

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

In the Matter

- of -

the Application of

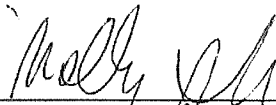
SMJ Development, LLC

for Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 61273

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge
November 6, 2018

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 SMJ Development, LLC ("SMJ", "applicant") minority-owned business enterprise certification 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 applicant SMJ challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise ("MBE").

SMJ's application (Exhibit 1) was received on April 26, 2016. By letter dated April 13, 2018, the Division denied the application of SMJ for MBE certification (Exhibit 2).

Applicant appealed from the Division's denial of its application for certification as a minority-owned business enterprise and the hearing was held May 1, 2018 at the Division's office located at 633 Third Avenue, New York, New York. Mr. Barahona appeared for SMJ and Division staff appeared by Benson V. Martin, Esq. and Alan Culbreath, certification analyst.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation and control are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). Among other showings, the applicant must demonstrate that the minority-owned business is an independent business enterprise actively seeking contracts or orders and regularly and actively performing business activities; and the ownership and control by

the minority group member must be real, substantial and continuing and go beyond the pro forma ownership of business pursuant to 5 NYCRR 144.2(a)(2) and (c)(2).

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.

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

The Division asserts that applicant failed to meet necessary criteria for certification. The Division asserts that applicant failed to demonstrate that the minority-owned business is an independent enterprise.

Position of the Applicant

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

FINDINGS OF FACT

1. SMJ Development, LLC was founded in May 2014 (Exhibit 1).
2. Juan Barahona ("Mr. Barahona"), founder and principal, owns 100% of the enterprise (Exhibit 1).

3. SMJ is an affordable housing development firm (Exhibit 1).
4. Mr. Barahona is a full time employee of [REDACTED] ([REDACTED]), a real estate development company in New York City (Hearing testimony).
5. Mr. Barahona stated that the income he earns as a [REDACTED] employee provides a steady source of income and allows him to support his family while he operates and grows SMJ (Hearing testimony).
6. Mr. Barahona testified that he co-developed SMJ's projects with his employer [REDACTED] to allow SMJ to secure necessary funding for the project. He anticipates that SMJ will have projects without [REDACTED] as a partner once it is credit worthy (Hearing testimony).
7. Mr. Barahona stated SMJ is able to secure necessary financing to conduct its business due to its business relationship with [REDACTED] (Hearing testimony).
8. Mr. Barahona is the sole employee of SMJ.
9. The [REDACTED] company website has information about SMJ Development LLC. It states, in relevant part, that Juan Barahona formed SMJ to develop affordable housing projects in partnership with [REDACTED] (Exhibit 7).
10. [REDACTED] is not a minority-owned business (Hearing testimony).

DISCUSSION

The application of SMJ for minority-owned business certification was denied by the Division on the basis that the business is not an independent business enterprise as required under 5 NYCRR 144.2(a)(2) & (c)(2). Specifically, the Division concluded that the business was not independent of [REDACTED], the employer of Juan Barahona, sole owner of SMJ (Exhibit 2). [REDACTED] is not a minority-owned business.

Juan Barahona submitted the application for MBE certification in April 2016 (Exhibit 1). The business address for SMJ is 150 Myrtle Avenue, Brooklyn, New York, the same

business address as [REDACTED] (Exhibit 1, 1.D.). Mr. Barahona acknowledged that he operates SMJ from the offices of [REDACTED] while he is also an employee of [REDACTED]. He pays no rent to [REDACTED] for the use of the space. [REDACTED] is in the business of property development in New York City, including affordable housing. SMJ is in the business of affordable housing development in New York City. According to Mr. Barahona, SMJ has partnered with [REDACTED] for its projects as SMJ would not be able to secure its own financing for projects without the business relationship with [REDACTED].

SMJ was started by Mr. Barahona in 2014 (Exhibit 1 at 2.A.) and has no employees (*id.* at 1.P.). Mr. Barahona began working for BFC in 2005 and continues to work for the company. He has no formal division of his time during the work day. He does work for both [REDACTED] and SMJ during the work day, as needed. Mr. Barahona envisions SMJ being able to operate independently of [REDACTED] in five years, when it is more credit worthy and established. He believes that he will have gained enough experience to be able to secure his own financing for projects by that time.

The regulations governing minority business enterprise certification require, among other things, that the minority business operate independently (see 5 NYCRR 144.2). The minority business enterprise certification program is intended to allow State agencies to encourage and assist minority and women owned businesses. It is an essential component that the business be an independent operation owned by a woman or minority. In this case the business, while owned by a minority, Juan Barahona, is partnered with a non-minority owned business. SMJ acknowledges that it does not operate independent of [REDACTED].

CONCLUSION

SMJ Development has not carried its burden of establishing that the Division's denial is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny SMJ Development's application for certification as a minority-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of SMJ Development
DED File ID No. 61273
Division Exhibit List

Exh. #	Description
1	Application of SMJ Development
2	NYSDED denial letter dated April 14, 2017
3	Executed [REDACTED] Term Sheet [REDACTED]
4	[REDACTED] Signed Commitment
5	[REDACTED] Signed Commitment
6	[REDACTED]
7	[REDACTED] Profile