

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

In the Matter

- of -

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

NYS DED File ID No. 69505

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 5, 2023

This matter considers the written appeal by SBR Services, LLC, (“SBR” 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 February 5, 2023 (incorrectly stated as February 2, 2023, on the Division’s determination letter), Ms. Brielle Cookinham, as President, applied on behalf of SBR for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 20, 2023 (incorrectly stated as March 20, 2021, on the Division’s determination letter), 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 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).
3. SBR timely filed a Request to Appeal on April 20, 2023 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to SBR on May 4, 2023 (DED Exhibit 3).
5. SBR filed its written appeal by letter dated May 12, 2023 (APP Exhibit B).

6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated August 2, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated August 3, 2023.

FINDINGS OF FACT

7. SBR is engaged in the business of trucking and hauling aggregate materials via dump truck or dump trailer services, heavy equipment and crane mats on flat trailer or lowboy trailer, and trucking and hauling of blacktop via flow-boy trailer (DED Exhibit 1).
8. Ms. Brielle Cookinham is the President and has a 100% ownership interest (DED Exhibit 1).
9. The application states that the capital used to start the business was a dump truck purchased by Ms. Cookinham and her husband, Mr. Cookinham for \$ [REDACTED]. The application further states that the financing to start the business came from Ms. Cookinham's "personal credit" (DED Exhibits 1 and 4).
10. Ms. Cookinham has a bachelor's degree in business administration management. She is responsible for managing SBR, including billing, financial transactions, permitting, human resources, purchases, insurance, and the business bank accounts (DED Exhibit 9).
11. Mr. Cookinham began working at SBR on March 21, 2017, and works primarily as a dispatcher and on light mechanical duties. He is authorized to purchase, order and schedule deliveries relating to maintenance and repairs, and is authorized to negotiate pay rates for deliveries (DED Exhibit 10).

APPLICABLE LAW

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

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...

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 SBR 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.

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).

The capital contribution for the business included a dump truck, valued at \$25,000, purchased jointly by Ms. Cookinham and her husband, Mr. Cookinham (DED Exhibits 1 and 4). No supporting documentation of this purchase was provided. Ms. Cookinham alleges additional capital contributions of personal credit and credit cards held by Ms. Cookinham. No evidence was provided regarding how these credit lines were used, except for a vehicle purchased for \$ [REDACTED], which was purchased by both Ms. Cookinham and Mr. Cookinham (DED Exhibit 4). Since the dump truck and the vehicle were purchased jointly by Ms. Cookinham and Mr. Cookinham, these are not capital contributions solely from Ms. Cookinham.

Applicant argued on appeal that Ms. Cookinham provided monetary contributions to the

business from her salary from another job (APP Exhibit B). No documentation was provided to show how those monies supported the business, or that the alleged monetary contributions were solely from Ms. Cookinham's personal funds or made at the time she took ownership interest. Applicant also argued on appeal that her expertise gained through her work experience should have been considered as part of her capital contribution (APP Exhibit B). The contribution of expertise must be uncompensated and directly applicable to one or more critical aspects of the business. 5 NYCRR §144.2(b)(2)(i)(4). No evidence was provided as to the value of her expertise or examples of expertise relating to the core functions of the business, such as licenses to operate the trucks needed for trucking and hauling. No evidence was provided reflecting an agreement specifically detailing the precise expertise to be used and the specific dollar value associated with the expertise. 5 NYCRR §144.2(b)(2)(i)(4) See *Matter of Whitman Engineering*, Recommended Order dated March 20, 2017, Final Order 17-23, dated March 27, 2017.

The Division's determination to deny the application on the basis that SBR failed to demonstrate that Ms. Cookinham made contributions to SBR in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2), 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, 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.

SBR is engaged in the business of trucking and hauling materials via dump truck or dump trailer services (DED Exhibit 1). The critical function of the business requires experience and expertise in handling heavy equipment and a CDL to perform the work contracted by the business. The application does not reflect Ms. Cookinham has any experience in the use of heavy equipment or that she possesses a CDL required to drive the dump trucks and haul the trailers used by the business. Her resume reflects her experience in administrative and financial management but does not reflect the training or experience in the industry necessary to supervise the work of the employees. (DED Exhibit 9). On appeal, Ms. Cookinham submitted an updated resume reflecting experience in the use of heavy equipment and the labor she provides for SBR (APP Exhibit B). However, she failed to provide any information regarding the supervision of field operations and admitted she does not hold a CDL. Therefore, she must rely on other employees to complete the core functions of the business.

The Division's determination to deny the application on the basis that SBR failed to demonstrate that Ms. Cookinham possesses adequate industry-specific competence to make critical business decisions without relying upon others, as required under 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

CONCLUSION

SBR 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(c)(1) 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 SBR's application for certification as a woman-owned business enterprise.

In the Matter of SBR Services, LLC
 DED File ID No. 69505
 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	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Proof of Business Capital Narrative	Y	Y
DED 5	Deed for 555 Beecher Road	Y	Y
DED 6	NYS Division of Corporations Entity Registration	Y	Y
DED 7	2022 School and Property Tax Receipts	Y	Y
DED 8	Narrative Explaining SBR Lease and Business Location	Y	Y
DED 9	Brielle Cookinham's Resume	Y	Y
DED 10	Scott Cookinham's Resume	Y	Y
DED 11	Current Employee Driver's Licenses	Y	Y
DED 12	SBR 2021 Employee W-2s	Y	Y