U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

MAR 29 2005

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: JONATHAN L. SNARE
Acting Assistant Secretary

SUBJECT: Response to OIG's Draft Audit Report
No. 05-05-002-10-001
"OSHA Correctly Denied ED&D's Incomplete NRTL Application"

This memorandum is in response to your March 8, 2005, transmittal of the Office of Inspector General (OIG) Draft Audit Report No. 05-05-002-10-001, "OSHA Correctly Denied ED&D's Incomplete NRTL Application." We are pleased that the OIG has found that OSHA acted properly in its handling of the Educated Design and Development, Inc. (ED&D) application for recognition as a Nationally Recognized Testing Laboratory (NRTL). OSHA appreciates the vindication of its actions as well as the effort that the OIG put into this audit to understand what occurred and to provide insights into how the agency can improve its NRTL Program.

Before addressing the specific conclusions and recommendations in the draft report, we wish to point out that OSHA was making many improvements to its NRTL Program operations at the same time that ED&D's application was under consideration. One of these improvements is noted in the report: the implementation of our revised application processing procedures in December 1999. Had these procedures been in place at the time ED&D applied for recognition, it is likely that the situation that led to ED&D filing its complaint with the OIG would have been avoided. We continue to address different facets of the program operations and believe that these ongoing improvement efforts are consistent with the tenor of your recommendations. Our specific responses below capture our commitment to implement your recommendations and to provide additional information and clarification to further clarify OSHA's handling of ED&D's application.

For ease of providing our response, we are following the presentation format of the report, first responding to the Objective and Findings section and then the Recommendations of the Draft Audit Report.

Objectives and Summary of Findings:

1. **Was OSHA's decision not to grant ED&D NRTL recognition justified?**

OIG Executive Summary of Findings:
OSHA's records show that ED&D did not meet two of the four primary requirements for recognition described in 29 CFR 1910.7(b) (capability to test and evaluate equipment, and control of certified products), and questions regarding ED&D's compliance with a third primary requirement (independence) were never resolved. Therefore, OSHA denied ED&D's NRTL recognition and closed its application on May 12, 2003. OSHA's decision was justified.

OSHA Comment:
OSHA's decision to close the application was based on the belief that ED&D had abandoned it, and that the agency had given ED&D more than adequate opportunity to meet the requirements for recognition. Under governing agency rules, closing an application due to inaction or incompleteness by an applicant does not legally deny recognition -- it merely halts the application process. The legal process for formal approval or denial of recognition under OSHA regulations involves the publication of two Federal Register notices. The first notice announces an application and OSHA's preliminary decision, i.e., approval or denial. The final decision is contained in the second notice. OSHA did not publish any such notices for the ED&D application. While we agree that closing the ED&D application was functionally equivalent to denying recognition, it was not a formal denial as required by our own regulations and suggested by the wording of the OIG language.

2. **Were other NRTLs identified in ED&D's complaint given recognition inappropriately?**

OIG Executive Summary of Findings:
ED&D alleged that OSHA unfairly favored several unqualified organizations by granting them NRTL recognition. OSHA's records adequately supported its decision to grant recognition to Detroit Testing Laboratory, Inc. (DTL) and conditional recognition to Curtis-Straus LLC (CSL), and NSF International (NSF) because they had the capability to test and evaluate equipment.

ED&D also alleged that OSHA did not impose independence restrictions as a manufacturer on Underwriters Laboratories (UL), U.S. Testing Company, Inc. (now known as SGS U.S. Testing, Inc. (SGSUS)), and other unnamed NRTLs. At the time of UL's and SGSUS's applications, OSHA permitted NRTL applicants to self-certify that they were independent of manufacturing and marketing operations. UL and SGSUS provided self-certifications, thus satisfying OSHA's requirement. While OSHA directives subsequently established procedures for verifying an NRTL's

independence, verification is not required. We believe OSHA should verify ongoing independence during onsite audits.

OSHA Comment:
OSHA appreciates the endorsement by the OIG of the sufficiency of agency records for granting NRTL recognition for the other applicants reviewed. Concerns about ongoing independence in future onsite audits are addressed in our response below to the related recommendation.

3. Did OSHA handle ED&D's application for NRTL recognition appropriately?

OIG Executive Summary of Findings:
We identified two areas where OSHA did not appropriately handle ED&D's application. However, these deficiencies did not adversely impact the outcome of ED&D's application. 1) OSHA did not follow its regulations for accepting applications when processing ED&D's request for NRTL recognition and did not apply procedures it finalized while the ED&D application was open. 2) We identified two instances where OSHA could not document any feedback. In one other instance, cited by ED&D, we found that OSHA did not provide timely feedback.

OSHA Comment:
One of the Objective 3 findings quotes the text of a January 2000 letter that could be misleading to those who are unfamiliar with our NRTL Program process. The text contains some inconsistencies. It alludes to a "training/assisting" role that OSHA does not perform in evaluating the capability of applicants in meeting our requirements. As clarification, we note that OSHA **does not** "train" any organization in how to meet the requirements for recognition. Our assistance to applicants only extends to clarifying or explaining our requirements.

As stated in the report, "In December 1999, OSHA finalized and issued procedures for processing applications in OSHA Directive CPL 1-0.3. However, these procedures were not applied to the ED&D application in process." OSHA notes that it did not apply those procedures to the ED&D application in order to be fair to the applicant. Had we applied those procedures then as we routinely do now, we would have closed the application shortly after the directive went into effect. However, earlier applicants, which were as inexperienced in testing and certification as ED&D, had been afforded adequate time to develop the necessary operational and quality systems, policies, and procedures to meet OSHA's requirements for recognition. When the directive went into effect, only 2 years had elapsed from the time of our initial review of ED&D's application, an amount of time that is not uncommon in terms of application processing. At that time, we had no guideline or policy limiting the time an application could remain open in the recognition process.

Recommendations

1. **Make the procedures in Appendix E of Enforcement and Compliance Directive CPL 1-0.3 for review of independence a mandatory part of:**
   a. **the initial and renewal recognition process;**
   b. **at least one of the annual audits performed on the NRTL during each five-year recognition period; and**
   c. **the audit that is performed after notification of a change in the NRTL's ownership.**

OSHA concurs with this recommendation. We will develop more detailed and comprehensive procedures for this review and implement them.

2. **Modify CPL 1-0.3 to ensure that all areas related to an NRTL's recognition, including independence, are reviewed at least once during each five-year recognition period.**

OSHA concurs with this recommendation and will implement it.

3. **Review UL's and SGSUS's current business practices to ensure conformance with the independence requirement for NRTL recognition.**

OSHA concurs with this recommendation. We will implement this recommendation concurrently with the implementation of Recommendation #1.

4. **Adhere to OSHA procedures when reviewing applications and performing onsite assessments so that incomplete applications are closed.**

OSHA concurs with this recommendation. OSHA has adhered to its procedures for all applications received following the effective date of our Program Directive: December 1999. We believe that continuation of that existing practice will implement this recommendation.

5. **Maintain a log of contacts with the applicants and NRTLs as part of the application/reapplication files.**

OSHA concurs with this recommendation. OSHA has already begun to implement this recommendation. The agency has distributed a phone log document to its NRTL Program staff for purposes of detailing substantive contacts with applicants. However, we will also supplement this document with a chronological log for each staff to capture all contacts with applicants or other parties.

6. **Develop procedures to acknowledge all requests for feedback (i.e., followup visits or status reports).**

OSHA concurs with this recommendation and will implement it. We note that currently our operational goal is to respond to such requests within 3 working days. In addition, the directorate that administers the NRTL Program maintains a tracking system for tasks, projects, and other assignments. Pending NRTL applications are tracked under this system. OSHA has controls in place that are consistent with this recommendation, but we will augment them to more fully comply with the intent of this recommendation.