

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

In the Matter

- of -

the Application of Trip Consultants U.S.A., Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70280

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
April 30, 2024

This matter considers the written appeal by Trip Consultants U.S.A., Inc., (“TRIP” 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 July 2, 2022, Dolly Naaman, as President/CEO, applied on behalf of TRIP for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On July 17, 2023, the Division denied the application on the grounds that: (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 and women relied upon for certification have failed to demonstrate they are not encumbered in their ability to realize the benefits of ownership of the business enterprise and/or are not subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4); and
 - (c) Minority group members and women relied upon for certification have failed to demonstrate that the ownership was not allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required by 5 NYCRR §144.2(b)(5); and

(d) Minority group members and women relied upon for certification have failed to demonstrate that the minority group members or women relied upon possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under NYCRR §144.2(c)(1).

3. TRIP submitted its Request to Appeal by letter dated September 7, 2023. (APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent to the Applicant on October 12, 2023. (DED Exhibit 4).
5. TRIP did not send a written appeal submission.
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director dated February 14, 2024, and a brief of Kyle Satchell, Esq., counsel for the Division, dated February 15, 2024.

FINDINGS OF FACT

7. TRIP is a business that provides Traffic Data Collection Services, including turning movement counts, volume counts, pedestrian and bicycle counts, speed surveys and origin-destination surveys. The business uses Miovision Video camera system for traffic data collection, a Reconyx LPR camera for license plate surveys, automatic traffic recorders (ATR) and radar guns for speed monitoring. (DED Exhibit 1).
8. Dolly Naaman is TRIP's President/CEO and has a 51% ownership interest. Dolly Naaman's son, Francois Naaman, Jr., is Vice President/Secretary/Treasurer and has a 39% ownership interest. Dolly Naaman's husband, Francois Naaman, is a Shareholder and has a 10% ownership interest. (DED Exhibit 1).
9. The business was established on April 25, 2005. On January 9, 2009, Francois Naaman received the original common stock issue of 200 shares in TRIP for \$█ (DED Exhibits 1 and 5).

10. On February 28, 2022, Francois Naaman transferred 102 common shares to Dolly Naaman and transferred 78 common shares to Francois Naaman, Jr. Neither party paid for their shares. Francois Naaman retained 20 shares. (DED Exhibits 1, 5, 6 and 8).

11. On February 28, 2022, Francois Naaman signed three resolutions (“Resolution 1”, “Resolution 2” and “Resolution 3”). The resolutions detail the ownership interests, how shares shall be valued and transferred, the desire to be MWBE certified, and the transfer of shares at death or disability. (DED Exhibits 6, 7, 8).

12. With regard to ownership interests, Resolution 1 and Resolution 2 state, in part: (DED Exhibits 6 and 7)

“All persons who own stock in TRIP must do so in their own name, and not a grantor or other form of trust. Further, (a) upon their demise, the stock they hold must be sold back to the Corporation, (b) the stock may not be gifted or assigned to any third party without the unanimous approval of the shareholders of all outstanding shares, given in advance and in writing, (c) should a person wish to sell some or all of their stock during their lifetime, it can only be sold back to the Corporation and only after owning the shares for five years;” and

“Any shareholder owning 5% or more of the outstanding shares is entitled to a seat on the Board.”

13. With regard to valuation and transfer, Resolution 1 and Resolution 2 state, in part: (DED Exhibits 6 & 7)

“In the case of a sale or transfer of stock, the value of the stock shall be established based upon the percentage “p” of the stock being sold or transferred divided by the total number of outstanding shares, applied to the Equity of the firm as reported on the Financial Statement for the fiscal year preceding the sale, with the (reviewed, not necessarily audited) Financial statement being issued by the firms independent certified public accountant(s). Payment shall be over 60 equal monthly payments, amortized using 3% per annum as the applicable interest rate. The firm may prepay amounts due, in whole or in part, without penalty.”

14. With regard to MWBE status, Resolution 1 and Resolution 2 state, in part: (DED Exhibits 6 and 7)

“Given that this firm is planning to apply for an operate as a WBE and (if feasible) a DBE, the President of the Company, the Chair of the Board, and the Chair of the Shareholders Meeting shall be female. No meeting with less than 51% applicable membership for WBE and/or DBE present shall be deemed to have a quorum.”

15. With regard to transfer at death or disability, Resolution 3 states, in part: (DED Exhibit 8)

“In the event of death or total and permanent disability of Dolly Naaman, her shares shall revert to Francois Naaman.”

16. TRIP’s Bylaws state, in part: (DED Exhibit 9)

“Article II Board of Directors – Compensation of Directors – The Board of Directors shall have authority to fix the compensation of the directors for services in any capacity” and

“Article III Officers – Compensation – The salaries of all officers and agents of the Corporation shall be fixed by the Board of Directors.”

17. Dolly Naaman’s day-to-day business activities include: responding to client inquiries; general oversight of operations; managing office activities; verifying payroll hours; and handling invoicing and expense reports. She responds to phone calls and emails, addresses employee concerns, and ensures data technicians adhere to processing guidelines. She performs field work for manual traffic counts, using a counting board, as needed. (DED Exhibits 10 and 13).

18. In 2015, 2017 and 2020, Dolly Naaman worked as an Administration Assistance/Surveyor, where she assisted with processing invoices, bill payments and payroll, and conducted manual traffic survey counts for TRIP, when needed. She also oversaw supervision of manual surveyors in the field. In 1994, she worked as a Manual Surveyor conducting manual traffic counts. Her education includes studying civil law. (DED Exhibits 10 and 12).

19. Francois Naaman, Jr.’s day-to day business responsibilities include: preparing documents for field work; obtaining all necessary permits and insurance for projects; overseeing use of contract vending databases and government marketplaces to assist with project bidding

opportunities; and overseeing operations in the field, including Miovision camera installations and ATR (automatic traffic recorder) installations. (DED Exhibit 13).

20. Francois Naaman, Sr. responsibilities include: working as a traffic engineer who responds to client's technical inquiries regarding traffic data; overseeing the calibration of traffic data; and communicating with professional engineering clients. (DED Exhibits 11 and 13).

21. Francois Naaman Sr. has 40 years of experience as a Field Operations Manager and Construction Coordinator. He has managed numerous large data collection/computer processing efforts. He has performed traffic capacity and safety analysis and has worked on projects with the State, city and county authorities and DOTs. He is knowledgeable in video, ATR and manual data collection techniques, specializing in the mobilization and management of large teams of survey and data collection personnel. (DED Exhibits 11 and 13).

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 a 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)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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 women-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.

5 NYCRR § 144.2 (c)(1) states as follows:

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;
- (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.

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 TRIP 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 consistently denies applications for MWBE certifications where an applicant fails to substantiate the source of the capital contribution by the minority or woman owners. (See *Matter of A.A.C. Contracting, Inc. v. State of New York Department of Economic Development et al.*, 195 A.D.3d 1284, 1285 (3d Dept. 2021)). 5 NYCRR §144.2(b)(2) requires that “to establish a real, substantial and continuing majority ownership of a business, minority group members or women owners must demonstrate a capital contribution to the business that is proportionate to their equity interest.” The purpose of the capital contribution test is “to ensure that the MWBE program directly benefits minority or woman business owners who have a direct financial stake in the business, and to guard against the installation of minority or woman owners as majority shareholders in a business enterprise for the purpose of obtaining certification.” (See *MS Analytical, LLC*, Recommended Order dated August 6, 2018, Final Order 18-47, dated January 30, 2019)).

The burden of proving the capital contribution was made and proportionate to their equity interest is on the applicant. (See 5 NYCRR §144.2(b); see *Matter of A.A.C. Contracting, Inc. v. State of New York Department of Economic Development et al.*, supra; see also *Matter of Marinelli Construction Corp. v. State of New York*, 200 A.D.2d 294, 297 (1994)). 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)).

On February 28, 2022, Francois Naaman, Sr. transferred 102 common shares to Dolly Naaman giving her a 51% ownership interest in the business. Dolly Naaman did not pay money for these shares. The application does not include evidence of any other form of capital contribution, such as property, equipment or expertise, by Dolly Naaman as consideration for the shares. (DED Exhibits 1 and 5).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that the party relied upon for certification failed to demonstrate that they made a capital contribution to the business enterprise that was proportionate to their equity interest therein, as required under 5 NYCRR §144.2(b)(2).

The Division also denied the application for certification on the grounds that the woman owner being relied on for certification sought ownership of the business enterprise solely for the purpose of securing certification. “(O)wnership 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 women-owned business enterprise.” (5 NYCRR §144.2 (b)(5)). The regulation states that “[w]here a . . . woman relied upon for certification obtains [her] ownership interest in a

business enterprise through a transfer from another person, such. . . woman must demonstrate that such transfer was supported by reasonable consideration. . .” (5 NYCRR § 144.2(b)(5)).

The application included three Resolutions, dated February 28, 2022, the same day as the transfer of shares. Resolution 1 and Resolution 3 detail the appointment of Dolly Naaman as the President/CEO and the transfer of 102 shares to her by Francois Naaman, Sr., giving her 51% ownership interest. Resolution 1 and Resolution 2 state that the business plans to operate as a WBE, and the President, Chair of the Board and Chair of the Shareholders meeting shall be female. Resolution 1 and Resolution 2 state a shareholder meeting quorum cannot be reached unless there is at least 51% female membership for WBE purposes. (DED Exhibits 6, 7 and 8).

The Resolutions evidence that the transfer of ownership was for MWBE certification purposes. The Resolutions requires a female President for MWBE purposes. Naming Dolly Naaman as President/CEO, along with transferring 51% interest to her without a capital contribution to the business, is substantial evidence that the transfer of ownership interests was solely for the purpose of securing certification as a minority or women-owned business enterprise. (DED Exhibits 6, 7 and 8).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that TRIP failed to demonstrate that the woman being relied upon for certification was not allocated ownership solely for the purpose of securing certification as required by 5 NYCRR §144.2(b)(5).

The Division also denied TRIP’s application for certification on the grounds that the woman being relied upon for certification is encumbered in her ability to realize the benefits of ownership of the business enterprise and/or is subject to undue restrictions against alienating such ownership interests, as required by 5 NYCRR §144.2(b)(4). The Resolutions place encumbrances

and/or restrictions on Dolly Naaman's ownership. The Resolutions control how the shares are held, transferred, valued, divided and paid out and are encumbrances and restrictions on Dolly Naaman's ownership interest. (DED Exhibits 6, 7, and 8).

Resolution 1 and Resolution 2 state that upon a shareholder's demise, their stock must be sold back to the Corporation. The stock cannot be gifted or assigned to a third party without the unanimous approval of the stockholders. If a shareholder wanted to sell their stock during their lifetime, it can only be sold back to the Corporation and only after owning the stock for five years. These are restrictions on her ownership interests. Resolution 3 places restriction on transfer of shares upon death or disability. The resolution requires that her shares revert to Francois Naaman, Sr., the original founder and shareholder, at death or disability. The Resolutions place encumbrances and restrictions on Dolly Naaman's ability to transfer ownership. (DED Exhibits 6, 7, and 8).

The bylaws presented evidence that it is the Board who manages the business and that fix and control the salaries of all of TRIP's officers and agents. These bylaws encumber Dolly Naaman's ability to realize the benefits of her 51% ownership interest and being President/CEO. (DED Exhibit 9).

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that the woman being relied upon for certification is encumbered in her ability to realize the benefits of ownership of the business enterprise and/or is subject to undue restrictions against alienating such ownership interests, as required by 5 NYCRR §144.2(b)(4).

II. Operation

The Division also denied application for certification as a WBE on the basis that Applicant failed to demonstrate that the party being relied upon for certification possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1). “This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things.” (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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 Division requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021, Final Order 21-05 dated December 22, 2021); see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)). The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this 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*, *supra*).

The critical functions of the applicant’s business involve providing Traffic Data Collection Services, including turning movement counts, volume counts, pedestrian and bicycle counts, speed

surveys and origin-destination surveys. The business uses Miovision Video camera system for traffic data collection, a Reconyx LPR camera for license plate surveys, automatic traffic recorders and radar guns for speed monitoring. Applicant states this is a highly specialized field. (DED Exhibits 1 and 12).

The application evidences that Dolly Naaman is responsible for the business's administrative duties. She was trained on invoicing, expense management, processes and organization by Francois Naaman's secretary. Over time, she learned how to name business files and site photos which are tailored to each client. She responds to client inquiries and provides oversight of operations. She verifies payroll hours, handles invoicing and expense reports, and organizes materials. She responds to phone calls/emails and monitors adherence to processing guidelines. She handles employee concerns, oversees safety standards and updates bookkeeping and administrative procedures. These are administrative duties. (DED Exhibits 10, 12 and 13).

The record contains some evidence to support Dolly Naaman's field work experience. In 1994, Dolly Naaman worked as a Manual Surveyor for TRIP where she assisted in manually counting vehicles. In 2015, 2017 and 2020, she worked as an Administration Assistance/Surveyor for TRIP and went out into the field to conduct manual traffic surveys, when needed. She oversaw supervision of manual surveyors in the field. The application states Dolly Naaman performed these manual counts as needed/as necessary. The application did not include information detailing recent field experience using the Miovision Video camera system, Reconyx LPR cameras, automatic traffic recorders and radar guns. (DED Exhibits 1, 10 and 12).

The narrative states that Francois Naaman, Jr.'s day-to day business responsibilities include preparing documents for field work and obtaining all necessary permits and insurance for projects. He oversees use of contract vending databases and government marketplaces to assist with project

bidding opportunities. He heads operations in the field, including Miovision camera installations and ATR (automatic traffic recorder) installations. Applicant relies on Francois Naaman, Jr. to perform the critical functions of the business. (DED Exhibit 13).

Applicant also relies on Francois Naaman, Sr. to carry out the critical functions of the business. He has 40 years of experience as a Field Operations Manager and Construction Coordinator. In 1985, he received his Bachelor/Master of Science in Transportation Planning and Engineering. He has managed numerous large data collection and computer processing efforts and performed traffic capacity and safety analysis. He has worked on projects with the State, city and county authorities and DOTs. He is knowledgeable in video, ATR and manual data collection techniques, specializing in the mobilization and management of large teams of survey and data collection personnel. Francois Naaman, Sr. works as a traffic engineer who responds to technical inquiries from clients regarding their traffic data. Francois Naaman, Sr oversees the calibration of final products of traffic data. His experience, education and expertise evidence his industry-specific competence. (DED Exhibits 11 and 13).

The record before the Division at the time of determination to deny the WBE certification contains substantial evidence to support its finding that the party relied upon for certification does 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).

CONCLUSION

TRIP 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), (4), (5) and (c)(1) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Trip Consultants U.S.A., Inc.
 DED File ID No. 70280
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	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	Stock Transfer Ledger	Y	Y
DED 6	Corporate Resolution 1	Y	Y
DED 7	Corporate Resolution 2	Y	Y
DED 8	Corporate Resolution 3	Y	Y
DED 9	Bylaws	Y	Y
DED 10	Dolly Naaman Resume	Y	Y
DED 11	Francois Abou Naaman Resume	Y	Y
DED 12	Narrative Q-6	Y	Y
DED 13	Narrative Q-9	Y	Y