

February 14, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 05-0014

Ms. Melissa Wiesner
Wiesner Enterprises, LLC
1832 E. 164th Place
Thornton, CO 80602

Dear Ms. Wiesner:

This is in response to the appeal that you filed on behalf of your firm, Wiesner Enterprises, LLC ("WE,LLC"). We have carefully reviewed the material from the Colorado Department of Transportation ("CDOT") as well as information you provided and concluded that the denial of the 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 CDOT's conclusion that your contribution of capital to acquire 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 CDOT's conclusion that you do not control the firm as required by the Department's Regulation.

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

OWNERSHIP

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 §26.69(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. 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.

According to the firm's May 2004 DBE certification application, you are the sole owner and Chief Executive Officer of WE,LLC, a firm you first established as ----- . The DBE application, as well as the firm's operating agreement, indicates that you acquired your ownership interest in WE,LLC with a capital contribution of \$750.00. The record indicates that various loans made to the firm in order to obtain its primary equipment.

Loans to the Firm

1. The record contains a March 1, 2004, "Notice of Security Agreement and Lien Holder" between you and your father-in-law -----, which references an April 23, 2002 agreement. This document states:

Melissa Wiesner, CEO (WE,LLC), formerly -----, transferred all said equipment: 1994 [Peterbilt] and 2002 CONS over from ----- into WE,LLC. The lien holder holds effect; ----- . . . The original lien still stands: \$59,000.00 at an 8 percent interest rate. A new note had been added on December 31, 2003 [for a] 2004 Witzco TL. Melissa Wisner borrowed \$23,000.00 from ----- at an 8 percent interest rate. The outstanding loan amounts totals \$82,000.00 at an 8 percent interest rate.

2. The record contains a May 3, 2002, collateral agreement signed by you for \$41,367.11, between WE,LLC and ----- . According to CDOT's August 18, 2004, DBE certification denial letter:

The promissory note for this transaction has not been included. You stated over the phone that this loan was used to finance a new transmission for the 1994 Peterbilt Truck and to purchase the 2002 CONS rock trailer.

3. ----- also loaned you \$23,000.00 in December 2003 which was used to purchase a 2004 Witzo Low Boy. The file contains a "Notice of Security Agreement and Lien Holder" along with a copy of a \$23,000.00 check made out to you individually. According to the security agreement, ----- holds the lien on the Witzo Low Boy.

It appears that Diamond W Trucking's assets were transferred to WE,LLC. The record contains various documents which explain how this transfer was made and the respective roles of ----- . ----- . (The Department notes that these documents were submitted to CDOT after its DBE denial decision was rendered).

In an affidavit dated August 2, 2004, your husband, ----- states:

On November 25, 2002, I borrowed \$49,484.47 and used as collateral for the financing a 1994 Peterbilt Truck that I purchased April 12, 2002, . . . from ----- and a Rockmaster End Dump (2002 CONS) . . . I did not receive a bill of sales for these items. I sold these items to Melissa Wiesner on March 1, 2004 in exchange for her promise to assume the outstanding liability to ----- . I do not have copies of the loan agreement papers or other documents relating to the financing other than the attached Promissory note. . .

Attached to the affidavit is a bill of sale, dated August 2, 2004, wherein ----- sold you the 1994 Peterbilt Tractor and 2002 CONS Rock Trailer, for you agreeing to assume his outstanding obligation to ----- . The consideration for this sale was \$15.00.

You also signed an affidavit August 2, 2004, which states:

On March 1, 2004, I purchased from ----- a 1994 Peterbilt Truck and a Rockmaster End Dump (2002 CONS). I sold these items to WE,LLC and did not realize a bill of sale had not been executed by me to the LLC until the State of Colorado made an inquiry as part of the application it is reviewing. I do not have copies of the loan agreement papers and other documents relating to the financing other than ----- copy of the promissory note, the original is maintained by -----

An undated promissory note, which you signed, states:

For value received, the undersigned, Melissa Wiesner, . . . do promise to pay to the order of -----, mortgagee and payee, the principal sum of \$82,000.00, plus interest on the unpaid balance at a rate of 8 percent per annum, payable in equal amortized monthly installments of \$1,000.00 each, principal and interest, . . .

The Regulation §26.69(c) requires that the disadvantaged business owner's contribution to acquire their ownership interest in the firm be real, substantial, and continuing going beyond pro forma ownership of the firm as reflected in ownership documents. The record indicates that the firm received a substantial amount of capital from ----- in order to acquire the assets of ----- . Although you alleged that you contributed \$750.00 to start the business, the Regulation requires a clear showing of a substantial contribution of capital to establish your ownership interest in the firm. The \$750.00 used to start the firm is not considered a real and substantial contribution under the Regulation for a firm with large assets

such as WE,LLC. In addition, it appears that you agreed to assume ----- loan obligation with ----- . A promise to contribute capital is a clear example of insufficient contribution of capital under the Regulation §26.69(e). Furthermore, there is no indication that any of the firm's loans were paid back with your personal funds. Substantial record evidence therefore supports CDOT's determination that your ownership in WE,LLC does not meet the requirements of the Department's Regulation.

CONTROL

The Regulation at §26.5 states, in part that, a DBE is a for-profit business whose management and daily business operations are controlled by one or more disadvantaged individuals who own it.

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.

Under the Regulation §26.71(h), if state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

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

The record indicates that you do not possess sufficient control of the firm's primary operations and critical activities on a day-to-day basis. The record also indicates that non-disadvantaged individuals associated with WE,LLC handle and manage key operations of the firm.

The firm's master business plan states:

WE,LLC, formerly -----, is a full service trucking company currently serving ----- and ----- . Our mission is to provide trucking services for wet batch concrete hauling, dry materials hauling, and demolition needs. WE,LLC can also supply and haul highway construction materials to construction sites. . . . ----- began in 2002 as a small company with two of its own trucks to include one tractor-trailer with a rock tub and one tandem axle truck. These trucks hauled sand, cement treated base, wet batch concrete and rubble from ----- to the ----- border in just its first year of existence. In the course of these projects ----- networked hard to make many contacts. WE,LLC now has a database of potential truckers numbering over one hundred.

According to the record, you are the firm's only member/manager and run the business from your home. Your duties include handling dispatch, visiting job sites, payroll, networking, ordering supplies, managing compliance, maintaining inventory, and office administration. Your résumé indicates that you attended -----, -----, and -----; and have attended business and development workshops. You listed on your résumé your professional experience as "financial decisions and office management; advertising, sales and marketing; working with the public one-on-one; managing and overseeing all projects; and estimating and bidding."

The firm subcontracts its work or hires additional personnel who perform the driving tasks for the business. Your husband ----- drives the truck and lowboy; and received approximately ----- during 2003. The record indicates that you do not possess a Commercial Driver's License (CDL) which is required in order to operate the firm's trucks. --- . ----- was the trucking manager for ----- and a sales consultant of an excavating company prior to his employment with that firm. You stated in your rebuttal letter to the Department that you: "subcontract out ----- in a different area than trucking; he works for transport." You also stated "I also have workman's compensation with all said checks to prove that I pay him as a driver."

Based on the record evidence, you have not met your burden of proof in establishing control of the firm under the Regulation §26.61(b) and §26.71(k). It does not appear that you possess technical competence and experience in order to operate the firm's equipment in the field. You may have a working knowledge and understanding of the trucking industry as described by various letters from other company personnel; however, record evidence reveals that without the assistance from others involved in the firm, you could not run the business on your own. Such factors are necessary to support your claim of control over the firm. Your husband, -----
-- -----, a non-disadvantaged individual, and other drivers are the persons relied upon to perform crucial firm activities, which you could not perform on your own. With their running the crucial trucking/delivery aspects of the firm, your ability to oversee the direction of its activities and exercise control as required by the Department's Regulation §26.71 is clearly inhibited. Substantial evidence therefore supports CDOT's conclusion that you lack control of the firm as required by the Department's Regulation.

In summary, the information provided cumulatively supports a conclusion that WE,LLC 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 CDOT'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: CDOT