



New York State  
Department of Economic Development  
Division of Minority and Women's  
Business Development

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In the matter of the appeal of

**Pro Tile Distributors, Inc.**

FINAL ORDER 18-50

From a denial of certification as a Women-owned Business Enterprise pursuant to Executive Law Article 15-A.

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This order arises from an administrative appeal brought on behalf of Pro Tile Distributors, Inc. ("Pro Tile Distributors") pursuant to section 144.2 of title 5 of the New York Codes, Rules and Regulations. Appellant seeks reversal of the decision of the Division of Minority and Women's Business Development (the "Division"), dated June 15, 2017, to deny Pro Tile Distributors certification as a Women-owned Business Enterprise ("WBE").

Appellant initiated this appeal and requested a hearing on July 20, 2017. The Division acknowledged Appellant's request and scheduled a hearing for September 27, 2018. The hearing occurred as scheduled before Administrative Law Judge Jeffrey M. Bernbach. Mark A. Rubeo, Jr., Esq., appeared on behalf of the appellant, and Gretchen Robinson, Esq., represented the Division. A copy of the audio recording was provided on October 25, 2018, and the record closed on October 26, 2018, after Administrative Law Judge Bernbach received closing-briefs that were submitted by the parties.

The issues on appeal were whether Pro Tile Distributors demonstrated that the women owners made capital contributions in proportion to their collective majority equity interests in the business enterprise, as required by 5 NYCRR § 144.2(a)(1); whether the applicant business sufficiently demonstrated that the women owners share in the risks and profits in proportion with their collective majority ownership interest in the business enterprise, as required by 5 NYCRR § 144.2(c)(2); and whether the women owners relied upon for certification, make decisions pertaining to the operation of the business enterprise as required by 5 NYCRR § 144.2(b)(1).

On December 11, 2018, the Division received a Recommended Order from Administrative Law Judge Bernbach that recommended affirmation in part, of the Division's denial of the application to certify Pro Tile Distributors as a WBE on the grounds set forth in the Division's June 15, 2017 denial letter as it pertains to sharing in risks and profits pursuant to 5 NYCRR § 144.2(c)(2), and making decisions as it relates to the operation of the business pursuant to 5 NYCRR § 144.2(b)(1); but did not recommend affirmation of denial based on capital contributions pursuant to 5 NYCRR § 144.2(a)(1).

With respect to analysis offered in support of the recommendation by the Administrative Law Judge as it pertains to the first ground of denial - Capital Contributions pursuant to 5 NYCRR § 144.2(a)(1) – I disagree. First, it is the applicant's responsibility – not the Division – to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution. The Division's determination that the applicant failed to make capital contributions in proportion to their equity interests cannot be arbitrary and capricious where such information is not expressly provided on the certification application. Indeed, it is not the Division's responsibility to interpret what may inherently be a capital contribution that has not been clearly identified by the applicant. Further, determinations by the Division as well as findings by the Administrative Law Judge are limited to the information and reasonable inferences therefrom that were before the Division at the time of application. Based on the facts and circumstances presented here, applicant never referred to their majority acquisition of the applicant business in any other manner than a gift. Moreover, there was never any indication submitted as part of the certification application that stated the applicant's education, prior work experience, or any relevant expertise, were to be treated as a capital contribution.

Second, the Division does not recognize “gifts” – whether it be an actual gift or as alleged here, a gift so-designated for tax purposes, as a capital contribution. An applicant must sufficiently demonstrate that he or she made independent capital contributions into the business enterprise that is in proportion to his or her equity interests. In instances where equity interests in the applicant business are gifted to the person relied upon for certification, or designated as a gift for tax purposes, a determination by the Division that the applicant failed to demonstrate that he or she made capital contributions in proportion to their equity interests cannot be arbitrary and capricious. Nor are the findings – that the Division's witness testimony was vague and insufficient to meet the substantial evidence standard, proper as those findings of credibility were based on facts that were not before the Division as the time of application, and therefore irrelevant for purposes of this proceeding.

For the above-stated reasons, I reject the recommendation of the Administrative Law Judge as the basis for the analysis was not a part of the evidence before the Division at the time of application and therefore should not have been considered.

With respect to the remaining denial grounds that the women do not share in the risks and profits in proportion to their ownership interest in the business enterprise pursuant to 5 NYCRR § 144.2(c)(2); and the women do not make decisions pertaining to the operation of the business enterprise pursuant to 5 NYCRR § 144.2(b)(1) – I accept the recommendation of the Administrative Law Judge as it pertains to the facts of this case. Incorporation by reference is hereby made with respect to the findings and conclusions of the Recommended Order.

As such, after considering the appeal record, I reject the recommendation of the Administrative Law Judge as it pertains to the capital contribution ground of this case, and hereby accept the recommendation of the Administrative Law Judge as it pertains to the remaining facts in this case. Incorporated by reference is hereby made with respect to the findings and conclusions of the Recommended Order.

It is hereby **ORDERED** that the determination as it pertains to capital contributions pursuant to 5 NYCRR § 144.2(a)(1) is hereby rejected as reflected in the analysis stated herein, and the Division's determination to deny certification set forth in the June 15, 2017 denial letter is affirmed; and

It is further **ORDERED** that the decision to deny certification based on the remaining grounds pursuant to 5 NYCRR §§ 144.2(c)(2) and 144.2(b)(1), as stated in the Division's denial letter dated June 15, 2017, is affirmed.

Accordingly, Pro Tile Distributors will not be listed in the Division's directory for Minority and Women-owned Business Enterprises.

June 5, 2019



Valerie White  
Executive Director  
Division of Minority and Women's  
Business Development