

May 25, 2016

Reference Number: 16-0023

Ms. Elicia Mitchell
Interim Agency Director
North Central Texas Regional Certification Agency
CenterPoint Two, Suite 100
624 Six Flags Drive
Arlington, Texas 76011

Dear Ms. Mitchell:

Vic Thompson Company (VTC) appeals the North Central Texas Regional Certification Agency's (NCTRCA's) denial of the firm's application for certification as an Airport Concessions Disadvantaged Business Enterprise (ACDBE) under criteria set forth at 49 C.F.R. Parts 23 and 26 (the Regulation). After reviewing the complete full administrative record, we remand under Regulation §26.89(f)(4) for further proceedings consistent with the instructions below.

The Department finds the record unclear or incomplete with respect to matters likely to have a significant impact on the outcome of the case. NCTRCA's Denial Letter does not sufficiently indicate that the disadvantaged owners do not satisfy the requirements of §§26.69(c), (d) and (h) relating to ownership; and §§26.71(b), (d), and (h) relating to control. *See generally* §26.86(a).

NCTRCA determined that VTC's disadvantaged owners' (Christine Norton and Robin Baughman's) ownership interest is not real and substantial and did not constitute a majority ownership interest in the firm under §26.69(c). We are unpersuaded, on the evidence before us, that NCTRCA correctly analyzed a REDACTED loan from Victor H. Thompson to Vic Thompson Company as a failed capital contribution by the disadvantaged owners. The disadvantaged owners took over the loan from the company and were contracted to make substantial monthly payments. We instruct NCTRCA on remand to clarify whether the loan is properly a capital contribution and whether, if so, the firm shows a history of repayment according to the terms of the underlying Promissory Note.

With regard to §26.69(d)(4), the Department finds the argument for this ground unpersuasive. NCTRCA indicates that the transferred stock owned by the disadvantaged owners is held in escrow as security for the repayment of the Promissory Note. This analysis is unpersuasive as

transferred stock is frequently held in escrow in the regular course of business. NCTRCA should not consider this ground on remand. NCTRCA's §26.69(h)(1) argument is also unpersuasive because the certifier fails to identify any transfer for inadequate consideration. NCTRCA should not explore this ground on remand.

NCTRCA also took issue with VTC's ability to control the firm with regard to §§26.71(b), (d), and (h). The Denial Letter lacks specific reasons and analysis to support its control grounds, and consequently we request that NCTRCA submit a new Denial Letter that comports with the requirements of §26.86(a).

Applicable Regulation Provisions

§23.31 provides in pertinent part:

“(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).”

§26.61(b) provides:

“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.”

§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(d) provides:

“All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

- (1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
- (2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.”

§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(b) provides:

“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.

(1) 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.

(2) 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.

(3) 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.

(4) 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.”

§26.71(d) provides:

“The socially and economically disadvantaged owners must 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.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.”

§26.71(h) provides:

“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.”

§26.89(f)(4) provides:

“If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding.

The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.”

§26.86(a) provides:

“When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

VTC provides design and construction services for aviation security and baggage handling system projects; and research, development and testing of aviation security related systems and equipment (Uniform Certification Application dated April 21, 2015). The firm was established on September 23, 1997. The UCA indicates that disadvantaged owners currently own 100% of the firm: Christine H. Norton is the C.E.O. of the firm and owns 50% of the firm; and Robin E. Baughman is the President and the C.F.O. of the firm and also owns 50%.

Prior to the disadvantaged owners becoming sole owners of VTC, the UCA indicates that each owner previously owned only 15% (30% combined) of the firm as of December 2009.¹ The UCA also indicates that the disadvantaged owners each acquired an additional 35% on April 1, 2015.² On April 1, 2015, a Special Meeting and Unanimous Consent of Shareholders and Directors of VTC shows that the former owners transferred their shares of the firm to the current owners, who became 100% owners of the firm:

¹ The Record contains an e-mail correspondence dated May 27, 2015 to Priscilla Puentez of NCTRCA, indicating that the disadvantaged owners paid REDACTED to former owner Victor Thompson for their initial 30% of the firm in 2009. The UCA indicates that each of the owners contributed REDACTED presumably for the original 15% of the firm. According to the Proof of Capital Contributions Toward the 100% Purchase of VTC (Proof of Capital) document, Christine H. Norton had a separate agreement to pay Robin E. Baughman back REDACTED for the purchase of her shares. The following payments are verified by copies of checks in the Record:

Check No.: 300127223	REDACTED	Robin E. Baughman
Check No.: 182	REDACTED	Robin E. Baughman
Check No.: 3393	REDACTED	Christine H. Norton

² According to the firm’s Minutes of Annual Meeting of Shareholders of Vic Thompson Company dated January 6, 2015, there were originally 5 owners of the firm, each that owned the following percentages: Victor H. Thompson, Jr. (32.5%); Sarah A. Thompson (32.5%); Robin E. Baughman (15%); Christine H. Norton (15%); and Floyd Holway (5%).

“WHEREAS Victor H. Thompson, Jr. (“V. Thompson”), owner of 65 shares of common stock [35.5%] in the Company represented by certificates 7 and 9 (“Stock”), and Sarah A. Thompson (S. Thompson”) owner of 65 shares of Stock [35.5%] represented by certificate 8, and Floyd Holway (“Holway”), owner of 10 shares [5%] of Stock represented by certificate 3, have agreed to sell all of their Stock to Robin E. Baughman (“Baughman”) and Christine H. Norton (“Norton”) collectively, “Purchasers”) pursuant to the terms of the Stock Purchase and Sale Agreement (the “Agreement”) effective April 1, 2015.”

The Special Meeting Minutes, Stock Certificates, Stock Transfer Ledger and Stock Purchase and Sales Agreement support the entire transfer of ownership from Victor H. Thompson, Sarah A. Thompson and Floyd Holway to Christine Norton and Robin Baughman. The Proof of Capital indicates that the disadvantaged owners paid one of the three former owners, Floyd Holway in full with a check for REDACTED.15 as evidenced in the Record.

Prior to the transfer of his shares back in 2009, the Proof of Capital indicates that Victor H. Thompson originally loaned the firm REDACTED to be used as operating capital. The disadvantaged owners have guaranteed payment of the loan as indicated by the Stock Pledge Agreement.³ The Promissory Note (Exhibit A) dated April 1, 2015 indicates that in exchange for the shares from Victor H. Thompson and Sarah A. Thompson (lenders), the disadvantaged owners became the debtors of the of the Thompsons’ Promissory Note for REDACTED: “Makers [DBE owners] have guaranteed the payment of that certain Promissory Note from the Company to V. Thompson dated 12/21/2009 in the original principal sum of REDACTED (existing note)).”

The Promissory Note (Exhibit A) indicates that until the end of calendar year 2015, *monthly payments of accrued interest on the REDACTED shall be paid monthly commencing on April 30, 2015 through December 31, 2015 at the rate of 4.75% per annum.* (Emphasis added.) The note also indicates that starting January 31, 2016, the note shall be paid in equal monthly installments of REDACTED (principal), plus accrued interest on the unpaid principal at the rate of 4.75% per annum until the Principal Amount of REDACTED is paid in full. The last payment is due on December 31, 2019. Id. at 1. The current Promissory Note is secured by all outstanding and issued stock of VTC. Id.

In the Denial Letter, NCTRCA requested proof payment from the disadvantaged owners for initial payment on April 15, 2015, but claims they have not received any documentation. NCTRCA argues the disadvantaged owners’ failure to substantiate monthly payments is not in accordance with §26.69(c). Id. at 2-3.

³ The Stock Pledge Agreement (Exhibit B), dated April 1, 2015, indicates that the Pledgors (Christine H. Norton and Robin E. Baughman) entered into that certain Stock Purchase and Sale Agreement and the Secured Parties (Thompsons) collectively sold 130 shares of Common Stock of VTC to Pledgors. In connection with the sale of Stock to Pledgors, the Pledgors executed and delivered to Secured Parties a promissory note in the original amount of REDACTED. Id. The Pledgors granted a security interest in and to the Pledged Stock to secure Pledgors’ present and future obligations to Secured Parties (Thompsons). Id.

On Appeal, the firm argues that the disadvantaged owners have made payments according to the terms of the note:

“Ms. Norton and Ms. Baughman made a substantial financial investment when they purchased VTC. They have invested REDACTED of hard cash towards the purchase of 100% of the outstanding stock.⁴ The Promissory Note, which is for REDACTED, and the debt obligations of VTC are secured by their personal guarantees. They [disadvantaged owners] pledged valuable real estate that they owned personally which required that their spouses waive *their* ownership interests in the respective properties.

The payment terms of the New Note are significant. Ms. Norton and Ms. Baughman were to pay REDACTED a month for the remaining months of 2015. These *REDACTED per month payments began almost one week after the signing of the Note. Beginning in January 2016, they are to pay REDACTED. These payments are made by Ms. Norton and Ms. Baughman personally as shareholder distributions taxable to them and reported on K-1 s...*” (Emphasis added.)

The Record contains several documents indicating that the disadvantaged owners have made payments toward the note—and have made them in higher amounts and possibly earlier than required. VTC provides a copy of an online checking account statement from PayCom showing relevant transactions from April 2015 to January 2015 showing the following direct deposits or Note Payments accordingly⁵:

June 2015	REDACTED
June 2015	REDACTED
June 2015	REDACTED
May 2015	REDACTED
*May 29, 2015	REDACTED
*May 29, 2015	REDACTED
*April 30, 2015	REDACTED
January 2016	REDACTED

*Copy of First National Bank check located in the Record.

It is unclear why the payments are in different amounts each month or why some months show multiple payments. VTC also claims that the payments were personally made by Christine H. Norton and Robin E. Baughman personally as shareholder distributions taxable to them and reported on K-1s. Id. The 2015 K-1s are not available in the Record. The 2016 K-1s are not yet in existence.

⁴ The Record does not specifically state the origin of REDACTED investment of cash. It is presumed that this figure is an approximation of the disadvantaged owners’ original payment of REDACTED for their 30% of shares to Victor H. Thompson, combined with the payment to Floyd Holway in the amount of \$153,846.15 for his 5%. Together, these amounts add up to REDACTED, approximately REDACTED, which disadvantaged owners may be referring to on Appeal.

⁵ We note that the listed dates for the transactions or direct deposits on the Copy of the Online Statement are somewhat illegible. However, the amounts are clear.

With regard to control, the Denial Letter simply cites §§26.71(b) and (d) on page 4, but provides little to no evidentiary support from the Record. The Denial Letter indicates that the firm employs several Engineers and other Technical employees including Victor Thompson, former owner and applicant of the firm. *Id.* The certifier indicates that because Victor H. Thompson is still employed with the firm, the independence of VTC is “questionable.” *Id.*

Discussion and Decision

Ownership

Real and Substantial Ownership

It is unclear whether the disadvantaged owners have demonstrated that they own the firm per §26.69(c) (the firm’s ownership must be real, substantial, and continuing, going beyond mere pro forma ownership of the firm as reflected in the ownership documents). We instruct NCTRCA to examine the documents in the Record and conduct further analysis. We believe there may be substantial evidence of regular repayment according to the terms of the note, in which case the loan is properly viewed as a valid capital contribution. If that is the case, then there should be no §26.69(c) impediment to certification. We instruct NCTRCA to weigh the available evidence carefully and reconsider its position in light of these instructions. NCTRCA may collect further evidence of repayment as it sees fit.

The disadvantaged owners originally owned 30% combined interests of the firm in 2009. In April 2015, the 3 former owners, REDACTED, and REDACTED agreed to sell the remaining 70% to REDACTED. The disadvantaged owners paid Floyd Holway for his 5% in the amount of REDACTED. In exchange for remaining 65% of the firm, the disadvantaged owners assumed payments of a REDACTED Promissory Note to Victor H. Thompson and Sarah A. Thompson. The disadvantaged owners were contracted to immediately pay approximately REDACTED per month per the terms of the new Promissory Note and to pay REDACTED per month beginning in 2016.

NCTRCA asserts that the disadvantaged owners have not provided proof of continuous payments for the Promissory Note in exchange for their newly transferred shares. As a result, Christine H. Norton and Robin E. Baughman would not really and substantially own 100% the firm, but only 35%, according to NCTRCA’s apparent reasoning. The disadvantaged owners’ majority ownership would therefore be merely pro forma. *See* §26.69(c).

On Appeal, VTC indicates that the disadvantaged owners’ ownership is more than pro forma. The disadvantaged owners invested REDACTED in cash.⁶ VTC also provides a copy of an online checking account statement from PayCom showing direct deposit transactions to Victor H. Thompson between January 1, 2015 and July 31, 2015. Though the exact dates of the direct deposits are unclear, the Note Payment amounts are evident. VTC also contends that the REDACTED payments started one week after the signing of the note and that the payments were personally made by Christine H. Norton and Robin E. Baughman personally as shareholder

⁶ *See* footnote 5.

distributions taxable to them and reported on K-1s. If that is correct, then Ms. Norton and Baughman's ownership would appear to be real, substantial, and continuing, within the meaning of §26.69(c).

The record suggests that the disadvantaged owners have made substantial payments as evidenced by the direct deposits to Victor H. Thompson's account. Though the direct deposit amounts are not the same exact amounts indicated in the terms of the Promissory Note, the disadvantaged owners seem to have made payments as indicated by the copy of Victor H. Thompson's electronic statement activity. However, there is a question as to whether the payments are continuous and are in fact from the disadvantaged owners. Not all of the copies of the checks indicating that the payments came from the disadvantaged owners are located in the Record.

In addition, the relevant 2015 and 2016 K-1 tax documents were unavailable in the Record or are not yet in existence. The Department instructs NCTRCA to conduct further fact-finding and analysis with regard to the monthly payments of the Promissory Note. It is uncertain as to whether substantial evidence supports the proposition that the disadvantaged owners' majority/controlling interest in VTC is real, substantial, and continuing, going beyond pro forma ownership as reflected in the ownership documents pursuant to §26.69(c). We remand in accordance with §26.89(f)(4) for NCTRCA to reconsider its determination and to collect additional evidence as necessary.

Other Ownership Grounds

We find NCTRCA's reasons for denying VTC per §§26.69(d)(4) and (h)(1) unpersuasive and do not consider these grounds to be ones that NCTRCA should explore on remand.

The certifier notes that the transferred stock owned by the disadvantaged owners is held in escrow as a security for the repayment of the Promissory Note. *See* §26.69(d)(4). NCTRCA asserts that because the transferred stock from the Thompsons is held in escrow and the disadvantaged owners are not holding the stocks themselves, they do not own the 65% interest from the Thompsons. We find this line of reasoning unpersuasive as transferred stock is frequently held in escrow in the regular course of business. Section 26.69(d) is not intended to apply to escrowed stock. It relates more specifically to shares held in trust.

With regard to §26.69(h)(1), the certifier fails to identify any transfer for inadequate consideration. The disadvantaged owners paid REDACTED for their original 30% of the firm as evidenced by checks in the Record. They also paid Floyd Holway over \$REDACTED for his 5% shares. The disadvantaged owners have paid (via debt) REDACTED in exchange for the remaining 65% of the firm. NCTRCA having identified no transfer for inadequate consideration, we do not understand how §26.69(h) can apply. We cannot affirm on this ground and do not believe it would be a productive avenue for NCTRCA to explore on remand.

Control

The Denial Letter cites §§26.71(b) and (d) on page 4 with regard to control but provides little to no evidentiary support from the Record and minimal explanation. *See* §26.86(a). With regard to

independence, the letter recites §26.71(b)(1) and then mentions facts ostensibly irrelevant to the provision.⁷ We find no clear rationale under §26.71(b) for why VTC is not viable but for the participation of Victor H. Thompson and other professional engineers. NCTRCA, contrary to the provision's "must" language also failed to consider all four independence factors in §26.71(b)(1)-(4).

Similarly, the certifier does not provide reference to board control other than listing §26.71(d) on the page 4 of the Denial Letter. NCTRCA failed to provide full explanations for these control grounds that comport with §26.86(a). (NCTRCA also attempts to make a licensing argument, but does not cite §26.71(h) in the Denial Letter.) We cannot make a principled determination relating to these grounds, as expressed in the current Denial Letter. We therefore instruct the certifier under §26.89(f)(4), if it finds VTC ineligible on control grounds, to submit a new Denial Letter clarifying and fully explaining the reasons for its denial and citing specific evidentiary support, as §26.86(a) requires.

Conclusion

We remand for NCTRCA for reconsideration of its §26.69(c) denial ground and, if applicable, for further development and exposition of its §§26.71(b) and (d) denial grounds.

We respectfully request that NCTRCA, not later than August 1, 2016, either certify the firm (if it determines the firm has demonstrated eligibility) or fully address the provisions specified in a new Denial Letter that considers all of the evidence (as supplemented, at NCTRCA's discretion) in the record and fully comports with §26.86(a).

Sincerely,

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

cc: VTC

⁷ Of possible relevance under §26.71(b)(2), the Denial Letter recites facts about the firm's Employment Agreement with Victor H. Thompson, "The ongoing continued employment relationship coupled with the employment agreement which states in part, it would be in the best interests of the Company to continue employment of Victor H. Thompson, Jr. consistent with the terms of the Employment Agreement, calls into question the independence of the firm and the disadvantaged owners ability to direct or cause the direction of the firm without Victor Thompson's interference." NCTRCA did not specify any facts or rationale pertaining to the other two independence factors per §26.71(b)(3)-(4).