

March 11, 2020

Docket Number 19-0171

Jessica Clore, Managing Member
Clore Equipment
21220 FM 1420
Harlingen TX 78550

Dear Ms. Clore:

Thank you for your letter of July 11, 2019, in which you contest the Texas Department of Transportation's June 18, 2019, denial of your firm's application for certification as a Disadvantaged Business Enterprise under rules found in Part 26 of Title 49 of the Code of Federal Regulations. The sections we cite here contain discrete rules within Part 26.

TXDOT denied Clore's application under section 26.73(c) because Clore did not respond to TXDOT's May 15, 2019, request for information pertinent to the application. On appeal, you explain that you were unaware of the request because TXDOT's email went into your spam folder. You ask us to consider the documentation attached to your appeal letter and reconsider "your" decision.

There are a number of reasons why we cannot do that.

First, the allocation of responsibility in the DBE Program is that state or local agencies, typically departments of transportation, make certification decisions. We do not. Our function is appellate, and our review is limited to claims of specific certifier errors. We do not consider documents you did not provide to the certifier.¹ See generally sections 26.73(b)(1) and 26.89(f)(6).

¹ This rule relates to process integrity, allocation of responsibility, and resource management. If a firm could avoid a deadline or rely on information the certifier has not seen, then certification applications would remain open indefinitely, a host of certification standards would become meaningless, and we would usurp the responsibilities of state certifiers.

Second, you do not allege that TXDOT erred in any way.² Your narrative indicates that the error was yours. Having sent the information request to the email address you provided, TXDOT is not responsible for filtration parameters or folder assignment on your end.³

Third, TXDOT cites section 26.73(c) as the reason for denial. That provision reads: “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 refusal to provide such information is a ground for a denial or removal of certification.” TXDOT allowed you a reasonable amount of time to provide the information requested; you did not provide that information; and your “[f]ailure to provide such information is a ground for a denial or removal of certification.”

To summarize, TXDOT’s request was proper. TXDOT’s transmission was proper. TXDOT had a valid reason for denial. TXDOT explained the reason, cited the supporting facts, and advised you of your appeal rights, all in accord with section 26.86(a). There is no reason for us to reverse the denial. The regulations render Clore ineligible on the basis of its non-cooperation.

We affirm TXDOT’s decision as supported by substantial evidence and consistent with applicable certification rules.

Our decision is administratively final and not subject to requests for reconsideration.

Clore may reapply for certification after June 18, 2020.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

² Your appeal does not meet the requirements of section 26.89(c), and we could dismiss it on the basis that it states no claim we can or should address. TXDOT’s denial cites the provision so that you can make sure you send a conforming appeal. The relevant part reads, “you must send a letter to the Department within 90 days of the date of the recipient’s final decision, including information and setting forth a full and specific statement as to why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply.” Although the clear implication is that you did not read the rule, we decide the appeal in the interest of providing guidance on an issue frequently encountered.

³ Please consider the practical effect on program administration if a spam claim could absolve any applicant of the obligation to comply with any request of any certifier. How many certification requirements would survive? We do not doubt that in this case TXDOT’s request went to spam. We simply point out that quite a few firms appeal on this basis and none prevails.