

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

the Application of CNC Construction, Inc
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 54855

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
May 28, 2024

This matter considers the written appeal by CNC Construction, Inc. (“CNC” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On January 13, 2023, Ms. Regina Esa, as President, applied on behalf of CNC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 17, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5);
 - (c) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);

- (d) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2);
 - (e) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1);
and
 - (f) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. CNC timely filed a Request to Appeal on August 28, 2023 (APP Exhibit A, DED Exhibit 18).
 4. A notice to proceed via written appeal was sent to CNC on August 28, 2023 (DED Exhibit 19).
 5. CNC submitted its written appeal by letter dated October 12, 2023, with attachments (APP Exhibit B).
 6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated April 18, 2024, and a brief of JaMone Turner Esq., counsel for the Division, dated April 24, 2024.
 7. The Division withdrew its denial grounds under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) in its April 24, 2024, brief.

FINDINGS OF FACT

8. CNC provides commercial concrete and sidewalk contracting services, which include concrete curbs, sidewalks and walls, excavation/backfill foundations, footings, pavers, warning tiles, landscaping, ramps, stairs, rebar, and subgrade (DED Exhibit 1).
9. Ms. Regina Esa is the President and has a 100% ownership interest (DED Exhibit 1).
10. The application states that Ms. Esa made a capital contribution of \$[REDACTED] in cash on January 1, 2018 and a capital contribution of \$[REDACTED] on January 15, 2006 in the form of a home mortgage for a home office (DED Exhibit 1).
11. Applicant provided a narrative dated May 30, 2023, which states: “CNC was formed in 1995 with my dad, my mom and myself. The original shares were Manuel Neto – 450, Aida Neto – 150, and Regina Esa – 400. Manuel and Aida put in \$[REDACTED] cash and I contributed \$[REDACTED] cash for the start up... Manuel Felipe Neto, my father, gifted his shares to me... I bought out Aida Neto’s shares to have 100% control over CNC Construction. I was requested to do a buyout for [REDACTED]/share (see attached check and deposit).” (DED Exhibit 6).
12. At the time of the transfer of the 150 shares from Ms. Neto to Ms. Esa, the January 1, 2018 Shareholder Meeting Minutes states: “...Be it further resolved that Regina Esa shall file an application to qualify the corporation as a Woman-Owned Business.” (DED Exhibit 8).
13. The January 8, 2018 Shareholder Meeting Minutes states, in part, “Be it resolved that Regina Esa, Cynthia St. Clair and Christopher Neto be and are hereby elected to the Board of Directors...” (DED Exhibit 8)
14. Applicant provided a copy of its Amended and Restated By-Laws. Article IV, Section 1 states: “The business of this Corporation shall be managed by its Board of Directors...”.

Article IV, Section 4 of the By-Laws states “A majority of Directors shall constitute a quorum of the Board, or any committee thereof, for the transaction of any business. The majority vote at a meeting at which a quorum is present shall be the act of the Board or the committee.” Article IV, Section 6 of the By-Laws states “The Board of Directors shall have responsibility for the management of the business of the Corporation...” (DED Exhibit 9).

15. Mr. Christopher Neto is Ms. Esa’s sibling and the owner of CFN Carting, LLC (“CFN”), which shares yard space with CNC. Ms. Esa stated “CFN Carting LLC is owned and operated by Christopher Neto. This business provides safe disposal service for garbage and debris at job sites. The CFN dumpster trucks share a yard space with CNC Construction at 199 New Rd.”. CNC shares equipment (including rentals) with CFN (DED Exhibit 1).
16. The application states “Phil Neto Construction is owned and operated by Christopher Neto. This company provides operators and ironworkers to CNC. Phil Neto also shares a yard space with CNC Construction at 199 New Rd.” (DED Exhibit 1).
17. The application further states “CRC Real Estate Holdings is owned by Christopher Neto, Cynthia St. Clair & Regina Esa. This company owns real estate and rents to a number of companies. CRC owns the shared yard space at 199 New Rd.” (DED Exhibit 1).
18. CNC’s 2021 tax return reflects that it paid \$██████ to subcontractors out of a total of \$██████ in “other costs” (DED Exhibit 10). CNC’s 2022 tax return reflects that it paid \$██████ to subcontractors out of a total of \$██████ in “other costs” (DED Exhibit 12).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states as follows:

Capital contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or more of the following:
 - 1. Money;
 - 2. Property;
 - 3. Equipment; or
 - 4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR §144.2(b)(5) states as follows:

Pro forma ownership. Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.

5 NYCRR §144.2(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by CNC for certification as a WBE 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 Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021). The applicant must show how the woman-owner's contribution was proportionate to her equity interest even where the business has been either inherited or gifted. See *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order dated October 31, 2016, Final Order 16-55 dated November 1, 2016.

Applicant provided a narrative dated May 30, 2023, which states: "CNC was formed in 1995 with my dad, my mom and myself. The original shares were Manuel Neto – 450, Aida Neto – 150, and Regina Esa – 400. Manuel and Aida put in \$██████ cash and I contributed \$██████ cash for the start up... Manuel Felipe Neto, my father, gifted his shares to me... I bought out Aida Neto's shares to have 100% control over CNC Construction. I was requested to do a buyout for \$██████ share (see attached check and deposit)." (DED Exhibit 6).

With regard to her original 400 shares, Ms. Esa did not provide any documentation to support her claim that she contributed \$[REDACTED]. With regard to the additional 450 shares she received from her father, those shares were gifted and she made no contribution. With regard to the 150 shares she received from her mother, Ms. Esa included a deposit ticket as proof that the \$[REDACTED] she paid to her mother was deposited into her mother's bank account (DED Exhibit 6).

On appeal, applicant states: "...Moreover, as the President and sole owner of CNC, I regularly make contributions of money, property, equipment, or expertise to CNC in the form of : (1) sweat equity; (2) utilizing my own personal home as my home office to lessen the overhead for the company; (iii) delaying taking a salary or distribution(s) from the company to make sure that CNC has sufficient capital to pay its reoccurring and ongoing obligations; and (iv) donating a 2004 Dodge Ram Pickup truck to CNC that the company still uses and is registered to CNC." (APP Exhibit B).

However, applicant failed to provide any documentary evidence to support any of the above claims.

Ms. Esa stated, "Through my expertise in this industry, I have contributed hundreds of hours of uncompensated work to the business to ensure its success." (APP Exhibit B).

5 NYCRR §144.2(b)(2)(i) states that "Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (4) Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented." Where applicant provided no valuation of the owner's expertise, the Division was

not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016.

Ms. Esa did not provide any evidence of the value of her expertise when she received any of her shares. Also, no evidence was submitted to demonstrate that the expertise was uncompensated.

The Division's determination to deny the application on the basis that CNC failed to demonstrate that Ms. Esa made contributions to CNC in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

Where a woman relied upon for certification obtains her ownership interest through a transfer from another person, the applicant "must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria..." 5 NYCRR §144.2(b)(5).

Ms. Esa provided no documentation to enable the Division to independently verify that she paid any consideration for her ownership interest in the business. Also, at the time of the transfer of the 150 shares from Ms. Neto to Ms. Esa, the January 1, 2018 Shareholder Meeting Minutes states: "...Be it further resolved that Regina Esa shall file an application to qualify the corporation as a Woman-Owned Business." (DED Exhibit 8). This supports the Division's position that the purpose of transferring the shares was to secure certification as a WBE.

The Division's determination to deny the application on the basis that Ms. Esa failed to demonstrate that the ownership interest she received was not for the sole purpose of securing certification as required under 5 NYCRR §144.2(b)(5), is supported by substantial evidence.

II. Control

The Division also denied certification on the ground that Ms. Esa is not the highest-ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

The January 8, 2018 Shareholder Meeting Minutes states, in part, “Be it resolved that Regina Esa, Cynthia St. Clair and Christopher Neto be and are hereby elected to the Board of Directors...” (DED Exhibit 8).

Applicant provided a copy of its Amended and Restated By-Laws. Article IV, Section 1 states: “The business of this Corporation shall be managed by its Board of Directors...” Article IV, Section 4 of the By-Laws states “A majority of Directors shall constitute a quorum of the Board, or any committee thereof, for the transaction of any business. The majority vote at a meeting at which a quorum is present shall be the act of the Board or the committee.”. Article IV, Section 6 of the By-Laws states “The Board of Directors shall have responsibility for the management of the business of the Corporation...” (DED Exhibit 9).

Since CNC has three members of the Board of Directors, and a majority is required to constitute a quorum of the Board, a quorum can be present and business and management decisions made, without Ms. Esa being present.

On appeal, Ms. Esa states “As a result of my efforts, soon after acquiring full control of CNC, the business began to flourish.” (APP Exhibit B). However, stating that she has full control of CNC does not negate the fact that the By-Laws allow for business and management decisions to be made by the other directors. Therefore, she does not have control of the Board of Directors.

The Division’s determination to deny the application on the basis that CNC failed to demonstrate that Ms. Esa is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

III. Independence

The Division further found that CNC is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space... 5 NYCRR §144.2(e)(1), and “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

Mr. Christopher Neto is Ms. Esa’s sibling and the owner of CFN Carting, LLC (“CFN”), which shares yard space with CNC. Ms. Esa stated “CFN Carting LLC is owned and operated by Christopher Neto. This business provides safe disposal service for garbage and debris at job sites. The CFN dumpster trucks share a yard space with CNC Construction at 199 New Rd.”. CNC shares equipment (including rentals) with CFN (DED Exhibit 1).

The application states “Phil Neto Construction is owned and operated by Christopher Neto. This company provides operators and ironworkers to CNC. Phil Neto also shares a yard space with CNC Construction at 199 New Rd.” (DED Exhibit 1).

The application further states “CRC Real Estate Holdings is owned by Christopher Neto, Cynthia St. Clair & Regina Esa. This company owns real estate and rents to a number of companies. CRC owns the shared yard space at 199 New Rd.” (DED Exhibit 1).

On appeal, applicant states “CNC has used and currently uses a myriad of vendors and subcontractors to provide materials, equipment and labor for the various projects that CNC works on. CFN Carting LLC (“CFN”) and PNC are two of the many vendors/subcontractors that CNC does business with... CNC utilizes the services of many other vendors and subcontractors and is not reliant or dependent on PNC or CFN.” (APP Exhibit B). CNC’s 2021 tax return reflects that it

paid \$ [REDACTED] to subcontractors out of a total of \$ [REDACTED] in “other costs” (DED Exhibit 10). CNC’s 2022 tax return reflects that it paid \$ [REDACTED] to subcontractors out of a total of \$ [REDACTED] in “other costs” (DED Exhibit 12). This supports the Division’s finding that CNC predominately uses subcontractors and is dependent on the work of those subcontractors to complete its projects.

CNC shares resources, including personnel, yard space, storage space and equipment, with PNC, CFN and CRC, which are all family businesses. It also is dependent upon subcontractors to complete its projects. It is therefore not an independent business, as required under 5 NYCRR §144.2(e).

The Division’s determination to deny the application on the basis that CNC failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

CNC did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(b)(5), 144.2(d)(1) and 144.2(e), was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division’s determination to deny CNC’s application for certification as a woman-owned business enterprise.

In the Matter of CNC Construction, Inc.
DED File ID No. 54855
Exhibit Chart

Exhibit #	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Kelco Construction Subcontract	Y	Y
DED 4	CPPP Subcontract 1	Y	Y
DED 5	CPPP Subcontract 2	Y	Y
DED 6	Capital Contribution Narrative	Y	Y
DED 7	Shareholder Resolution	Y	Y
DED 8	Meeting Minutes	Y	Y
DED 9	Amended and Restated By-Laws	Y	Y
DED 10	2021 Corporate Income Tax Returns	Y	Y
DED 11	2021 Subcontractor Payment Statements	Y	Y
DED 12	2022 Corporate Income Tax Returns	Y	Y
DED 13	2022 Subcontractor Payment Statements	Y	Y
DED 14	Construction Equipment Lease Agreement	Y	Y
DED 15	Storage Space Lease Agreement	Y	Y

DED 16	2021 Annual Summary and Transmittal of U.S. Information Returns	Y	Y
DED 17	2022 Annual Summary and Transmittal of U.S. Information Returns	Y	Y
DED 18	Applicant's Notice of Appeal Letter	Y	Y
DED 19	Notice to Proceed Via Written Appeal	Y	Y