

May 15, 2019

Reference Number 18-0178

Leslie Meyer  
President  
Flatrock LLC  
1700 Woodlands Drive  
Maumee, OH 43537

Dear Ms. Meyer:

This is in response to Flatrock's appeal of the decision of the Ohio Department of Transportation (ODOT) decision to deny the firm's application for DBE certification. The U.S. Department of Transportation (DOT) is upholding the ODOT decision.

### **Procedural History**

Flatrock applied for DBE certification on March 26, 2018. ODOT conducted an on-site review on June 7, 2018. On July 3, 2018, ODOT denied the firm's application. The firm appealed to the Department on September 24, 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 Part 26. 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 to meet 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..."<sup>1</sup> The Department does not make a *de novo* review of the matter;"<sup>2</sup> rather, it affirms (a certifier's) decision unless it determines, based on the entire

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<sup>1</sup> 49 CFR 26.89(e).

<sup>2</sup> Id.

administrative record, that (the certifier's) decision is unsupported by 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 ODOT decision and the firm's appeal, both lengthy, discuss issues including control, independence, affiliation<sup>3</sup>, and the motives behind the firm's formation and ODOT's decision. In our decision, the Department will focus on basic issue of Ms. Meyer's ability to control the firm.

Ms. Meyer is the 51 percent owner of Flatrock, the remaining 49 percent being owned by Paul Dymarkowski. Other key participants are Ms. Meyer's husband, Benjamin Meyer, and James Stark.<sup>4</sup> The latter two individuals are slated to be the firm's field superintendent and estimator/operations manager, respectively. At the time of the application, Flatrock had not performed any contracts.

ODOT compared the resumes of the key participants. The key points of these resumes follow:

- Ms. Meyer held career services/student coaching/student development positions at three institutions of higher education, as well as business-side and communications positions at a hospital, nursery, and other organizations. She has a B.A. in Education, an M.A. in College Student Personnel, and a “mini-MBA” in social media marketing. At the time of the application, she had received or was receiving training in OSHA rules and procedures, rigging safety, construction estimating, and bridge plan reading. She is also being mentored in project bidding and estimating on ODOT bridge work by several professionals in the field.
- Mr. Meyer has a wide range of experience in all aspects of heavy commercial/industrial concrete work and ironwork in a wide variety of contexts. His over 20 years of experience in construction in a leadership role in construction include skills in building layout, blueprint reading, surveying, and welding. He has widespread experience in bridge, highway, parking garage, and other infrastructure projects. He has an associate of arts degree and completed work-related training courses.
- Mr. Starr has worked as an operations manager, field superintendent, and/ estimator for three companies since 1985, like Mr. Meyer participating in a wide variety of infrastructure projects in those roles.

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<sup>3</sup> Given that business size is not an issue in the case, it is puzzling why the parties spent the time they did arguing the issue.

<sup>4</sup> Because Flatrock had, at the time of the application, not yet performed any contracts, Mr. Star and Mr. Meyer, while committed to working for Flatrock in the future, were not then actually working for the company. See appeal letter, p. 4.

- Paul Dymarkowski has worked in a combination of management, financial, and operations capacities for two steel specialty subcontractors, including a DBE firm owned by his wife, Foundation Steel, for which he, Mr. Starr, and Mr. Meyer all worked until March 2018. Previously, he worked in business administration capacities for real estate and investment companies. He has a business administration degree.

In addition to the information in the resumes, ODOT cited statements from the participants' on-site interviews that it believes corroborate their relative degrees of experience.<sup>5</sup>

From their respective backgrounds, ODOT concluded that Ms. Meyer lacks the knowledge and expertise needed to control Flatrock's bridge prospective bridge subcontracting activities and that she would necessarily be dependent on the experience and expertise of the other three key participants, all of whom have extensive industry experience. Without the key contributions of Mr. Meyer, Mr. Starr, and Mr. Dymarkowski, ODOT said, it can reasonably conclude that Flatrock would not be viable.

In its appeal letter, Flatrock asserts that ODOT ignored or minimized important points concerning Ms. Meyer's experience and abilities. Her seven years at Barnes Nursery, which she describes as one of Ohio's largest landscape construction firms, gave her experience in management, human resources, sales/marketing/estimating work, supervision, customer relations, contract negotiation, ordering equipment. Her education-related degrees and experience equipped her with leadership, communications, and critical thinking skills. All this provided her with a skill set readily transferrable to other fields, including the bridge specialty subcontracting work to be performed by Flatrock.

The appeal also itemizes the several training opportunities that Ms. Meyer has recently pursued<sup>6</sup>, arguing that ODOT gave them insufficient weight. She gave an example of one of the skills she had learned by walking the ODOT reviewers through an estimating spreadsheet she had developed with Mr. Dymarkowski and describing her approach to contract bidding.<sup>7</sup> The appeal also included a breakdown of the participants' roles, emphasizing Ms. Myers' position at the top of the firm's chain of command. In the absence of any specific education, training, or field experience standards for controlling Flatrock's work, ODOT simply applied subjective judgment in concluding that the company was not viable in the absence of the other three key participants.

## Discussion

It is clear from the record that the experience and expertise of Mr. Meyer, Mr. Stark, and Mr. Dymarkowski far exceed that of Ms. Meyer with respect to the specific substance of the work

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<sup>5</sup> Denial letter, p. 11.

<sup>6</sup> Appeal letter, p. 5.

<sup>7</sup> Id. at 6.

Flatrock is intending to perform. Ms. Meyer's success in a variety of jobs, and her commendable efforts to seek additional experience and guidance, speak well of her intent to put herself in the position to genuinely control Flatrock's affairs. Nevertheless, it is hard to avoid ODOT's conclusion that, absent the contributions of the other three key participants, the firm as of the time its application would not have been viable and that they would therefore wield disproportionate control of the company's operations.

The strongest argument to be made favoring Ms. Meyer's ability to control the business is under the provisions of paragraphs 26.71(f) and (g) of the Department's regulations, concerning an owner's ability to delegate functions and maintain control by being able to make informed, independent, decisions based on input from other participants who may have greater expertise on specific aspects of the firm's business. While the appeal asserts that Ms. Meyer has this ability, ODOT has sufficient basis in the record for determining that Flatrock did not carry its burden of proof that this potential has been realized.

The appeal notes that Flatrock has obtained several subcontracts subsequent to its application.<sup>8</sup> Should Flatrock choose to reapply for DBE certification, evidence concerning the interaction among the company's participants on those projects could potentially support the argument that Ms. Meyer has, in practice, made the kind of independent decisions called for by paragraph 26.71(g).

### **Conclusion**

The Department concludes that ODOT has substantial evidence in the record to support its determination that Ms. Meyer did not control Flatrock. Consequently, we are affirming ODOT's application.

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: Deborah M. Green

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<sup>8</sup> With Mosser Construction (with Mr. Myer on board as field superintendent), E.S. Wagner, Vernon Nagel, and Eagle Bridge Construction. Ms. Meyer also has taken advantage of several post-application training opportunities. See p. 1-2 of Part 4 of the appeal.