

July 16, 2015

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

Reference Number: 14–0050

Ms. Linda B. Wright, Executive Officer  
Diversity and Economic Opportunity Division  
Los Angeles County Metropolitan Authority  
One Gateway Plaza  
Mail Stop 99 8-4  
Los Angeles, CA 90012-2952

Dear Ms. Wright:

Civil Environmental Survey Group, Inc. (CES) appeals the Los Angeles County Metropolitan Authority's (Metro) denial of CES' application for certification as a Disadvantaged Business Enterprise (DBE) under the requirements of the DBE Program Regulation 49 C.F.R. Part 26 (the Regulation). In its August 19, 2013 denial letter, Metro cites the firm's failure to meet the requirements of §§26.71(d), (e), (h), and (i).<sup>1</sup> We carefully considered the entire administrative record, including Metro's denial rationales as §26.89(e) requires, and determine that Metro did not sufficiently examine the firm's eligibility to enable the Department to make a principled decision. We remand under §26.89(f)(4) for reconsideration consistent with the instructions below.

1. CES was established by two non-disadvantaged individuals, Jim Keegan and Timothy Lane, in 2001; and in 2010 the firm merged with Environmental Remediation Group (ERG). (Metro On-Site Report, Apr. 11, 2013, p. 1). The firm is owned by three disadvantaged owners—Ms. Skye Green, CEO/Secretary (20.2% owner); Daniel Baysa, Executive Vice-President (20.2% owner); and Jeffry Fujita, Vice President and Sr. Geologist (11.1% owner); and two non-disadvantaged owners—Mr. Keegan, CFO, President/Treasurer and Mr. Lane, who own 39% and 10% of CES, respectively. (CES' DBE certification application).<sup>2</sup>

CES is managed by or under the direction of a Board of Directors, which may delegate the management of the day-to-day operations. (CES Bylaws §2.01). A majority of directors

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<sup>1</sup> Metro also denied certification on ownership grounds. Metro stated on page 2 of its denial decision that CES did not meet §26.69(b)(1) requirements, however, on page 4 the agency acknowledges that disadvantaged individuals own over 51% of the total shares. We do not affirm Metro's determination on the basis of §26.69(b); however, we do request the agency examine whether the firm meets all other §26.69 requirements, in particular, §26.69(i) given Ms. Green's statement that marital assets were used as a source of capitalization for CES.

<sup>2</sup> These ownership percentages, reported on the firm's application, amount to 100.5%.

constitute a quorum of the Board for the transaction of business (Bylaws §2.11). The Board chairperson, or if there is no such person, the President, or in the Chairperson's absence, any director selected by those present, shall preside at Board of Director meetings. (Bylaws §2.14). Section 4.01 of the bylaws state that the firm shall have a board chairperson, a Chief Executive Officer, a President, a secretary, and a Chief Financial Officer, who may also be called a Treasurer. One person may hold two or more offices. Section 4.02, defines the Board chairperson as the Chief Executive Officer of the corporation and shall preside at all meetings of the board. The position of President is, according to section 4.03, subject to any supervisory powers given by the Board of Directors to the Board Chairperson, if there is such an officer. Under this section, the President presides at all meetings of the shareholders, and if there is no Board Chairperson, at all meetings of the Board. The Vice Presidents perform the duties of the President in his or her absence an in other circumstances. (Bylaws §§4.04, 4.05).

On February 18, 2010 James Keegan (a non-disadvantaged individual) called a meeting of ERG, where the participants discussed the merger with CES. (Meeting Minutes) Mr. Keegan stated that he would be the President of the newly formed company known as CES; Mr. Esteban Garcia would be CEO/Vice-President; and the remaining members (including Ms. Green and Mr. Baysa) would become members of the Board of Directors. According to meeting minutes from August 14, 2012, Mr. Keegan served as Acting Chairman and [REDACTED] [REDACTED]. On August 27, 2012, CES elected officers for the remainder of 2012 and the firm structure became Ms. Green as CEO/Secretary, James P. Keegan as President/Treasurer and CFO, and Mr. Baysa as Executive Vice President.

Metro determined that CES had not met §26.71(d)<sup>3</sup> requirements reasoning that Ms. Green does not hold the highest office of the firm, concluding that (1) Mr. Keegan presided as Acting Chairman during CES' Board meetings held on August 14 and 27, 2012; (2) there was no evidence that he resigned his position as Chairman of the Board; and (3) according to sections 4.02 and 4.03 above, it is the Board Chairperson who is CES' Chief Executive Officer and that the President shall preside at all meetings of the shareholders, and if there is no Board Chairperson, at all meetings of the Board; (4) Mr. Keegan continues as Chairman of the Board (evidenced by the August 27, 2012, minutes) and is identified as the President in CES' DBE application; and (5) Ms. Green did not submit documentation supporting her title as CEO.

We disagree with Metro's analysis on several points. Ms. Green was elected CEO on August 27, 2012, at a meeting where Mr. Keegan presided as "Acting" Chairman. Minutes from this day describing Ms. Green's election was submitted to Metro and we do not see any document in the record requiring Mr. Keegan to formally resign before this action is effective. In addition, contrary to Metro's analysis, a reading of §4.02 indicates the Board Chairperson shall be the Chief Executive Officer of the firm. Ms. Green is this person and is listed as such on the California Secretary of State's website as evidenced by a printout contained in Metro's record.

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<sup>3</sup> Section 26.71(d) states: "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. (1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president). (2) In a corporation, disadvantaged owners must control the board of directors. (3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions."

Under §4.03 of the bylaws, Mr. Keegan as President, presides at all shareholder meetings, and only in Ms. Green's absence, will preside at meetings of the Board. The Department also observes that according to a job description in the record, the President of CES is directly supervised by the CEO. These facts appear to support Ms. Green's position that she controls the firm within the meaning of §26.71(d); her role as CEO appears to be the highest officer in the firm.

2. Metro vaguely raises an argument that non-disadvantaged individuals are disproportionately responsible for the firm, however, it does not cite the relevant provisions of sections 26.71(e) and (f). Metro references Ms. Green's responsibilities as described during the on-site visit, cites points from her résumé that she controls financial and business decisions, and states that she and Mr. Keegan signed contracts. This recitation of facts though is blended amongst the agency's determination that Ms. Green has not met §26.71(d) requirements. For instance, Metro states:

“Based on the above discussed facts, James Keegan as Chairman of the Board, as CEO and President, possesses and actually exercises the power to direct or cause the direction of the management as well as long term decisions in its primary business activities. You, Mrs. Green, share negotiating and contract execution with James Keegan. . .[he is] authorized to make financial transactions with James Keegan and Jeff Fujita. . .[and] James Keegan has significant involvement in the day-to-day operations of the firm in its primary business activities.”

Metro then concludes that Ms. Green does not control the Board as required by §26.71(d), and later down in its denial letter, references Mr. Lane, a non-disadvantaged individual, as controlling work areas in NAICS Code 237110 (water and sewer line and related structures construction). Metro's analysis is not well developed on these points; and there is no reference back to §26.71(e) and (f) provisions that address disproportionate involvement by non-disadvantaged participants in the firm.<sup>4</sup> We remind Metro that one of §26.86(a) requirements, when denying a firm DBE certification, is that recipients must provide a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial.

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<sup>4</sup> Section 26.71(e) states: “Individuals who are not socially and economically disadvantaged or immediate family members 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.”

Section 26.71(f) provides: “The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.”

3. Section 26.71(h)<sup>5</sup> formed Metro's second basis for denial, with the agency concluding that Ms. Green and the other disadvantaged individuals lacked a state required license or credential to own/or control CES in the NAICS codes industries described as the primary business activities of wireless concealment and ERG-land surveying.

Metro acknowledges that Ms. Green holds a professional engineering license and that the firm applied for DBE certification in engineering services (NAICS Code 541330) and other codes. We remand this matter for Metro to reevaluate its position in light of the specific requirements of §26.71(h) and (n), noting that CES, if it meets eligibility requirements should be certified in all areas of work in which the firm's disadvantaged owners can control (See §26.71(n)). The Department has issued several official question and answer documents on the subject of NAICS code assignments, available at <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/dbe-guidance>.

4. Metro, citing §26.71(i),<sup>6</sup> determined as its third explanation for denying DBE certification, that because Mr. Keegan receives a higher salary than Ms. Green and the other disadvantaged owners, the firm did not meet its burden of proof that they are "compensated accordingly." The agency's rationale is that Ms. Green is to be the highest paid person in the firm, something our regulation does not require. Metro did not do a full and proper analysis of this aspect of the case in accordance with §26.71(i), which specifically permits a recipient to determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

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<sup>5</sup> Section 26.71(h) states: "If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm."

<sup>6</sup> Section 26.71(i) states: "(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. (2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual."

We remand the matter in accordance with §26.89(f)(4) for further fact-finding and/or analysis of the evidence CES has presented. We direct Metro to reconsider the evidence and within 90 days, either certify the firm or provide it a new denial letter that fully explains Metro's reasons for denial under the provisions discussed above, with a copy of Metro's timely determination to this Office. Should Metro again determine that CES is ineligible, then the firm will have the usual 90 days within which to appeal to the Department. Thank you for your cooperation.

Sincerely,

Marc D. Pentino  
Lead Equal Opportunity Specialist  
External Civil Rights Program Division  
Departmental Office of Civil Rights

cc: Skye Green, CES