



**U.S. Department of
Transportation**

Office of the Secretary
Of Transportation

Departmental Office of Civil Rights
1200 New Jersey Avenue, S.E., W76-401
Washington, DC 20590

September 30, 2020

Docket No. 20-0061

Danielle L. Dietrich
Tucker/Arensberg Attorneys
1500 One PPG Place
Pittsburgh, PA 15222

Dear Ms. Dietrich:

This is in response to your appeal on behalf of your client, FlatRock LLC (FRL), from its denial for DBE certification by the Ohio Department of Transportation (ODOT). After reviewing the administrative record of the case, the Department is reversing this decision and directing ODOT to certify the firm.

This is the second time that FR has filed an appeal of a denial by ODOT. In July 2018, ODOT found that FRL's 51 percent owner, Leslie Meyer, did not control the firm. We upheld that denial in May 2019. Following a reapplication by FRL, ODOT again denied the firm certification, on February 10, 2020, which you appealed on April 1, 2020. The issues in the present case concern business size and cooperation, rather than control.

The principal issue in contention between FRL and ODOT is whether FRL is affiliated with Foundation Steel (FS). Under section 26.65(b) of the Department's DBE regulation, if a firm, including its affiliates, has gross receipts, averaged over three years, of more than \$23.98 million, it is not an eligible small business for DBE purposes. Thus, if FRL and FS are affiliates and their combined gross receipts exceed this figure, FRL is ineligible.

Paul Dymarkowski owns the other 49% of FRL. He formerly worked for FRL. Mr. Dymarkowski's wife Charlotte owns FS, which describes itself as a structural steel/metal building systems erector and reinforcing steel installer.¹ FS describes its work as installing reinforcing steel on bridges.² FRL works exclusively on bridges while FS does no bridge work.

Section 26.65 refers to Small Business Administration (SBA) regulations in 13 CFR Part 121 to determine whether firms are affiliated. Under SBA rules and SBA administrative law cases

¹ See the company website, www.foundationsteel.com.

² See the company website, www.flatrockbridgegroup.com.

interpreting them, FRL and FS are presumed to be affiliated because of the family relationship between Paul Dymarkowski and his wife, Charlotte Dymarkowski, who owns FS.³ To rebut this presumption, the firms must show that there is a “clear line of fracture” between the parties involved.⁴ Under SBA rules, a firm “may demonstrate a clear line of fracture by proving there is no business relationship or involvement with each other's business concerns.”⁵

In its appeal, and in a number of prior communications with ODOT, FRL asserted that there was such a clear line of fracture between FRL and FS. Paul and Charlotte Dymarkowski, and consequently the two firms with which they are involved, “have no business relationship,” the appeal argues, and “are not involved in each other’s business concerns. There is no economic activity between Flatrock and Foundation. The companies do not share officers, employees, facilities, or equipment. They have different lines of business and customers. They bid on entirely different contracts and jobs. There is no financial assistance, loans or any subcontracting between the firms. Paul and Charlotte Dymarkowski do not participate in any business together” (emphasis in original).⁶ While some individuals worked for FRL at some times and for FS at other times (e.g., Paul Dymarkowski⁷ and certain unionized employees), ODOT’s denial letter does not cite any facts that undermine FRL’s assertions.

This being the case, the Department accepts the appeal’s representation that there is a clear line of fracture between FRL and FS, meaning that the two firms should not be viewed as affiliates. As a result, FRL does not exceed the \$23.98 million size cap imposed by section 26.65.

The second denial ground ODOT cites is that FRL failed to cooperate with the certification process, contrary to section 26.109(c) of the Department’s regulation. The chain of events leading to this assertion is curious. On a number of occasions (e.g., October 21, December 13, and December 31, 2109), ODOT demanded that FRL provide copies of FS’s 2017 and 2018 tax returns.

FRL’s January 15, 2020, response attached a January 13, 2020, letter from Charlotte Dymarkowski to FRL’s attorney refusing to provide FS’s tax returns to FRL to pass on to ODOT. This letter suggested that FRL could remind ODOT that ODOT already had copies of

³ See 13 CFR 121.103(f). While SBA’s administrative law cases are illustrative rather than binding on DOT decisions, SBA’s “long-standing case precedent interprets this regulation as creating a rebuttable presumption that family members have identical interests and must be treated as one person. The underlying rationale for the rule is that persons will, because of their common interests, act in concert or as one.” *Alleo Corporation* SBA No. SIZ-5405 (2012). See also *Knight Networking & Web Design*, SBA No. SIZ-5561 (2014); *Black Box Technology*, SBA No. SIZ-5011 (2008), and *Megen-AWA 2*, SBA No. SIZ-5852 (2017).

⁴ See *Alleo*, supra, and *Speegle Construction, Inc.*, SBA No. SIZ-5147 (2010), both cited in a DOT certification appeal case, 19-0113 *Flovera Construction Services LLC* (November, 5, 2019).

⁵ *Speegle*, supra, note 4.

⁶ Appeal letter, p. 8.

⁷ Paul Dymarkowski, while still working for FS, did provide some assistance to the nascent FS with respect to business administration and financial matters, before FRL applied for DBE certification.

Ms. Dymarkowski's 2017-18 personal tax returns and business tax returns for FS, part of the administrative record of FRL's 2018 application. ODOT in fact used these tax returns to make its calculations of the companies' gross receipts.

Nevertheless, ODOT asserted that because FRL's January 15 letter did not explicitly call attention to Ms. Damarkowski's attached January 13 letter, and because the January 15 letter continued to insist that there was a clear fracture between FRL and FS, FRL had failed to cooperate with the investigation.

This makes no sense. ODOT already had the documents in question. FRL pointed this out to ODOT in an attachment to its January 15 letter. ODOT used the documents. For ODOT to say that FRL failed to cooperate because it did not underline the content of an attachment in the body of its letter, and because it continued to argue its legal position, is to try to bootstrap its way to a ground for denial. This attempt fails.

The Department has determined that ODOT did not have substantial evidence to find that FRL and FS are affiliated, there being a clear fracture between the firms. The Department also finds that ODOT did not have substantial evidence to find that FRL failed to cooperate. Consequently, we are reversing ODOT's decision. ODOT is directed to certify the firm immediately.

This decision is administratively final.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Leslie Meyer
Deborah M. Green