

May 2, 2015

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No.: 14-0044

Ms. Donna K. Levine, President  
Conflo Services, Inc.  
**REDACTED**  
Dublin, CA 94568

Dear Ms. Levine:

Conflo Services, Inc. (CSI), appeals the California Unified Certification Program's (CUCP) determination that it is ineligible for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth in the DBE Program Regulation 49 C.F.R. Part 26. Having carefully reviewed the full administrative record we conclude that substantial evidence supports CUCP's determination. CSI failed to demonstrate, by a preponderance of the evidence, that it met the requirements of Regulation §§26.69 and 26.71.<sup>1</sup> We affirm CUCP's denial under §26.89(f)(1) because substantial evidence in the record supports the determination as explained below.<sup>2</sup>

Ownership

CSI's Uniform DBE Certification Application (UCA), states that you and your non-disadvantaged husband, Daniel Levine, established the firm in 2011. You list equal contribution of **REDACTED** each to acquire your respective 51% and 49% ownership interests. CUCP conducted an on-site interview with you on July 10, 2013; and the agency records that you funded CSI with monies from your joint business account, which was used to buy equipment, licenses, etc. The funds you indicated were from joint funds with Mr. Levine (on-site report, p. 5); and a check for **REDACTED** from your joint personal account dated July 14, 2011 is contained in the record.

CUCP concluded that the firm is ineligible because you have not met your burden of proof by a preponderance of evidence that the capital contribution to start the firm came from your sole funds as opposed to marital assets §26.69(i).<sup>3</sup> On appeal, you stated:

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<sup>1</sup> Regulation §26.61(b) requires that applicant firms satisfy each eligibility requirement. The firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

<sup>2</sup> As regulation §26.89(f)(1) requires. We base our decision solely on the entire administrative record, per §26.89(e).

<sup>3</sup> CUCP also cited §26.69(h) as a ground for denial; however, this provision applies in cases wherein interests in a business or other assets were transferred without adequate consideration from non-disadvantaged individuals to the

That I own 51% of the shares of CSI is indisputable. You have proof in your files. So perhaps your skepticism is because I conveniently own 51% and my husband owns 49%. Perhaps you feel that we're pretending to be woman owned/controlled just to get the DBE classification. If so, let me explain the strategy behind this. With lots of experience establishing, managing, and divesting corporate business units, my husband was the best candidate to help me establish CSI. He however, is 62 years of age and wants to retire soon. To help fund his retirement, we plan on selling his shares of stock to investors. Selling up to 49% of his stock maintains me as majority owner and in control of votes.

The applicable regulation provisions in this appeal concerning your ownership of CSI are:

§26.69(a): In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

§26.69(b): To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. (1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding. (2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement. (3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

§26.69(c)(1): The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan. (2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm. (3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged

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socially and economically disadvantaged individual. This does not seem to be the case in this matter. Similarly, CUCP stated that it could not conclude that your expertise could form a portion of your contribution to acquire your ownership; however, this assertion was not made in the record or with your appeal. The Regulation does not recognize contributions of labor in lieu of capital except as specified in §26.69(f), relating to contributions of "expertise" as therein defined. The more applicable provisions in this appeal are §26.69(c), (e), and (i), which we determine CSI has not met.

individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial. (4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

*Examples to paragraph (c):* (i) An individual pays **REDACTED** to acquire a majority interest in a firm worth **REDACTED**. The individual's contribution to capital would not be viewed as substantial. (ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute **REDACTED** and **REDACTED**, respectively, to acquire a firm grossing **REDACTED**. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1). (iii) The disadvantaged owner of a DBE applicant firm spends **REDACTED** to file articles of incorporation and obtains a **REDACTED** loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature.

§26.69(e): The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

§26.69(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm. (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm. (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

You do not dispute that marital assets were used to fund CSI and there is no renunciation by your spouse Mr. Levine contained in the record or any other proof that you contributed more than half of the monies used to fund CSI. The Department has consistently ruled that when spouses contribute joint property to acquire ownership interests in an applicant firm, each is considered to own half of the property and to have made half of the capital contribution, unless there is a renunciation or proof of separate resources. The firm having made no showing to the contrary at the time of the firm's application to CUCP,<sup>4</sup> you and your non-disadvantaged husband would be

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<sup>4</sup> The Department received from your attorney your transmutation and renunciation agreement; however, this was executed after your firm applied for DBE certification. As stated in §26.69(i), this document must be included as part of the firm's application. In the even the firm reapplies, CUCP can consider this document as part of the firm's submission.

considered to own the firm equally, rendering the firm unable to meet the 51% disadvantaged ownership requirement of §26.69(b). We affirm CUCP's decision under §26.89(f)(1).

### Control

CSI's activities as described in the firm's DBE Certification Application as: "commercial abatement, restoration, demolition, site remediation and general engineering services. . .ranging from abatement of lead, asbestos, and mold to interior demo and decon[struction], exterior demo[lition], concrete asphalt removal and lead remediation." CUCP first cited §26.71(a)'s general requirement that all the facts in the record are to be viewed as a whole when determining whether socially and economically disadvantaged owners control the firm. CUCP also cited control specific regulations §26.71(e), (f), (g), and (h) in its DBE certification denial decision, and its resulting determination centered on your lack of sufficient knowledge and experience directly related to the firm's primary operations, and the disproportionate involvement of your non-disadvantaged spouse Mr. Levine who is the qualifying individual for the firm's license.

The applicable regulatory provisions relevant to your control of CSI are:

§26.71(e): Individuals who are not socially and economically disadvantaged or immediate family members may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

§26.71(f): The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

§26.71(g): The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

§26.71(h): If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

Mr. Levine is listed on CSI's UCA as solely responsible for estimating and bidding; negotiating and contract execution; and marketing/sales. He holds the titles of Vice President, estimator, project manager, and web designer. (UCA p. 5) Both you and Mr. Levine are listed as sharing the responsibility for making financial decisions, hiring/firing of management personnel, purchasing of major equipment, signing company checks and making financial transactions. (UCA, pp. 5, 6) His duty statement contained in the record states he is "responsible for overall management of the independent contractors; responsible for bidding abatement of asbestos, lead and mold, site remediation, and removal of underground UST/AST tanks, hydraulic lifts, and hazpower cleanups." He also "oversees the day-to-day projects that are ongoing." (Duty Statement). Mr. Levine is the firm's qualifier for company licenses in general engineering (Class A); building moving/demolition (C21), hazardous substance removal (HAZ); and asbestos (ASB). He is the reference for CSI's site cleanup projects involving contaminated soil, underground tanks, and hydraulic lifts, and previously served as senior project manager at Bluewater Environmental Services, Inc. (BSI) for hazmat abatement and demolition services. (Levine résumé). Mr. Levine's résumé attests to several decades of management involving product engineering and manufacturing.

As stated in your résumé, you began your career in elementary education in Louisiana in 1981 and were a housewife from 1988 to 2001. You started working for BSI in 2004 and you stated you served as "project administrator" for 3 project managers where you managed key components of jobs including setting up the jobs into the system and allocating labor, material, and equipment resources. (Résumé) You further assisted with scheduling jobs and submitted all regulatory paperwork. (Résumé). Your experience at BSI appears to be described on a page from CSI's website, which states: "As project administrator for a local abatement/demolition company for over 3 years, she assisted in bid preparation, converted bids into projects, ordered insurances, liaised with the regulatory agencies (EPA, OSHA, etc.), generated filed job logs, collected post job information, invoiced, and collections." At CSI, according to your duty statement, you are "responsible for facilitating bid preparations, responsible for getting contracts signed and executed; work on all aspects of administration operations (order insurance, order equipment and supplies, liaison between regulatory authorities, generate field logs, order EPA numbers, complete manifests and labels); assist in collections, answer phone calls, responsible for worker docs [sic] up-date."

CUCP explored in greater detail the entry on your résumé that you hold a California Class A general engineering license. The agency's on-site report states: "applicant stated that she did have a license but let it expire. She stated that she was not going to apply for a license; she didn't want to go [through] studying for another test. At this point, she is fine with her husband having

the licenses for the company.” (On-Site Report, p. 2) CUCP also noted that there was no evidence from the state licensing board website of any active or expired licenses in your name. (CUCP Eligibility Worksheet)

CSI bears the burden of demonstrating by a preponderance of evidence per §26.61(b) that you, as its socially and economically disadvantaged owner, control the applicant firm as defined by the Regulation §26.71. There is substantial evidence, highlighted above, to the effect that you have very little to do with the “operations” for which the firm seeks certification, namely, abatement, demolition, restoration, remediation, and general engineering. In fact, your non-disadvantaged spouse Mr. Levine oversees and supervises CSI’s day-to-day projects which are disproportionately under his purview. (You stated on appeal: “my husband and son run the field work force.”) Mr. Levine’s expertise and skills are used precisely in the manner for which the firm has been engaged in; and he clearly has more substantial duties, as specified in the UCA, résumés, and on-site report (estimating, bidding, negotiating, supervision, etc.). CUCP’s on-site report at page 7 notes that Mr. Levine and two independent contractors are responsible for estimating and bidding and that you are “not involved at all.” We affirm CUCP’s conclusion under §26.71(e) that the firm is ineligible because a non-disadvantaged individual (Mr. Levine) is disproportionately responsible for CSI’s operations. In addition, we affirm under §26.71(h); you hold none of the firm’s licenses, which is a factor negatively effects your ability to meet the control requirements.

There was also substantial evidence; all of it provided by the firm and yourself, that your duties are primarily administrative/financial and that your experience and understanding relate primarily to administrative functions, not actual field operations. You stated on appeal:

Financials. . . I employ a part-time bookkeeper to run our general ledger and maintain all aspects of our financials on QuickBooks. I serve as his backup, particularly for payroll and job costing. I review our A/R reports with him weekly and do calculations as needed. I review our A/P reports weekly and approve which and by how much we pay our vendors. I approve and sign all checks, payroll or otherwise. I review the monthly financials with my husband and the bookkeeper to track our progress.

Sales: I serve as the company’s project administrator. This in itself is a full-time job but it keeps me totally aware of what the project managers are doing and keeps me interactive with all customers. I alone ensure that all regulatory agency requirements are met. I don’t allow a job to be scheduled until contracts are signed, insurance certifications are in place and pre-liens are mailed. (Rebuttal Letter)

You further stated in your appeal under the categories of “operations” and “human resources” that you are the HR manager tracking certifications, receive time cards each week from field foremen, review job logs they submitted, and work with them on schedule changes personnel problems and equipment rentals. These are all very important to a firm such as CSI, but under the Regulation, your involvement and expertise in the firm’s overall affairs must be such that CUCP reasonably could conclude that you meet all §26.71(g) requirements. We agree with

CUCP's conclusions. We note that although you likely have an "overall understanding of" the firm's activities, you did not present sufficient evidence that you possess managerial and technical competence and experience directly related to "the type of business" in which CSI is engaged and its operations, which is a part of the requirement of this provision. The pertinent technical experience rests with Mr. Levine, a non-disadvantaged owner, who holds the requisite certifications.

Substantial evidence supports CUCP's conclusion that CSI did not meet its burden of proof concerning your control of CSI.

**CONCLUSION:**

The Department affirms, as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification, CUCP's determination that CSI is ineligible for certification as a DBE. We reach this conclusion based on the firm's failure to satisfy the requirements of §26.69 and §26.71 discussed above. This decision is administratively final and not subject to petitions for reconsideration. **CSI may reapply for DBE certification with CUCP at any time.**

Sincerely,

Marc D. Pentino, Acting Associate Director  
External Civil Rights Programs Division  
Departmental Office of Civil Rights

cc: CUCP