

November 2, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0107

Ms. Vicky Schiantarelli, Manager
Certification Division
Office of Minority and Women's Business Enterprises
406 South Water, P.O. Box 41160
Olympia, WA 98504-1160

Dear Ms. Schiantarelli:

This is in reference to an appeal of Disadvantaged Business Enterprise (DBE) filed on behalf of The SeaTac Bar Group, LLC ("STBG"). We have carefully reviewed the material from the Office of Minority and Women's Business Enterprises ("OM&WBE") as well as the information provided by the firm's attorney, Ms. Carla DewBerry, and have concluded that the record should be developed further before the Department can make a final decision on the appeal. Accordingly, we are remanding the case to OM&WBE for further consideration.

It appears that the record is unclear with respect to matters likely to have a significant impact on the outcome of the case.

COOPERATION

According to the record, STBG, an airport concessionaire, was formed in September 2003 by Mr. Jerry Whitsett, a disadvantaged individual living in ----- . The firm submitted an application for DBE certification on September 24, 2003, and a revised application on October 1, 2003. The original DBE application indicated that the street address for the firm was ----- but that the mailing address was ----- , Seattle, Washington. The firm's certification of formation as a limited liability company from the State of Washington Secretary of State indicates that the firm's principal place of business is -----
----- .

In its certification denial letter, OM&WBE stated that it attempted to perform an on-site visit at the firm's Strander Boulevard address, however the unit numbers were mailbox numbers and the address corresponds to Seattle Pack and Mail, a mailbox rental establishment. OM&WBE

determined that since STBG lacked a physical location and an office in Washington State, it would be unable to perform an on-site visit as required by the Department's Regulation.

Following OM&WBE's certification denial decision, Mr. Whitsett requested an informal review of the OM&WBE's certification denial decision. Mr. Whitsett stated that the ----- addressed was discussed with OM&WBE as being a mailing address for the firm which has been used in all dealing with government agencies as a mailing address.

The firm's attorney, Ms. Carla DewBerry stated in her rebuttal letter:

The term headquarters is not defined by state law. In Washington State, each lawfully formed entity is required to have a "principal place of business," and the firm properly notified the Washington Secretary of State that its principal place of business is the ----- . When asked by OM&WBE for its headquarters, the firm also provided its airport address, including its concession site locations, as well as Mr. Whitsett's home address in ----- . OM&WBE found this information to illustrate the "fact that the firm is not physically present in Washington State." The firm is a Washington enterprise and as matter of law, present in Washington State.

Under the Regulation §26.61(b), STBG bears the burden of demonstrating that it is eligible for the DBE program and meets the criteria concerning ownership, control, among others. A firm must have "offices" in order for recipients to conduct a site-visit and determine the firms' eligibility as stated in the Regulation §26.83(c). In this instance, OM&WBE attempted to perform a site visit at not only the firm's address listed in its application but also at ----- . It appears however, that the firm's primary business location was under construction at that time. This hardly seems the fault of STBG, and OM&WBE should take into consideration the fact that concessionaires must at times establish a business enterprise without an actual site in place in order to become a concessionaire with a prime contractor.

CONTROL

Mr. Whitsett indicated on the firm's DBE application that he performs management or supervisory functions for ----- , which according to the record, is his other business enterprise, (also a concessionaire) headquartered in Nevada. According to the firm's rebuttal letter, Mr. Whitsett is the 40% owner of ----- .

OM&WBE also asked who served as the STBG's qualified representative at the ----- as mentioned in § 6.03 of the sublease agreement with HMS Host International, Inc. ("Host"). This section states "[c]oncessionaire shall at all reasonable times retain in the Airport at least one qualified representative, authorized to represent and act for it in matters pertaining to its operation, and shall keep Host and the Port informed in writing of the identity of each such person . . ." OM&WBE indicated that the firm responded ". . . Jerry Whitsett, ----- , Nevada." OM&WBE determined that Mr. Whitsett would not be a qualified representative because he is not physically present in Washington State and would have difficult time remaining both in SeaTac Airport full time and in Nevada full time.

Mr. Whitsett indicated that the firm's headquarters is the bar locations at the -----
----- and that he will devote full time to the business in excess of 40 hours per
week. OM&WBE however, stated that its original question asked how many hours per week Mr.
Whitsett currently devotes to the full time efforts of STBG in the State of Washington.
According to OM&WBE, Mr. Whitsett responded that he will devote in excess of 20 hours per
week to ----- . He will accomplish both tasks by commuting.

In the firm's rebuttal letter, Ms. DewBerry stated that:

OM&WBE ignored the fact that §6.03 of each lease requires the firm to retain in
the airport at least one qualified representative at all reasonable times to
represent and act for it in operational matters. The firm will have an onsite
representative present at reasonable times after the facilities are substantially
ready. Mr. Whitsett indicated that he will work on a combined basis more than
full time for both companies.

The Regulation at §26.71(f), permits the disadvantaged owner to delegate various areas of the
management, policymaking, or daily operations of the firm to other participants, the
disadvantaged owner's managerial role is such that the recipient can reasonable conclude that he
or she actually exercises control over the firm's operations, management, and policies. Unlike
other business ventures; it is common for concessionaires to employ a manager who oversees the
daily operations of the business. OM&WBE should obtain more information relevant to Mr.
Whitsett's actual control of STBG. Such factors would include the details of the manager's role
at STBG's location, his or her responsibilities vis-à-vis Mr. Whitsett's, and whether the hours
devoted by Mr. Whitsett to the business are sufficient for him to direct or cause the direction of
the management and polices of the firm and to make day-to-day as well as long-term decisions
on matters of management, policy, and operations.

INDEPENDENCE

OM&WBE determined that STBG was not an independent business within the meaning of the
Department's Regulation due to the firm's relationship with MRW and other firms.

1. STBG's DBE application indicated that Mr. Whitsett's home phone number was the business
telephone number for the firm and ----- . Because both applications for STBG and ----- were
incomplete, OM&WBE was unable to determine whether resources were shared between the two
firms. OM&WBE stated "the close connection and shared resources between the two companies
prevents OM&WBE from reasonably determining that the firm and ----- operate independently
of one another."

The firm questioned OM&WBE's conclusion that the two entities were dependent upon each
other simply because Mr. Whitsett used a common fax machine to send and receive information
for both business entities. It appears that more information is needed regarding -----
operations before OM&WBE can make a determination whether STBG is dependent upon
----- .

2. OM&WBE stated in its certification denial letter that: 1) STBG did not provide documentation related to the operation of a space at the airport referred to as the ----- and did not provide any franchise or other operating agreement with Red Hook that shows the firm obtained the rights to use that name; 2) it could not determine whether the firm met the requirements of the Department’s Regulation without a copy of the lease agreement for the space; 3) the firm did not provide copies of company minutes nor documentation that indicates what activities occur at those meetings; 4) there is no documentation establishing that Mr. Whitsett was elected to the position of President at STBG; and 5) the firm did not provide a copy of its operating agreement. (OM&WBE acknowledged that although the firm may not be required to have an operating agreement because the LLC has a sole member, there was no documentation that Mr. Whitsett was in fact, the firm’s sole member and manager).

In Mr. Whitsett’s March 4, 2004, request for an informal review of the OM&WBE’s certification denial decision, he raised the following points: 1) there are no contractual obligations between STBG and ----- ; 2) there are no franchise agreements connected with STBG, nor are future franchised opportunities planned; 3) STBG entered into a sublease agreement for a food and beverage facility with Host; and OM&WBE was informed that STBG was awaiting signed subleases from Host; and 4) the subleases are for sites located within the secure area of SeaTac Airport and an escort would be required for OM&WBE personnel to conduct a site-visit.

OM&WBE considered Mr. Whitsett’s arguments but reaffirmed its earlier certification denial decision on April 8, 2004. In OM&WBE’s written determination, it focused on the firm’s responses to questions it posed to the firm in March 2004. According to OM&WBE, the firm indicated that there were no licensing agreements with ----- or ----- and that the lease or franchise concept was deliberately left out of the lease agreement. OM&WBE stated:

Although the firm executed numerous lease agreements, all the executed leases are invalid because they are for specific business concepts that the firm does not have the right to operate. Furthermore, the leases were executed after the firm submitted its application for certification. Prior to that time, the firm did not have a location in Washington State. Finally, these locations do not exist. On April 2004, the office attempted to perform its on-site visit but that the airport’s concourse had not opened yet.

Ms. DewBerry raised the following points in her rebuttal letter.

- 1) STBG has two leases for separate sites at the ----- . Both sites are located on ----- . The ----- is in space sub-leased from ----- . The ----- is in space leased from ----- .
- 2) A specific reference to ----- is found in §6.11 of the ----- lease which provides: *Concessionaire will be operating the premises as - - At the discretion of - [landlord], the facility will be operated pursuant to a*

license agreement with - . At one time, the firm contemplated entering into an agreement with ----- . In addition, the firm registered a potential trade name (i.e. -----) with the Washington State Department of Licensing. Ultimately, the firm abandoned its plans to highlight the availability of ----- products and abandoned its efforts to seek permission from ---- ----- to use its logo. The firm explained this to OM&WBE, stating that “there is no licensing agreement with ----- .”

- 3) The firm raised the similar issue with respect to ----- and advised OM&WBE that “there is no license agreement with the ----- . . . the trade name lease or franchise agreement was deliberately left out of the lease agreement” with ---- , because the firm had . . . abandoned the concept of using beer-maker logos in STBG’s facilities.
- 4) OM&WBE questioned when the business would begin operations. Upon execution of the leases in February, 2004, the firm was allowed to assume occupancy and to begin the formal process for construction of the bars. The bars are not yet open. The firm is awaiting receipt of its liquor license and cannot stock the bars or begin selling from the leased locations until these licenses are in hand.

OM&WBE appears to focus primarily on STBG’s dealings with ----- and ----- . One of the reasons for OM&WBE’s certification denial, namely – the absence of details concerning the firm’s leases, may be moot since STBG did not ultimately sign lease contracts with either company. OM&WBE needs to examine deeper the firm’s relationship and contract with the actual prime STBG contracted with, i.e. – ---- , before making a determination concerning the firm’s independence.

We specifically request that a new decision be issued within forty-five (45) days with further consideration being applied to the above areas of concern. To obtain the specific information noted above, an on-site review is required since OM&WBE was unable to conduct one in April, 2004 and it appears that the firm’s actual business location is more permanent. We suggest that if all possible, OM&WBE afford STBG an opportunity to adequately rebut and present evidence. However, if you still conclude that the firm does not meet the eligibility requirements of the Regulation, STBG will, of course, have the opportunity to renew its appeal to this office. This appeal is being closed in our files pending outcome of this remand.

Sincerely,

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

cc: Carla M. DewBerry