

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

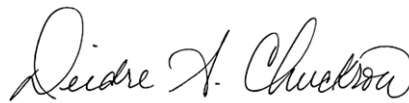
- of -

the Application of Capital Area Janitorial, LLC
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70315

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
December 21, 2023

This matter considers the written appeal by Capital Area Janitorial, (“CAJ” 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, CAJ applied for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On April 24, 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), and
 - (b) The applicant business did not demonstrate that ownership was not allocated to the woman relied upon for certification solely for the purpose of securing certification.
3. CAJ submitted a request to appeal the denial determination on May 8, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to CAJ on May 15, 2023 (DED Exhibit 4).
5. CAJ’s written appeal, with exhibits, was filed on May 19, 2023. (APP Exhibit B)
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated September 21, 2023, and a brief of Karen L. Bernstein, counsel for the Division, dated September 22, 2023.

FINDINGS OF FACT

7. CAJ is engaged in the business of commercial janitorial services. (DED Exhibit 1).
8. CAJ based its application on Brenda Hastings, the President and 51% owner of the applicant business. Sean Fitzgerald is the Sales Manager and 49% owner of CAJ. (DED Exhibits 1 and 5).
9. CAJ was established in 2008 by Sean Fitzgerald and Scott Kelley. Mr. Kelley sold his shares to Mr. Fitzgerald in April of 2020. In July of 2020, Mr. Fitzgerald gifted 51% of his shares to his daughter, Ms. Hastings, “as part of his retirement plan.” The amount of 51% was on the advice of a certified public accountant. No monetary contributions were made by Ms. Hastings for the shares, and neither Ms. Hastings nor Mr. Fitzgerald have receipts or proof of any money being paid for business capitalization. (DED Exhibits 1 and 5).

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 of 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 women-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.

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 CAJ 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 – Capital Contribution

The Division denied CAJ's application for certification as a WBE on the basis that CAJ failed to demonstrate that the woman owner relied upon for certification made capital contributions

proportionate to her equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the woman owner contributed, “as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise,” in proportion “to their equity interest in the business enterprise.” (5 NYCRR § 144.2(b)(2) and 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 Division requires an applicant to demonstrate that the contribution is proportionate to an owner’s equity interest in the business enterprise even if the interest has been inherited or gifted. (See *Matter of Coverco, Inc.*, Recommended Order, December 12, 2017 (Final Order 17-06), January 30, 2017; *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order, May 25, 2017 (Final Order 16-55, Nov. 1, 2016); *Matter of Friend Commercial Contracting, Corp.*, Recommended Order May 11, 2016, (Final Order 16-15, May 16, 2016)).

The applicant bears the burden in establishing that they have 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 admits that there was no transfer of capital when Ms. Hastings received her ownership shares from her father, Mr. Fitzgerald. (DED Exhibit 1, § 2.E.). Ms. Hastings, in a narrative included with the application, states that her father gifted her 51% of the shares of the applicant business in 2020 as part of his retirement plan. (DED Exhibit 1, p. 14). On appeal, for the first time, Applicant argues that Ms. Hastings satisfies the capital contribution standard by virtue of expertise. (APP Exhibit A). While the regulation does provide that expertise may qualify as a capital contribution, it is the responsibility of the applicant “to clearly identify, quantify, and

explain on the certification application, what is considered a capital contribution.” (*Scherzi Systems, supra.*) Further, it is the responsibility of the applicant to clearly document a “reasonable assessment of the fair market value of the expertise” and that the expertise is “uncompensated.” (5 NYRR § 144.2(b)(2)(i)(4)).

Here, both in the application and in the appeal submission, the applicant has failed to clearly identify, quantify, and explain the value of the expertise to be considered, and no evidence has been presented that the work done by Ms. Hastings, prior to her taking ownership, went uncompensated. Without evidence of an agreement specifically detailing the precise expertise to be used and the specific dollar value associated with that expertise, prior work cannot be considered as consideration towards the purchase of an eligible owner’s shares. (See, *Scherzi Systems, supra.*)

Thus, the Division’s determination that the party relied upon for certification failed to demonstrate that they made capital contributions to the business enterprise proportionate to their equity interest therein, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Ownership – Pro Forma

The Division also denied CAJ’s application for certification on the grounds that the woman owner relied on for certification sought ownership of the business enterprise solely for the purpose of securing certification. The regulation prohibits the transfer of ownership interest solely for the purpose of securing certification of a business enterprise as a woman-owned business ownership. (5 NYCRR § 144.2(b)(5)). In pertinent part, the regulation states that “[w]here a . . . woman relied upon for certification obtains [her] ownership interest in a business enterprise through a transfer

from another person, such. . . woman must demonstrate that such transfer was supported by reasonable consideration. . .” (5 NYCRR § 144.2(b)(5)).

In this instance, the applicant, at the time of the application, stated that Ms. Hastings received shares of CAJ from her father, Mr. Fitzgerald, as part of Mr. Fitzgerald’s retirement plans. (DED Exhibit 1, p. 16). While Ms. Hastings admits to being gifted the shares, she also states that she was doing “much of the business operations” and that her father’s retirement plans include transferring “all or most of the ownership” to herself. (DED Exhibit 1, p. 16). Applicant also admits that the original plan was to transfer 50% of the ownership to her, but their CPA recommended that the transfer be for 51%, instead of 50%, so that they could consider applying for certification. (DED Exhibit 1).

On appeal, Ms. Hastings further explains her decision-making process in choosing to apply for certification as a WBE. (APP Exhibit A). While she admits receiving advice from an accountant, she also states that she took her time in completing the application, and considered it carefully before applying. (DED Exhibit 1 and APP Exhibit A). The application is also clear that the succession plan for the business enterprise is for Ms. Hastings to eventually receive most or all of the company shares, and that this transfer was the first step in her father’s retirement process. (DED Exhibit 1). The explanation, provided in the letter appeal, does not present new evidence but clarifies the decision-making process of the applicant business in seeking certification, and thus is admissible. (See *Scherzi Systems, supra*). In this instance, it is clear that the transfer of ownership was not made solely for the purpose of securing certification, but on the advice of an accountant.

Based on the foregoing, I find that the Division did not have substantial evidence in its finding that ownership of CAJ was transferred solely for the purpose of the business enterprise seeking certification as a WBE.

CONCLUSION

CAJ 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) was not based on substantial evidence. CAJ did however, meet its burden with respect to the eligibility criteria at 5 NYCRR § 144.2(b)(5).

RECOMMENDATION

The Division's determination to deny Capital Area Janitorial, LLC's application for certification as a woman-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of Capital Area Janitorial, LLC
 DED File ID No. 70315
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal Submission with Exhibits	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed by Written Appeal	Y	Y
DED 5	Narrative re: Capital Contribution	Y	Y
DED 6	Resume of Brenda Hastings, Version 1	Y	Y
DED 7	Resume of Brenda Hastings, Version 2	Y	Y