

April 12, 2017

Reference Number: 16-0168

Ms. Linda Clark
President
Clark Land Resources, Inc.
REDACTED
Vista, CA 92084

Dear Ms. Clark:

This letter responds to the June 13, 2016 appeal¹ by Clark Land Resources, Inc. (CLR) of the California Unified Certification Program's (CUCP) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under 49 CFR Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, pursuant to §26.61(e), the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) affirms CUCP's decision, as required by §26.89(f)(1).² CLR has not shown, by a preponderance of the evidence, that a socially and economically disadvantaged individual owns and controls the firm, as required by §26.61(b) of the Regulation.³

Linda Clark and her husband, Fred Clark, founded CLR in October 2012.⁴ Mr. Clark is non-socially and economically disadvantaged (non-SED) under the Regulation. The firm provides consulting services to utility companies and municipalities regarding the research, acquisition, inspection, protection, and management of land rights.⁵ To start the firm, Ms. Clark contributed REDACTED and Mr. Clark contributed REDACTED from a joint account.⁶ Ms. Clark is CLR's President and Treasurer and Mr. Clark is the firm's Vice President and Secretary. Stated ownership percentages are 51 and 49, respectively.

CUCP denied CLR's application on multiple ownership and control grounds.⁷ We affirm on the bases of §26.69(i) and §26.71(d) and (e).

¹ See Appeal Letter (Sept. 7, 2016).

² See §26.89(f)(1): "The Department affirms [a certifier's] decision unless [the Department] determines, based on the entire administrative record, that [the certifier's] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

³ See §26.61(b): "The firm seeking certification has the burden of demonstrating to [the certifier], 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."

⁴ See DBE Application (Nov. 19, 2015) at 1.

⁵ See *id.*

⁶ See DBE Application and Appeal Letter.

⁷ See Denial Letter (June 13, 2016).

I. OWNERSHIP

Section 26.69(i) states:

You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.**
- (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.**

(Emphasis added).

The Regulation permits the use of joint marital assets for an SED individual to gain an ownership interest in a firm, as long as the non-SED spouse irrevocably renounces and transfers all rights in the ownership of the firm at the time of submitting its DBE application.⁸

The record contains substantial evidence that Mr. and Ms. Clark used joint marital funds to start CLR.⁹ Indeed, the firm confirmed this in its appeal letter, stating, “[I]t is true that the origin of the funds to obtain Linda Clark's 51 % interest was from community property with her husband, Fred[.]”¹⁰ The firm did not include a document in which Mr. Clark irrevocably renounced and transferred all rights in his spouse's ownership interest to Ms. Clark. Absent such evidence, CUCP correctly determined that CLR did not prove, by a preponderance of the evidence, that an SED individual owns at least 51% the firm, as the Regulation requires. Absent a spousal renunciation, the Regulation considers Mr. and Ms. Clark each to own 50% of CLR. Substantial evidence in the record supports CUCP's conclusion, and we affirm it.

II. CONTROL

Section 26.71(d)(2) states:

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

⁸ Otherwise, §26.69(i)(1) considers the SED spouse to have personally contributed 50% of the firm's capital and to own, at most, a 50% ownership interest.

⁹ See Capital Contributions Statement (Dec. 2012).

¹⁰ Appeal Letter at 1.

CLR contends that as the 51% owner and President of the firm, Ms. Clark controls the board of directors in reality and as indicated in the firm's bylaws.¹¹ The firm has not referenced any portion of the bylaws or proffered any other evidence to substantiate its claim. To the contrary, the record contains substantial evidence that Ms. Clark does not control the board of directors but instead shares that control with Mr. Clark. The firm's bylaws state:

A majority of the authorized number of directors shall constitute a quorum except when a vacancy or vacancies prevents such majority, whereupon a majority of the directors in office shall constitute a quorum, provided such majority shall constitute at least either one-third of the authorized number of directors or at least two directors, whichever is larger, or unless the authorized number of directors is only one.¹²

(Emphasis added).

Because Mr. and Ms. Clark are the sole directors, both must be present to approve the board's actions. Ms. Clark, by herself, is not a majority of the authorized number of directors and cannot form a quorum without Mr. Clark. She cannot carry any board vote without Mr. Clark's cooperation and assent. Mr. Clark's mere absence renders the board powerless to act. The bylaws permit Mr. Clark an effective veto over any and all board action. As a result, we find that Ms. Clark does not control the board of directors, within the meaning of the Regulation. *See, e.g.*, 16-0015, *Tollie's Landscaping & Lawn, Inc.* (June 10, 2016) (disadvantaged spouse did not control board when her non-disadvantaged husband had an equal vote and applicable quorum provision required a majority of the two directors).

Section 26.71(e) states:

Individuals who are not socially and economically disadvantaged or immediate family members 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.

(Emphasis added).

CUCP determined that a non-disadvantaged person possesses or exercises the power to control CLR or is disproportionately responsible for its operation. We find that substantial evidence in the record supports that determination.

According to official minutes, Mr. Clark possesses the power to control the firm through his authorization to contractually obligate the firm in the ordinary course of business, without Ms. Clark's consent:

“RESOLVED: That the following officers be, and the same hereby are authorized to sign contracts and obligations on behalf of the corporation: President and Vice President.”¹³

CLR's bylaws also permit Mr. Clark to unilaterally control the firm's finances:

¹¹ See Appeal Letter at 4.

¹² See Bylaws of Clark Land Resources, Inc., Art. II, Sec. 8 (Nov. 1, 2012).

¹³ Minutes of First Organizational Meeting of Incorporators and Initial Directors at 6.

RESOLVED FURTHER: That until such authority is revoked by sealed notification to said Bank of such action by the Board of Directors of this corporation, President and Vice President be, and hereby is/are authorized, Any One Acting Alone, to execute all checks, drafts and other instruments obligating this corporation to pay money, and to withdraw funds on deposit on behalf of the corporation.¹⁴

(Emphasis added).

In addition, Mr. Clark “frequently” shares Ms. Clark’s control of a multitude of CLR’s key management and operational functions:¹⁵

- Sets policies for company direction/scope of operations;
- Bids on and estimates contracts;
- Makes major purchasing decisions;
- Performs marketing and sales activities;
- Supervises field operations;
- Attends bid openings and lettings;
- Hires and fires management staff;
- Hires and fires field staff or crew; and
- Obligates the firm by contract/credit.

The record does not contain any evidence that Mr. Clark needs Ms. Clark’s authorization or involvement to perform the above functions or that Ms. Clark could even perform those functions without Mr. Clark’s involvement. The evidence indicates that Mr. Clark’s unilateral powers to obligate and bind the firm are disproportionate to his stated minority ownership interest. That evidence, as noted above, is substantial, and it supports CUCP’s determination that Mr. Clark possesses or exercises the power to control CLR or is disproportionately responsible for operating the firm.

The Department therefore affirms CUCP’s ineligibility determination under §26.89(f)(1). CLR failed to carry its burden of proving, by a preponderance of the evidence, that a socially and economically disadvantaged individual owns and controls the firm within the meaning of the Regulation.

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: CUCP

¹⁴ *Id.*

¹⁵ DBE Application at 9.