

May 21, 2018

Reference Number 17-0154

Ms. Elicia Mitchell  
Executive Director  
North Central Texas Regional Certification Agency  
624 Six Flags Dr., Suite 100  
Arlington, TX 76011

Dear Ms. Mitchell:

This letter responds to GFRC 360 LLC's (GFRC) appeal<sup>1</sup> of the North Central Texas Regional Certification Agency's (NCTRCA) denial<sup>2</sup> of the firm's application for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 CFR Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, we vacate NCTRCA's denial decision and remand for further proceedings consistent with the instructions below.

## **I. Background**

In July 2015, Melvin Bryant, who is presumed socially and economically disadvantaged (SED) under the Regulation, founded GFRC as a subsidiary of parent firm BG 360, Inc. He is the President and Chief Executive Officer (CEO) of both firms. GFRC claims that Mr. Bryant is the sole owner of BG 360, and that BG 360 is the sole owner of GFRC.<sup>3</sup> GFRC explains that Mr. Bryant expressly created both firms to allow GFRC to purchase the assets of non-DBE firm New GFRC Cladding, Inc. (Cladding) from Gladstone Capital Corporation (Gladstone) in October 2015.<sup>4,5</sup> Gladstone had hired Mr. Bryant in January 2015 to turn around Cladding. GFRC concedes that Gladstone significantly financed BG 360's and GFRC's start-up activities, particularly GFRC's purchase of Cladding.

## **II. Authority**

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<sup>1</sup> See Appeal Letter (Sept. 12, 2017).

<sup>2</sup> See Denial Letter (June 16, 2017).

<sup>3</sup> See Appeal Letter at 4.

<sup>4</sup> See *id.* at 10. Like Cladding, GFRC specializes in designing, engineering, fabricating, and installing glass fiber reinforced concrete cladding systems for institutional and commercial buildings. See Uniform Certification Application (UCA) at 1.

<sup>5</sup> See Asset Purchase Agreement (Sept. 30, 2015).

Section 26.61(b) states:

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.

Section 26.73(e) states in pertinent part:

An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. *Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.*

(1) *If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.*

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals.

(Emphasis added.)

### III. Discussion

The general rule of §26.73(e) is that an applicant owned by another firm (subsidiary owned by parent) is ineligible for certification. The subsection (e)(1) exception requires a certifier to conduct a three-pronged eligibility analysis: (1) evaluate whether one or more SED individuals own and control the parent; if so, (2) determine whether the parent owns and controls the subsidiary; and if so, (3) evaluate whether the subsidiary “otherwise meets all [certification requirements].”<sup>6</sup>

NCTRCA appears to have evaluated whether Mr. Bryant owns and controls parent BG 360 without actually determining whether he does. NCTRCA instead relied on the BG 360 evidence to determine whether Mr. Bryant owns and controls GFRC directly. The latter determination is inconsistent with the prescribed analysis and essentially irrelevant to the question of GFRC’s eligibility under §26.73(e)(1), which is the only way GFRC *can* be eligible on these facts.

We remand for NCTRCA to reevaluate eligibility based on a proper §26.73(e)(1) analysis.<sup>7</sup>

### IV. Remand Instructions

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<sup>6</sup> Section 26.73(e)(1). A negative conclusion at any step in the analysis is a sufficient ineligibility determination.

<sup>7</sup> This letter assumes the accuracy of the contentions that Mr. Bryant owns 100% of the parent and the parent owns 100% of the applicant. Should NCTRCA determine that in fact Mr. Bryant owns less than 100% but at least 51% of BG 360, or BG 360 owns less than 100% but at least 51% of GFRC, then it should refer to §26.73(e)(2). Ownership of under 51% at either tier defeats eligibility.

We instruct NCTRCA to reconsider GFRC's DBE eligibility by first determining whether Mr. Bryant owns and controls BG 360 within the meaning of the Regulation. If NCTRCA concludes he does, then NCTRCA should evaluate whether BG 360 owns and controls GFRC. Finally, if NCTRCA concludes that BG 360 owns and controls GFRC, section 26.73(e)(1) deems Mr. Bryant to own and control GFRC, and NCTRCA must evaluate whether GFRC "otherwise meets" the Regulation's requirements for certification.<sup>8</sup>

## **V. Conclusion**

We remand under §26.89(f)(4) for NCTRCA to reconsider GFRC's DBE eligibility in accordance with the instructions above. We request that NCTRCA issue a new eligibility determination to GFRC, with this office copied, by August 15, 2018.

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

Sincerely,

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

cc: Hicks Law Group, PLLC for GFRC 360, LLC

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<sup>8</sup> NCTRCA should reevaluate existing evidence in light of these instructions; it may also, at any step in its analysis, request new or augmented information and/or conduct further proceedings it considers helpful.