

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

In the Matter

- of -

the Application of Gothic MBE Corporation
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61282

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 28, 2023

This matter considers the written appeal by Gothic MBE Corporation, (“Gothic MBE” 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 minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On October 8, 2018, Mr. Jerry Almonacid, as President, applied on behalf of Gothic MBE for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On May 27, 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) Minority group members or women are not the highest-ranking officer(s) of the business and do not control the Board of Directors, as required under 5 NYCRR §144.2(d)(1); and
 - (c) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Gothic MBE timely filed a Request to Appeal on July 15, 2022 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Gothic MBE on October 5, 2022 (DED

Exhibit 3)

5. No further documentation was received from Gothic MBE.
6. The Division filed an Affidavit of Glenn Butler, Certification Director, dated August 4, 2023, and a brief of Anequa Pond, Esq., counsel for the Division, dated August 14, 2023.

FINDINGS OF FACT

7. Gothic MBE is engaged in the business of home building, renovation, framing, flooring, siding, millwork, and various other construction related work (DED Exhibit 1).
8. Mr. Jerry Almonacid is the President and has a 51% ownership interest. Mr. Steve Kastan is the Secretary/Treasurer and has a 49% ownership interest. (DED Exhibit 1).
9. Mr. Kastan owns two other businesses: Gothic Construction Corporation and Painting Tech America (DED Exhibit 8). Mr. Almonacid previously worked for Mr. Kastan at Gothic Construction Corporation from 2012 to 2017. He was still working at Gothic Construction Corporation when he and Mr. Kastan started Gothic MBE in August 2015 (DED Exhibits 1 and 7).
10. The certification application alleges that Mr. Almonacid contributed \$ [REDACTED] in expertise as his capital contribution (DED Exhibit 1).
11. Mr. Almonacid and Mr. Kastan jointly handle financial decisions, negotiating insurance, purchasing equipment and supplies, managing and signing payroll, negotiating contracts and are both signatories for business accounts (DED Exhibit 1).
12. Article III, Section I of the Bylaws state that the business is managed “under the direction of its Board of Directors”. Article III, Section 6 states that “A majority of the Directors currently holding office shall constitute a quorum for the transaction of business at any meeting of the Board of Directors”. Article II, Section 10.2 states that every shareholder is

entitled to one vote. (DED Exhibit 5) Gothic MBE's Shareholder Agreement gives each director, Mr. Almonacid and Mr. Kastan, one equal vote (DED Exhibit 6).

13. Gothic Construction Corporation, which is 100% owned by Mr. Kastan, made a number of loans to Gothic MBE totaling over \$ [REDACTED]. Gothic MBE was "struggling to stand on its own" and received financial assistance from Gothic Construction Corporation for Gothic MBE to operate. Gothic MBE made partial repayments, with a loan balance of over \$ [REDACTED] (DED Exhibits 4, 9, 10 and 11).

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(d)(1) states as follows:

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 considered 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 Gothic MBE for certification as an MBE 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 minority-owner's contribution came from assets belonging solely to the minority-owner. Given this criterion, the Division consistently denies applications for MBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority-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 Application alleges that Mr. Almonacid contributed \$ [REDACTED] in expertise as his capital contribution for his 51% ownership interest (DED Exhibit 1). Applicant failed to submit any proof of this contribution. Applicant argued on appeal that Mr. Almonacid's contributions include 300 hours in time for a project that Gothic MBE contracted, the use of his van, his equipment, and his Spanish speaking ability. (APP Exhibit 1). Without evidence of an agreement detailing the expertise and the dollar value assigned to that expertise, the claimed expertise contribution cannot be considered. See NYCRR §144.2(b)(2)(i)(4) and *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022. Applicant failed to clearly identify, quantify, and explain his capital contribution (APP Exhibit 2). 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).

Gothic Construction, which is 100% owned by Mr. Kastan, made several loans to Gothic MBE totaling over \$ [REDACTED]. Gothic MBE made partial repayments, with a loan balance of over \$ [REDACTED] (DED Exhibits 4 ,9, 10 and 11). Loans do not constitute contributions to the business. They are viewed as an extension of credit in anticipation of repayment. See *Matter of PamTen, Inc.*, Recommended Order dated June 26, 2018, Final Order 18-38 dated July 30, 2018.

The Division's determination to deny the application on the basis that Gothic MBE failed

to demonstrate that Mr. Almonacid made contributions to Gothic MBE in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

II. Control

Mr. Almonacid is the President and highest-ranking officer of Gothic MBE (DED Exhibit 1). 5 NYCRR §144.2(d)(1) requires that the minority-owner must also control the Board of Directors. Article III, Section I of the Bylaws state that the business is managed “under the direction of its Board of Directors”. Article III, Section 6 states that “A majority of the Directors currently holding office shall constitute a quorum for the transaction of business at any meeting of the Board of Directors”. Article II, Section 10.2 states that every shareholder is entitled to one vote (DED Exhibit 5). Gothic MBE’s Shareholder Agreement gives each director, Mr. Almonacid and Mr. Kastan, one equal vote (DED Exhibit 6). Mr. Almonacid, as one of two Directors, where each has an equal vote, does not have control of the Board of Directors. Also, the managerial functions such as financial decisions, purchasing equipment/sales, negotiating contracts and insurance, and managing and signing payroll, are shared between the owners (DED Exhibit 1).

The Division further found that Gothic MBE 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). Mr. Almonacid previously worked for Mr. Kastan at Gothic Construction Corporation from 2012 to 2017. He was still working at Gothic Construction Corporation when he and Mr. Kastan started Gothic MBE in August 2015 (DED Exhibits 1 and 7). Gothic MBE has been funded by Gothic Construction Corporation through the issuance of several loans to Gothic MBE (DED Exhibits 4, 9, 10 and 11). Mr. Almonacid stated that Gothic MBE was “struggling to stand on its own” and

received financial assistance from Gothic Construction Corporation for Gothic MBE to operate (DED Exhibit 4).

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

CONCLUSION

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

In the Matter of Gothic MBE Corporation
 DED File ID No. 61282
 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	Applicant's February 5, 2021 letter	Y	Y
DED 5	Applicant's Bylaws	Y	Y
DED 6	Applicant's Shareholder Agreement	Y	Y
DED 7	Mr. Jerry Almonacid's Resume	Y	Y
DED 8	Mr. Steve Kastan's Resume	Y	Y
DED 9	Applicant's 2015 Loan Documents	Y	Y
DED 10	Applicant's 2016 Loan Documents	Y	Y
DED 11	Applicant's 2017 Loan Documents	Y	Y
APP 1	Request to Appeal	Y	Y