May 20, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 04-0097

Mr. S. Leo Arnold, Esquire
Law Offices of Ashley, Ashley & Arnold
P.O. Box H
322 Church Avenue
Dyersburg, TN 38025-2008

Dear Mr. Arnold:

This is in response to the appeal that you filed on behalf of your client, Quinn Contracting Inc. (Quinn Contracting). We have carefully reviewed the material from the Mississippi Department of Transportation (MissDOT) as well as that submitted by you and have concluded that the denial of Quinn Contracting's certification as an eligible DBE under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon our determination that substantial record evidence supports MissDOT's conclusion that control by the disadvantaged owner, is not real, substantial and continuing as required by the Regulation.

How are burdens of proof allocated in the certification process? The Regulation provides that firms seeking DBE certification have the burden of demonstrating to the recipient that they meet the requirements of the regulation for group membership, individual disadvantage, business size, ownership and control by a preponderance of the evidence (more likely than not). In reviewing all of the facts of record, this office has concluded that Quinn Contracting has failed to meet its burden by a preponderance of the evidence with regard to whether or not the firm meets the requirements of 49 CFR Part 26.

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

The record evidence indicates that Janet Quinn is the 60% owner and President of Quinn Contracting. The firm has three officers including her husband, David Quinn, II who is the 40% owner and Secretary and her son, David Quinn, III, who is the Vice President. According to the record Quinn Contracting was established in September 1991 as a corporation by Janet and David Quinn, II. Quinn Contracting is a construction company.

The Regulation at §26.71(e) requires that "Individuals who are not socially and economically disadvantaged 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 at §26.71(g) requires a disadvantaged owner to have technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. The disadvantaged owner is 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 owner 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.

Under the Regulation §26.71(h), if state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

Under the Regulation §26.71 (k)(2) states, "If you cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities."

We have also carefully considered the disadvantaged owner's background with respect to her ability to control this firm. The Department however, agrees that, the disadvantaged owner has a grasp of the management and administrative functions of the firm by virtue of the many years spent at Quinn Contracting. However, no record information can be found to indicate whether the disadvantaged owner has the intricate knowledge of construction or management of construction projects, the firm's main line of work. The record evidence contains a statement of Mrs. Quinn's daily duties which includes hiring, bookkeeping, quality control, accounts receivable, accounts payable, payroll, invoicing and general office work. Her responsibilities appear to be primarily administrative and clerical in nature is unrelated to the performance or supervision of the technical aspects of construction activities conducted by the firm. Further, the

record does not indicate that the disadvantaged owner had any prior experience in the construction field before starting Quinn Contracting in 1991. According to the record, prior to starting Quinn Contracting, the disadvantaged owner worked for [redacted] for 19 years until retirement.

The regulation requires that DBE owners possess the requisite skills, which enable them to intelligently and critically evaluate technical information presented to them by other participants in the firm's activities. The record evidence clearly establishes that the disadvantaged owner does not meet this requirement. Therefore, we agree with the MissDOT that the disadvantaged owner does not possess the power to direct or cause the direction of the management and policies of the firm.

The record evidence reveals that the individuals associated with this firm who possesses the ability to control the day-to-day activities of a construction business is Mrs. Quinn's non-disadvantaged husband, David Quinn, II and her son David Quinn, III also a non-disadvantaged individual. Mr. David Quinn, II is responsible for the critical activities of this business such as field supervision, quality control, safety, estimating and bidding). According to the MissDOT's January 6, 2004, site visit questionnaire and other documents contained in the record, prior to starting the firm, he worked for a rubber manufacturing company. The record further reveals that Mr. Quinn is also the qualifying individual for the firm's contractor's license.

The record indicates that the disadvantaged owner's son David is responsible for quality control, safety, super, reader, and equipment operation. He also holds the license required to operate the equipment.

The Department has determined that David Quinn, the non-disadvantaged owner, is disproportionately responsible for control over Quinn Contracting's day-to-day operations in at least equal measure to the disadvantaged owner, and that his technical expertise is relied upon and for the critical day-to-day operations of the firm.

Specifically, the documents contained in the record reveal that, David Quinn, II has authority to make financial decisions and purchase major equipment. He also shares with the disadvantaged owner contract signature authority and the authority to hire and fire employees.

The record evidence indicates that the two owners share most of the administrative and technical activities of the firm; and, in fact operate much more as equal partners than as a business owned and controlled by a disadvantaged individual. The type of shared decision making contained in the record is not permissible under the Department's Regulation.

Your letter of rebuttal states,

> "While Mrs. Quinn does rely on other employees, including her husband David, for technical expertise, Mrs. Quinn does have significant experience and expertise in the company's business which is primarily excavation and soil preparation. Mrs. Quinn controls the day-to-day operations of the business and has over 15 years of experience in

> the contracting business. She reviews all proposals and subcontracts and exercises final authority on bid decisions."

While we realize that the disadvantaged owner may have contributed to the success of Quinn Contracting and may be involved in the day-to-day operations of the business, the fact remains that the record is void of any documentation that substantiates that Mrs. Quinn has the technical expertise and background to control day-to-day operations of a construction business.

The Department has carefully reviewed the entire record in this matter and has determined that David Quinn, II and David Quinn III, both non-disadvantaged individuals have the technical ability and expertise to control day-to-day activities of Quinn Contracting and are disproportionately responsible for the operation of the firm. This conclusion is supported by documents contained in the record such as Quinn Contracting's DBE application, MissDOT's on-site evaluation, hearing transcripts and other documents. Furthermore, Quinn Contracting appears at best to be a family-run business. It is important to note that, without the expertise of non-disadvantaged individuals, it is doubtful that the disadvantaged owner would be able to exercise control of the firm without input on substantive areas of the firm's operations. The MissDOT has presented clear and convincing evidence to substantiate its decision to deny DBE Certification to Quinn Contracting.

In summary, the information provided cumulatively supports a conclusion that Quinn Contracting 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 MissDOT's Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Original Signed By

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

cc: MissDOT