

October 27, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0084

Ms. Linda Gasch
Owner / President
Gasch Printing, LLC
9090 Junction Drive
Annapolis, MD 20701

Dear Ms. Gasch:

This is in response to the appeal that you filed on behalf of your firm, Gasch Printing, LLC. We have carefully reviewed the material from the Maryland Department of Transportation ("MDOT") as well as information you provided. We have concluded that the denial of your firm's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial record evidence.

Your appeal is denied based upon our determination that substantial evidence supports MDOT's conclusion that you do not enjoy the customary incidents of ownership and share in the risks and profits commensurate with your ownership interests as required by the Department's Regulation.

Your appeal is also denied based upon our determination that substantial evidence supports MDOT's conclusion that you do not possess actual control of Gasch Printing as required by the Department's Regulation.

The specific reasons for the denial of your appeal include the following:

CUSTOMARY INCIDENTS OF OWNERSHIP

The Regulation at §26.69(c) provides in part, that the disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

According to the record, you and your husband, Douglas B. Gasch, a non-disadvantaged individual and Vice President, are the 51% and 49% owners, respectively. Gasch Printing, a

firm which provides offset, typesetting, and binding printing services, was first incorporated in 1993 and registered as an LLC in 2003.

MDOT determined that you do not enjoy the customary incidents of ownership of the firm because you receive less remuneration than other participants in the firm. A firm's president generally receives greater compensation than the firm's employees, regardless of experience and skill level. State Unemployment (SUTA) reports indicate that non-disadvantaged individuals such as Douglas E. Gasch, Michael Hanson, and Anthony Terry received higher compensation than you for quarters ending September 30, 2002, December 31, 2002, March 31, 2003, and June 30, 2003. You alleged in your appeal letter that you receive a small salary from Gasch Printing, LLC as President and owner of the business; and are paid a monthly fee for the use of the equipment that you own. You further alleged that the SUTA reports do not reflect the compensation you receive from proceeds, dividends, or billings from the firm.

The Regulation at §26.69(c) requires that the disadvantaged owner enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests. While you may receive remuneration in other ways besides the salary reported on SUTA reports, you have not provided supportive documentation that your compensation exceeds that which is earned by other non-disadvantaged individuals. Substantial evidence thus supports MDOT's conclusion.

CONTROL

The Regulation at §26.71(d) requires in part, that the disadvantaged owner 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.

The Regulation at §26.71(e) requires that the disadvantaged owner possess the power to control day-to-day and major decisions of their firms in critical matters. Non-disadvantaged persons may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

The Regulation §26.71(f) states in part that a disadvantaged owner may delegate various areas of the management, policy making, or daily operations of the firm to other participants in the firm, regardless of whether these participants are disadvantaged individuals. Such delegations of authority must be revocable, and the disadvantaged owner must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the disadvantaged owner in the firm's overall affairs must be such that the recipient can reasonably conclude that the disadvantaged owner actually exercises control over the firm's operations, management, and policy.

The Regulation §26.71(g) states in part, that the 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 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 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.

1. MDOT determined that you are responsible for managing the administrative work of the firm, business development, contract negotiating, and sales. Your résumé indicates that you worked in the area of accounting and bookkeeping before starting the firm with your husband. You indicated in your résumé:

While printing was not my choice of careers, I became very familiar with the day to day operations of an offset print shop. Since that time, I have been responsible for the administrative management of the company, payroll, accounts payable, accounts receivable, sales and am involved in all the fiscal and managerial decisions of the company.

According to MDOT, you reported that in addition to you and your husband, the company employs a pressman, a binder, and your son, Douglas E. Gasch, also a non-disadvantaged individual. Douglas E. Gasch is responsible for bidding, estimating, sales, and customer satisfaction. Your husband Mr. Douglas B. Gasch supervises job assignments. MDOT determined that he acts as a consultant and mentor to you and Douglas E. Gasch, by giving advice and directions. According to his résumé, he was a pressman for Craftsman Press and Vitro Labs, and a Plant Manager for Robert J. Brady Company. He also started his own printing company in 1982.

The following exchange took place at a December 3, 2003, hearing held by MDOT to evaluate the firm's eligibility for the DBE program:

Mrs. Gasch: Offset printing, I personally cannot run a press. But I've been involved with the printing ever since my husband started it back in 1983 and have been involved in all aspects of the printings. Every other aspect of the printing, I have actually done as far as preparing the work, . . . doing the stripping, making plates, doing film, and know how the press works, but I don't run the press. I also am involved in sales with customers and I do all the administrative work and all that. But as far as actual printing, I do not run the press. But I don't have to. That's why I have people that work for me that can do that.

Chairman Smith: Who actually runs the press?

Mrs. Gasch: Right now, Anthony Terry

Chairman Smith: And who supervises Mr. Terry?

Mrs. Gasch: He's supervised mostly by Doug, my son Doug, and I oversee all the jobs when they go out. I know what my customer wants and I look at the jobs. . . .

Chairman Smith: So your son supervises the - -

Mrs. Gasch: The production.

Chairman Smith: And you perform most of the administrative work?

Mrs. Gasch: Mostly the administrative work, but I oversee - I do the hiring. I do the overseeing what goes on in the back. I oversee the customers, all that --- except for the main taxes that the accountant would take care of, I do all the quarterly reports and all the payroll and all that . . .

Chairman Smith: What kind of equipment do you own?

Mrs. Gasch: We have a Harris press [and] a Heidelberg GTO. The bigger press will take 11 by 17 paper and we can run four of them up on it, like if you're doing booklets, and then that way it can be folded and stitched together and then cut, trimmed, and saddle stitched. Saddle stitch is where it's stapled, whereas if you have a book, it's called perfect binding. We don't do perfect binding but we do saddle stitching. We also do spiral binding as well. That's booklets.

Chairman Smith: And here again, you don't operate any of the equipment, is that correct?

Mrs. Gasch: Well, yes I can. I can do the bindery equipment. I can do like, the collators. I can do the folders. I can do the stitcher, the numberer, the drill. We have a drill, the cutter, the plate makers, and [a] light table. Everything but the press. I just don't like to get my hands all inky.

Chairman Smith: What does your husband do for the company?

Mrs. Gasch: Mostly he's a consultant . He's kind of retiring . . But he comes in occasionally and any time we need him for . . . questions, we can - - because he has a lot of the printing experience. He knows the presses real well. But he doesn't run them anymore.

Chairman Smith: Does your husband or your son do any of the hiring, and firing, share that with you?

Mrs. Gasch: We always consult. We're such a small company that we definitely consult. . . But then I kind of have the final say.

MDOT concluded that Mr. Douglas B. Gasch and Douglas E. Gasch possess the technical competence in the printing operations and that given your limited technical experience in the industry, are dependent upon them. While a family run business could be certified as a DBE, the disadvantaged business owner must meet his or her burden in demonstrating that they control the firm. It is unclear from the record the exact level of your involvement or the involvement of the other participants in the firm, and whether you in fact control its operations, management, and policy within the meaning of the Regulation §26.71(f).

2. The record evidence indicates that the firm has a business account wherein both Mr. Douglas B. Gasch, and Douglas E. Gasch share signature authority with you. There appears to be only one signature that is needed on the checks. Although you alleged on page 2 of your rebuttal letter that you sign 99 percent of the checks for the firm, you stated that other individuals have signature authority if you are unavailable or in cases of emergency. Even though you alleged that they are family members and trusted employees, there is still the possibility that purchases may be made without your approval. The ability therefore, of non-disadvantaged individuals, incurring liability for the firm weakens your control of the firm and does not conform to the Requirements of the Regulation.

Substantial record evidence thus supports MDOT's conclusion that you do not possess actual control of the firm within the meaning of the Department's Regulation.

In summary, the information provided cumulatively supports a conclusion that Gasch Printing does not meet the criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on MDOT's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: MDOT