

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

In the Matter

- of -

Vales Construction Corp.
for Certification as a Minority-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69624

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
December 26, 2023

This matter considers the written appeal by Vales Construction Corp., (“VCC” 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 December 6, 2022, VCC applied for certification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1).
2. On February 3, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members 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);
 - (b) Minority group members relied upon for certification have not demonstrated that they are the highest-ranking officer and/or control the Board of Directors and/or serve as a general partner, as required by 5 NYCRR § 144.2(d)(1).
3. VCC submitted a request to appeal the denial determination on February 21, 2023. (DED Exhibit 6).
4. A Notice to Proceed Via Written Appeal was sent to VCC on March 2, 2023 (DED Exhibit 6).
5. VCC’s written appeal, with exhibits, was filed on March 30, 2023. (APP Exhibit A)

6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated September 20, 2023, and a brief of Laurel Wedinger-Gyimesi, counsel for the Division, dated September 21, 2023.

FINDINGS OF FACT

7. VCC is in the business of municipal roadwork, including curbs, sidewalks, asphalt, drainage, water mains, equipment and dump truck rentals. (DED Exhibit 1).
8. VCC was established in 1984 by Albina and Agostinho Vales. Albina and Agostinho Vales each own 15% of the business enterprise. Silvano and John Vales, the owners relied on for certification, are brothers and the children of Albina and Agostinho Vales, and each own 35% of VCC. (DED Exhibits 1, 3, and 4).
9. Ownership was transferred by Albina and Agostinho Vales to Silvano and John Vales on June 1, 2017. At that time, Albina Vales owned 51% of VCC and Agostinho Vales owned 49%, and they transferred 36% and 34% respectively to Silvano and John Vales. The shares were gifted to Silvano and John Vales, and as such, no funds were exchanged. (DED Exhibits 1 and 4).
10. Agostinho Vales is the President of VCC, Silvano Vales is the Secretary, and John Vales is the Treasurer. (DED Exhibit 1 and Tribunal Exhibit I).
11. Silvano Vales made a cash contribution of \$ [REDACTED] to VCC on July 2, 2019. (DED Exhibit 1 and APP Exhibit A).
12. John Vales made a cash contribution of \$ [REDACTED] on March 4, 2013. (DED Exhibit 1).
13. VCC's by-laws, provided with the application, state that "The president shall be the chief executive officer of the corporation; ... shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect."

The application lists Agostinho Vales as the President of the business enterprise. (DED Exhibits 1 and 5).

14. Albina and Agostinho Vales are no longer involved in the running of the company. John and Silvano Vales have worked for VCC for over thirty years, and have run the business enterprise for many years, including prior to the transfer of ownership. (APP Exhibit A).

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 (d)(1) states as follows:

Control. Minority group members and women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business

enterprise for which certification is sought, and, where applicable, control of the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

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 VCC for certification as an 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 denied VCC's application for certification as an MBE on the basis that VCC failed to demonstrate that the minority owners 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 owners, relied on for certification, 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)). In addition, the Division requires an applicant to demonstrate that the contribution is proportionate to an owner’s equity interest in the business enterprise even if the interest 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, Nov. 1, 2016); *Matter of Friend Commercial Contracting, Corp.*, Recommended Order May 11, 2016, (Final Order 16-15, May 16, 2016)).

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).

The applicant admits that there was no transfer of capital when the shares were transferred to John and Silvano Vales. (DED Exhibit 4). However, the application does state that Silvano Vales made a cash contribution in the amount of \$ [REDACTED] on July 2, 2019, and John Vales contributed \$ [REDACTED] on March 4, 2013. (DED Exhibit 1). On appeal, the applicant includes a copy of a personal check, written by Silvano Vales and Susan Fiore Vales to VCC in the amount of \$ [REDACTED] dated July 3, 2019, with a copy of the bank statement evidencing that the check was paid. (APP Exhibit A). However, as the check was written from a joint bank account, it would not constitute a capital contribution. (See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order, April 25, 2017 (Final Order 17-28, May 8, 2017 [finding that proceeds from jointly held marital property did not constitute a capital contribution solely by the owner relied on

for certification]; and see, *Matter of Hertel Steel Inc.*, Recommended Order, Feb. 10, 2017 (Final Order 17-21, March 15, 2017) [finding that a business was not eligible for certification where the money to purchase the business was from a jointly owned bank account]). In addition, “[w]hen the Division evaluates capital contributions to the business enterprise in the form of expertise. . . the Division considers such contributions by the woman or minority owner at the time the business was acquired.” (See *Matter of MS Analytical, LLC*, Recommended Order, August 8, 2018 (Final Order 18-47, January 30, 2019). Here, the contribution submitted with the appeal, occurred in 2019, two years after the shares were acquired by the relied upon owners. (DED Exhibit 1).

Applicant also states that both John and Silvano Vales have made cash contributions over time and includes invoice for items purchased for the business by the Vales brothers individually in 2021. (APP Exhibit A). As these items present new information and were not before the Division at the time of the application, they cannot now be considered. (See *Scherzi Systems, supra*; see also, *Lida Strategic Solutions, Inc.*, Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019 [Administrative Law Judge declined to consider documents offered by the appellant on appeal that were not part of the application and thus, not before the Division at the time of denial determination])).

It appears, that for the first time on appeal, Applicant is also asking the Division to consider both John and Silvano’s expertise as a capital contribution. While the regulation does provide that expertise may qualify as a capital contribution, it is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is considered a capital contribution.” (*Scherzi Systems, supra*.) Further, it is the responsibility of the applicant to clearly document a “reasonable assessment of the fair market value of the expertise” and that the expertise is “uncompensated.” (5 NYRR § 144.2(b)(2)(i)(4)). Here, the applicant has failed to clearly

identify, quantify, and explain the value of the expertise to be considered, and no evidence has been presented that the work done at VCC by either John or Silavano Vales, prior to their taking ownership, went uncompensated. No value of the prior work done by either of the eligible owners' prior work is articulated, and there is no evidence that the prior work done by either went uncompensated. Without evidence of an agreement specifically detailing the precise expertise to be used and the specific dollar value associated with that expertise, prior work cannot be considered as consideration towards the purchase of an eligible owner's shares. (See, *Scherzi Systems, supra*).

Thus, the Division's determination that the party relied upon for certification failed to demonstrate that they made capital contributions 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. Control

The Division also denied VCC's application for certification on the grounds that the minority group members relied upon for certification are not the highest-ranking officers of the business enterprise, do not control the board of directors, or serve as a general partner as required by 5 NYCRR § 144.2(d)(1). In evaluating this regulation, the certification application asks for a list of the business enterprise's corporate directors and the Division regularly examines an applicant's by-laws. (See e.g. *Matter of ADK Water Solutions, Inc.*, Recommended Order, June 12, 2023 (Final Order 23-07, Aug. 10, 2023), *Matter of LHS International, Inc.*, Recommended Order, June 6, 2023 (Final Order 23-07, Aug. 11, 2023), and *Matter of S.C. Spencer Electric, Inc.* Recommended Order July 29, 2021 (Final Order 22-04, March 31, 2022).

Here, at the time of application, Agostinho Vales was listed as the President of the business enterprise, while John and Silvano Vales are listed as Treasurer and Secretary, respectively. (DED Exhibit 1 and Tribunal Exhibit I). VCC's by-laws state that "The president shall be the chief executive officer of the corporation; ... shall have the management of the business of the corporation and shall see that all orders and resolutions of the board are carried into effect." (DED Exhibit 5). As such, neither John nor Silvano Vales are the highest-ranking member of the business enterprise and do not control the Board of Directors. (5 NYCRR § 144.2 (d)(1))

On appeal, Applicant provides a copy of a resolution, passed on February 15, 2023, after the date of the application, which changes the makeup of VCC's Directors. (APP Exhibit A). John Vales now serves as the President and Treasurer of VCC and Silvano Vales serves as Vice President and Secretary. However, as this is a change which post-dates the date of the certification application, and was not before the Division at the time of the denial, it cannot now be considered. (See *Scherzi Systems, supra*, see also, *Lida Strategic, supra*).

Thus, the Division's determination that the minority owners, relied upon for certification, are not the highest-ranking officers of the business enterprise, and do not control the board of directors, as required by 5 NYCRR § 144.2(d)(1) is supported by substantial evidence.

CONCLUSION

VCC 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(d)(1) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Vales Construction Corp.'s application for certification as a minority owned business enterprise should be affirmed.

In the Matter of Vales Construction Corp.
 DED File ID No. 69624
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal Submission with Exhibits	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Vales Federal Business Taxes, 2021	Y	Y
DED 4	Proof of Capitalization Letter, Nov. 23, 2021	Y	Y
DED 5	Vales By-laws	Y	Y
DED 6	Appeal Request and Notice to Proceed via Written Appeal	Y	Y
TRIBUNAL I	Application for Certification (complete)	N	Y