

December 21, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 04-0146

Ms. Linda M. Mathias
Owner
L & M Contracting, LLC
P. O. Box 2751
Elkins, WV 26241

Dear Ms. Mathias:

This is in response to the appeal you filed on behalf of your firm, L & M Contracting, LLC (L & M). We have carefully reviewed the material from the West Virginia Department of Transportation (WVDOT) as well as that you submitted, and have concluded that the denial of L & M's certification as an eligible Disadvantaged Business Enterprise (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 WVDOT's conclusion that the contribution of capital or expertise to acquire ownership interest in the firm by the disadvantaged owner was not real, substantial and continuing.

The appeal is further denied based upon our determination that substantial record evidence supports WVDOT's conclusion that the socially and economically disadvantaged owners do not 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.

How are burdens of proof allocated in the certification process? The Regulation provides that firms seeking DBE certification have the burden of proof by demonstrating to the recipient, that they meet the requirements of the regulation for group members, individual disadvantage, business size, ownership, and control, by a preponderance of the evidence (more likely than not). In reviewing all facts of the record, this office has concluded that L & M failed to meet its burden, by a preponderance of the evidence, with regards to the contributions of capital and that

the social and economically disadvantaged owners do not 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 specific reason for the denial of your appeal is as follows:

The Regulation also provides that the contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The record evidence reveals that L & M's primary area of work is excavation, utilities, drainage, and misc. concrete. L& M was initially established on May 26, 2004 as a Limited Liability Partnership in the state of West Virginia by both yourself and Mary Beth Angotti. According to the record, you invested \$1,250. A canceled check # _____ written on the joint account of David F. Mathias/Linda M. Mathias in the amount of \$2,400.00 on _____ . A check was written in the amount of \$100 on the personal checking account of Mary Beth Angotti and _____. A check No. _____ in the amount of \$1,150.00 was a personal gift from _____, a non-disadvantaged individual, to Mary Beth Angotti. During the on-site review conducted July 2, 2004, Ms. Mathias stated "L & M Contracting does not own any real estate at this time, however the firm does share leased office space for L & M Office and The Angotti Law Office."

The Department's Regulation at §26.69(c), (e), (h) (1) (2) and (i) (1) (2) state:

- (c) **"The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. 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."**
- (e) **"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."**
- (h)(1) **"You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interest in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is –**

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of the firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that –

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.”

(I) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by the spouse with his or her own individual resources, provided that the spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse’s rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm’s application for DBE certification.

We agree with the WVDOT’s determination that the contribution of capital or expertise by the socially and economically disadvantaged owner to acquire her ownership interests was not real, substantial and continuing. Specifically, one of the Managing Partner’s contribution of capital can not be considered real, substantial and continuing, since it is a gift from a non-disadvantaged individual who is also involved in the firm. This is contrary to the intent of the Department’s DBE Regulation.

In your letter of rebuttal you state “In point numbers three, four and five, WVDOT addresses the initial capital contributions made by Ms. Angotti and Ms. Mathias as start-up funds for L & M Contracting, LLC. What the WVDOT fails to recognize is that any monies utilized from a checking account, by married parties, are marital and therefore are owned equally by the married parties. 49 CFR §26.69(I)(1) states that ‘when marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by laws of both the state in which either each spouse or the firm is domiciled.’ With regards to L & M Contracting, both spouses of Ms. Angotti and Ms. Mathias signed documents irrevocably denouncing any ownership interest in L & M Contracting, LLC.” We have reviewed the documents where both spouses irrevocably renounced and transferred all of their rights in the ownership interest in L & M. Although both spouses are not owners, they are involved in the business and are responsible for some critical functions of the business. This arrangement is contrary to the intent of the Department’s Regulation.

- 2) **§26.71(d) states “The socially and economically disadvantaged owners must 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.”**

§26.71(e) states “Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, officers, and/or directors. Such individuals must not, however, possess or be disproportionately responsible for the operation of the firm.”

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

§26.71(g) The socially and economically 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 socially and economically 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 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 socially and economically 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.”

According to the records, during the on-site review, you stated that you will manage and monitor administrative functions of the business while Ms. Angotti will manage the Personnel/HR/Legal areas for the company. You further stated that the responsibilities will vary; sign contracts, review and approve bids, meet with clients; hire, fire, obtain capital, and manage all day to day operations of their business. According to the WVDOT investigator, both owners maintain that while they do not have the expertise in the actual phases of construction, they feel that they will be able to hire those employees who do have the knowledge which will enable their company to perform the quality work desired. The interviewer stated that you informed him that you spend 10 hours per week on L & M business since L & M is still in the start-up stage. She spends approximately 20 hours per week with Grandview Testing and approximately 10 hours per week at _____, your husband’s company. Ms. Angotti states that she spends 20 hours per week at a minimum with L & M and 25-30 hours per week with her law practice.

The investigator inquired as to whether the husbands of the owners would be joining the firm and _____. The investigator stated that Ms. Angotti stated that the _____ are planning to quit their jobs when they become employees of L & M Contracting. This would not occur until the firm is up and running. It was also stated during the interview that _____ knew nothing about your _____ plans.

During the onsite review, it was determined that L & M shares the same telephone number with _____, a firm owned by David Mathias, your non-disadvantaged husband. Grandview Testing is also located at the same location as well as _____, the owner of the building.

Your letter of rebuttal states “The WVDOT, misstated 49 CFR in claiming that the individuals designated as being responsible for the bidding and estimating perform critical items of operation of the firm. Bidding and estimating are only two of the many responsibilities or critical items necessary for the operation of a construction company. The individual designated do not have the authority to negotiate or sign contracts for the company nor do they have the authority to sign checks, create policy or run the day to day operations of the firm. Ms. Angotti and Ms. Mathias are responsible for day to day operations of the company and have the ultimate decision-

making authority regarding all aspects of the daily operations of L & M Contracting, LLC. In fact, only Ms Angotti or Ms Mathias can bind L & M Contracting to a bid estimate as the estimate will require a signature of one of the owners.”

Your rebuttal further states that “Ms. Angotti and Ms. Mathias are both knowledgeable of all aspects of the business and have complete control of all elements of operation. WVDOT is inferring that Ms. Angotti and Ms. Mathias are not actually running the company and that bidding and estimating covers the entire extent of running a construction company. Whereas, in fact, Ms. Angotti and Ms. Mathias are the individuals who have the ability to intelligently and critically evaluate the information presented by other participants in the firm’s activities and to use this information to make independent decisions concerning L & M Contracting, LLC’s daily operations, management, and policy as required by 49 CFR §26.71(g).”

The DBE Certification Committee Meeting Minutes dated July 21, 2004 states the following:

Cooke: Who has the experience to actually go out on the site and actually be the supervisor for that particular project? For example curb and gutter or excavation, who has the expertise in that area to actually go out be the field supervisor and experience, what experience have you had to support that?

Angotti: We do not have that experience. But that does not mean we can not run a company. That’s where as officers, managing partners of the company, you hire people with knowledge to go out and run the jobs. Linda and I can not; right now we would have to find an individual with experience. It would not be Linda and it would not be myself, we do not have engineering backgrounds, we’ve not...Linda has more experience in terms of going out and looking at job sites. But no we can not...you can show us a set of plans, we know what that is, we may not know where it is, but we’re not going to be able to interpret it. That needs to be done by another individual. And as any smart CEO or manager of a company, you surround yourself with the people that are knowledgeable...our jobs, she’s the financial, I as personnel, is finding the right people that have the knowledge to go out and do that.

Mathias: The expertise and experience, we would have to find qualified people.

Mary Beth Angotti résumé states that she has a B. A. in Philosophy from _____ in May 1984; an M.A. in Education Administration in _____ in May 1986; and a J.D., from _____ in May, 1990. According to her résumé, she was a Solo Practitioner from July 1996 – present; September 1992- April 1993; June 1995-November 1995). She was an Adjunct Faculty at _____ . (Fall 2000- Spring 2003). She also supervised students in the practice of handling actual cases

including the areas of Domestic Relations, Social Security Disability, Bankruptcy and Property. A majority of her work experience is in the area of law.

Your résumé states that from 1998 – Present, you were an Office Manager for _____, where you were responsible for payroll duties: including processing weekly payroll and completing monthly and quarterly payroll reports. Accounts Payable duties include entering invoices into accounting system and paying invoices. You also have various office duties including answering phones, typing and filing. You were also a Loan Assistant from 1985 to 1998, where you assisted loan officers which includes taking loan applications and closing loans; processing loan documents; and assisting customers. We agree with WVDOT's determination that the socially and economically disadvantaged owners do not 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 as required by the Department's Regulation. Substantial record evidence supports this determination.

3) §26.71(j) state **“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.”** According to the record information, you spend 10 hours per week on L & M business and approximately 20 hours per week with Grandview Testing and approximately 10 hours per week at _____, your husband's company. Ms. Angotti states that she spends 20 hours per week at a minimum with L & M and 25-30 hours per week with her law practice. Substantial record evidence supports WVDOT's determination that the socially and economically disadvantaged owners do not devote sufficient time and attention to the affairs of firm in order to be considered as controlling its activities.

In summary, the information provided cumulatively supports a conclusion that L & M 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 WVDOT'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: WVDOT