



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 11, 2019

Reference Number 18-0081

Ms. Margarita Samuel-Henry
Global Conveyor Installation, Inc.

REDACTED

Kissimmee, FL 34746

RE: DBE Decertification of Global Conveyor Installation, Inc.

Dear Ms. Samuel-Henry:

This letter responds to Global Conveyor Installation, Inc.'s (GCI) March 5, 2018, appeal of the Kentucky Transportation Cabinet (KTC) December 7, 2017 removal of the firm's Disadvantaged Business Enterprise certification (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). After careful review of the entire administrative record, the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) finds that the decertification is supported by substantial record evidence and is consistent with the Regulation's substantive and procedural provisions concerning decertification. We affirm under §26.89(f)(1).¹ The record confirms that GCI did not cooperate with KTC's requests for information.

Under the Regulation, after a certifying agency deems a firm eligible for the DBE program, DBE firms have a continuing obligation to provide the certifying agency with a yearly submission of information. This requirement is specified in §26.83(j) and states:

“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

¹ §26.89(f)(1) states: “The Department affirms [the certifier's] 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.”

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).” §26.83(j)

GCI was certified as a DBE by KTC in October 2010. On August 24, 2017, KTC requested from you several documents including a signed and notarized “no-change affidavit,” corporate tax returns for 2016; a personal net worth statement; balance sheets for 2014-2016; copies of 3 contracts the firm has performed in the last 2 years, and other items.² KTC’s August 24, 2017, correspondence was sent certified mail and you acknowledged receipt on August 28, 2017.

When KTC did not receive a response, the agency notified you on October 5, 2017 (by certified mail), that GCI’s non- responsiveness constituted good cause to decertify the firm. In this correspondence, KTC offered the firm 30 calendar days to submit written information responding to the agency’s finding and an opportunity to appear before a Certification Committee to present information demonstrating that the firm should remain certified. There is no indication in the record you responded to KTC’s August 24 and October 4, 2017 correspondence.

The Certification Committee voted on December 5, 2017 to uphold KTC’s decertification of GCI because the firm did not provide the documents nor cooperate with its requests for information as required by §26.73(c) and §26.109(c). These provisions state:

DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification. §26.73(c)

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;

² We note in this regard that §26.83(j) requires only the affidavit of no-change and documentation of the firm’s size and gross receipts (normally in the form of a business tax return). The annual certification anniversary is not an open opportunity for a recipient, as a matter of course, to ask for a host of other, new or updated documents such as personal and business financial statements, updated licenses, contracts, etc. The purpose of the no-change affidavit is to attest that there have not been changes that would affect the firm’s continuing eligibility. There is simply no requirement that a DBE further document each and every such underlying attestation—the Department in promulgating §26.83(j) explicitly chose to impose the lesser burden on firms of documenting only business size and gross receipts. Accordingly, the provision, e.g., of federal income tax returns for the most recent period generally satisfies the documentation requirement in full. In this matter however, KTC’s request for additional items were part of the agency’s three-year review and did not constitute a full “reapplication,” as referenced in §26.83(h). KTC sent its request as a courtesy. The obligation to provide the annual affidavit rests exclusively with the firm. Filing the affidavit is a condition of remaining certified, and it is an obligation of which GCI was fully aware.

with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment). §26.109(c)

You acknowledge in your March 5, 2018 appeal letter that GCI did not provide the documents KTC requested. You state you attempted to submit them on February 21, 2018 (after KTC's decision) but were advised by the agency to appeal the matter to the Department.

To remain compliant with the Regulation's requirements, GCI is under a continuing obligation to provide KTC (the certifying agency), with its annual affidavit and accompanying material, as the rule provides. Uncontroverted evidence demonstrates that GCI failed to comply with §26.83(j) and with KTC's requests. This oversight constitutes a failure to cooperate under the terms of both §§26.73(c)³ and 26.109(c).⁴

We affirm the decertification under §26.89(f)(1)⁵ because substantial evidence supports it and because the decision is consistent with applicable substantive or procedural provisions of the Regulation.⁶ This decision is administratively final and not subject to petitions for reconsideration. **GCI may reapply for DBE certification immediately as the applicable waiting period has passed.**

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: KTC

³ See §26.73(c), above, which clearly provides "removal of certification" as a remedy available to a certifier.

⁴ §26.87(f) states in part: "*Grounds for decision.* You may base a decision to remove a firm's eligibility only on one or more of the following grounds: . . . (6) *The firm has failed to cooperate with you* (see §26.109(c))."

⁵ The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1).

⁶ See, e.g., §26.87 (compliance with removal procedures where notice of intent issued specifying the reason for the proposed action, offer of a hearing, and, finally, removing certification when the required affidavit is not forthcoming).