

December 8, 2017

Reference Number 17-0057

Patricia Gillen, Esq.  
Duke Holzman, Photiadis & Gresens LLP  
701 Seneca Street  
Suite 750  
Buffalo, New York 14210

Dear Ms. Gillen:

Marage Trucking, Inc., (MTI), appeals the New York Unified Certification Program's (NYUCP)<sup>1</sup> December 16, 2016, removal of its Disadvantaged Business Enterprise (DBE) certification, under criteria set forth at 49 C.F.R. part 26 (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) affirms NYUCP's decision. *See* §26.89(f)(1).

Specifically, we find that substantial evidence supports NYUCP's conclusion that MTI did not rebut the presumption of affiliation under the identity of interest rule.<sup>2</sup> *See* Small Business Administration (SBA) regulation §121.103(f)(2) (affiliation based on identity of interest derived from economic dependence). As a result, MTI's affiliated gross receipts exceed the Regulation's \$23.98 million gross receipts limit. *See* §26.65(b) (\$23.98 million overall gross receipts cap); *see also* §26.65(a) (to be eligible, firm must be a small business, as defined by the SBA standards).

### I. Procedural History

NYSDOT issued the Notice of Intent to decertify (NOI) on September 2, 2016. MTI filed a written response to the NOI on September 12, 2016, and the firm presented arguments against the proposed decertification during an informal hearing on November 9, 2016. NYUCP's Independent Hearing Committee (Committee) confirmed the NOI's findings, and it issued the Notice of Decision (NOD) to decertify the firm on December 16, 2016. MTI appealed the NOD to the Department on March 15, 2017.

---

<sup>1</sup> The New York State Department of Transportation (NYSDOT) is the certifying UCP member.

<sup>2</sup> The Regulation specifically incorporates the Small Business Administrations (SBA) definitions and provisions that pertain to affiliation and gross receipts. *See* §§26.5 ("Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121.") and 26.65 (adopting the SBA's gross receipts definition).

## II. Facts

Mary Salvadore, MTI's President and 100% owner, formed the trucking firm in the early nineties. MTI has performed subcontract work for Concrete Applied Technologies Corporation (CATCO) since the late nineties. Informal Hearing Transcript (November 9, 2016) (Transcript) at 7. Ms. Salvadore married Michael Salvadore (CATCO's owner) in 2005.<sup>3</sup> Appeal at 2-3. MTI concedes that about 90% of its gross receipts from the previous ten years derive from CATCO contracts. *See* Transcript at 7.

NYDOT found reasonable cause to believe that MTI and CATCO are affiliates based on the identity of interest rule.<sup>4</sup> NOI at 3-4. Specifically, the NOI found that MTI is economically dependent upon CATCO because over 70% of MTI's gross receipts in the previous three years derive from CATCO subcontracts.<sup>5</sup> *See id.* The NOI also determined, based on MTI's corporate tax returns and CATCO's New York State Vendor Responsibility Questionnaire For-Profit Construction (CCA-2), that MTI's affiliated gross receipts exceed the Regulation's \$23.98 million limit. *Id.* The NOD affirms the NOI's findings.<sup>6</sup> The NOD particularly found that, "none of the information provided by Marage Trucking rebuts the assumption of affiliation that Marage is economically dependent on CATCO." NOD at 2.

## III. Discussion

1. Under the identity of interest rule, there is a presumption of:

---

<sup>3</sup>The Salvadores separated in the fall of 2015, but they were still married when NYUCP issued the NOD.

<sup>4</sup>The affiliation based on identity of interest rule, §121.103(f), states:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

<sup>5</sup>NYUCP decertified MTI based on §§121.103(f)(1) and (f)(2). Section 121.103(f)(1) creates a presumption of identity of interest when married couples conduct business with each other. Section 121.103(f)(2) creates a presumption of identity of interest when one firm derives 70% of receipts from another over the previous three fiscal years. We decline to opine on NYUCP's §121.103(f)(1) rationale in light of our disposition on §121.103(f)(2), which is sufficient to affirm the decertification.

<sup>6</sup>The specific grounds for decertification are: §§26.87(f)(1) ([c]hanges in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the [certification] eligibility standards) and 26.87(f)(4) (change in the certification standards or requirements of the Department (in this case the SBA's affiliation provisions, which the Regulation incorporates by reference) since [recipient] certified the firm).

an identity of interest based upon economic dependence if the [firm] in question derived 70% or more of its receipts from another [firm] over the previous three fiscal years.

This presumption may be rebutted by a showing that despite the contractual relations with another [firm], the [firm] at issue is not solely dependent on that other [firm], such as where the [firm] has been in business for a short amount of time and has only been able to secure a limited number of contracts.

§121.103(f)(2).

Here, there is presumed affiliation—because over 90% of MTI’s gross receipts derive from work performed for CATCO—and no rebuttal. *See generally* Transcript at 6-7 and NOD. Furthermore, the appeal does not point to evidence that the firm is not solely dependent on CATCO. *See generally* §26.89(c) (firm must provide an explanation of certifier error, omission, or misconstruction of applicable rule). Instead, Ms. Salvadore acknowledges that “Marage continues to work for CATCO *because CATCO pays its bills on time and [she] need[s] the money. . .* Marage has worked for other contractors but [she] cannot realistically wait 6 or 7 months or longer for payment.” M. Salvadore Statement (attached to appeal) at 2. (Emphasis added.) Ms. Salvadore’s statement acknowledges that MTI is economically dependent on CATCO. Accordingly, substantial, uncontroverted evidence supports NYUCP’s finding that MTI and CATCO are affiliated entities. *See* §26.65(b) and §121.103(f)(2).

2. Section 26.65(b) states that a firm is not an eligible DBE “if the firm (*including its affiliates*) has had average annual gross receipts, as defined by SBA regulations, over the firm’s previous three fiscal years, in excess of \$23.98 million.” (Emphasis added; citation omitted.)

CATCO’s reporting shows that it had gross receipts of REDACTED in 2013 and REDACTED in 2014; the reporting does not show gross receipts for 2015. However, MTI does not contest NYUCP’s gross receipts calculation, and even if CATCO’s 2015 gross receipts were zero, its average gross receipts for the three-year period is REDACTED. Furthermore, that number, without even including MTI’s gross receipts, exceeds the Regulation’s \$23.98 million cap. *See* CCA-2 at 8. Thus, CATCO’s CCA-2, by itself, provides substantial evidence to support NYUCP’s §26.65(b) decertification ground, which we affirm under §26.89(f)(1).

3. Substantial evidence shows that MTI’s affiliated gross receipts are at least \$38,114,793, which renders it ineligible under §26.65(a). Further, there is substantial evidence that NYUCP complied with applicable §26.87 decertification rules. We affirm.

#### IV. Conclusion

We affirm NYUCP’s decertification decision under §26.89(f)(1) because substantial evidence supports it and the decision is consistent with applicable certification rules.

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

Sincerely,

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

cc: NYUCP