

May 15, 2018

Reference Number 18-0147

Joseph Q. McCoy
Riley, Safer, Holmes, Cancila
70 West Madison St., Suite 2900
Chicago IL 60602

Dear Mr. McCoy:

This is in response to your appeal of the decision of the North Central Texas Regional Certification Agency's (NCTRCA) decision to deny the application for DBE certification of your client, Gideon Toal Management Services (GTMS). The U.S. Department of Transportation (DOT) is remanding the NCTRCA decision for further proceedings consistent with this letter.

Procedural History

GTMS applied for DBE/ACDBE certification on January 27, 2018. NCTRCA conducted an on-site review of the firm on March 21, 2018. NCTRCA denied the firm's application through a letter of May 7, 2018. The firm appealed to the Department through a letter of August 2, 2018.

Burden of Proof and Standard of Review

Burden of proof when applying for certification. Section 26.61(b) requires an applicant for DBE and/or ACDBE certification to demonstrate, by a preponderance of the evidence, that it meets the requirements of 49 CFR Parts 26 and 23, respectively. This means that the applicant must show that it is more likely than not that it meets these requirements. A certifier is not required to prove that a firm is ineligible. A certifier can properly deny certification on the basis that an applicant did not submit sufficient evidence that it meets eligibility criteria.

Standard of review for appeals of certification denials. On receipt of an applicant's appeal from a denial of certification, the Department makes its decision "based on the entire administrative record as supplemented by the appeal..."¹ The Department does not make a *de novo* review of the matter;² rather, it affirms (a certifier's) decision unless it determines, based on the entire administrative record, that (the certifier's) decision is unsupported by

¹ 49 CFR 26.89(e).

² Id.

substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

This language means that the Department does not act as though it were the original decision maker or substitute its judgment for that of the certifier. If decision – including a finding that an applicant failed to meet its burden of proof – is supported by substantial evidence, then the Department affirms the decision.

Issues

The parties agree that Mr. Alvin Brown, a disadvantaged individual, owns 100 percent of an airport services company named AFS and that AFS owns 51 percent of GTMS. AFS obtained its share of GTMS through a 2017 purchase from the former owner of that share of the company, Ms. Kim Wiemuth.³ A non-disadvantaged person, Mr. Randall Gideon, owns the other 49% of GTMS.

The key issue in the case concerns the interpretation of the rule governing disadvantaged individuals’ indirect ownership of applicants for certification.⁴ The parties rely on different parts of this provision. NCTRCA focuses on the general rule that “a firm that is not owned by such individuals, but is instead owned by another firm – even a DBE firm – cannot be eligible.”⁵ NCTRCA concludes that GTMS is ineligible because Mr. Brown does not own GTMS directly.

GTMS emphasizes the language of exception in paragraph (e)(1): “[if] a parent or holding company, established for tax, capitalization, or other purposes consistent with existing 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.”⁶ GTMS maintains that it qualifies for the exception because its AFS is its “parent,” within the meaning of section 26.73(e)(1).

Discussion

The general rule of §26.73(e) is that an applicant firm owned by another firm, i.e., subsidiary owned by a parent company, is ineligible for DBE certification. The exception in subsection (e)(1) permits the subsidiary to be eligible based on the disadvantaged owner’s indirect ownership and control of the subsidiary, through the parent company. This exception requires the disadvantaged owner to demonstrate (1) that he owns and controls the parent company and (2) that the parent owns and controls the subsidiary/applicant.

³ Under Ms. Wiemuth’s 51 percent ownership, NCTRCA decertified GTMS in 2015, on the basis that she did not control it. GTMS unsuccessfully reapplied for certification in 2015.

⁴ See 49 CFR 26.73(e), including paragraph (e)(1) and Example 2.

⁵ Denial letter, p. 2.

⁶ Appeal letter, p. 3.

In this case, the parties agree that Mr. Brown owns 100 percent of the “parent” company, AFS, and there is no suggestion in the record that he does not control it. There is also agreement that AFS owns 51 percent of GTMS, as the result of AFS’ purchase of Ms. Wiemuth’s former interest.

The appeal is correct in stating that NCTRCA did not properly consider the application of the paragraph (e)(1) exception to the case. As a result, the NCTRCA decision did not fully explore the second part of this office’s analysis of how that exception should be applied, namely whether AFS controls GTMS. The only point NCTRCA makes with result with respect to AFS’ control has to do with the ability of Mr. Gideon to bind GTMS financially by signing checks for the company, a matter of factual dispute between NCTRCA and the appellant. While this is a relevant consideration, the NCTRCA decision does not discuss whether, for instance, the kinds of factors that led to the firm’s 2015 decertification under its previous ownership or any provisions of corporate governance documents impair the ability of AFS to control GTMS today.

For this reason, we are remanding the case to NCTRCA to consider whether, given all the evidence in the record, AFS controls GTMS.

Conclusion

In remanding this case, we instruct NCTRCA to fully consider whether AFS meets its burden of proof that it controls GTMS. If NCTRCA concludes that it does, then the agency must determine whether GTMS meets all other eligibility requirements. GTMS may provide any supplementary information it wishes by June 15, 2019, and NCTRCA is directed to issue its eligibility decision by July 12, 2019.

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

Sincerely,

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

cc: Elicia Mitchell