

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12245

In the Matter

- of -

the Application of P&P Pallets & Recyclers, Inc.
for certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 53658

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
June 3, 2024

This matter considers the written appeal by P&P Pallets & Recyclers, Inc., (“P&P” 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 June 2, 2023, Amanda Chimirri, as President, applied on behalf of P&P for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On October 6, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
 - a. The 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 minority group members or women relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1); and
 - c. The minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals

of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).

3. P&P timely filed a Request to Appeal on October 26, 2023. (APP Exhibit A).
4. A Notice to Proceed Via Written Appeal was sent to P&P on October 31, 2023. (DED Exhibit 3).
5. P&P filed its written appeal on November 30, 2023. (APP Exhibit B).
6. The Division filed an Affidavit of Raymond Emanuel, Associate Director, dated April 19, 2024, and a brief of Candace C. Williamson, Esq., counsel for the Division, dated April 24, 2024.

FINDINGS OF FACT

7. P&P is a business that repairs and recycles pallets. (DED Exhibit 1).
8. Amanda Chimirri is the President of P&P and has an 100% ownership interest. (DED Exhibit 1).
9. A corporate resolution and minutes from a special meeting, dated December 31, 2015, stated that P&P would repurchase Augustine Gonzalez's, the previous 100% owner, ownership interest in P&P for \$██████, to be paid pursuant to a promissory note providing for installments of principal and interest over a period of twenty years, with interest at the annual rate of 4%. The purchase price to be paid for the stock was determined to be fair and reasonable. The resolution also stated that upon receipt of \$██████ from each of the key employees, Ms. Chimirri and Oqui Lozano, P&P would be authorized to issue all the shares in equal percentages, i.e. 50/50, which reflected the reasonable value of the equity in the company. (DED Exhibits 5, 6 and 9).

10. On January 1, 2016, a promissory note was signed by Ms. Chimirri and Mr. Lozano stating that P&P would pay Mr. Gonzalez, \$[REDACTED] in the form of monthly installments of \$[REDACTED], with Ms. Chimirri and Mr. Lozano, the subsequent owners, as guarantors. (DED Exhibits 5, 6, 7 and 9).
11. On January 1, 2018, as part of his resignation from the company, Oqui Lozano retired his 50% ownership interest in the company and then this 50% ownership interest was issued to Ms. Chimirri, making her P&P's sole owner. Mr. Lozano was also released from the \$[REDACTED] payment obligation. (DED Exhibits 8 and 9).
12. Ms. Chimirri has worked for P&P since 2008. She is responsible for organizing the office operations for the business enterprise, which include invoicing, collections, accounts receivable and accounts payable, and payroll. She graduated from the School of Visual Arts and the Culinary Academy of Long Island and has received numerous awards from cake competitions between 2012 and 2016. (DED Exhibit 10).
13. Since 2018, Ms. Chimirri is also responsible for coordinating P&P's incoming and outgoing deliveries and routing trucks. (APP Exhibit B).
14. P&P employs four truck drivers who are responsible for making deliveries and doing pick-ups, two individuals responsible for breaking up pallets, three pallet repairers, and one cutter who cuts boards to the correct sizes, and one individual who oversees quality control in the warehouse. (DED Exhibit 1).
15. Ms. Chimirri, as P&P's authorized signatory, signed a lease for P&P's trucking equipment. She does not possess a license to operate the business' trucks. She is also an authorized signer for the business' line of credit agreement and promissory note. P&P does not have contracts in place with any customers. (DED Exhibits 11, 12 and 13).

APPLICABLE LAW

5 NYCRR § 144.2 (b)(2) states as follows:

Capital Contribution. Minority group members and women may 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(c)(1) 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) Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses

or certifications to provide products or services to the clients of the business enterprise; and

- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

5 NYCRR §144.2(d)(2) states in relevant part as follows:

Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 P&P 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." (See *Matter of Scherzi Systems*, Final Order 19-16 dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021)).

Applicant's stock ledger, included with the application, states that Mr. Gonzalez was issued 10 shares in 1994. Applicant repurchased the 10 stock shares on December 31, 2015, for \$██████, with a 20-year promissory note stating Ms. Chimirri and Mr. Lozano were the guarantors of the payment. The promissory note stated that P&P would make monthly installments until the \$800,000 purchase price was satisfied. On January 1, 2016, Ms. Chimirri and Mr. Lozano each purchased 50% of the authorized and un-issued shares in the company, and each paid \$██████ for their shares. A corporate resolution dated December 31, 2015, states that the \$██████ business

valuation was reasonable. On January 1, 2018, Ms. Chimirri received Mr. Lozano's 50% interest in the business, making her the sole owner of P&P. Mr. Lozano signed over his shares to pay a debt that he owed to the company. (DED Exhibits 1, 5, 6, 7, 8, and 9)

On appeal, Ms. Chimirri clarifies there were some monthly payments made to Mr. Gonzalez and included copies of checks for payments made over the course of two years in accordance with the 20-year promissory note. However, the checks were issued by P&P rather than payments made from Ms. Chimirri's personal funds, and the payments made were not in full satisfaction of the \$ [REDACTED] purchase price. Ms. Chimirri also explained there was no payment made to Mr. Lozano in exchange for the shares she received from him in 2018. Although Ms. Chimirri states she poured her personal savings into the business to avoid closure in 2018, there is no documentation to support this claim of capital contribution. The record before the Division did not establish that the woman owner made payments from her personal account. (APP Exhibit B).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that P&P failed to demonstrate that Ms. Chimirri made capital contributions to P&P in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2).

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, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the

denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

The application before the Division did not include evidence of Ms. Chimirri's industry specific expertise; her skills are related to general business or office management. Ms. Chimirri's resume was included with the application and showed she has worked for the business since 2008 and her responsibilities include organizing and coordinating office operations and procedures to ensure the business operates efficiently, financial responsibilities such as invoicing, collections, accounts receivable and payable, and managing payroll and working in customer service. Ms. Chimirri has an educational background in fine arts and professional baking and pastry arts. The resume does not indicate Ms. Chimirri received any training or education related to the business or show a history of performing work for Applicant outside of her administrative and managerial tasks. (DED Exhibits 1 and 10)

The core business functions of the business are repairing and recycling pallets, including using equipment and trucks for deliveries and pick-ups, breaking up pallets, repairing pallets and cutting boards for pallets. The record before the Division did not include evidence that Ms. Chimirri is engaged in performing the core business functions. P&P employs four truck drivers who are responsible for making deliveries and doing pick-ups, two individuals responsible for breaking up pallets, three pallet repairers, and one cutter who cuts boards to the correct sizes, and one individual who oversees quality control in the warehouse. Ms. Chimirri does not have a license to operate the trucks, which is required to perform these core functions. Ms. Chimirri must rely on her employees to perform the core functions of the business. (DED Exhibits 1 and 10).

On appeal, Ms. Chimirri submitted an updated resume and stated she sent her old resume in error. She argues she has taken over Mr. Lozano's duties since 2018, such as shipping/receiving,

production, and routing of trucks, and has restructured key personnel into management positions. Since this information was not before the Division at the time of the denial and is new information, it will not now be considered. (APP Exhibit B; See *Scherzi*, supra).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that P&P failed to demonstrate that Ms. Chimirri possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1).

III. Control.

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. (See *Matter of C EZ Key Service*, Recommended Order dated January 5, 2024; Final Order 24-01 dated February 22, 2024). Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. (See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022). Substantial evidence supports the Division's denial where no evidence was presented that the woman-owner signs contracts on behalf of the business. (See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016).

Applicant was asked to produce contracts entered into by P&P. Applicant stated that there were no such contracts or documents of business transactions signed by Ms. Chimirri as the principal of the business. The documents that were included in the application did not show the authority Ms. Chimirri is operating under or show her control with respect to business negotiations. It is uncertain whether the documents, a lease for trucking equipment and P&P's line of credit, are

negotiated contracts, and Ms. Chimirri is acting as P&P's authorized signatory rather than signing as the President or principal of the business. Applicant states the business does not enter into contractual agreements with customers. Rather, the business supplies pallets on a need-by-need basis, and in most cases, customers will give a verbal purchase order. There was no evidence presented that the woman-owner signs contracts on behalf of the business. (DED Exhibits 1, 11, 12 and 13).

On appeal, Applicant explained that P&P does not work off signed contracts and submitted purchase orders and quotes provided to P&P's customers which she argues were negotiated by her. The appeal documents postdate the date of the Division's denial. Since they were not before the Division at the time of determination, and are considered new information, they will not now be considered. (APP Exhibit B; See *Scherzi*, supra.)

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that P&P failed to demonstrate that Ms. Chimirri negotiates business contracts and represents herself to clients as the principal of the business enterprise, as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

P&P 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(c)(1) and 144.2(d)(2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny P&P's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of P&P Pallets & Recyclers, Inc.
 DED File ID No. 53658
 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 Form	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Meeting Minutes from December 31, 2015	Y	Y
DED 6	Resolution Dated December 31, 2015	Y	Y
DED 7	Promissory Note dated January 1, 2016	Y	Y
DED 8	Resolution dated January 1, 2018	Y	Y
DED 9	P&P Pallets' Stock Ledger	Y	Y
DED 10	Amanda Chimirri's Resume	Y	Y
DED 11	P&P Pallets' Equipment Lease	Y	Y
DED 12	Narrative Response	Y	Y
DED 13	P&P Pallets' Line of Credit	Y	Y