

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

In the Matter

- of -

the Application of J. Bognar Construction, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62322

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 25, 2024

This matter considers the written appeal by J. Bognar Construction, LLC, (“JBC” 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 1, 2021, Ms. Jennifer Bognar, as President, applied on behalf of JBC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 26, 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) 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).
3. JBC timely filed a Request to Appeal on June 13, 2023 (APP Exhibit A/ DED Exhibit 9).
4. A notice to proceed via written appeal was sent to JBC on June 21, 2023 (DED Exhibit 10).

5. JBC filed its written appeal brief with attachments from its attorney, Kevin O'Brien, Esq. dated July 17, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated January 26, 2024, and a brief of JaMone Turner Esq., counsel for the Division, dated January 30, 2024.

FINDINGS OF FACT

7. JBC is engaged in the business of providing earthworks services, including excavation, grading, land clearing, drainage, site preparation, underground tank removal, pneumatic rock drilling, culvert replacements, water line work, sewer line work, retaining/sea walls, and stream bank stabilization (DED Exhibit 1).
8. Ms. Jennifer Bognar is the President and has a 51% ownership interest. Mr. John Bognar III is a Member of JBC and has a 49% ownership interest. (DED Exhibit 1).
9. The application states that on May 16, 2014, Ms. Bognar made a capital contribution of \$█ in cash and Mr. Bognar made a capital contribution of \$█ in cash. Applicant stated "On May 16, 2012, I opened the commercial checking account for J. Bognar Construction, LLC. I deposited \$█ into that account. I contributed \$█ and Mr. Bognar contributed \$█." Applicant further stated, "Mr. Bognar and I [Ms. Bognar] both contributed equipment into the business, through shared marital assets." (DED Exhibit 1).
10. In 2020, Ms. Bognar received \$█ in wages and \$█ in distributions from JBC, while Mr. Bognar received \$█ in wages and \$█ in distributions and JBC employee, Jeffrey Steinhardt, received \$█ in wages (DED Exhibits 4 and 5).

11. In 2021, Ms. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions from JBC, while Mr. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions (DED Exhibits 6 and 7).

12. In 2022, Ms. Bognar received \$ [REDACTED] in wages from JBC, while Mr. Bognar received \$ [REDACTED], and JBC employees Kenneth Smith and Jeffrey Steinhardt received wages of \$ [REDACTED] and \$ [REDACTED], respectively (DED Exhibit 8).

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(b)(3) states in relevant part 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...

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 JBC 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 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 on May 16, 2014, Ms. Bognar made a capital contribution of \$█ in cash and Mr. Bognar made a capital contribution of \$█ in cash. Applicant stated “On May 16, 2012, I opened the commercial checking account for J. Bognar Construction, LLC. I deposited \$█ into that account. I contributed \$█ and Mr. Bognar contributed \$█.” Applicant provided a copy of a Citizens Bank statement dated May 16, 2014 – May 31, 2014, showing a deposit of \$█ was made on May 16, 2014 (DED Exhibit 1). However, applicant did not provide any documentation demonstrating that the \$█ she contributed was from her personal funds (DED Exhibit 1).

Applicant further stated, “Mr. Bognar and I [Ms. Bognar] both contributed equipment into the business, through shared marital assets.” (DED Exhibit 1). However, contributions from shared marital assets are not from assets solely belonging to the woman-owner, as required under 5 NYCRR §144.2(b)(2). 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).

Applicant argues on appeal that “The Division simply failed to include Jennifer’s expertise in its 5 NYCRR §144.2(b)(2) capital contribution analysis.” (APP Exhibit B). 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 Ms. Bognar’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 JBC failed to demonstrate that Ms. Bognar made capital contributions to JBC 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 reviewing W-2’s and K-1’s the woman owner was paid significantly less. Therefore, the Applicant’s arguments were deemed insufficient to overturn the Division’s determination that the woman owner does not share in the risks and profits of the business. The woman owner is not sharing in the risks and profits in proportion to her equity interest”).

In 2020, Ms. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions from JBC, while Mr. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions and JBC employee, Jeffrey Steinhardt, received \$ [REDACTED] in wages (DED Exhibits 4 and 5). In 2021, Ms. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions from JBC, while Mr. Bognar received \$ [REDACTED] in wages and \$ [REDACTED] in distributions (DED Exhibits 6 and 7). In 2022, Ms. Bognar received \$ [REDACTED] in wages from JBC, while Mr. Bognar received \$ [REDACTED], and JBC employees Kenneth Smith and Jeffrey Steinhardt received wages of \$ [REDACTED] and \$ [REDACTED], respectively (DED Exhibit 8).

Since Ms. Bognar received substantially less compensation than the male owner and non-qualifying employees at the time of the application, she did not share in the profits in proportion to her ownership interest (DED Exhibits 4, 5, 6, 7 and 8).

On appeal, applicant states, “At JBC, employees are W-2 wage earners that are paid for their time worked on various JBC projects that are chargeable to a client... the members, Jennifer and John, are paid W-2 wages only when JBC is required to do so for a project – work performed on public works projects that utilize a prevailing wage rate. These are not profits of JBC – they are expenses of JBC.” (APP Exhibit B). However, as stated above, the Division may rely upon wage

statements as substantial evidence for the determination that the woman-owner who makes substantially less than others within the company, does not share in the profits in proportion to her ownership interest. *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

On appeal, applicant states, "...the information on the K-1's regarding allocation of profits and losses is consistent with the percentage ownership set forth in the Operating Agreement, as required by NY CLS LLC §503." (APP Exhibit B). However, whether the amount of compensation Ms. Bognar received under JBC's Operating Agreement and/or New York State Limited Liability Company Law, is irrelevant. The fact that Mr. Bognar and other non-qualifying employees received more compensation than Ms. Bognar demonstrates that she does not share in the profits in proportion to her equity interest.

The Division's determination to deny the application on the basis that Integrity failed to demonstrate that Ms. Bognar shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

Applicant further argues on appeal that the Division violated its governing statute in failing to timely review the application and, in doing so, violated JBC's due process rights and that the Division's decision, therefore, should be set aside. (APP Exhibit B). However, time schedules are directory, not mandatory, and a delay in the procedures of a state agency does not violate a petitioner's rights unless there is a showing of substantial actual prejudice. See *Matter of Corning Glass Works v. Ovsanik*, 84 N.Y.2d 619, 623-625). Applicant has not established that there was a substantial actual prejudice in the claimed delay. As noted by the Division in its Brief, "Applicant was not prohibited from conducting business in New York or obtaining state contracts during the pendency of the application or appeal process."

CONCLUSION

JBC 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) and 144.2(b)(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 JBC's application for certification as a woman-owned business enterprise.

In the Matter of J. Bognar Construction, LLC
 DED File ID No. 62322
 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	Applicant's Citizen Bank Statement	Y	Y
DED 4	2020 Corporate Income Tax Returns	Y	Y
DED 5	2020 W-2 Forms	Y	Y
DED 6	2021 Corporate Income Tax Returns	Y	Y
DED 7	2021 Individual Income Tax Returns	Y	Y
DED 8	2022 W-2 Forms	Y	Y
DED 9	Request to Appeal	Y	Y
DED 10	Notice to Proceed Via Written Appeal	Y	Y