

November 15, 2017

Reference No: 17-0109

Ms. Pamela L. DelNegro

REDACTED

Trinity, FL 34655

Re: DBE Certification Denial of Ozmatic, Inc.

Dear Ms. DelNegro:

Ozmatic, Inc. (Ozmatic) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the certification denial as a Disadvantaged Business Enterprise (DBE) by the Florida Department of Transportation (FDOT) pursuant to the DBE Program Regulation, 49 C.F.R. Part 26. FDOT issued its DBE certification denial decision on April 5, 2017, citing the firm's inability to meet various ownership and control requirements of §26.69 and §26.71.¹ Ozmatic appealed this decision to the Department on June 14, 2017, and we requested FDOT's administrative record pursuant to §26.89(d). We conclude, based on a review of this record and your appeal, that substantial evidence supports FDOT's decision for the reasons below.²

Background

Mr. Austin Kurt Ostensen, a non-disadvantaged individual, was Ozmatic's President/CEO until 2016, when the firm's corporate documents were amended so that you could hold this title. Per Ozmatic's Uniform Certification Application (UCA), you purchased 51% of the firm from Mr. Ostensen, for **REDACTED** on May 18, 2016, and he retained a 49% ownership interest. (UCA, pp. 7, 9). The record contains a note payable wherein you agreed to pay this amount in annual

¹ The Department is not addressing in this decision FDOT's §26.69(h) conclusions, because it suffices for purposes of this appeal for us to affirm on the §26.69 grounds discussed and Ozmatic's failure to show that it satisfies any one certification requirement renders the firm ineligible. *See generally* §26.61(b). We note that FDOT cited to other sections of the regulation in its decision, but its focus was clearly on your contribution of capital, which the Department addresses here in the context of §26.69(c).

² When a firm appeals a certification denial determination, the Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. §26.89(e). The Department affirms the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." §26.89(f)(1). The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed; the Department does not consider new evidence that was not before the certifier when making a decision. §26.89(f)(6).

installments (principal and accrued interest) of **REDACTED** beginning on May 18, 2017, and continuing until May 18, 2019. Article IV of the firm's Shareholder Agreement entitled "Purchase Price and Transfer" states in part:

§4.02(b): In the event of any purchase. . .the purchase price shall be paid in cash in full at the closing, or, in the alternative, in installments at the option of the corporation and/or any non-selling shareholders who are purchasing some or all of the shares of the selling shareholder, as the case may be. If the installment election is chosen, the corporation and/or non-selling shareholders, as the case may be, shall pay in cash at the time of closing 20% of the purchase price and the balance shall be paid in not more than 60 equal monthly installments. The first installment shall be due on the 1 month anniversary date of the closing.

The record contains an "owner equity and stock share contribution/distribution report" dated May 18, 2016 showing the amount of stock purchased and transferred; and FDOT asked you during the on-site interview to describe the funds or investment that was made to start the business, how much was it, where did it come from and what was it used for. The answer recorded states:

Pamela has a note payable, a copy of the "promise to pay" for **REDACTED** with the first payment in 5/2017 one year after initial ownership is located in the file. Pamela brings in an expertise to the business which has allowed the business to become pre-qualified with FDOT as the business wasn't able to do so before. Pamela brings in a level of experience and this is why she is President/CEO of the business. Pamela is going to pay her first payment from her and her husband's personal savings account (renouncement form signed). The money/payments is going to her brother through the business. (On-Site Interview Report, Feb. 15, 2017, p. 4).

Discussion and Decision

As the applicant firm, Ozmatic bears the burden of proving it meets all eligibility requirements, including those related to capital contributions by owners. FDOT determined that Ozmatic did not provide copies of the corporate stock certificates or ledger showing the actual transfer of shares. The agency also determined that your contribution of capital was not sufficient for the 51% ownership interest you claim. The relevant Regulation provisions in this regard is §26.69(c), which requires in part, that the disadvantaged owner demonstrate a contribution of capital or expertise for their ownership interest is real, substantial, and continuing, that goes beyond pro forma ownership of the firm as reflected in ownership documents.³

³ §26.69(c) states: "(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

The record indicates that you contributed no amount of money when you acquired your initial ownership interests from Mr. Ostensen, but rather pledged a note for the amount. Your capital contribution is therefore zero, as reported to FDOT, which by definition is not real and substantial. One counterargument you posit is that the May 18, 2016, shareholder agreement was executed after the stock transfer occurred and was not in place prior to or at the time of purchase. Regardless of when the agreement was executed, it documents the parties' arrangement, which clearly defines your first payment in May 2017. This payment had not occurred at the time of FDOT's denial decision and there was no capital contribution in the record before us. We therefore affirm FDOT's conclusion that you, Ozmatic's *disadvantaged owner* has not demonstrated that you contributed real and substantial capital within the meaning of §26.69(c), a provision that states in part "[i]nsufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual." See *generally* examples at §26.69(c) (real and substantial capital contributions); §§26.73(b) and 26.89(f)(6) (firm's present circumstances and status and circumstances at the time of the certifier's decision).

You make several additional arguments on appeal, the first being that you contributed expertise and experience, which consists of your civil engineering degree, professional engineer license, and 23 years of experience in field. Second, you allege that Ozmatic lacked consultant prequalification and once you brought this prequalification to the firm as its owner, the firm's contracts increased to over **REDACTED**. Third, you allege that FDOT did not fully understand this aspect of the case, dismissed it in its evaluation, and did not pose follow-up questions to clarify the issues.

As noted above, your expertise was mentioned to FDOT during the on-site interview, however, §26.69(f) makes clear that the person upon whose skills or expertise the firm relies "must have a significant financial investment in the firm." We find that you had not demonstrated any such investment for the reasons stated above. In addition, although you proffer information on appeal claiming that your skills/qualifications satisfy the other requirements of §26.69(f)—(i) expertise in a specialized field, (ii) of outstanding quality, (iii) in areas critical to the firm's operations, (iv) indispensable to the firm's potential success, and (v) specific to the type of work the firm performs; these were not documented in the firm records nor presented to FDOT.⁴ Expertise is an

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. (4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

Examples to paragraph (c): (i) An individual pays **\$REDACTED** to acquire a majority interest in a firm worth \$1 million. The individual's contribution to capital would not be viewed as substantial. (ii) A 51% disadvantaged owner and a non-disadvantaged 49% owner contribute **REDACTED** and **REDACTED**, respectively, to acquire a firm grossing **REDACTED**. This may be indicative of a pro forma arrangement that does not meet the requirements of (c)(1). (iii) The disadvantaged owner of a DBE applicant firm spends **REDACTED** to file articles of incorporation and obtains a **REDACTED** loan, but makes only nominal or sporadic payments to repay the loan. This type of contribution is not of a continuing nature." (Emphasis Added)

⁴ §26.89(f) states: "The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership: (1) The owner's expertise must be—(i) In a specialized

acceptable form of contribution but you did not appropriately document your expertise in the records of the firm presented to FDOT, which is a requirement of §26.89(f).

While we acknowledge Ozmatic's attempt to remedy the eligibility deficiencies that FDOT identified, it may not effectively do so on appeal in this case. The Department's role on appeal is not to consider new evidence that was not before the certifier. *See* §26.89(e). The Department does not perform a *de novo* review. Rather, it is to determine whether, based on the record at the time of the initial decision, substantial evidence supported FDOT's decision. *See* §26.89(e) and (f)(6) (Department bases its appeal decision on status and circumstances of firm as of date of certifier's decision).

Conclusion

We affirm the certification denial of Ozmatic as a DBE under §26.89(f)(1) based on the ownership grounds specified above. There exists substantial record evidence to support the denial, and the denial is consistent with applicable substantive and procedural provisions of the Regulation.⁵ **Ozmatic may present information substantiating your contribution of capital and expertise if it chooses to reapply, which it may do after the appropriate waiting period.** This decision is administratively final and not subject to further review.

Sincerely,

Marc D. Pentino
Acting Associate Director
Disadvantaged Business Enterprise Program Division

cc: FDOT

field; (ii) Of outstanding quality; (iii) In areas critical to the firm's operations; (iv) Indispensable to the firm's potential success; (v) Specific to the type of work the firm performs; and (vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm. (2) The individual whose expertise is relied upon must have a significant financial investment in the firm."

⁵ The Department's decision that a recipient's certification decision was supported by substantial evidence is not a decision that the firm is ineligible. Rather, it is a finding that the recipient had enough evidence to reach that decision. *See* 64 Fed. Reg. 5096, at p. 5124 (Feb. 2, 1999).