

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
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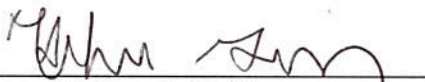
In the Matter

-of-

The Application of **TECHNICALLY CREATIVE, INC.**,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61413

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

October 29, 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 (DED) to deny the application filed by Technically Creative, Inc. (TCI or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

TCI applied for certification as a woman-owned business enterprise on October 18, 2016. *See*, Exhibit DED-1. By letter dated March 20, 2017 (Exhibit DED-2), the Division determined that TCI does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application.

The grounds for the Division's determination were:

- Pursuant to § 144.2(a)(1) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), the contribution of the woman owner is not proportionate to her equity interest in the business enterprise as demonstrated by, not limited to, contributions of money, property, equipment or expertise.
- Pursuant to 5 NYCRR § 144.2(c)(2), the woman owner does not share in the risks and profits in proportion with her ownership interest in the business enterprise.
- Pursuant to 5 NYCRR § 144.2(b)(1), the woman owner does not make decisions pertaining to the operation of the business enterprise.
- Pursuant to 5 NYCRR § 144.2(b)(1)(i), the woman owner of the business enterprise does not have adequate managerial experience or technical competence to operate the business enterprise.
- Pursuant to 5 NYCRR § 144.2(b)(2), the corporate bylaws and other documents governing the business enterprise does not permit the woman owner to make decisions without restrictions.

Danielle Amatulli, Director of Business Operations of TCI, submitted an appeal with several attachments dated April 12, 2017 and received by the Division on April 17, 2017, appealing from the Division's determination to deny TCI's application for WBE certification (Exhibit DED-3). On behalf of the Division, Donald J. Tobias, Esq. submitted a Memorandum of Law (MOL) dated September 24, 2019 and the Affidavit (Aff.) of Certification Director Raymond Emanuel dated September 24, 2019 with associated exhibits in response to the appeal.

By email dated October 1, 2019, Ms. Amatulli made additional arguments with respect to TCI's appeal including citations to articles she wrote on LinkedIn. By email dated October 2, 2019, Mr. Tobias objected to this late submission that included information not submitted with TCI's application. By email dated October 8, 2019, I advised the parties that I would not consider TCI's late submissions.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at 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 by the applicant 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 § 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, TCI bears the burden of proving that the Division's denial 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 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 TCI for certification as a woman-owned business enterprise with its letter dated March 20, 2017 (*see*, Exhibit DED-2). The Division determined that TCI failed to demonstrate: (1) the contributions of Ms. Amatulli 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); (2) Ms. Amatulli shared in the risks and profits in proportion to her ownership interest in the business enterprise as required by 5 NYCRR § 144.2(c)(2); (3) Ms. Amatulli made decisions pertaining to the business enterprise as required by 5 NYCRR § 144.2(b)(1); (4) Ms. Amatulli had adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR § 144.2(b)(1)(i); and 5) the corporate bylaws and other documents governing the business enterprise gave Ms. Amatulli authority to make decisions without restrictions pursuant to 5 NYCRR § 144.2(b)(2).

The Division emphasized that the business that Ms. Amatulli had started in 2005 (when she was Danielle Smith) had substantially changed when her now husband, Christopher, joined the firm in 2019. Emanuel Aff., ¶¶ 8-11. According to Division staff, the company had changed from a web design firm to one that specialized in technology advisement and programming. *Id.*, ¶¶ 10-11. Staff maintains that based on this metamorphosis, the company's income was much greater and given "the beneficial nature" of Mr. Amatulli's expertise, he was compensated with a greater share of the profits despite Ms. Amatulli's share in the ownership of the company. *Id.*, ¶ 20. Staff also points to the lack of proof of investment in the company by Ms. Amatulli commensurate with her ownership. *Id.*, ¶¶ 18-19. And while Ms. Amatulli maintains that she put her profits back into the company, staff provides that there is no evidence of this claim. *Id.*, ¶ 22. Division staff also claim that based on the nature of the company's business at the time of the application, Ms. Amatulli did not demonstrate the necessary expertise to run the business. *Id.*, ¶ 25. And, the bylaws in existence at the time of the application did not give Ms. Amatulli the authority to make the company decisions. *Id.*, ¶ 30.

TCI

On her appeal, Ms. Amatulli points to her incorporation of the business in 2004 and her sole ownership of the enterprise for six years prior to Mr. Amatulli joining TCI. She emphasizes that she handled all aspects of starting and running the business. Appeal, pp. 1-2. With respect to the variance in compensation, Ms. Amatulli provides that in order to keep the very skilled IT professionals at TCI, she must pay industry competitive salaries. Appeal, p. 2. She states that she has chosen to "take a modest salary and reinvest profits back into my company, as a strategy for sustainable growth." Appeal, p. 2. With respect to decisionmaking, she acknowledges the delegation of specific projects to her technicians but maintains that she handles all marketing and sales, negotiates all contracts, manages compliance and secures liability insurance, fidelity bonds, workers compensation, makes assignments, does all hiring, manages invoicing and billing, and manages customer satisfaction. Appeal, p. 3. She claims that while Mr. Amatulli is very skilled, the business's survival is dependent on her decisions and actions. *Id.* With respect to her skill level, she provides that she has an MBA and has all the skills necessary to run the business in addition to creation, maintenance and enforcement of her Information Securities Policies. Appeal, p. 4. She acknowledges that mistakes were made in the development and adoption of the company's governing policies and bylaws but that these mistakes have been corrected with the resignation of Mr. Amatulli and amendment of the bylaws on April 3, 2017. Appeal, p. 5; Exhibit DED-S.

FINDINGS OF FACT

1. Technically Creative, Inc. (TCI) is located at 3212 US Route 9W, New Windsor, NY and provides technology programming and advisement. Exhibit DED-A, §§ 1. D, 3.C.

2. TCI was established in December 2004 by Danielle Smith (now Amatulli) as a website design and development company. Exhibits DED-A, §§ 1.R.; DED-B.
3. TCI submitted its application for WBE certification on October 18, 2016. Exhibit DED-A.
4. In 2005, TCI issued Ms. Amatulli 500 shares and she invested ██████ in the company. Exhibits DED-A, § 2.C.; DED-G. In 2011, when Christopher Amatulli joined the company, TCI distributed the company shares with 250 shares to Christopher and 250 shares to Ms. Amatulli. Exhibit DED-G.
5. In 2011, TCI amended its bylaws so that both Christopher and Danielle became directors. Exhibit DED-H. These bylaws required that decisionmaking for TCI required a 60% vote of the Board of Directors. Exhibit DED-H.
6. Subsequent to Christopher Amatulli's participation in the company, TCI evolved from a website development firm to one engaged in the more complex field of technology development, maintenance, troubleshooting and related endeavors. Exhibits DED-I, J, K; Emanuel Aff., ¶¶ 10-14.
7. Since 1998, Mr. Amatulli has gained extensive experience in computer technology issues including data conversion, security, data loss prevention, and regulatory compliance in addition to knowledge of many computer languages and operating systems. Exhibit DED-E.
8. Ms. Amatulli has an MBA in management information systems and has experience with Photoshop and Fireworks, Microsoft Office Suite and Quick Books. Exhibit DED-B.
9. In 2014, Christopher transferred to Danielle fifty of his shares making her the majority shareholder. Exhibit DED-O. There is no indication in the record of any consideration that Danielle produced in exchange for these shares. Emanuel Aff., ¶ 14.
10. In 2013, Danielle received ██████ in salary while Christopher was paid ██████. Exhibit DED-L. In 2014, Christopher received ██████ in salary as compared to ██████ paid to Danielle. Exhibit DED-M. In 2015, TCI paid ██████ to Christopher and ██████ to Danielle. Exhibit DED-N.
11. In its application for WBE certification, TCI identifies Ms. Amatulli as the individual responsible for the 12 noted managerial functions. Exhibit DED-A, § 4A.
12. Mr. Amatulli and the key TCI staff members identified in this application have extensive backgrounds in programming, hardware and software design, repair and maintenance. Exhibits DED-E, Q.

13. The examples of the contracts that TCI entered into with clients indicates the level of sophisticated programming work expected from TCI. Exhibit DED-R; Emanuel Aff., ¶ 27.
14. From 2011 until April 2017 (after TCI was denied WBE status), TCI's bylaws required the approval of 60% of the board of directors on all major decisions. Exhibits DED-H, S.
15. In April 2017, Mr. Amatulli resigned from TCI's Board of Directors and the bylaws were amended to reflect that there was one director. Exhibit DED-S.

DISCUSSION

This recommended order considers TCI's April 12, 2017 appeal from the Division's March 20, 2017 determination to deny TCI'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 March 20, 2017 denial letter (*see*, Exhibit DED-P), TCI did not demonstrate that: Ms. Amatulli's contributions were proportionate to her equity interest in the business; Ms. Amatulli shared in the risks and profits in proportion with her ownership interest in the business enterprise; that Ms. Amatulli made decisions pertaining to the operation of the business enterprise; that Ms. Amatulli demonstrated adequate managerial experience or technical competence to operate the company; or that the corporate bylaws and related documents governing the business permitted Ms. Amatulli to make decisions without restrictions as required by 5 NYCRR §§ 144.2(a)(1), 144.2(c)(2), 144.2 (b)(1), 144.2(b)(1)(i), and 144.2(b)(2), respectively.

I. Contributions

The eligibility criterion with respect to contributions is whether TCI demonstrated compliance with 5 NYCRR § 144.2(a)(1) which requires that "[t]he contributions of women are proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." At the time of application, Ms. Amatulli owned the majority of shares in the company by virtue of the transfer that was made in 2014 from Mr. Amatulli giving her 300 of the 500 shares. Exhibit DED-O. However, the application only notes Ms. Amatulli's original [REDACTED] investment in the company in 2005. Exhibit DED-A, § 2.C. As Division staff argue in their response to the appeal, TCI failed to document any evidence of Ms. Amatulli's provision of consideration for this transfer.

Based on TCI's failure to provide the critical information with respect to Ms. Amatulli's contributions, I find that the Division's position is supported by substantial evidence and I recommend that the Director conclude the same.

II. Proportional Share in Risk and Profits

The eligibility requirement 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. *See, e.g., Matter of Corporate Branding, Inc., Recommended Order* <https://esd.ny.gov/sites/default/files/CorporateBrandingRO.pdf> (ALJ Lisa A. Wilkinson, 8/31/17).

Mr. Emanuel, the supervisor of the certification process, notes in his affidavit in support of the Division's response to TCI's appeal that after Mr. Amatulli joined TCI, he received more substantial remuneration for performing information technology consulting and various programming assignments. Emanuel Aff., ¶ 20. The TCI tax returns for 2013-2015 show the disparity in salaries with Christopher making more than twice the salary of Ms. Amatulli. Exhibits DED-L, M and N. Ms. Amatulli does not dispute this disparity and acknowledges that for Mr. Amatulli and all of their IT technicians it was important to appropriately compensate in order to retain these individuals. APP-1, p. 2. She provides that she opted "to take a modest salary and reinvest profits back into my company, as a strategy for sustainable growth." *Id.* However, as Mr. Emanuel has assessed, TCI has failed to demonstrate that there was any such reinvestment. Emanuel Aff., ¶¶ 21-24. Mr. Emanuel also points out that the documentation in support of TCI's application demonstrates that the proportionate share of the gains received by both Christopher and Danielle were collected as profit. Emanuel Aff., ¶ 22. The documentation submitted by TCI does not show that there were any shareholder loans and/or equity adjustments to support this claim of reinvestment except for one small loan in 2013. Emanuel, ¶ 20.

Accordingly, I find that the Division's position with respect to Ms. Amatulli's lack of proportional share in the risks and profits of the company is supported by substantial evidence and I recommend that the Director conclude the same.

III. Operation

The eligibility requirement at issue requires that the woman owner makes decisions pertaining to the operation of the business enterprise. 5 NYCRR § 144.2(b)(1). The regulation points to several factors for the Division to consider with respect to this requirement including whether the woman has adequate managerial experience or relevant technical competence; demonstration of knowledge and ability to operate the business enterprise; and an expenditure of time on an ongoing basis to the daily operation. 5 NYCRR §§ 144.2(b)(1)(i), (ii), (iii).

Ms. Amatulli formed Technically Creative, Inc. when she was a website designer for the [REDACTED]. Exhibits DED-A, B; Emanuel Aff., ¶ 5. After she married Mr. Amatulli who has an extensive background in computer programming, systems design, data analysis, security compliance and related fields, Mr. Amatulli left his position at [REDACTED] and joined TCI. Exhibit DED-E; Emanuel Aff., ¶ 8. This transition resulted in a change in the nature of TCI's services and in the company's structure with Ms. Amatulli and Mr. Amatulli having equal shares in TCI. Exhibits DED G, I, J, K. As Mr. Emanuel explains in depth in his affidavit, website design was no longer the source of principal income of TCI but rather technology advisement, data protection, compliance with Dodd-Frank disclosure and related legal requirements brought in the majority of business. Emanuel Aff., ¶¶ 10-13. The types of contracts the company was now entering into with its customers demanded skills that are not reflected in the experience of Ms. Amatulli. Exhibits DED-B, I, J, K and R. Thus, it is reasonable for Division staff to conclude that Ms. Amatulli is not in a position based on her background to make the necessary decisions with respect to selection of programming choices or data loss solutions or to oversee the work of the majority of TCI's employees. Emanuel Aff., ¶¶ 27-30.¹ While Ms. Amatulli argues that it is she who created the company and is essential to its success, it is clear from the documentation that TCI has changed substantially, and her skills no longer provide the company's essential underpinnings.

Accordingly, I find that the Division's position with respect to Ms. Amatulli's lack of expertise to demonstrate operation of TCI is supported by substantial evidence and I recommend that the Director conclude the same.

IV. Control

The eligibility requirement at issue requires that corporate bylaws and other documents governing the business enterprise permit the woman owner to make decisions without restrictions. 5 NYCRR § 144.2(b)(2). On January 1, 2011, the Amatullis executed an amendment to TCI's bylaws making them both directors of the company. Exhibit DED-H. This amendment also provided that the consent of sixty percent of the directors was required to take a significant number of actions including adopting an annual budget, appointing officers, making material changes to nature of business, altering employment agreements and entering into or changing agreements to acquire assets. Exhibit DED-H. Thus, there can be no dispute that at the time of TCI's application Ms. Amatulli did not have unrestricted authority over the company and therefore, TCI could not meet the requirement of 5 NYCRR § 144.2(b)(2). Shortly after Division staff denied TCI's application, the company attempted to correct this status by submitting documentation that Mr. Amatulli had resigned from the board as of April 3, 2017 and the bylaws were amended on this same date to designate one board member. Exhibit DED-S;

¹ There is a typographical error in Mr. Emanuel's affidavit with two paragraphs numbered "27." In this Recommended Order, I am referencing the paragraphs to reflect the correct sequence and thus, the second paragraph "27" is identified as "28", *et seq.*

Emanuel Aff., ¶ 32. However, as noted by Mr. Emanuel (Aff., ¶ 33), review of this appeal can only consider those materials that were provided with the application. 5 NYCRR § 144.4(e).

Accordingly, I find that the Division's position with respect to TCI's corporate structure at the time of the application showing that Ms. Amatulli did not have unrestricted ability to make corporate decisions is supported by substantial evidence and I recommend that the Director conclude the same.

CONCLUSION

For the reasons set forth above, TCI failed to demonstrate that that Ms. Amatulli made any contribution in proportion 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). Nor does Ms. Amatulli share in a proportionate share of the risks and profits as required by 5 NYCRR § 144.2(c)(2). In addition, Ms. Amatulli does not make decisions pertaining to the operation of the business enterprise based upon her lack of expertise in the areas in which the company now concentrates pursuant to 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(1)(i). Finally, the corporate structure at the time of application did not permit her to do so unfettered as required by 5 NYCRR § 144.2(b)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's March 20, 2017 determination to deny TCI's application for certification as a woman-owned business enterprise based on the failure to demonstrate a contribution in proportion to her equity interest (5 NYCRR § 144.2[a][1]), failure to demonstrate proportional share of the risks and profits go to Ms. Amatulli (5 NYCRR § 144.2[c][2]), failure to demonstrate that Ms. Amatulli makes the company's decisions and has adequate technical expertise to do so (5 NYCRR §§ 144.2[b][1] and 144.2[b][1][i]), and failure to show the company structure at the time of application allowed Ms. Amatulli to make unrestricted decisions (5 NYCRR § 144.2[b][2]).

Attachment: Exhibit Chart

TECHNICALLY CREATIVE, INC. EXHIBIT LIST

- DED A - Application
- DED B - Danielle Amatulli Resume
- DED C - 2014 Individual (Joint) Tax Return - Danielle and Christopher Amatulli
- DED D - 2005 Tax Return for Technically Creative, Inc.
- DED E - Christopher J. Amatulli Resume
- DED F - 2010 W-2 Christopher J. Amatulli
- DED G - Record of Shares, Stock Certificate 2005 - Danielle Amatulli - 500 shares
Stock Certificate 2011 - 250 issued to Danielle Smith Amatulli
Stock Certificate 2011 - 250 issued to Christopher Amatulli
Record of Transfer
- DED H - Amendment No. 1 to Bylaws - 2 board members - 1/1/11
- DED I - ██████████ Statement of Work - 10/19/16
- DED J - ██████████. Statement of Work - 11/01/16
- DED K - ████████████████████ - 3/6/17
- DED L - Tax return 2013 - Technically Creative, Inc.
- DED M - Tax return 2014 - TCI
- DED N - Tax return 2015 - TCI
- DED O - Stock Certificate 2014 - 200 shares to Christopher Amatulli
Stock Certificate 2014 - 50 shares to Danielle Amatulli
- DED P - Division Denial - 3/20/17
- DED Q - TCI Staff resumes
- DED R - Employment agreements
- DED S - Christopher Amatulli resignation letter dated 4/3/17; written consent of shareholders
and Amendment No. 2 to Bylaws

- APP 1 TCI Written Submission Request for Appeal dated 4/12/17