May 23, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 13-0239

Raleigh Lewis, Certification Manager
Office of Minority, Women & Emerging Small Business
775 Summer Street NE, Suite 200
Salem, OR 97301-1280

Re: Appeal of Berona Engineers, Inc., July 1, 2013, Decertification

Dear Mr. Lewis:

Thank your for your letter of August 27, 2013, in response to our notice that Berona Engineers, Inc. (BEI) appealed (by letter dated July 17, 2013) the Oregon Unified Certification Program's (OUCP) July 1, 2013, decertification of the firm as a Disadvantaged Business Enterprise (DBE) for failure to provide the annual no-change affidavit that the Department's DBE Regulation (49 CFR Part 26) §26.83(j) requires.

We fully endorse OUCP's position that the obligation to file the no-change affidavit rests with the business owner alone and is in no way contingent upon having received a reminder from the certifier. However, based on information you provided in your August 27, 2013, letter, it does not appear that the firm's no-change affidavit was yet due at the time OUCP removed eligibility. The procedure OUCP used, further, does not appear to have fully complied with the requirements of §26.87, which include, among other things, a notice of intent with a statement of the reasons for the proposed action, an offer of an informal hearing at which the firm can respond, and (only) then a notice of decision. The rule contemplates two letters with time for a hearing in between. The record indicates that OUCP provided only the notice of decision, no notice of intent to decertify. That was reversible error, for the decertification was inconsistent with a procedural provision relating to certification. *See* §§26.87(b), (d), (g); 26.89(f)(1).

OUCP's decision must also be reversed because there is no evidence that the no-change affidavit was actually due at the time OUCP decertified the firm. OUCP therefore appears to have had no valid ground upon which to certify. You state in your August 2013 letter that OUCP "emailed on May 14, 2013 (*approximately 60 days prior to the firm's anniversary date*)" a notice that the no-change affidavit would be due. Your own language suggests that the firm's anniversary date was on or about July 14, 2013. On July 1, even without having received the no-change affidavit

and documentation of business size and gross receipts[1], OUCP had no reasonable cause to decertify, particularly not for the reason stated (failure to provide the no-change affidavit).

You appear to contend in your rebuttal letter that the firm's failure to respond to OMWESB's e-mail of May 14, 2013, or the certified letter dated June 14, 2013, constituted a failure to cooperate, irrespective of the fact that the no-change affidavit was not yet due. We disagree for several reasons. First, while we in no way condone the firm's failure to respond to the certifier's communications, it is common knowledge that e-mail accounts frequently route incoming e-mails, correctly or not, to spam or junk folders. Second, OMWESB requested at least two documents to which it was not entitled under the Regulation, even on the anniversary date. A failure to comply with an unauthorized and in this case unreasonable request is not, in our view, a failure to cooperate under §26.109(c). Third, even if the June 14 letter were a proper request for information related to certification, we question whether OMWESB gave the firm reasonable time to comply. June 14, 2013, was a Friday. The owner could not reasonably be expected, even if he was in town, to see such a letter until at least Monday, June 17. OMWESB decertified exactly 14 days later. The time frame is not particularly reasonable in the middle of summer when no affidavit or supporting documentation was yet due.

The Department commends you for telephoning Mr. Berona (after we notified you of the firm's appeal) and indicating OUCP's willingness to accept the no-change affidavit and most recent business tax return. We direct OUCP to restore BEI's certification promptly upon receipt of Mr. Berona's §26.83(j) affidavit for 2013 and the firm's 2012 federal business tax return.

We reverse OUCP's 2013 decertification as unsupported by substantial evidence and inconsistent with certification-related procedural requirements. The reversal is contingent upon the firm's owner providing the two specified documents to OUCP forthwith.

This decision is administratively final. Thank you for your continued cooperation.

Sincerely,

Samuel F. Brooks, DBE Appeal Team Lead
External Civil Rights Programs Division
Departmental Office of Civil Rights

cc: Melchor E. Barona, Principal, BEI

[1] We caution OMWESB that the Regulation strictly does not authorize the certifier to request, much less *require* the business owner to provide, a new personal financial statement or (as a matter of course) a new personal federal income tax return. The rule requires the affidavit "with supporting documentation of your firm's size and gross receipts" (typically a business tax return), nothing more. OMWESB's assertion in its document request to BEI dated June 14, 2013, that the owner must also provide a new Personal Financial Statement and individual tax returns is incorrect.