

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

- of -

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

NYS DED File ID No. 66661

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
February 6, 2024

This matter considers the written appeal by Tryfacta, Inc. (“Tryfacta” 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 woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On July 21, 2021, Tryfacta applied for certification as a minority women-owned business enterprise (“MWBE”). Tryfacta based its application on Ms. Ratika Tyagi (DED Exhibit 1).
2. On April 3, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The minority woman owner relied upon for certification did not make capital contributions to the business enterprise proportionate to her equity interest therein as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise (5 NYCRR § 144.2(b)(2));
 - (b) The business enterprise failed to demonstrate that it made a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or by having any payroll in New York State as required under 5 NYCRR §§ 144.2(f)(2), 140.1(hh) and 140.1(gg).
3. Tryfacta submitted a request to appeal the denial determination, dated April 11, 2023. (DED Exhibit 4).

4. A Notice to Proceed Via Written Appeal was sent to Tryfacta on April 12, 2023 (DED Exhibit 3).
5. No additional materials or information were submitted by Tryfacta to be considered in the written appeal.
6. The Division filed an Affidavit of Amanda Brennan, Senior Project Director, dated November 17, 2023, and a brief of Lisa S. Berk, counsel for the Division, dated November 21, 2023.

FINDINGS OF FACT

7. Tryfacta is engaged in the business of IT Consulting and Staffing Services, including custom programming, temporary staff augmentation and payroll services. (DED Exhibit 1).
8. Ratikay Tyagi, is the CEO and the 100% owner of Tryfacta. (DED Exhibit 1).
9. The business enterprise was formed in March of 1996, and was previously known as Systems America, Inc., Systems America Public Sector, and Systems Logic. It was originally owned by Adesh Tyagi, Ms. Ratika's husband.
10. Mr. Tyagi gifted the business to Ms. Tyagi. He gifted 70 shares to Ms. Tyagi on March 25, 2011. The remaining 30 shares were transferred from Mr. Tyagi to Ms. Tyagi on June 30, 2014, giving Ms. Tyagi 100% ownership of the business enterprise. (DED Exhibits 1 and 5).
11. The application states that Ms. Tyagi's cash and capital contribution was \$0 and that the shares were gifted. (DED Exhibit 1).
12. Tryfacta has not filed any New York State Tax returns in the three years prior to its application. In addition, the business enterprise has not purchased goods or materials in New York for the three years preceding its application. Applicant also states that because they had no business activity in New York and no employees they were unable to produce New York State tax returns. (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 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(f)(2) states as follows:

Small business requirement. Any business enterprise for which certification as a minority or women-owned business enterprise is sought must be a small business, as that term is defined in Part 140 of this Title.

5 NYCRR § 140.1(gg) states as follows:

Significant business presence. A business authorized to do business in New York State, and that makes a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or has any payroll in New York State.

5 NYCRR § 140.1(hh) states as follows:

Small business. A business which has a significant business presence in the State, is independently owned and operated, and is not dominant in its field, but in no event employes more than three hundred people.

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 CR&M for certification as an MWBE 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 denied Tryfacta's application for certification as an MWBE on the basis that the applicant business failed to demonstrate that the party relied upon for certification made capital contributions proportionate to her equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the minority woman owner contributed, "as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise," in proportion "to their equity interest in the business enterprise." 5 NYCRR § 144.2(b)(2) and 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 Division requires an

applicant to demonstrate that the woman-owner's contribution is proportionate to her equity interest in the business enterprise even if the interest in the business enterprise has been inherited or gifted. (See *Matter of Coverco, Inc.*, Recommended Order, December 12, 2017 (Final Order 17-06, January 30, 2017); *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order, May 25, 2017 (Final Order 16-55, November 1, 2016)). Where, as here, an applicant fails to substantiate the source of the capital contribution by the woman owner, the Division will deny the application for MWBE certification. (See *Matter of Otone Mechanical Construction, Inc.* Recommended Order, April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.* Recommended Order, March 17, 2017 (Final Order 17-21, March 27, 2017)).

The Applicant bears the burden in establishing that they have 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).

Here, the application states that Ms. Tyagi was gifted all of her ownership shares. No evidence is presented that Ms. Tyagi made any contributions, either monetarily or by expertise. Instead, the application states that, "there was no capital investment. The business was gifted to [Ms. Tyagi] at [her] marriage in 2011. . ." (DED Exhibit 1).

Based on the foregoing, I find that the applicant did not demonstrate that the woman owner relied on for certification made capital contributions to Tryfacta in proportion to her ownership interest. Thus, the Division's determination that the party relied upon for certification failed to demonstrate that they made a capital contribution to the business enterprise proportionate to their equity interest therein, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Small Business

The Division also denied Tryfacta's application for certification as an MWBE on the basis that the applicant failed to demonstrate that they have a significant business presence in New York State by being authorized to do business in New York State, and making a contribution to the New York State economy through the payment of taxes, the purchase of products or materials made in New York, or having payroll in New York as required by 5 NYCRR §§ 144.2(f)(2), 140.1(gg) & (hh). (DED Exhibit 2).

Tryfacta admitted that at the time of application, and for the three years prior, they did not have any New York State tax returns, nor had they purchased any goods or materials in New York nor had any business activity or employees in New York. Applicant, on appeal, provides new information, which states that since the time of their application they have been awarded several contracts in New York. (DED Exhibit 4). However, this information was not before the Division at the time of application, and thus constitutes new evidence, and therefore cannot now be considered. (See *Scherzi, supra*, and *Matter of Lida Strategic Solution, Inc.*, Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019) (holding that documents offered by appellant on appeal, that were not part of the application and not before the Division at the time of application, were not to be considered).

Thus, the Division's determination that the applicant business failed to demonstrate that it makes a contribution to New York State through payment of taxes, or the purchase of made in New York products or materials, or by having any payroll in New York State, as required under 5 NYCRR §§ 144.2(f)(2), 140.1(gg) and (hh) is supported by substantial evidence.

CONCLUSION

Tryfacta did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(2) and 144.2(2)(2), 140.1(gg) and (hh) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Tryfacta, Inc.
DED File ID No. 66661
Exhibit Chart

| Exhibit #: | Description of the Exhibits | Offered (Yes/No) | Admitted (Yes/No) |
|------------|---|---------------------|----------------------|
| DED 1 | Application for Certification | Y | Y |
| DED 2 | Denial Determination | Y | Y |
| DED 3 | Notice to Proceed Via Written Appeal | Y | Y |
| DED 4 | Applicant's Request for Appeal | Y | Y |
| DED 5 | Meeting Minutes for Systems America, and Statements of Adesh Tyagi | Y | Y |