

May 4, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 03-0150

Mr. Roger Dunbar
The Nuance Group (Washington DC) LLC.
C/O 5925 Airport Road, Suite 300
Mississauga, Ontario L4V 1W1

Dear Mr. Dunbar:

This is in reference to an appeal of a Disadvantaged Business Enterprise (DBE) challenge filed by the Nuance Group (Nuance) against the certification of Ms. Bettye Dixon of Concourse Gift & News (Concourse Gift & News) by the Metropolitan Washington Airports Authority (MWAA). Nuance appealed the decision pursuant to 49 CFR 26.89(a) (2) on the basis that:

- (1) MWAA erred in finding that the owner of CGN, Ms. Bettye Dixon, is socially disadvantaged; and
- (2) MWAA erred in finding that Ms. Dixon is economically disadvantaged.

In its letter of appeal of MWAA's decision, "Nuance asserts that on the face of the evidence presented, MWAA erred in determining that Ms. Dixon meets the criteria of being either socially or economically disadvantaged. Not only did it fail to present evidence to satisfy the guidelines set out in Appendix E, but failed to recognize that those guidelines are not intended to be exhaustive, and in some instances the guideline criteria is subjective. The guidelines leave room for the recipient to exercise common sense and ask itself 'would the average person (even the average non-disadvantaged person) find Ms. Dixon to be socially and economically disadvantaged?' MWAA failed to exercise such common sense, because the answer would clearly be 'surely not'." Even if Appendix E is correct, §26.67 is the prevailing authority in this situation.

The Office of Inspector General (OIG) involvement resulted from the May 13, 2003 letter from U.S. Representative Joseph R. Pitts. Congressman Pitts letter requested that the OIG undertake an investigation of MWAA's administrative award of the duty free concession (RFP No. MWAA-R1-02-02) to Duty Free Americas ("DFA") (also doing business as DFA, DFA Holdings, World Duty Free, UETA, and AMMEX Tax & Duty Free Shops). The Congressman asked the OIG to investigate:

- 1) Whether in making its selection for the duty free concession contract, MWAA considered the financial and management challenges facing DFA;
- 2) Whether in making its selection for the duty free concession contract, MWAA complied with its own contracting competition procedures and guidelines, including, but not limited to, the application of Disadvantaged Business Enterprise criteria and the necessary Board of Directors approval of an award with less than full and open competition; and
- 3) Whether in making its selection for the duty free concession contracts, MWAA complied with the statutory and lease requirements of “complete and open competition/full and open competition.”

In response to Question 1, the OIG did not identify anything to contradict MWAA’s conclusion about DFA’s financial fitness to perform under the terms of its contract. In response to question 2, the OIG did not find evidence that MWAA failed to comply with its contracting competition procedures and guidelines in effect at the time the RFP was issued. However, the OIG stated “that the current DBE regulations stipulate that an individual’s claim of social and economic disadvantage is a rebuttable presumption, the regulations do not provide clear, objective, and tangible standards by which the presumption of economic disadvantage may be challenged.” With regards to question 3, the OIG concluded that the notes and scoring sheets from the selection panel revealed that DFA was the unanimous choice of the selection panel, with Alpha Stella ranked second and Nuance ranked third. When the OIG reviewed the proposals submitted by DFA and Nuance, it found that under DFA’s proposal, Concourse Gift and News had substantially higher, hands-on participation than Nuance proposed for Pen and Prose. The OIG also stated that the greatest rating difference between DFA and Nuance was in the area of quality of DBE participation. DFA pledged to utilize Concourse Gift and News to fully run two of the four duty-free stores at Dulles International Airport. Nuance proposed utilizing Pen & Prose in a lesser role, primarily involving management, training, and merchandising. The OIG did not find any evidence that DFA was given an unfair advantage based upon the participation level of the DBE. However, the OIG stated that “it appears to us that absent a limitation on personal net worth and clear, objective, and tangible criteria for rebutting the presumption of social and economic disadvantage, it is not surprising that a wealthier, more established DBE would naturally have a greater capacity for substantial participation in concession operations, over a DBE with fewer financial resources.” The OIG did not find evidence to support Nuance’s contentions the DFA was “pre-selected” for the duty-free concessions contract. The OIG also stated “Regarding Nuance’s assertion that the owner of Concourse Gift and News is not economically disadvantaged, it is not our role to determine the personal net worth of this individual (or the owner of Pen & Prose), nor do we know the personal net worth of the individuals involved.”

We have carefully reviewed the material from the Metropolitan Washington Airports Authority (MWAA), the Office of Inspector General and Nuance and concluded that the

MWAA's determination that Ms. Dixon is socially and economically disadvantaged is supported by substantial record evidence. §26.89(f)(1) states that "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

Our findings are as follows:

1.) Your letter of rebuttal states "Social Disadvantage Compared to Whom? Appendix E also makes clear that a finding of social disadvantage is a prerequisite to any consideration of whether an individual is economically disadvantaged. The criteria for determining social does not explicitly include any consideration of the presumptively disadvantaged person's social opportunities as compared with persons who are not presumed to be disadvantaged. Nuance submits that MWAA has erred in using a standard of comparing the presumptively disadvantaged individuals only to individuals who are not presumed to be socially disadvantaged. The logic is simple – the range of social disadvantage in our society is enormous among persons who are not presumed to be socially disadvantaged. The range is so large that it is reasonable to suggest that ninety percent of the population could point to the other ten percent and say 'I don't have the same access to education, employment and credit as those people, therefore I must be socially disadvantaged.' As such, comparing the presumptively socially disadvantaged person only to persons who are not disadvantaged would virtually ensure that every presumptively disadvantaged individual would be judged socially disadvantaged. This clearly is not the intent of the DBE program." The Regulations do not require that recipients compare DBEs against DBEs to determine their relative disadvantage. This is not consistent with the Department's DBE statute or regulations. 49 CFR Part 26 explicitly requires the Department to evaluate DBE social and economic disadvantage as compared to non-disadvantaged businesses.

The record evidence reveals that Ms. Dixon is an African-American female, born in Birmingham, Alabama. She received a BS Degree from [REDACTED] and an MS Degree from [REDACTED]. She started work in the retail operations in 1984 and continues today. She has over eighteen (18) years work experience in Airport retail concession operations and currently is the sole owner and president of Concourse Gifts and News. She is also affiliated with numerous professional organizations. Ms. Dixon oversees the day-to-day operations of the firm. Ms. Dixon does meet the definition of being socially disadvantaged.

In the Preamble to the Regulations, 49 CFR Part 26, the Department's response to the commenters and DBE opponents regarding this issue was "By having passed the DBE statutory provision, after lengthy and specific debate, Congress has once again determined that members of the designated groups should be presumed socially disadvantaged. All of these groups are specifically incorporated by reference in the legislation that Congress debated and approved. This presumption (i.e., a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of

Congress about the discrimination that members of these groups have faced. If a recipient or third party determines that there is a reasonable basis for concluding that an individual from one of the designated groups is not socially disadvantaged, it can pursue a proceeding under §26.87 to remove the presumption.”

Appendix E to Subpart 26 — Individual Determinations of Social and Economic Disadvantage. The Regulations define Social Disadvantage as:

1. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantaged must stem from circumstances beyond their control. Evidence of social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American Society, or other similar causes not common to individuals who are not socially disadvantaged;

Ms. Dixon is an African American female. There is no dispute regarding this matter.

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

Nuance contends that Ms. Dixon should not be considered socially disadvantaged because she is the widow of a prominent California congressman and was invited to state dinners at the White House, and because of her long-term business affiliations with Ms. [REDACTED] and [REDACTED]. According to Nuance’s assertion, Ms. Dixon is a member of the Airports Council International Economic Affairs Committee and has been involved with the Advisory Council of the Los Angeles Volunteer Bureau.

What is relevant is Ms. Dixon’s entry into the business world and not just her situation today. According to the record information, Ms. Dixon was born in [REDACTED] and spent her childhood in [REDACTED] during the era when racial segregation was the norm. She believes that she has experienced unequal treatment in American society. (See C below for examples). Ms. Dixon was married to a member of the U.S. House of Representatives from the state of California. The former Congressman passed away in December 2000. Because someone has political connections does not necessarily imply that the person is not socially disadvantaged. This requires further analysis and unfortunately we do not have any additional information to evaluate this area.

(C) Negative impact on entry into or advancement in the business world because of the disadvantage.

Ms. Dixon states that when she entered the airport concessions industry, she encountered discrimination on the basis of race and gender. Concession contracts were held by large

corporations or companies owned by white males. Ms. Dixon further stated that she still encounters barriers and difficulties in her business that are related to her race and gender. She states that she sought credit from a local Washington, DC financial institution to finance a new gift store. Despite her background, experience and collateral, the financial institution insisted that her husband co-sign the loan. She further stated that even currently, another bank requested that she obtain a co-signer for a loan for a shop, despite her substantial track record in her business.

In your rebuttal you stated that “Nuance submits that the fact airport concession contracts may have been (or continue to be) held by large corporations is more to do with the large capital investment required in such business and not due to any discrimination as a result of Ms. Dixon’s gender or minority status. It is unlikely that even non-disadvantaged individuals operating small businesses can muster the capital required to compete in significant airport concessions.” “With respect to Ms. Dixon’s anecdotal difficulties in obtaining financing for new shops, again Nuance reiterates that the airport concession world is different from non-airport retail, and often requires significant capital outlay which is not recovered for several years. In addition, in recent years airport travel retail has encountered numerous external difficulties which make obtaining financing a challenge, even for non-disadvantaged individuals and large corporations. In short, Nuance submits that MWAA has put forth no evidence that Ms. Dixon’s anecdotal difficulties related to her gender or minority status as opposed to simply the unique nature of the industry in which she chose to operate.” Your May 5, 2003 letter to Ms. Pattie Tom, Manager, Equal Opportunity Programs Department, MWAA, states “49 CFR 26.87(1) provides that the airport authority is not required to accept general allegations that a firm is ineligible. Although we suspect that a thorough investigation (which we are not in a position to undertake) will reveal even more information to rebut the presumption that Ms. Dixon is a disadvantaged individual, the level of detail supplied above makes this complaint more than a ‘general allegation’.” It does not appear that Nuance submitted any information to support its allegations. While this may be the nature of the beast in the airport concessions area, the Department often hears complaints from DBEs about the difficulties they encounter obtaining financing in the airport concessions industry.

(1) Education.

(2) Employment

(3) Business history

Each was previously addressed above.

Economic Disadvantage

The record evidence contains an affidavit from Ms. Dixon stating that her personal net worth is less than two million dollars, the amount proposed in the Department’s September 8, 2000 supplemental notice of rulemaking (SNPRM) to revise the

disadvantaged business enterprise Regulation. The SNPRM stated that “We believe that \$2 million will be a standard that will achieve the objectives of a PNW standard while not interfering unduly with the ability of firms to succeed in the concessions business. We believe that the \$2 million limitation is high enough to enable an owner to expand to several airports, yet it is sufficiently low to prevent the individual from amassing unlimited assets. The figure also considers the substantial capital investment and higher operating costs generally associated with a concession, compared to DOT assisted contracts.”

Nuance rebuttal states “MWAA asserts that it is not appropriate to determine economic disadvantage by comparing the financial resources of the presumptively disadvantaged individual to the financial resources of other disadvantaged individuals with whom the applicant DBE would be competing, but rather that the comparison should be to the non-disadvantaged individuals with whom they must compete for airport business. For reasons discussed under Social Disadvantage, Nuance disagrees. However, even if that is the correct comparison, as stated earlier, the airport retail concessions business is different from many other D.O.T. assisted contracts due to the sizeable capital investments required. It is not appropriate to compare Ms. Dixon’s financial resources or gross receipts to those of other companies in the airport duty free industry, as MWAA did. The majority of such companies are not small businesses.”

This contradicts the intent of the Regulations. Opponents of certification would have to demonstrate that the DBE does not meet the criteria of Appendix E. Currently, the Department does not have a PNW standard for airport concessionaires. Thus, PNW is not a basis for revoking Ms. Dixon’s DBE certification. Moreover, as explained above, Ms. Dixon has produced evidence that her “ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunity as compared to others in the same or similar line of business who are not socially disadvantaged. Unfortunately, Nuance has not provided any evidence to contradict Ms. Dixon’s.

Based upon the record, we must concur with MWAA’s decision that Ms. Dixon is a socially and economically disadvantaged individual under 49 CFR Parts 23 and 26.

Thank you for your continued cooperation.

Sincerely,

Original Signed by

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: MWAA