



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

March 9, 2022

Docket No. 21-0103

Laurie Kyles
President, Total Trucking Inc.
2640 W Reno
Oklahoma City, OK 73107

Scott M. Houck
Civil Rights Division
Oklahoma Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105-3204

Dear Ms. Kyles and Mr. Houck:

The Oklahoma Department of Transportation (OKDOT) removed the DBE certification of Total Trucking, Inc. (TT) for the firm's failure to timely file a no change affidavit (NCA) and supporting documentation. In TT's appeal, Ms. Kyles cites a cascading series of misfortunes involving health, bad weather, power outages, and difficulties in uploading documents to OT's computer system to explain its not having submitted the information on time.

Background

The record in the case is convoluted. The following chronology lists events in case. All dates are 2020 except where otherwise noted.

September 2, 2016 – Initial certification of TT in record.¹
July 19 – “Courtesy reminder” from OT to TT concerning need for NCA
August 19 – Second “courtesy reminder”
 - OCS says “application” process has begun on this date, with
 “renewal” and “expiration” date of 9/17/20
 - Ms. Kyles signs NCA
September 2 - Third “courtesy reminder”
September 17 – Anniversary of last “certification,” date NCA filing due
October 5 – OKDOT letter to TT proposing decertification if NCA not received by
November 5

¹ There are subsequent “certifications” listed in the OKDOT’s online certification system (OCS) on September 28, 2017; September 18, 2018; and September 13, 2019. Each listed “certification” was accompanied by a “renew” date of approximately one year later. The “action” referred to in each case was an NCA.

- November 5- OKDOT sends TT notice of decertification even though TT's "application" remained open
- November 16 - TT emails to OKDOT, saying TT could not upload documents into the OCS
- November 17 – OT replies, saying documents had been loaded into system but lacked "signature and submission"
- November 25 – Email from OT to TT saying TT's "application" had been deleted as "incomplete"

Compliance

What is wrong with this picture?

1. Like any certified DBE, TT has an affirmative obligation to send its certifier an NCA and supporting documents on each anniversary of its initial certification. See section 26.83(j) of the regulation. There is no obligation on the part of the certifier to send reminder notices. By sending a proposal to decertify to TT on October 5, OKDOT satisfied the notice requirement of section 26.87(a)(3) of the regulation. Not having received a reply to the notice, OKDOT decertified TT on November 5. See section 26.87(g). It is unclear why TT, having signed an NCA on August 19, did not submit it in a timely fashion. By not doing so, TT became subject to decertification under section 26.109(c) of the regulation.
2. After sending the administratively final decertification letter on November 5, OKDOT inexplicably continued to treat TT as a DBE subject to the NCA filing requirement. The anomaly appears to derive from OKDOT's erroneous treatment of a section 26.83(j) filing as a new "application" for certification.² That "application" evidently remained open at least until OKDOT's new, November 17 due date for the NCA. Under these circumstances, it is plausible to believe that TT believed that it had until November 17 to submit the NCA. Its action in attempting to submit the NCA on November 16 is consistent with such a belief.
3. OKDOT confirmed on November 17 that TT had uploaded the documents but on November 25 told TT that its "application" had been "deleted" as "incomplete." OKDOT apparently deleted the "application" for lack of the very "signature and submission" that TT, in its November 16 email, told OKDOT it had been unable to complete in the OCS. OKDOT, in short, seems to have deployed an opaque, user-unfriendly certification system, replete with misleading labels and faulty instructions, in service of a baffling administrative process. If TT was confused by this time, it is little wonder.

Significant problems with OKDOT's OCS are not unique to this case. Issues concerning inconsistencies within and access to the OCS helped to detail OKDOT's decertification action in

² It is possible that the OT system conflates actual initial applications with actions concerning certified DBEs. If an applicant for initial certification does not complete its application in a timely manner, it is appropriate for a certifier to return the application to sender without taking further action. In the case of a decertification, however, there is no application to delete.

the recent case of *D&J Distributors, LLC*.³ Other states' online systems have also led to analogous problems.

Discussion

OT's "application" process as applied to certified DBEs is not an application process, in any sense recognized by the Department's regulation. Certified DBEs do not have "renewal" or "expiration" dates. Under the DOT DBE regulation, certifications never have to be "renewed" and never "expire." A firm once certified remains so unless and until it is decertified. See section 26.83(h). This is more than a matter of mistaken terminology. Imposing inapplicable requirements on DBEs, thereby thwarting the objectives of the program by creating administrative barriers to DBE participation⁴, may risk exposing a recipient to sanctions for noncompliance under sections 26.101, 26.103, and 26.109(c) of the regulation.

Neither party to this case comes away with clean hands. Despite having an NCA in hand in August, TT failed to submit it when due. We accept TT's explanation that OKDOT's OCS impeded its 11th hour attempt to supply an NCA due fully 2 months earlier.⁵ This seems more than generous, as rule states no exceptions.

However, Ms. Kyles' other explanations do not withstand scrutiny.⁶ The Department designed the NCA provision to be a relatively painless substitute for proving eligibility every year. The rule minimizes administrative intrusion and frees up time for owners to focus on their businesses.⁷ In deciding to facilitate DBEs' relatively unfettered operation, we placed considerable weight on self-reporting. The annual filing requirement is a condition of continued certification, and the responsibility lies with the firm and its owner. Ms. Kyles and TT did not comply.⁸

OT failed in its obligation to operate a comprehensible certification system consistent with the objectives and requirements of the DBE regulation. These failings overburden and sometimes exclude eligible firms, undermining the purpose and integrity of the program. While the

³ 21-0049; December 14, 2021.

⁴ See 49 CFR 26.1.

⁵ Similar to our comment in footnote 6 the *D&J Distributors* case, a simple human communication from OCS staff, rather than an email listing standard steps to accessing the system or a suggestion from OKDOT staff that TT could use the appeals process to remedy access issues, could have avoided much of the confusion in this case.

⁶ It is unlikely, for example, that bad weather and power outages persisted for several months, and even if they did, the NCA obligation is not contingent on having optimal conditions. Further, the record demonstrates that poor health did not preclude Ms. Kyles from signing the NCA well before its due date.

⁷ It takes very little time or effort to sign a standard attestation and provide evidence of the previous year's gross receipts. (We remind the parties that gross receipts documentation may take any reasonable form that is sufficiently authoritative. Examples are pertinent pages of the applicable, signed tax return; or a statement that a CPA puts on letterhead, signs, dates, and attests is accurate and complete.)

⁸ We may well have affirmed OKDOT's decision were it not for OKDOT's own failures. See section 26.89(f)(1).

administrative record is often unintelligible (see sec. 26.89(d) for OT's obligation to do better), it strongly suggests that OKDOT has automated critical oversight functions, using a system that leads to unacceptable results.

We remand for the parties to correct their errors and become rule-compliant (see sec. 26.89(f)(4)), and we instruct them as follows: To regain its certification, TT must provide an NCA and supporting documents for 2021 to OT within 30 days of the date of this letter. If OT's certification system does not readily permit TT to do so, TT may email the two documents or submit them in hard copy. Upon timely receipt of conforming documents, OT must immediately reinstate TT's certification. TT must submit future years' NCA filings on or before the anniversary date of its reinstatement.

We direct OT to undertake a comprehensive review of its certification process, specifically including its certification system and software, and rectify its deficits as soon as possible.⁹ We direct OT to provide us a progress report no later than 90 days from the date of this letter.

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

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

⁹ Meanwhile, we direct OKDOT to place prominent notices, in each place its certification system requests documents, that the applicant or DBE may, if it chooses, email those documents to an address provided in the notices.