

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

In the Matter

- of -

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

NYS DED File ID No. 69118

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 17, 2023

This matter considers the written appeal by Meltek, Inc., (“Meltek” 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 August 9, 2021, Mr. Frank Bruckner, as CEO, applied on behalf of Meltek for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On March 17, 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. Meltek timely filed a Request to Appeal on April 14, 2023 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Meltek on April 19, 2023 (DED Exhibit 3).
5. Meltek submitted its written appeal by letter dated May 25, 2023 (APP Exhibit 2).

6. The Division filed an Affidavit of Amanda Brennan, Project Director of the Department of Economic Development, dated August 2, 2023, and a brief of Diedre Chuckrow, Esq., counsel for the Division, dated August 3, 2023.

FINDINGS OF FACT

7. Meltek is engaged in the business of providing cloud-based software to electric utilities and their residential and small commercial customers (DED Exhibit 1).
8. Mr. Frank Bruckner is the CEO and has a 67.8% ownership interest. Mr. Mark Bruckner, Mr. Frank Bruckner's father, is the Chief Operating Officer and has a 30.2% ownership interest. The remaining 2% ownership interest is split among other non-minority shareholders (DED Exhibit 1).
9. In 2020, Frank Bruckner purchased [REDACTED] shares for \$ [REDACTED] and Mark Bruckner purchased [REDACTED] shares for \$ [REDACTED] (DED Exhibits 1 and 7).
10. Frank Bruckner is responsible for product development, information technology, marketing, business development, and fundraising. He works 60 to 80 hours per week for the business. Mark Bruckner is responsible for human resources and finance and works 30 to 40 hours per week for the business (DED Exhibit 1).
11. In 2020, Frank Bruckner did not receive any wages from Meltek. In 2021, he received \$ [REDACTED] in wages from the business. Mark Bruckner received no wages from the business in 2020 or 2021 (DED Exhibits 8 and 9).
12. Additional funding for Meltek was generated through the use of convertible promissory notes. Frank Bruckner loaned \$ [REDACTED] to Meltek through two convertible promissory notes, Mark Bruckner loaned \$ [REDACTED], several others loaned between \$ [REDACTED] and \$ [REDACTED], and [REDACTED] loaned \$ [REDACTED] to Meltek, all through convertible promissory notes These

notes are debt instruments that convert to equity if Meltek raises an additional \$ [REDACTED] in a subsequent round. (DED Exhibits 1 and 5).

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.

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...

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 Meltek for certification as a 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).

In 2020, Frank Bruckner purchased [REDACTED] shares for \$ [REDACTED] and Mark Bruckner purchased [REDACTED] shares for \$ [REDACTED] (DED Exhibits 1 and 7). Mark Bruckner paid more than five times the price per share than Frank Bruckner paid. Frank Bruckner's contribution was not proportionate to his ownership interest.

Applicant argued on appeal that Frank Bruckner's background and expertise, in addition to the work he provided over the three previous years, should be considered as consideration for his ownership interest (APP Exhibit 2). 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).

The Division's determination to deny the application on the basis that Meltek failed to demonstrate that Frank Bruckner made contributions to Meltek in proportion to his 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 minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to his ownership interest in the business.

The Division routinely denies certification where the minority-owner does not share in the risks and profits in proportion with his ownership interest. See *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017; *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3d Dept. 1995).

Frank Bruckner contributed \$ [REDACTED] through two convertible promissory notes out of \$ [REDACTED] in total convertible promissory notes. This is a disproportionate amount of risk taken by the other lenders than the minority-owner. These notes are debt instruments that convert to equity if Meltek raises an additional \$ [REDACTED] in a subsequent round. The other lenders will lose their prospective ownership interests if the business fails, while Frank Bruckner would not lose any of his ownership interest. If the notes are converted to equity, Frank Bruckner's ownership interest would decrease, affecting his proportionality to potential profits (DED Exhibits 1, 5 and 10).

Meltek has not established that Frank Bruckner shared in the risks and profits of the business in proportion to his ownership interest.

CONCLUSION

Meltek 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(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 Meltek's application for certification as a minority-owned business enterprise.

In the Matter of Meltek, Inc.
DED File ID No. 69118
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	Amended Stock Plan	Y	Y
DED 5	Convertible Promissory Notes (12)	Y	Y
DED 6	Notices of Stock Issuance (6)	Y	Y
DED 7	Detailed Capitalization Table	Y	Y
DED 8	Frank Bruckner's 2021 W2	Y	Y
DED 9	Meltek Employees 2020 W2s	Y	Y
APP 1	Request to Appeal	Y	Y
APP 2	Written Appeal submission	Y	Y