

October 5, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0119

Ms. Dawn Barr
President
Barrier Construction, Inc.
5000 Belle Chase Drive
P.O. Box #8189
Bossier City, LA 71113

Dear Ms. Barr:

This is in response to the appeal that you filed on behalf of your firm, Barrier Construction, Inc. ("Barrier Construction"). We have carefully reviewed the material from the Louisiana Department of Transportation and Development ("LDOT&D") as well as the information you submitted, and have concluded that the denial of Barrier Construction's certification as an eligible DBE under criteria set forth in 49 C.F.R. Part 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon our determination that substantial record evidence supports LDOT&D's conclusion that your contribution of capital to acquire ownership interest in the firm was not real or substantial within the meaning of the Department's Regulation.

Your appeal is also denied based upon our determination that substantial record evidence supports LDOT&D's conclusion that you do not have actual control of Barrier Construction, Inc. as required by the Department's Regulation.

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

OWNERSHIP

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.

The record indicates that that Barrier Construction was formed in May 2002 by you and your husband, Bruce Barr, a non-disadvantaged individual, and 49% owner. The company began

operations in July 2003 and is operated from your home. According to the record, you capitalized the firm with a \$12,000.00 loan from your mother-in-law, ██████████, in February, 2003. A small business line of credit for \$125,000.00 was opened with ██████████ Bank. LDOT&D determined that the loan from ██████████ was repaid by the company and not by you individually. The record contains a check stub showing that Barrier Construction paid ██████████ \$12,500.00 on November 10, 2003.

In your rebuttal letter, you state:

The substantive facts are as follows: I never claimed to have made a contribution of capital to acquire ownership. What I did state was that all funds to start up the business were borrowed funds by the corporation and paid back by the Corporation.

This is a newly formed business and neither owner made a capital investment. No Corporate law in Louisiana requires capital infusion into a newly formed corporation. There was an initial loan to the Corporation in the amount of \$12,000.00 . . . , a Corporate Line of Credit, . . . and numerous open credit accounts with vendors of which I conduct trade for materials and other services. My investment contribution is merely "sweat equity" and debt risk.

[The] Federal Register [Vol. 64] February 2, 1999 . . . Page 5119 [states]: *Also, for purposes of ownership, all assets are created equal. If the money that one invests in a company is really one's own, it does not matter whether it comes from the sweat of one's brow, a bank loan, a gift or inheritance, or hitting the lottery. As long as there are sufficient safeguards in place to protect against fronts . . . the origin of the assets is unimportant.* Federal Regulation 49 CFR §26.69(e) states in part, "*The contribution of capital expertise by the socially and economically disadvantaged owner to acquire their ownership interests must be real and substantial*".

My contribution of "sweat equity" has been real and substantial, and my expertise is far beyond "sufficient" to demonstrate my control in this firm.

LDOT&D determined (and you confirmed above), that you did not make an actual contribution of capital to the firm, but rather relied upon loan proceeds to acquire your ownership interest. Your contribution of "sweat equity" does not conform to the Regulation which requires you to make a real, substantial, and continuing contribution to acquire your business. Furthermore, a disadvantaged owner must contribute actual capital or experience to gain your ownership interest and assumption of debt risk is not considered sufficient. If experience is relied upon to substantiate your ownership interest, it must be clearly documented in the firm's records. According to the Regulation §26.69(f), the owner's expertise must be 1) in a specialized field, 2) of outstanding quality, 3) in areas critical to the firm's operations, 4) indispensable to the firm's potential success, 5) specific to the type of work the firm performs, and 6) documented in the records of the firm. In addition, the Regulation §26.69(f) requires that the firm's records clearly show the contribution of expertise and its value to the firm; and the individual whose expertise is relied upon must have a significant financial investment in the firm. Your contribution of

expertise is not reflected in the record.

The Department notes here that the Federal Register portions you cite represent discussion and rationale supporting the Regulation which became effective in March 1999. Although you correctly cite the Federal Register in your rebuttal letter and may have contributed “sweat equity” to the firm, that does not equate to contributing “sweat equity” to acquire the assets used to capitalize the firm in such a way as to satisfy §26.69(e). The Department therefore, agrees with LDOT&D’s determination that you have not met the requirements of the Regulation.

ACTUAL CONTROL

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) 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 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.

The record indicates that Barrier Construction primarily installs fencing, highway guardrails, signs, and road markers. LDOT&D determined that you disproportionately depend on your husband, Bruce Barr, a non-disadvantaged individual, for his knowledge and background expertise, which is necessary to control the technical aspects of the firm’s operations.

Bruce Barr serves as the firm’s Secretary and Treasurer and acts as project manager on the firm’s jobs. His résumé indicates he has been in the construction industry for 27 years. Between 1976

and 2003, he was responsible for all construction operations for [REDACTED] before starting Barrier Construction. His job duties at [REDACTED] included contracting, project management, estimating/bidding, scheduling, environmental and safety regulations, employer labor obligations, and financial management.

In contrast, your experience appears to have been in the banking industry. From 1990 to 1993, you worked for [REDACTED]. Between 1993 and 2003, you worked for [REDACTED] and at the same time (from 1994-1996), worked as an office manager for [REDACTED]. Your résumé indicates that while employed with [REDACTED], you were responsible for all office operations. You also prepared estimates and bids for project managers, payroll, workman's compensation; and handled safety administration and OSHA regulation matters, accounts receivable and payable, and deposit accounts. You hold a paralegal certificate from [REDACTED] and completed various courses on banking and negotiable instruments.

In addition, it appears that both you and Bruce Barr share job duties such as selecting jobs and estimating and bidding. LDOT&D's on-site review indicates that both you and Bruce Barr are able to sign checks drawn on the firm's checking account with [REDACTED], and share in the job of ordering materials. Bruce is responsible for scheduling jobs and, according to your February 2004 DBE application; he is the firm's field production operations supervisor. The application also indicates that both of you perform estimating and bidding, negotiate and execute contracts, purchase major equipment, and are authorized to make financial transactions.

You state in your rebuttal letter:

I do have sufficient experience and technical knowledge to control the daily operations of Barrier Construction. I have been doing so for the past year since operations began in July, 2003. Since my marriage to Bruce Barr . . . in 1986 (18 years), I have been "exposed" to this line of work. For many years, I have assisted him with estimating and preparing bids, and submitting take-offs to suppliers for material quotes. . . .

I am the qualifying party on Barrier Construction's contracting license. I took the Business and Law exam, and although there are no written exams for the specialty items I am licensed to perform and contract, I was required by the licensing board to participate in oral interviews regarding the specialty items. . . . In preparing for the exam and oral interviews, I studied Business and Project Management for Contractors - General Contractors Edition, ATSSA Guardrail Installation Training Course, ATSSA Manual on Uniform Traffic Control Devices, as well as, Sections 704 and 705 of the Louisiana Standard Specifications for Road and Bridges by DOTD. My contribution of the license is essential to the operation of this firm. My husband is not and never has been licensed to contract.

I am not disproportionately dependant upon my husband's expertise and knowledge. In fact, I possess as much technical knowledge as he, and more

managerial expertise than he. My background in commercial banking is an asset to managing this firm. Stated simply, I can and do run this company from a contractual, technical and business aspect. I can and do intelligently and critically evaluate information from my husband, other sources, and data that help me in making independent decisions in operating this firm.

The fact that the non-disadvantaged owner is authorized to perform certain functions of operat[ion] such as signing checks, estimating, hiring or firing, does not constitute power to control. His main function is getting the project done. He shares in the responsibility of supervising laborers who perform the installation and construction, bidding, and estimating. The balance of responsibility lies with [me]. I am not disproportionately dependent on him. I ultimately make all final decisions.

My expertise is not limited to office management, administration and bookkeeping. I have demonstrated my technological knowledge of the principal business activities by obtaining the license to contract. I am the officer of the corporation who reviews and executes contracts. I decide what projects to bid, consider profitability and scheduling. I control the accounts of the firm. I analyze and make decisions regarding insurance, payroll, financing and taxes.

While you may possess an understanding of the firm's activities and can handle the firm's finances, there is no indication that you have specific experience installing fencing, highway guardrails, signs, and road markers. You indicate that you are the qualifying party for the firm's license; however LDOT&D's on-site certification report states that only the Business Law test is required for this license. Furthermore, based on the record evidence, it does not appear that Barrier Construction would be able to perform this work without the input and participation of your husband, Bruce Barr. He possesses many years experience directly related to the firm's primary operations and supervises the firm's field operations.

OTHER ISSUES

1. In your rebuttal letter, you alleged that LDOT&D improperly evaluated your application for DBE certification. You stated:

I do not feel that all of the evidence submitted in my application was considered in the review process; and the on-site review was vague and inconclusive in regard to the questions asked during this process regarding determination of my control and ownership.

Under the Department's Regulation §26.61(a), the applicant firm seeking certification bears the burden of demonstrating its eligibility for the DBE program. Recipients are required under the Regulation §26.83 to perform various tasks before determining whether to certify a firm. These include performing an on-site review, interviewing the officers of the firm and reviewing their résumés, and analyzing stock ownership. According to the record, LDOT&D conducted its site-

visit on April 27, 2004, and the DBE on-site questionnaire used to record your responses is contained in the file. The questions asked appear appropriate in terms of scope and substance and were consistent with the requirements of the Regulation.

2. The record contains a letter from you dated June 9, 2004 in which you requested that LDOT&D provide you with a verbatim record of the hearing on which its DBE certification denial of Barrier Construction was based. On June 15, 2004, LDOT&D responded in writing to you:

. . . [T]he information used to reach this decision was information that you provided our office during the application process. The only other documents in your file are the on-site review questionnaire and the on-site review report, both of which were faxed to you on June 2, 2004. . . . [T]here was no hearing conducted to determine your eligibility. There is a Certification Review Team meeting in which each member reviews your file, however, there are no formal records or minutes taken. Therefore, there is no transcript available.

In a July 19, 2004, letter to the Department you indicated:

According to [LDOT&D] . . . , [its] decision was based on information I provided during the application process, and the on-site review report. . . . [T]he letter [states that] there is a Certification Review Team meeting in which each member reviews the file, however, I was given no opportunity to respond to the discrepancies or the recommendation prior to, or during the review meeting. [It] also states that there was no hearing conducted to determine my eligibility, and there were no formal records or minutes taken. Therefore, there is no transcript available. I don't feel that this was a fair or proper procedure according to Due Process requirements.

Under the Regulation §26.61 recipients must consider the entire records as a whole. The Department's Regulation does not require recipients to afford you an opportunity to respond to discrepancies or recommendations prior to or during a meeting to determine your firm's eligibility. For an applicant firm not already certified, a hearing to determine DBE eligibility is not required and formal records or minutes of a DBE Committee's decision need not be written. Recipients must however, provide you with a written explanation of the reasons for denying your firm certification under the Regulation §26.86. In this instance, LDOT&D complied with the Regulation.

3. You reference in your rebuttal letter the case Jack Wood Construction Co., Inc. v. U.S. Department of Transportation, 12 F. Supp.2d 25 (1998). You state:

[That decision] overturned [the Department's] certification appeal decision that upheld the denial of certification based on lack of control. The court, reading existing [49 CFR] Part 23, said that a non-disadvantaged individual who was an employee, but not an owner of a firm could disproportionately control the affairs of a firm without making it ineligible. The court also said that the existing rule

language did not make it necessary for a disadvantaged owner to have both technical and managerial competence to control a firm. [49 CFR] Part 26 solves both problems that the court found to exist in Part 23's control provisions (see §26.71 (e)-(g). However, in the present case "Barrier," I, the disadvantaged owner, have both the technical and managerial competence to control this firm.

The Department's Regulation §26.71, enacted after the Jack Woods decision requires the disadvantaged owner to have both managerial and technical competence to control an applicant firm. For the reasons stated above, we agree with LDOT&D's decision that you lack the requisite control under the Regulation.

In summary, the information provided cumulatively supports a conclusion that Barrier Construction, Inc. does not meet the criteria as required for DBE certification under 49 C.F.R. Part 26. The company is, therefore, ineligible to participate as a DBE on LDOT&D'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: LDOT&D
Honorable John Breaux, U.S. Senate
Honorable Jim McCrey, U.S. House of Representatives