

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

In the Matter

-of-

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

NYS DED File ID No. 55531

RECOMMENDED ORDER

/s/

Helene G. Goldberger
Administrative Law Judge

August 4, 2020

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

PROCEEDINGS

Janus applied for recertification as a woman-owned business enterprise on September 21, 2015. Exhibit (Ex.) DED-1. By letter dated October 1, 2018 (Ex. DED-2), the Division determined that Janus does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. By letter dated October 24, 2018, Diane Windholz, Esq. and Johanna Sanchez, Esq. of Jackson Lewis P.C. requested an appeal of this determination via written appeal. Ex. DED-3. By letter brief dated December 28, 2018, Ms. Windholz submitted Janus's appeal along with a binder of supporting exhibits A-N. The Division responded with the affidavit of Raymond Emanuel dated July 8, 2020 with exhibits 1-10 and the brief of Bella Satra, Counsel for Respondent. Attached to this recommended order is a list of the exhibits offered by both parties. I have not considered those submitted by Janus because there is no evidence that these were before Respondent at the time of the application.

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 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 144.4(e).

STANDARD OF REVIEW

On this administrative appeal, Janus 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 Janus for certification as a woman-owned business enterprise with a letter dated October 1, 2018. Ex. DED-2. The Division determined that Janus failed to demonstrate 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). The Division made its determination based on the W-2 information that was provided as part of the application and showed that several members of the enterprise between the years of 2013 and 2017 earned substantially more than Ms. Patricia Fisher, the majority owner of the company. DED-Exs. 5-9. Based on this information, the Division concluded that non-qualifying owners Adam Fisher and Steve Zeve earned a disproportionate share of the profits as compared to Ms. Fisher who owned over 90% of the company – even when the company’s profits were declining. Emanuel Affidavit (Aff.) ¶¶ 14-15. Based upon these facts, the Division concluded that Janus had not met the required criteria for certification.

Janus

In the correspondence submitted by Attorney Windholz, applicant submits that Janus has been certified by New York State as a WBE since 2005. In addition, counsel notes that Janus has been certified as a woman-owned business by 11 other governmental entities as well as the Women’s Business Enterprise National Council. Applicant provides that Ms. Fisher’s ownership interest should not be measured by her wages but by her equity interest which is 93%. The appeal reviews WBE certification requirements generally. The appeal stresses that Ms. Janus took pay deductions and no salary at times due to the economic struggles of the company during and after the 2008 recession. Janus stresses that Ms. Fisher made these sacrifices because she had other sources of income and wanted to ensure the company’s survival. The appeal notes that Adam Fisher, Ms. Fisher’s son and owner of 3% of the company works from home and reports to Ms. Fisher. Similarly, the appeal states that Steven Zeve, who owns 0.41% of Janus, also works at home and does not have any responsibilities controlling the company. Finally, the appeal stresses Ms. Fisher’s involvement, dedication and leadership in all aspects of the company’s operation to demonstrate that the company is entitled to certification.

FINDINGS OF FACT

1. Janus Software, Inc. is located at 4 High Ridge Park, Suite 200, Stamford CT 06905-1325. The company provides information security and business information solutions including risk analysis, planning and assessment, information security, regulatory

compliance assessment, disaster recovery and business continuity planning, data forensics among other services. Ex. DED-1, §§ 1.E, 5.A.

2. Patricia A. P. Fisher is the president owning 93% of the company. Adam G. Fisher is the Secretary and Chief Technical Officer owning 3% of the company. Adam is Patricia's son. Ex. DED-1, §§ 3.A, 3.D.
3. Mr. Steven Zeve, a consultant employee, and a few other employees own a small amount of stock. Ex. DED-4.
4. The 2013 W-2 Wage and Tax Statements submitted with the application reveal that Patricia Fisher made [REDACTED] while several employees including Adam Fisher, Steven Zeve, Carmen Baughn, Foad Ardalan and George Bormes made considerably more. Ex. DED-5.
5. The 2014 W-2 Wage and Tax Statements indicate that Ms. Fisher earned [REDACTED] while Mr. Fisher and others earned considerably more. Ex. DED-6.
6. The 2015 and 2016 W-2 Wage and Tax Statements do not report any income for Ms. Fisher while showing Mr. Fisher made over [REDACTED] and Mr. Zeve [REDACTED] and [REDACTED] respectively. Exs. DED-7 and 8; Emanuel Aff. ¶ 14.
7. The 2017 W-2 Wage and Tax Statements show Ms. Fisher making [REDACTED], Adam Fisher making [REDACTED] and Mr. Zeve making [REDACTED]. Exs. DED-9.

DISCUSSION

This Recommended Order considers Janus's appeal from the Division's October 1, 2018 determination to deny the company'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 October 1, 2018 denial letter (*see*, Ex. DED-2), Janus did not demonstrate that women shared in the risks and profits in proportion with their ownership interest in the business enterprise. 5 NYCRR § 144.2(c)(2).

I. Proportional Share in the 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]). 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 MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits.

Raymond Emanuel, the Certification Director for the Division, notes that non-qualifying male owners earned substantially more wages than Ms. Fisher between 2013 and 2017. Emanuel Aff. ¶ 14. He further notes that even if the declining income of the firm brought about Ms. Fisher's decreased income, "Adam Fisher and Steve Zeve continued to earn a disproportionate (and in some years, *increasing*) share of the profits as compared to Ms. Fisher, who owns over 90% of the company." See, Emanuel Aff. ¶ 15, Exs. DED-5-9.

In response to the binder of exhibits submitted by Ms. Windholz, Mr. Emanuel notes that none of them were submitted with the application and therefore could not be considered. Emanuel Aff., ¶ 17-18. Even if I could consider them, many, with the possible exception of Exhibit A, have nothing to do with the issue on this appeal – that is whether members of non-protected class members receive more benefits at Janus than the woman owner Ms. Janus.

While Ms. Windholz notes the prior certifications of Janus by New York State and its WBE certifications with other jurisdictions, these are not grounds to continue certification in the face of evidence indicating that Janus did not meet the New York State requirements. As Administrative Law Judge Daniel O'Connell noted in his Recommended Order in *Matter of Watson Farms, LLC* ([July 19, 2018], https://esd.ny.gov/sites/default/files/012819_WatsonFarmsLLC_RO.pdf, Final Order 18-49 is available from the New York State Department of Economic Development Division of Minority and Women's Business Development) the doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function (*see e.g. Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Envtl. Conservation*, 119 AD3d 1172, 1173 [2014]).

With respect to the certifications by other jurisdictions, the Division is not bound by these determinations. See, *Sunrise Credit Services, Inc. v Zapata*, (unreported), 57 Misc 3d 1225 (A) (Sup. Ct., NY County 2017).

On the appeal, Janus does not dispute that Mr. Fisher, Mr. Zeve and others were paid more than Ms. Fisher. Rather, the arguments are that Ms. Fisher's equity interest should govern and that she took less salary in order to ensure the company's survival and as an investment in its future. See, Windholz Letter Brief, pp. 4-6. But the issue here is not whether Ms. Fisher has a considerable interest in the company but whether a non-protected class individual is receiving a disproportionate share of the profits and, thus, benefits inappropriately from the classification. DED Brief, pp. 5-7.

The appeal provides a lot of paper to demonstrate that Ms. Fisher is in control of the company. Apart from the fact that none of the exhibits were submitted with the application and therefore cannot be considered by me, much of this has nothing to do with the criteria at issue. *See, Matter of Lida Strategic Solutions, Inc.* (DED File No. 60212) (March 6, 2019) (recommended order declining to consider documents not part of application), *affirmed* Final Order 19-02, June 5, 2019. And, as noted by Attorney Satra, Janus must satisfy all the eligibility criteria and those concerning control and contributions are separate from the requirement that the woman owner “must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with [her]ownership interest in the business enterprise.” 5 NYCRR § 144.2(c)(2). See, DED Brief, p. 7.

CONCLUSION

For the reasons set forth above, Janus failed to demonstrate that Ms. Fisher shared in the risks and profits in proportion with her ownership interest pursuant to 5 NYCRR § 144.2(c)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff’s October 1, 2018 determination to deny Janus’s application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

MATTER OF JANUS SOFTWARE, INC.

NYS DED FILE ID No. 55531

EXHIBIT LIST

Exhibit No.	Description	ID	Rec'd
DED-1	Quality's Application – 9/21/15	√	√
DED-2	Application Denial dated 10/1/2018	√	√
DED-3	Letter Requesting Permission to Proceed with Written Appeal dated October 24, 2018	√	√
DED-4	Narrative History of the Business	√	√
DED-5	W-2 Wage and Tax Statement – 2013	√	√
DED-6	W-2 Wage and Tax Statement – 2014	√	√
DED-7	W-2 Wage and Tax Statement – 2015	√	√
DED-8	W-2 Wage and Tax Statement – 2016	√	√
DED-9	W-2 Wage and Tax Statement – 2017	√	√
DED-10	Letter dated September 18, 2018 from Patricia A.P. Fisher	√	√
Janus A	Mrs. Fisher's Mortgage Deed	√	
Janus B	Correspondence between Mrs. Fisher and Janus Staff	√	
Janus C	Correspondence between Mrs. Fisher and Janus Staff	√	
Janus D	Proposals for Work by Mrs. Fisher	√	

Exhibit No.	Description	ID	Rec'd
Janus E	Engagement Contracts Executed by Mrs. Fisher	√	
Janus F	Janus 401K Plan Executed by Mrs. Fisher	√	
Janus G	Janus Workshare Agreements	√	
Janus H	Janus Consent to Sublease	√	
Janus I	Promissory Notes Executed by Mrs. Fisher	√	
Janus J	Check endorsed by Mrs. Fisher on behalf of Janus	√	
Janus K	Correspondence between Mrs. Fisher and staff regarding offerings	√	
Janus L	Correspondence between Mrs. Fisher and staff regarding recruitment	√	
Janus M	Correspondence between Mrs. Fisher and staff regarding leave	√	
Janus N	Janus Employee Handbook	√	