July 28, 2015

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 14–0077

Mr. John W. Kellogg, Esq.
Moye White, LLP
16 Market Square, 6th Floor
1400 16th Street
Denver, CO 80202-1486

Dear Attorney Kellogg:

Sierra Rebar, LLC (SRLLC) appeals the Colorado Department of Transportation's (CDOT), decertification of the firm as a Disadvantaged Business Enterprise (DBE) for failure to provide timely notification of material changes that the Department's DBE Regulation (49 C.F.R. Part 26) §26.83(i) requires, and concealing or misrepresenting information relevant to the firm's eligibility, a ground for decertification under §26.87(f)(3). The Department reviewed the entire administrative record per §26.89(f)(1), along with the material that you provided and we conclude the decertification was supported by substantial evidence and consistent with the certification provisions of 49 C.F.R. Part 26. We affirm CDOTs decision for the reasons below.

Pertinent Facts:

SRLLC, a reinforcing steel contracting business established in November 2011, applied for DBE certification with CDOT in January 2012. The firm's certification application identified Jeffrey Basagoitia as the firm's sole owner with an initial capital contribution of $2,000 to start the firm. CDOT conducted an onsite interview on May 4, 2012 and certified the firm as a DBE on May 16, 2012. In this letter of certification, CDOT stated:

> The anniversary date of your firm's DBE certification is May 31, 2013. You will be notified 45 days prior to the anniversary date that eligibility must be reevaluated. The notification provides documents, with instructions to submit to [CDOT]. . . .Pursuant to 49 C.F.R. §26.83(i), submittal of this information is required to ensure that there is no interruption in your firm's status as a certified DBE. If any change occurs in the firm's legal structure, ownership, management, control, or work performed, you must notify [CDOT] immediately. (CDOT Letter to SRLLC, May 16, 2012)

On April 15, 2013, CDOT notified the firm that its annual no-change affidavit was due, which the agency requested be submitted by May 15, 2013. CDOT noted in this correspondence that "any items checked yes on the change affidavit must be accompanied by supporting documentation; e.g., a change in ownership must be accompanied by the relevant corporate, LLC, or partnership documents." SRLLC submitted a Change Affidavit to CDOT on May 15, 2013, noting that in the past year a change occurred in the firm's ownership, directors/officers or bylaws, and the LLC Agreement. Three accompanying affidavits were signed by Mr. Basagoitia, Dale Rinehart, Michael Benge of Summit MRB Holdings, LLC (Summit). Mr. Benge's résumé attached to the affidavit states he has been the owner of Summit and SRLLC since November 2011. One of the items submitted by SRLLC was the firm's amended Operating Agreement, which indicates that as of August 21, 2012, the new members of the LLC were Summit and Mr. Rinehart, each possessing 245 member units, or 49% of the total.

By letter dated May 24, 2013, CDOT acknowledged receiving the firm's change affidavit and requested additional information to enable the agency to assess the changes and the firm's eligibility. Among the items CDOT requested, the agency sought résumés and personal tax returns for the individuals listed, documentation of the contributions made by Mr. Rinehart and Summit, and contracts. It appears the firm submitted the résumés and personal tax returns and other items, but no documentation concerning the contributions. On August 2, 2013, CDOT requested additional supporting information such as equipment lists and purchase documents, SRLLC's accountants' "compilation report and financial statements of December 31, 2012," and copies of Summit's tax returns. CDOT repeated its request for documentation of the contributions and sources of contributions made by Mr. Rinehart and Summit to acquire their ownership in SRLLC. The record contains an August 12, 2013, correspondence from SRLLC's accountant, W. Scott Weismann, who states Mr. Rinehart made a $980 contribution in the company on December 23, 2011; and that Summit/Michael Benge made its $980 contribution on February 23, 2012. This letter also mentioned that a contingent liability reflected in the December 31, 2012, compilation report represents a bonding security deposit put up by Mr. Benge with his personal funds and that if the deposit was called, SRLLC would owe Mr. Benge.

After receiving the requested information CDOT identified issues affecting the eligibility of the firm, and sent a letter on August 27, 2013, of intent to remove SRLLC's DBE certification, citing 5 grounds, which the Department summarizes as follows:

> (1) Mr. Basagotia's ownership is not in accordance with §26.69(c) when viewed in the context of Summit's contributions. Here CDOT cited Mr. Basagotia's original $2,000 contribution and loans to SRLLC later made by Summit totaling $846,926.75, concluding that: (a) the $3,960 total contribution made by the owners appears to be pro forma in nature, as the loan amounts appear to represent the real cost to capitalize the business; and (b) Mr. Basagotia's risk is not commensurate with his ownership interest, nor proportionate to that of Summit.
>
> (2) SRLLC's viability is compromised by its dependence upon Summit and Mr. Benge for operating capital, equipment, and bonding capacity. CDOT, citing §§26.71(b) and (e), noted Mr. Benge's experience in the steel industry, and him

(through Summit) loaning SRLLC over $846,000 on September 7, 2012, and providing a security deposit enabling SRLLC to obtain bonding capacity. CDOT noted that since Summit's 2012 tax returns provide no evidence of assets in the form of these loans owed to it, nor is there is evidence of contributions to the business during the year that provide evidence of the company's ability to make loans of that amount, that Mr. Benge personally provided those loans. CDOT further noted that after reviewing the firm's equipment list, all equipment in SRLLC's possession is leased from Summit and that SRLLC has no equipment of its own. In addition, the terms of the equipment lease agreement calls for monthly payments of $486.30, which is less than the monthly payment of $556.92, that Summit makes on just one vehicle. Lastly, CDOT cited Mr. Basagotia's correspondence that indicated that SRLLC's $300,000 contingent liability amount for a bonding security deposit (referenced in its December 31, 2012 financial statement) was put up by Mr. Benge with his personal funds; and that according to a Bonding Company Authorization signed by both firms, SRLLC has a bonding capacity of $5.0 million per project and $10 million aggregate.

(3) SRLLC did not comply with §26.83(i) requirements by not notifying the agency that the firm's ownership had changed within 30 days of the occurrence.[1] CDOT indicated that SRLLC's Operating Agreement was amended on August 21, 2012, showing that an ownership change had occurred, but that the firm only notified the agency when it submitted its change affidavit on May 15, 2013. SRLLC's delay in notifying CDOT of this change within the required 30 days constitutes a failure to cooperate under §26.109(c).

(4) Pursuant to §26.87(f)(3), CDOT may remove DBE certification upon learning of information that was concealed or misrepresented in previous certification actions. CDOT indicated that (a) SRLLC and Summit were formed on the same day, (b) SRLLC's certification was granted on the basis that Mr. Basagoitia held 100% ownership interest; (c) the information reflected in the accountant's August 12, 2013, letter (see above) mentioned Mr. Rinehart contribution to the firm on December 23, 2011; yet SRLLC's application makes no mention of his contribution; (d) Summit's contribution, made on February 23, 2012[2], was not mentioned during CDOT's May 4, 2012 on-site interview; and (e) SRLLC obtained a line of credit from Valley Bank & Trust on March 7, 2012, a fact that undisclosed during the May 4th on-site interview.

[1] Section 26.83(i) states: "If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form. (1) Changes in management responsibility among members of a limited liability company are covered by this requirement. (2) You must attach supporting documentation describing in detail the nature of such changes. (3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under §26.109(c)."

[2] In its letter, CDOT referenced 2013 as the date of Summit's contribution. This appears to be in error; the document from Mr. Weisman clearly states this occurred in 2012.

> (5) Contrary to the requirements of §26.109(c), SRLLC did not cooperate with CDOT's May 24, 2013, request for information regarding the contributions and sources of made by Mr. Rinehart and Summit to acquire their ownership interest in the firm, despite a follow-up request on August 2, 2013. CDOT acknowledged that Mr. Basagoitia indicated the amounts of the contribution, but did not provide the documentation to support that statement.

CDOT afforded the firm the opportunity for an informal hearing in accordance with §26.87(d) and you submitted a written rebuttal to CDOT's notice of intent to remove on September 6, 2013. A hearing occurred on October 4, 2013, before attorney Charlotte Robinson who served as the hearing officer. Ms. Robinson's Order of October 25, 2013, affirmed CDOT's findings. CDOT sent SRLLC a letter removing the firm's DBE certification on November 18, 2013 based on the order.

You appealed CDOT's decision on the firm's behalf on February 17, 2014, and pursuant to §26.89(d), we requested CDOT's complete administrative record, which we received June 23, 2014. On rebuttal, you dispute all of CDOT's decertification grounds, including those ownership and control related reasons listed as (1) and (2) above. It suffices for purposes of this appeal for us to address grounds 3–5 above and your allegation that CDOT's §26.87 process was procedurally flawed.

Decision

1. The purpose of firms notifying a recipient of changes in circumstances pursuant to §26.83(i) is so the recipient can assess whether the change affects the firm's ability to meet size, disadvantage status, ownership or control requirements. This notice must be sent within 30 days of the change. The record supports CDOT's decision that SRLLC did not comply with §26.83(i) requirements, when it did not timely provide CDOT with information regarding the firm's owners (Rinehart and Summit) until May 15, 2013, with the submission of its annual affidavit. SRLLC's Operating Agreement was amended on August 21, 2012; and you opined in your appeal, Mr. Rinehart and Summit became owners on <u>that</u> date when the agreement was executed. (Rebuttal pp. 7, 16). New ownership is a material change; one that SRLLC was obliged to inform CDOT within 30 days from its occurrence. Notice of this requirement was included in the original notice of certification SRLLC received. SRLLC's failure to do so (a point you acknowledge on pages 3, 9, and 17 of your appeal) prompted the agency to remove the firm's DBE certification for failure to cooperate under §26.109(c),[3] an action upheld by hearing officer Robinson.

[3] Section §26.109(c) states: "All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment)."

You allege that late filing under §26.83(i) is not a valid ground for decertifying the firm as a DBE under this provision. However, this provision at §26.83(i)(3) states explicitly that a firm that fails to make a timely notification of such a change will be deemed to have failed to cooperate under §26.109(c). The remedy for failure to cooperate includes decertification under §26.109(c). CDOT also has met its burden of proof that SRLLC failed to cooperate fully, as the Regulation §26.109(c) requires, with the certifier's reasonable requests for eligibility-determinative information; namely details concerning the contributions made by Rinehart and Summit. This ground alone is sufficient for affirming decertification.

CDOT has met its burden of proof in this regard and its action is proper under §26.87(f)(3), a provision that at the time of CDOT's decision listed as a ground for removing DBE eligibility, "Information that was concealed or misrepresented by the firm in previous certification actions by a recipient." The evidence is such that information was misrepresented. Both Rinehart and Summit made contributions to the firm (December 23, 2011 and February 23, 2012, respectfully) that were not disclosed in the firm's January 2012 DBE certification application nor to CDOT at the agency's May 4, 2012 on-site interview or prior to CDOT certifying the firm 12 days later.[4]

2. Your allegations that CDOT failed to comply with the due process and procedural requirements found in §26.87[5] are based on your claim that: (1) CDOT did not maintain a

[4] On this point, citing Mr. Basagotia's testimony at the hearing, you allege that at the time of SRLLC's application, Mr. Basagotia knew Mr. Rinehart would be a part of the business, but that he did not immediately join the firm. You further stated that Mr. Rinehart paid Mr. Basagoitia for his interest in the business but he declined to be formally a part of it. (Rebuttal pp. 8–9). This strains credulity. On a related point, you allege that CDOT's reference to Mr. Benge's LinkedIn profile indicating his ownership of SRLLC since November 2011 is not part of the administrative record and was not raised by CDOT nor the hearing officer. The record does contain Mr. Benge's résumé he attached to the firm's annual affidavit, which confirms he has been the owner of Summit and SRLLC since November 2011. Yet, SRLLC's application makes no mention of this nor is it noted on CDOT's on-site interview report. These facts support CDOT's determination under §26.87(f)(3).

[5] The procedural safeguards of §26.87 that are relevant here are found in sections d, e, and g. In this footnote, the Department selects the most salient subsections to this appeal, which at the time of CDOT's action stated:

"(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. (1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part. (2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record..

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions. (1) Your method of implementing this requirement must be made part of your DBE program. (2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

complete verbatim record of its hearing by failing to record the initial hearing at which SRLLC presented and answered numerous inquiries from the hearing officer; (2) because the hearing was not recorded, SRLLC was again required to present its evidence, however, this proceeding was limited in scope lasting approximately 20 minutes compared to one hour for the initial hearing; (3) CDOT failed to maintain a complete record of information the firm submitted during its initial application, during the reevaluation process, and during CDOT's hearing; (3) CDOT failed to conduct an impartial review as required by §26.87(e), because as you claim, all communication regarding the review and leading up to the informal hearing was with the same CDOT staff person (Mr. Liljenberg). You claim Mr. Liljenberg did the initial assessment; issued the initial notice of removal; requested all documents; authored all the letters regarding the assessment; and later (when SRLLC asked for a hearing) requested that all correspondence regarding the informal hearing go through him; and lastly, commented on the hearing officer's final order.

We find that CDOT properly initiated and conducted the decertification action in this matter in accordance with §26.87. An independent hearing officer conducted the informal hearing that from the Department's reading included an opportunity for you and Mr. Basagotia to repeat your presentation, which was recorded. Hearing Officer Robinson noted in her Order, page 1, footnote 1: "Two hearings were actually held. The record did not record the first hearing and SRLLC and its counsel agreed to convene an additional hearing immediately following the original hearing." A plain reading of the nearly 20 page transcript (that CDOT forwarded to the Department with its administrative record per §26.87(d)(2)) indicates to us the second hearing was much longer than 20 minutes as you allege.

In regards to your claim that CDOT acted in an impartial manner, we note that CDOT's August 27, 2013, notice of intent to decertify was signed by Mr. Liljenberg, but that there was clearly an independent hearing officer (Ms. Robinson), who submitted her order to the agency. We do not see an issue with Mr. Liljenberg performing the initial assessment and reevaluation of SRLLC's eligibility and authoring the notice of intent to remove DBE certification; and later providing input to the hearing officer prior to her decision. Ms. Robinson signed her own order, which ultimately, the manager of CDOT's civil rights officer, Mr. Diehl, summarized the hearing officer's findings in the agency's final decertification notice sent to the firm. Mr. Diehl's letter does not mirror Ms. Robinsons findings (from the informal hearing) verbatim, but maintains the core justifications for removal as identified in the hearing results. CDOT appropriately ensured a separation of functions in the proceeding to remove SRLLC's DBE eligibility and followed the requirements of §26.87 in this matter.

In regards to your claim that CDOT failed to maintain a complete record of the information the firm submitted, you refer the Department to your exhibit B, which in your view raise concerns of

---

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

the overall completeness of CDOT's records. However, your exhibit B contains the same documents found in CDOT's records.

Conclusion

We affirm the decertification as supported by substantial evidence and consistent with the certification provisions of 49 C.F.R. Part 26. SRLLC may reapply to the DBE program if it believes it has better arguments or facts than those presented to the CDOT in 2013. The Department's decision is administratively final and not subject to petitions for reconsideration. (See 49 C.F.R. §26.89(g)).

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: CDOT