

March 25, 2016

Reference Number: 15-0148

Ms. Kim Wiemuth
Gideon Toal Management Services, LLC
500 West 7th Street, Suite 550
Fort Worth, Texas 76102

Dear Ms. Wiemuth:

Gideon Toal Management Services, LLC (Gideon) appeals the North Central Texas Regional Certification Agency's (NCTRCA's) decertification of the firm as an Airport Concessions Disadvantaged Business Enterprise (ACDBE) under criteria set forth at 49 C.F.R. Parts 23 and 26 (the Regulation). NCTRCA issued a Notice of Intent (NOI) to remove ACDBE eligibility from Gideon on March 17, 2015, and issued a Notice of Decertification (NOD) on July 7, 2015. Gideon appealed to the Department by letter dated September 28, 2015. After carefully reviewing the complete administrative record, we conclude that substantial evidence supports NCTRCA's determination. We affirm the decertification under §26.89(f)(1).

NCTRCA cites the firm's failure to meet the requirements of §§26.69(c) and (h)¹ relating to ownership and 26.71(c) relating to control. We find that substantial evidence supports NCTRCA's determination under §26.71(c), and we therefore affirm on this ground. *See generally* §26.89(f)(1).

Applicable Regulation Provisions

§23.31 provides:

“(a) As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see part 26, §26.81).

(b) The UCP's directory of eligible DBEs must specify whether a firm is certified as a DBE for purposes of part 26, an ACDBE for purposes of part 23, or both.

¹ In light of our disposition, we do not opine on ownership grounds.

(c) As an airport or UCP, you must review the eligibility of currently certified ACDBE firms to make sure that they meet the eligibility standards of this part.

(1) You must complete these reviews as soon as possible, but in no case later than April 21, 2006 or three years from the anniversary date of each firm's most recent certification, whichever is later.

(2) You must direct all currently certified ACDBEs to submit to you by April 21, 2006, a personal net worth statement, a certification of disadvantage, and an affidavit of no change.”

§26.69(c) provides, in pertinent part:

“(1) The firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.”

§26.69(h) provides:

“(1) You must presume as not being held by a socially and economically 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—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(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—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) 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.”

§26.71(a) provides:

“In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.”

§26.71(c) provides:

“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).” (Emphasis added.)

§26.89(f)(1) provides:

“The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

Operative Facts

Gideon provides airport and lounge management, and was established in 1996 (Uniform Certification Application (UCA) dated December 29, 2011 at 2). You are the disadvantaged Managing Member and own 51% of the firm (On-Site Review Report (OSRR) dated February 26, 2015 at 1). Nondisadvantaged owner and Member Randall Gideon owns 49% of the firm (UCA at 7).

The Consent to Action Taken Without Special Meeting of the Managers of Gideon (Consent to Action) dated April 5, 2010 specifies that Randall Gideon was removed as a Manager, and that you would serve as the Sole Manager of the Company. In your response to the NOI (Response)

dated March 26, 2015, you state that you are the Sole Manager and that Randall Gideon is just a Member who has no authority or power to act on behalf of the company.

You state in the Appeal Letter (Appeal Letter) dated September 28, 2015, that “the Company Agreement gives me the *sole power* and authority to manage and direct business and affairs of the Company and to make all short-term and long-term business decisions with regard to every aspect of the Company and its operations; in his capacity as a *Member*, the Company Agreement allows Randy no authority or power to act for or on behalf of the Company, to bind the Company, or to incur any expenditure on behalf of the Company.” (Emphasis added.) You refer to Sections 11.4, 11.5, and 11.6 of the Amended and Restated Company Agreement dated November 1, 2009 (Company Agreement) to support the distinction between Sole Manager and Member and the authority of the Sole Manager. Id. at 3.

The Company Agreement specifies:

“ARTICLE 11 MANAGEMENT OF COMPANY

11.4 Lack of Authority.

No *Member* (other than in such Member's capacity as a *Manager* or an officer, as applicable) has the authority or power to act for or on behalf of the Company, to do any act that would be binding on the Company, or to incur any expenditures on behalf of the Company. (Emphasis added.)

11.5 Specific Power and Authority of Managers.

Except for situations in which the approval of the Members is required by this Agreement or by nonwaivable provisions of applicable law, and subject to the provisions of Section 11.10, *the powers of the Company will be exercised be or under the authority of, and the business and affairs of the Company will be managed under the direction of, the Managers; and the Managers may make all decisions and take all actions for the Company not otherwise provide or in this Agreement, including without limitation, the following...* (Emphasis added.)

11.6 Reliance Upon Managers' Certificate.

(a) Any Person dealing with the Company or the *Managers* may rely upon a certificate signed by the *Managers*, thereunto duly authorized, as to:

- (i) The identity of any Member;
- (ii) The existence or nonexistence of any fact or facts which constitute a condition precedent to acts by the Managers or in any other manner germane to the affairs of the Company;
- (iii) The Persons who are authorized to execute and deliver any instrument or document of the Company; or
- (iv) Any act or failure to act by the Company or as to any other matter whatsoever involving the Company or any Member.

(b) After delivering such statement, the *Managers, by the Managers' signatures alone, may sign any instrument and bind the Company and the Company's property.* Such

statement will not, however, be determinative as between the *Members* Unless the action in question was in fact authorized in accordance with this Agreement. (Emphasis added.)”

In contrast, the Promissory Note for **REDACTED** dated February 15, 2011, shows that you and Mr. Gideon signed as a *Managers* of Gideon. The record also contains the Texas Franchise Tax Public Information Report dated November 30, 2014, indicating that Randall Gideon remains a *Manager* of Gideon.

The Company Agreement, further, specifies that Randall Gideon may not be removed as a Manager except with his consent:

“ARTICLE 11 MANAGEMENT OF COMPANY

11.2 Resignation: Removal of Managers

(c) Exception. *Gideon may not be removed as a Manager for any reason other than For Cause as long as he, directly or indirectly through Gideon Holdings, LLC, owns at least Twenty-Five Percent (25%) Membership Interest in the Company.* (Emphasis added.)”

The Company Agreement further illustrates that a majority in number of the managers is needed for a quorum and, similarly, a majority vote of applicable managers is needed for committees of managers to act on behalf of the managers.

“11.11 Actions by Managers; Committees; Delegation of Authority and Duties.

...

(b) The Managers may, from time to time, designate one or more committees, each of which must be comprised of one or more Managers. Any such committee, to the extent provided in such resolution or in the Certificate or this Agreement, will have and may exercise all of the authority of the Managers, subject to the limitations set forth in the Law. *At every meeting of any such committee, the presence of a majority of all the members thereof will constitute a quorum, and the affirmative vote of a majority of the members present will be necessary for the adoption of any resolution.* The Managers may dissolve any committee at any time, unless otherwise provided in the Certificate or this Agreement. (Emphasis added.)”

The NOI asserts that Gideon’s “Company Agreement requires a majority vote of managing members to execute the affairs of the firm. With only two (2) voting members, and each vote counting as one, rather than [you, the] socially and economically disadvantaged individual having a majority percentage of ownership, Ms. Wiemuth [you] would be restricted from solely executing the affairs of the company without the consent of the non-disadvantaged managing member, Mr. Gideon, if indeed Mr. Gideon remains a managing member.”

The NOD reiterates, “...the Company Agreement restricts Ms. Wiemuth [you] from exercising majority ownership privileges because the voting structure requires a majority vote of the managing members to execute the affairs of Gideon, LLC. Since Ms. Wiemuth’s [your] vote represents only one of two managing members votes on critical issues, Ms. Wiemuth [you] cannot control the voting structure as required by the Company Agreement. Thus, it appears that

Ms. Wiemuth's [your] control of the day-to-day operation of Gideon requires the authorization and sanction of the non-socially and disadvantaged owner."

Discussion and Decision

Formal or Informal Restrictions

Section 26.71(c) provides that "the DBE firm must not be subject to any formal or informal restrictions limiting the discretion of the disadvantaged owner and that there can be no restrictions through corporate charter provisions...preventing the disadvantaged owner, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm."

The Company Agreement, as detailed above, contains precisely such a restriction, provided that Mr. Gideon, in fact, remains a Manager of the firm. There is substantial evidence that Mr. Gideon remains a manager of the firm notwithstanding the asserted resolution to the contrary.

As evidenced in the record, you and Mr. Gideon signed a Promissory Note for **REDACTED** dated February 15, 2011 as *Managers* of Gideon. The record also shows that on November 30, 2014, Mr. Gideon signed as a Manager on the Texas Franchise Tax Public Information Report, filed for tax purposes in the State of Texas. Despite the Consent to Action dated April 5, 2010, Mr. Gideon has held himself out to the public and the financial community as still a Manager of the firm. Based on this evidence, Mr. Gideon is a Manager as well as a Member of the firm.

Article 11.11 requires that "the affirmative vote of a majority of the members present will be necessary for the adoption of any resolution," at a managers' committee. It is impossible for you to control the firm because you and Mr. Gideon are the only members and the sole managers. You appear to be unable to carry any vote without the acquiescence or assent of Mr. Gideon. The quorum provision suggests that Mr. Gideon's absence on a committee of which he is a member renders you powerless to act. Further, if Mr. Gideon disagrees with an action proposed by you, you cannot overrule him. The preponderance of the evidence is that the firm's affairs are structured to give Mr. Gideon effectively a veto over firm action. This article shows a restriction preventing you as the disadvantaged individual, without the cooperation or vote of any nondisadvantaged individual, from making any business decision of the firm. *See* §26.71(c).

Therefore, per the manager quorum and voting provisions, your control is impermissibly restricted within the meaning of §26.71(c). We affirm NCTRCA's conclusion, under §26.89(f)(1), as supported by substantial evidence.

Conclusion

We affirm NCTRCA's decertification under §26.89(f)(1) as supported by substantial evidence and not inconsistent with the substantive or procedural provisions concerning certification.

This determination is administratively final and is not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights programs Division

cc: NCTRCA