**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

August 31, 2020

Docket No. 20-0077

Sara R. Fila, PE
Legacy Engineering, PC
419 Chatham Square Office Park
Fredericksburg VA 22405

Dear Ms. Fila:

This is in response to your appeal of the denial of the application of Legacy Engineering, PC
(LE) for disadvantaged business enterprise (DBE) certification by the Virginia Unified
Certification Program (VUCP). The denial was based on provisions of LE's corporate
documents.

The denial points out that Article III, Section 1, of LE's bylaws provides that the business and
affairs of the corporation are to be managed by, or under the direction of, LE's board of
directors. Article III, Section 8, of the same document says that a quorum of the board consists of
60 percent of the members of the board of directors, and that actions of the board on behalf of the
corporation are made by a majority of the directors present at a board meeting.

You own 51 percent of LE, and non-disadvantaged owner Bruce Reese, owns 49 percent.
Together you and he constitute the board. You are the only two directors. By the terms of the
bylaws, both you and Mr. Reese would have to be present to form a quorum of the board and, to
make a decision, you both would have to agree. To state the matter another way, Mr. Reese can
block the board from meeting at all and veto any action he does not favor. This arrangement is
contrary to section 26.71(c) of the Department's DBE regulations, which provides that
arrangements that "prevent the socially and economically disadvantaged owners, without the
cooperation or vote of any non-disadvantaged individual, from making any business decision of
the firm" preclude a disadvantaged owner from controlling the firm. On this basis, VUCP found
that you do not control VE.

The Department has frequently ruled that provisions that prevent a disadvantaged owner from
making business decisions without the cooperation of a non-disadvantaged participant run afoul
of section 26.71(c).[1] The bylaws noted have precisely this effect. You require Mr. Reese's
cooperation and consent to make any business decision.

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[1] See, e.g., 14-0024 *Smart Associates Environmental Consultants, Inc.* (July1, 2015), 14-0035 *Rear View Safety,
Inc.* (July 6, 2015), 14-0034 *Vegas Heavy Haul, Inc.* (July8, 2015), 15-0148 *Gideon Toal Management Services*

On appeal you contend that a small adjustment to the bylaws could fix this problem, and you enclose such an amendment for our review. The amendment postdates VUCP's decision by a month. However, an after-the-fact change does not make VUCP's decision, based on the bylaws then in effect, erroneous. See generally sections 26.73(b)(1) (firm's circumstances at time of decision control), 26.89(c) (appeal must allege error, omission, or misapplication of applicable regulations), and 26.89(e) (we do not decide questions of eligibility as if we were the certifier).

The problem for LE, in short, is that the amendment is untimely. As is the case with VUCP, we base our decisions "on the status and circumstances of the firm as of the date of the decision being appealed." Section 26.89(f)(6). On that date, April 20, 2020, the provisions cited in the denial letter were intact.

We conclude that the VUCP had substantial evidence to find that LE did not meet the control requirements of the Department's DBE regulation.[2] We therefore affirm the denial.

This decision is administratively final.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Calvin M. Thweatt

(March 26, 2016), 16-0015 *Tollie's Landscaping and Lawn* (June 10, 2016), 16-0064 *Ryan Biggs/Clark Davis Engineering and Surveying, P.C.* (August 12, 2016), 17-0053 *D.M. Conlon Inc.* (November 21, 2017), 17-0131 *Cable Trucking Inc.* (March 26, 2018), 19-0010 *VEC Services LLC* (May 2019).

[2] LE may provide amended bylaws should it reapply for certification.