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Karyn E. Polito, Lieutenant Governor
Stephanie Pollack, MassDOT Secretary & CEO



**MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM
ADJUDICATORY BOARD**

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In the Matter of Ellco Promotions, Inc. (MUCP #2016-0001)

NOTICE OF FINAL AGENCY DECISION

Pursuant to 49 CFR §28.87(g) and M.G.L. c. 30A, §11(8), the Massachusetts Unified Certification Program Adjudicatory Board (Board) hereby gives Notice of its Decision (Decision) in the above-captioned matter. The parties have been notified by mail on this date.

The Board finds no grounds to remove Ellco Promotions, Inc.'s certification as a Disadvantaged Business Enterprise.

The reasons for the Board's finding are set forth in the attached Decision.

Dated: December 8, 2016

The Adjudicatory Board

Albert A. Caldarelli
Miguel G. Fernandes
Kenrick W. Clifton
Albert B. Dalton

By: _____
Lisa Harol, Secretary
Tel: (857) 368-9495

FINAL AGENCY DECISION

MASSACHUSETTS UNIFIED CERTIFICATION PROGRAM ADJUDICATORY BOARD

IN THE MATTER OF ELLCO PROMOTIONS INC.

INTRODUCTION

The Adjudicatory Board of the Massachusetts Unified Certification Program is authorized to hear and decide appeals from determinations of the Supplier Diversity Office (SDO) to decertify or remove a Disadvantaged Business Enterprise's eligibility pursuant to 49 CFR §26.87.

By letter dated May 26, 2016, SDO notified Ellco Promotions Inc. (Ellco) that it was initiating ineligibility proceedings. Ex. 2. On June 2, 2016, Ellco requested a hearing before this Board. Ex. 3. The Board held an adjudicatory hearing on November 9, 2016, in accordance with the requirements of 49 CFR §26.87, M.G.L. c. 30A, and 801 C.M.R. §1.02 and §1.03.

FINDINGS

After careful review of the testimony and evidence presented at the hearing, the Board makes the following findings:

1. Ellco is owned by Ms. Ellen Orne, who also serves as the company's President. Ellco is located at 113 Smoke Hill Ridge Road, Marshfield, MA, and is in the business of providing broker services on behalf of buyers and sellers of promotional products such as wearable apparel, executive gifts, caps, offices supplies, etc. Ex. 4, 6.
2. iPROMOTEu (IPU) is a company founded by Mr. Ross Silverstein, who serves as its President and CEO. Hr'g Tr. 135:25. IPU provides services to independent promotional products distributors, like Ellco, in the form of an online order management system through which distributors can place orders and manage their billings. Ex. 4; Hr'g Tr. 89:14-15.
3. In 2010, Ellco contracted for IPU's online order management services. Ellco and IPU entered into an "Independent Distributor Affiliate Agreement" dated February 12, 2010, which sets forth the terms and conditions of the contractual relationship between them. Ex. 5/SDO8.
4. Ellco's use of IPU's online order management system, in practice, is as follows:
 - a) Ellco logs into IPU's online order management system, enters relevant order information, and generates and transmits a purchase order to the desired suppliers or manufacturers.

- b) Upon receipt of the purchase order, the suppliers fulfill the order, ship the final products to Ellco's customer, and issue an invoice to IPU on Ellco's behalf for the cost of the goods.
- c) IPU generates an invoice to Ellco's customer for Ellco's review.
- d) When Ellco approves the invoice, IPU transmits it to the customer on Ellco's behalf.
- e) The customer then remits a check payable to Ellco at an IPU drop-off location.
- f) IPU deposits the check on Ellco's behalf, deducts the fee for its services, and remits payment to the manufacturer. The remaining proceeds of the customer payment are paid to Ellco for its services.

Ex. 4; Hr'g Tr. 101-123.

- 5. Ellco's relationship to IPU is entirely contractual. Ellco pays a fee to IPU to use its online order management system to save administrative time and effort. There is no common ownership or any exercise of authority or decision-making by IPU concerning the business activities of Ellco. Ex. 5/SDO 8; Hr'g Tr. 89-90. IPU has no role in determining what customers Ellco serves, what products Ellco sells, which manufacturers and suppliers Ellco uses, or what prices Ellco charges. Ms. Orne has full authority and control of Ellco, and does not delegate any of its fiduciary responsibilities to IPU. She directs the management, policies and operations of the company on a long term and day-to-day basis. Ex. 4; Hr'g Tr. 101-123.
- 6. The contractual relationship between Ellco and IPU was known to SDO since 2010, when Ellco provided a copy of the "Independent Distributor Affiliate Agreement" dated February 12, 2010 as part of Ellco's initial application for DBE certification. Ex. 5/SDO8.
- 7. On December 16, 2010, SDO certified Ellco as a Disadvantaged Business Enterprise (DBE) and classified Ellco's business under three NAICS¹ codes identified and defined as follows:
 - a. 541890 - Other Services Related to Advertising: This industry comprises establishments primarily engaged in providing advertising services (except advertising agency services, public relations agency services, media buying agency services, media representative services, display advertising services, direct mail advertising services, advertising material distribution services, and marketing consulting services).
 - b. 425110 - Business to Business Electronic Markets: This industry comprises business-to-business electronic markets bringing together buyers and sellers of goods using the Internet or other electronic means and generally receiving a commission or fee for the service. Business-to-business electronic markets for durable and nondurable goods are included in this industry.
 - c. 425120 - Wholesale Trade Agents and Brokers: This industry comprises wholesale trade agents and brokers acting on behalf of buyers or sellers in the wholesale distribution of goods.

¹ The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. U.S. Census Bureau, 2012 NAICS introduction and definitions.

Agents and brokers do not take title to the goods being sold but rather receive a commission or fee for their service. Agents and brokers for all durable and nondurable goods are included in this industry.

Ex. 6.

8. On November 24, 2015, Mr. Wystan Umland, MBTA Government Programs Compliance Officer, conducted a “Commercially Useful Function” review² of Ellco in connection with a federal-aid contract for the MBTA’s “THE RIDE” program. The review included a meeting and email exchanges with Ms. Orne, review of information posted on the websites of Ellco and IPU, and other internet research concerning Ellco’s business. He recorded his observations and his “overall impressions” concerning Ellco and its relationship with IPU in handwritten and typed notes. Ex. 5/SDO4. He also completed a “Commercially Useful Function Checklist.” Ex. 5/SDO2.
9. Based on his observations during the CUF review, particularly with respect to Ellco’s interaction with IPU concerning its billing and payment practices, Mr. Umland made a determination that “Ellco is likely non-compliant with the DBE certification standards set forth in 49 CFR 26.” Accordingly, he referred the matter by memorandum dated December 14, 2015 to SDO for review and investigation. Ex. 5/SDO 3; Hr’g Tr. 33:6-10. SDO assigned the referral to Mr. Andre Titus, DBE Investigator, to review and investigate Ellco’s DBE certification status. Hr’g Tr. 44:16-25, 45:1-3.
10. Mr. Titus conducted a site visit to Ellco on January 21, 2016 during which he interviewed Ms. Orne in accordance with an investigation questionnaire developed by SDO. Hr’g Tr. 46:10-21, Ex. 5/SDO 5. He reviewed information contained in SDO’s certification file for Ellco, including purchase orders and the “Independent Distributor Affiliate Agreement” between Ellco and IPU. Hr’g Tr. 47:9-19, Ex. 5/SDO 7,8. He also considered the information and determinations contained in Mr. Umland’s referral. Hr’g Tr. 47:20-25.
11. Based on his investigation, Mr. Titus concluded that Ellco “no longer meets the certification standards for independence and control as defined under 49 CFR Part 26 Subpart D Certification Standards.” The information that he relied on to reach his findings and conclusion are contained in his report dated May 25, 2016 and entitled “Certification Investigator’s DBE Report – Eligibility Review”. Ex. 5/SDO 5.
12. Based on Mr. Titus’ conclusions, SDO initiated ineligibility proceedings that led to an adjudicatory hearing before this Board on November 9, 2016.

² A Commercially Useful Function (CUF) review is performed when a DBE participates in a federal-aid contract for the purpose of determining the value of the DBE’s work toward the contract’s DBE goals. 49 CFR §26.55(c). In this case, the CUF review of Ellco was conducted because Ellco was to perform work as a subcontractor under MBTA’s “THE RIDE” contract. Hr’g Tr. 32:14-17.

DISCUSSION

Pursuant to 49 CFR §26.87(d)(1), SDO had the burden of proving by a preponderance of the evidence that Ellco does not meet the certification standards of 49 CFR Part 26. The meagre evidence presented by SDO at the hearing falls far short of meeting that burden.

The evidence and testimony presented at the hearing establishes that the control and operation of Ellco, including its relationship with IPU, is entirely consistent with operating a business within the industry of a Wholesale Trade Agent/Broker and Business to Business Electronic Markets as described by the NAICS codes for which Ellco is certified. Ellco pays a fee to IPU to use an online order management system to save administrative time and effort. In that regard, Ellco is merely one of many customers who contract for IPU's services. There is no common ownership or any exercise of authority or decision-making by IPU concerning the business activities of Ellco. IPU has no role in determining what customers Ellco serves, what products Ellco sells, which manufacturers and suppliers Ellco uses, or what prices Ellco charges. Ms. Orne has full authority and control of Ellco, and does not delegate any of its fiduciary responsibilities to IPU. She directs the management, policies and operations of the company on a long term and day-to-day basis. All of this satisfies the Board that Ellco is an independent business and meets the requirements of 49 CFR §26.71.

The Board is not satisfied, however, with SDO's investigation into Ellco's eligibility. Better efforts could have been made to verify basic factual information, which was readily available and may have avoided the need for a costly adjudicatory hearing. Also, it is not clear to the Board that SDO followed all of the steps and scrutinized all of the items required by 49 CFR §26.83 in making its determination regarding Ellco's eligibility to remain certified. Lastly, SDO initiated formal ineligibility proceedings based on IPU's purported control of Ellco's administrative and fiduciary responsibilities; yet, it made no direct inquiry of IPU to try to corroborate its assumptions. These and other shortcomings in SDO's investigation led to reliance on facts that were ambiguous, incomplete and, in some cases, patently incorrect.

DECISION

SDO requests that this Board approve its determination to remove Ellco's DBE eligibility pursuant to 49 CFR §26.87(f)(5) on the basis that its decision to certify Ellco in 2010 was clearly erroneous. For the reasons discussed above, the Board is in unanimous agreement that there are no grounds upon which to remove Ellco's eligibility.

Dated: December 8, 2016

The Adjudicatory Board:

On behalf of its members:

Albert A. Caldarelli
Miguel G. Fernandes
Kenrick W. Clifton
Albert B. Dalton