

May 11, 2018

Reference Number: 17-0125

Ms. Arlene Prince
Director, Business Development & Special Programs
South Carolina Department of Transportation
P.O. Box 191
Columbia, SC 29202

Dear Ms. Prince:

This letter responds to the South Carolina Department of Transportation's (SCDOT) denial¹ of Foursquare Integrated Transportation Planning, Inc.'s (Foursquare) application for Disadvantaged Business Enterprise (DBE) interstate certification² under the standards of 49 C.F.R. Part 26 (Regulation). After considering the full administrative record, pursuant to §26.61(e), we reverse SCDOT's decision under §26.89(f)(2)³ and direct SCDOT to certify the firm forthwith.

BACKGROUND

Lora Byala and her husband Gary Byala founded Foursquare in Maryland in January 2013. Mr. Byala is not presumed socially and economically disadvantaged (SED) under the Regulation. Ms. Byala and Mr. Byala respectively own 51% and 49% of Foursquare. Ms. Byala is the firm's President and Treasurer and Mr. Byala is the Secretary. Ms. Byala has been the firm's sole director since the firm's founding. The Maryland (State A) DOT (MDOT) certified Foursquare in November 2013. Foursquare then applied for and received interstate certification in at least ten other states.⁴ Foursquare submitted its interstate certification application to SCDOT (State B) in April 2017. SCDOT denied Foursquare's application, claiming to have had "good cause" for doing so. Foursquare filed a timely appeal.

¹ See Notice of Denial (NOD) (June 15, 2017).

² See generally §26.85 – Interstate certification.

³ Section 26.89(f)(2) states: "If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it."

⁴ Foursquare claims that it received interstate certification in 17 states. See Appeal Letter (July 19, 2017) at 4. However, the administrative record includes evidence of only 10 states: Virginia, New Jersey, New York, North Carolina, Pennsylvania, Florida, Rhode Island, Massachusetts, Louisiana, and Connecticut.

DISCUSSION

Section 26.85 (Interstate Certification Rule) states in pertinent part⁵:

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, you must take the following actions:

(2) *Determine whether there is good cause to believe that State A’s certification of the firm is erroneous or should not apply in your State.* Reasons for making such a determination may include the following:

(i) Evidence that State A’s certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) *State A’s certification was factually erroneous or was inconsistent with the requirements of this part;*

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(emphasis added).

The issue in this case is whether substantial evidence supports SCDOT’s decision that MDOT’s certification of Foursquare is “inconsistent with”⁶ the Regulation’s requirements, having determined that Ms. Byala does not own and control the firm under §26.69(i) and §26.71(c). SCDOT did not cite any of the specific §26.85(d)(2)(i-v) good cause reasons to support its belief. We infer that SCDOT relied on §26.85(d)(2)(iii).

The interstate certification rule does not require out-of-state certifiers, *e.g.*, SCDOT, to accept home-state decisions without review. However, we have long held that State B must review home-state applications through a narrow lens, and afford significant deference to State A’s decision. The interstate certification rule allows State B to deny an application if it believes that it has one or more “good cause” reasons for doing so. Section 26.85(d)(2) contains the only five reasons for which State B may challenge State A’s determination. One such reason is that State A’s

⁵ SCDOT did not exercise the option in §26.85(b) of accepting MDOT’s certification decision and certifying Foursquare without further procedures. SCDOT chose instead to follow the procedures in §26.85(c). The record demonstrates that SCDOT and Foursquare fully complied with their obligations under §26.85(c). Neither party argues otherwise.

⁶ SCDOT does not contend that Maryland’s certification decision was factually erroneous.

certification is “inconsistent with” the Regulation’s requirements⁷ because it “directly contradicts a provision in the regulatory text.”⁸

The interstate certification rule does not permit State B simply to substitute its judgment regarding how to apply the Regulation’s requirements for that of State A.⁹ “Inconsistent with” is a much higher standard than interpretive disagreement.¹⁰

Ownership: Irrevocable Renunciation and Transfer of Ownership Rights

Section 26.69(i) of the Regulation addresses the effect of marital assets on a disadvantaged individual’s ownership of a firm seeking certification.

Section 26.69(i) provides:

“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.)

SCDOT argues that Ms. Byala does not own Foursquare because “The regulations clearly state a renunciation of rights is required when martial [sic] assets are used to acquire ownership.”¹¹ Foursquare concedes that the Byalas used marital funds to found the firm. However, Foursquare contends it satisfies the requirements of §26.69(i) because the Byalas irrevocably renounced their rights in each other’s ownership interests through a Restrictive Stock Transfer Agreement (Agreement).¹² They explain that the Agreement ensures that that in the event of Ms. Byala’s departure from the firm, or death, disability (or other incapacitation), her 51% ownership interest vests with the members of her estate. Mr. Byala cannot claim her ownership interest.¹³ Foursquare

⁷ See §26.85(d)(2)(iii).

⁸ Preamble of Final Interstate Certification Rule at 76 Fed. Reg. 5089.

⁹ See, e.g., 17-0017 DES Wholesale, LLC (March 16, 2018) and 15-0044 Three Oaks Engineering, Inc. (Oct. 13, 2015).

¹⁰ See Interstate Certification Guidance (July 9, 2014) at 4.

¹¹ NOD at 1. We note that State A law may well treat a document other than a special-purpose “renunciation” as effective to renounce and transfer rights.

¹² See Appeal Letter at 4. SCDOT does not contend that South Carolina law requires a different result.

¹³ See *id.*

contends that the Agreement is consistent with the requirements of §26.71(i) because it is binding and enforceable, and there is “no ambiguity that [she and Mr. Byala] agreed to divide their ownership.”¹⁴

MDOT is best equipped to interpret Maryland State law and determine whether Mr. Byala irrevocably transferred and renounced his rights in Ms. Byala’s ownership interest through the Agreement. MDOT evidently determined that he did. We defer to MDOT’s determination. Under the interstate certification rule, SCDOT should have done the same, rather than substituting its judgment about the effect of a Maryland law.

Control: Shareholder Quorum Provision

Section 26.71(c) of the Regulation addresses formal and informal restrictions that impermissibly limit the disadvantaged owner’s customary discretion related to control.

Section 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).

The pertinent shareholder provisions in Foursquare’s bylaws state:

Art. Six, Section 1. Duties of the Shareholders. The shareholders of the corporation shall select the members of the Board of Directors at the Annual Meeting of the shareholders. The shareholders shall also vote on all fundamental changes (“Fundamental Changes”) to the Corporation at the Annual Meeting. Fundamental Changes shall be defined as charter amendments, consolidations, mergers, share exchanges accomplished by a Corporation-to-Corporation act, asset transfers outside the ordinary course of business, and dissolution of the corporation.¹⁵

Art. Six, Section 3. Quorum And Voting. A simple majority of the Shareholders shall be necessary at all times to constitute a quorum for the transaction of the business of the Shareholders. If, however, such quorum shall not be present or represented at any meeting of the Shareholders, the Shareholders present shall have the power and authority to adjourn the meeting from time to time without notice, other than an announcement at the meeting, until a quorum shall be present or represented. Each Shareholder shall be entitled to one vote. Unless these Bylaws state otherwise, the affirmative vote of a majority of the Shareholders (who are participating, in a duly called meeting at which there is quorum, by

¹⁴ *Id.*

¹⁵ Bylaws of Foursquare Integrated Transportation Planning, Inc. (Bylaws) at Art. Six, Sec. 1.

their presence including by means of a conference telephone or similar communication equipment (in accordance with Section 2 above) shall be required in order to constitute the transaction of the Shareholders.¹⁶

The pertinent board of directors provision in Foursquare's bylaws state:

Art. Three, Section 1. Management; Acting As Members. The Board of Directors shall manage the affairs of the Corporation. The Board of Directors shall have power to [...] employ necessary employees [...] and to take such other action as may be necessary or proper to carry out the purposes of the Corporation.¹⁷

The pertinent officers provision in Foursquare's bylaws states:

Art. Five, Section 3. Removal. Any officer may be removed at any time, with or without cause, by the action of the Board of Directors.¹⁸

SCDOT argues that the shareholder quorum provision restricts Ms. Byala's customary discretion because the provision requires the Byalas to agree when choosing or changing directors.¹⁹ Foursquare contends that Ms. Byala alone has the power to take actions on behalf of the firm, including to appoint and remove board members.²⁰

SCDOT argues that the shareholder quorum provision is "inconsistent with" the Regulation. The shareholder quorum provision requires the representation or presence of a majority of the shareholders to make decisions within the shareholders' power. Hence both Byalas must be present for the shareholders to discharge shareholder duties. According to the Agreement's provisions, neither shareholder can outvote the other. But Ms. Byala is the sole director. Accordingly, Mr. Byala in fact requires *Ms. Byala's consent* to elect himself a director—a situation that clearly does not restrict Ms. Byala's customary discretion.²¹ Ms. Byala remains the sole director until such time as *she chooses* to remove herself.²² SCDOT cites no substantial evidence of a direct contravention of §26.71(c).

SCDOT also argues that Ms. Byala requires Mr. Byala's consent if she wishes to "fire" him. SCDOT must mean to remove him as an officer of the firm since the office of Secretary is his only position. SCDOT cites no authority for the proposition. Article Five, Section 3 of Foursquare's

¹⁶ *Id.* at Sec. 3.

¹⁷ Bylaws at Art. Three, Sec. 1.

¹⁸ *Id.* at Art. Six, Sec. 3

¹⁹ *See* NOD at 1.

²⁰ *See* Appeal Letter at 5. Foursquare also argues that the language in its shareholder quorum provision is inadvertently erroneous, and thus ineffective, because it is "improper," "unlawful," and "unenforceable." *Id.*

²¹ *See generally* §26.73(b)(1): "You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part."

²² Foursquare reaches the same result with a different rationale.

bylaws provides that the board may remove an officer at any time, with or without cause. Therefore, as sole director, Ms. Byala has unfettered discretion to remove Mr. Byala whenever she chooses.²³ SCDOT cites no substantial evidence that the operative provisions are “inconsistent with” §26.71(c).

CONCLUSION

MDOT determined that Ms. Byala owns and controls Foursquare. At least ten states deferred to Maryland’s determination. SCDOT did not, and failed to cite substantial evidence in support of its ineligibility determination. SCDOT challenged Maryland’s decision based on its own, contrary interpretation of certain provisions, in effect substituting its judgment for the home state’s. We find that SCDOT’s decision is unsupported by substantial evidence and inconsistent with applicable certification provisions. There being no “good cause” to deny certification, we reverse under §26.89(f)(2) and direct SCDOT to certify Foursquare without delay.

This decision is administratively final and not subject to petitions for review. Thank you for your continued cooperation.

Sincerely,

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

cc: The Samek Law Firm, LLC for Foursquare

²³ Bylaws at Art. Five, Sec. 3.