

New York State Ethics Commission

Advisory Opinion No. 95-23: Application of the revolving door provisions of Public Officers Law §73(8) to a former Department of Transportation employee seeking to have his business certified as a minority business enterprise by his former agency.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by [], a former employee of the New York State Department of Transportation ("DOT") and currently President of [a contracting company], who is seeking, pursuant to federal regulations, to have his business certified by DOT as a minority business enterprise ("MBE")⁽¹⁾, so that it may pursue bidding on a federally funded New York City contract.

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission ("Commission") concludes that the two year bar of Public Officers Law §73(8)(a) does not prohibit [the requesting individual] from applying to DOT for MBE certification within two years of his having left State employment because DOT, in considering such an application, is acting as agent for the federal government.

BACKGROUND

[The requesting individual] retired from DOT in June of 1994 after 32 years of service. Prior to his retirement, he was a Civil Engineer []. [The contracting company], which he now heads, wishes to bid as a subcontractor on a federally funded highway project for the City of New York's ("City") Bureau of Bridges. It is seeking a contract as an MBE subcontractor.

The federal government, in providing funds to the states for the rehabilitation of highway infrastructure, sets aside a percentage of those funds for minority owned or controlled businesses.⁽²⁾ As a condition of the receipt of federal money, state governments must implement the federal government's MBE certification program. The Secretary of the United States Department of Transportation ("Department") has established minimum uniform criteria which State governments must follow in determining whether a concern qualifies as an MBE. DOT, as New York's state "highway agency," performs this function and certifies contractors, even for projects in which it is not involved, pursuant to the federal eligibility standards contained in 49 CFR §23.53. These standards include:

- bona fide minority group membership;
- independent ownership or control of the business by a minority;
- management control by a minority;

- ownership and control by a minority of the securities of the business; and
- contributions of capital and expertise to the business by a minority.

Procedurally, applicants for MBE certification by DOT use specific schedules established by the Secretary of Transportation.⁽³⁾ According to DOT's certification unit staff, it performs an in-depth review of all applications, following the applicable federal regulations, to determine whether the above-cited standards have been met. For example, DOT will review tax returns, resumes, and existing contracts to verify that a minority individual is the true owner of an applicant's business. There are occasions when DOT will ask an applicant to supply further documentation. Because DOT acts as the federal government's representative, it conducts a complete inquiry even if a contractor has been certified elsewhere. Once certified, an MBE must revise its application annually by submitting updated information on federally established schedules.

For applicants which are denied certification by DOT, there is an appeal mechanism to the federal government. Any firm that believes that it has been wrongly denied certification may file an appeal to the Secretary of Transportation within 180 days of the final State agency action.⁽⁴⁾

[The requesting individual], as President of [the contracting company], has submitted an application to DOT for certification of [the contracting company] as an MBE for the purpose of obtaining the City contract. However, DOT's certification unit has questioned [the requesting individual]'s eligibility to apply within two years of his having retired from the agency.

[The requesting individual] argues that if the post-employment provisions of Public Officers Law §73(8)(a) prohibit his obtaining an MBE certification for [the contracting company], his company will not only be prevented from bidding on the City contract but also on other contracts which require MBE certification by DOT. He states that he is already certified as an MBE by the Metropolitan Transportation Authority ("MTA"), and argues that the DOT certification, while legally required for many projects, is duplicative.

APPLICABLE STATUTE

Public Officers Law §73(8) states, in relevant part, that:

(a) No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency.

DISCUSSION

Public Officers Law §73(8), generally referred to as the "revolving door" provision, sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency. Paragraph (a),

cited above, contains a two year absolute bar on an employee's appearing, practicing or rendering services for compensation on any matter before his or her former agency.

Clearly, [the requesting individual], in applying for MBE certification for his firm, is appearing on a matter before DOT. However, every appearance is not necessarily a violation. For example, in [Advisory Opinion No. 94-2](#), the Commission permitted a former employee to renew her professional license from her former State agency within two years of having left State service.

[The requesting individual] is applying for [the contracting company]'s initial certification to permit it to work as an MBE on a project which is not a DOT project but which involves federal monies. He states that [the contracting company] will not use the certification, if issued, to bid on any DOT contracts, as that conduct would violate the Ethics Law. In fact, [the requesting individual] recommends that his MBE certificate be provided on the condition that it does not apply to DOT projects until his two year post-employment bar has expired.

Because DOT is acting as the agent of the federal government in reviewing and determining MBE applications for contracts in which it is not directly involved, [the requesting individual] may apply to DOT for MBE certification for his contracting company during the period of his two year bar⁽⁵⁾. That DOT, as New York's highway agency, is acting as the agent of the federal government and performing a federal function is clear. The federal Department establishes the procedure for certification, the standards for eligibility, and the schedules to be submitted. Furthermore, any appeal is brought before the Secretary. Given these circumstances, [the requesting individual] is not prohibited by the Ethics Law from obtaining what is, in essence, a federal certificate, even though issued by his former agency through delegation of the federal government.

CONCLUSION

The Commission concludes that the post-employment restrictions of Public Officers Law §73(8)(a) do not prohibit [the requesting individual] from applying to DOT for MBE certification for [the contracting company] within two years of his having left State employment because DOT, in considering [the contracting company]'s application, is acting as agent for the federal government.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All concur:

Joseph M. Bress, Chair

Angelo A. Costanza,
Robert E. Eggenschiller, Members

Donald A. Odell, abstained

Dated: July 18, 1995

Endnotes

1. In his request letter, [the requesting individual] states that he is seeking certification as a disadvantaged business enterprise ("DBE"). However, both the federal regulations and DOT use the term MBE.
2. The particular federal highway appropriation covering the New York City bridge contract and [the contracting company's] potential subcontracting is contained in the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"). The purpose of the MBE provisions of the Act "is to carry out the [federal] Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women (MBEs) in Department of Transportation programs."
3. A State highway agency may establish a different certification process only after the Secretary of Transportation determines that the State process is as or is more effective than the process provided for in the federal regulations.
4. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE may so advise the Secretary, who may then take certain actions.
5. The Commission takes note of the recent United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*, (1995 WL 347345). As it reads that decision, the Commission believes that it has no bearing on [the contracting company]'s current application for certification as an MBE.

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