

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

In the Matter

- of -

the Application of Dan's Snowplowing, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 66535

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 9, 2023

This matter considers the written appeal by Dan’s Snowplowing, LLC, (“Dan’s Snowplowing” 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 December 31, 2018, Ms. Rachel Bliemeister, as President, applied on behalf of Dan’s Snowplowing for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On November 12, 2021, 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) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (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); and

(d) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).

3. Dan's Snowplowing timely filed a Request to Appeal on December 22, 2021 (APP Exhibit 1).
4. Dan's Snowplowing submitted its written appeal by letter dated February 1, 2022, with Appeal Petition from its attorney, Elise Cassar, Esq. (APP Exhibit 2). By letter dated June 27, 2022, attorney Daniel Sarzynski advised that his office has been substituted as counsel for Dan's Snowplowing (APP Exhibit 3).
5. The Division filed an Affidavit of Kathleen Slatin, Senior Certification Analyst, dated July 11, 2023, and a brief of Laurel Wedinger-Gyimesi Esq., counsel for the Division, dated July 21, 2023.

FINDINGS OF FACT

6. Dan's Snowplowing is engaged in the business of light commercial construction: sitework, including asphalt and concrete operations, concrete foundations and flatwork, and demolition (DED Exhibit 1).
7. Ms. Rachel Bliemeister is the President and has a 90% ownership interest. Mr. Timothy Such is the Office Manager and has a 10% ownership interest (DED Exhibit 1).
8. Applicant's business began on November 19, 2010. Mr. Daniel Benesh was the original owner. The application states that on September 10, 2014, Ms. Bliemeister contributed ██████ to purchase the business from Mr. Benesh (DED Exhibit 1). The company's 2015 tax returns show that in 2015, it had gross receipts of ██████ (DED Exhibit 6).

9. In 2019, Ms. Bliemeister received [REDACTED] in wages from outside employment, and no wages from Dan's Snowplowing, while Mr. Timothy Such received [REDACTED] in wages from the business. (DED Exhibit 10). That same year, the business reported gross receipts of over [REDACTED] and gross profit of over [REDACTED] (DED Exhibit 19). Ms. Bliemeister listed her occupation as hairstylist on her 2019 tax return (DED Exhibit 10).
10. In 2020, Ms. Bliemeister received [REDACTED] in wages from the business and [REDACTED] from outside employment, while Mr. Such received [REDACTED] in wages from the business (DED Exhibit 10). That same year, the business reported gross receipts of over [REDACTED] and gross profit of over [REDACTED] (DED Exhibit 19). Ms. Bliemeister listed her occupation as hairstylist on her 2020 tax return (DED Exhibit 10).
11. Ms. Bliemeister was employed as a hairstylist at the time of the Application and continued to work as a hairstylist in 2019 and 2020 (DED Exhibits 9 and 10). She is responsible for negotiating bonding and insurance, hiring, and firing, managing and signing payroll (DED Exhibit 1). Ms. Bliemeister/Dan's Snowplowing maintain licenses for light commercial contracting and for grade three demolition (DED Exhibit 12),
12. Mr. Such has been involved in the concrete industry since 1981. He worked as a foreman, superintendent, office manager and project manager. He owned his own company from 1988 to 2008, and has been working at Dan's Snowplowing since 2010 (DED Exhibit 13). He is responsible for estimating, preparing bids, supervising field operations, and negotiating contracts (DED Exhibit 1).

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.

5 NYCRR §144.2(b)(3) states as follows:

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

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(c) states as follows:

Operation. Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Competence in the industry. Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Operational decisions. Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
 - (i) The products or services the business enterprise provides to clients; and
 - (ii) The means by which the business enterprise obtains contracts or orders.

- (3) Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 Dan's Snowplowing 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).

Ms. Bliemeister purchased the business for [REDACTED] on September 10, 2014. The certification application lists assets of the business valued at [REDACTED] and gross receipts in 2015 of [REDACTED] (DED Exhibit 1). Based upon the asset valuation and the 2015 gross receipts, the [REDACTED] capital contribution to purchase the business was not proportionate to her ownership interest at the time of purchase.

Applicant argues on appeal that Ms. Bliemeister made additional capital contributions (APP Exhibit 2). She stated that she personally purchased a building for the business. However, evidence of the alleged purchase was not submitted. She further alleged that she personally guaranteed business loans and lines of credit on behalf of the business. These documents were not before the Division at the time of the certification application and therefore will not be considered. Applicant failed to clearly identify, quantify, and explain her capital contribution. See *In the Matter of Scherzi Systems*, Final Order 19-16 dated September 6, 2019; *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

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

5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3d Dept. 1995), the Court found that the Division's review of tax returns provided substantial evidence to support the Division's consideration of whether a woman-owned business enterprise meets the eligibility criteria.

The tax documents submitted with the application show that in 2019 and 2020, Ms. Bliemeister listed her occupation on her tax returns as hairstylist. In 2019, Ms. Bliemeister received no wages from Dan's Snowplowing and [REDACTED] from outside employment, while Mr. Such received wages of [REDACTED]. In 2020, Ms. Bliemeister received wages of [REDACTED] while Mr. Such received wages of [REDACTED] (DED Exhibits 10, 19 and 20).

The tax documents submitted provide substantial evidence that Ms. Bliemeister did not share in the risks and profits of the business in proportion to her ownership interest.

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things". In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the

denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Bliemeister does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the industry (DED Exhibits 1 and 9). The critical functions of the business are demolition work, commercial construction, and sitework (DED Exhibit 1). Although Ms. Bliemeister submitted documents reflecting that she/Dan's Snowplowing have licenses for light commercial contracting and for grade three demolition (DED Exhibit 12), Mr. Such is responsible for performing estimating, preparing bids, negotiating contracts, and supervising field operations (DED Exhibit 1). He performs project procurement, contracting and billing, quality control compliance through project completion and closeout, estimating and bidding. He acts as senior project manager and director of field operations, performs equipment management and procurement, and assists with managing the workforce (DED Exhibits 8, 13 and 14). Ms. Bliemeister's resume reveals that she has no prior experience in the industry and has been a hairstylist (DED Exhibit 9). She does not have the training or experience in the industry necessary to supervise the work of the employees.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR §144.2(c)(3). Ms. Bliemeister's resume reflects that at the time of the application, she was employed as a hairstylist. Her tax returns identify her occupation as a hairstylist through the year 2020 (DED Exhibits 9, 10, 17 and 18). She was working for years as a hairstylist after her purchase of the business. Ms. Bliemeister stated that Mr. Such was devoting 40-50 hours per week, performing estimating and bidding, senior project management, and acting as director of field

operations (DED Exhibit 8). This evidence supports the conclusion that he was operating the business and devoting more time than Ms. Bliemeister. The denial on the ground of time devoted to the business was based on substantial evidence.

CONCLUSION

Dan's Snowplowing 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)(3), 144.2(c)(1) and 144.2(c)(3) 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 Dan's Snowplowing's application for certification as a woman-owned business enterprise.

In the Matter of Dan's Snowplowing, LLC
DED File ID No. 66535
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant's Article of Incorporation	Y	Y
DED 4	Sales Agreement and Receipt	Y	Y
DED 5	Letter dated 10/26/21 Re: Information concerning capital contribution	Y	Y
DED 6	Applicant's 2015 Tax Returns	Y	Y
DED 7	Bank Signatory Card	Y	Y
DED 8	Letter dated 1/25/21	Y	Y
DED 9	Resume of Rachel Bliemeister	Y	Y
DED 10	Bliemeister Personal Tax Returns 2019/2020	Y	Y
DED 11	Letter dated 11/5/21	Y	Y
DED 12	Licenses for light commercial/demolition	Y	Y
DED 13	Resume of Timothy Such	Y	Y
DED 14	Second Letter dated 10/26/21 Re: employee job duties	Y	Y
DED 15	Lease Commencing 1/1/18	Y	Y
DED 16	Applicant's 2016 Tax Returns	Y	Y
DED 17	Bliemeister 2016 Tax Returns	Y	Y

DED 18	Bliemeister 2017 Tax Returns	Y	Y
DED 19	Applicant's 2019/2020 Tax Returns	Y	Y
DED 20	Applicant's 2019 Select W-2's	Y	Y
DED 21	Applicant's 2020 Select W-2's	Y	Y
APP 1	Request to Appeal	Y	Y
APP 2	Written Appeal submission	Y	Y
APP 3	Substitution of Counsel letter	Y	Y