

May 4, 2018

Reference Number 17-0144

Mr. Rafique Hajee
President
MD Solar Co., Inc. dba MD Construction Services
REDACTED
South El Monte, CA 91733-1729

Dear Mr. Hajee:

By letter dated July 28, 2017, you appeal the California Unified Certification Program's (CUCP) May 31, 2017 denial of MD Solar Co., Inc.'s (MDS) application for Disadvantaged Business Enterprise (DBE) certification under criteria set forth at 49 C.F.R. part 26 (Regulation).¹ After careful consideration of the full administrative record, we conclude that substantial evidence supports CUCP's decision and that the decision is consistent in pertinent part² with applicable Regulation provisions. We therefore affirm under Regulation §26.89(f)(1).

Operative Facts

You formed MDS on April 17, 2015. You are MDS's sole owner. MDS applied to CUCP on or about April 5, 2016 to be certified as a DBE. After several requests for information, most of which you and MDS provided, CUCP denied the application for three reasons:

1. CUCP claims your net worth exceeds the §26.67(a)(2)(i) cap of \$1.32 million.

¹The "Re" line refers to "denial of smbe certification," which is a local matter not appealable to us. It seems reasonable to assume, given CUCP's DBE ineligibility determination two months before, and the fact that you appeal to us as that letter directs, that you intend to appeal the denial of DBE certification.

²Because of the interplay among §§26.61(b) (firm must prove *each aspect* of eligibility by a preponderance of the evidence), 26.73(c) (applicants must comply fully with certifier requests for information relevant to the certification process), 26.86(a) (certifier must provide applicant written explanation of reasons for denial, specifically citing evidence in the record that supports each reason), and 26.89(f)(1) (we affirm certifier's decision if it is supported by substantial evidence and consistent with applicable certification rules), we affirm if the certifier states just one sufficient, Regulation-compliant ineligibility ground. Here, we conclude that substantial evidence supports CUCP's determination of non-cooperation with at least one pertinent information request; CUCP adequately explained the reason for its determination and cited specific evidence in support; and its decision is consistent with applicable certification rules, which we understand to be principally those found in §§26.73 and 26.86.

2. CUCP maintains that the totality of your economic circumstances indicates a lack of economic disadvantage under its §26.67(b)(1)(ii)(A) ability to accumulate substantial wealth (AASW) analysis.
3. CUCP asserts that MDS failed to cooperate when it did not provide, among other things, certain business tax returns for Mehfar Corporation.³

Discussion

1. Excess Personal Net Worth

You filed a personal net worth (PNW) statement in support of MDS's application. That statement, dated March 31, 2016, shows your PNW as **REDACTED**. CUCP takes issue with this statement for various reasons, most deriving from the terms of your November 21, 2010 divorce, including the distribution of property, assumption of certain liabilities, and the effect of California law. CUCP questions your claim that your wife now owns substantially all of the assets you may have owned, separately or jointly, before the divorce.⁴ Another main area of CUCP's concern is a **REDACTED** shareholder loan you made to a company⁵ other than MDS and a loan that your former wife made to you. CUCP questions what unreported assets generate the substantial interest income and capital gain you do report, and how you fund what you claim is your obligation to pay your **REDACTED** month, when you report very limited net assets. Finally, CUCP questions the rapid appreciation in the value of a retirement account you report on March 31, 2016, as compared with your reporting of the same asset on March 11, 2016; and your failure to report as an asset the shareholder loan referenced above.⁶

³ A 2016 filing with the California Office of the Secretary of State indicates that you were Mehfar's Chief Executive Officer in 2016, which is when MDS applied for DBE certification and when CUCP asked you to provide that firm's tax returns for the preceding three years.

⁴ We find much of this dispute overly complex. Your tax filing status is not itself a DBE concern if CUCP accepts that you are divorced, which it should since you provided the notice of judgment described below. Any misrepresentation of filing status is an IRS matter. The question of who owns underlying real estate, IRA assets, securities, and companies—you or your ex-wife—can presumably be resolved directly, via titles, transfer documents/filings, or other available indicators: certificates, operating agreements, transfer ledgers, minutes of meetings, Schedules K-1, account names/statements, and so forth.

CUCP questions the authenticity of an attachment to the court's August 2010 Notice of entry of judgment dissolving your marriage. You appear to have provided the Notice and the attachment, which describes the division of property. The Notice itself references the attached document, but CUCP challenges that document, apparently in toto, because the attachment is not separately "certified." We find no "certification" requirement in the supporting document checklist in Appendix F. To the extent the document describes the ownership of property otherwise determinable as above, CUCP might authenticate this corroborating evidence, if it wishes, with the court. The Denial Letter (at 4) makes clear that CUCP has all pertinent case information.

⁵ See M.D. Insulation Company Inc., 2014 Form 1120S, Schedule L.

⁶ You must report the shareholder loan, as CUCP maintains, as your asset—although you may not be aware due to an uncorrected error in the instructions on the standard PNW form the Department requires certifiers to use without amendment. The instructions wrongly state that you must report as assets only loans [from an owned firm] to you "and other receivables." A loan to a shareholder is in fact the shareholder's *liability* (provided s/he must repay it) not a "receivable" or other type of asset to the shareholder. Proper reporting of a *shareholder's loan to his or her company* is, in contrast, as that shareholder's asset. When the tax returns in the record clearly indicate that you

CUCP cites §26.67(b)(1) for the proposition that it has rebutted your presumption of economic disadvantage. Pertinent text of that provision states:

(i) If the statement of personal net worth *that an individual submits* under paragraph (a)(2) of this section *shows that* the individual's personal net worth exceeds \$1,320,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage *in this case*. (Our emphasis.)

You did not submit a PNW statement showing excess PNW. You submitted a PNW statement showing net worth of roughly **REDACTED**. Accordingly, if CUCP intended to challenge your reporting, it was obliged to follow procedures set out in §26.67(b)(2), which states:

If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of §26.87.

Section 26.87 procedures include written notice to you, an opportunity to respond, and a shift in burden of proof. We find no evidence that CUCP complied with §26.67(b)(2) or §26.87. Hence we cannot affirm CUCP's conclusion that you are not in fact economically disadvantaged as consistent with applicable certification rules. *See generally* §26.89(f)(1).

2. Ability to Accumulate Substantial Wealth

Section 26.67(b)(1)(ii)(A) permits the certifier to rebut the owner's presumption of economic disadvantage when the owner's overall economic circumstances indicate AASW despite his having reported PNW of or under \$1.32 million. CUCP concludes, Denial Letter at 7, that it rebuts the presumption based on this provision. CUCP quotes the AASW provision in its entirety, including §26.67(b)(1)(ii)(B), which states:

You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

As noted above, section 26.67(b)(2) requires that the certifier follow §26.87 procedures if it wishes to rebut the presumption of economic disadvantage on AASW grounds, and there is no indication that CUCP did. As a consequence, we cannot affirm CUCP's decision as consistent with applicable certification rules.

3. Failure to Cooperate

loaned the money to the firm, it is unclear why CUCP would attempt to recast the transaction as you loaning money to yourself. The recast creates a nullity or an offsetting asset and liability, with no PNW effect either way.

Your ex-wife's loan to you is your liability, provided that you can demonstrate an obligation to repay.

CUCP grounds its denial for failure to cooperate on MDS's failure to provide tax returns of other companies that CUCP claims, Denial Letter at 8, are "affiliated" with MDS. CUCP's requests of April 11 and 20, 2016 read:

Farshid LLC, First Pacific Holdings LLC, and Mehfar Corporation: do you have tax returns for these entities, if so, please provide the federal returns for the past 3 years. Please provide your valuation and your ownership composition of these three entities.

CUCP states that as of May 26, 2017, MDS had not provided the requested information. However, you responded almost immediately (on April 21, 2016) that you had no ownership interest in any of the entities. The record leaves unclear why you did not further respond simply that you do not have the requested documents, or why CUCP waited over a year before determining that the firm failed to cooperate.

CUCP cites as evidence of the failure to cooperate and/or the claimed affiliation that your former wife and another person (not you) have managerial or ownership interests in First Pacific and Farshid. CUCP also cites evidence that in 2016 you were Mehfar's CEO. While your non-provision of the other tax returns might be excused because CUCP's requests are predicated on your having them, you effectively concede that you provided none of Mehfar's tax returns either.

You certainly do not argue on appeal that you provided the returns. Nor do you explicitly argue that the firms are not MDS's affiliates. You contend instead that you gave up all pertinent ownership interests in 2010. While that may be the case, you do not rebut CUCP's evidence that in 2016 you were CEO of Mehfar Corporation. We find that even if you technically did not "have" Mehfar's tax returns, you had power to acquire and provide them. Your failure to do so is a failure to cooperate. CUCP properly denied MDS's application as a result. *See* §26.73(c).

MDS may reapply for certification after May 30, 2018. *See* §26.86(c).

Conclusion

We affirm CUCP's denial for failure to cooperate as supported by substantial evidence and consistent with applicable Regulation provisions.

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

Thank you for your interest in the DBE program.

Sincerely,

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

cc: ML Miglino
Chief
Office of Business and Economic Opportunity
California Department of Transportation