

March 9, 2018

Reference Number 17-0104

Mr. Mark Serrano
Eagle Rock Industries, Inc.
redacted
Walnut Creek, CA 94598

Dear Mr. Serrano:

Eagle Rock Industries, Inc. (Eagle Rock) appeals¹ the California Department of Transportation's (Caltrans) March 15, 2017 decisions to deny the firm's request for additional work codes and decertify the firm as a Disadvantaged Business Enterprise (DBE),² under the rules of 49 C.F.R. Part 26 (the Regulation). After reviewing the complete administrative record, the U.S. Department of Transportation (the Department) affirms³ Caltrans's denial of the request for work codes and reverses⁴ the decertification decision.⁵

BACKGROUND

¹ See Appeal Letter (June 5, 2017).

² See Denial of Request to Add Work Codes (Nov. 15, 2016) and Final Removal Letter (Notice of Decertification (NOD)) (March 15, 2017).

³ See §26.89(f)(1): "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

⁴ See §26.89(f)(2): "If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it."

⁵ On November 15, 2016, Caltrans sent Eagle Rock two letters – a denial of all the requested work codes and a Notice of Intent (NOI) to decertify the firm under §§26.87(b) and (f) of the Regulation. Both letters informed Eagle Rock of its §26.87(d) right to an informal hearing at which the firm could respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. Eagle Rock requested a hearing, which occurred on February 16, 2017. The hearing focused primarily on the NOI but addressed the work codes as well, albeit somewhat tangentially. Caltrans issued Eagle Rock a Notice of Decertification (NOD) on March 15, 2017 under §26.87(g), affirming the work codes denial decision as well as the NOI.

You are Eagle Rock's sole owner and formed Eagle Rock in January 2015. You are presumed socially and economically disadvantaged (SED) under the Regulation. You do not hold any professional licenses. Eagle Rock applied for DBE certification in March 2015.⁶ You described the firm's primary business activity as performing "all types" of construction work; supplying construction materials; manufacturing materials such as concrete, asphalt, and lean base; and providing construction management and consulting services.⁷ Caltrans contends that Eagle Rock "is marketed as a Management Consulting business."⁸ Caltrans certified Eagle Rock as a DBE in July 2015 with North American Industry Classification System (NAICS) Codes 541618 (Other Management Consulting Services) and 541611 (Administrative Management and General Management Consulting Services),⁹ as well as corresponding Work Category Codes (work codes) C8770 Construction Management; C8714 Consultant, Project Management/Business Administration; and C8700 Consultant, Non-Engineering. None of these codes requires a license. In June 2016, you notified Caltrans that Eagle Rock had obtained a D06 license and requested that Caltrans add 27 new work codes to the firm's DBE certification.¹⁰ You did not identify the holder of the license.¹¹

Caltrans denied Eagle Rock's request to add 27 new work codes because the firm did not provide "any evidence that any and/or all of the work codes [Eagle Rock] requested is now the [firm's] primary specialty...therefore, we are denying your request for addition of work codes."¹² CUCP later concluded that you concealed or misrepresented information that is relevant to Eagle Rock's eligibility for the 27 requested work codes.¹³ Caltrans's eligibility evaluation for the work codes request included a review of the California State Licensing Board (CLSB) website to identify the license holder.¹⁴ The website listed John Sellers as the holder and responsible managing officer (RMO) of Eagle Rock's D06 license.¹⁵ You stated that Mr. Sellers ceased all

⁶ See Uniform Certification Application (UCA).

⁷ See *id.* at 1; see also Site Visit Questionnaire (On-Site Report) (May 22, 2015).

⁸ Denial of Request to Add Work Codes at 5.

⁹ See DBE Certification Letter (July 23, 2015).

¹⁰ See Request for Codes (June 7, 2016).

¹¹ See *id.* Obtaining the requested work codes – the majority of which require a D06 or "A" license – would have allowed Eagle Rock to perform concrete-related construction work; supply sand, gravel, concrete, and cement; supply and/or manufacture concrete, gypsum, and plaster products; and rent out construction equipment.

¹² Denial of Request to Add Work Codes at 5.

¹³ See NOD at 1.

¹⁴ See Caltrans Operating Procedures for North American Industry Classification System and Work Code Requests (May 12, 2015). A certifier does not simply "update" its directory to include a new license. Caltrans properly considered the license in evaluating eligibility. See generally §26.71(h).

¹⁵ See §26.87(f) *Grounds for decision*. "You may base a decision to remove a firm's eligibility only on one or more of the following grounds: (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part; (2) Information or evidence not available to you at the time the firm was certified; (3) *Information relevant to eligibility that has been concealed or misrepresented by the firm*; (4) A change in the certification standards or requirements of the Department since you certified the firm; (5) Your decision to certify the firm was clearly erroneous; (6) The firm has failed to cooperate

involvement with the firm in November 2016, at which time Matthew Sorrow acquired 25% ownership of the firm. Mr. Sorrow holds an “A” license on behalf of Eagle Rock.¹⁶

Caltrans contends that you intentionally concealed Mr. Sellers’s identity as the holder of the D06 license and misrepresented yourself as the license holder.¹⁷ It is upon this basis that Caltrans decided to remove Eagle Rock’s DBE certification pursuant to §26.87(f)(3).

DISCUSSION

Denial of Request for Additional Work Category Codes

§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.

§26.71(h) states:

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.” (emphasis added).

§26.71(m) states:

In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a

with you (see §26.109(c)); (7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or (8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.” (emphasis added).

¹⁶ See Change of Ownership Letter (Nov. 11, 2016). The difference between a D06 license and an “A” license is unclear. You and Caltrans agree, however, that at least one such license is necessary for Eagle Rock to perform concrete-related activities. See Hearing Transcript at 53-54.

¹⁷ See NOI. Caltrans also contends that Mr. Sellers’s involvement with Eagle Rock, which commenced after Caltrans certified the firm, is a change in Eagle Rock’s circumstances that renders the firm ineligible. See §26.87(f)(1).

relationship with a prime contractor or other party that compromises the independence of the firm.

§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.” (emphasis added).

- (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.

§26.73(a)(2):

You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

§26.87(f) states:

Grounds for decision. “You may base a decision to remove a firm's eligibility only on one or more of the following grounds: (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part; (2) Information or evidence not available to you at the time the firm was certified; (3) *Information relevant to eligibility that has been concealed or misrepresented by the firm*; (4) A change in the certification standards or requirements of the Department since you certified the firm; (5) Your decision to certify the firm was clearly erroneous; (6) The firm has failed to cooperate with you (see §26.109(c)); (7) *The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program* (see §26.73(a)(2)); or (8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.” (emphasis added).

Section 26.71(n) is the provision generally applicable to requests for new work codes. It requires that the certifier issue only codes that narrowly and specifically describe the firm's activities, and that the firm prove only that its disadvantaged owner(s) can control the firm with respect to the

underlying work. While the provision further explains the narrowness/specificity concept at some length in subsections (n)(1)-(4), it provides no independent, self-sufficient definition of control. Thus, the term “control” necessarily refers to the particularized facets or elements described in other parts of §26.71; otherwise, the provision would be meaningless. *See generally* 17-0101 C.E. Technologies (Jan. 16, 2018), n.11; 17-0087 Mast Industrial Painting, Inc. (Dec. 14, 2017), n.5. Further, and for essentially the same reason, §26.71(n) cannot properly be read to nullify, *e.g.*, the generally applicable burden of proof, present circumstances, cooperation, burden of production, appeal, and anti-abuse rules housed in §§26.61, 26.73, 26.89, and 26.109.

Section 26.71(n)(1) states that a correct NAICS or (derivatively) Work Category Code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Caltrans denied Eagle Rock’s work code request in full on the general basis that it assigns NAICS and Work Category codes based on a firm’s primary business activity.¹⁸ Caltrans characterizes Eagle Rock’s primary business activity as Management Consulting, based on the NAICS and Work Category codes it received with its DBE certification. Caltrans explained that Eagle Rock did not provide evidence that the activities within each requested code are the firm’s primary business activity.¹⁹ The firm did not provide evidence that it performs any of the activities described within the requested work codes.

Section 26.71(n)(1) also requires the certifier to “rely on, and not depart from,” the plain meaning of work code descriptors. The descriptors for the work codes Eagle Rock requested indicate that 21 require a D06, “A,” or “C” license;²⁰ two require distribution equipment; four require warehouses, rental facilities, and/or storage facilities;²¹ and one code requires both a

¹⁸ *See* Denial of Request for Work Codes at 5.

¹⁹ *See id.*

²⁰ *See id.* at 1-2 (quoting CSLB website): C1531 Plane Asphalt Concrete – Contractor License A, C8, C61 or D06 required; C1575 Remove Bridge Item – Contractor License A or C12 required; C1580 Modify Bridge Item – Contractor License A or C12 required; C1901 Roadway Excavation – Contractor License A or C12 required; C2800 Concrete Base – Contractor License A or C8 required; C3000 Concrete Pumping – Contractor License A or C8 required; C4040 Clean & Seal Pavement Joints/Rout & Seal Cracks – Contractor License A, D6 or C8 required; C4201 Groove & Grind Pavement – Contractor License D6 or A required; C5110 Concrete Surface Finish – Contractor License A, CS or D6 required; C5111 Concrete Overlay Drill & Bond – Contractor License A, D6 or C8 required; C5124 Erect Precast Concrete – Contractor License A, C8 or D6 required; C5150 Core Concrete – Repair Bridge Deck – Contractor License C8 or A required; C5310 Pipe Lining (Cement Mortar) – Contractor License A, CS or D6 required; C7215 – Concreted Rock Slope Protection – Contractor License A, C8 or D6 required; C7218 Air Blown Mortar (Slope Paving) – Contractor License A, C8 or D6 required; C7250 Sacked Concrete – Contractor License A, C8 or D6 required; C7301 Concrete Curb & Sidewalk – Contractor License A, C8 or D6 required; C8831 Concrete Barrier – Contractor license C8 required; C9904 Coring – Contractor D6 license required; C9905 Cutting – Contractor C12 license required; and C9980 Demolition – contractor License C21 required. Eagle Rock does not claim to hold any type of “C” license. *See* CUCP Work Code Guide (http://www.dot.ca.gov/hq/bep/find_certified.htm).

²¹ *See id.*: C0625 Sand & Gravel Supplier – requires distribution equipment; C0651 Concrete & Cement Supplier – requires distribution equipment; C9907 Construction Equipment Rental – facility that rents and/or leases equipment to the public; C9908 Heavy Equipment Rental – facility that rents and/or leases equipment which includes most wheeled or tracked equipment, *e.g.*, backhoes, wheel loaders, etc.; C9988 Moving & Storage – operation of merchandise warehousing and storage facilities; and D3270 Concrete, Gypsum, & Plaster Products Manufacturing – requires a facility and employees to do the work. *See* CUCP Work Code Guide (http://www.dot.ca.gov/hq/bep/find_certified.htm).

facility and employees.²² Caltrans determined the firm does not qualify for the codes requiring a license because you do not personally hold any licenses.²³ Caltrans found Eagle Rock ineligible for the remainder of the codes because the firm does not own or lease any distribution equipment, warehouses, rental facilities, and/or storage facilities; and lastly, Eagle Rock does not have any employees.²⁴ Section 26.71(h) permits Caltrans, in evaluating control, to consider the fact that you do not personally hold pertinent licenses. Caltrans permissibly considered your personal lack of licenses as one factor in determining Eagle Rock's ineligibility for the 21 codes requiring a license.²⁵ Caltrans also determined that Eagle Rock was ineligible because the work described is not a principal service Eagle Rock provides under §26.71(n)(1) and because your misrepresentation of pertinent facts amounted to an attempt to subvert the intent of the DBE program under §26.73(a)(2). Substantial evidence supports Caltrans's determination that Eagle Rock is not eligible for the 21 codes requiring a license.

Regarding codes C0625 and C0651, you argue that acquiring distribution equipment (whether by purchase or lease) makes no economic sense but cite no Regulation provisions that address "economic sense." Section 26.71(m) expressly permits a certifier to consider "whether the firm owns equipment necessary to perform its work." However, that section prohibits a certifier from determining that an SED owner lacks control solely because the firm leases, rather than owns, such equipment "where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm." Eagle Rock concedes that it presently neither owns nor leases the requisite distribution equipment for codes C0625 (Sand & Gravel Supplier) and C0651 (Concrete & Cement Supplier). It is consequently outside the limited "solely" exception in §26.71(m). By the terms of the rule, Caltrans properly considered whether Eagle Rock presently owns equipment necessary to perform the work described in the codes C0625 and C0651. Codes C9907, C9908, and C9988 involve facilities that rent and/or lease equipment to the public.²⁶ Each explicitly requires, in part, equipment to perform the activity, and Eagle Rock concedes that it has none. Accordingly, substantial evidence supports Caltrans's conclusion that the firm is ineligible under §26.71(m).²⁷

CUCP's Work Code Guide states that code D3270 (Concrete, Gypsum, & Plaster Products Manufacturing) is for "establishments engaged in manufacturing concrete, gypsum, and plaster products."²⁸ There is no evidence that Eagle Rock has a facility for manufacturing concrete,

²² You stated that Eagle Rock does not have any employees. *See* On-Site Report at 4.

²³ *See* Denial of Request for Work Codes at 1. You confirmed that you do not hold any licenses. *See* Hearing Transcript at 53.

²⁴ *See id.*

²⁵ Appeal Letter at 3. Mr. Sorrow's holding of an "A" license does not render the issue of Eagle Rock's eligibility "moot." His license does not implicitly demonstrate *your* ability to control the underlying activities.

²⁶ *See* CUCP Work Code Guide (http://www.dot.ca.gov/hq/bep/find_certified.htm).

²⁷ We also affirm under §26.71(n)(1).

²⁸ CUCP Work Code Guide (http://www.dot.ca.gov/hq/bep/find_certified.htm).

gypsum, and plaster products. You stated during the on-site visit that Eagle Rock does not have a factory, storage area, or facilities.²⁹ We find that substantial evidence supports CUCP's conclusion that Eagle Rock is ineligible for code D3270.

We affirm Caltrans's decision to deny all of the work codes Eagle Rock requested, for the reasons stated above, and under §26.89(f)(1).

Decertification

§26.73(a)(2) states:

You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

§26.87(b) states:

Recipient-initiated proceedings. If, based on notification by the firm of a change in its circumstances *or other information that comes to your attention*, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based. (emphasis added).

§26.87(d) states:

Hearing. When [recipients] notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, recipients 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, recipients bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) Recipients 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, recipients must provide a transcript of the hearing to DOT and, on request, to the firm. Recipients must retain the original record of the hearing. Recipients may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, recipients bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

§26.87(f) states:

²⁹ See *id.*

Grounds for decision. “You may base a decision to remove a firm's eligibility only on one or more of the following grounds: (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part; (2) *Information or evidence not available to you at the time the firm was certified*; (3) *Information relevant to eligibility that has been concealed or misrepresented by the firm*; (4) A change in the certification standards or requirements of the Department since you certified the firm; (5) Your decision to certify the firm was clearly erroneous; (6) The firm has failed to cooperate with you (see §26.109(c)); (7) *The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program* (see §26.73(a)(2)); or (8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph (g) of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph (d) of this section.” (emphasis added).

§26.87(g) states:

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. Provided that, when sending such a notice to a complainant other than a DOT operating administration, you must not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information. (emphasis added).

In the NOI Caltrans contended that you falsely claimed during the on-site visit to hold a D06 license; did not disclose Mr. Sellers’s ownership interest in Eagle Rock; and provided inconsistent and contradictory information in Eagle Rock’s UCA about the nature of your involvement in Eagle Rock and another firm.³⁰ Caltrans explained that Mr. Sellers’s ownership interest is information or evidence that was not available at the time it certified Eagle Rock, and that your false statement about holding a D06 license, when in fact Mr. Sellers held the license, as well as the contradictory information on Eagle Rock’s UCA, is relevant information that you concealed or misrepresented and demonstrates your attempt to subvert the intent or requirements of the DBE program. Caltrans conducted an informal reconsideration hearing upon your request.

The hearing transcript demonstrates that you substantively answered the bulk of the Reconsideration Official’s (RO) questions during the hearing. The transcript also states that you gave the RO a portfolio of evidence at the conclusion of the hearing.³¹ The RO and you debated at length whether you ever claimed to hold a D06 license. You denied having said so and asked

³⁰ See NOD at 2. In the Majority Owner Information section of Eagle Rock’s UCA, you answered “no” to whether you perform a management or supervisory function at any other firm and answered “no” to the question of whether you are employed at any other firms; however, you answered “yes” to the same questions in the Control section of the UCA. It is the Department’s view that mere inconsistencies are not a decertification ground, and Caltrans could easily have avoided any misunderstanding by requesting clarification or reconciliation during the on-site interview.

³¹ See Hearing Transcript at 57. Caltrans appears not to have complied with the §26.89(d) requirement that it provide us a complete administrative record.

the RO if she had any record of your statement; the RO declined to answer your question.³² You said Eagle Rock did not have a license at the time of the on-site review and that you would not have attempted to indicate otherwise.³³ You stated that you do not hold any licenses and that Mr. Sorrow holds Eagle Rock's "A" license.³⁴ The RO then asked you if Mr. Sellers ever owned Eagle Rock. You said he did not, and asked the RO if Caltrans had any evidence indicating otherwise; the RO simply responded "no."³⁵

You contend that CUCP shifted the burden of proof to Eagle Rock during the hearing, in contravention of §26.87(d)(1).³⁶ You cite multiple portions of the hearing transcript to support your argument:

- RO [in response to Mr. Serrano stating Caltrans bears the burden of proof in a decertification proceeding]: "No, I don't have to prove anything to you right now. This is your reconsideration hearing."
- Mr. Serrano [referencing §26.87(d)(1)]: "To proceed you've [Caltrans] got the burden of proving, beyond a preponderance of the evidence that [Eagle Rock] does not meet the certification standards of this part."³⁷ RO: "Uh-hum. That's when I render a decision to you. Okay. So, now, you need to tell me why you feel that your firm should not be removed."³⁸
- Mr. Serrano: "There are no more opportunities for me to hear what it is that Caltrans had to say, and possibly respond to it...that's why the [Regulation] require[s] that Caltrans prove that their case is their case so, again, I could possibly respond to it."³⁹ RO: "Uh-hum."⁴⁰
- Mr. Serrano: "[W]hat you're asking me to do is tell [you] why I shouldn't be decertified. I don't even know the rational[e]. I've seen no evidence. I've got zero documents. All I have is a paragraph of a letter that states reasons why I should be decertified and nothing was sent to me." RO: "But you read this, right? You did read the November 15th letter,

³² See *id.* at 38. The On-Site Report indicates you did purport to hold the license.

³³ See *id.* at 39.

³⁴ See *id.* at 53 and Change of Ownership Letter (Nov. 11, 2016).

³⁵ See Hearing Transcript at 40-41.

³⁶ Caltrans complied with the §26.87(d)(2) requirement of maintaining a complete, verbatim record of the hearing and providing copies to the Department and Eagle Rock.

³⁷ Hearing Transcript at 31.

³⁸ *Id.* at 31-32.

³⁹ *Id.* at 33.

⁴⁰ *Id.*

correct?” Mr. Serrano: “I read all three of the November 15th letters that I received, yes.”
RO: Okay. And why do you disagree?”⁴¹

The Department agrees that §26.87(d) places the burden of proof on the certifier in a decertification proceeding. It does not necessarily follow that the RO shifted the burden of proof by asking you to clarify and verify information. What matters for purposes of resolving this appeal is that Caltrans presented virtually no case.

Following the hearing, Caltrans issued its decertification letter. The NOD mostly repeats the NOI grounds without citing substantial evidence to support Caltrans’s main contentions that you falsely claimed to hold a license and that you failed to disclose Mr. Sellers’ alleged ownership.⁴² Caltrans simply fails to make its case that your statements or Mr. Sellers’s participation render the firm ineligible for DBE certification.⁴³

CONCLUSION

The Department affirms CUCP’s denial of Eagle Rock’s expansion request under §26.89(f)(1). We reverse the decertification decision under §26.89(f)(2) as unsupported by substantial evidence and partially inconsistent with applicable certification standards. We direct CUCP to promptly restore Eagle Rock’s DBE certification with the previously assigned NAICS and Work Category codes.

This decision is administratively final and not subject to petitions for reconsideration. Thank you for your continued cooperation.

Sincerely,

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

cc: CUCP

⁴¹ *Id.* at 37.

⁴² Regarding the claimed nondisclosure, we note again that Caltrans presented no evidence whatsoever that Mr. Sellers ever owned Eagle Rock.

⁴³ *See generally* §26.87(d)(1). Instead, the NOD purports to impose on Eagle Rock a non-existent burden of production when it states that the firm “did not provide any additional new information to rebut the findings of having concealed or misrepresented information pertaining to the certification of Eagle Rock.” (emphasis in original). Section 26.87 allows but does not require a DBE to produce supplemental information.