

November 10, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0112

Ms. Tracey L. Mitchell
M.A.C. Trucking, Inc.
421 S.W. 17th Street
Richmond, IN 47374

Dear Ms. Mitchell:

This is in response to the appeal that you filed on behalf of your firm, M.A.C. Trucking, Inc. ("MAC Trucking"). We have carefully reviewed the material from the Indiana Department of Administration ("INDOA") as well as information you provided. We have concluded that the denial of your firm'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 INDOA's conclusion that your contribution of capital to acquire your ownership interest in the firm was not real, substantial, and continuing within the meaning of the Regulation.

Your appeal is also denied based upon our determination that substantial evidence supports INDOA's conclusion that you do not possess actual control of MAC Trucking as required by the Department's Regulation.

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

According to the Regulation at §26.61(b), the firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

The Regulation at §26.67(a)(2)(i) requires that each individual owner of a firm applying to participate as a DBE (except a firm applying to participate as a DBE airport concessionaire) whose ownership and control are relied upon for DBE certification must certify that he or she has a personal net worth that does not exceed \$750,000.

The record indicates that you are the 51 percent owner of MAC Trucking, a firm established in October, 2001. Your mother-in-law, Helen Joyce Mitchell, is the 49 percent owner of the firm and the 50 percent owner of ----- and -----, both trucking firms.

The record indicates that MAC Trucking was denied certification as a DBE in December 2001. In May 2002, INDOA acknowledged receipt of the firm's women business enterprise (WBE) certification application. In July 2002, INDOA received the firm's application for DBE certification, and in August, 2002 requested that the firm provide copies of its corporate tax returns and other items. INDOA performed an on-site review in November, 2002. According to INDOA's "contact tracking information sheet," INDOA received tax information from the firm on July 25, 2003; however, it was not until March 22, 2004, that INDOA denied the firm DBE certification.

On June 21, 2004, INDOA requested MAC Trucking provide copies of its completed contracts and Helen Mitchell's personal net worth statement. On July 23, 2004, Helen Mitchell, submitted her personal net worth statement which indicated that her net worth was ----- . Under the Department's Regulation, Ms. Mitchell's socially and economically disadvantaged status has been rebutted and therefore, she is no longer eligible for participation in the program.

Miscellaneous

1. The Department is concerned that INDOA appears to have taken nearly 8 months from the time it received the firm's tax information to deny the firm DBE certification; which is well beyond the 90 day time frame for certification decisions as specified under the Department's Regulation 49 CFR Part 26 ("the Regulation") §26.83(k). It is unclear however, whether INDOA was waiting for your personal net worth statement. According to INDOA's certification denial letter, you did not provide notarized statements of your personal net worth. However, INDOA's contact tracking information log indicates that on September 9, 2002, it "received personal net worth statement and additional information." You note in your rebuttal letter:

We filed for the WBE certification back in April of 2002. They then sent us out a new application for DBE stating that this was the one we needed. We sent all requested information along with the application. Upon their receipt of our application packet, the Disadvantaged Business Enterprise Division sent out to us a check off list of any information that was missing or additional information that was needed. We then sent all other requested information back to them. The first reasons given [for] denial was that no notarized statements of our personal net worth was not provide which is not a true statement. The personal net worth statements for Tracey Mitchell and Helen Mitchell [were] provided in the application package we sent out the very first time. As I stated above, they

sent out a check off list after receipt of our package for additional information that they needed, thus our personal net worth statements were not on this check off list which would be a good indication that they had received them along with the initial application package.

Even assuming your personal net worth statement was available to INDOA, the record contains Helen Mitchell's statement which indicates that her net worth is ----- . This rebuts her economic disadvantaged status under the Regulation §26.67(b) and the Department will examine INDOA's assessment of whether your contribution to acquire ownership in MAC Trucking was real, substantial, and continuing within the meaning of the Regulation, and whether you, as the disadvantaged business owner, control the firm.

OWNERSHIP

The Regulation at §26.69(c) provides in part, that contributions of capital or expertise by the disadvantaged owner to acquire an ownership interest in the participating DBE business be real and substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents.

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.

According to the record, you acquired your ownership interest in the firm in January, 2002. According to the firm's May 2002 WBE application, you contributed \$510.00 and Helen Joyce Mitchell contributed \$490.00 as start up money for the business. INDOA indicated in its certification denial letter that the record contains copies of cancelled checks indicating that each owner contributed \$500.00 to start the business. There are no cancelled checks in the record. In addition, INDOA indicates that Helen Joyce Mitchell and ---- ----- are guarantors on the firm's loan with ---- ----- for the purchase of the firm's truck. Since there is neither proof of your capital contribution nor loan documentation or sales documents for the truck in the file, it is difficult to determine whether you actually contributed \$510.00 as you alleged. In the absence of supportive documentation, we must conclude that your \$510.00 contribution was not "real, substantial, and continuing going beyond pro forma ownership" within the meaning of the Regulation §26.69. You have thus not met your burden of proof in demonstrating that your ownership conforms to the requirements of Regulation.

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

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) states in part, that the 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 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 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 Regulation at §26.71(j) requires that 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.

The Regulation at §26.71(k) states, in part that a 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 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. If you cannot determine that the disadvantaged owners--as distinct from the family as a whole--

control the firm, then the disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

INDOA determined that you do not have control of MAC Trucking since: a) your experience in the firm's primary line of work has been limited to administrative and office management, b) Helen Mitchell handles the day-to-day operation of the firm, and c) the firm appears affiliated with other business entities.

a) Your résumé indicates that you worked as a bookkeeper for ----- where you were the dispatcher and handled all accounts payables and receivables, and the payroll. Between August 1990 and May 2001, you worked at the company's factory preparing and shipping final products. You worked in the office at ----- and in sales at ----- from September 1989 to 1990. From June 1989 to August 1989, you were a receptionist/secretary with ----- . You hold a High School Diploma from -- ----- where you majored in business and the secretarial field. It does not appear that you possess experience in the trucking industry.

b) INDOA determined that the firm's non-disadvantaged owner, Helen Mitchell, controls the day-to-day operations of the business and possesses over 17 years of experience in the trucking industry and has worked in the industry since 1986.

As stated above, the Regulation §26.71(k)(1) states that "if you cannot determine that the disadvantaged owners--as distinct from the family as a whole--control the firm, then the disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities."

c) INDOA determined that MAC Trucking has an affiliation with other outside entities through common ownership and sharing of employees. It appears that both you and Helen Mitchell are involved in ----- INDOA's contact tracking information log notes that Helen Mitchell is the President/Business Office Manager at ---- ----- and ----- and that you are the bookkeeper for ----- INDOA stated in its denial letter, that "the businesses obviously have a relationship and it is unclear as to how the relationship affects day-to-day operations." Although you indicate in an undated note that there are no agreements between the three firms, there is still the question of whether you devote sufficient time to the affairs of MAC Trucking such that INDOA could reasonably conclude that you devote sufficient time and attention to the affairs of the firm to control its activities within the meaning of the Regulation at §26.71(j).

Substantial record evidence thus supports INDOA's conclusion that you do not possess actual control of the firm within the meaning of the Department's Regulation.

In summary, the information provided cumulatively supports a conclusion that MAC Trucking 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 INDOA'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: INDOA