

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

In the Matter

- of -

the Application of Joseph A. LaCatena General Contractor LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70219

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
May 6, 2024

This matter considers the written appeal by Joseph A. LaCatena General Contractor LLC (“JAL” 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 11, 2022, Ms. Regina LaCatena, as CEO, applied on behalf of JAL for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 15, 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);
 - (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) 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);

- (d) 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);
 - (e) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and
 - (f) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. JAL timely filed a Request to Appeal on September 6, 2023 (APP Exhibit 1, DED Exhibit 3).
 4. A notice to proceed via written appeal was sent to JAL on September 8, 2023 (DED Exhibit 4).
 5. JAL submitted its written appeal by letter dated October 7, 2023, with attachments, from its attorney, Sergio A. Saravia. (APP Exhibit 2).
 6. The Division filed an Affidavit of Abdul Karim Bah, Associate Certification Director, dated February 27, 2024, and a brief of Kyle Satchell Esq., counsel for the Division, dated February 28, 2024.

FINDINGS OF FACT

7. JAL is a professional service company specializing in construction/carpentry services, including framing, flooring, poured concrete, roofing, siding, heating, electric, drywall and insulation (DED Exhibit 1).

8. The application provides that Ms. Regina LaCatena is the President and has a 51% ownership interest. Mr. Joseph LaCatena is a Manager and has a 49% ownership interest (DED Exhibit 1).
9. The application states that Ms. LaCatena and Mr. LaCatena each contributed \$■■■ cash to the business on May 5, 2002. (DED Exhibit 1). Applicant stated, “When we started this business back in 2002 we each contributed \$■■■ as noted in our “Consent of Managers”” (DED Exhibit 5). The consent states that Joseph A. LaCatena and Regina LaCatena, as joint tenants, purchased ten (10) units of the Company’s membership interest for \$■■■ cash (DED Exhibit 6).
10. On January 15, 2018, the shares were reallocated. Regina LaCatena was issued 51 shares and Joseph LaCatena was issued 49 shares (DED Exhibit 7). On April 6, 2023, Joseph LaCatena transferred his 49% ownership interest to Regina LaCatena for “monetary consideration”. The amount of the monetary consideration was not stated (DED Exhibit 8).
11. The Operating Agreement dated April 6, 2023, states that Regina LaCatena holds 100% membership interest. The amount of capital contribution is blank (DED Exhibit 9).
12. A narrative provided with the application states, “Joseph LaCatena was the only person issued a W-2 from the business in 2021 and 2022.” (DED Exhibit 5).
13. The 2021 tax return shows that Regina LaCatena received Ordinary business income of \$■■■ and distributions of \$■■■, while Joseph LaCatena received ordinary business income of \$■■■ and distributions of \$■■■ and wages of \$■■■ (DED Exhibits 10 and 12). The 2022 tax return reflects that Regina LaCatena received ordinary business income of \$■■■ and distributions of \$■■■, while Joseph LaCatena received ordinary business

income of \$██████, distributions of \$██████ and wages of \$██████ (DED Exhibits 11 and 13).

14. Regina LaCatena is the sole individual responsible for managing and signing payroll and Joseph LaCatena is the sole individual responsible for estimating and supervising field operations. All other managerial operations are shared between Regina LaCatena and Joseph LaCatena (DED Exhibit 1).

15. A narrative provided with the application states that Regina LaCatena is the Executive Assistant for the Commissioner of Mental Health in Orange County, New York. Her work hours there are 40 hours per week, Monday -Friday. Applicant states “This position does not conflict with the day-to-day operations of my construction business, all work/tasks necessary is accomplished in the evenings and weekends. My husband and business partner manages the jobs/sites, estimates the jobs, orders materials needed and meets with the customers.” (DED Exhibit 5).

16. Ms. LaCatena’s resume reflects that her responsibilities include reviewing plans, communicating with the Project Manager, managing subcontractors, conducting meetings, scheduling jobs, payroll, accounts payable/receivable, banking and scheduling appointments (DED Exhibit 14).

17. Mr. LaCatena’s resume reflects that he is the Project Manager. His responsibilities include managing day to day operations, project estimating, meeting with customers, ordering supplies/materials, working with subcontractors, and the lead carpenter handling the work on all construction sites. He was previously employed as a Carpenter from 1978 – 2002, where job included framing, roofing, siding, tile, decks, painting, interior trim, light electrical, and light plumbing (DED Exhibit 15).

18. The 2021 and 2022 individual tax returns show Ms. LaCatena's occupation as "Management" and Mr. LaCatena's occupation as "Carpenter." (DED Exhibits 16 and 17).
19. JAL is operating primarily using subcontractors, although applicant states that it did not issue any 1099s to the subcontractors in 2021 and 2022. Applicant submitted twelve (12) subcontractor agreements with invoices (DED Exhibit 20).
20. The application lists the number of JAL employees as zero (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.

- (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 or 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 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 in relevant part 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) 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) 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.

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 JAL 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).

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).

The application states that Ms. LaCatena and Mr. LaCatena each contributed \$█ cash to the business on May 5, 2002. (DED Exhibit 1). Applicant stated, “When we started this business back in 2002 we each contributed \$█ as noted in our “Consent of Managers”” (DED Exhibit 5). The Consent states that Joseph A. LaCatena and Regina LaCatena, as joint tenants, purchased ten (10) units of the Company’s membership interest for \$█ cash (DED Exhibit 6).

On January 15, 2018, the shares were reallocated. Regina LaCatena was issued 51 shares and Joseph LaCatena was issued 49 shares (DED Exhibit 7). On April 6, 2023, Joseph LaCatena transferred his 49% ownership interest to Regina LaCatena for “monetary consideration.” The amount of the monetary consideration was not stated (DED Exhibit 8).

The Operating Agreement dated April 6, 2023, states that Regina LaCatena holds 100% membership interest. The amount of capital contribution is blank (DED Exhibit 9).

Whether each of Mr. and Ms. LaCatena contributed \$█ or \$█ for their initial ownership interest, Ms. LaCatena did not make a proportional contribution for her initial 51% interest or subsequent 100% interest.

Applicant argues on appeal that no consideration was demonstrated on the books because it was deemed unnecessary for tax purposes, and that it would be a de minimus amount and could be shown as a gift on the corporate books if the Divisions requires. Applicant further argues that

consideration is not demonstrative of her contribution, and that the LLC would not exist if not for her expertise regarding estimates, permits, approvals of contracts, and obtaining adequate insurance (APP Exhibit B). No proof was submitted to show the value of the claimed expertise.

5 NYCRR §144.2(b)(2)(i) states that “Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (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.” Where applicant provided no valuation of the owner’s expertise, the Division was not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016.

The Division’s determination to deny the application on the basis that JAL failed to demonstrate that Ms. LaCatena made contributions to JAL 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. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

The 2021 tax return shows that Regina LaCatena received ordinary business income of \$█████ and distributions of \$█████, while Joseph LaCatena received ordinary business income of \$█████ and distributions of \$█████ and wages of \$█████ (DED Exhibits 10 and 12). The 2022 tax

return reflects that Regina LaCatena received ordinary business income of \$ [REDACTED] and distributions of \$ [REDACTED], while Joseph LaCatena received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED] and wages of \$ [REDACTED] (DED Exhibits 11 and 13). For those years, Ms. LaCatena was a 51% owner. She received less compensation than Mr. LaCatena, a 49% owner.

Applicant argues on appeal that fact that Mr. LaCatena's earned more than Ms. LaCatena is not demonstrative of Ms. LaCatena's risk and profits in the business. Applicant states that Ms. LaCatena shares greater in the risks and profits because she has to maintain a job outside of her business in order to support the business; and that without her taking a second job, JAL would not be able to exist, and that her investment in the business is greater than Mr. LaCatena's salary (APP Exhibit B). These arguments are without merit. 5 NYCRR §144.2(b)(3) clearly requires that the woman-owner share in the profits of the business in proportion to her ownership interest.

The Division's determination to deny the application on the basis that JAL failed to demonstrate that Ms. LaCatena shares 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.

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. LaCatena's initial capital contribution was either \$ [REDACTED] (DED Exhibit 1) or \$ [REDACTED] (DED Exhibit 5). She provided no proof of any contribution for the additional 49% membership interest transferred to her from Mr. LaCatena (DED Exhibit 8). Her resume shows that she was working as a secretary for JAL from 2002 until 2018, when she was made CEO. She has no prior experience in construction/carpentry services including framing, roofing and siding (DED Exhibit 14).

The Division's determination to deny the application on the basis that Ms. LaCatena failed to demonstrate that the ownership interest she received was not for the sole purpose of securing certification as required under 5 NYCRR §144.2(b)(5), is supported by substantial evidence.

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. In *C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841 (3d Dept 1995), the Court affirmed the denial where the woman-owner had no training or experience in the industry, nor could she specify the "working knowledge" necessary to review the estimates made by or evaluate the work of more experienced employees. 5 NYCRR §144.2(c)(1) states that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things".

Ms. LaCatena does not have any industry specific expertise; her skills are related to general business or office management (DED Exhibits 1 and 14). The critical functions of the business are construction/carpentry services which include framing, flooring, poured concrete, roofing, siding, plumbing and heating, electric, drywall and insulation (DED Exhibit 1). Mr. LaCatena's resume reflects that he worked as a carpenter from 1978 to 2002. He "worked for family-owned construction company, daily tasks included framing, roofing, siding, tile, decks, painting, interior trim, light electrical, and light plumbing." At JAL, he serves as the Project Manager. His duties include "manage day to day operations, including project estimating, meeting with customers, order supplies/materials, working with subcontractors, and I am the lead carpenter handling the work on all construction sites." (DED Exhibit 15).

Ms. LaCatena's resume reflects that from 2002 to 2018, she worked as a secretary for JAL. Her responsibilities included "clerical duties, accounts payable/receivable, scheduling

appointments, and banking.” Her duties since becoming the CEO include “Review plans pre-construction, Communicate daily with Project Manager; Sub-contractor management; Conduct contractor meetings; Scheduling jobs; Payroll.” She has no prior experience related to construction or carpentry. (DED Exhibit 14). The individual tax returns list Regina LaCatena as “Manager” and Joseph LaCatena as “Carpenter” (DED Exhibits 16 and 17).

On appeal, applicant attached a revised resume for Ms. LaCatena that contains new information that was not previously provided as part of the certification application (APP Exhibit B). This is new information that does not clarify or explain previously materials and will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Also, the revised resume reflects her only claimed construction experience of two summer internships over 40 years ago (APP Exhibit B).

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that “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”. The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. *See J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

Here, the products and services provided by applicant include construction/carpentry services (DED Exhibit 1). Mr. LaCatena “Manage[s] day to day operations” and is the lead carpenter handling the work on all construction sites (DED Exhibit 15). Ms. LaCatena’s resume

does not show any previous experience working in the field on construction related projects (DED Exhibit 14). The critical functions of the business are construction/carpentry services, which are handled by Mr. LaCatena as lead carpenter handling the work on all construction sites. Ms. LaCatena states that since she works full time as the Executive Assistant for the Commissioner of Mental Health in Orange County, at JAL “all work/tasks necessary is accomplished in the evenings and weekends” while Mr. LaCatena “manages the job/sites, estimates the jobs, orders materials needed and meets with the customers.” (DED Exhibit 5).

On appeal, applicant argues that Ms. LaCatena’s “work does not end when she leaves the job at Orange County. Her workday begins when she returns home. Regeana has to go over everything that happened that day and prepared for the next day.” Since Ms. LaCatena only devotes evenings and weekends to JAL, she is therefore not managing the day-to-day operation of the business (APP Exhibit B).

The Division’s determination to deny the application on the basis that JAL failed to demonstrate that Ms. LaCatena possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

III. Independence

The Division further found that JAL is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space... 5 NYCRR §144.2(e)(1), and “whether the business

enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

JAL is operating primarily using subcontractors, although applicant states that it did not issue any 1099s to the subcontractors in 2021 and 2022. Applicant submitted twelve (12) subcontractor agreements with invoices (DED Exhibit 20). The work on the agreements were performed by independent subcontractors, not employees of JAL. Joseph LaCatena is the only person that received W-2 wages from JAL (DED Exhibit 5). Ms. LaCatena does not have any experience in the work involved with these agreements (DED Exhibits 14 and 20). The application lists the number of JAL employees as zero (DED Exhibit 1). JAL employees are not performing the critical functions of the business and must rely on non-employees to perform the work.

On appeal, applicant states JAL “is a general contracting company inherently as a general contractor she is required to use independent contractors... Therefore, her duties are those of a general contractor and the use of independent contractors and workers is inherent to her obligations as a general contractor. By definition, a general contractor oversees the work that is done by the independent contractors or employees.” (APP Exhibit B). However, by using independent contractors, JAL relies on non-employees to perform the work.

JAL is therefore reliant upon subcontractors to perform the revenue-generating critical functions of the business. Without the subcontractors, JAL would not be able to perform the critical functions of its business.

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

CONCLUSION

JAL 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(b)(5), 144.2(c)(1), 144.2(c)(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 JAL's application for certification as a woman-owned business enterprise.

In the Matter of Joseph A. LaCatena General Contractor LLC
 DED File ID No. 70219
 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	Request to Appeal	Y	Y
DED 4	Notice to Proceed via Written Appeal	Y	Y
DED 5	Narrative I	Y	Y
DED 6	Consent of the Managers	Y	Y
DED 7	Meeting Minutes dated January 15, 2018	Y	Y
DED 8	Transfer of Membership Interest dated April 6, 2023	Y	Y
DED 9	Operating Agreement	Y	Y
DED 10	2021 Business Tax Returns	Y	Y
DED 11	2022 Business Tax Returns	Y	Y
DED 12	2021 W-2s	Y	Y
DED 13	2022 W-2s	Y	Y
DED 14	Resume of Regina LaCatena	Y	Y
DED 15	Resume of Joseph LaCatena	Y	Y

DED 16	2021 Individual Tax Returns - Joseph and Regina	Y	Y
DED 17	2022 Individual Tax Returns – Joseph and Regina	Y	Y
DED 18	Four Contractor Agreements	Y	Y
DED 19	Proposal/Construction Estimate	Y	Y
DED 20	Copies of 12 Subcontractor Agreements	Y	Y
DED 21	List of Subcontractors	Y	Y