

May 18, 2001

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No.: 01-0155

Ms. Kristy L. Whitton  
President  
Asphalt & Concrete Recycling, LLC  
4801 Wible Road  
Bakersfield, CA 93313

Dear Ms. Whitton:

This is in response to the appeal that you filed on behalf of your firm, We have carefully reviewed the material from the California Department of Transportation ("Caltrans") and have concluded that the denial of Asphalt & Concrete Recycling, LLC (A&CR'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 contributions of capital or expertise to acquire ownership interest by the disadvantaged owner was not real and substantial.

Your appeal is also 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.

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

1) The Regulation provides that contributions of capital or expertise by the disadvantaged owner to acquire ownership interest in the participating DBE business be real and substantial. The record evidence reveals that ownership in the business is as follows:

Kristy Whitton (disadvantaged)	30% ownership
Karen Whitton (disadvantaged)	30% ownership
Marty Whitton (non-disadvantaged)	40% ownership

You acquired your 30% ownership interest in this business by contributing \$10,000 (allegedly

cash that you owned) and \$20,000 that was gifted to you by Marty and Karen Whitton, your parents. Monies that were gifted to you by non-disadvantaged individuals such as Marty Whitton, your father, are not considered to be real and substantial contributions of capital. The record further reveals that Mr. Whitton loaned the firm \$135,000 to purchase equipment for the business. A promissory note in the amount of \$135,000 was issued by A&CR to Mr. Whitton as collateral for this loan.

The regulation states that it must be presumed, for purposes of determining ownership, that all interests in a business or other assets obtained by a socially and economically disadvantaged individual, as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm, is not held by the socially and economically disadvantaged individual if the non-disadvantaged individual or non-DBE firm is (1) involved in the same firm for which the individual is seeking certification, (2) involved in the same or a similar line of business, or (3) engaged in an on-going business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification. Contrary to statements contained in your letter of appeal to this office, the manner in which this business was capitalized, clearly does not meet the requirements of the regulation. We agree with Caltran's decision regarding this issue.

2) The Regulation further 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 individual associated with this firm who possesses the ability to control day-to-day activities of A&CR is clearly Marty Whitton. Mr. Whitton, as you acknowledged in the submitted duty statement and during the on-site interview on May 25, 2000, has many years of experience in the critical activities of this business (field supervision, bidding, estimating, etc.). You also stated that Mr. Whitton makes the final decisions on what jobs the company will undertake and provides guidance to you on how to operate the business. You also stated that you, your mother, and father were all on even ground with respect to controlling this business. Although you subsequently sought to clarify these statements, the record evidence clearly indicates that Mr. Whitton does, in fact, play a major role in the day-to-day management and control of the business.

The Department has also carefully considered both your background and experience as well as your mother's with respect to the ability to control critical activities of this business. The record clearly establishes that your background and that of Karen Whitton have involved experiences that are primarily clerical and administrative in nature and do not indicate that either of the female owners possess the technical ability to critically analyze and independently use technical information supplied by others. It is clear from the record that Marty Whitton exercises control over the day-to-day operations of the firm in at least equal measure to you and your mother. In fact, you stated during the on-site interview that you were new to the business and relied on the guidance of Marty Whitton.

3) The record evidence also reveals that A&CR is not an independent business for the following reasons: (a) Marty Whitton, the Treasurer and 40% shareholder in A&CR is also the owner of (b) Marty Whitton is the owner of the property at which both firms are located, (c) Mr. Whitton operates from this same location, (d) permits A&CR

to lease property and use its yard space for six months at no charge and purchases products from A&CR at a discount rate in exchange for being allowed the use of equipment, and (e) both firms share employees, and is A&CR's major client.

In your rebuttal letter you stated that "I cannot dispute the fact that on occasion ACR and share employees. However, this is a business decision on my part, as sharing employees is a better utilization of our labor costs to manage peak periods. is not in the same line of business as ACR. employees only help me when I am running the crusher and I need someone to run the loader and pick trash out of the materials as it is being processed. also allows me to use the loader for my company."

The regulation states that "...an independent company is one, the viability of which does not depend on its relationship with another firm or firms." Obviously a firm with the above interrelationships does not meet the independence requirements of the regulation. The Department agrees with Caltrans' conclusion that AC&R does not meet the independence requirements of the regulation with respect to its relationship with .

Based on these findings, we have determined that Asphalt & Concrete 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 A&CR 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 Caltrans' 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: CALTRANS