

December 21, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 04-0118

Mr. Kenneth A. Neal
Director, Office of Civil Rights
New York Metropolitan Transportation Authority
2 Broadway
New York, NY 10004

Dear Mr. Neal:

This is in reference to an appeal of Disadvantaged Business Enterprise (DBE) certification denial concerning Electrical Distribution Services, Inc. (“EDS”). We have carefully reviewed the material from the New York Metropolitan Transportation Authority (“NYMTA”) and EDS and have concluded that the NYMTA’s decision is inconsistent with the requirements of the Department’s Regulation 49 CFR Part 26.

The record evidence indicates that NYMTA first certified the firm as a DBE in 1998 as a supplier of electrical apparatus and equipment and recertified the firm as a DBE in April 2000 and May 2004. According to NYMTA, EDS sought to provide cable as a regular dealer on a NYMTA contract in December 2002. NYMTA denied this request but reached an agreement with the firm whereby it would receive credit for on-going projects until such time that NYMTA reviewed the firm and rendered a decision on its request to expand its service areas. NYMTA conducted an on-site review on June 17, 2003. On May 12, 2004, NYMTA informed EDS that it continued to meet the DBE eligibility criteria for the following services: “cable management, supplier of electrical apparatus and equipment including wire and cable (broker only).” NYMTA denied the firm’s application to be credited as a regular dealer of electrical equipment and supplies.

It appears that both the firm and NYMTA misunderstand the substantive requirements of the Department’s Regulation. NYMTA determined that EDS is an eligible firm for purposes of the DBE program. This implies that the firm meets the requirements of the Regulation §26.5; and is (in NYMTA’s view) a for-profit small business, that is at least 51 percent owned by one or more disadvantaged individuals who control the firm’s management and daily business operations. By making the determination it did, NYMTA implicitly decided that the firm’s disadvantaged owners controlled its operations in the supply of electrical apparatus and equipment as well as in cable management. That is the end of the inquiry, as far as certification is concerned. The issue concerning whether the firm acts as a broker or a regular dealer is neither a certification nor a

decertification matter, but is instead a counting issue. Firms that perform a “commercially useful function” are counted towards DBE goals. In determining whether a firm acts as a broker or a regular dealer, the recipient is determining what is the value of the commercially useful function that the firm performs. This has no relevance to whether a firm is eligible for certification under the DBE program, and this issue is one that should not be cited in certification decisions. According to the Regulation §26.73(a)(1), consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Under the Regulation §26.73(a)(2), “commercially useful function” issues can be used in making decisions about whether to certify a firm as a DBE only if the firm exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. NYMTA has not made this allegation in this instance.

NYMTA’s decision that the firm is not an eligible DBE as a regular dealer is therefore inconsistent with the Part 26, since under the Regulation whether or not a firm is a regular dealer is not a certification decision at all. However, the Department does not render an opinion on its determination of whether, on one or more contracts, the firm’s participation should be counted that of a regular dealer or a broker. Since such counting decisions are not part of the certification process, they are not subject to the Department’s certification appeal process.

We note that NYMTA and other recipients have a responsibility to carefully monitor whether EDS and all other DBE firms are performing a commercially useful function on each contract. If EDS or any other firm is not performing a commercially useful function, then it cannot be awarded any credit toward DBE goals. Credit may be counted only for the particular kind of commercially useful function a firm performs on a given contract. Any prime contractor who uses a firm that does not perform a commercially useful function cannot claim that firm’s participation toward a DBE goal, and use of a firm not performing a commercially useful function cannot be regarded as part of the prime contractor’s good faith efforts on the contract in question.

Consequently, we are remanding this matter to NYMTA, with instructions to NYMTA to remove references to the firm’s status as a regular dealer or broker in its certification decision and documents concerning EDS. These documents should simply reflect the fact that the firm is certified in the applicable types of work. This appeal is being closed in our files. Thank you for your continued cooperation.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: Honorable Robert Menendez, U.S. House of Representatives
Alan C. Antonucci, Esq.