

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

In the Matter

- of -

the Application of Casarsa Construction Supply Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 55186

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 23, 2024

This matter considers the written appeal by Casarsa Construction Supply Inc. (“CCSI” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On December 29, 2022, Ms. Mary Casarsa, as President, applied on behalf of CCSI for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 6, 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 business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. CCSI timely filed a Request to Appeal on August 3, 2023 (APP Exhibit A/DED Exhibit 3).
4. A notice to proceed via written appeal was sent to CCSI on August 17, 2023 (DED Exhibit 4).

5. CCSI filed its written appeal by letter dated September 1, 2023, with attachments, from its attorney, Kinsey O'Brien, Esq. of Hodgson Russ LLP (APP Exhibit B).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated December 13, 2023, and a brief of Karen Bernstein Esq., counsel for the Division, dated December 18, 2023.

FINDINGS OF FACT

7. CCSI is a building material supply dealer and distributor (DED Exhibit 1).
8. The application states that Ms. Mary Casarsa is President and has a 75% ownership interest. Her daughter, Ms. Anna Casarsa, is Vice President and has a 25% ownership interest. Anna Casarsa was gifted her shares from her father and Mary Casarsa's husband, Mr. Thomas Casarsa, on January 15, 2021 (DED Exhibit 1). The 2019 – 2022 business tax returns reflect that Mary Casarsa owns 80% of the common stock (DED Exhibits 7, 8, 9 and 10).
9. The application states that Mary Casarsa paid \$ [REDACTED] for her shares (DED Exhibit 1). The application also states that Mary Casarsa made a capital contribution of \$ [REDACTED] from her personal savings on February 12, 2009 (DED Exhibit 1). Mary Casarsa also claimed to have paid \$ [REDACTED] in expenses for the business prior to the business checking account being established (DED Exhibit 11). Applicant stated "The Capital Contributions made to the company in 2009, were from my personal checking account. No other Capital Contributions have been made in the past 7 years..." (DED Exhibit 11).
10. Applicant did not allege: (1) that a \$ [REDACTED] loan from Mary Casarsa to the business was a capital contribution, and (2) that two loans from C. S. Behler, Inc. ("Behler") were capital contributions (APP Exhibit B/DED Exhibits 1, 3, 11 and 12,).

11. CCSI and Behler are “two non-competing firms in the same industry.” (APP Exhibit B/ DED Exhibit 3). Mary Casarsa’s husband, Thomas Casarsa, is an owner of C. S. Behler, Inc. (DED Exhibit 1).
12. CCSI received two loans from Behler - one for \$ [REDACTED] in April 2009 and another for \$ [REDACTED] in 2010 (DED Exhibit 1).
13. CCSI leases an office, garage, and 2,466 square feet of warehouse space from Behler. The lease dated April 1, 2021, was for a term of two years at the rate of \$205 per month (DED Exhibit 15). An updated “Lease Agreement (Renewal)” dated April 1, 2023, was for a term of two years and maintained the lease payment at \$ [REDACTED] per month (DED Exhibit 14). A lease amendment dated July 17, 2023, increased the lease payment from \$ [REDACTED] per month to \$ [REDACTED] per month (APP Exhibit B/ DED Exhibit 3).

APPLICABLE LAW

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

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(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 CCSI for recertification 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. Prior Certification

The Division acknowledges that CCSI was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify CCSI based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, CCSI had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the December 29, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. 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 MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24,

2015 (Final Order 17-28, dated 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).

It is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution.” *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

The application states that Mary Casarsa paid \$300 for her shares on February 15, 2009 (DED Exhibit 1). Applicant on appeal correctly states that the Stock Record Book reflects this transaction (APP Exhibit B/DED Exhibit 3). However, applicant provided no documentary evidence showing the source of the funds or a deposit into the business bank account.

The application also states that Mary Casarsa made a capital contribution of \$ [REDACTED] from her personal savings on February 12, 2009 (DED Exhibit 1). Applicant submitted an M&T Bank deposit slip dated February 13, 2009, showing a \$ [REDACTED] deposit into a bank account ending in [REDACTED] (DED Exhibit 6) and a screenshot showing a credit of \$ [REDACTED] into a bank account ending in [REDACTED] and a debit of \$ [REDACTED] from an account ending in [REDACTED], both on February 13, 2009. In a prior application dated February 9, 2014, an M&T Bank statement for the account ending in [REDACTED] reflects that this account was a joint account held by Mary and Thomas Casarsa (DED Exhibit 11). Therefore, the \$ [REDACTED] deposit on February 13, 2009, came from their joint account. Capital contributions from a jointly owned bank account does not meet the requirement that the

contribution came from assets solely belonging to the woman-owner. *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

Mary Casarsa also claimed to have paid \$ [REDACTED] in expenses for the business prior to the business checking account being established (DED Exhibit 11). Applicant stated “The Capital Contributions made to the company in 2009, were from my personal checking account. No other Capital Contributions have been made in the past 7 years...” (DED Exhibit 11). However, applicant submitted no documentation to show proof of the expenditures or the source of the funds.

On appeal, applicant argues that Mary Casarsa “continuously contributes her knowledge, expertise, and experience to, develops intellectual property for, and runs the day-to-day operation of CCSI... The [Denial] Determination seemingly disregards the extensive evidence of [Mary Casarsa’s] many other contributions beyond start-up capital, including extensive expertise and day-to-day “sweat equity” in running CCSI’s operations.” (APP Exhibit B/ DED Exhibit 3). This argument that expertise should be considered as a capital contribution was not before the Division at the time of the application and is new evidence which will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Also, there is no evidence that Mary Casarsa’s contribution of expertise was uncompensated, specialized and directly applicable to one or more critical aspects of the operation of the business, and there is no documented valuation of the claimed expertise. (5 NYCRR §144.2(b)(2)(i)(4)) See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022; *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016 (applicant provided no valuation of owner’s contributions of expertise. Without such information, the Division was unable to ascertain whether the owner’s contribution was proportionate).

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

III. Control

The Division found that CCSI is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers "whether the business enterprise receives tangible benefits as a result of a connection to another entity...". 5 NYCRR §144.2(e)(3). The Division consistently denies MWBE certification where the business does not operate independently. See *Husted Concrete Products Co., Inc.*, Recommended Order dated December 1, 2020, Final Order 20-13 dated December 23, 2020 (applicant denied certification where firm leased space from an entity owned by the husband, for which rent was not paid for two years).

Mary Casarsa's husband, Thomas Casarsa, a former shareholder of CCSI, is an owner of C. S. Behler, Inc. ("Behler") (DED Exhibit 1).

CCSI received two loans from Behler - one for \$ [REDACTED] in April 2009 and another for \$ [REDACTED] in January 2010 (DED Exhibit 1). CCSI received a tangible benefit through these start-up loans due to Mary Casarsa's affiliation with Behler.

Both CCSI and Behler are engaged in the distribution and sale of construction and building materials. CCSI and Behler are "two non-competing firms in the same industry." (APP Exhibit B/ DED Exhibit 3). Applicant states there are "occasions that warrant a mutual relationship to a customer, for example if the job itself requires the supplier to have an Erie County WBE/DBE status, henceforth, hindering [Behler's] ability to supply materials." (DED Exhibit 14). This reflects that CCSI benefits through added business by Behler's lack of WBE/DBE status.

CCSI leases an office, garage, and 2,466 square feet of warehouse space from Behler. The lease dated April 1, 2021, was for a term of two years at the rate of \$ [REDACTED] per month (DED Exhibit 15). An updated “Lease Agreement (Renewal)” dated April 1, 2023, was for a term of two years and maintained the lease payment at \$ [REDACTED] per month (DED Exhibit 14). That would have covered four years of rent with no increase.

The Division’s denial determination states “Monthly rent payments are at the rate of \$ [REDACTED], which calls into question fair market value. This raises concerns that Mary Casarsa, the owner relied upon for certification, receives preferential rent benefits as a result of her affiliation with her husband’s company.” (DED Exhibit 2). A lease amendment dated July 17, 2023, increased the lease payment from \$ [REDACTED] per month to \$ [REDACTED] per month (APP Exhibit B/ DED Exhibit 3). The lease amendment was signed 11 days after the date of the denial determination and only three months into the April 1, 2023, lease which had a much more favorable lease payment that would otherwise have remained in effect until April 1, 2025. This substantial increase in lease payment right after the denial determination reflects that the initial lease rate was a preferential rate based on Mary Casarsa’s affiliation with her husband’s company.

On appeal, applicant argues that the lease with Behler does not “undermine CCSI’s independence”, and that it is good business to take advantage of a good rent rate (APP Exhibit B/ DED Exhibit 3). This argument is unpersuasive.

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

CONCLUSION

CCSI did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2) 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 CCSI's application for recertification as a woman-owned business enterprise.

In the Matter of Casarsa Construction Supply Inc.
DED File ID No. 55186
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	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Stock-Related Documents	Y	Y
DED 6	Documents Submitted in Support of Capital Contribution	Y	Y
DED 7	2019 CCSI Taxes	Y	Y
DED 8	2020 CCSI Taxes	Y	Y
DED 9	2021 CCSI Taxes	Y	Y
DED 10	Q&A Responses	Y	Y
DED 11	Documents Submitted in Support of Capital Contribution (Prior Application)	Y	Y
DED 12	Q&A Responses	Y	Y
DED 13	2018 Recertification Application	Y	Y
DED 14	Q&A Responses	Y	Y
DED 15	Lease Agreement	Y	Y