

October 10, 2017

Reference Number: 17-0058

Mr. Frank L. Cara, Esq.
Pepper Hamilton LLP
The New York Times Building, 37th Floor
620 Eighth Avenue
New York, NY 10018

Dear Mr. Cara:

This letter responds to the December 20, 2016 letter in which The Port Authority of New York and New Jersey (PANYNJ) denied ARS Electric, LLC's (ARS) application for certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, pursuant to §26.61(e), the U.S. Department of Transportation (the Department) affirms PANYNJ's decision, as required by §26.89(f)(1).¹

FACTS:

ARS is a New York-based electrical contracting firm. PANYNJ certified the firm as a DBE in March 2016.² At that time, Ali Ahmad was ARS's President and majority (60%) owner. Mr. Ahmad is presumed socially and economically disadvantaged (SED) under the Regulation. He left the firm on June 30, 2016. That same day, a presumed SED employee of ARS, Renee DePeiza, purchased Mr. Ahmad's ownership interest in ARS. In addition to becoming the firm's majority owner, Ms. DePeiza became the firm's President.³

Ms. DePeiza's non-SED brother, Sean Murphy, has been ARS's Vice President since the firm's founding in 2014. Russell DiFrancisca has been ARS's Vice President of Operations since the firm's founding in 2014. He is non-SED under the Regulation. Mr. Murphy and Mr. DiFrancisca both have minority ownership interests in ARS.

¹ See §26.89(f)(1): "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

² See Certification Letter (March 9, 2016).

³ In November 2016, PANYNJ provided ARS written notification that it had suspended the firm's DBE certification because of the change in the firm's ownership and as permitted by §26.88(b)(1) of the Regulation. See Notice of Suspension (Nov. 29, 2016). PANYNJ opined that Ms. DePeiza's purchase of Mr. Ahmad's majority ownership interest constituted a material change that affected ARS's DBE eligibility. See *id.* at Attachments A and B. In response, ARS reapplied for DBE certification in December 2016.

As President, Ms. DePeiza holds ARS's highest officer position. She sets policies for the firm's direction/scope and is responsible for hiring and firing management staff.⁴ She shares all other responsibilities and authority with Mr. Murphy and/or Mr. DiFrancisca. Ms. DePeiza and Mr. Murphy both perform office management duties; designate profit spending and investments; and obligate ARS by contract/credit.⁵ Ms. DePeiza and Mr. DiFrancisca both hire and fire field staff or crew. Ms. DePeiza, Mr. Murphy, and Mr. DiFrancisca all bid on and estimate projects; make major purchasing decisions; perform marketing and sales activities; supervise field operations; purchase equipment; and sign checks.⁶ Mr. DiFrancisca is the only officer of ARS who holds a Master Electrician license.⁷

PANYNJ denied ARS's application for DBE certification under control provisions §§26.71(d), (g), and (h) of the Regulation. The Department affirms on the basis of §§26.71(g) and (h).

DISCUSSION:

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.

PANYNJ relied only on the introductory language of §26.71(d) to conclude that ARS does not meet that section's requirements, omitting any eligibility analysis under subsections (1-3).⁸ The Department has previously opined that the introductory language is merely prefatory and does not constitute an eligibility requirement independent of subsections (1-3). *See, e.g., 13-0073 C2PM, Inc.* (Nov. 7, 2013) (certifier disregarded SED owner's holding of highest officer position and demonstrated control of board of directors; decision reversed) and *16-0017 Tamarac Land Surveying LLC* (April 28, 2016) (certifier cited introductory language of §26.71(d) to support denial but did not dispute SED owner's ability to control board of directors; decision reversed).

⁴ See Uniform Certification Application (UCA) at 10.

⁵ See *id.*

⁶ See UCA at 10-11.

⁷ See New York State Master Electrician License of Russell DiFrancisca.

⁸ ARS appears to meet the requirements of §26.71(d)(1-3). As President, Ms. DePeiza holds the highest officer position at ARS. The firm does not have a board of directors because it is not a corporation. Similarly, ARS does not have any general partners because the firm is not a partnership.

Section 26.71(d) and its three subsections concern an SED owner's ability to control the firm's *governance*. PANYNJ did not question Ms. DePeiza's governance of ARS (evidence of which may have been found, *e.g.*, in the firm's operating agreement).⁹ Instead, PANYNJ determined that ARS does not satisfy the requirements of §26.71(d) because Ms. DePeiza does not have a Master Electrician license. PANYNJ concluded that the lack of such license prevents Ms. DePeiza from possessing the power to direct or cause the direction of ARS's management and policies, and to make related day-to-day as well as long-term decisions.¹⁰ Notably, no portion of §26.71(d) addresses professional licenses.¹¹

PANYNJ cites no substantial evidence to support its conclusion that ARS does not meet the requirements of §26.71(d). Consequently, we do not affirm on that basis.

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.

(Emphasis added).

Ms. DePeiza earned an Associate Degree in Design from the Fashion Institute of Technology in 2003.¹² For the next 13 years, she held a variety of purchasing, design, and merchandising positions, primarily in the fashion industry.¹³ PANYNJ stated that none of these employment experiences required the “technical skills and competencies to manage the day-to-day operational activities of an electrical contracting firm.”¹⁴ Immediately prior to becoming President of ARS at the end of June 2016, Ms. DePeiza served as the firm's Project Manager for approximately six

⁹ The UCA Document Checklist requires LLCs to submit a copy of their operating agreement. In addition, New York state law requires LLCs to have an operating agreement. However, the record does not contain a copy of ARS's operating agreement.

¹⁰ See Denial Letter at 4. PANYNJ does not appear to have relied on any additional evidence in the record to support this conclusion.

¹¹ Section 26.71(h) of the Regulation, however, squarely addresses the role of licenses in determining whether an SED individual controls a firm. See *infra* discussion.

¹² See Résumé of Renee DePeiza.

¹³ See *id.*

¹⁴ Denial Letter at 2.

months.¹⁵ In that role, she worked closely with management and project supervisors to develop work schedules; prepared detailed reports for categorized cost estimations of necessary resources and other expenses; maintained relationships and stayed in constant contact with all clients; generated additional project work; participated in budget control and materials management; prepared and evaluated submission documents in accordance with contract specifications; collected cost details of resources, as guided by the construction estimator; controlled project costs; and processed monthly payments.¹⁶ In addition, Ms. DePeiza earned certificates related to general construction.¹⁷ None of these certifications, however, specifically pertain to electrical contracting work.

As President of ARS, Ms. DePeiza sets policies for the firm's direction/scope and is responsible for hiring and firing management staff.¹⁸ These are the only two activities of the firm that she solely controls. She shares all other responsibilities and authority with Mr. Murphy and/or Mr. DiFrancisca. Ms. DePeiza and Mr. Murphy both perform office management duties; designate profit spending and investments; and obligate ARS contractually.¹⁹ Ms. DePeiza and Mr. DiFrancisca both hire and fire field staff or crew. Ms. DePeiza, Mr. Murphy, and Mr. DiFrancisca all bid on and estimate projects; make major purchasing decisions; perform marketing and sales activities; supervise field operations; purchase equipment; and sign checks.²⁰

In its denial letter, PANYNJ stated that Ms. DePeiza contributes to ARS's "facilitation and efficiency,"²¹ including the management and supervision of all staff, budget planning, document management, bid proposals, and "other related administrative functions."²² PANYNJ stated that

¹⁵ See Résumé of Renee DePeiza. Ms. DePeiza's résumé does not provide exact dates for this position. Her résumé states that she worked at Building Brooklyn Management from 2007-2016; thus, it can be reasonably inferred that she began working at ARS in early 2016.

¹⁶ See *id.*

¹⁷ See *id.* See also Pace University Certification of Completion in Construction Management (Oct. 8, 2016) and Skanska USA Certification of Completion in Construction Management and Building (Nov. 2016).

¹⁸ See UCA at 10. Ms. DePeiza has not yet hired or fired any staff. See On-Site Report at 3.

¹⁹ See *id.*

²⁰ See UCA at 10-11.

²¹ Denial Letter at 3.

²² *Id.*

while these activities are “important roles,” they demonstrate that Ms. DePeiza’s role at ARS is “predominantly administrative in nature” and “not critical to the mission of the firm.”^{23, 24, 25}

On appeal, ARS contends that “DePeiza’s resume [sic] amply demonstrates her capabilities to manage and control an electrical firm such as ARS.”²⁶ To support this statement, ARS references a letter from the owner of Building Brooklyn Management LLC (Building Brooklyn Management), a firm at which Ms. DePeiza was previously employed. ARS cited portions of the letter in which the firm’s owner stated that Ms. DePeiza managed electrical plans, worked with architects and electrical subcontractors to request project quotes, gathered permits, and negotiated project costs.²⁷ Ms. DePeiza’s experience at Building Brooklyn Management and as Project Manager of ARS appears to satisfy the requirement of §26.71(g) that a firm’s SED owner must have an overall understanding of the type of business in which the firm is engaged and the firm’s operations. However, such experience does not relate to §26.71(g)’s requirement that Ms. DePeiza have the ability to make a critical evaluation of information that technical experts (or other participants in the business) provide and make informed, independent decisions based on that information. ARS did not provide any evidence that Ms. DePeiza has such ability.

The Department finds that substantial evidence in the record supports PANYNJ’s conclusion that ARS has not demonstrated eligibility under §26.71(g).

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.

²³ *Id.*

²⁴ *Id.* In its denial letter, PANYNJ relied, in part, on Mr. Murphy’s and Mr. DiFrancisca’s extensive electrical contracting experience to support its conclusion that ARS did not satisfy the requirements of §26.71(g) because Mr. Murphy and Mr. DiFrancisca, “are the primary possessors of the expertise and experience necessary to manage the day-to-day operations of the subject firm.” Denial Letter at 3. However, §26.71(g) states that an SED owner need not have greater experience or expertise than managers or key employees, *i.e.*, Mr. Murphy and Mr. DiFrancisca. A discussion of their experience and expertise would have been relevant under §26.71(e), a provision of the Regulation that PANYNJ did not cite in its denial decision.

²⁵ ARS also argues that PANYNJ’s decision should be reversed because of possible inaccuracies in the On-Site Report. However, the record clearly demonstrates that PANYNJ relied on multiple sources of information to reach its denial decision, and not solely or primarily on the On-Site Report.

²⁶ Appeal Letter at 2. ARS further contends that Ms. DePeiza’s qualifications are equivalent to those of Mr. Ahmad, the previous owner of ARS on whose SED status the firm relied to obtain its former DBE certification. As Mr. Ahmad ceased any involvement with ARS before the firm reapplied for DBE certification, the Department does not find any relevance of Mr. Ahmad’s qualifications to the current appeal.

²⁷ *See id.* *See also* Letter from Building Brooklyn Management LLC (Nov. 29, 2016).

(Emphasis added).

Section 27-3004 of the New York City Electrical Code states:

RESPONSIBLE REPRESENTATIVE: A master electrician who has the authority to make final determinations and who has full responsibility on behalf of a master electrician business for the manner in which electrical work is done and for the selection, supervision and control of all employees of such business who perform such work.

(Emphasis added).

Section 27-3013 of the New York City Electrical Code states:

The responsible representative of a [master electrician] business may not delegate such authority to a master electrician who is not an officer of such corporation or a partner of such partnership. Such person shall personally sign applications for permits. The responsible representative of a business shall have the authority to make final determinations and shall have full responsibility for the manner in which the work is done [...], except that where work is done under a permit issued pursuant to an application bearing the signature and seal of a master electrician acting pursuant to a written delegation from the responsible representative of such business, both the responsible representative of such business and the master electrician who signed and affixed his or her seal to the application for such permit shall be jointly and severally responsible for the manner in which the work is done.²⁸

(Emphasis added).

Mr. DiFrancisca is ARS's only officer who holds a New York City Master Electrician license. The New York City Electrical Code explicitly defines an electrical contracting firm's responsible representative as a licensed Master Electrician. The responsible representative, *i.e.*, Mr. DiFrancisca, has the authority to make final determinations and has full responsibility for how ARS performs electrical contracting work in New York City.²⁹ Further, the New York City Electrical Code gives Mr. DiFrancisca full responsibility for the selection, supervision, and control of all employees who perform electrical contracting work.

Section 26.71(h) of the Regulation permits PANYNJ to consider Ms. DePeiza's lack of a Master Electrician license as *one factor* in determining whether she controls the firm. PANYNJ, as noted above, also considered Ms. DePeiza's apparent failure to meet the requirements of §26.71(g) in determining that Ms. DePeiza does not control the ARS. PANYNJ based its §26.71(h) conclusion based on the evidence cited above, which we consider to be substantial, PANYNJ concluded that Ms. DePeiza does not control ARS. Accordingly, we affirm.

²⁸ Section 27-3013 of N.Y.C. Elec. Code.

²⁹The question of whether Ms. DePeiza could validly delegate this authority to Mr. DiFrancisca is not before us because PANYNJ made no finding based on §26.71(f).

CONCLUSION:

Substantial evidence supports PANYNJ's determination that ARS does not meet the requirements of §§26.71(g) and (h), and that determination is consistent with applicable certification standards. We therefore affirm under §26.89(f)(1).

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

Sincerely,

Samuel F. Brooks
Acting Associate Director
Disadvantaged Business Enterprise Division

cc: PANYNJ