

December 17, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number.: 04-0137

Lyell H. Champagne, Esq.
The Champagne Law Firm
The Frisco Building
906 Olive Street, Suite #1110
St. Louis, MO 63101

Dear Attorney Champagne:

This is in response to the appeal that you filed on behalf of your client, Park-Mark, Inc (“Park-Mark”). We have carefully reviewed the material from the Lambert-St. Louis International Airport (“STLIA”) as well as the information you provided. As a result of our review and analysis, we have concluded that the denial of your client’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 STLIA’s conclusion that the disadvantaged business owner, Ms. Bertha Toman, does not possess the requisite level of control over Park-Mark’s day-to-day activities as required by the Department’s Regulation.

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

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 polices of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

Under the Regulation at §26.71(e) 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 at §26.71(i), you may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

The record indicates that Ms. Bertha Toman is the sole owner of Park-Mark, a pavement marking, concrete surface protection, and waterproofing firm established in 1958. On March 9, 2004, STLIA advised the firm that it was not eligible to participate in the DBE program after determining that Ms. Toman does not independently control the day-to-day operations of the company, does not possess knowledge and expertise necessary to manage the firm, and must rely upon non-minority individuals to assist in the firm's direction and operation. The firm appealed and a hearing was held by the City of St. Louis Certification Appeals Board ("Appeals Board") on May 20, 2004 which upheld STLIA's decision on June 3, 2004.

STLIA determined that Ms. Toman does not possess control of Park-Mark since 1) her experience in the firm's primary line of work has been limited to administrative and office management; 2) because she relies upon others to handle the day-to-day operations of the business, 3) her remuneration is lower than other individuals in the firm, and 4) she works at the firm part-time.

1) Ms. Toman's résumé indicates that she has worked for the company since 1958. She "continues to manage the overall operations of the company along with her management team. Her duties include final review and approval of all key company decisions relating to finance, administration, contracts, and personnel." According to the firm's DBE application, Ms. Toman co-manages the firm's financial decisions, negotiating and contracting, hiring/firing, office

management, and purchasing of major equipment with Ms. Gay VanDover, and Rick Toman, a non-disadvantaged individual. STLIA's site visit report indicates that a former employee of (which later became Park-Mark); taught Ms. Toman's husband the striping equipment business.

The site visit report indicates that Mrs. Toman was responsible for the administrative duties processing accounts payable/receivables, payroll, and general office duties; and that prior to starting the firm she had no previous experience in the construction industry.

According to the record, others in the firm appear to control various aspects of the business. Ms. Gay VanDover, the firm's Vice President, serves as Ms. Toman's chief of staff. According to her résumé, she manages the various administrative functions of the company, including accounting, cash flow management decisions, risk management, and human resources. At the time of the firm's application, Ms. VanDover expected to receive her Bachelor of Science degree in accounting from . Mr. Rick Toman, Bertha Toman's son, is the firm's Vice President for Marketing and "provides support management responsibilities relating to marketing and customer relations. He has worked for the company since 1977 and, according to STLIA's site visit report, signs the firm's payroll which is then stamped with Ms. Toman's initials and accompanied by Gay VanDover's initials. Mr. Harvey Shafferkotter, a non-disadvantaged individual, is responsible for field operations and equipment maintenance issues. Ms. Jane Calvin, Administrator for Roadwork Estimating and Projects, prepares all bid estimates for review and final pricing, and prepares and processes roadwork invoices and contract paperwork. Ms. Jackie Toman, Operations Manager, is Ms. Toman's granddaughter, and is responsible for day-to-day project scheduling coordination and works with the general contractor project supervisors and state engineers to facilitate job setup and completion.

Additional details of the employee's job duties are contained in a November 6, 2003, letter from the firm to STLIA, which states:

We would like to announce several exciting management changes that we feel will set the stage for the future of Park Mark's involvement with your program. Gay VanDover has been named Vice President, Administration. Gay has been with the company for over 12 years and continues to become more important in the day-to-day administrative management functions of Park-Mark. She has front line responsibility for a myriad of key management activities including financial accounting, cash flow, risk management, EEO, safety, and personnel.

Jackie Toman has been officially named Operations Manager, Roadwork Division. Jackie brings previous work experience in the field for Park-Mark to this operations management position. She is responsible for coordinating and managing the direct labor, materials, and equipment components of our work to the job site for project completion. As anyone in construction knows, this role is one of the most important positions in a small specialized contracting company like Park-Mark.

Sue LaBeau has been named Assistant Comptroller. She assists Gay with the day-to-day cash flow management activities of Park-Mark. She is also in charge of preparing and printing the field payroll and related union checks every week.

. . . We have expanded our Board of Directors at Park-Mark to include Gay VanDover and our corporate attorney, Tom Bearden.

According to STLIA's site visit report:

[Ms. Van Dover] indicated that Rick Toman is responsible for Requests for Proposals and Jane Calvin assists him in conducting "take-offs" that are generated on a manual system and finalized on Excel spreadsheets. Rick Toman has 25 years of experience in the construction industry in this related capacity. . . . Rick Toman intervened and indicated that he handles client complaints and pricing issues. . . . Jackie Toman works directly in the field . . . Ms. Toman iterated that she supervises office personnel while Jackie Toman is responsible for field personnel. Hiring and firing of personnel is a shared responsibility between Ms. Toman, Rick Toman, and Gay VanDover. However, Ms. Toman indicated that she has the ultimate decision.

The February 24, 2004, minutes from the Certification Review Committee (CRC) meeting states:

[Bertha Toman] advised that her name is on everything around the office. She told the committee that she handled all aspects of the business in the beginning but as business grew she had to hire people to help. Bertha Toman used Monsanto as an example by saying that when she worked there the owner never signed a check. She emphasized that she determines what goes on in the company. Bertha Toman informed the Committee that for 47 years the company has been a part of her life. She stated that she knows everything that is going on; does not spend time in the office now; makes company decisions; has knowledge about projects and equipment purchases; and hires and fires. Bertha Toman stated that she has been involved with the business in a managerial position. Bertha Toman told the committee that her son does sales but the firm does not go after sales. She added that the firm bids on work. She emphasized that he is not the controlling party. She advised that Gay VanDover, Vice President, is very knowledgeable about the company. Bertha Toman told the committee that she is in on hiring interviews with Gay and also collaborates with Gay. Bertha Toman expressed her concern that people want to think she does not have control of her firm because she is . . . Bertha advised the committee that she plans to retire when she turns , if health permits. . . . CRC member asked what skill set was required to be a stripper. Bertha Toman admitted that she has never run a stripper and been a driver in any of the trucks. She stated that she has been schooled in clerical and secretarial work.

2) According to a December 11, 2003 note from the firm's accountant, , Ms. Toman was treated as an independent contractor by the firm for tax considerations. Mr. indicated that during 2003, Ms. Toman again became a W-2 employee. According to STLIA, as of September 30, October 30 and November 30, 2003, Ms. Toman received , , and respectively in salary; while Richard Toman received and in compensation during these same periods. Ms. Toman's April 5, 2004 response to STLIA, states:

. . . You can't measure an owner's control of the business just by looking at the salary, because many times the owner is the last one to take money out of the business. I've had many situations where, because of the cash flow, I paid my people before (or even more than) I got paid just to keep the business operating and growing.

3) You state in your rebuttal letter that:

Ms. Toman was asked in the hearing to approximate the number of hours she spent running Park-Mark. She stated that she spent as many hours as necessary, which was on average, about thirty hours a week. Based on this testimony, the STLIA wrongfully concluded that Ms. Toman does not devote sufficient time and attention to the affairs of the firm to control its daily business operation. The first and only time this was brought up was at the appeal of the initial denial. Neither Ms. Toman, nor her counsel was permitted to address this new reason for denying Park-Mark's certification. We can only assume that this conclusion was based on the erroneous conclusion that Ms. Toman would need to be working a 40-hour work week to devote sufficient time and attention to the affairs of the firm to control its daily business operation. Had Ms. Toman been given the opportunity, she could have testified that the 30 hours she averages does not include lunch hours, or breaks, or any other beneficial time that employees are typically given in an average 40 hour work week. The STLIA, without legal justification, and contrary to all the evidence presented, apparently decided that Ms. Toman's average of 6 hours a day, 5 days a week, was not sufficient time and attention to the affairs of the firm to control its activities. . . . Finally to conclude that a old company President who devotes at least 30 hours per week to running a company she has operated in the same business for 46 years, is "working part time in a full time business" flies in the face of the Regulation which requires only that one "devote sufficient time and attention to the affairs of a firm to control its daily business operation."

Your focus seems to be on Ms. Toman's work hours, however, STLIA's decision and the Department's Regulation address other aspects of control which you overlook. The Regulation §26.71(e) allows non-disadvantaged individuals to be involved in the firm as managers, or employees, but the non-disadvantaged individuals must not possess or exercise the power to control the firm, or be disproportionately responsible for the firm's operations. While Ms. Toman may have experience at the firm, record information reveals that non-owners in Park-Mark are relied upon to meet the critical areas of the firm's needs. The record indicates that others, including Gay VanDover, Rick Toman, Jackie Toman, Harvey Shaferkotter, and Jane Calvin, handle the majority of the firm's day-to-day activities, including those in the field. When Ms. Toman responded to STLIA's decision to deny DBE certification to Park-Mark on April 5, 2004, she stated:

. . . Basically, I manage the company by putting in charge people who I know from my experience and expertise can efficiently run the company without my having to get involved in all the day-to-day details. This allows me to focus on the major business issues . . .

Under the Regulation 26.71(d), the disadvantaged business owner must possess the power to direct or cause the direction of the firm's management and policies. With others in charge of areas relating to management, policy, and operations, Ms. Toman's control over the firm is limited at best. Although she has been involved in the business for many years, by her own admission, she has not operated the equipment nor is there any information in the file which indicates her knowledge of the technical aspects of the business.

Lastly, a firm's president generally receives greater compensation than the firm's employees, regardless of experience and skill level. It appears that your client received less remuneration than Mr. Toman. This is inconsistent with the Regulation at §26.69(i) which requires that the disadvantaged owner enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests.

Substantial record evidence thus supports STLIA's conclusion that Ms. Toman does not possess actual control of the firm within the meaning of the Department's Regulation.

OTHER ISSUES

1) In your August 31, 2004, rebuttal letter, you indicated that the firm was allotted a five minute presentation by counsel and Ms. Toman was questioned extensively by the Appeals Board at its May 20, 2004 hearing. According to the record, on June 3, 2004, STLIA informed the firm that the Appeals Board affirmed the decision that Park-Mark was ineligible. The letter states:

Ms. B.E. Toman does not devote sufficient time and attention to the affairs of the firm to control its daily business operation. According to Ms. Toman, her involvement with Park-Mark, Inc. is only on a part-time basis. . . . Without full-time involvement with Park-Mark, Inc., it appears that Ms. Toman does not meet the control requirements for certification. Park-Mark Inc., failed to meet the eligibility requirements of [the Regulation] §26.71(j).

You alleged that STLIA committed administrative error because it 1) based its denial on a new reason without providing Park-Mark notice of the reason or an opportunity to be heard on the reason; 2) did not provide prior notice that it was in violation of §26.71(j) of the Regulation and thus had no opportunity to rebut orally, or in writing, the sole alleged reason for its denial, and 3) forbade Park-Mark from introducing new evidence.

The fact that Ms. Toman may work part-time in the firm does not appear, as you allege to be a new justification for STLIA's denial. As stated above, Ms. Toman informed the committee that she "does not spend time in the office now." While the only point addressed by STLIA's June 3, 2004, letter dealt with her part-time status at the firm, the Appeals Board clearly affirmed STLIA's earlier decision which raised additional concerns regarding her control of the firm. It should be noted that recipients are not required to hold a hearing in making initial certification decisions. Although STLIA did not permit the firm to present new or additional documentation to the Certification Appeals Board without first showing that the information was not available, this is not inconsistent with the Department's Regulation. Under the Regulation §26.86(a), recipients need only provide a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason. Here, STLIA denied the firm

DBE certification in writing on March 9, 2004 and STLIA's June 3, 2004; letter noted the Appeals Board's concurrence with that decision.

2) You stated in your rebuttal letter that Mr. Jack Thomas of STLIA wrote the following to Ms. Toman on May 30, 2004:

Please accept my sincere apology for any and all statements made by my staff which implies that you do not "possesses the knowledge and expertise to independently manage the business of Park-Mark. I think we were in error in making that statement. . . . Park-Mark does personify excellence and we have been fortunate to have your firm as one of our subcontractors.

The record clearly indicates STLIA's decision and there is no document in the record wherein STLIA reversed its decision to deny Park-Mark DBE certification. While the language in Mr. Thomas' letter may contradict STLIA's ruling regarding Ms. Toman's control of the firm, the record does not support his May 30, 2004, position.

3) The Regulation at §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. According to STLIA's site visit report, Ms. Toman is the sole owner of _____, which the report states, is a labor shop flow through corporation, that provides shop labor to Park-Mark. STLIA's report indicates that there are no company revenues generated and that this firm is under a separate tax return. These circumstances raise questions concerning the firm's independence; however, since this was not part of STLIA's decision, the Department will not address the issue.

In summary, the information provided cumulatively supports a conclusion that Park-Mark, Inc. does not meet the eligibility criteria as required for DBE certification under 49 CFR Part 26. The company is, therefore, ineligible to participate as a DBE on STLIA'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: STLIA