

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

In the Matter

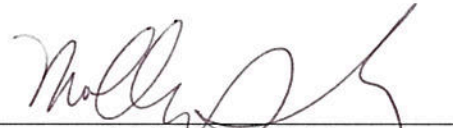
- of -

the Application of **A.A.C. Contracting, Inc.**
for Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61977

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge

September 23, 2019

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 ("NYSDED") to deny A.A.C. Contracting, Inc. ("AAC" or "applicant") certification as a minority-owned business enterprise ("MBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") 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, by AAC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

AAC submitted an application to the NYSDED on January 16, 2017 (Exhibit A). By letter dated August 17, 2017, the Division denied the application for MBE certification on two grounds: (1) minority group members do not own at least 51 percent of the business enterprise (5 NYCRR 140.1[aa][1]); and (2) the contribution of minority group members is not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (5 NYCRR 144.2[a][1]) (Exhibit B).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on April 2, 2019, at the Albany office of the NYSDED. Kevin Cannan appeared for applicant with Jennifer Harvey, Esq., of Couch White, LLP, and the Division appeared by Raymond Emanuel, Director of Certification Operations, and Simon Wynn, Esq., Senior Counsel. The parties submitted post-hearing closing briefs and the record closed on April 23, 2019.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself and, upon appeal, the hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application and during any site visit that had been carried out (5 NYCRR 144.5). On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a minority-owned business enterprise (see State Administrative Procedure Act § 306[1]). To

carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence.

POSITIONS OF THE PARTIES

Position of the Division

The Division's denial letter asserts that applicant failed to meet two criteria for certification: (1) applicant failed to establish that a minority group member owns at least 51% of the outstanding common stock pursuant to 5 NYCRR 140.1(aa); and the contribution of minority group members is not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1).

Position of the Applicant

AAC asserts that it meets the criteria for certification and that the Division erred in not recertifying it as a minority-owned business enterprise pursuant to EL Article 15-A.

FINDINGS OF FACT

1. A.A.C. Contracting, Inc. was formed by Kevin Cannan, Ron Eglert, Gary Merrill and Frank Mazzarella in 1983 in Rochester, New York (Exhibit A). Each owner held a 25% stake in the company at its founding. In 1999, Mazzarella and Cannan purchased the shares of Englert and Merrill and each held a 50% ownership interest in AAC (Exhibit A).
2. A.A.C. Contracting, Inc. is in the business of asbestos/lead/mold abatement and facility clean up and fireproofing (Exhibit A, 3.C).
3. The application states Kevin Cannan made a capital contribution to the business of [REDACTED] in 1983 and Frank Mazzarella made a capital contribution of [REDACTED] in 1983 (Exhibit A, 2.D).
4. Kevin Cannan is President of AAC and a Board member, and Frank Mazzarella is a Board member and shareholder (Exhibit A, 2.F). Both men are responsible for financial decisions for the business and are signatories on the financial accounts (Exhibit A, 4.A.12).
5. Kevin Cannan and Frank Mazzarella also own commercial real estate together in Rochester and Buffalo, New York, and are partners in Humboldt Street Properties. Also, Mazzarella owns Genesee Environmental, LLC, an environmental remediation company of which Cannan is Vice President as well as a Board member and an investor. (Exhibit A, 6. A-C.)

6. The application states Kevin Cannan purchased one share of stock from Frank Mazzarella for [REDACTED] in January 2016, thereby giving Cannan a majority ownership interest in the company (Exhibit A).
7. Proof of the [REDACTED] payment was provided to the Division only after the application for MBE certification was denied.
8. No information was provided as to how the one share of stock was valued at [REDACTED] in 2016 when Mr. Cannan purchased it.
9. The application states that AAC owns assets in excess of [REDACTED]. Gross receipts for 2015 were reported on the application as [REDACTED] (Exhibit A, 1.V. & 5.D.) Tax returns submitted indicated 2016 gross receipts in excess of [REDACTED] and gross profits of [REDACTED] (Exhibit 15).
10. Kevin Cannan received officer compensation in 2016 in the amount of [REDACTED] and Frank Mazzarella received officer compensation in the amount of [REDACTED] (Exhibit 15).
11. Kevin Cannan applied for membership in the Wyandot of Anderdon Native American tribe in 2016 and he was granted membership in January 2017.
12. AAC began the application process for MBE certification in November 2016 and submitted the application on January 16, 2017, immediately after the tribal membership was approved (Exhibit A).

DISCUSSION

This report considers the appeal of applicant from the Division's determination to deny certification as a minority-owned business enterprise (MBE) pursuant to EL Article 15-A. On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's MBE certification is not supported by substantial evidence (see State Administrative Procedure Act § 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 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

OWNERSHIP

The Division's denial was based on the ground that the minority owner, Kevin Cannan, did not make a capital contribution to the business that is proportionate to his equity interest. The standards to determine if a business should be afforded minority-owned business certification are defined in 5 NYCRR 144.2. Section 144.2(a)(1) of 5 NYCRR requires the minority owner to

demonstrate he has made a capital contribution to the business enterprise proportionate to his equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (5 NCYRR 144.2 [a][1]). Applicant claimed that Kevin Cannan made a capital contribution in the form of cash that was proportionate to his majority ownership of the company (Exhibit A). The Division concluded that AAC failed to provide sufficient documentation to establish the purchase of stock by Kevin Cannan that gave him majority ownership and AAC failed to demonstrate that if he did in fact purchase the share of stock that allegedly gave him majority interest. Therefore, applicant failed to demonstrate that the amount paid was proportionate to the equity interest.

AAC was started in 1983 by 4 equal owners. The application only provides information regarding the contribution of two of the original owners, Kevin Cannan and Frank Mazarella. The application indicates that Kevin Cannan made a capital contribution of [REDACTED] in 1983 and Frank Mazarella made a capital contribution of [REDACTED] (Exhibit A, 2. C). In support of the application, Mr. Cannan supplied the Division with a written narrative detailing the ownership of the company from its formation in 1983 to the time of the application for MBE certification (Exhibit 6). According to the narrative, Cannan and Mazarella each held a 25% ownership interest in the company until 1989 when they, along with a third partner, bought out their fourth partner. At that time all three partners held an equal interest in AAC (Exhibit 6). No information was provided as to the amount paid to the partner for his 25% interest in AAC. In 1999, Cannan and Mazarella bought out their partner, becoming equal partners in AAC (Exhibit 6). No information was provided as to the amount paid to the partner for his 33 1/3% interest in AAC. In 2016, according to the application and narrative supplied to the Division, Cannan purchased one share of common stock from his partner Mazarella for [REDACTED], thereby becoming the majority owner of AAC. Although the application indicates that Cannan paid [REDACTED] for the one share of stock he purchased from Mazarella, no proof of any consideration having been paid for the purchase was submitted to the Division before the application was denied. No minutes from any meeting of the AAC shareholders was offered to demonstrate that Mr. Cannan paid consideration proportionate to the value of the share he acquired, and no receipt for the sale, or canceled check evidencing any consideration given for the purchase of the one share (Disk 2 at 1:00.40)

The Division concluded that applicant failed to demonstrate that Mr. Cannan made a capital contribution in proportion to his equity interest and denied the application for minority business enterprise certification (Exhibit B). Applicant submitted a copy of a canceled check evidencing Cannan's payment to Mr. Mazarella of [REDACTED]. The canceled check was submitted to the Division after the denial letter was issued by the Division (Exhibit 3). Also, the check from Mr. Cannan to Mr. Mazarella was dated November 28, 2016, almost 11 months after the alleged sale took place (Disk 2 at 1:1.40).

Prior to the denial, on June 16, 2017, the Division analyst had requested, during the application review process, that applicant submit a CPA prepared book value of AAC (Exhibit A). The CPA book value submitted by AAC identified the value of AAC in 2016 in excess of [REDACTED] and Kevin Cannan's equity in AAC was valued at over [REDACTED] (Disk 2 at 58:00). This CPA prepared book value was requested by the Division's analyst after the

applicant submitted a Shareholders Agreement dated January 2, 2016 (Exhibit 12). This Agreement was between AAC and the two shareholders Cannan and Mazzarella, and it limits the number of shares to be issued to 100 shares (Exhibit 12). The Agreement has three exhibits, two of which are relevant on this issue. Exhibit A to the Agreement identifies the shareholders names and number of shares owned (Cannan, 51 shares and Mazzarella, 49 shares). Exhibit C, states that the agreed value of all outstanding shares will be [REDACTED] per share (Exhibit 12, Exhibit C). The Division concluded that applicant had not supported the minority member's capital contribution being proportionate to the equity interest with Exhibit 12). At the time of the hearing, applicant's counsel asked whether capital contribution could be made in non-cash means and the Division expert confirmed that it was allowable under the regulations (Disk 3, 7:30). However, Mr. Cannan only identified cash as his capital contribution and the cash contribution was all that was considered by the Division in reviewing the capital contribution (Disk 3, 8:10).

The Division concluded that based upon the information supplied by applicant, Kevin Cannan did not demonstrate he has made a capital contribution to the business enterprise proportionate to his equity interest in the business enterprise, as demonstrated by contributions of money (5 NCYRR 144.2 [a][1]). Based upon applicant's failure to provide documentation evidencing Cannan's purchase of the one share of stock from Mazzarella, and applicant's failure to explain the value placed on the one share of stock in the January 2016 Shareholders Agreement, applicant has failed to demonstrate that the minority owner made a capital contribution in proportion to his ownership interest and, therefore, has not shown that the Division's denial on this ground was not based on substantial evidence.

OWNERSHIP

The Division also denied the application on the ground that a minority group member does not own at least 51% of the business enterprise, as required pursuant to Section 140.1(aa)(1). The Division denied on two grounds: the applicant did not provide sufficient documentation to support the membership claim, and that the Wyandot Nation is not federally recognized tribe by the U.S. Department of Interior Bureau of Indian Affairs (Exhibit 2). Applicant argued that Mr. Cannan applied for membership in the Wyandot of Anderdon Nation (Wyandot) in 2016 and a became of a member of the Wyandot of Anderdon Nation shortly after he submitted an application for membership and a \$20.00 fee. The only support presented to the Division during the application process was documentation printed by Mr. Cannan from the Wyandot website (Exhibits 17, 18, 19) that detailed the Nation's background and a print out of Mr. Cannan's lineage prepared from information he presented. Senior Certification analyst Raymond Emanuel testified for the Division and stated that usually the Division receives verification of tribal membership in the form of a Tribal membership card, proof of ancestor membership as well as the minority member's membership that is verified by the Tribe (Disk 2 at 51:44). Again, the Division concluded that the documentation submitted was insufficient to verify minority status (Disk 2 at 52:00). Mr. Emanuel was asked about documentation provided

in other requests for MBE certification. Mr. Emanuel testified about the type of documentation that is reviewed when a person is claiming minority membership as a Hispanic person of Mexican, Puerto Rican, Dominican, Cuban, Central American or South American descent of either native American or Latin descent (Section 140.1(zz)(2)). The Division customarily receives birth certificates that identify minority membership, passport evidencing birth in a country afforded the above stated such minority status, marriage certificates if they identify birth place and race (Disk 3 at 15:10). AAC did not submit sufficient documentation for the Division to confirm minority status.

Mr. Cannan testified that when he was young, he had an uncle that talked about them having a great-great grandfather who was an Indian Chief (Disk 1 at 36). He said he forgot about that ancestry in his 30's, 40's and 50's (Disk 2 at 35:01). Mr. Cannan explained that he only learned of the specifics of his Wyandot ancestry when a niece completed a family tree in 2015 (Disk 1 at 27:00). He and his brother were interested in it, but their mother objected to them pursuing it, so they did not (Disk 1 at 27:30). Years later his brother reached out to the Wyandot of Anderdon Nation and contacted the genealogist for the Nation and learned more details through his research (Disk 1 at 29:00). Shortly thereafter the brother applied for membership in the Wyandot of Anderdon Nation by filling out an application and paying a fee of \$20.00 (Disk 2 at 30:40). Although he prepared a detailed genealogy for the Wyandot of Anderdon Nation to establish his ancestry to allow him to join, including supplying records supporting his family tree, he did not submit it to the Division with his application for MBE certification (Disk 2 at 30:50). When he learned of his ancestry and joined the Nation, he spread the word in his family (Disk 2 at 21:58). He says it is a lot of fun for his family and he wants to take part in their traditions (Disk 2 at 22:00). He was shown pages from the Nation's website that noted that the Wyandot of Anderdon Nation is seeking members as "part of the movement of the Tribe toward federal recognition" (Exhibit C). Cannan is aware that the Wyandot of Anderdon Nation is not federally recognized (Disk 2 at 26:00).

Applicant has not demonstrated that the denial of the application on the grounds of minority ownership was not based on substantial evidence.

CONCLUSIONS

1. A.A.C. Contracting, Inc. has not demonstrated that the minority owner, Kevin Cannan, made a capital contribution to the business that is in proportion to his equity interest as required by 5 NYCRR 144.2(a)(1) and the denial was not based on substantial evidence.

3. A.A.C. Contracting, Inc. has not demonstrated that the majority owner has minority group membership as defined as required by 5 NYCRR 140.1(zz)(3) and the denial was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny A.A.C. Contracting, Inc.'s application for certification as a minority-owned business enterprise should be affirmed for the reasons stated herein.

Applicant Exhibit List

1	Application for MBE certification
2	Denial letter of 8-18-17
3	Notice of Appeal dated 9-5-17
4	Applicant discovery requests
5	Division discovery responses
6	AAC ownership history narrative
7	AAC Certificate of Incorporation
8	AAC Director Minutes 11-15-88
9	AAC Director Minutes 10-11-95
10	AAC Amended By-laws
11	AAC Share transfer logs
12	Shareholder Agreement 2016
13	Kevin Cannan resume
14	AAC Licenses and Certifications
15	AAC 2016 Tax Return
16	Attestation of Minority Status 12-30-16
17	Wyandot of Anderdon webpage
18	Michigan Indian Directory
19	Wyandot of Anderdon records for Cannan
20	Census pages 1901, 1881, 1871

DED Exhibit List

Exh. #	Description
A	Denial Letter dated 8-18-17
B	AAC Application
C	Webpage from Wyandot of Anderdon website
D	Wyandot website pages, consent form for membership and ancestry chart