorial Services, Inc.
REDACTED
New York, NY 10030

Dear Mr. Stackhouse:

Polished Clean Janitorial Services, Inc.'s (PCJS) appeals the Metropolitan Transportation Authority's (MTA)¹ removal of the firm's Disadvantaged Business Enterprise (DBE) certification. MTA decertified PCJS for failure to provide information pursuant to the requirements of the DBE Regulation, 49 C.F.R. Part 26 (the Regulation), specifically the annual no change affidavit required by §26.83(j). After careful review of the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) finds that the decertification is supported by substantial record evidence and is consistent with the Regulation's substantive and procedural provisions concerning decertification. We affirm under §26.89(f)(1).² The record confirms that PCJS did not file the required affidavit and did not cooperate with MTA's repeated requests for the affidavit.

Operative Facts

MTA certified PCJS as a DBE on April 30, 2014. The firm's one-year certification anniversary was April 30, 2015. MTA sent you a reminder on April 1, 2015 of the firm's requirement to submit an affidavit of no change and other items. The reminder was mailed via the U.S. Postal Service and an electronic version was sent via email. Subsequent to the first notification, MTA again notified PCJS on September 29, 2015 and October 19, 2015, about the need to submit its annual affidavit of no change.

After PCJS failed to respond to any of MTA's requests for this documentation, MTA proposed to remove PCJS' certification in a letter dated November 6, 2015. In this correspondence, MTA informed you of your ability to provide information and arguments as to why PCJS should maintain its DBE certification. The final notification gave you the option to respond in writing

¹ MTA is a member of the New York Unified Certification Program (UCP).

² §26.89(f)(1) states: "The Department affirms [the certifier's] 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."

within 10 days or to contact MTA within 7 days to inform MTA of your desire for an informal hearing. Like the previous notifications, you did not respond to MTA's final notification, and MTA decertified PCJS as a DBE on April 8, 2016.

The Department's Decision

A. Scope and Standard of Review

Under the Regulation, a firm that is denied DBE certification or decertified may make an administrative appeal to the Department. 49 C.F.R. §26.89(a)(1). The Department does not perform a *de novo* review or conduct a hearing; instead, the Department's decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). Therefore, the Department affirms the recipient's decision unless it determines, based upon a review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [the Regulations] concerning certification." §26.89(f)(1).

B. Cooperation

Under the Regulation, after a certifying agency deems a firm eligible for the DBE program, DBE firms have a continuing obligation to provide either the certifying agency or UCP with a yearly submission of information. This requirement is specified in §26.83(j) 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 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)." §26.83(j)

MTA notified you multiple times regarding the annual recertification requirement and attempted to contact you through various means (traditional mail and email).³ The record shows that MTA provided ample notifications and opportunities for you to cooperate, but you never responded. In regard to noncooperation, the Regulation 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

³ The regulatory obligation to file the annual affidavit exists independent of the certifier's notification or reminder. See §26.83(j). The MTA notices were simply a courtesy to the firm.

refusal to provide such information is a ground for a denial or removal of certification.”
§26.73(c)

“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).” §26.109(c).

You allege in your appeal letter to the Department that a fire occurred in your building and that your mail was misplaced and this explains your noncooperation. We regret this occurred. However, to remain compliant with the Regulation, PCJS is under a continuing obligation to provide the certifying agency with its annual affidavit and accompanying material. Uncontroverted evidence demonstrates that PCJS failed to comply with §26.83(j) and with MTA’s repeated requests for the required affidavit. These oversights constitute a failure to cooperate under the terms of both §26.73(c)⁴ and §26.109(c). The record demonstrates that MTA complied with applicable decertification rules and procedures when it removed PCJS’ certification for failure to cooperate.⁵ 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.⁶

This decision is administratively final and not subject to further review. PCJS may reapply for certification after the appropriate waiting period.

⁴ Although §§26.83(j) and 26.87(f)(6) technically reference the §26.109(c) failure to cooperate provision and not the §26.73(c) provision on which MTA relies, the provisions are sufficiently similar that the error (which is not alleged on appeal), if any, is harmless. *See* §26.89(f)(3) (Department need not reverse if a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case). Here, PCJS was on clear notice that MTA proposed to remove certification because it had failed to cooperate in not timely providing the required no change affidavit. There was no fundamental unfairness resulting from MTA’s citing one failure to cooperate provision rather than another similar one, and that citation did not in any way prejudice PCJS’ opportunity to present its case for remaining certified. The factual record indicates, in any case, that the firm failed to cooperate under §26.73(c) as well as §26.109(c) when it failed to respond to MTA’s multiple, specific requests “for information relevant to the certification process.” *See* §26.73(c), above, which clearly provides “removal of certification” as a remedy available to a certifier.

⁵ §26.87(f) states in part: “*Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds: . . . (6) *The firm has failed to cooperate with you* (see §26.109(c)).” (Emphasis added)

⁶ *See, e.g.*, §26.87 (compliance with removal procedures where notice of intent issued specifying the reason for the proposed action, offer of a hearing, and, finally, removing certification when the required affidavit is not forthcoming).

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division
Departmental Office of Civil Rights