

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

In the Matter

- of -

the Application of Westal Construction, LLC
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 0113201

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
February 16, 2024

This matter considers the written appeal by Westal Construction, LLC (“Westal” 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 (“WBE”).

PROCEDURAL HISTORY

1. On April 3, 2023, Westal applied for certification as a women-owned business enterprise (“WBE”). Westal based its application on Ms. Joann Damm. (DED Exhibit 1).
2. On June 23, 2023 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);
 - (b) 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 under 5 NYCRR § 144.2(c)(1); and
 - (c) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Westal submitted a request to appeal the denial determination, dated July 7, 2023. (DED Exhibit 4).

4. A Notice to Proceed via Written Appeal was sent to Westal on July 13, 2023 (DED Exhibit 3).
5. A written appeal submission dated August 1, 2023, was submitted by Applicant. (APP Exhibit A).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated October 25, 2023, and a brief of Dennie Byam, counsel for the Division, dated October 30, 2023.

FINDINGS OF FACT

7. Westal is engaged in the business of landscape restoration and concrete repair and was formed to provide union labor only. (DED Exhibit 1).
8. Joann Damm, the woman relied upon for certification, is the 100% owner, managing member and sole member of the Board of Directors of Westal. (DED Exhibits 1 and 2).
9. The application states that Ms. Damm made a capital contribution of \$ [REDACTED] on June 30, 2020, to the business enterprise from a joint account belonging to Joann Damm and her husband, James Damm. Ms. Damm states that the “\$ [REDACTED] initial deposit [was] from [a] personal savings account” and cites to a bank statement and “original deposit ticket.” (DED Exhibits 1, 5, and 10).
10. The critical functions of Westal are landscape restoration and concrete repair. (DED Exhibit 1).
11. Ms. Damm has an associate degree in business management and states that “since 1993 [she] handles all accounting. . .[and] became involved with bidding and contract negotiations as an employee of Westal Contracting Corp. before [taking] over as owner.” (DED Exhibit 1).

12. The business is a “labor only” business which provides labor to companies who contract with Con Edison. To date, the only business to hire the applicant is Posillico Civil, Inc. (“Posillico”). 100% of the work done by Westal is for Posillico. (DED Exhibit 1; APP Exhibit A).
13. Carlos Flores and Andres Flores are employed by Westal and “. . . work full time performing restoration work for Posillico Civil.” They have both passed the Con Edison Laborer exam, have certifications from OSHA in Construction Safety and Health and have received training from Posillico regarding the critical functions of the applicant business, including but not limited to: guidelines for digging around electrical facilities; emergency communications; gas requirements associated with design and excavation in the area of gas regulator stations; the inspection, handling, storage, and transportation of polyethylene plastic tubing and fitting for gas mains and services. The application states that Ms. Damm does not need any training. (DED Exhibits 1, 7 and 11).
14. The application states that Ms. Damm is solely responsible for all of the applicant business’ managerial operations and for estimating, preparing bids, negotiating bonding, negotiating insurance, negotiating contracts, supervising field operations, payroll, and as the signatory for business accounts. Ms. Damm also states that she “handle[s] all financial and business decisions,” and that her “duties include all financial responsibilities. Invoicing, Payroll, Union reporting, Insurance and Taxes. . . [and] spend[s] approximately 16-20 hrs per week performing” those responsibilities. (DED Exhibits 1, 15, and 16).
15. The applicant business operates from Ms. Damm’s primary residence, owned by both Ms. Damm and her husband James Damm, but uses a mailing address for a property owned by Mr. Damm. The applicant business does not pay for the use of the mailing address. (DED Exhibits 1 and 8; 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 (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:

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

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

Operational decisions. Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:

- (i) The products or services the business enterprise provides to clients; and
- (ii) The means by which the business enterprise obtains contracts or orders.

5 NYCRR § 144.2 (e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 Westal 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 denied Westal’s application for certification as a WBE on the basis that the applicant business failed to demonstrate that the woman relied upon for certification did not make contributions proportionate to her equity interest in the business enterprise, 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 and/or woman owner contributed, “as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise,” in proportion “to their equity interest in the business enterprise.” (5 NYCRR former § 144.2(a)(1) 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 applicant must substantiate that the source of the capital contribution is by the minority group member or 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 Division consistently denies applications for certification where an applicant fails to substantiate the source of the capital contribution consistent with the eligibility criteria. (See, *Darr Construction Equipment Corp.*, Recommended Order August 30, 2022 (Final Order 22-11,

Nov. 7, 2022) and *Matter of Coverco, Inc.*, Recommended Order, Jan. 23, 2017 (Final Order 17-06, Jan. 30, 2017) aff'd by *Coverco, Inc. v. NYS Dept. of Econ. Development*, 159 AD 3d 1538 (4th Dept. 2018)).

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, Ms. Damm, the 100% owner of Westal, contributed \$ [REDACTED] as her capital contribution and states that it came from a personal savings account, jointly held by Ms. Damm and her husband. (DED Exhibits 1, 5, 10; APP Exhibit A). Applicant admits that Ms. Damm's capital contribution came from jointly held funds, and offers no proof as to the source of the funds being solely attributable to Ms. Damm. (APP Exhibit A). The Division consistently denies applications for WBE certification where the source of the capital contribution comes from a jointly owned bank account and repeatedly interprets the regulation "to require the woman owner to demonstrate that she made a capital contribution to the business enterprise from her own personal assets, not from jointly held assets." (*Matter of OTONE, supra*; see also *Matter of Hertel Steel, Inc.*, Recommended Order, dated Feb. 10, 2017 (Final Order 17-12, dated March 15, 2017) (business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account)).

Applicant also states in her appeal submission, under the Ownership section, that her thirty plus years in the contracting industry qualifies as experience. (APP Exhibit A). However, this argument, to consider Ms. Damm's expertise as a capital contribution, is made for the first time on appeal. While the regulation does allow for expertise to be considered as a capital contribution,

it is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is to be considered as capital contribution.” (*In the Matter of Scherzi Systems*, Final Order 19-16, September 6, 2019; *Scherzi Sys., LLC v. White*, 197 A.D.3d 1466 (3d Dept. 2021)). Further, the applicant must provide an assessment, clearly documented, of the fair market value of their expertise. (*Matter of Darr Construction Equipment Corp.*, Recommended Order, dated August 30, 2022 (Final Order 22-11, dated November 7, 2022) and *Matter of JVR Electric, Inc.*, Recommended Order, dated August 31, 2016 (Final Order 16-43, dated September 9, 2016). Here, no evidence has been presented that, at the time of the transfer, or at any time thereafter, Ms. Damm’s expertise was to be considered as a capital contribution, nor was any valuation provided regarding the value of the shares or the value of her expertise. (5 NYCRR § 144.2 (b)(2)(i)(4))

Based on the foregoing, I find that the applicant did not demonstrate that the woman owner relied on for certification made capital contributions to Westal 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 former § 144.2(a)(1) is supported by substantial evidence.

II. Industry Specific Competence

The Division denied Westal’s application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Damm possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). “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 consistently 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*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Nowhere in the materials before the Division is there any evidence that Ms. Damm has adequate, industry-specific competence or training in landscape restoration or concrete repair, the core revenue generating functions of the applicant business. (DED Exhibits 1 and 6). Ms. Damm's experience is in bookkeeping and accounting, and in response to questions regarding her experience Ms. Damm stated that she "ha[s] been employed in the construction field since 1993 handling all accounting" and that she has been "involved with bidding and contract negotiations" for many years. (DED Exhibit 1). However, no evidence was provided regarding Ms. Damm's expertise in the core revenue generating functions of the applicant business. (DED Exhibit 7). The

only evidence regarding anyone having industry experience and competence in relation to landscape restoration and concrete repair is regarding Westal's two employees, Carlos and Andres Flores. They have both passed the Con Edison Laborer exam, have OSHA certifications in Construction Safety and Health and received training from Posillico regarding the critical functions of the applicant business, including but not limited to: guidelines for digging around electrical facilities; emergency communications; gas requirements associated with design and excavation in the area of gas regulator stations; the inspection, handling, storage, and transportation of polyethylene plastic tubing and fitting for gas mains and services. (DED Exhibits 1, 7 and 11). In response to questions from the Division regarding Ms. Damm's certifications and training, the applicant responded ". . .none needed." (DED Exhibit 1).

Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

III. Operation

The Division denied Westal's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Damm makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders." 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive

experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division determined, based on the application, what products and services the applicant business provides to clients. (DED Exhibits 1). Westal's business is landscape restoration and concrete repair. (DED Exhibit 1). Ms. Damm's prior experience, as per her resume is in accounting, office management, business finance and tax. (DED Exhibit 6). Her role at Westal is financial and administrative in nature and Ms. Damm states that she "handle[s] all financial and business decisions," and that her "duties include all financial responsibilities. Invoicing, Payroll, Union reporting, Insurance and Taxes. While the application states that she is solely responsible for estimating, preparing bids, negotiating bonding, negotiating insurance, negotiating contracts, supervising field operations, payroll, and as the signatory for business accounts, her duties do not involve the critical functions of the applicant business. Narratives included in the application state that Ms. Damm's responsibilities are administrative and financial while her employees perform the restoration and repair work required from her contracts. (DED Exhibit 1). The applicant's employees are OSHA certified and have completed the required trainings relating to the core functions of the business, and Ms. Damm has not. (DED Exhibits 1, 7, and 11).

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). Here, the evidence presented establishes that Ms.

Damm's role at Westal is administrative while other employees, namely Carlos and Andres Flores, are responsible for the day-to-day operations of the business enterprise. (DED Exhibits 1, 7, and 11).

Based on the foregoing, I find that the Division's determination that Westal has not demonstrated that the woman owner relied upon for certification makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR § 144.2(c)(2) is supported by substantial evidence.

IV. Independence

Finally, the Division denied Westal's application for certification as a WBE on the basis that the applicant business failed to demonstrate that it operates independently, as required by 5 NYCRR § 144.2(e). (DED Exhibit 2). To determine whether a business operates independently the Division shall consider, but is not limited to the following: "(1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) Whether the business enterprise transacts business primarily with one other entity; and (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices." (5 NYCRR § 144.2 (e) (1) (2) and (3)). The Division regularly denies certification where the applicant business primarily transacts with one other business entity. (See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, Final Order dated April 21, 2020) (applicant denied certification where it paid that same entity as a subcontractor to perform majority of work).

Westal operates from Ms. Damm's primary residence, owned by both Ms. Damm and her husband James Damm, but uses a mailing address for a property owned by Mr. Damm. The

applicant business does not pay for the use of the mailing address. (DED Exhibits 1 and 8; APP Exhibit A). In addition, 100% of the applicant's business comes from one company, Posillico Civil. (DED Exhibit 1). The applicant states that both the Messers. Flores "work full time performing restoration work for Posillico Civil" and in addition, their training has all been done through Posillico, as evidenced by their training records. (DED Exhibit 7). The applicant's explanation, in their appeal submission, that they have been unable to secure other contracts, does not overcome the fact that 100% of their work comes from only one company, and that the same company provides all the training for Westal's employees. (DED Exhibit 7; APP Exhibit A).

Based on the foregoing, I find that the applicant has not demonstrated that Westal operates independently. Accordingly, the Division's determination that the business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e) is supported by substantial evidence.

CONCLUSION

Westal 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), 144.2(c)(2), 144.2(e), was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Westal Construction LLC
DED File ID No. 0113201
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Written Appeal and exhibits	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Notice to Proceed by Written Appeal Submission	Y	Y
DED 4	Appeal Letter	Y	Y
DED 5	Capital Contribution Documentation	Y	Y
DED 6	Joann Damm Resume	Y	Y
DED 7	Training Transcripts	Y	Y
DED 8	Yorktown Town and County Tax Bill	Y	Y
DED 9	Proof of Payments from Posillico Civil	Y	Y
DED 10	Initial Contribution of Capital	Y	Y
DED 11	Carlos Flores and Andres Flores OSHA Cert.	Y	Y
DED 12	PM Purchase Order Change Order	Y	Y
DED 13	Letter from Posillico Civil	Y	Y
DED 14	Westal Construction LLC 2022 W-2s	Y	Y
DED 15	James and Joann Damm 2021 Tax Returns	Y	Y
DED 16	James and Joann Damm 2022 Tax Returns	Y	Y