

December 14, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 05-0012

Ms. Vienna Dietrich
President
Minority One, LLC
11444 Glen Arm Road
Glen Arm, MD 21057

Dear Ms. Dietrich:

This is in response to the appeal that you filed on behalf of your firm, Minority One, LLC ("Minority One"). We have carefully reviewed the material from the Maryland Department of Transportation ("MDOT") as well as information you provided and 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 MDOT's conclusion that you do not control the firm as required by the Regulation.

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

CONTROL

The Regulation at §26.71(a) and (b) provides in part 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. 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. 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. 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. 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.

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. A disadvantaged owner must hold the highest officer position in the company (e.g. chief executive officer or president). In a corporation, disadvantaged owners must control the board of directors. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

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 §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 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.

In determining whether a firm is controlled by its socially and economically disadvantaged owners, the Regulation at 26.71(m) states that, 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.

The record reveals that you are the sole owner and employee of Minority One, established in January, 2004 as a general contracting firm. According to Minority One's business plan, you will be the sole person operating the business and sub-contractors will provide any heavy equipment necessary for jobs the firm undertakes. The types of services to be performed by subcontractors include plumbing, HVAC, hauling, and snow removal. You stated during

MDOT's Minority Business Enterprise Advisory Committee's ("MBEAC") July 21, 2004 hearing:

. . . I'm going to be acting as a general contractor. I've had about six months to actually go out and talk to a couple of small businesses that would actually employ my services. That means I've talked to a trucking company, Brian Usal, who owns Usal Trucking. If he needs dump trucks, I can go get him some. If there's a larger company . . . [that] needs trucks for snow plowing, I can subcontract the dump trucks from Brian Usal to go out to the site. I don't plan on touching any of the equipment. I plan on going out, getting the jobs, supervising the jobs, acting as the general, and basically putting them on a job site. And I will just subcontract them out.

. . . I've already made all my contracts with a couple of businesses that will use my services. . . I can go to Jeff Knorr Plumbing and Heating, and I can get him to come in and do a bid for me to do the plumbing. And then what I'll do is I will subcontract him to go in and do the plumbing and heating work.

Your résumé indicates that you are the Vice President of ----- which is a family run business owned by your husband, a mechanical engineer and a non-disadvantaged individual. (The Department notes that at the time of MDOT's hearing, you stated that you were not Vice President of -----). Your duties at ----- were primarily office related and included scheduling, payroll, accounts payable, and other financial responsibilities. From May 2000 to April 2001, you were a human resource manager for ----- where you previously served as a bookkeeper. From October 1996 to May 2000, you worked for ----- as an office/general manager. Your responsibilities included management of customer service/sales departments, human resources duties, processing month-end reports, hiring and firing of employees, and other duties. Between 1988 and 1995, you were a financial coordinator with ----- where you managed customer operations, credit/collections, and purchasing. From 1984 to 1988, you were a sales representative for ----- where you presented software for major distributors, retailers, and individuals. You also worked in that firm's accounting department and assisted the manager of shipping and receiving. Your résumé states that you have "business education" from -----, -----, and -----.

During the July 21, 2004 hearing, in response to MDOT's question regarding your experience as a general contractor, you stated:

As a general contractor, to actually go on the jobs, I've got experience. I've been out to the ----- . . . I talked to all the heads of the ----- . I know what you can do when you go into a building and actually break down a building. I know what needs to get down as far as plumbing, running pipes. I can tell you about five ton unit, ten ton unit, and I've got enough experience with your AC mechanic. . . . I can go in and I can tell somebody what they need. If I don't know what they need, then I've got enough people that I've worked with in the past that can go in, do a bid, and tell me exactly what it is. . . . I know enough about a lot of mechanical, a lot of HVAC. If you look at my résumé . . . I've been a general manager of 45 people. I can

run 45 people easy and have multiple tasks going on at the same time. . . I have not acted as a general contractor. I have not had that title. I've been a general manager . . .

The record evidence indicates that you do not possess the ability to control the firm within the meaning of the Department's Regulation §26.71 due to a) your lack of experience in the firm's primary field of operations, and b) Minority One's reliance upon other firms.

a.) Under the Regulation at §26.71(g), the disadvantaged business owner is required to have technical competence and experience directly related to the type of business in which the firm is engaged and the firm's operations. While you may have experience in scheduling jobs and marketing, the record does not indicate that you have the technical competence and experience in plumbing, HVAC, hauling, and snow removal so that you can intelligently and critically evaluate the information presented by others such that you could make independent decisions concerning the firm's daily operations, management, and policymaking.

b) 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. It appears that the firm plans to rely upon other contracting firms to perform Minority One's work. Since Minority One will schedule jobs and not actually perform the work itself, the firm must rely upon other firms for equipment and supplies necessary for each job. This is inconsistent with the intent of the Regulation; which is to ensure that only firms able to perform work are certified as DBEs.

Substantial record evidence therefore supports MDOT's conclusion that you do not have control of the firm within the meaning of the Department's Regulation.

Under the Regulation §26.89(f)(6), the Department bases its decision on the status and circumstances of the firm as of the date of the decision being appealed. You indicated in your October 18, 2004 rebuttal letter that the firm 1) opened a business account, 2) will now solely focus on the trucking industry involving hauling and snow removal, and 3) will not be involved with general contracting. The Department did not use this information in its decision because it appears that control issues would still be a factor even with the changes made by the firm.

In summary, the information provided cumulatively supports a conclusion that Minority One 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 MDOT'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: MDOT