

September 10, 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Reference No.: 04-0100

Ms. Stephanie Loud  
Mountain West Barriers  
2742 Adams Avenue  
Ogden, UT 84403

Dear Ms. Loud:

This is in response to the appeal that you filed on behalf of your firm, Mountain West Barriers, Inc. (Mountain West Barriers). We have carefully reviewed the material from the Utah Department of Transportation (UDOT) as well as that submitted by you and have concluded that the denial of Mountain West Barrier'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 UDOT's conclusion that ownership and control by you, the disadvantaged owners, is not real, substantial and continuing as required by the Regulation.

Your appeal is denied based upon our determination that substantial evidence supports UDOT's conclusion that your contribution of capital to acquire your ownership interest in Mountain West Barriers was not real and substantial within the meaning of the Department's Regulation.

Your appeal is also denied based upon our determination that substantial record evidence supports UDOT's conclusion that Mountain West Barriers is not an independent business as required by the Department's Regulation.

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

**1) The Regulation at §26.69(c) provides in part, that contributions of capital or expertise by the disadvantaged owner to acquire an ownership interest in the participating DBE business be real and substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents.**

**Under the Regulation at §26.69(e), contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and**

**substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee.**

According to the record, you are the 40% owner and Vice President/General Manager of Mountain West Barriers, and LeeAnn Jackson, 60% owner is President CEO. The business was established in May 2002.

Based on the record, you, the disadvantaged owner, contributed sweat equity and made no contributions from your individually-owned assets and, therefore, did not make a substantial contribution to acquire your (40%) ownership interest in the firm as required by the Regulation. Further the record evidence reveals that LeeAnn Jackson, obtained her 60% ownership interest in Mountain West Barriers based on a check in the amount of \$1,550 made payable to Brad Jackson, her non-disadvantaged husband. The record reveals that the cancelled check provided as proof of capitalization was drawn on the joint checking account of LeeAnn Jackson and Brad Jackson.

You state in your rebuttal that:

“At our onsite interview, we were told that money coming from a joint account could not be used to start women owned business. The civil rights official told us that the regulation clearly stated this stipulation. Both LeeAnne and her husband are on all of their accounts for their own protection. We offered to send her further proof of her contributions in the form of LeeAnne’s check stubs. We were told that would not be necessary, the regulation was very clear that money used as a capital contribution can’t come from a joint account. No where in the regulation does it state this. We provided evidence that she personally wrote the check which became our capital contribution. It came from a [REDACTED] account which was primarily funded by LeeAnne’s employment. We submitted copies of checks written by LeeAnne into that account. The capital contribution was written to Brad Jackson who acting as the registered agent filed our articles of incorporation, and set up our corporate bank account. We have included with this letter LeeAnne’s W’2’s for several years as further proof that she has her own income.”

The Regulations at 26§26.69 (e) states:

“The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.”

The Department has carefully considered the statements contained in your letter of appeal, however, the regulation explicitly excludes contributions of capital which did not derive from the independent assets of the disadvantaged applicant owner. Since no evidence was provided to substantiate that funds used to acquire ownership interest derived from the disadvantaged

owner's individually owned resources, as required by the Regulation, we therefore must conclude that a real and substantial investment was not made.

Under the Regulation at §26.69(f)(1) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

- (1) The owner's expertise must be-
  - (i) In a specialized field;
  - (ii) Of outstanding quality;
  - (iii) In areas critical to the firm's operations;
  - (iv) Indispensable to the firm's potential success;
  - (v) Specific to the type of work the firm performs; and
  - (vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

Since the record is void of any clear documentation that substantiates the contribution of expertise and its value to the firm, we cannot consider it.

**2) 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.”**

According to the record, Mountain West Barriers is in the business of cement, ready mix and concrete barrier manufacturing. We have carefully considered your background and expertise as well as that of LeeAnn Jackson's with respect to your ability to control the day-to-day managerial and operational decisions of this type of business. Based on the record evidence, it does not appear that the two disadvantaged owners possess the experience in this type of business, beyond the administrative functions. According to your résumé and other documents contained in the record, prior to starting Mountain West Barriers, your experience appears to be in marketing. Specifically, you worked as a Senior LifeCare Program Manager for a non-profit program for low income senior citizens; you also worked in outside sales for the [REDACTED]. Further, the record evidence reveals that LeeAnne Jackson's profession is listed as an Underwriter and that she has a B.A. Degree in Geography and History. LeeAnne is employed full time with [REDACTED]. It is not clear from the record or the points you raised in your appeal letter that you actually possess the technical competence and experience in this type business. The regulation clearly requires DBE owners to 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 record reveals that Brad Jackson, the 60% owner's non-disadvantaged husband is the individual who has the technical ability and expertise to control the day-to-day activities of Mountain West Barriers and is disproportionately responsible for the operation of the firm by virtue of the fact that the required license is in his name and Chris Jackson. This conclusion is supported by documents contained in the record such as the DBE application, UDOT's on-site evaluation, and résumés of the individuals. Furthermore, Brad Jackson's resume reveals that he was the firm's Operations Manager, is the person relied upon to perform crucial activities of the firm such as project management, quality assurance and supervision of staff. It is important to note that, with out Brad Jackson's expertise and knowledge as well as the other non-disadvantaged individuals, it is doubtful that the two disadvantaged owners would be able to exercise control of the firm without the input of the non-disadvantaged individuals on substantive areas of the firm's operations.

While the record establishes that the disadvantaged owners play an important role in the business, it clearly establishes that Brad Jackson and other non-disadvantaged individuals, possess the expertise necessary to perform critical activities of Mountain West Barriers.

**3) Under the Regulation §26.71(j), In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other**

**business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.**

The record reveals that, LeeAnne Jackson is employed full-time with the [REDACTED] [REDACTED] as a Commercial Auto Underwriter. This Department has consistently held that in demonstrating control, the disadvantaged owner of a participating firm must devote substantial time and attention (during working hours) to the day-to-day operations of the business. If an individual is holding down another job that requires a full time commitment, or is involved in other outside business activities that prevent him/her from devoting full time and attention to the DBE firm, then that individual is obviously not in a good position to control the DBE business.

In your letter of rebuttal you stated, "As explained in the opening paragraph of our letter, LeeAnne Jackson the 60% owner does work full time outside of our business. She has been a major financial contributor and her financial obligations to our company do not allow her to quit her full time employment at the present time. She has a natural knack for finances, and controls all of our books and financial decisions. As soon as our company is able to grow large enough, she will be able to work full time here where her extensive managerial experience is a real asset." We do not believe that this type of absentee ownership meets the requirements of the Department's Regulation.

The Regulations at 26§26.71 (c) states:

"A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 26.69(j)(2).

The record evidence further reveals that the corporation's bylaws restrict the disadvantaged owner's ability to control the applicant firm. Article III of the bylaws state that: "Voting will be done with each member of the quorum having one equal vote. A quorum will consist of three voting members." The record reveals that there are four board members: Messrs. Jeff Jackson and Brad Jackson (both non-disadvantaged) and the two disadvantaged owners. This composition precludes the two female owners from making management decisions without the cooperation of at least one of the non-disadvantaged members. This arrangement is inconsistent with the control requirements of the Department's Regulation.

**4) The Regulation, 49 CFR Part 26.71(b) provides that “Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.”**

In the instant matter, the record evidence reveals that Mountain West Barriers is too dependent on JB Parsons Company, Great Western Excavation and Golden West Builders. These firms are much too closely interrelated for the following reasons: (a) Great Western Excavation and Golden West Builders are both owned by the Jackson family; (b) JB Parsons Company allows the applicant firm to use space at the South Weber Pit free of charge; (c) Chris Jackson, your non-disadvantaged brother, also serves as the Supervisor for Field/Production Operations in addition to his responsibilities with Great Western Excavation; (d) Mountain West Barriers leases employees and general labor from Great Western Excavation and, (e) Mountain West Builders is located in the same building as the other firms owned by the Jackson family. Specifically, you share space and office staff with Golden West Builders. A firm with the above stated dependencies does not meet the eligibility requirements of the Regulation.

In your rebuttal you state, “No where does it state that we can’t have office space in the same building as a family member, especially since they have no control or influence over the affairs of our company.”

The Regulation, 49 CFR Part 26.71(b)(1),(4) provides that:

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such area as personnel, facilities, equipment, financial and/or bonding support, and other resources.”

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.”

The Department has carefully reviewed the entire record as a whole in this matter. In our opinion, the disadvantaged owner has not met her burden of proof in establishing control of the firm. Mountain West Barriers at best appears to be a family-run business. The UDOT has presented clear and convincing evidence to substantiate its decision to deny DBE Certification to Mountain West Barriers. It appears to the Department that non-disadvantaged individuals are disproportionately responsible for the success of this business.

In summary, the information provided cumulatively supports a conclusion that Mountain West Barriers 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 UDOT’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: UDOT