

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

**In the Matter**

**- of -**

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

**NYS DED File ID No. 70337**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**April 17, 2024**

This matter considers the written appeal by JVA Enterprise, Inc. (“JVA” 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 10, 2022, Ms. Debra Tuzze, as President, applied on behalf of JVA 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) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. JVA timely filed a Request to Appeal on May 26, 2023 (APP Exhibit A/ DED Exhibit 4).
4. A notice to proceed via written appeal was sent to JVA on May 30, 2023 (DED Exhibit 3).
5. No additional documentation was submitted by applicant.

6. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director, dated February 23, 2024, and a brief of Dennie Byam, Esq., counsel for the Division, dated February 22, 2024.

### **FINDINGS OF FACT**

7. JVA is engaged in the business of providing logistical consulting services and processing of the physical distribution of specialized freight (salt) trucking (DED Exhibit 1).
8. Ms. Debra Tuzze is the President and has a 100% ownership interest (DED Exhibit 1).
9. The application states that Ms. Tuzze contributed \$██████ cash on March 15, 2015, for 200 shares of common stock (DED Exhibit 1). The 2018, 2019, 2020 and 2021 business tax returns reflect “Capital Stock” of \$██████.
10. Applicant stated that it hires Tuzze Trucking and other trucking companies to handle its trucking needs. (DED Exhibit 14). Tuzze Trucking is owned by Ms. Tuzze’s spouse (DED Exhibit 1). Applicant listed 13 additional businesses that it contracts with as sub-contractors. (DED Exhibit 14). Applicant lists the three largest completed contracts were with Cargill (DED Exhibit 1). Applicant only provided rate sheets between JVA and Cargill (DED Exhibits 9, 10 and 11). No documentation was provided to show that JVA works with any other companies other than Cargill.
11. Applicant’s 2019 tax return reflects gross receipts totaling \$██████ and outsourced trucking expenses totaling \$██████ (DED Exhibit 7). Applicant’s 2020 tax return reflects gross receipts totaling \$██████ and outsourced trucking expenses totaling \$██████ (DED Exhibit 6). The 2021 tax return reflects gross receipts totaling \$██████ and outsourced trucking expenses totaling \$██████ (DED Exhibit 15).

## 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(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 JVA 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 Ms. Tuzze contributed \$[REDACTED] cash on March 15, 2015, for 200 shares of common stock (DED Exhibit 1). The 2018, 2019, 2020 and 2021 business tax returns reflect “Capital Stock” of \$[REDACTED]. Applicant submitted no documentation of the sources of her capital contribution, including documentation for the \$[REDACTED] capital stock and the initial \$[REDACTED] contribution that was purportedly paid in March 2015. Therefore, applicant has failed to substantiate the source of the capital contribution.

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

## II. Control

The Division found that JVA 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).

Where a company derives a significant majority of its revenue from one entity and reported that same entity as the only active contract at the time of the application, it is not operated as an

independent business. See *Matter of KI Direct LLC*, Recommended Order dated June 25, 2019, Final Order 18-37, dated July 30, 2018.

The critical functions of the business are freight hauling and providing logistical services, as well as the processing of the physical distribution of salt trucking over long distances (DED Exhibit 1). Applicant stated that it hires Tuzze Trucking and other trucking companies to handle its trucking needs. (DED Exhibit 14). Tuzze Trucking is owned by Ms. Tuzze's spouse (DED Exhibit 1). Applicant listed 13 additional businesses that it contracts with as sub-contractors. (DED Exhibit 14). Applicant lists the three largest completed contracts were with Cargill (DED Exhibit 1). Applicant only provided rate sheets between JVA and Cargill (DED Exhibits 9, 10 and 11). No documentation was provided to show that JVA works with any other companies other than Cargill.

Applicant's 2019 tax return reflects gross receipts totaling \$ [REDACTED] and outsourced trucking expenses totaling \$ [REDACTED] (DED Exhibit 7). Applicant's 2020 tax return reflects gross receipts totaling \$ [REDACTED] and outsourced trucking expenses totaling \$ [REDACTED] (DED Exhibit 6). The 2021 tax return reflects gross receipts totaling \$ [REDACTED] and outsourced trucking expenses totaling \$ [REDACTED] (DED Exhibit 15). JVA therefore derived approximately 97% of its revenue through work done by its subcontractors.

JVA is therefore reliant upon subcontractors to perform the revenue-generating critical functions of the business. Without the subcontractors, J&L would not be able to perform the critical functions of its business and is therefore not an independent business. See *Matter of A J Nesti Materials, LLC*, Recommended Order dated January 12, 2024, Final Order 24-02 dated February 22, 2024.

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

### **CONCLUSION**

JVA 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) 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 JVA's application for certification as a woman-owned business enterprise



In the Matter of JVA Enterprise, Inc.  
DED File ID No. 70337  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
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	Request to Appeal	Y	Y
DED 5	JVA Corporate 2021 Tax Returns	Y	Y
DED 6	JVA Corporate 2020 Tax Returns	Y	Y
DED 7	JVA Corporate 2019 Tax Returns	Y	Y
DED 8	JVA Corporate 2018 Tax Returns	Y	Y
DED 9	JVA/Cargill Rate Agreement - 5/6/2023	Y	Y
DED 10	JVA/Cargill Rate Agreement – 6/9/2017	Y	Y
DED 11	JVA/ Cargill Rate Agreement – 5/14/2018	Y	Y
DED 12	Broome Bituminous Products, Inc. – 10/31/2019	Y	Y
DED 13	NBT Bank October 2017 Statement	Y	Y
DED 14	May 2022 Narrative Responses	Y	Y
DED 15	Debra Tuzze 2021 JVA Enterprise W-2	Y	Y