

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

In the Matter

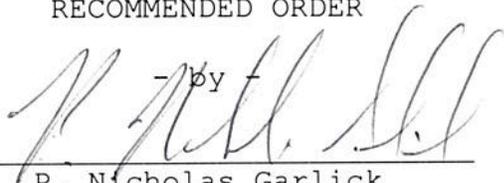
- of -

the Application of  
**SH5 Construction Corp.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51487

RECOMMENDED ORDER

- by -

  
P. Nicholas Garlick  
Administrative Law Judge

September 28, 2017

## **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 of SH5 Construction Corp. ("applicant") for certification as a woman-owned business enterprise ("WBE") 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 SH5 Construction Corp. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.<sup>1</sup>

SH5 Construction Corp.'s application was submitted on April 20, 2015 (Exh. DED3).

The application was denied by letter dated March 11, 2016, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Yasmeen Latif's ownership and control of the applicant.

By letter dated May 5, 2016, Yasmeen Latif, on behalf of the applicant, appealed from the Division's denial determination.

By letter dated May 10, 2016, the applicant submitted its written appeal which consisted of a two page letter and three exhibits (listed in the attached exhibit chart as A1 - A3).

In an undated five page memorandum, the Division responded to the applicant's appeal. Enclosed with the response was a list of thirteen exhibits as well as copies of twelve (one exhibit, DED7, was not included but later provided). The

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<sup>1</sup> In its response, the Division explains that SH5 Construction Corp. did qualify as a minority owned business enterprise (MBE) but was found not to qualify as a woman owned business enterprise (WBE).

Division's exhibits are described in the attached exhibit chart as DED1-DED13).

On June 26, 2017, this matter was assigned to me.

With an email dated July 6, 2017, the Division supplied the missing exhibit.

In an email dated July 7, 2017, Martin J. Kernan, Esq., of Kernan and Associates stated that he had recently been retained by the applicant and requested the opportunity to reply to the Division's papers. DED counsel did not object and the request was granted. The applicant's reply was received on August 30, 2017 at which time the record of this matter closed.

#### **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

#### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's 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**

### Position of the Division

In its denial letter, the Division asserts that the application failed to meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Yasmeen Latif's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that corporate documents and relevant business agreements permit the woman owner, Yasmeen Latif, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

### Position of the Applicant

SH5 Construction Corp. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

## **FINDINGS OF FACT**

1. SH5 Construction Corp. is in the business of general contracting and subcontracting in masonry, concrete work, chemical grout injection, waterproofing, carpentry, site work, excavation and painting (DED3 at 3). SH5 Construction Corp. has a business address of 8684-25<sup>th</sup> Avenue Brooklyn, New York (DED3 at 1).

2. SH5 Construction Corp. was established on September 20, 2004 by Mohammad Latif. On December 15, 2005, he gifted 51% of his shares to his daughter Yasmeen Latif (Exh. DED4 at 2). Ms. Latif also uses the title chief executive officer (Exh. DED2 at 1 & 3).

3. Mohammad Latif is president of SH5 Construction Corp. and Yasmeen Latif is the corporation's secretary (Exhs. DED3 at

3, DED12). The corporate bylaws state in relevant part that the president shall be the chief executive officer of the corporation and shall have general and active management of the business of the firm (Exh. DED 11 at 9). The office of chief executive officer, a title used by Ms. Latif, is not set forth in the bylaws.

4. SH5 Construction Corp. is certified by the Division as a minority owned business enterprise.

#### **DISCUSSION**

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth two bases related to Ms. Latif's ownership and control of SH5 Construction Corp. Each basis is discussed individually, below.

However, before addressing the grounds for denial, applicant's counsel, in his reply, asserts that the Division's action in the matter was not a denial, but rather a revocation of the applicant's existing certification. Counsel argues that because there have been no material changes at the firm since certification was originally granted, the Division failed to follow its own precedent when it denied the present application. This is incorrect. WBE certification is granted only for a period of three years, at which time firms are required to re-apply for certification. A past mistake by the Division to properly apply the criteria found in 5 NYCRR 144.2 does not bind it to repeat that mistake in all future re-applications.

#### **Ownership**

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Yasmeen Latif's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

On the appeal, Ms. Latif does not directly address the issue of her contributions to the firm. She states that she has been working for the company since 2004 and acquired shares in

the firm from her father in 2005. When she started, she worked part-time in the office while her father worked in the field. She then completed an Associates degree in construction management and worked at other construction firms to learn the business. She also states she acquired a [REDACTED] line of credit last year. She concludes by suggesting that the Division contact four references she lists on the appeal. Attached to her appeal letter are three exhibits: (1) a letter from the Metropolitan Transportation Authority (MTA) stating that the firm was accepted for admission into the MTA's Small Business Mentor Program - Tier 2 (Exh. A1); (2) a letter from the MTA stating that the firm has been certified as a Disadvantaged Business Enterprise (DBE) (Exh. A2); and (3) a lease between Ms. Latif and the firm for a private residence located at 162 Bay Street, Brooklyn, New York Exh. A3).

Included in the record on appeal is a narrative describing Ms. Latif's contributions, including her experience in estimating, management, and financial management; her knowledge of blueprints, contract documents, scheduling software, QuickBooks, financial monitoring, and advertising; and her experience in bidding, and overseeing staff, as well as quality control. (Exh. DED6 at 1).

In its response, the Division argues that the record before it at the time of the denial did not show any contribution of cash to the firm by Ms. Latif and that the shares she received from her father on December 15, 2005 were a gift (Exh. DED4 at 2). With respect to the claimed line of credit secured last year referenced in the appeal, the Division states that this information was not before it when the denial was made and is therefore not relevant to the appeal.<sup>2</sup>

The Division also argues that Ms. Latif has not shown an uncompensated contribution of expertise to the firm because there is no assertion or proof that she was not adequately compensated for her services. The submitted documents do not suggest that her experience was uncompensated, pre-existing

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<sup>2</sup> The Division notes that the corporation's 2013 financial statements do reference a \$26,000 line of credit but this was not cited in the appeal or the application (Exh. DED5 at 9). The Division also argues that there is no proof that Ms. Latif's property is used as collateral for the capitalization of the corporation.

expertise that was donated to the corporation for below market value. The Division argues that the record contains no information about her compensation at the time she acquired her 51% of the firm. The Division concludes by noting that Ms. Latif earned substantially more than her father in 2012, demonstrating that she was not donating expertise at that time (Exhs. DED7, DED9, & DED10).

With respect to the documents submitted on appeal regarding the corporation's certification as a Distressed Business Enterprise (DBE), the Division responds that this program and the WBE program have different criteria and the fact that SH5 Construction Corp. is certified as a DBE does not entitle it to WBE status.

In his reply, applicant's counsel argues that the record supports a finding that Ms. Latif earned her 51% stake in the company by hard work and self-improvement. He also argues that her salary relative to her father's as well as her pledging of personal assets as collateral for business loans and performance bonds demonstrate her contribution. Counsel argues that Ms. Latif made a contribution of expertise and sweat equity in exchange for her shares in the company. At the time she acquired her ownership interest in 2005, counsel argues the firm had little value and that her ownership interest was a reward for past contributions of labor and her future experience.

While it may be possible in a future application for WBE certification for Ms. Latif to precisely quantify the monetary value of her contributions of uncompensated labor and experience to the firm, there is nothing in this record to conclude that the Division's denial for failing to meet this criterion was not based on substantial evidence. Based on the evidence in the record, specifically the lack of any proof of a monetary contribution or proof of a contribution of uncompensated labor or expertise at the time the shares were acquired, the applicant has failed to demonstrate that the woman owner, Yasmeen Latif's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial was based on substantial evidence.

## Control

The second ground for denial was that the applicant failed to demonstrate that corporate documents and relevant business agreements permit the woman owner, Yasmeen Latif, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

On the appeal, Ms. Latif does not address the issue of her authority to make decisions for the corporation without restrictions.

In its response, the Division argues that the documents submitted with the application fail to demonstrate that Ms. Latif controls the decisions of the corporation for certification purposes. Numerous documents in the record, including the corporation's bylaws, designate Mr. Latif as president and Ms. Latif as secretary of the firm (including Exhs. DED3 at 3, DED11 at 13, & DED12 at 1). The bylaws state, in relevant part, that the president shall be the chief executive officer of the corporation and shall have general and active management of the business of the firm (Exh. DED 11 at 9). The bylaws do not permit Ms. Latif to make decisions regarding the corporation without restriction.

It should be noted that Ms. Latif uses the title CEO in her correspondence regarding this appeal (Exh. DED2 at 1 & 3), however, this title does not appear in the bylaws.

In his reply, applicant's counsel argues that Ms. Latif's position as an officer and majority shareholder of the company endows her with the legal authority to exercise broad and unrestricted discretion with respect to all aspects of company operations. Counsel acknowledges that corporate documents appointing Ms. Latif as CEO were not submitted with the application. He maintains that Mr. Latif remains president of the company but this position is subordinate to Ms. Latif's ownership rights.

Counsel's argument is unpersuasive. The WBE regulations require the corporate documents and relevant business agreements to permit the woman owner to make business decisions without

restriction. In this case, the fact that her father serves as president, the highest ranking officer of the corporation, restricts Ms. Latif's authority. Should the corporate documents be amended to make the CEO the highest ranking officer or should Ms. Latif be made president of the firm, this may constitute a significant change in the facts and circumstances of the denial which may allow for a new application to be filed (see 5 NYCRR 144.4[d]).

Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that corporate documents and relevant business agreements permit the woman owner, Yasmeen Latif, to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

#### **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owner Yasmeen Latif's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. Second, the applicant failed to demonstrate that corporate documents and relevant business agreements permit the woman owner, Yasmeen Latif, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

#### **RECOMMENDATION**

The Division's determination to deny SH5 Construction Corp.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of  
SH5 Construction Corp.**

**DED File ID No. 51487  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Denial letter
DED2	Appeal
DED3	Application
DED4	Corporate stock ledger and certificates
DED5	2013 & 2104 financial statements
DED6	Resumes and general duties narrative
DED7	2012 corporate taxes
DED8	2013 corporate taxes
DED9	Ms. Latif's 2012 taxes
DED10	Mr. Latif's 2012 taxes
DED11	SH5 corporate bylaws
DED12	SH5 corporate minutes
DED13	Leases
A1	Letter from MTA dated December 17, 2014
A2	Letter from MTA dated December 19, 2014
A3	Lease