

April 22, 2019

Reference Number 19-0013

Mr. Wayde Swenson, Director  
Office of Operations  
North Dakota Department of Transportation  
**REDACTED**  
Bismarck, ND 58505-0700

Dear Mr. Swenson:

This letter responds to Reiner Contracting, Inc.'s (Reiner) appeal<sup>1</sup> of the North Dakota Department of Transportation's (NDDOT) second decertification of the firm as a Disadvantaged Business Enterprise (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). After considering the all the facts in the record, we reverse<sup>2</sup> NDDOT's decision.

In June 2018 we vacated NDDOT's first decertification decision and remanded for NDDOT to issue a new decision in a manner consistent with our instructions:

"NDDOT should fully comply with §26.87 when conducting the new decertification proceedings. NDDOT's new [notice of intent to decertify] should describe its [ability to accumulate substantial wealth] analysis with references to specific evidence in the record. To comply with §26.87(e), NDDOT must consider which personnel from which office are actually making the final decision. We advise NDDOT that small offices often enlist personnel from other Unified Certification Programs (UCPs) to render the final decision. As a best practice, we recommend that in the [notice of decertification], NDDOT not simply make a blanket reference to the [notice of intent to decertify]. Rather, NDDOT should fully explain the reasons for decertification and reference specific evidence in the record. *See* §26.87(g) (notice of decision)."<sup>3</sup>

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<sup>1</sup> *See* Appeal Letter (Oct. 9, 2018).

<sup>2</sup> *See* §26.89(f)(2): "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."

<sup>3</sup> 17-0148 Reiner Contracting, Inc. (June 6, 2018) at 5.

In August 2018 NDDOT again decertified Reiner.<sup>4</sup> NDDOT did not, however, send the firm a notice of its intent to decertify or offer the firm an opportunity for an informal hearing. *See* §§26.87(b) and (d). That failure renders NDDOT’s action inconsistent with applicable certification rules within the meaning of §26.89(f)(2). We reverse and direct NDDOT to restore certification promptly, as that rule requires.<sup>5</sup>

We remind the parties that under §26.83(h), a DBE firm remains certified until its certification is removed “*through the procedures of § 26.87*” [or it withdraws its certification], and that where, as is the case here, the certifier has reasonable cause to believe a firm currently certified is ineligible, it “*must*” initiate decertification proceedings in accordance with the rules specified in §§26.87(b) and following.

This determination is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: Best & Flanagan LLP for Reiner Contracting, Inc.

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<sup>4</sup> *See* Notice of Decertification – Final Decision (Aug. 21, 2018).

<sup>5</sup> *See* §26.89(f)(2). We do not necessarily disagree with NDDOT’s conclusion that Ms. Reiner has the ability to accumulate substantial wealth. We reverse exclusively on the basis that NDDOT did not fully comply with §26.87 procedural requirements or with our instructions in last year’s letter.