

November 7, 2017

Reference Number 17-0083

Mulissa Smith, Manager
Department of Transportation Division of Engineering Services Office Engineer
1727 30th Street
MS 43
Sacramento, CA 95816-8041

Dear Ms. Smith:

Double G's Supply, Inc. (DGS) appeals the California Unified Certification Program's (CUCP) April 21, 2017 denial of its March 10, 2016 request for expanded Disadvantaged Business Enterprise (DBE) certification, under the standards of 49 C.F.R. part 26 (the Regulation), in twenty-one additional areas of work. CUCP determined that DGS was ineligible for twelve of the requested work codes because the firm lacks required licenses. As DGS does not contest those denials, see Appeal Letter at 3, we affirm CUCP's determination of ineligibility with respect to them on the basis of Regulation §26.89(f)(1) (Department affirms certifier decisions supported by substantial evidence and consistent with applicable certification standards).

The remaining nine work codes requested are all wholesaler codes, eligibility for which requires DGS to have a warehouse or storefront open to the public and an inventory of work-code specific supplies. CUCP denied the firm's request for certification in these codes in part based on DGS's failure to demonstrate that it met the warehouse or inventory requirements. After considering the complete administrative record (as supplemented by DGS's appeal under §26.89(e)), we affirm CUCP's determination as supported by substantial evidence and consistent with operative certification provisions, substantive and procedural.

Pertinent Facts and Procedural History

You and your brother Mike Glenn formed DGS in January 2013. CUCP certified the firm as a DBE on February 27, 2015, after conducting a site visit on January 29, 2015 (Original Site Visit, or OSV). During the OSV, you met with CUCP representatives in your 120 square-foot home office and told the interviewers that it was DGS's only facility. You specifically confirmed that DGS at that time had no storage facility, store front, warehouse, inventory, or office outside your home. OSV Report at 6.

On March 10, 2016, you requested expanded certification in numerous new work codes. You stated that the firm was moving into the business of wholesale supply of a range of construction-related goods. There ensued a series of emails during spring and summer 2016 concerning the propriety of the requested work codes, whether the firm had a warehouse and inventory, and where CUCP stood in its evaluation process. In email to CUCP on July 12, 2016, you stated that you had a warehouse with inventory and open to the public, located at 500 Sequoia Pacific Avenue, Suite A, Sacramento, CA 95811. By letter dated July 25, 2017, CUCP denied the firm's application for certification in all of the additional work codes requested (First Denial). In the week of July 18, 2016, CUCP made three unannounced site visits during regular business hours to that address and found the space locked, apparently empty, and with no one present. First Denial at 2. CUCP denied the work codes for which state licenses are required on the basis that DGS lacked licenses to perform the work. CUCP denied the remaining work codes on the basis that the firm failed to demonstrate that it is a supplier/wholesaler within the meaning of the nine underlying work code requests: "Double G's Supply, Inc. is not a supplier in the true sense of the word. A supplier owns, operates, or maintains a store or warehouse where materials are purchased, kept in stock, and regularly open to and sold to the public." *Id.*

CUCP also took issue with the breadth of DGS's request: "The regulation further requires that we align these codes as closely as possible to those related to the primary business activity over which the disadvantaged owner has control. Therefore, as a practical matter, the codes are not assigned on a generic basis; instead, the codes are assigned based on a preponderance of evidence to support a firm's ability to perform work in each code, and the disadvantaged owner's ability to control the work." *Id.* CUCP concluded: "We have not been provided any evidence that any and/or all of the Work codes requested (supplier codes) are now the primary specialty of Double G's Supply, therefore we are denying your request for addition of Work codes." *Id.*

The First Denial informed DGS of its right, within thirty days, to present (by way of appeal) CUCP with information and arguments in response. DGS responded in an email exchange of August 9 and 10 and in a formal appeal letter dated August 22, 2016. On August 9, you, as President of DGS, advised CUCP:

We just received notice from CalTrans about the dismissal of our DBE request. I didn't get back to you, because we found a new and bigger location for our warehouse. As our landlord was given notice he was being evicted. This is all messed up ... how do we fix this? We have been waiting almost a year for recertification, and we have been patient. I was under the assumption I would have notice of an appointment. Otherwise, I would have notified you we were moving. Please help.

Noting that in fact just five months (not almost a year) had elapsed since DGS's request,¹ on August 10, 2016, CUCP responded:

¹ Section 26.83(k) specifies that the certifier "make decisions on applications for certification *within 90 days of receiving from the applicant firm all information required* under this part." (Emphasis added.) Although CUCP took more than 13 months from DGS's expansion request to final denial, it is not clear from the record when or whether the 90-day period began to run.

Thank you for your email. Your request to add Work Codes was received on March 11, 2016 and assigned to me on March 14, 2016. I'm confused as to what you mean when you say you have been waiting almost a year for recertification. Please know that your firm remains certified, however, the requested Work Codes were denied. Per your email to me on July 12, 2016, you stated that you have a warehouse open to the public with inventory located at 500 Sequoia Pacific, Suite A, Sacramento, CA 95811.

Please refer to your denial letter which states that you have the right to present information and arguments in writing to our Reconsideration Official no later than 30 days from the date of the letter. Please mail to:

Reconsideration Official
Department of Transportation
Office of Business and Economic Opportunity
1823 14th Street
Sacramento, CA 95811

DGS submitted a To Whom It May Concern letter to CUCP dated August 22, 2016, in which it argued:

The only appeal that we would like to make, is that Double G's Supply does in fact have a store open to the public. By complying with this requirement, [DGS] is eligible for new codes and the removal of the work code stating that Double G's Supply, Inc is only a wholesale dealer and not an official supplier.

During the time that we have patiently waited for a response to our request, many things have happened within our small business. We have been patiently waiting for almost six months for a response from the Department of Transportation. And as luck would have it, of course *an inspection would happen during the time our company was forced to move.* Our landlord had other tenants that did not pay their bills, which caused him to be behind in his payments and get evicted. A phone number can be given to you, if you wish to call Mr. Steve Lade and confirm this.

Anyhow, we are hoping that we can reschedule an inspection very soon in our new location which is currently pending approval. We *plan to be* moved officially moved and *open again to the public* in a week. This process has been very stressful for us. Our company will not be able to remain in business with the wholesaler code. And for a program such as the Disadvantaged Business Enterprise designed to help actual disadvantaged, minority owned, and women owned businesses, we are hoping for your understanding and cooperation.

Like I said, *we are hoping to be up and running in a week. We just need a little more time.* We can not afford to wait another six months and to go through this process again.

And as incredibly backed up and behind you guys are, I'm sure getting another company off the books would be helpful. (Emphasis added.)²

CUCP acknowledged receipt of DGS's appeal and request for a hearing on September 6, 2016, but fully five more months passed before CUCP, on February 15, 2017, notified DGS that its hearing was scheduled for March 2, 2017. There is no transcript of the hearing in the administrative record and no explanation for the delayed scheduling.

On April 21, 2017, CUCP advised you that it had affirmed (Second Denial) the July 25, 2016 denial DGS's application for additional work codes for essentially the same reasons cited in the First Denial. DGS appealed to the Department by letter dated April 25, 2017 (Appeal Letter) and made arguments not materially different from those made in the state-level appeal. We quote all substantive portions below:

[CUCP] states in this paragraph that work codes classifying "suppliers" is given when a firm owns, operates, or maintains a store, warehouse, or other establishment on which materials, supplies, articles, or equipment of the general character are kept in stock and regularly sold or leased to the public..." Double G's Supply, Inc has performed and falls within these guidelines and requirements. We have secured a business location with a small store and a small warehouse that is available to the public. Our business location is 3936 Wayside Lane, Carmichael, Ca 95608. Our business hours are open to the public Monday through Friday, 9:00am-4:00pm. *Caltrans was unable to determine if Double D's Supply meet these requirements because Caltrans never made the effort to visit our location. Therefore, this reason for denial is void and not valid.*

[CUCP] goes on to state that Double G's Supply appears to be an unstable business due to the moving of our business location on several occasions. During the interview, I told [CUCP] that the address at **REDACTED** was my home address. That address is my personal residence. When my business partner and I decided to make the jump from being a "drop shipper," and a "broker," and to become a "supplier," we decided to move our location from my home to a public business address. I did not realize that we would be penalized for making the decision to better ourselves and to move our business from my home to an actual business location where we could attempt to become more successful. With this decision, we moved to the address on **REDACTED** Sequoia Pacific Avenue. We remained in this location for about eight months and performed business at this location. During this time, without my knowledge, our landlord was evicted from his building. Our landlord was subleasing all the units in the building and did not notify his tenants that he was being evicted. One morning, when we showed up, there was a sign on the door that said we had five business days to remove all our property. I am sure you can understand, how frustrated we were and how expensive it was to move all our property without prior notice to plan and prepare.

We had been waiting for our onsite interview for almost a year. *We did not think to notify Caltrans and tell them we were in the process of moving because we had not*

² Even a generous reading of DGS's letter would conclude that DGS did not in fact have a warehouse open to the public from at least July 18, 2016 until about the end of August 2016.

heard anything from Caltrans. So of course, Caltrans decides to do their onsite visit, after we had removed all our property and desperately trying to find a new location so we could resume business. How [CUCP] believes that being evicted by our landlord's landlord without any notice at all, is somehow at the fault of Double G's Supply is beyond me.

A few months later, we were able to find a new location at 3936 Wayside Lane in Carmichael, Ca. We have entered into a three-year lease, and have been able to continue to resume business at this location. We have almost been at this location about a year. We are very happy here and have no intention of moving. Doing business at my home was not going to work, and we were forced out of the location in Sacramento by the neglect of our Landlord. These reasons do not prove our company to be unstable. It proves to show that we have been forced with some obstacles and we have successfully been able to overcome them. [CUCP's] reason for denial of codes based on "instability" is definitely an unfair reason and not valid at all.

The third reason why [CUCP] denied us for codes is based upon the actual codes on which we were applying for. It appears that we were given some incorrect information. The documents we had, did not state that the codes we are applying for require licenses. *This is a very simple issue to fix. With the new information provided by [CUCP], we are currently only applying for the codes that do not require licenses.* Below are the codes Double G's Supply, Inc is currently applying for:

C0612 C0655 C0657 C0680 C0698 C0699
C0621 C0649 C0653

I believe in this letter, *I have successfully proven* why the decision to deny Double G's Supply new work codes is just not a valid reason at all. The DBE certification program is designed to help small minority businesses to have a fair chance and somewhat an equal opportunity at the work being offered in the state of California. Denial of our small company is not an example of the reasons of why the DBE programs were set in place. Without these codes, then yes, our company will have a difficult time surviving against the competition. Our company is not attractive to the major construction companies without these codes. We are currently already supplying to quite a few customers, we should be rewarded with the codes that best represent our company and what we do. [Emphasis added.]

Authority

Section 26.61(b) states:

The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

Section 26.71(n) states in pertinent part:

You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(1) The types of work a firm can perform (whether on initial certification or when a new type of work is added) *must be described in terms of the most specific available NAICS code for that type of work*. If you choose, you may also, in addition to applying the appropriate NAICS code, apply a descriptor from a classification scheme of equivalent detail and specificity. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification. If your Directory does not list types of work for any firm in a manner consistent with this paragraph (a)(1), you must update the Directory entry for that firm to meet the requirements of this paragraph (a)(1) by August 28, 2011.

(2) Firms and recipients must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. *The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.* [Emphasis added.]

Section 26.83(c) states in pertinent part:

(1) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(i) Perform an on-site visit to the firm's principal place of business.

Section 26.89(c) states in pertinent part:

If you want to file an appeal, 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.* [Emphasis added.]

Section 26.89(f)(6) states:

The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

Discussion

To become certified in an additional type of work, the applicant DBE firm must demonstrate, by a preponderance of the evidence, both that the requested code narrowly describes the work that the firm performs and that its socially and economically disadvantaged owners control the firm with respect to that type of work. §§26.61(b) (burden of proof) and 26.71(n) (certification in additional NAICS codes). The onus is on DGS to prove its eligibility.

As an initial matter, we affirm the denials of the requested codes involving licenses in light of the firm's concession that it lacks those licenses and its failure to challenge CUCP's characterization of the license requirement as error. *See* §26.89(c).³ Accordingly, substantial, uncontroverted evidence supports these determinations.

Regarding the remaining wholesaler codes, there is little evidence in the record that DGS actually performs work that narrowly "fits" within those codes' descriptions, as §26.71(n)(1) requires,⁴ or maintains a warehouse or store open to the public which has a stored inventory of goods for purchase. We disagree that DGS has "successfully proven" eligibility. Aside from the §26.71(n) question, DGS fails to prove that, at the time of CUCP's decision, it had either a wholesale office or inventory for sale to the public. In fact, the Appeal Letter appears to confirm the absence of either, for a period extending "a few months" from July 18, 2016:

So of course, Caltrans decides to do their onsite visit, after we had removed all our property and desperately trying to find a new location so we could resume business. How [CUCP] believes that being evicted by our landlord's landlord without any notice at all, is somehow at the fault of Double G's Supply is beyond me.

A few months later, we were able to find a new location at 3936 Wayside Lane in Carmichael, Ca. [Appeal Letter at 2-3, emphasis added.]

³ To reach this result, we need not and do not decide which if any portion of §26.71(h) may apply.

⁴ DGS instead makes largely uncorroborated assertions. The invoices it submits are evidence that it supplies the goods described in the invoices but do not demonstrate, by a preponderance of the evidence, that DGS maintained a warehouse or inventory at the time of CUCP's ineligibility determination. We note that DGS's time line cannot be accurate if, as DGS thrice concedes, its premises were located on Sequoia Pacific Avenue in July 2016. It would be impossible to have moved to 3936 Wayside "several months later" and to have been at that same Wayside address for "about a year" as of the Appeal Letter's April 25, 2017 date. We further note that applying indiscriminately for a multitude of work codes for which a firm clearly does not qualify, which we do not decide occurred here, simply wastes scarce state and federal DBE resources. *See generally* 17-0042 Morgan Wendell Johnson dba Combi-Tech (July 27, 2017)

Separately, the Regulation speaks of "principal goods or services," not, as CUCP maintains, "primary specialty." CUCP, however, states the tenor of the rule accurately. The slight discrepancy in phrasing is a non-issue in this appeal because all of the codes at issue are "wholesaler" codes, and DGS maintains that wholesaling is in fact the principal service it provides. *See* Appeal Letter at 2.

Again, the burden is on DGS. Section 26.83(c) requires a site visit to the principal place of business (PPB). It was incumbent on DGS to inform CUCP of a change in its PPB, particularly since it readily admits it was expecting CUCP to conduct a new site visit. We agree that DGS's landlord's eviction was not DGS's fault, but it was hardly CUCP's fault either. CUCP came on July 18, 2016 to the address you had confirmed as recently as July 12, 2016 was DGS's leased warehouse space. The Appeal Letter confirms that as of the CUCP's July 25, 2016 decision date (see quotation immediately above) you lacked a warehouse with inventory for sale to the public. This acknowledgment belies your assertions on August 9 (DGS found a "new and bigger" warehouse) and August 22, 2016 (DGS both "does in fact have a store open to the public" yet "plan[s] to be...open again to the public in a week").⁵

Further, notwithstanding the naked assertion in the August 22, 2016, state-level appeal of CUCP's First Denial, there is no evidence in the record that DGS made any substantive challenge to CUCP's July 25, 2016 determination that DGS had no warehouse or inventory for sale to the public. There is likewise no evidence that DGS notified CUCP when it leased the replacement premises on Wayside Lane, and DGS cites none on appeal. Finally, contrary to the argument that DGS makes to the Department, no provision of the Regulation requires CUCP to conduct another site visit after the several attempts to interview you at the Sacramento address of record.

Conclusion

The Appeal Letter states no ground upon which we might grant relief under the provisions of §26.89. Substantial evidence supports CUCP's ineligibility determination with respect to all twenty-one new work codes DGS requested, and CUCP's determination was consistent with applicable certification rules. We therefore affirm the decision *in toto*.

Should DGS believe it is now eligible for certification in any of the denied work codes, it may reapply after April 20, 2018.

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

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: CUCP

⁵ We do not consider CUCP's "instability" argument except insofar as it relates to the firm's failure to prove it operated a warehouse, open to the public with specific types of inventory (corresponding to the work codes requested) in stock, at the time CUCP made its ineligibility determination.

