

June 6, 2019

Reference Number 19-0042

Ms. Donna Flatt, President  
ETTL Engineers and Consultants, Inc.  
**REDACTED**  
Tyler, TX 75702

Dear Ms. Flatt:

ETTL Engineers & Consultants, Inc. (ETTL) appeals the Texas Department of Transportation's (TXDOT) November 28, 2018 denial of the firm's application for Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R. Part 26 (the Regulation). After reviewing the full administrative record, we affirm TXDOT's conclusion that you do not satisfy the requirements of §26.71(g).<sup>1</sup>

#### Background

ETTL provides geotechnical engineering and construction testing services. You joined ETTL's board of directors in 2014 and began working at the firm in 2017. You became ETTL's 51% owner and President on January 1, 2018. As President, your résumé states that you are:

Responsible for day to day operations of multi-faceted engineering and consulting firm, including, but not limited to:

- Responsible for the operating and financial needs of the corporation
- Manage all accounting, corporate tax filings, and the corporate books
- Management duties involve hiring, firing, and day-to-day employee procedures/operations
- Manage all accounting, corporate tax filings, and the corporate books.
- Sign all of the business proposals for ETTL
- Manage accounts receivables and invoicing customers
- Maintain website for marketing and business exposure
- Responsible for business development and planning

#### D. Flatt Résumé.

Before you began working for ETTL, you worked in the nursing field from 2010 to 2017. *Id.* Your résumé also shows that you worked as an Outside Drug Sales Representative from 1989 to

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<sup>1</sup> We do not opine on TXDOT's other denial grounds because our disposition on §26.71(g) is sufficient to affirm the decision under §§26.61(b) and 26.89(f)(1).

1993, and as a Store Manager in the retail industry from 1987 to 1989.<sup>2</sup> *Id.* You earned a Bachelor of Science degree in Nursing and a Bachelor of Business Administration degree. ETTL offers no evidence showing that you have education, work experience, or training directly related to engineering or construction.

### Decision

An applicant firm must demonstrate, by the preponderance of evidence, that it meets all certification requirements. §26.61(b). TXDOT determined that ETTL failed to prove that you control the firm within the meaning of §26.71(g), primarily because TXDOT found that you lack “expertise in the field of engineering and laboratory testing.” TXDOT Denial Letter (November 28, 2018) at 3.

Regulation §26.71(g) requires that you have “an overall understanding of, and managerial and technical competence and experience *directly related* to, the firm’s type of business and its operations.” (Emphasis added).<sup>3</sup> ETTL argues that your educational background and work experience, particularly in nursing, demonstrates that you satisfy these requirements. *See* ETTL Appeal (December 11, 2018) at 4-5. However, your academic qualifications and work experiences are not directly related to ETTL’s business and its engineering/construction testing operations.<sup>4</sup>

The Regulation does not require that a disadvantaged owner have experience or expertise in every critical area of the firm’s operations, or that the owner have greater expertise or experience in a given area than the firm’s other managers or employees.<sup>5</sup> Section 26.71(g) states that the disadvantaged owner must have the ability to intelligently and critically evaluate information presented by other participants in the firm’s activities to make independent decisions concerning the firm’s daily operations, management, and policymaking. In this instance, ETTL fails to

<sup>2</sup> Your résumé shows no work experience between 1993 and 2010.

<sup>3</sup> The full provision of §26.71(g) states that:

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm’s operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm’s operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm’s activities and to use this information to make independent decisions concerning the firm’s daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

<sup>4</sup> The appeal briefly mentions that you have 34 years of experience “around the industry,” 5 years of experience as a board member, and 2 years of “daily” experience working at the firm. Appeal at 3. But ETTL fails to explain how these experiences provided you with the required technical competence related to geotechnical engineering and construction testing.

<sup>5</sup> The Regulation at §26.71(f) specifically allows you to delegate control of various areas of operations to ETTL’s other employees.

demonstrate that you are able to “intelligently and critically” evaluate information to make independent decisions concerning the firm’s highly technical engineering/construction operations.

We acknowledge that ETTL may have become more profitable since you joined the firm, and we recognize that you probably obtained valuable skills through your education and previous work experiences. However, these facts, by themselves, do not demonstrate that you possess the specific qualities and abilities required by §26.71(g). The firm has not demonstrated that you have directly related managerial and technical competence and experience or the critical evaluation and independent decision making abilities the rule requires.

We find that substantial evidence supports TXDOT’s conclusion that you do not control ETTL within the meaning of §26.71(g). We affirm.

### Conclusion

We affirm TXDOT’s decision under §26.89(f)(1) as supported by substantial evidence and consistent with applicable certification provisions.

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks  
Appeal Team Lead  
Disadvantaged Business Enterprise Division

cc: TXDOT