

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

In the Matter

- of -

the Application of **MLJ Painting, Corp.**
for Certification as a Women-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61601

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

May 2, 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 to deny the application filed by MLJ Painting, Corporation (MLJ or applicant) for certification as a woman owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

By a letter dated August 30, 2017, the Division determined that MLJ does not meet the eligibility criteria to be certified as a woman owned business enterprise, and denied MLJ's application (*see* WBE Exh. 13). In a letter dated September 11, 2017, Lorianne Picataggi, as the president of MLJ, appealed from the Division's determination to deny WBE certification.

With a notice dated January 22, 2019 (*see* WBE Exh. 14), the Division scheduled the administrative appeal hearing for 10:00 a.m. on February 5, 2019 at the Division's offices located at 633 Third Avenue, 33rd Fl., New York, New York 10017. The notice also reiterated the Division's bases for the denial. The hearing convened as scheduled before Administrative Law Judge Daniel P. O'Connell. Horace Flowers, Esq. (New York) represented MLJ at the hearing. Ms. Picataggi testified on behalf of applicant. Simon Wynn, Esq., Senior Counsel, appeared for Division Staff. Naheem Oyebanjo, Senior Certification Analyst, testified on behalf of Division staff.

During the hearing, the parties offered a total of 14 exhibits. All were received into evidence (Recording [Rec] at 02:42:19). An exhibit chart is attached to this recommended order. The proceedings were audio recorded. The Office of Hearings and Mediation Services received a thumb drive of the recording on April 9, 2019. Whereupon, the record of the hearing closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman owned business enterprise are established by regulation (*see* 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, and control of the business enterprise 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).¹

¹ Notwithstanding the condition outlined in 5 NYCRR 144.5(a), which identifies the scope of the administrative appeals hearing, applicant's counsel argued that MLJ should be allowed to supplement the application during the appeal hearing (Rec at 02:49:02; 02:54:30; 02:56:00; 02:59:58). Given the plain language of the regulation, I am not persuaded by this argument. Therefore, I assign no weight to any new information offered at the hearing that was not before Division staff prior to staff's August 30, 2017 determination.

STANDARD OF REVIEW

On this administrative appeal, MLJ, as the applicant, bears the burden of proving that the Division's denial of its application for WBE 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]).

POSITIONS OF THE PARTIES

The Division

In the August 30, 2017 denial letter, the Division asserted that the application failed to meet three criteria for WBE certification as outlined in 5 NYCRR 144.2 concerning the ownership, and operation of MLJ (*see* WBE Exh. 13). With respect to ownership, the Division determined that MLJ did not meet the criterion outlined at 5 NYCRR 144.2(a)(1) because applicant did not demonstrate that the woman owner's contribution is proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise. The Division asserted that the application materials do not include any documentation concerning Ms. Picataggi's capital contribution to MLJ.

As required by 5 NYCRR 144.2(b)(1), the Division determined further that the woman owner did not make decisions pertaining to the operation of the business enterprise. Rather, the Division contended that Ms. Picataggi is primarily responsible for managing human resource matters, scheduling, and performing other administrative functions at MLJ.

Finally, the Division determined that MLJ failed to demonstrate that the woman owner possesses the requisite managerial experience or technical competence needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). According to the Division, Leon Barrett² worked in the painting industry for nearly forty years with about twenty years of experience as a foreman. However, Ms. Picataggi's work experiences are related primarily to managing human resources and other administrative operations at the painting company.

MLJ Painting Corporation

In a letter dated September 11, 2017, Ms. Picataggi stated that, with respect to the ownership criterion at 5 NYCRR 144.2(a)(1), the Division did not evaluate her contributions of property, consider that she assumed responsibility for the seller's debt associated with the business enterprise, or inquire about her contributions of labor to the business enterprise without adequate compensation. Ms. Picataggi contended that the Division incorrectly assumed that she obtained ownership of MLJ as a gift.

² Mr. Barrett died on January 27, 2019 (Rec at 03:36).

With respect to the operation criteria at 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(i), MLJ argued the following. Ms. Picataggi has prior experience owning and operating a profitable painting company, Midtown Industries, Inc. (Midtown), from 1999 to 2008, where she exercised management and control over all aspects of the business enterprise. Ms. Picataggi said that she has been a key person at MLJ. During her tenure at MLJ, Ms. Picataggi said that she has been involved in all aspects of operating the business enterprise. As president of MLJ, Ms. Picataggi said that she exercises full authority over all major activities related to its operation. Finally, any authority delegated to other personnel at MLJ is subject to Ms. Picataggi's approval.

FINDINGS OF FACT

I. General

1. MLJ Painting, Corporation (MLJ) has business offices located at 10 Shanandoah Boulevard, Port Jefferson Station, New York 11776 (*see* WBE Exh. 12 [Fast Track M/WBE Application submitted June 21, 2016 (6 pages)]).
2. MLJ is a non-union painting contractor. Joseph Picataggi formed MLJ in 2006. (Rec at 10:47; 11:07).
3. Lorianne Picataggi acquired full ownership of MLJ in February 2014 (*see* WBE Exh. 4, 10, and 12; Rec at 10:47).
4. On June 21, 2016, Ms. Picataggi submitted a fast track M/WBE application on behalf of MLJ for certification as a woman owned business enterprise (*see* WBE Exh. 12).
5. By letter dated August 30, 2017, the Division denied MLJ's application for WBE certification (*see* WBE Exh. 13).
6. With a letter dated September 11, 2017, Ms. Picataggi responded to the Division's August 30, 2017 denial letter, and requested a hearing.

II. Ownership

7. Between September and December 2006, Ms. Picataggi's husband, Joseph, obtained a home equity line of credit (HELOC) in the amount of [REDACTED] on their residence, which they jointly-own (*see* WBE Exh. 5; Rec at 13:53; 14:31; 15:10; 01:37:23.)
8. With the proceeds from the HELOC, Joseph Picataggi financed MLJ, and became its president. From 2006 until February 2014, Mr. Picataggi was the sole shareholder of MLJ. (*See* WBE Exh. 4 and 10; Rec at 15:10.)
9. In February 2014, Mr. Picataggi transferred all his shares of common stock in MLJ to Ms. Picataggi, and resigned from the position of president. As a result, Ms. Picataggi became the president and sole shareholder of MLJ. (*See* WBE Exh. 4 and 10; Rec at 21:06; 41:30.)

10. It is unknown whether Ms. Picataggi paid any consideration for MLJ's shares (Rec at 02:26:28).
11. After acquiring MLJ in February 2014, Ms. Picataggi agreed to assume the responsibility for paying off the remaining balance on the HELOC (Rec at 21:53; 01:39:05).
12. WBE Exhibit 6 includes a statement from Joseph Picataggi's bank dated April 29, 2017 to May 26, 2017. This bank statement shows a balance of [REDACTED] on the HELOC. WBE Exhibit 6 also includes a set of MLJ's monthly bank statements from January 30, 2016 to May 31, 2017. These statements reflect a series of transfers from MLJ's bank account to Mr. Picataggi's bank account as payments made toward the balance owed on the HELOC. (See WBE Exh. 6; Rec at 20:26; 20:33; 22:27; 23:05; 23:24.)
13. MLJ offered nothing to show that payments made toward the balance owed on the HELOC came from Ms. Picataggi's personal account (Rec at 02:00:33; 02:27:56).
14. Ms. Picataggi was the president and sole shareholder of Midtown from 1999 to 2008. Like MLJ, Midtown was a painting contractor. At Midtown, Ms. Picataggi was responsible for all day to day operations such as preparing the payroll, scheduling jobs, hiring and firing employees, budgeting jobs, and ordering materials. (See WBE Exh. 2 and 3; Rec at 11:16; 11:33.)
15. WBE Exhibit 3 demonstrates that Ms. Picataggi received compensation while working as the president of Midtown (see WBE Exh. 3; Rec at 35:06).

III. Operation

16. As a painting contractor, one of MLJ's core functions is painting (Rec at 02:04:10).
17. Lorianne Picataggi is not a painter. With respect to her work experiences at both Midtown and MLJ, Ms. Picataggi's résumé shows that she is responsible for day to day operations, such as preparing the payroll, scheduling jobs, hiring and firing employees, and ordering materials (see WBE Exh. 2 and 8; Rec at 41:41; 01:01:15; 01:22:30).
18. Leon Barrett, a former employee of Midtown and MLJ, worked at job sites as a painter for more than 40 years, and as a foreman or project manager for almost 20 years (see WBE Exh. 2 and 9; Rec at 53:18; 01:40:05).

DISCUSSION

This recommended order considers MLJ's September 11, 2017 appeal from the Division's August 30, 2017 determination to deny WBE certification to MLJ, pursuant to Executive Law Article 15-A. The discussion that follows addresses the bases for the Division's denial.

I. Ownership - Capital Contribution

In the August 30, 2017 denial letter, the Division contended that MLJ did not show that the woman owner's contribution is proportionate to her equity interest in the business enterprise. The criterion at 5 NYCRR 144.2(a)(1) states in full that:

[t]he contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

According to the Division, the application materials do not include any documentation concerning Ms. Picataggi's contributions to MLJ (*see* WBE Exh. 13).

Ms. Picataggi filed the fast track M/WBE application form with the Division on behalf of MLJ. Pursuant to 5 NYCRR 144.8, an applicant may file the fast track application when, as here, the applicant can demonstrate that it holds a current New York municipal certification. For the hearing record, MLJ offered WBE Exhibit 11. This exhibit is a copy of the April 12, 2016 opinion prepared by the General Counsel for the New York City Department of Small Business Services. The opinion grants MLJ's request for certification as a woman owned business enterprise.³ (Rec at 02:40:59.) Unlike the Division's full application, the fast track application does not expressly request information about the woman owner's contribution to the business enterprise. Nevertheless, on June 1, 2017, the Division requested proof of all capitalization contributions to MLJ.⁴ (*See* WBE Exh. 11 and 12; Rec at 01:58:01; 02:11:17.)

At the hearing, Ms. Picataggi credibly testified about the following circumstances. In addition, to substantiate Ms. Picataggi's testimony, MLJ offered WBE Exhibits 4, 5, and 10. Between September and December 2006, Ms. Picataggi's husband, Joseph, obtained a HELOC in the amount of [REDACTED] on their residence, which they jointly-own. When applying for the HELOC, the banker advised the Picataggis that because Joseph Picataggi's credit rating was better than Lorianne Picataggi's, the HELOC should be exclusively in Mr. Picataggi's name. Therefore, Lorianne Picataggi's name does not appear on the HELOC application. (*See* WBE Exh. 5; Rec at 13:53; 14:31; 15:10; 01:37:23; 02:00:33).

With the line of credit, Joseph Picataggi financed MLJ, and became its president. From 2006 until February 2014, Mr. Picataggi was the sole shareholder of MLJ. In February 2014, Mr. Picataggi transferred all his shares of common stock in MLJ to Lorianne Picataggi, and resigned from the position of president. Consequently, Ms. Picataggi became the president and sole shareholder of MLJ. (*See* WBE Exh. 4 and 10; Rec at 15:10; 21:06; 41:30; 56:10.) It is

³ The Division is not bound to certify MLJ as a WBE because it obtained certification from the New York City Department of Small Business Services. The certification criteria administered by the Department of Small Business Services are different from the criteria administered by the Division. To obtain WBE certification from New York State, MLJ has the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR 144.2.

⁴ The application (*see* WBE Exh. 12) notes that Ms. Picataggi responded to the Division's inquiry on June 20, 2017. Ms. Picataggi testified that she provided what is identified as WBE Exh. 6, among other things, to Division staff in response to the inquiry about her capital contribution (Rec at 22:27; 23:24).

unknown whether Ms. Picataggi paid any consideration for MLJ's shares. Division staff concluded that the shares were a gift (*see* WBE Exh. 13; Rec at 02:26:28).

After acquiring MLJ in February 2014, Ms. Picataggi testified that she agreed to assume the responsibility for paying off the remaining balance on the HELOC. Ms. Picataggi offered WBE Exhibit 6 to corroborate her testimony. Among other things, WBE Exhibit 6 includes a statement from Mr. Picataggi's bank dated April 29, 2017 to May 26, 2017. This bank statement shows a balance of [REDACTED] on the home equity line of credit. WBE Exhibit 6 also includes a set of MLJ's monthly bank statements from January 30, 2016 to May 31, 2017. These statements reflect a series of transfers from MLJ's bank account to Mr. Picataggi's bank account as payments toward the balance owed on the HELOC. (*See* WBE Exh. 6; Rec at 20:33; 22:27; 23:24.) The balance owed on the HELOC when Ms. Picataggi took over MLJ was about [REDACTED]. The balance, as of the date of the hearing, was about [REDACTED]. (Rec at 25:12.)

In addition to a capital contribution, Ms. Picataggi also contended that she contributed expertise to MLJ (*see* WBE Exh. 4; Rec at 26:25). According to Ms. Picataggi's résumé (*see* WBE Exh. 2), she was the president of Midtown from 1999 to 2008. Midtown was a painting contractor. At Midtown, Ms. Picataggi was responsible for all day to day operations such as preparing the payroll, scheduling jobs, hiring and firing employees, budgeting jobs, and ordering materials. (*See* WBE Exh. 2; Rec at 11:16; 21:33; 39:05-39:42.) Ms. Picataggi was the sole shareholder of Midtown's stock (*see* WBE Exh. 3 and 7; Rec at 11:33:36:38).

In evaluating whether a woman owner made a capital contribution proportionate to her ownership interest in the business enterprise, Division staff looks to whether the contribution came from funds personally held by the woman owner. Staff considers capital contributions of marital property to be contributions by both the husband and wife to the business enterprise and, therefore, not a contribution solely by the woman owner.⁵ For example, in *Matter of KTR Trucking, LLC*,⁶ the Director upheld the denial of an application, in part, because the capital contribution consisted of proceeds from a home equity loan taken out by the fiancé of the woman owner on his property. With respect to the captioned matter, the source of the capital contribution for MLJ came from a line of credit taken out on the home jointly owned by Joseph and Lorianne Picataggi.

Moreover, Ms. Picataggi's assertion that she has been personally responsible for the repayment of the outstanding balance on the HELOC since she became the president of MLJ is not substantiated by the evidence offered by MLJ at the hearing. As outlined above, the source of the payments has been MLJ's bank account not Ms. Picataggi's personal account (*see* WBE Exh. 6; Rec at 02:27:56). The Director has previously determined that loans taken out on behalf of the business enterprise and repaid by the business enterprise do not constitute a capital

⁵ *See Matter of OTONE Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017, Final Order 17-28 (May 8, 2017), available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/05022017_OTONEMechanicalConstruction_RecommendedOrder.pdf.

⁶ Recommended Order dated October 26, 2016, Final Order 16-54 (October 28, 2016), available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/10272016_KTRTruckingRecommendedOrder.pdf.

contribution by the woman owner (*see Matter of Spring Electric, Inc.*, Recommended Decision [March 17, 2017],⁷ Final Order 17-21 [March 27, 2017]).

In addition to capital contributions by the woman owner, 5 NYCRR 144.2(a)(1) identifies other acceptable types such as contributions of expertise. As noted above, MLJ asserted that Ms. Picataggi's work experience as president of Midtown, should be considered a contribution of expertise to MLJ. Like MLJ, Midtown was a painting contractor. (*See* WBE Exh. 2 and 3; Rec at 26:25). However, MLJ's assertion is misplaced for the following reasons.

The Division distinguishes the terms, *experience* and *expertise*. Managerial experience (*see* 5 NYCRR 144.2[b][1][i]) may be acquired from prior work experiences. However, contributions of expertise to a business enterprise must be in the nature of a gift. Here, WBE Exhibit 3 demonstrates that Ms. Picataggi received compensation while working as the president of Midtown.⁸ Because Ms. Picataggi received compensation for her work at Midtown, the experience may not be considered a contribution of expertise to MLJ. Whether the work experience that Ms. Picataggi acquired at Midtown demonstrates compliance with 5 NYCRR 144.2(b)(1)(i) is addressed below.

Based on the foregoing, I conclude that the Division's determination that the woman owner did not contribute to the business enterprise, as required by 5 NYCRR 144.2(a)(1), is supported by substantial evidence. I recommend that the Director conclude the same.

II. Operation

As required by 5 NYCRR 144.2(b)(1), the Division determined that the woman owner does not make decisions pertaining to the operation of the business enterprise. In addition, the Division determined that MLJ failed to demonstrate that the woman owner possesses the requisite managerial experience or technical competence needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). With respect to these criteria, the Division contended that Leon Barrett has worked in the painting industry for nearly forty years with about twenty years of experience as a foreman. In contrast, Ms. Picataggi's work experiences are related primarily to managing human resources and the administrative aspects of the painting company. (*See* WBE Exh. 13; Rec at 02:04:10; 02:05:22.)

The objective of these criteria is to determine whether the woman business owner operates the core functions of the business enterprise. As a painting contractor, one of MLJ's core functions is painting. Ms. Picataggi is not a painter. With respect to her work experiences at both Midtown and MLJ, Ms. Picataggi's résumé shows that she is responsible for day to day operations, such as preparing the payroll, scheduling jobs, hiring and firing employees, and ordering materials (*see* WBE Exh. 2 and 8; Rec at 50:57; 51:51; 01:01:15; 01:22:30). However, Leon Barrett, a former employee of Midtown and MLJ, worked at job sites as a painter for more

⁷ Available at https://esd.ny.gov/sites/default/files/03172017_SpringElectric%20_RO.pdf.

⁸ WBE Exhibit 3 includes a set of Midtown's US Income Tax Returns for an S Corporation (IRS Form 1120S) for tax years 2005, 2006, and 2007. The exhibit also includes copies of the Schedule K-1 for the same years.

than 40 years, and as a foreman or project manager for almost 20 years (*see* WBE Exh. 2 and 9; Rec at 53:18: 02:36:48).

During her testimony, Ms. Picataggi offered substantial information about her work experiences at Midtown (Rec at 30:20-41:01), as well as her duties and responsibilities at MLJ (41:41-51:51). Ms. Picataggi acknowledged that her résumé lacked these details, but contended that she provided much of the particulars discussed in her testimony with MLJ's responses to Division staff's inquiries (*see* WBE Exh. 2, 8, 9 and 12 [at 5 of 6]; Rec at 01:35:14; 01:35:23). Division staff reviewed the additional information provided in MLJ's responses concerning the eligibility criteria, which are identified as WBE Exhibits 8 and 9 (Rec at 02:33:05).

The details offered in Ms. Picataggi's testimony are new information that were not before Division staff during the consideration of MLJ's application for WBE certification. Accordingly, this information may not be considered here.⁹ After reviewing and comparing Ms. Picataggi's duties and responsibilities (*i.e.*, WBE Exh. 8) with Leon Barrett's (*i.e.*, WBE Exh. 9), Division staff concluded that Mr. Barrett was responsible for more core functions at MLJ than Ms. Picataggi was.

In *Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.* (163 AD 3d 1517, 1520 [4th Dept 2018]), the Court recently determined that a woman owner must exercise control over the core functions of the business enterprise to demonstrate compliance with the certification criteria outlined at 5 NYCRR 144.2(b)(1), and the associated subdivisions. Therefore, I conclude that Division staff's determinations that MLJ did not demonstrate compliance with the criteria outlined at 5 NYCRR 144.2(b)(1) and 5 NYCRR 144.2(b)(1)(i) are supported by substantial evidence. I recommend that the Director conclude the same.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), MLJ did not meet its burden to show that the Division's August 30, 2017 determination to deny the application of MLJ for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(i), MLJ did not meet its burden to show that the Division's August 30, 2017 determination to deny MLJ's application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny MLJ's application for certification as a woman owned business enterprise should be affirmed for the reasons set forth above.

Attachment: Exhibit Chart

⁹ The additional details of Ms. Picataggi's work experiences at Midtown may establish compliance with 5 NYCRR 144.2(b)(1)(i) in a future application for WBE certification, however.

Division of Minority and Women's Business Development
 Exhibit Chart
Matter of MLJ Painting, Corp.
NYS DED File No. 61601

Hearing Date: February 5, 2019

WBE Exhibit No.	Applicant's Exhibit No.	Description
1	1	Signed Contracts by Lorianne Picataggi
2	2	Résumés of Lorianne Picataggi and Key Employees
3	2.1	Lorianne Picataggi Experience and Expertise in Painting Industry
4	3	Lorianne Picataggi Summary Point regarding Contribution (See WBE Exhibit 7, <i>infra.</i>)
5	3.1	Lorianne Picataggi Line of Credit & Security Interest in jointly owned property of Lorianne and Joseph Picataggi
6	3.2	Lorianne Picataggi assumption of Line of credit Debt and Line of Credit Payment History
7	3.3	Lorianne Picataggi Experience and Expertise (Partial duplicate of WBE Exh. 3)
8	4	Lorianne Picataggi's duties at MLJ Painting Corp.
9	5	Leon Barrett's duties at MLJ Painting Corp.
10	5.1	MLJ Corporation resolution subject Leon Barrett and staff to Lorianne Picataggi
11	6	Decision by NYC Division of Small Business Services concerning MLJ application for WBE certification
12		Fast Track M/WBE Application
13		Division's denial letter dated August 30, 2017
14		Division's Notice of Appeal Hearing dated January 22, 2019

All exhibits offered received into evidence (Rec at 02:42:19).