

August 23, 2017

Reference Number: 17-0043

Ms. Nancy L. Walker

Rico Enterprises, Inc.

**REDACTED**

Huntley, IL 60142

Dear Ms. Walker:

Rico Enterprises, Inc. (Rico) appeals the December 21, 2016 Illinois of Department of Transportation's (IDOT) removal<sup>1</sup> of the firm from the Disadvantaged Business Enterprise (DBE) program under criteria set forth at 49 C.F.R. part 26 (the Regulation). IDOT determined that Rico exceeded the small business size requirements of the Regulation. The U.S. Department of Transportation (Department) carefully reviewed the full administrative record and concludes that IDOT's decertification of Rico is supported by substantial evidence and is substantially consistent with the Regulation's substantive and procedural certification provisions. Therefore, the Department affirms.

#### *Scope and Standard of Review*

A firm whose DBE certification is removed may make an administrative appeal to the Department. Regulation §§26.87(k) and 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). 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 Regulation] concerning certification." §26.89(f)(1).

#### *Operative Facts*

Rico provided IDOT its annual §26.83(j) affidavit and supporting documentation for 2016, including applicable tax returns. Upon review, IDOT determined that Rico's average annual gross receipts for the years 2013-2015 was **REDACTED**, based on reported gross receipts of

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<sup>1</sup> Hereinafter NOI. As we explain below at note 3 and accompanying text, December 21, 2016 is not the date of decertification. The December 21, 2016 letter states, erroneously, that: "[s]hould you choose not to appeal your graduation to IDOT, you may file an appeal in writing to the U.S. Department of Transportation (address below) within 90 calendar days from receipt of this letter. In fact, the firm has 90 days, under §26.89(c), from the date of the certifier's *final decision* to appeal to the Department. By the terms of the IDOT's letter, the decision would become final 21 days after December 21, 2016, i.e., on January 11, 2017.

**REDACTED** in 2013, **\$REDACTED** in 2014, and **REDACTED** in 2015. IDOT Memorandum, Rico Enterprises, Inc., December 20, 2016. IDOT concluded that Rico exceeded the size limit of **REDACTED** established by the Small Business Administration (SBA) for work related to snow removal.<sup>2</sup>

Asa noted above, IDOT issued Rico an NOI explaining IDOT's intent to "graduate" Rico from the DBE program because RICO exceeded the business size limit under §26.65. NOI at 1. The NOI stated that Rico could request an informal hearing or file a written response to the proposed action within twenty (20) calendar days. *Id.* The NOI further stated that Rico's failure to respond to IDOT within 20 days would result (automatically) in Rico's decertification. *Id.* at 2. Finally, the NOI informed Rico that it could forego any response to IDOT and appeal directly to the Department. *Id.* at 3.<sup>3</sup>

Rico appealed to the Department on January 17, 2017 (Appeal Letter). In its Appeal Letter, Rico does not contest IDOT's figures, its calculation for the period 2013-2015, or the size standard it used. Rather, Rico states merely that "[u]pon a preliminary review of my firm's gross receipts for 2016, and according to the federal regulation our firm will still qualify for the DBE program regarding 2014, 2015, and 2016 gross receipts." *Id.*

### *Discussion*

The firm's tax returns for the years 2013, 2014, and 2015 confirm that IDOT used the correct gross receipts numbers to compute the average for the test period 2013-2015. Further, IDOT's calculation is correct. Rico exceeded the applicable size standard and became ineligible for continued certification as a result. Substantial evidence supports IDOT's decertification on the substantive ground that Rico exceeded the size cap. *See generally* §§26.65, 26.87(f)(1), and 26.89(a).

IDOT's procedures, in addition, substantially (with the exception noted above) complied with the decertification requirements of §26.87. IDOT provided written notice to Rico of the proposed action and the reason for it, and the notice cited specific evidence in support. IDOT further offered Rico the opportunity for a hearing or written response, specified the consequences of inaction, and advised Rico of its appeal rights.

Therefore, substantial evidence supports the decertification as consistent with applicable certification provisions, substantive and procedural. Accordingly, we affirm IDOT's decision. At the time of IDOT's determination, Rico was ineligible for continued participation in the DBE program. *See generally* §26.87(f)(1).

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<sup>2</sup> If Rico is affiliated with CJP Leasing, Inc., then affiliated average gross receipts totals \$8,145,117. Since the gross receipts of Rico alone exceed the size standard, we do not address the affiliation issue.

<sup>3</sup> We acknowledge that such instructions are premature in that as of the date of the NOI there is no §26.87(g) "decision" to appeal to the Department. We read §§26.87(b) and (g) generally to require two separate letters, one notifying the firm of the certifier's proposal and one notifying the firm of the certifier's "decision." We caution IDOT against the use of self-actuating §26.87(b) notices (NOIs) and remind IDOT that its final decision requires a separate notice that meets the requirements of §26.87(g). In this case, however, IDOT's procedural error did not result in fundamental unfairness to Rico or substantially prejudice its opportunity to present its case, so we need not reverse. *See* §26.89(f)(3).

Rico's defense (that its 2016 annual gross receipts may lower its average gross receipts when tested for a later period) simply does not apply to the period that IDOT tested and upon which it properly based its determination. Further, the would-be defense is based on events that had yet to occur at the time of IDOT's NOI, with the result that neither IDOT nor we may consider them. *See* §§26.73(b)(1), 26.89(f)(6).

Rico's remedy is to reapply for certification, after the applicable waiting period, should the firm in fact become eligible again.

*Conclusion*

We affirm, as supported by substantial evidence, IDOT's decision to decertify Rico on the basis of excess business size. IDOT's decision is substantially consistent with applicable substantive and procedural provisions of the Regulation.

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

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
Disadvantaged Business Enterprise Division  
Departmental Office of Civil Rights

cc: IDOT