

April 19, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 02-0257

Ms. Patricia A. Atherton
P.A. Atherton Construction, Inc.
57 Eichhorn Road
Spring Bay, IL 61611

Dear Ms. Atherton:

This is in response to the appeal that you filed on behalf of your firm, P.A. Atherton Construction, Inc., ("Atherton Construction"). We have carefully reviewed the material from the Illinois Department of Transportation ("IDOT") and have concluded that the denial of Atherton Construction's certification as an eligible DBE under criteria set forth in 49 CFR Part 26 ("the regulation") is justifiable.

Your appeal is denied based upon a determination that ownership and control by you, the disadvantaged owner, is not real, substantial and continuing as required by 49 CFR Part 26.69 and 26.71; and that you 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 major decisions on matters of management, policy and operations.

Your appeal is also denied based upon a determination that Atherton Construction is not an independent business as required by the regulation.

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

- 1) The regulation requires that disadvantaged owners of participating DBE firms possess the power to control day-to-day and major decisions of their firms in critical matters. The record evidence reveals that the individuals associated with this firm who possess the ability to control day-to-day activities of a construction business include Dwayne Atherton, your non-disadvantaged spouse; Louis Atherton, your non-disadvantaged brother-in-law; and Mindy Atherton, your non-owner, sister in-law. All of these individuals have many years of experience in the critical activities of the construction business (field supervision, bidding, estimating, etc.).

Dwayne Atherton has been in the construction industry since 1985, and is presently employed as a foreman for . He is a supervisor for the firm.

Louis Atherton has 35 years of experience in the construction industry. He is presently employed as a foreman for where his duties are piping, earth excavation and organizing work and people.

Mindy Atherton, serves as an officer for the firm. She has 10 years of experience as a laborer with and now works as a field/production supervisor for Atherton Construction.

All of the above individuals appear to possess the requisite expertise to critically analyze and independently use technical information supplied by subordinates. It also appears that they have the ability to control day-to-day and long range decisions of this business.

We have also carefully considered your background and expertise as they relate to your ability to control your firm, as required by the regulation. According to the application you submitted, you are solely responsible for financial decisions, estimating, contract signature authority and purchasing of equipment. The Department has carefully considered the record evidence with respect to your ability to run this business. While the record clearly shows that you are involved in this business, the record also reveals that your role with the firm appears to primarily be in an administrative capacity. Unlike the individuals identified above, you do not possess the requisite skills and experience that would enable you to control a firm engaged in aggregate bases & surfaces, bituminous paving, drainage, miscellaneous concrete, excavating & grading, and related construction services.

In your letter of rebuttal you stated that “I feel that because I am a manager, I am being reprimanded for my experience. The idea of this company was noted in my interview as being my sister-in-law’s, Mindy S. Atherton. She has 10 years experience in this type of work. We decided together that we would form this company. Along with Elisabeth Atherton, we formed this company with the intent of all three of us being owners. We are all officers of the Corporation. I also have experience in construction. My husband and I have owned our own construction business for many years. I have been involved hands on and as the manager.”

We agree with IDOT that your work history and background do not substantiate that you have the expertise or experience to control this firm.

2) The regulation also requires that participating DBE firms be independent businesses. In determining whether a potential DBE is an independent business, relationships with non-DBE firms and individuals must be carefully scrutinized. The record evidence reveals that Atherton Construction is overly dependent on . The two firms share employees, Mindy Atherton, Dwayne Atherton, and Louis Atherton, all of whom presently work for . The record reveals that you are, in fact, an absentee owner, by your own admission. At the time you submitted your certification application you were working full-time for the . The regulation specifically precludes this type of absentee ownership in the DBE Program. In

your letter of appeal, you stated that you resigned from the bank. However, this information was not available to IDOT at the time its decision was rendered.

Your letter of rebuttal stated that “I am currently the president of a small bank in the town which we live. During the interview with Lynn Roof from IDOT I disclosed that I would be resigning this position to pursue my new business.” You further stated “this refers to our employees. We had just started the business and all of our employees had been working for _____, Construction. This is inevitable because _____ had merged with all of the companies in the area and this is the only company most laborers in the area worked for.”

We agree with IDOT that there is a close association that exists between Atherton Construction and _____ because of the reliance of resources of an ineligible firm

Based on these findings, we have determined that Atherton Construction does not meet the requirements of the Department's Regulation 49 CFR Part 26.69 (a),(c),(e), and 26.71 (a),(b),(c),(d),(e),(f), (g), (j), and (k)(1), and (k)(2) which state, in part, as follows:

26.69 What rules govern determinations of ownership?

- (a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.
- (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. 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.

26.71 What rules govern determinations concerning control?

- (a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.
- (b) 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.

- (1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
 - (3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
 - (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.
- (c) 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).
- (d) 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.
- (1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (2) In a corporation, disadvantaged owners must control the board of directors.
- (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.
- (f) The socially and economically disadvantaged owners of the firm 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 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.

- (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 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 policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- (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.
- (k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.
- (2) 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.

- (m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

In summary, the information provided cumulatively supports a conclusion that Atherton Construction 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 IDOT 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: IDOT