

July 22, 2016

Reference Number: 16-0033

Mikhail Ogawa, President
Mikhail Ogawa Engineering
REDACTED
San Diego, CA 92130

Dear Mr. Ogawa:

Mikhail Ogawa Engineering (MOE), appeals the California Unified Certification Program's (CUCP)¹ decertification of MOE as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After examining the full administrative record, we find that there is substantial evidence upon which to affirm the decertification under Regulation §26.89(f)(1). We regret that we cannot reach a result more favorable to the firm.

The record reflects that CUCP notified MOE on January 26, February 19, and April 20, 2015 that MOE's required annual affidavit and supporting documentation for 2014 were due.² The §26.83(j) affidavit requirement is mandatory. It exists independent of the certifier's reminder or request. The regulatory requirement is:

“If you are a DBE, *you must provide* to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been *no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form*, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts (e.g., submission of Federal tax returns). *If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.109(c).*” (Emphasis added.)

Section 26.109(c) provides:

¹ The certifier in this case is the California Department of Transportation (Caltrans), a member of the CUCP. Caltrans' actions are attributed to the CUCP hereafter.

² CUCP certified MOE by letter dated October 2, 2008. That letter at page 2 states that “[i]n order to assure your continuing DBE status, you must submit annually a No Change Declaration form (which will be sent to you), along with supporting documentation.”

“Cooperation. 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).” (Emphasis added.)

When MOE did not provide the required affidavit and documentation,³ CUCP validly moved to decertify, via §26.87(b) Notice of Intent dated May 27, 2015 (stating that the reason for the proposed removal of certification was non-receipt of the required information and the firm's resulting failure to cooperate). That Notice stated that you had the right to an informal hearing within 30 days of the Notice and that you also had the right to present written information and arguments. The Notice further stated that if you chose not to appeal to CUCP's Reconsideration Official, the firm would be found ineligible. CUCP issued its Notice of Decertification on August 19, 2015. These actions appear to have fully complied with the substantive and procedural decertification rules of §26.87.⁴

MOE does not contest the decertification, and its appeal letter states no reversible error on CUCP's part. It states:

“We would like to appeal the effective date of no longer being eligible to participate in the CUCP as a DBE. We request that the effective date be November 1, 2014. This is the date the No Change Declaration was required to be submitted or the certification would be cancelled. Our firm would be eligible to reapply for DBE certification [on or after] November 1, 2015.”

This Office does not conduct a de novo review of certification decisions. It does not certify, decertify, or reinstate certifications: those are recipient prerogatives. This Office lacks the power to change a decertification date, as this appeal requests, which is fixed by Regulation. This Office's function is instead to resolve appeals based on the particular issues presented, the requirements of the Regulation, and the complete administrative record. Section 26.89(e). The standard is whether substantial evidence supports the certifier's decision (here, decertification)

³ The record shows some history of MOE failing to file the affidavit and/or supporting documentation on time.

⁴ The record does not reflect any appeal to CUCP's Reconsideration Official. Rather, MOE officials continued via email to request extensions of time to provide the requested documentation. CCUP gave the firm nearly 90 days from the §26.87(b) Notice of Intent to the §26.87(g) Notice of Decision, which was fully 9 months after the affidavit and supporting documentation were due.

To the extent that the company contends a change in ownership delayed its No Change Affidavit, we find that argument unpersuasive. Section 26.83(i) separately requires the firm to report ownership or control changes to the UCP within 30 days of the change, or the firm will be deemed to have failed to cooperate under §26.109(c).

and whether that decision is consistent with the Regulation. Section 26.89(f). In this case, there is substantial evidence that the firm failed to provide the mandatory affidavit (about which requirement MOE was notified repeatedly) and consequently failed to cooperate. However, the decertification is not automatic, as the appellant appears to contend. CUCP must follow the specific procedures enumerated in §26.87 to actually effect the decertification. The record demonstrates the CUCP followed all required procedures.

CUCP's decertification complied with the Regulation's substantive and procedural rules, and §26.89(f)(1) requires us to affirm it.⁵ The effective date of the decertification under the rules of §26.87 is August 19, 2015, the date of CUCP's §26.87(g) Notice of Decision. MOE may reapply for DBE certification after August 18, 2016.

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

Sincerely,

Samuel F. Brooks
DBE Appeal Team Advisor
External Civil Rights Programs Division

cc: Janice Salais, CUCP

⁵ The firm's recourse after a valid decertification is to reapply for certification, after the appropriate waiting period. CUCP's waiting period is one year from the date of decertification.