

January 31, 2005

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Reference No.: 05-0019

Ms. Kim Foss  
Foss Landscapes, Inc.  
5757 Harlem Road  
Loves Park, IL 61111

Dear Ms. Foss:

This is in response to the appeal that you filed on behalf of your firm, Foss Landscapes, Inc. (Foss Landscapes). We have carefully reviewed the material from the Illinois Department of Transportation (IDOT), as well as that submitted by you and have concluded that the denial of Foss Landscape's certification as an eligible DBE under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon our determination that substantial record evidence supports IDOT's conclusion that ownership and control by the disadvantaged owner, is not real, substantial and continuing as required by the Regulation.

Your appeal is also denied based upon our determination that substantial record evidence supports IDOT's conclusion that the socially and economically disadvantaged owner(s) does not possess the power to direct or cause the direction of the management and policies of the firm as required by the Regulation.

**How are burdens of proof allocated in the certification process? The Regulation provides that firms seeking DBE certification have the burden of demonstrating to the recipient that they meet the requirements of the regulation for group membership, individual disadvantage, business size, ownership and control by a preponderance of the evidence (more likely than not).** In reviewing all of the facts of record, this office has concluded that Foss Landscapes, Inc. has failed to meet its burden by a preponderance of the evidence with regard to whether or not the firm meets the requirements of 49 CFR Part 26.

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

## **OWNERSHIP**

**The Regulation at §26.69(c) provides 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. 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.**

**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.**

**The Regulation at §26.69 (h)(1) requires that you must presume as not being held by a disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is involved in the same firm for which the individual is seeking certification, or an affiliate of that firm; involved in the same or a similar line of business; or engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.**

**Under the Regulation at §26.69(h)(2), to overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.**

According to the record, Foss Landscapes was established in April 1998, by you and your non-disadvantaged husband, Ronald Foss, with each of you owning 50% of the stock. According to the minutes of the first meeting, Ronald Foss is listed as President and you were listed as Vice President, Secretary and Treasurer. It is also important to note that Mr. Foss was also the Sole Director and Shareholder. Subsequently, in December of 2000, you were given 10 additional shares of stock by your husband, giving you (the qualifying individual) 60% ownership and Mr. Foss (non-disadvantaged) owning 40% of the applicant firm. During this same meeting you were appointed the firm's President and Mr. Foss, Vice President.

Your letter of rebuttal states, "The statement made regarding that I did not make a "real and

substantial contribution from personal resources to acquire my majority ownership is unfounded. I have invested more money into my company than I have into any stocks or bonds for my children's college education in the last 10 years. When I had my attorney transfer the majority of ownership to me putting myself at 60% and giving my husband, Ron 40%, it was at a time I had just purchased 11 acres of land, reorganized, revised by business plan, built a new building and felt it was time for a female landscaper that employs over 80% minorities to put herself in front and make a bigger footprint than any male dominated landscape construction company did or could in this area."

The record contains no evidence that the transfer of 10 additional shares to acquire your 60% ownership interest in the firm was for reasons without adequate consideration. The Regulation at §26.69 (h)(1) states "You must presume as not being held by a disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is involved in the same firm for which the individual is seeking certification, or an affiliate of that firm; involved in the same or a similar line of business; or engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification."

While we realize that you, the disadvantaged owner may have contributed to the success of the firm, you have failed to provide adequate proof that you contributed funds from individually owned assets to acquire your 60% percent ownership interest in the firm. Therefore, the Department must conclude that the disadvantaged owner's contribution is not real and substantial as required by the Regulation.

Although there may be legitimate reasons as to why an owner chooses to pay herself less than other employees, the rationale does not meet the requirements of the Department's Regulation. According to the record evidence you, the disadvantaged owner did not make a real and substantial contribution to acquire your ownership interest in Foss Landscapes, Inc. nor do you enjoy the customary incidents of owning the firm.

### **CONTROL**

**The Regulation at §26.71(d) and (e) requires 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. 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 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 (k)(2) states, “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.”

Under the Regulation at §26.71(l), where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to you, by clear and convincing evidence, that (1) the transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and (2) the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

Foss Landscapes is a construction business that performs work in the line of excavating & grading, landscaping and seeding and sodding. The record evidence reveals that the individual associated with this firm who possesses the ability to control the day-to-day activities of a construction business is your non-disadvantaged husband, Ronald Foss. Mr. Foss has over 24 years of experience in the critical activities of this business (field supervision, bidding, estimating, etc.). According to the June 17, 2004 onsite visit questionnaire, résumé and other documents contained in the record, prior to starting Foss Landscapes, he worked for ----- from 1987 to 1994; ----- from 1994 to 1996; and ----- from 1996 to 1998. Also during 1996 to 1998, he owned and operated -----, a firm in a similar line of business as Foss Landscaping. In addition, he is jointly responsible for financial decisions, estimating, bid preparation, major equipment purchase, hiring/firing of management personnel, field production supervision, marketing/sales, scheduling and project management and signature authority.

While the record indicates that you, the disadvantaged owner play an important role in this firm, we have carefully considered your background and expertise as it relates to your ability to critically analyze and independently use technical information supplied by subordinates such as

Mr. Foss and other family members. According to the information contained in the record, before working at Foss Landscapes, you, the disadvantaged owner, worked for ----- as an Accounts Manager from 2002-2003. From 1993-2002, you worked for Hughes Business ----- as a Project Manager/Installation Manager, and from 1991 to 1993, you were the Director of Information Services for ----- . It appears that your past work experiences were office management, including customer service, sales support and accounting.

In your rebuttal you state “Back when I incorporated Foss Landscapes, Inc. I did what I felt was best for my company and that was to put a man out in the “front” line. The construction industry is a very “male” dominated industry and making a footprint in this area was my first objective. After my company had gained a reputation of being reliable, trustworthy, professional and fair, it was at that time I put my name out in front. For obvious reasons this gives the impression that my husband, whose name I put out there first gave him control, on the contrary, this was simply on paper. I can’t reiterate enough, that if the roles were reversed, no one would ever question if a man could run my landscape construction company so of course, it seems ironic to me that a woman in the construction field would be looked at as ‘lack of being real or substantiated’.”

The record evidence reveals that you, the disadvantaged owner, do not possess sufficient knowledge and experience which directly relates to the firm’s primary operations and does not control its critical activities on a day-to-day basis. Your responsibilities and experience appear to be primarily administrative in nature. The Department agrees that you, the disadvantaged owner may have a grasp of the administrative functions of the firm by virtue of your years at Foss Landscapes and previous employment. However, the record information does not substantiate that you have the intricate knowledge of a construction company providing excavating, landscaping, and seeding and sodding.

Moreover, it appears that the disadvantaged owner is responsible for all of the management aspects of the business whereas the non-disadvantaged owner is responsible for all the labor and key functions. Although you may have gained some knowledge of the business while working at Foss Landscapes, Inc., your experience appears to be administrative in nature and does not prove that you can successfully operate a construction business without the expertise of non-disadvantaged individuals.

The record evidence also reveals that -----, your father and -----, your son, both non-disadvantaged individuals are employed by the firm. ----- has signature authority and is able to contract business on behalf of Foss Landscaping in the absence of the disadvantaged owner.

You stated in your rebuttal, “My father, -----, is a retired sales manager, who drives a truck for me when needed, and keeps my shop and equipment clean. My son, -----, is a part-time laborer for my company during his summer sessions from college. Both employees/family members are without question important members of my firm, however, all of my laborers, all of my drivers, all of my operators and all of my employees are in “key” positions for this company. Each of my employees are without question, important, loyal, respected and well compensated fro their efforts. None of my family members find themselves in any role of authority, these kinds of positions are filled by my tenured, experienced employees. My son, ----- and my dad,

----, report to my foreman, ----- and to my superintendent, ----- .”

You further stated, “I have, in fact, given the two individuals that I would trust with my life, the ability, upon my direction to sign checks. Neither of these individuals have contract signing privileges, nor have the authority to make any kind of solo financial decisions. With Ron’s equipment background and experience, I rely on him highly for his opinion of the best equipment, trucks, etc, prior to my final decision. Who wouldn’t take advantage of an individual with that background in my business? I have given my dad, -----, check signing privileges in my absence should a nursery stock order arrive or should a situation arise that required immediate payment.”

The Department has carefully reviewed the entire record in this matter and has determined that Ronald Foss, the non-disadvantaged owner and other non-disadvantaged family members, have the technical ability and expertise to control day-to-day activities of Foss Landscapes and are disproportionately responsible for the operation of the firm. This conclusion is supported by substantial record information contained in the record such as Foss Landscape’s DBE application, IDOT’s on-site evaluation, and résumés of the individuals.

**Under the Regulation at §26.71(i)(1), recipients may consider differences in remuneration between the disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. Recipients may determine that a firm is controlled by its disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.**

The Regulation requires that participating DBE owners enjoy the profits and losses of their businesses in a degree that is commensurate with their ownership interest. The Department has reviewed the compensation paid to you, the disadvantaged owner and that of your husband and has concluded that your compensation is not commensurate with your ownership interest in the business. The record evidence reveals that since the incorporation of the firm, Mr. Foss has received significantly higher compensation than that of you, the disadvantaged owner. According to the personal financial statements contained in the record Mrs. Foss earned ----- while Mr. Foss earned ----- .

In summary, the information provided cumulatively supports a conclusion that Foss Landscapes, Inc. 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’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: IDOT

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