

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

- of -

the Application of **LB Transportation Consulting, Inc.**
for Certification as a Minority and Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 49778

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

August 1, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (“Division”) of the New York State Department of Economic Development to deny LB Transportation Consulting, Inc. (“LB” or “applicant”) certification as a minority and women-owned business enterprise¹ (“MWBE”) be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) Parts 140-144, challenging the determination of the Division that LB does not meet the eligibility criteria for certification as a MWBE.

The Division denied LB’s application for MWBE certification (Exhibit 1) by letters dated April 12, 2017. Exhibit 2. The denial letters set forth four grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that the contributions of Lena Bansal, the minority and woman owner, are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) (“Ownership”));
- (2) applicant did not show that Ms. Bansal shares in the risks and profits in proportion with her ownership interest in the enterprise (see Section 144.2(c)(2) (“Ownership”));
- (3) applicant failed to demonstrate that Ms. Bansal made decisions pertaining to LB’s operation (see Section 144.2(b)(1) (“Operation”)); and
- (4) applicant did not establish that Ms. Bansal has the experience or technical competence, working knowledge or ability needed to operate the enterprise (see Section 144.2(b)(1)(i) (“Operation”)).

Exhibit 2. On May 9, 2017, applicant requested the opportunity to appeal from the denial, and the Division responded by letter dated June 29, 2017, advising applicant that a hearing had been scheduled. Exhibits 3 and 4.

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”). A “minority-owned business enterprise” is defined as a business enterprise that is at least 51 percent owned by one or more United States citizens or permanent resident aliens who are minority group members. See Section 140.1(aa) of 5 NYCRR. The certification requirements for a minority-owned business enterprise are similar to the requirements for certification as a women-owned business enterprise. Id.

The hearing took place as scheduled on July 25, 2017. Ms. Bansal testified on her own behalf, and also called LB's former accountant, Lynne Absher, CPA, as a witness. Division Staff was represented by Phillip Harmonick, Esq., and called Iliana Farias, a senior certification analyst employed by the Division. Ms. Farias was the analyst who reviewed LB's application.

A list of exhibits is attached to this recommended order. Exhibits submitted by LB were not marked or received if those exhibits were duplicates of exhibits submitted by the Division and already received into the record. The hearing was recorded by Division staff. The recording was provided to the administrative law judge ("ALJ") in compact disc format on July 31, 2017, and the record closed. This audio recording is approximately one hour long, on one compact disc. References to testimony from the hearing are identified by the time on the recording at which the testimony occurs ("HR at ____").

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a minority and women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted MWBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of LB's application for MWBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 306(1)). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of LB's MWBE application. With respect to ownership, applicant referred to the 2005 corporate tax return showing [REDACTED]. Exhibit 9, at 4, Schedule L. The 2015 corporate tax return continued to show [REDACTED]. Exhibit 7, at 4, Schedule L. The source of those funds was not identified in the application.

Subsequent to the denial, and at the hearing, applicant asserted that the [REDACTED] represented [REDACTED]. The business was formed in

2005, and according to applicant, [REDACTED] in the account were attributable to Ms. Bansal, and [REDACTED] was attributable to Rafal Niedzwiedz, Ms. Bansal's male, non-minority partner. Applicant acknowledged that Mr. Niedzwiedz received greater compensation than Ms. Bansal, but contended that this discrepancy was attributable to the fact that his services were billed as part of LB's contracts with clients.

With regard to operation, applicant argued that Ms. Bansal makes decisions pertaining to LB's operation. Applicant argued further that although Ms. Bansal is not trained as an engineer, engineering is only a relatively small part of LB's business.

Division

The Division contends that its determination is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a minority and woman owner. Specifically, the Division asserted that with respect to ownership, applicant failed to demonstrate that Ms. Bansal's contributions were proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. Moreover, the Division pointed out that Ms. Bansal received less compensation than her non-minority male partner, and thus did not share in LB's profits in proportion with her ownership interest. With respect to operation, the Division contended that applicant failed to show that Ms. Bansal has the managerial experience or technical competence, working knowledge or ability to operate LB, and argued that Ms. Bansal did not make decisions pertaining to LB's operations. Accordingly, the Division requested that its determination to deny MWBE certification to LB be upheld.

FINDINGS OF FACT

1. LB Transportation Consulting, Inc. is located at 130 Barrow Street, No. 418, New York, New York. Exhibit 1, at 1.
2. LB provides electrical engineering, mechanical engineering, construction management, testing, quality assurance, and IT solutions. Exhibit 1, at 3. The business also provides temporary staffing support. Exhibit 17.
3. LB's application indicated that no capital contribution was made. Exhibit 1, at 3. At the hearing, Ms. Bansal testified that neither she nor her partner had made a capital contribution at the time the business was started. HR at 30:41. The source of the [REDACTED] that appeared in the 2005 and 2015 tax returns was not identified in the application.
4. In 2015, Ms. Bansal received less in compensation from the business than Rafal Niedzwiedz, a non-minority male owner. Exhibit 7.
5. Ms. Bansal's background is in urban planning. Exhibit 10. Mr. Niedzwiedz has a degree in electrical engineering, and has diversified experience in engineering and project management. Exhibit 11.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a minority and women-owned business enterprise, pursuant to Executive Law Article 15-A.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information provided in supplemental submissions and interviews that are conducted by Division analysts.

Ownership

Section 144.2(a)(1) of 5 NYCRR requires an applicant to demonstrate that the minority and woman owner's contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. In addition, an applicant must show that a minority and woman owner shares in the risks and profits in proportion with her ownership interest in the business enterprise (see Section 144.2(c)(2) of 5 NYCRR).

In the denial letter, the Division stated that applicant failed to satisfy the ownership criteria, based upon the following "relevant facts":

- The application indicates that LB Transportation Consulting, Inc. ("LBTC") was organized on or about February 02, 2003.
- On or about January 01, 2007, Mr. Rafal Niedzwiedz, a non-minority group member, transferred certain of his shares of common stock in LBTC to Ms. Bansal.
- As a result of the aforementioned transfer, Ms. Bansal owns fifty-one percent of the outstanding common stock of LBTC and Mr. Niedzwiedz owns forty-nine percent of the outstanding common stock of LBTC.
- Prior to Ms. Bansal becoming the majority owner of LBTC, one or more individuals contributed [REDACTED]. Ms. Bansal represented that she could not identify the source of these contributions in her application.
- Ms. Bansal did not demonstrate any contributions on her part to LBTC.
- Mr. Niedzwiedz received significantly greater compensation from LBTC during its 2015 tax year than did Ms. Bansal.

Exhibit 2, at 2-3.

At the hearing, applicant acknowledged that the source of the [REDACTED] was not identified in LB's application, and testified that neither she nor Mr. Niedzwiedz contributed capital to start the business. HR at 30:41. Applicant offered the testimony of Lynne Absher, LB's accountant at the time the contribution was made, as well as a letter from Ms. Absher detailing the source of the funds contributed at the time of incorporation, asserting that Ms.

Bansal had contributed [REDACTED], and Mr. Niedzwiedz contributed [REDACTED]. HR at 52:45; Exhibit 15.

The Division pointed out that the application stated that there was no contribution to the business (Exhibit 1, at 3). Moreover, the Division noted that LB's response to a request by the analyst for additional information indicated that there was no initial investment into the business (Exhibit 6). LB's corporate tax return for 2015 showed [REDACTED] Exhibit 7, at 4 (Schedule L). A letter from LB's current accountant, LoriAnn Paiva, CPA, attached LB's 2005 tax return and stated that "I am not sure why it [REDACTED] is there since neither of the shareholders contributed money to the company. As the company was newly incorporated in 2005, I think to make the balance sheet balance, the [REDACTED]. No one ever questioned the [REDACTED] before. Being I did not know why it was put in [REDACTED] Exhibit 8.

On this record, it was reasonable for the Division to determine that Ms. Bansal had not made a contribution of money, property, equipment, or expertise sufficient to entitle LB to MWBE certification. All of the information provided in the application, and in response to requests for information by the Division, indicated either that there was no capital contribution, or that the source of the [REDACTED] could not be identified. The testimony and exhibits offered by applicant at the hearing with respect to the source of these funds post-dated the Division's denial, and are therefore not considered on appeal. Moreover, Ms. Absher testified that she had not prepared the 2005 tax return, and stated further that her knowledge as to the breakdown of the [REDACTED] was based upon notes and "old e-mails" she had found in the file. HR at 53:15. The witness had no personal, direct knowledge with regard to this point. Accordingly, the Division established that its determination to deny certification to LB was supported by substantial evidence.

As an additional basis for denial on the grounds of ownership, the Division observed that Mr. Niedzwiedz received greater compensation during 2015 than Ms. Bansal. HR at 15:22; Exhibit 7, at 5. At the hearing, applicant did not effectively rebut this testimony, stating only, as an explanation for the discrepancy, that Mr. Niedzwiedz's services were "billed out." HR at 30:53. In this regard, applicant offered a letter from LB's current CPA, who stated that "Mr. Niedzwiedz was assigned certain project responsibilities by Ms. Bansal which allowed him to bill for his time. This time was billed directly [sic] the client and he was compensated based on those hours worked." Exhibit 16.

It is undisputed that Mr. Niedzwiedz's compensation was greater than Ms. Bansal's in 2015. Consequently, applicant's argument regarding the nature of Mr. Niedzwiedz's compensation is unavailing. *See Matter of C. W. Brown v. Canton*, 216 A.D.2d 841, 843 (3rd Dept. 1995) (finding substantial evidence to support determination to deny certification as a woman-owned business enterprise where husband earned disproportionate salary compared to woman owner). As the Division maintained, the business reasons for the disparity in compensation were beside the point, because the purpose of the MWBE program is to ensure that profits from a business enterprise will flow proportionately to the minority and women individuals who will benefit the most. Moreover, even assuming that this evidence were persuasive, the information regarding Mr. Niedzwiedz's "billed out" compensation was not

before the Division at the time of the denial. Under the circumstances, the Division's determination was reasonable, and supported by substantial evidence. The Division's denial on the basis of the ownership criteria should be affirmed.

Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the minority and woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the minority and woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification.

With respect to operation, the Division's denial letter set forth the following "relevant facts":

- LBTC is primarily engaged in providing electrical engineering, mechanical engineering, and construction management services.
- Mr. Niedzwiedz is primarily responsible for managing significant operations of LBTC related to project design, project management, and supervising field operations.
- Ms. Bansal is primarily responsible for managing administrative functions of LBTC.
- Mr. Niedzwiedz possesses significant managerial experience in project design and supervision of field operations in the electrical engineering industry.
- Mr. Niedzwiedz earned a Bachelor of Sciences degree in electrical engineering.
- Ms. Bansal lacks managerial experience or academic credentials relevant to project design and supervision of field operations in the electrical engineering industry.

Division Exhibit 1, at 3.

At the hearing, Ms. Bansal testified that engineering services were only part of the operation of LB, and that she was responsible for employees who build, operate and maintain the subway and mass transit systems at airports. HR at 34:50. Ms. Bansal testified further that she is ultimately responsible for operations, and that although she consults with Mr. Niedzwiedz, she has the managerial experience necessary to operate the business. HR at 38:56. Ms. Bansal went on to discuss her updated resume (Exhibit 18), which was not before the Division at the time of the denial, and stated that she had been remiss in providing the earlier resume which was "severely outdated." HR at 43:45; Exhibit 10.

In response, the Division pointed out that Mr. Niedzwiedz has significant experience in electrical engineering, and noted that contracts entered into by LB called for the services of electro-mechanical technicians and project engineers. Exhibits 11, 12, 13, and 14. In contrast, Ms. Bansal's education is in the field of urban planning. Exhibit 10.

The record supports the Division's determination regarding the operation of LB. It was reasonable for the Division to conclude that non-minority males operated the significant functions of the business. Although Ms. Bansal testified credibly regarding her role in the operation of LB, the functions she performs are primarily administrative. Moreover, even assuming that applicant satisfied the operational criteria, applicant did not establish ownership within the meaning of the regulations. The Division's denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny LB's application for certification was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny LB's application for MWBE certification should be affirmed.

Matter of LB Transportation Consulting, Inc.
DED File ID No. 49778
Exhibit Chart

Exhibit No.	Description	Rec'd
1	February 22, 2017 application	✓
2	April 12, 2017 denial letter (MBE), and April 12, 2017 denial letter (WBE)	✓
3	May 9, 2017 letter requesting appeal	✓
4	June 29, 2017 letter scheduling hearing	✓
5	Stock certificates and ledger	✓
6	February 21, 2017 letter from Lena Bansal re no initial investment into the firm	✓
7	2015 S Corporation income tax return	✓
8	Undated letter from LoriAnn Paiva, CPA, to Iliana Farias, NYS DED, re [REDACTED]	✓
9	2005 S Corporation income tax return	✓
10	Resume: Lena J. Bansal	✓
11	Resume: Rafal M. Niedzwiedz	✓
12	Hartsfield-Jackson Atlanta Airport Contract	✓
13	Washington Dulles International Airport Contract	✓
14	Greater Orlando Aviation Authority Contract	✓
15	May 17, 2017 letter from Lynne T. Absher to Cathy Powers re: [REDACTED]	✓
16	July 16, 2017 letter from LoriAnn Paiva, CPA to ALJ Villa re compensation	✓
17	July 16, 2017 letter from Lena J. Bansal to ALJ Villa re NAIC	✓
18	Resume: Lena J. Bansal (updated)	✓
19	October 15, 2015 letter from Port Authority of NY and NJ re: MWBE certification	✓
20	April 19, 2017 letter from NYC Department of Small Business Services re: MWBE certification with Metropolitan Transportation Authority	✓
21	September 26, 2016 letter from Metropolitan Transportation Authority re: certification as a Disadvantaged Business Enterprise	✓