

March 4, 2020

Docket Number 19-0162

Stephanie Juniel  
President/CEO  
Dorkin, Inc.  
800 Corporate Dr., Suite 301  
Stafford, VA

Dear Ms. Juniel:

This letter responds to yours of September 11, 2019, in which you contest the Virginia Unified Certification Program's decertification of your firm for failure to cooperate under section 26.73 of the DBE regulations in Title 49 of the Code of Federal Regulations. Specifically, you did not file the annual affidavit that section 26.83(j) requires.

You give several reasons for not filing the affidavit: you have so many other certifications and that it is hard to keep track of when each requires a filing; the Virginia website is confusing and difficult to navigate, in part because there is no designated section for annual affidavits; you misunderstood the information on the website as suggesting your affidavit was not yet due; you were "busy and [you] missed the cut off;" you may have overlooked Virginia's summary suspension notification or it may have gone into your spam folder.

Section 26.89(c) requires you to state an error, omission, or rule misapplication on the certifier's part. None of your reasons is a ground for reversing the decertification.<sup>1</sup> Timely filing the annual affidavit is mandatory and unconditional. You are charged with knowing when the anniversary of your DBE certification is; the date is on your 2014 certification letter. Section 26.83(j) deems the failure to file the affidavit when due to be a failure to cooperate, and the failure alone permits VUCP to begin decertification proceedings. VUCP need not notify you when the annual affidavit is due. Nor does it matter that you may have been confused about whether it was time for a filing related SBE, WBE, or DBE certification. Finally, there is no requirement that you actually receive notice of a proposed decertification. It suffices for VUCP to send a notice that meets regulatory requirements to the address you last provided.

VUCP sent you that notice via certified mail on July 31, 2019. The letter informed you that Dorkin's certification was summarily suspended and that if you failed to file the required

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<sup>1</sup> The second reason comes close, as we discuss below, but it does not help you because there is no indication that you tried to file on time. Further, Dorkin has been certified for at least 5 years. You have complied in the past.

documentation or request a hearing within 15 days, VUCP would decertify the firm. You did neither, and VUCP decertified the firm on August 30, 2019. VUCP sent you notice of its action that day, again via certified mail. *This* notice you appear to have received and read promptly, as you appealed almost immediately.

There is no dispute that you did not file the affidavit on time, that VUCP's July 31 notice was regulation-compliant, and that you did not respond. Accordingly, the decertification was proper, and we affirm it. Dorkin may reapply for certification after the waiting period runs.

We have two concerns, however.

First, you state that VUCP's electronic filing system requires DBE owners to provide annual affidavits in the "Application" section. Based on experience with other certifiers' portal design and underlying software, which tends to be from the same purveyor and fairly standard, we suspect that you are correct. If so, we agree that such a set-up is misleading, unreasonable, and wrong. Section 26.83(h)(1) states that certification persists until properly removed. There can be no *reapplication* requirement. (An annual "renewal" requirement amounts to the same thing.) To the extent its portal suggests otherwise, VUCP is noncompliant. VUCP is even more at odds with the regulation if it requires the owner to file *anything* other than documentation of the firm's gross receipts, which may but need not be a tax return, with the annual affidavit. The affidavit's *purpose* is to spare the firm and its owner from having to re-prove eligibility every year. Hence the standard attestation.

If VUCP or its systems do any of these things, we instruct VUCP, and any other UCP that may be non-compliant, to post prominently and immediately a notice that advises DBEs to disregard the instructions (including giving the appearance that a document not required is); accurately and clearly states the requirement and its limitations; and clearly explains the least burdensome procedure reasonably possible for DBEs to comply—as pertinent provisions intend. That may mean exclusively paper filings until the portal is reconfigured to comply with the regulations.

Second, we advise VUCP that the Department did not intend for the summary suspension rule to be used as a matter of course, in a way that supplants the usual section 26.87 procedures. We grant that the text of section 26.88(b) misstates that intent. We nevertheless request that certifiers reserve summary procedures for matters that directly threaten program integrity, not simple failures to cooperate.

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

Sincerely,

Samuel F. Brooks  
DBE Team Lead  
Disadvantaged Business Enterprise Division

cc: Calvin M. Thweatt, VUCP

