

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

In the Matter

- of -

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

NYS DED File ID No. 67771

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 27, 2023

This matter considers the written appeal by Enterprise Solution Providers, Inc. (“ESP” 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 May 19, 2020, Ms. Sarah Elliott, as President, applied on behalf of ESP for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On May 17, 2022, 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); and
 - (c) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under

5 NYCRR §144.2(d)(2).

3. ESP timely filed a Request to Appeal on August 4, 2022 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to ESP on October 5, 2022 (DED Exhibit 3).
5. ESP submitted its written appeal by letter dated November 30, 2022. (APP Exhibit 2).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated June 14, 2023, and a brief of William Chen Esq., counsel for the Division, dated June 15, 2023.

FINDINGS OF FACT

7. ESP is a “full-service boutique IT consultancy that provides highly skilled business and technical consulting and “specializes in strategic analysis, design, development and deployment services for custom and commercially available computer systems” (DED Exhibit 1).
8. Ms. Sarah Elliott is the President/CEO and has a 51% ownership interest. Mr. Joseph Alfieri is the Vice President and has a 49% ownership interest (DED Exhibit 1).
9. ESP was founded by Frank Colaccia on March 10, 1997. There was a total of 900 shares of common stock issued and outstanding. Mr. Alfieri purchased 459 shares on January 19, 1998. ESP purchased Mr. Colaccia’s outstanding shares on September 22, 1999 and those shares were retired. On February 3, 2020, Mr. Alfieri transferred 234 of his 459 shares to Ms. Elliott for no consideration. The Application stated that Ms. Elliott received the shares due to her marriage to Mr. Alfieri and as Ms. Elliott “has taken more of a leadership role in the company over the last five years” (DED Exhibits 1 and 6).
10. All of the managerial operations are shared between Ms. Elliott, Mr. Alfieri, Barbara Rizzo the CFO and Charles Roman the Lead Recruiter (DED Exhibit 1).

11. The contracts for services provided by ESP as part of the Application show that Ms. Rizzo and Mr. Alfieri are the persons signing the contracts on behalf of ESP (DED Exhibits 6, 7, 8, 11 and 12).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states 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.

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

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)(2) states as follows:

Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 ESP 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). Accordingly, applicant’s attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

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.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). 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).

On February 3, 2020, Mr. Alfieri transferred 234 shares to Ms. Elliott for no consideration. The Application stated that Ms. Elliott received her shares due to her marriage to Mr. Alfieri and as Ms. Elliott “has taken more of a leadership role in the company over the last five years” (DED Exhibit 1). The contribution was therefore not made from assets belonging solely to Ms. Elliott.

Applicant argues on appeal that Ms. Elliott contributed her expertise (APP Exhibit 2). No proof was submitted to show that the expertise was uncompensated, specialized and directly

applicable to the operation of the business, and no account of the fair market value of the expertise was documented. (5 NYCRR §144.2(b)(2)(i)(4))

The Division's determination to deny the application on the basis that ESP failed to demonstrate that Ms. Elliott made contributions to ESP 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. Elliott obtained her ownership interest from Mr. Alfieri. She made no capital contribution for her ownership interest (DED Exhibit 1).

II. Control

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

The Application states that the managerial functions of ESP are shared by Ms. Elliott, Mr. Alfieri, Barbara Rizzo and Charles Roman (DED Exhibit 1). The contracts provided by ESP were signed by Barbara Rizzo and Mr. Alfieri (DED Exhibits 6, 7, 8, 11 and 12). Ms. Elliott's signature did not appear on any of the contracts. Therefore, she did not demonstrate appropriate control of the business as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

ESP 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) and 144.2(d)(2) 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 ESP's application for certification as a woman-owned business enterprise.

In the Matter of Enterprise Solution Providers, Inc.
DED File ID No. 67771
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 | Notice to Proceed Via Written Appeal | Y | Y |
| DED 4 | Business Capitalization Narrative | Y | Y |
| DED 5 | 2/3/2020 Board of Directors Meeting Minutes | Y | Y |
| DED 6 | BMO SOW Purchase Order | Y | Y |
| DED 7 | RBCCM MSA | Y | Y |
| DED 8 | MSSG Task Order | Y | Y |
| DED 9 | S. Elliott 2018 Personal Tax Return | Y | Y |
| DED 10 | S. Elliott 2019 W-2 | Y | Y |
| DED 11 | BMO SOW 2 | Y | Y |
| DED 12 | SBA Loan Guarantee | Y | Y |
| DED 13 | ESP 2018 Federal Tax Return | Y | Y |
| DED 14 | J. Alfieri 2019 Personal Tax Return | Y | Y |
| DED 15 | Duties of ESP Team Members | Y | Y |
| DED 16 | ESP 2019 Federal Tax Return | Y | Y |
| DED 17 | S. Elliott Resume | Y | Y |
| DED 18 | J. Sywilok Resume | Y | Y |
| APP 1 | Request to Appeal | Y | Y |
| APP 2 | Written Appeal Submission | Y | Y |