

October 30, 2017

Reference Number: 17-0060

Kimberly A. King
Director, Equal Opportunity Division
Georgia Department of Transportation
600 West Peachtree Street, 7th Floor
Atlanta, GA 30308

Dear Ms. King:

Southern Food Traditions, LLC (SFT) appeals the Georgia Unified Certification Program's¹ (GUCP) December 19, 2016 determination that the firm is ineligible for certification as an Airport Concession Disadvantaged Business Enterprise (ACDBE), under criteria set forth at 49 CFR Parts 23 and 26 (the Regulation). After reviewing the complete administrative record, the US Department of Transportation ("the Department") vacates the denial and remands the case to GUCP for further proceedings consistent with the instructions below. *See generally* §26.89(f)(4).²

Specifically, we find the denial grounds to be unsupported by substantial evidence or inconsistent with the substantive and procedural provisions of the Regulation. We further find the record unclear or incomplete with respect to matters likely to have a significant impact on the outcome of this case, particularly matters related to the disadvantaged owner's control of the parent firm with majority ownership of SFT. *See generally* §26.73(e)(1) (socially and economically disadvantaged individuals must control SFT's parent firm); *see also* §§26.71(c) (prohibiting restrictions preventing disadvantaged owner, without cooperation or vote of nondisadvantaged person/s, from making firm's business decisions) and 26.71(d)(2) (disadvantaged owner must control board of directors).

I. Procedural History

SFT submitted its Uniform Certification Application (UCA) on September 6, 2016. GUCP conducted the firm's on-site interview on September 29, 2016, and it determined that SFT was

¹ The Georgia Department of Transportation (GDOT) is the agency that issued the denial. GDOT is a member of GUCP.

² §26.89(f)(4) states:

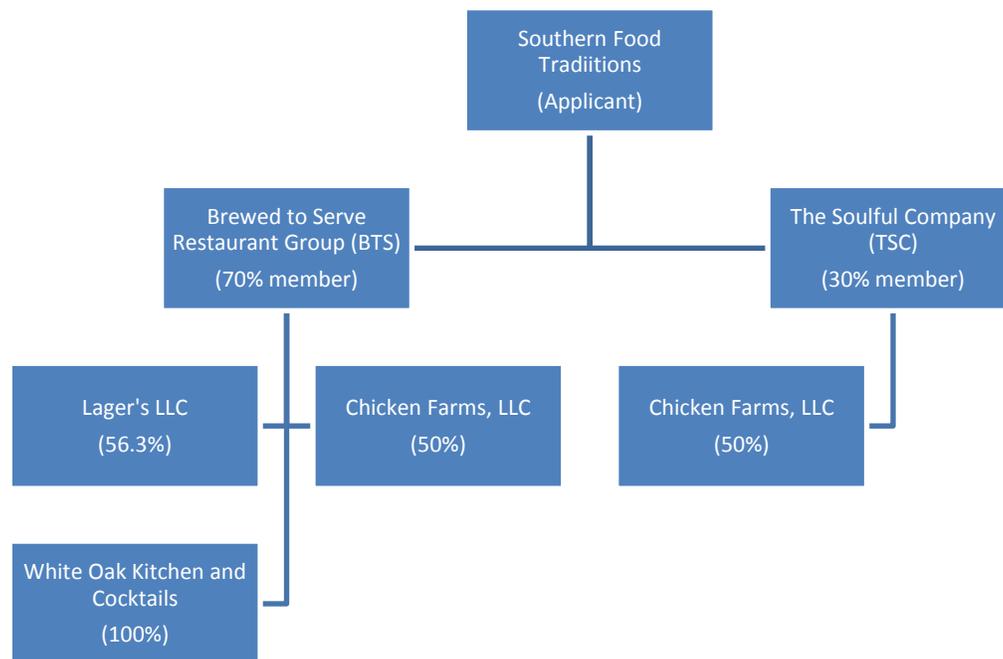
If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

ineligible for ACDBE certification on December 19, 2016. SFT filed its appeal to the Department on March 17, 2017.

II. Facts

SFT is a subsidiary of two firms: Brewed to Serve Restaurant Group, Inc. (BTS) (70% owner) and The Soulful Company (TSC) (30% owner). SFT describes its primary business activities as “develop[ing] and operat[ing] restaurant brands and related products. Operating restaurants is [its] primary focus, including developing concepts for restaurants, as well [sic] writing cooking books and limited consulting to help chefs.” SFT On-site Interview (September 29, 2016) at question 1.³ BTS contributed **REDACTED** to obtain its 70% ownership interest in SFT, and TSC contributed intellectual property and expertise to acquire its 30% ownership. *See* SFT Operating Agreement (August 4, 2015) at Exhibits A-B.

BTS and TSC are distinct businesses that own other restaurant ventures, both jointly and, in the case of BTS, with other parties. The chart⁴ below depicts pertinent portions of the ownership structure:



A. *Brewed to Serve Restaurant Group (BTS)*

³ The record suggests that SFT seeks to establish Chicken Farms restaurants as airport concessions. *See* SFT On-site at question 27 (Question: “Describe the day-to-day operation of the firm?” Answer: “The number one activity is asset management, i.e. Chicken Farm[s], LLC dba Richards Southern Fried.”)

⁴ As noted above, BTS and TSC are SFT’s parents. This chart inverts the usual positions of these top-tier companies to show more clearly their ownership interests in food and beverage companies other than SFT. BTS and TSC each own half of Chicken Farms while BTS owns 56.3% of Lager’s and 100% of White Oak.

Cynthia LeBlanc formed BTS (originally Eurovest, Inc.) on March 15, 1995.⁵ *See* BTS Consent to Action Taken to Organize Eurovest Inc. by the Board of Directors (Consent to Organize) (March 15, 1995) at 3. BTS owns and operates restaurants. *See* BTS UCA (April 11, 2005) at 1. GUCP certified BTS as a DBE and ACDBE in 2005; however, BTS lost its certification in 2009.⁶ *See* SFT Appeal at 6. Ms. LeBlanc is BTS's 90% owner, Chairman, and CFO. John Roberts (Ms. LeBlanc's non-disadvantaged nephew) and DeWayne Laffey (also non-disadvantaged) each hold a 5% ownership interest in the firm.⁷ Alan LeBlanc, Ms. LeBlanc's non-disadvantaged husband, is BTS's CEO and President; he has no ownership interest in BTS.⁸ BTS owns all or part of non-DBE/ACDBE subsidiaries SFT, Chicken Farms, Lager's, and White Oak.

B. The Soulful Company (TSC)

Todd Richards (presumed disadvantaged) formed TSC in September 2016.⁹ Mr. Richards is TSC's sole owner. TSC is a restaurant development and management company that owns 30% of SFT and 50% of Chicken Farms.¹⁰

Mr. Richards is the Executive Chef of BTS's WOK restaurant.

C. SFT's Management and Operations

BTS and TSC jointly own SFT as its Members. *See generally* SFT Operating Agreement. As majority owner, BTS has the authority to appoint two Managers to SFT's board of managers while TSC may appoint one Manager. *See* SFT Operating Agreement at Section 5.2. SFT's current Managers are Mr. and Ms. LeBlanc (BTS) and Todd Richards (TSC). *Id.* Each Manager holds one vote, and a majority (two of three) of Managers must be present to establish a quorum

⁵ GUCP states that Ms. LeBlanc formed BTS with her husband, but the Consent to Organize indicates that Ms. LeBlanc (using her maiden name Green-Fisher) established the firm as its 100% owner. *See* Consent to Organize at 1 (Cynthia Green-Fisher listed as sole shareholder with a **REDACTED** capital contribution). This document also supports SFT's position that the marital renunciation provision, §26.69(i), does not apply in this instance because BTS was formed before Mr. and Ms. LeBlanc were married. *See generally* discussion *infra* Section IV(A).

⁶ SFT claims that BTS "voluntarily relinquished" its certification. *See* SFT Appeal at 6. However, the record does not contain information to support the contention.

⁷ It is unclear whether Mr. Roberts or Mr. Laffey is a BTS director. As discussed below, the record demonstrates that Ms. LeBlanc owns BTS, but more information is required to determine whether she controls it.

⁸ It is unclear whether Mr. LeBlanc's powers impair Ms. LeBlanc's control.

⁹ We need not determine whether Mr. Richards is in fact socially and economically disadvantaged because GUCP did not rebut the presumption (through the procedures of §§26.67(b)(2) and 26.87) and because we conclude that Ms. LeBlanc's 63% ownership in SFT (90% of BTS's 70% of SFT; *see generally* §§26.69(b) and 26.73(e) and (e)(2), Example 3) is sufficient to meet the Regulation's disadvantaged ownership requirement, including the substantiality requirement of §26.69(c).

¹⁰ The record does not specify how BTS and TSC manage Chicken Farms.

and conduct business.¹¹ *See id.* at Section 5.3. BTS, as majority owner, sets the compensation for SFT’s Managers. *See id.* at Section 5.6. Finally, the Operating Agreement has a “drag-along” provision, which gives BTS the authority to compel TSC to sell its ownership interest if BTS agrees to sell its own interest to a “Qualified Purchaser.”¹² *See id.* at Section 13.3.

Ms. LeBlanc and Mr. Richards are primarily responsible for SFT’s day-to-day activities. *See* SFT On-site at questions 15, 17-35. Ms. LeBlanc controls SFT’s financial activities. *Id.* at 15; UCA at 9.¹³ Mr. Richards is in charge of operations including “P&I marketing, writing, consulting and staff development.” SFT On-site at question 15.¹⁴ Mr. LeBlanc shares some of Ms. LeBlanc’s financial and contract-related duties and powers. *See generally* SFT On-site.¹⁵

D. Denial and Appeal

GUCP found that SFT was ineligible based on several ownership and control grounds. Regarding ownership, the denial letter concludes that Ms. LeBlanc’s capital contribution was insufficient on the basis of §26.69(i).¹⁶ GUCP reasoned that “[a]bsent a copy of a document

¹¹ Although we have reservations about whether BTS’s control can properly derive from its appointment of two managers of differing SED status, do not decide this issue because GUCP did not directly raise it. *Cf.* §§26.71(d)(2) (disadvantaged persons must control board of directors *in a corporation*) and 26.73(e)(1) (requiring control at both parent and subsidiary levels).

¹² The full provision states:

In the event that B2S [BTS], after complying with all of the requirements set forth in Section 13.2 herein, accepts an offer to sell all (but not less than all) of its Membership Interests to a Qualified Purchaser, whether in a single transaction or a series of transactions over time, B2S shall have the right to require that the other Member(s) (the “Drag-Along Member”) sell all of its Membership Interests to the Qualified Purchaser on the same terms and conditions of the sale by B2S. This right must be exercised by delivering written notice of the intent to exercise (the “Drag-Along Notice”) to the Drag-Along Member within ten (10) days after all rights provided in Section 13.2 have either been expressly waived or the relevant time periods have expired (the “Offer Period”).

SFT Operating Agreement at Section 13.3. Unlike GUCP, we read the drag-along provision to *support* a finding that BTS controls SFT because BTS alone can decide whether to sell the entirety of the business, including TSC’s interest.

¹³ Ms. LeBlanc devotes 1-2 hours to per day to SFT. *See* SFT On-site at question 16.

¹⁴ Mr. Richards devotes 4-6 hours per day to SFT. *See* SFT On-site at question 16.

¹⁵ BTS’s 2015 UCA and Mr. LeBlanc’s résumé, however, show that Mr. LeBlanc has significant responsibilities at BTS. *See* A. LeBlanc Résumé at 1 (Mr. LeBlanc “developed and operated Max Lager’s Wood-Fired Grill & Brewery restaurant concept as well as White Oak Kitchen & Cocktails.”) *See also* BTS UCA at 5 (Mr. LeBlanc and Mr. Roberts control BTS’s field operations and estimating and bidding. Mr. and Ms. LeBlanc share all other aspects of control except for financial transactions and office management, which Ms. LeBlanc solely controls.) These documents suggest that Ms. LeBlanc may not control BTS within the meaning of the Regulation.

¹⁶ GUCP states:

Alan LeBlanc, a non-presumed disadvantaged individual, is recorded by the [Georgia Secretary of State] as the Registering [A]gent and CEO for Brewed [t]o Serve Restaurant Group, Inc. the parent

legally renouncing Alan LeBlanc's rights in the community assets used to acquire the ownership interest in the applicant firm, [GUCP] must deem the ownership interest in the firm to have been acquired by both spouses."¹⁷ Denial Letter at 3. GUCP also determined that Mr. Richards' ownership interest is not real and substantial. It reasoned that Mr. Richards did not make a significant financial investment in SFT and SFT therefore cannot satisfy the §26.69(f)(2) requirement relating to ownership.¹⁸

Regarding to control, the denial letter concludes that SFT is not independent within the meaning of §26.71(b). GUCP references an intercompany loan from BTS to SFT and the fact that the firms share facilities to support its independence ground. *See* Denial Letter at 5.¹⁹

The denial letter's other control grounds relate to GUCP's concern that Mr. LeBlanc, as BTS's CEO and President, controls SFT. The denial letter states that "Alan LeBlanc as the CEO of Brewed to Serve (B2S) limits the control of Todd Richards as evidenced in the Southern Food Traditions Operating Agreement. Todd Richards' interest, as the Drag-Along member, may be sold when deemed necessary by B2S as detailed in the ownership findings." *Id.*

company of the applicant firm. Cynthia LeBlanc is recorded as the Chief Financial Officer. The GUCP application indicates Cynthia and Alan LeBlanc are spouses. In response to question 7 of the on-site report conducted on September 27, 2016, Southern Food Traditions, LLC was initially capitalized with a **REDACTED** investment from Brewed to Serve Group, Inc. Absent a copy of a document legally renouncing Alan LeBlanc's rights in the community assets used to acquire the ownership interest in the applicant firm, we must deem the ownership interest in the firm to have been acquired by both spouses.

Denial Letter at 3.

¹⁷ The denial letter reasons that Ms. LeBlanc's ownership interest in BTS is therefore 45% and that her ownership interest in SFT is 31.5%, which is insufficient to satisfy the 51% disadvantaged ownership requirements of §§26.69(b) and 26.73(e)(2). *See* Denial Letter at 3-4. We need not decide whether the Regulation compels Mr. Richards, as GDOT apparently argues, to have a significant financial investment directly in SFT rather than in TSC because our analysis of BTS's side of the transaction suffices to vacate GDOT's denial based on insufficient disadvantaged ownership of SFT.

¹⁸ Again, for reasons further elaborated in the discussion below, we find that Ms. LeBlanc's ultimate ownership interest in SFT (through BTS) is itself sufficient to meet the Regulation's disadvantaged ownership requirements with respect to SFT. We therefore discuss GUCP's §§26.69(f)(2) and (c) rationales no further.

¹⁹ The denial letter states:

Southern Food Traditions, LLC was registered by Alan LeBlanc, a non-presumed disadvantaged individual. In response to question 37 of the onsite inspection report, related to financial lines of credit, the applicant firm receives intercompany loans from its parent company, Brewed to Serve. Currently, the firm has an outstanding loan of **REDACTED** owed to the parent company as recorded in answer 57. In response to question 42, the applicant firm also shares office space with Brewed to Serve. As recorded in a lease agreement dated March 11, 2011, the space is leased by Peachtree Baker, LLC and signed by Alan LeBlanc. Peachtree Baker is reported in the GUCP I application as being owned 100% by Brewed to Serve (BTS).

Finally, the denial letter takes issue with the order in which the Managers of SFT are listed in the firm's Joint Written Consent of the Members and Managers document. GUCP opines, in this regard, that "the established hierarchy in the list of managers and the document signatures tend to indicate that Alan LeBlanc is in charge of the applicant firm rather than one of the disadvantaged individuals. In a partnership, one or more disadvantaged owners must have control over all partnership decisions." *Id.*

According to the denial letter, these facts establish that SFT does not meet the eligibility requirements of §§26.71(c) (DBE must not be subjected to formal or informal restrictions that limit the customary discretion of the disadvantaged owner) and 26.71(d)(3) (disadvantaged owner(s) must serve as general partner(s), with control over all partnership decisions).²⁰

III. Authority

§23.31(a) states:

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).

§26.69(a) states:

In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

§26.69(b) states, in part:

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

§26.69(c) states, in part:

²⁰ *Id.* Notably, although GUCP includes §26.73(e)(1) in its list of citations, it does not explicitly base any control finding or ineligibility argument on that provision. Instead, it appears to base its control findings/arguments exclusively on facts concerning SFT's registration, the loan from BTS, the drag-along provision, and the order of signatures on the Joint Written Consent. *See id.* at 3-5; *see also* §§26.86(a) and 26.89(f)(5). We also note that the UCA and On-site suggest that Ms. LeBlanc and Mr. Richards are responsible for the majority of SFT's day-to-day activities. *See generally* SFT UCA at 9; *see also* SFT On-site at 17-35.

(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(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.)

§26.71(b) states:

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.*

(Emphasis added.)

§26.71(c) states:

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).

§26.71(d) states:

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(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.

§26.73(e) states, in 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.)

§26.86(a) states:

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.

(Emphasis added.)

IV. Discussion

A. *SFT meets the Regulation's 51% real and substantial disadvantaged ownership requirement*

Contrary to the denial letter's findings, §26.69(i) does not require a spousal renunciation in all instances. The provision applies only when a disadvantaged owner uses marital assets to acquire an ownership interest in an applicant DBE/ACDBE firm. In this case, GUCP merely assumes that Ms. LeBlanc used marital assets to acquire her ownership interest in BTS. The denial letter

states that “[a]bsent a copy of a document legally renouncing Alan LeBlanc’s rights in the community assets used to acquire the ownership interest in the applicant firm, we must deem the ownership interest in the firm to have been acquired by both spouses.” Denial Letter at 3. But the letter does not “specifically reference[] the evidence in the record that supports” that Ms. LeBlanc used marital assets to acquire her ownership interest, as §26.86(a) requires. We find no substantial evidence that the marital property provision applies on the facts presented, and GUCP cites none.²¹

Accordingly, we reverse GUCP’s ownership conclusions under §26.89(f)(2).²²

B. SFT’s relationship with BTS does not compromise its viability.

Section 26.71(b) states that, “[o]nly an independent business may be certified as a DBE.” An independent business is defined as “one the *viability of which does not depend on its relationship with another firm or firms.*” (Emphasis added.) The provision’s subsections set forth a four-factor test for assessing a firm’s viability in relation to another non-DBE firm. *See* §26.71(b)(1)-(4). Section 26.71(b) requires that a certifier examine all four subsections of the provision before it makes a final determination:

(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.

GUCP takes issue with intercompany loans from BTS to SFT and with the firms sharing an office space. These facts alone do not make SFT unviable (but for its relationship with BTS) under §26.71(b).

(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

The denial letter does not directly address this factor.

²¹ We vacate GUCP’s ownership determinations on §§26.69(b), 26.69(c), 26.69(f), and 26.73(e) grounds for the reasons set forth above. *See generally supra* notes 9, 17, and 18, and accompanying text. Regarding marital property, SFT provides a preponderance of evidence that the relevant provision does not apply. The Consent to Organize BTS (previously named Eurovest) indicates that Ms. LeBlanc formed BTS before she married Mr. LeBlanc. Further, Ms. LeBlanc’s résumé states that she founded BTS, while Mr. LeBlanc’s résumé only indicates that he developed and operates BTS’s Lager’s and White Oak subsidiaries). Finally, BTS’s previous DBE and ACDBE certifications strongly suggest that there is no marital property issue: GUCP found none when it certified BTS in 2005. After reviewing the same facts, however, GUCP reaches a different conclusion here without evidentiary support.

²² The result is that Ms. LeBlanc owns 90% of BTS and thus 63% of SFT, which is itself sufficient disadvantaged ownership under the rules discussed above.

(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.

GUCP appears not to have examined these relationships.

(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.

There is no indication that GUCP considered these relationships in the context of industry practice.

The record, considered as a whole under §§26.71(a) and 26.89(e), does not support a denial based on independence grounds, in part because GUCP does not appear to have considered all relevant factors. *See Denial Letter* at 5. We reverse GUCP's independence conclusion as unsupported by substantial evidence and inconsistent with the requirements of §26.71(b).

C. *Non-disadvantaged control of SFT's board of managers: §§26.71(c), (d), (e) and , 26.73(e)*

Section 26.73(e)(1), which GUCP cited without control-based elaboration, states that:

If socially and economically disadvantaged individuals *own and control* a firm through a parent or holding company. . .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.²³

(Emphasis added.)

1. *The arrangement of signatures on SFT documents do not violate the Regulation's control provisions.*

GUCP found that SFT does not meet the requirements of §§26.71(d)(3) and 26.71(e), based on the arrangement of signatures in SFT's corporate documents. This is an insufficient reason for denial, which in our view borders on the arbitrary. We also note that §26.71(d)(3) does not apply in this case because SFT, as a limited liability company, is technically not a partnership. To the extent that the denial relies on the order and hierarchy of signatures on SFT's corporate

²³ For the reasons set forth above, Ms. LeBlanc satisfies the Regulation's ownership requirements with respect to BTS (and SFT). There remains the issue of whether Ms. LeBlanc controls BTS. Disadvantaged control of SFT is not in dispute except to the extent of the concerns stated in the denial letter (please see discussion below and at notes 13-16 and 19-20, above, with accompanying text).

documents, we reverse denial as unsupported by substantial evidence and inconsistent with the substantive provisions of the Regulation. *See* §26.89(f)(2).

2. *Drag-along provision*

GUCP raises the issue of §26.71(c) restrictions that prevent the disadvantaged owner (on this record, Ms. LeBlanc is the relevant disadvantaged owner), without the cooperation of a nondisadvantaged person or persons, from making the firm's business decisions. However, GUCP concludes that "Alan LeBlanc as the CEO of Brewed to Serve (B2S) limits the control of Todd Richards as evidenced in the Southern Food Traditions Operating Agreement," and it cites only the drag-along provision in support of that determination. *See* Denial Letter at 5. First, we do not consider the facts or procedural posture of this case to require a determination whether Mr. Richards (as opposed to BTS) controls SFT. Second, as discussed above in Section II(C), the drag-along provision appears to constitute evidence that BTS controls SFT. Accordingly, disadvantaged control of BTS appears to be the principal issue remaining for GUCP to address, and we find that the record is incomplete or unclear in that regard and as noted below.²⁴

3. *Remand instructions*

We direct GUCP to consider carefully whether there are any restrictions at BTS that deprive Ms. LeBlanc of her customary discretion to make "any business decision" without the vote or cooperation of any non-disadvantaged person. Section 26.71(c). GUCP should also consider the effect, if any, that the rule of §26.71(d)(2) may have at the parent (BTS) level. After making these assessments, GUCP should be in a better position to determine whether SFT is eligible for certification under §26.73(e)(1).

We direct GUCP to reconsider existing evidence, request and examine pertinent other evidence, and conduct such further proceedings as may be warranted, consistent with these instructions.

V. Conclusion

We remand under §26.89(f)(4) for further elaboration of the issues specified above, including such additional fact-finding as GUCP considers useful. We respectfully request that GUCP issue a new eligibility determination, §26.86(a)-compliant if a denial, not later than January 31, 2018, with a courtesy copy to this Office.

²⁴ As currently constituted, the record does not resolve this issue. Powers accruing to non-disadvantaged participants Mr. Roberts, Mr. Laffey, or someone else, under the operative agreements or in fact, may rise to the level of §26.71(c) restrictions. If GUCP contests eligibility based on this ground, then it must make its case in a way that complies with §26.86(a).

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

Sincerely,

Samuel F. Brooks
Acting Associate Director
Disadvantaged Business Enterprise Division

cc: K & L Gates