



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

February 15, 2019

Reference Number 18-0130

Mr. Adonis Expose
DBE Compliance Manager-Liaison Officer
Regional Transit Authority
2817 Canal Street
New Orleans, LA 70119-6301

Dear Mr. Expose:

This is in reference to the appeal by Legacy Professional Services (LPS) of the Regional Transit Authority's April 5, 2018 decision to deny the firm's application to be certified as a Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 C.F.R. Part 26 (the Regulation). RTA determined that LPS' qualifying owner, Mr. Alcide Tervalon did not meet the control requirements §26.71(j). RTA concedes that it did not conduct a site-visit to the firm as required by §26.83(c)(1)(i) or interview Mr. Tervalon. The site visit(s) and interview(s) are mandatory. RTA erred when it did not conduct them. RTA requested on February 12, 2019, that we remand the matter for it to correct its error. We grant the request per §26.89(f)(4) and offer the following guidance when the agency reevaluates the firm's eligibility as instructed below:

1. When LPS applied for certification, Mr. Tervalon submitted his résumé indicating his position as a Chief Finance Officer at Royal Engineering & Consultants, LLC. This sole fact led RTA to determine he could not control LPS within the meaning of §26.71(j).¹

The focus of §26.71(j) is whether the qualifying owner engages in outside employment or other business interests that conflict with his/her devoting sufficient time and attention to the applicant firm to control its activities. As the provision states, an absentee ownership of a business and part-time work in a full-time firm when it is operating is not viewed as constituting control. The provision recognizes situations wherein a person can control an applicant firm that is a part-time business, even on evenings and/or weekends, if the owner controls it all the time it is operating. To assess whether an applicant meets §26.71(j) requirements requires a recipient to consider several factors including the type of business conducted (e.g., a virtual office as opposed to field/on-site operations, day versus night-time performance); the owner's time constraints to run a particular operation (i.e., full or part-time attention); his/her schedule and availability and their

¹ §26.71(j) states: "In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating."

responsibilities at both the applicant firm and the outside place of employment. These details are missing because RTA did not request Mr. Tervalon to clarify (either orally or in writing) his role as Chief Finance Officer at Royal Engineering & Consultants, LLC. These are essential matters that RTA could have explored at an on-site interview at the firm's principal place of business and at job sites if there are such sites on which the firm is working at the time of its eligibility investigation, which is a requirement of §26.83(c).²

As this matter is being remanded to RTA, the agency is directed to consider the letter from the President of Royal Engineering dated April 30, 2018 that Mr. Tervalon's last day of employment at the firm was January 31, 2018. This letter was submitted immediately following RTA's denial and is contained in the agency's records.

2. The record contains Mr. Tervalon's 2014 and 2016 personal tax return; firm balance sheets (one as of December 31, 2017, and a second, as of March 31, 2018); and LPS profit and loss statements for January through December 2017, and January to March 2018. RTA stated in its April 5, 2018 denial decision that LPS did not provide business tax returns. Mr. Tervalon stated in correspondence to the agency that because LPS is a limited liability company, the firm's profits would be reported on his personal tax returns. He also indicated that he received an extension to file his 2017 tax return, which is the year Legacy was organized with the Louisiana Secretary of State as a for-profit business.

We remand the above-captioned matter to your office under §26.89(f)(4) so that RTA can augment the record by conducting required site visits and personnel interviews, collect relevant information (such as the firm's tax returns), reconsider the application generally, and make a new eligibility determination. We direct RTA to conduct its site visit **within 45 days** of this letter but also to maximize its value as an evidence gathering and issue resolution. Section 26.61(b) requires the firm to demonstrate eligibility, but §26.83 requires the certifier, except in very limited circumstances not present here, to afford the firm a reasonable opportunity to resolve perceived conflicts or misunderstandings in its effort to meet its burden of proof.

² The Department's official guidance permits recipients to not conduct an on-site review only in limited circumstances. See guidance entitled, "*Is an on-site review of a firm necessary to certify a firm? To deny certification to the firm?*" which states:

"As a recipient, you are not permitted to certify a firm as an eligible DBE unless there has been an on-site review of its eligibility that you take into account in making your decision. There are no exceptions to this requirement, which is crucial to preventing DBE fraud and ensuring the integrity of the DBE program. However, there are some situations in which you may deny certification to a firm without an on-site review. Generally, these situations are ones in which the information contained in the firm's application, viewed in the light most favorable to the firm, precludes it from being certified. Here are examples of these situations:

- o The personal net worth statement of the sole owner of a firm exceeds the \$1.32 million limit
- o The firm exceeds the \$23.98 million cap on gross annual receipts, averaged over three years, or exceeds the applicable SBA business size standard
- o The applicant fails to cooperate with the recipient's information requests (e.g., an owner refuses to supply necessary personal net worth information)
- o It is clear from the application that disadvantaged individuals do not own or control the firm (e.g., that non-disadvantaged individuals own 60 percent of the stock, or that white males make all day-to-day business decisions of the company)

In other situations, there must be an on-site review before you deny a firm's application for certification."

If LPA demonstrates eligibility, RTA must certify the firm without delay. If not, RTA must provide the applicant a new denial letter that avoids the mistakes of the original, speaks directly to unproven aspects of eligibility, and otherwise conforms with §26.86(a) and other applicable certification rules. In the event of a new denial letter, LPA will have the usual 90 days within which to appeal to the Department.³ This decision is administratively final under and not subject to petitions for review.

Thank you for your continued cooperation.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Division

cc: LPA Counsel: Charline K. Gipson, Esq.

³ RTA correctly informed the firm in its April 5, 2018 denial decision of its appeal rights to the Department. We advise that should RTA again determine the firm to be ineligible it also inform the firm of its ability to reapply to the program after the appropriate waiting period has lapsed. The period is established in the state's Unified Certification Program (see §26.86(c)).