

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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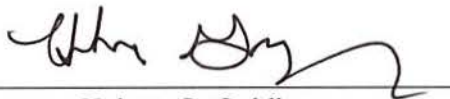
In the Matter

-of-

The Application of **ELITSAC, INC.**,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 10327

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

February 13, 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 (DED) to deny the application filed by Elitsac, Inc. (Elitsac or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Elitsac applied for certification as a woman-owned business enterprise on August 23, 2017. *See*, DED-1. By letter dated December 28, 2017 (DED-2), the Division determined that Elitsac does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. By letter dated January 22, 2018, Pamela Bliss, President, appealed the Division's determination to deny Elitsac's application for WBE certification (App 1). By letter dated January 2, 2019, the Division notified Elitsac that a hearing had been scheduled for January 15, 2019 at 11:00 a.m. at the Division's offices located at 625 Broadway, Albany, New York.

The hearing was convened as scheduled by Administrative Law Judge (ALJ) Lisa A. Wilkinson. ALJ Helene G. Goldberger was also present throughout the hearing and because Judge Wilkinson will be leaving her position with the Office of Hearings and Mediation Services, I am writing this recommended order. Benson Martin, Esq., Compliance Officer and Counsel, New York State Department of Economic Development, appeared on behalf of the Division and Joseph Sambu, Senior Certification Analyst, testified. Pamela Bliss appeared on behalf of the applicant and was the sole witness for Elitsac. An audio recording of the proceedings was made and I received two compact audio disks containing four track files on January 23, 2019, closing the hearing record. The recording is referred to in this recommended order as CD File, Disc __, Track __, 0:00.

During the hearing, the Division offered eight exhibits and they were received into evidence without objection. Ms. Bliss offered six exhibits of which one was accepted in total (App-1) and one was accepted in part with the second page redacted (App-2). Mr. Martin objected to Elitsac's exhibits on the basis that they did not reflect information that had been presented to DED as part of the application. Except for the appeal and the first page of App 2, ALJ Wilkinson did not admit them into evidence because these records were not part of the application and they were not submitted to the Division prior to its determination to deny certification. CD File, Disc 2, Track 2, 2:47. A list of the exhibits is attached to this recommended order.

After testimony by both parties was concluded, ALJ Wilkinson asked the parties if they would like a short adjournment to discuss the case. ALJ Wilkinson reviewed the DED's rules regarding when a company that has been denied certification can reapply depending on whether the original determination is accepted, or the agency's final determination is made after an

appeal and hearing. After some time, the proceeding reconvened, and Ms. Bliss reported that she wished to proceed with the appeal. Closings statements were made by both parties and the hearing adjourned at approximately 1:22 p.m.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied by the applicant through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, Elitsac bears the burden of proving that the Division's denial for WBE certification is not supported by substantial evidence (*see*, State Administrative Procedures Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and the 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]).

POSITIONS OF THE PARTIES

The Division

The Division denied the application filed by Elitsac for certification as a woman-owned business enterprise with a letter dated December 28, 2017 (*see*, DED-2). The Division determined that Elitsac failed to demonstrate: (1) that women share in the risks and profits in proportion with their ownership interest in the business enterprise as required by 5 NYCRR § 144.2(c)(2) and (2) women make decisions pertaining to the operation of the business enterprise as required by 5 NYCRR § 144.2(b)(1).

Elitsac

Pamela Bliss, Elitsac's current president and representative at the hearing, did not essentially dispute the evidence presented by the Division. *See, e.g.*, CD File, Disc 2, Track 1, 8:14; 10:31-13:27. Instead, Ms. Bliss's testimony and documentary evidence indicated that in 2009, she entered the company to prevent its financial failure and through her work there she

gradually learned the business and took on more authority. CD File, Disc 2, Track 1, 10:31-13:27; App 1. Ms. Bliss testified that she did not take a larger salary because she was less concerned with the money than ensuring the company's financial position and her customer's interests. CD File, Disc 2, Track 1, :51 – 3:00. Ms. Bliss maintained that she is now involved in every aspect of the company's operation and attributes its current viability to her involvement. CD File, Disc 2, Track 1, 3:15 – 6:17. She stated that William Bliss, her husband, is not interested in a leadership role in the company and therefore, her role is vital. CD File, Disc 1, Track 2, 6:47 – 9:06. Ms. Bliss maintained that while her greater involvement in the company was gradual, her elevation to manager of the entire enterprise occurred at least one year before she submitted the application to DED. *Id.*, CD File, Disc 2, Track 1, 10:31 – 13:27.

FINDINGS OF FACT

1. Elitsac, Inc. is located at 103 South Main Street, Castile, New York, and supplies lumber, building materials and hardware. In addition, Elitsac offers design build services and equipment rentals primarily for construction. DED-1, §§ 1.E, 3.C.
2. Elitsac was established in 1994 by Douglas F. Bliss, now deceased. DED-1, §§ 1.R, S.
3. Douglas F. Bliss was the father of William (Bill) Bliss, who is identified as President in the application. William Bliss is married to Pamela Bliss. DED-10.
4. In or around 2009, Pamela Bliss joined the company full-time when Elitsac was in financial distress and Sara Bliss, then president (William's mother) and William Bliss contemplated bankruptcy. App-1. Since that time, Pamela Bliss became more actively involved in the company's operations and management. CD File, Disc 2, Track 1, 10:31 – 13:27.
5. As of the date of the application, William Bliss was the president of Elitsac and he was responsible for financial decisions, negotiations/bonding, personnel determinations, supervision of field operations, purchase and sale of equipment, negotiation of contracts, and was the signatory for business accounts. DED-1, § 4.A; DED-7.
6. Since 1990, Pamela Bliss has had experience as a social worker, teacher, yoga instructor and has held various board positions. DED-6.
7. In or around 2007 to the time of Elitsac's application, Ms. Bliss was involved with accounts payable and receivable, customer service, advertising and human resources for the company. DED-6.
8. The applicant's 2014 federal tax return reveals that Bill Bliss received almost ██████ the compensation that Pamela Bliss received and that she did not own any stock. DED-3.

9. The applicant's 2015 federal tax return reveals that Bill Bliss received more than [REDACTED] the compensation that Pamela Bliss received and that she did not own any shares in the company. DED-4.
10. The applicant's 2016 federal tax return reveals Bill Bliss received more than [REDACTED] the compensation that Pamela Bliss received and that she did not own any shares in the company. DED-5.
11. On or about October 15, 2017, the Elitsac Board of Directors voted Pamela Bliss as president. DED-8. On August 15, 2017, Pamela Bliss acquired a 52.5% interest in the company. *See*, DED-1, 2.A.

DISCUSSION

This recommended order considers Elitsac's January 22, 2018 appeal from the Division's December 28, 2017 determination to deny Elitsac's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's December 28, 2017 denial letter (see DED-2), Elitsac did not demonstrate that women shared in the risks and profits in proportion with their ownership interest in the business enterprise and that women made decisions pertaining to the operation of the business enterprise as required by 5 NYCRR §§ 144.2(c)(2) and 144.2(b)(1), respectively.

I. Control

The eligibility criterion with respect to control is whether Elitsac demonstrated compliance with 5 NYCRR § 144.2(b)(1) which requires that "[d]ecisions pertaining to the operation of the business enterprise must be made by . . . women claiming ownership of that business enterprise." The regulation points to several factors for the Division to consider with respect to this requirement including whether the woman has adequate managerial experience or relevant technical competence; demonstration of knowledge and ability to operate the business enterprise; and an expenditure of time on an ongoing basis to the daily operation.

The Senior Certification Analyst, Joseph Sambu, who reviewed the Elitsac application and testified at the hearing, noted what he viewed as "red flags" with respect to the eligibility of the company for WBE status. CD File, Disc 1, Track 1, 8:40 – 9:12. Specifically, he noted that the application provided that Bill Bliss was the president of the company and was also responsible for overseeing most of the business operations. *Id.* at 10:03; DED-1; DED-7. Mr. Sambu noted that to qualify for the WBE certification, an enterprise must demonstrate that a woman is in charge and is making the final determinations. CD File, Disc 1, Track 1 13:31 –

13:51. Because the applicant's documentation indicated that Bill Bliss was in charge of most of the business's operations, it did not appear that a woman was in charge and/or making the final business determinations that were key to Elitsac's viability. *Id.*

Mr. Sambu also noted the discrepancy in the relevant experience between Bill Bliss and Pamela Bliss shown by their respective resumes. CD File, Disc 1, Track 1, 23:19 – 28:37; DED-6, 7. Mr. Bliss's resume shows experience and responsibilities throughout the company for many years. DED-7. In contrast, Ms. Bliss's resume is largely not related to her professed role at the company and the specific relevant duties do not indicate a managerial position. DED-6.

Elitsac's application pointed to William Bliss as the individual in control of the company based on his relevant experience and his position as president. The application including Ms. Bliss's resume showed limited experience and participation in the business operations. At the time Elitsac made its application, Division staff correctly found that Ms. Bliss's involvement in the company was subordinate to that of her husband, William Bliss, in contravention of the eligibility criterion outlined at 5 NYCRR § 144.2(b)(2). While Pamela Bliss was designated president in October 2017 and this documentation was submitted and made a part of the application (CD File, Disc 1, Track 1, 35:04 -35:50), the Division staff determination that Ms. Bliss was not the individual in charge of the facility is supported by the majority of the documentation and is therefore based on substantial evidence, and I recommend that the Director conclude the same.

II. Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).¹ This provision ensures that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from a WBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits.

Mr. Sambu testified that he reviewed the information contained in the three years of federal tax returns that were submitted by Elitsac as part of the application. CD File, Disc 1, Track 1, 14:19 – 22:39; DED-3-5. With respect to all three of these returns, Bill Bliss's compensation greatly exceeded that of Pamela Bliss. *Id.* at 22:09 – 22:39; DED-3-5.

In *Matter of CW Brown, Inc. v. Canton*, 216 AD2d 841, 843 (3d Dep't 1995), the Third Department found that staff's review of tax returns, such as those that Mr. Sambu reviewed during the hearing, constituted substantial evidence to support the Division's determination with respect to the criteria set forth in 5 NYCRR § 144.2(c)(2). Given, the great

¹ While the application notes two other female shareholders – specifically, Sara and Emily Bliss, there is no contention by the applicant that either of these two individuals have a current managerial role in the company. DED-1.

disparity of compensation in the three years of returns submitted by the applicant in this matter, Elitsac did not demonstrate that the woman-owner shared in the risks and profits of the business enterprise in proportion to her ownership.

The Division has consistently held that the woman owner must realize the majority of profits from the business enterprise to satisfy the criteria under 5 NYCRR 144.2(c)(2) (*see, e.g., Matter of Spring Electric*, Recommended Order, https://esd.ny.gov/sites/default/files/03172017_SpringElectric%20_RO.pdf [March 17, 2017 and Final Order 17-21] [both available from the New York State Department of Economic Development Division of Minority and Women's Business Development] [business not eligible for WBE certification when the woman owner's husband received significantly more compensation than she did]; *Matter of National Recovery Solutions, LLC*, Recommended Order [May 25, 2017], available at: https://esd.ny.gov/sites/default/files/052517_NationalRecoverySolutions_RO.pdf, [Final Order 17-31] [available from the New York State Department of Economic Development Division of Minority and Women's Business Development]; [business not eligible for certification when the woman owner and majority shareholder received the same compensation as her husband]).

Ms. Bliss testified that she chose not to accept more compensation based on her primary concerns of the business's precarious financial situation and serving the company's customers. CD File, Disc 1, Track 1, 36:54 – 38:47. While this sentiment is admirable, it does not provide any information indicating that Elitsac meets the criteria for WBE certification because clearly, Bill Bliss was being compensated at least [REDACTED] the amount that Ms. Bliss received. The Division's regulations require that the woman owner proportionally share in the profits of the business enterprise (5 NYCRR § 144.2[c][2]).

Based on the above, Mr. Sambu's conclusion that Pamela Bliss did not enjoy the customary incidents of ownership by sharing in the risks and profits in proportion to her ownership interest in the business enterprise as required by 5 NYCRR § 144.2(c)(2) is supported by the documentation and is therefore based on substantial evidence, and I recommend that the Director conclude the same.

CONCLUSION

In her closing statement, Ms. Bliss is critical of the WBE process because staff did not personally visit Elitsac in order to observe the operation first hand. Given the number of applications before the agency, this would not be feasible in all cases. The regulations provide that the Division must rest its determinations on the documentation presented by the applicant. 5 NYCRR §§ 144.4(e); 144.5(a). While Ms. Bliss spoke passionately about her gradual take over of the business beginning in 2009 when she committed to work at Elitsac full-time, the application and accompanying documents do not reflect this level of involvement in either salary or activity.

As Ms. Bliss explained in her closing statement, it was only after Mr. Sambu inquired regarding the discrepancies in the application did the Board meet to designate her as president. App 2: CD 2, Track 3, 4:58. Because the documentation submitted by Elitsac for its application does not demonstrate that Ms. Bliss actually led the company, compliance with the certification criteria was not met and the Division reasonably denied the application.

The legislative intent of Article 15-A is to serve a remedial purpose and remedy past discrimination experienced by minority and women business owners – not family businesses as explained by Mr. Martin in his closing.² The program, to pass constitutional muster, must be narrowly tailored to confer benefits exclusively to members of the protected class to redress prior discrimination – minority and women business owners who made a significant financial investment in business, enjoy the risks and profits of the business, operate the business in fact and have control over the business as a formal matter. *See, Richmond v. J.A. Croson*, 488 US 469, 506 (1989).

While I found Ms. Bliss to be a credible advocate for the company, the documentation submitted by Elitsac in support of its application does not match the testimony. Thought should be given to reapplication in two years that systematically documents how her role meets the requirements of the regulations.

For the reasons outlined above, Elitsac failed to demonstrate: (1) that Pamela Bliss shared in the risks and profits of the business enterprise in proportion to her ownership interest as required by 5 NYCRR § 144.2(c)(2) and (2) that Pamela Bliss as the woman-owner of the business enterprise made the operational decisions without restrictions as required by 5 NYCRR § 144.2(b)(1).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's December 28, 2017 determination to deny Elitsac's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

² While Sara Bliss was designated the prior owner of the company which enjoyed WBE status, as noted in *Matter of Empire Air Specialties, Inc. v. New York State Department of Economic Development*, Index No. 1270-16 (Justice Patrick J. McGrath, Sup. Ct. Albany County 2016), participants in this program are subject to a limited certification period and the Division seeks to ensure that every enterprise that receives certification continues to meet the necessary criteria. Thus, prior certification is not sufficient to establish certification. The Division must look at the information before it at the time of application.

MATTER OF ELITSAC, INC.

**DED FILE No. 14427
EXHIBIT LIST**

Exhibit No.	Description	ID	Rec'd	Notes
DED-1	Elitsac, Inc.'s Application	√	√	
DED-2	Denial Letter to Petitioner dated December 28, 2017	√	√	
DED-3	2014 Corporation Income Tax Returns	√	√	
DED-4	2015 Corporation Income Tax Returns	√	√	
DED-5	2016 Corporation Income Tax Returns	√	√	
DED-6	Resume of Pamela Bliss	√	√	
DED-7	Resume of William Bliss	√	√	
DED-8	October 15, 2017 Special Meeting Minutes	√	√	
DED-9	Elitsac Daily Operation	√		Staff elected not to offer
DED-10	Elitsac Historical Narrative	√		Staff elected not to offer
DED-11	Bill Bliss and Sally (Sara) Bliss current involvement in Elitsac, Inc.	√		Staff elected not to offer
App 1	Appeal letter and attachment (WBE response)	√	√	
App 2	Legal Summary Foote & Meyer	√	√	Only first page received into evidence

Exhibit No.	Description	ID	Rec'd	Notes
App 3	Paychex doc.	√		Not accepted into evidence
App 4	2018 NYS-45-ATT	√		Not accepted into evidence
App 5	Presidents job description	√		Not accepted into evidence
App 6	Assemblyman Dipietro letter	√		Not accepted into evidence