

June 19, 2015

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Reference No.: 14-0038

Ms. Rachel Lazarus, President  
Halmark Architectural Finishing Corp.  
**REDACTED**  
Brooklyn, NY 11207

Dear Ms. Lazarus:

This letter responds to your October 25, 2013, letter in which you appealed the New York State Uniform Certification Program ("NYSUCP"), Metropolitan Transportation Authority's ("MTA") denial of Halmark Architectural Finishing Corp. ("Halmark") for certification as a Disadvantaged Business Enterprise ("DBE"). In its evaluation, MTA determined that Halmark failed to meet the ownership and control requirements of 49 CFR §§ 26.69 and 26.71. The U.S. Department of Transportation ("Department") has carefully reviewed the full administrative record and concludes that substantial evidence supports MTA's decision. We therefore affirm the denial of DBE certification.

The specific reasons for the denial of your appeal include the following:

**OWNERSHIP**

According to the firm's August 2012 DBE Certification Application, Ms. Rachel Lazarus, is the sole owner and President of Halmark, a firm originally established in August 1984, by Joseph Leone, a non-disadvantaged individual. The firm provides architectural coating services for all types of metal, steel and aluminum. Halmark also provides paint with powder coating services as well. You acquired your sole ownership interest in the firm with a **REDACTED** contribution, which constituted your initial investment.

MTA's denial letter indicates that your claim of 100% ownership interest in the firm is not real and substantial and continuing as required by the Department's Regulation. According to the record, you listed your initial investment to acquire your ownership interest in the firm was in the form of a loan in the amount of **REDACTED**. The record indicates that you acquired your 100% ownership interest in Halmark via a loan agreement dated July 12, 2011, between you and Barry Borgen, your non-disadvantaged father and owner of Avant Guards. The agreement totaling **REDACTED**, indicates that you promised to pay 6 installments of **REDACTED** to

acquire your 100% ownership interest. The loan was due to be paid in full on July 12, 2014.

MTA's March 11, 2013, Eligibility Review Meeting ("ERM"), contains the following entries:

"During the ERM, Ms. Lazarus stated that she acquired the business for **REDACTED**. She submitted a copy of a Stock purchase Agreement. A review of the agreement indicates that an agreement was made by and between Joseph Leone, the owner of Halmark and Rachel Lazarus to sell and purchase Halmark for the purchase price of **REDACTED** on July 13, 2011. The agreement further states that two bank checks were to be paid directly to Joseph Leone, one for **REDACTED** and one for **REDACTED** within 180 days of the execution of the agreement....Rachel Lazarus stated during the ERM and noted on the Certification Application that she paid **REDACTED** for the purchase of the business. She stated that the sources of the funds came as a loan from a loan. Ms. Lazarus stated during the ERM, 'The business loaned me the money and I have a contract with them that should be included and I'm about halfway through paying that loan back. I had been working for my father at Avant Guards and I didn't have the money so my father's company where I had been working loaned me the money to purchase Halmark.'" (ERM p.9)

You stated in your October 25, 2013, rebuttal letter to the Department:

"As stated, I did purchase Halmark Architectural through a **REDACTED** loan which came from Avant Guards, which is owned by my father Barry Borgen. At the time of the purchase, I was not liquid enough to pay the required **REDACTED**, and therefore took the loan from Avant Guards. As of August 2013, the loan has been repaid in full. The signed agreement (Exhibit C) as well as the 6 cancelled checks (Exhibit D) has been attached. This loan does not fall into the category of prohibited contributions listed in the denial above." (Rebuttal Letter, Oct. 25, 2013, p. 5)

It appears that Avant Guards purchased Halmark rather than Ms. Lazarus, the socially and economically disadvantaged owner. The record indicates that the **REDACTED** was paid directly to Joseph Leone, owner of Halmark, from a check drawn from the business account of Avant Guards. The check was signed by Barry Borgen, your father and owner of Avant Guards. Avant Guards purchased the firm.

The Regulation §26.61(b) states the disadvantaged owner bears the burden of proving that your ownership interest in the firm is in accordance with the Regulation. Furthermore, there is no indication that you actually made any investment using your personal funds to start the firm. Since no evidence was provided to substantiate that funds used to acquire ownership interest actually derived from your individually owned resources, as required by the Regulation, we therefore must conclude that you, the socially and economically disadvantaged owner have failed to make a real and substantial investment in the acquisition of this business. We agree with

MTA's decision, that your capital contribution was not real and substantial, within the meaning of §26.69(e) which states:

“The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is a not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.”

The record contains no substantive record evidence that you made an initial cash investment to acquire your ownership in the firm as required by §26.69. These circumstances support MTA's conclusion that your contribution of capital to acquire Halmark was not in accordance with §26.69.

### **CONTROL**

According to firm's DBE Certification Application, Halmark is an approved applicator for all PPC coatings, Valspar, Sherwin Williams, Azko Nobel and Tiger DryLac finish, to provide quality finishes for lacquers, enamels, polyurethanes and various power chemistries for all types of coatings for metals, steel, aluminum and liquid paint with powder coating that are used in the exterior of commercial buildings.

MTA determined that you, the socially and economically disadvantaged owner, do not possess sufficient knowledge and experience which directly relates to the firm's primary operations. The record evidence reveals that while you may be involved in the day-to-day operations of the business, your résumé does not substantiate that you have the technical ability or expertise to control the day-to-day critical operations of a business involved in providing quality finishes and coatings for metals.

A review of your qualifications reveals that your experience and expertise has primarily been in the areas of office management and administration. Specifically, your résumé indicates that as President of Halmark your duties include overseeing day-to-day running of the factory in conjunction with Plant Manager; responsibility for all bookkeeping including accounts payable, accounts receivable and payroll; and designed all promotional material including mailings and internet marketing. Your résumé further details your work experience prior to becoming the 100% owner of Halmark in July 2011. From May 2009 to June 2011, you worked for Avant Guards Coatings as the Manager of Communications and Marketing; responsible for design of all promotional materials; supervised and updated the website; and specified architectural coatings and paint to architects and engineers. From December 2010 to March 2011, you worked for the Museum of Biblical Art as a Marketing Intern, where you were developed comprehensive social media strategy, with strong focus on Twitter; increased Twitter followers by over 60% as well as

increased fans on Facebook page; launched Four Square and Flickr accounts for the museum; and investigated and initiated web marketing opportunities. From April 2010 to November 2010, you worked for Wave Hill as an Exhibition Interpreter, where you researched exhibitions and designed exhibition-based interactive tours in conjunction with Visual Arts; advised the Education Department regarding educational art programming; lead weekly public tours, as well as school groups and private tours; greeted visitors to the gallery; answered questions about the exhibit, the artist, and Wave Hill in general; edited exhibition catalogues and wall text; and assisted with public programming such as artist's talks and lecturers. You received a Bachelor's Degree in Economic History from Barnard College and list your skills as: Proficient in Microsoft Office and social media marketing platforms.

Section 4 of the firm's DBE Certification Application, indicates that you, the socially and economically disadvantaged owner, are solely responsible for financial decisions; negotiating and contract execution; marketing/sales; and office management.

During MTA's ERM you were asked about the day to day operations of the firm. The transcripts contain the following exchange:

"What are some of the things that you do on a day-to-day basis in operating the business, Rachel?"

"I'm responsible for, like I mentioned previously, for all accounting, running payroll. Previously, Hal outsourced the payroll, ADP and I brought that in-house, so I'm responsible for that. I'm responsible for marketing. Hall did no marketing. We didn't have a website, so I created a website and we aggressively marketed, especially since we have new offerings, like I mentioned, had powder coating, painting steel and this is a piece of marketing that we do. I'm responsible for all legal decisions, all financial decisions." (ERM, pp. 24-25)

You stated in your rebuttal letter to the Department:

"I do in fact have the necessary skills and expertise required to run Halmark Architectural. I grew up in the industry because my father's business, Avant Guards, is also in the paint business. After college I worked for Avant Guards, as the denial mentions, in marketing for two years. This does not include summers and vacations spent working at Avant Guards, learning about the paint business and gaining valuable on-the-job experience. What the denial letter fails to explain is that as part of my responsibilities in marketing for Avant Guards, I worked closely with estimators and architects while gaining the necessary knowledge to run a paint business." (Rebuttal letter, October 25, 2013, p.2)

As stated above, the Department makes its decision solely on the record. You do not appear to possess the technical competence and experience that would enable you to perform the work which is providing quality finishes and coatings for metals; which is the type of business

Halmark is engaged in. In addition, documents contained in the record do not indicate that you had any training or have had experience directly related to the work in which the firm is engaged. Your role at the firm has been, and remains, non-technical and there is no support in the record that you possess any experience with the firm's painting operations. The information provided in your rebuttal letter only describes, in general terms, your control of the firm, and lacks any details regarding your knowledge of the primary activities of Halmark. Similarly, your résumé describing your administrative experience does not substantiate a technical ability or background comparable to what appears to be the work of the firm's Plant Manager, Mr. Neil Iovino. You clearly perform none of the field work yourself nor direct its completion.

The Regulation requires the disadvantaged owner of a firm to demonstrate by a preponderance of the evidence their control of the firm and "overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations." Section §26.71(g) states:

"The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control."

Your background in the firm's industry is limited, as is your role at the firm beyond office management functions and the delivery of services rendered by the firm. This is an important element of Halmark's operations; however, these tasks are not sufficient to demonstrate your control pursuant to the DBE Regulation. Section §26.71(g) specifically states in part, "Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control."

The record evidence reveals that while you may be involved in the day-to-day operations of the business, your résumé and work experience do not substantiate that you have the technical ability or background to control the day-to-day critical operations of this type of firm. While you may possess knowledge of the industry by virtue of the fact that you spent many years working for this type business, the record evidence does not substantiate that you would be able to direct Halmark's field operations, or that you have the expertise, experience, or technical skills necessary to control the daily operations of the firm's activities, or to evaluate information provided by subordinates. You do not possess any hands-on experience in this industry other

than the financial, marketing and bookkeeping functions of the firm. Your experience has primarily been in the firm's administration, marketing, bookkeeping, and office management; areas that §26.71(g) specifically states are insufficient to demonstrate control of a DBE applicant firm.

A review of the record indicates that Neil Iovino, a non-disadvantaged individual and non-owner of the firm, is the individual who has the technical competence and experience required to control the operations of Halmark. Mr. Iovino has significant expertise in the areas of work that Halmark engages in and is responsible for all shop production and quality control, in addition to estimating. According to his résumé, he has over 20 years of experience in this line of work. From January 1992 to July 2011, Mr. Iovino worked for the Sherwin Williams Company as a Sales Representative for the Chemical Coatings Division, where he was responsible for corporate sales administration for Long Island and Metro NYC market. From 1988 to 1991, he worked for Pan American World Airways as Supervisor Aircraft Paint/Interior at JFK Airport, A&P license.

During MTA's ERM, when asked who was the key person for the business? You stated:

“Aside from myself, Neil Iovino. He is the one who attracts the customers, he manages the floor, he does estimates. His background is in painting, so he has a knowledge of the paint mixing, the custom color mix in-house, which is something special that we do that most people do not, but knowing the chemistries with the colors, so he is involved with that.”

The DBE Certification Application also indicates that Mr. Iovino assists you with hiring/firing of management personnel, and purchasing of major equipment.

You further state in your rebuttal letter to the Department:

“Again, the denial wrongfully assigns responsibilities to Neil, asserting that he is disproportionately responsible for the operations of Halmark. Neil does not possess 20 years' experience in project estimating and bidding. I taught Neil these skills, and designed the programs he uses on a daily basis to generate bids. As a paint salesman he was rarely involved in estimating and bidding large construction projects; claiming he is more experienced and therefore more responsible in these areas is erroneous. Neil is responsible for hiring; however, firing is my responsibility. Halmark Architectural is a unions shop (local 298) and often any firing decisions have to be negotiated with the union and this falls solely under my purview. Claiming Neil is directly responsible for supervision of field productions is simply false as Halmark does not work in the field. All parts are dropped off, painted and sent back to the job site; we do not do any painting in the field.”

Substantial record evidence supports MTA's decision that you, the socially and economically

disadvantaged owner, do not control Halmark in accordance with §26.71.

Compared to your office management role at the firm, Neil Iovino is clearly disproportionately responsible for Halmark's essential operations and has the expertise in exactly the type of work the firm is seeking to perform. The firm, therefore, has not met its burden of proof that you, the socially and economically disadvantaged owner, meet the requirements of §26.71(d) and (e), which state:

“The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations. 26.71(d)

“Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.” §26.71(e)

As indicated above, Mr. Iovino, is the person clearly relied upon for his knowledge and technical expertise. In contrast to your administrative functions at the firm, his role at Halmark is such that he possesses the power to direct the management of the firm's work. There is no indication in the record to show that you, the socially and economically disadvantaged owner, would be able to oversee these activities without the assistance of Mr. Iovino, the non-owner of the firm. This is contrary to the intent of the Department's regulations regarding control.

In summary, the information provided cumulatively supports a conclusion that Halmark does not meet the criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on MTA's Federal financially assisted projects. This determination is administratively final.

Sincerely,

Sheryl G. Williams  
Acting Associate Director  
External Civil Rights Programs Division  
Departmental Office of Civil Rights  
Department of Transportation

cc: MTA