

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

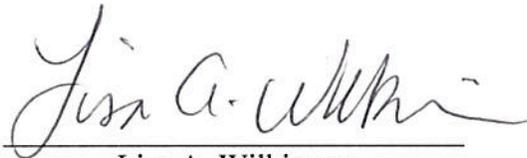
- of -

the Application of **CAC Contracting Corp.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59967

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge

December 28, 2016

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny CAC Contracting Corp. (CAC or applicant) certification as a woman-owned business enterprise (WBE) be modified in part, and otherwise affirmed for the reasons set forth below.

PROCEEDINGS

CAC Contracting Corp. (CAC) filed an application with the Division seeking certification as a woman-owned business on August 10, 2015 (Exhibit [Exh] 1). By a letter dated February 5, 2016, the Division determined that CAC does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied CAC Contracting's application (see Exh 2). In a letter dated March 3, 2016, John K. Diviney, Esq. of Rivkin Radler LLP, on behalf of CAC, requested to appeal from the Division's determination to deny WBE certification (see Exh 3).

The Division acknowledged CAC's request for an appeal in writing in a notice of appeal dated June 6, 2016, and directed that written submissions be submitted by July 21, 2016 (see Exh 4). The notice also reiterated the Division's bases for the denial (see id.).

On behalf of applicant, Mr. Diviney filed an appeal response dated July 20, 2016, contending that Cheryl A. Corazzini, as the President and sole owner of CAC, enjoys the customary incidents of ownership and shares in the risk and profits in proportion with her ownership interest, and that CAC is an independent business enterprise (see Exh 5 at 1).

The Division filed a response dated November 23, 2016, with exhibits (see Exh 6). The matter was assigned to Administrative Law Judge Lisa Wilkinson. An exhibit chart is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (see Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] § 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, CAC, as the applicant, bears the burden of proving that the Division's denial of its application for WBE certification 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 the applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

The Division

In its denial letter, the Division asserted that CAC failed to meet two criteria for WBE certification set forth in 5 NYCRR 144.2, including (1) that applicant failed to demonstrate that the woman owner shared in the risks and profits in proportion to her ownership interest in the enterprise and (2) that applicant is not an independent business enterprise (see Exh 2). In the Division's appeal response, counsel stated that the denial ground related to the sharing of risks and profits did not represent the findings of the Division's senior certification analyst and would not be addressed on appeal (see Exh 6 at 2)¹. Focusing solely on the denial ground related to independence, counsel asserted that the Division's finding that CAC is not an independent business enterprise, as required by 5 NYCRR 144.2, is supported by substantial evidence (see id.).

CAC

Inasmuch as the Division has abandoned the denial ground based on the sharing of risks and profits, that ground for denial should be struck, and there is no need to discuss CAC's position on this issue in this recommended decision. With respect to CAC's corporate independence, counsel for applicant states that CAC is an independent business enterprise that actively seeks contracts or orders, has its own letters of credit and bonding documents, has independent contracts with numerous local entities for public works projects, has its own contracts with suppliers and vendors, and has independent bank accounts (see Exh 5 at 4-5).

FINDINGS OF FACT

I. General

1. CAC Contracting Corp. (CAC) is an asphalt paving contractor engaging in asphalt paving construction, milling and resurfacing streets for publically funded projects (see Exh 1 [Certification Application submitted August 10, 2015] [10 pages] at 3.C).

¹ Exhibit (Exh) 6, the Division's response dated November 23, 2016, includes seven attached Exhibits. The seven exhibits will be referenced as "Exh 6, Exhibit [no.]", with the corresponding exhibit number from the Division's response papers.

2. Cheryl Corazzini is the president of CAC (see Exh 1 at 1.P).
3. CAC conducts business from office facilities it leases at 6245 Cox Lane, Cutchogue, New York 11935 (see id. at 5.A).
4. CAC rents warehouse, plant and yard facilities located at 6245 Cox Lane, Cutchogue, New York 11935 (see id. at 5.B).
5. Richard Corazzini, the husband of Cheryl Corazzini, is the owner of Corazzini Asphalt Inc. (Corazzini Asphalt), a paving construction business also located at 6245 Cox Lane, Cutchogue, New York 11935 (see id. at 6.C, 6.H).
6. Cheryl Corazzini, as president of CAC, is affiliated with Corazzini Asphalt (see id. at 6.C).
7. CAC relies on the employees of Corazzini Asphalt to supply CAC with a qualified, dependable workforce when needed (see Exh 6, Affidavit of Matthew LeFebvre sworn to November 17, 2016 [LeFebvre aff] ¶ 13).
8. CAC relies on Kevin Romanowski, a foreman employed by Corazzini Asphalt, to perform core business functions for CAC, including estimating contracts, supervising field operations, hiring and firing employees, and marketing and sales (see Exh 6, LeFebvre aff ¶ 14, see also Exh 1 at 4.A).
9. CAC relies on vehicles and equipment owned by Corazzini Asphalt to perform asphalt paving services, in particular trucks that have grandfathered NYS Department of Transportation overweight permits that are only available to applicants with grandfathered rights (see Exh 6 at 3 and Affidavit of Adbul Bah sworn to November 23, 2016 [Bah aff] ¶ 13).
10. CAC reimburses Corazzini Asphalt for the use of equipment, labor and trucks to supplement its limited resources (see Bah aff ¶¶ 18-19).

DISCUSSION

This recommended order considers CAC's July 20, 2016 appeal from the Division's February 5, 2016 determination to deny certification of CAC as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division determined that CAC is not an independent business enterprise as required by 5 NYCRR 144.2(a)(2) and (c)(2) because it relies on staff, vehicles, equipment and facilities of Corazzini Asphalt to provide services to its customers (see generally Exhs 2 and 6). Inasmuch as the Division has abandoned the denial grounds asserted in the February 5, 2016 letter based on the ownership criteria in 5 NYCRR 144.2, that ground for denial should be struck. Accordingly, the discussion that follows addresses only the Division's denial related to independence.

Independence

To be eligible for certification as a WBE, an applicant must demonstrate that the business enterprise is independent of other business enterprises (5 NYCRR 144.2[a][2] and [c][2]). The purpose of this requirement is to ensure that the Division bestows program benefits upon minority and woman owned businesses that are the most likely to have experienced discrimination, rather than those that enjoy benefits from their connection to a non-WMBE business. Accordingly, a business that derives such a significant portion of its revenue from a single client so as to be dependent upon that client, or that derives benefits from a relationship with another business that are out of line with industry practices, will not be considered to be an independent business enterprise (see Skyline Specialty, Inc. v Gargano, 294 AD2d 742 [3rd Dept 2002]).

The Division's determination that CAC is not an independent business from Corazzini Asphalt, an asphalt paving business owned and operated by the woman owner's husband, is supported by substantial evidence (see 5 NYCRR 144.2[c][2]).

The evidence in this record demonstrates that CAC's and Corazzini Asphalt's businesses are inextricably linked. Both businesses are engaged in the same line of work, namely asphalt paving services (see Exh 1 3.C), and are operated at the same location from the same administrative building (see Exh 1, 6.H and 6.I; see also Exh 6, LeFebvre aff ¶ 10). Matthew LeFebvre, a Division senior certification analyst who conducted a site visit on January 22, 2016, observed that CAC utilized equipment owned by Corazzini Asphalt to such an extent that it was difficult both for him and for Ms. Corazzini to identify any equipment that belonged solely to CAC (see Exh 6, LeFebvre aff ¶¶ 9-11).

CAC relies on the employees of Corazzini Asphalt to conduct business. Ms. Corazzini informed Mr. LeFebvre that employees move back and forth between the CAC and Corazzini Asphalt according to work flow demands (see Exh 6, LeFebvre aff ¶ 13-14). She explained that CAC's demand for labor is not adequate to support full-time work for employees on a consistent basis and that using personnel from Corazzini Asphalt allows her to have a qualified workforce at the ready when necessary (see Exh 6, LeFebvre aff ¶ 14, Bah aff ¶ 22). In terms of core business activities, Ms. Corazzini relies upon Kevin Romanowski, the foreman at Corazzini Asphalt, to perform job estimates, supervise field operations, a task she is not trained to do, as well as hire and fire employees and do marketing and sales (see Exh 6, LeFebvre aff ¶ 14, Bah aff ¶ 8). Based on these facts, Division staff reasonably determined that, without access to Corazzini Asphalt's employees, Ms. Corazzini would have to hire workers on a project-by-project basis and could not guarantee the same quality of work (see Exh 6, Bah aff ¶ 22).

Ms. Corazzini also informed Mr. LeFebvre that CAC does not own its own trucks and relies on trucks and NYSDOT overweight permits owned by Corazzini Asphalt, Inc. and Campbell Excavating, a holding company, owned by her husband, to perform services that CAC could not otherwise perform (see Exh 6, Bah aff ¶ 13, Lefebvre aff ¶ 16). Indeed, record

evidence does not support the conclusion that CAC owns any vehicles or paving equipment outright. During a site inspection, according to Mr. LeFebvre, Ms. Corazzini hesitantly identified only one piece of equipment – a small CAT skid steer loader that was not marked with a Corazzini Asphalt logo, as owned by CAC (see Exh 6, LeFebvre aff ¶ 11). Based on Ms. Corazzini’s demeanor, Mr. LeFebvre was skeptical that the equipment belonged to CAC and believed that she had randomly selected a piece of equipment that was not obviously marked as belonging to CAC (see id.).

In addition, the record evidence shows that CAC’s finances are closely linked to Corazzini Asphalt. At the beginning of 2013, CAC’s federal tax return showed that [REDACTED] was due from “affiliates” (see Exh 6, LeFebvre aff ¶¶ 5-7, Exhibit 2 Form 1120S). Accounting ledgers and invoices submitted by Ms. Corazzini showed transfers from CAC to Corazzini Asphalt that were offset during the course of the year by Corazzini Asphalt, providing CAC with labor, equipment and trucks to perform projects (see Exh 6, Bah aff ¶ 19, Exhibit 7 [CAC Transactions and Ledgers]).

In sum, substantial record evidence supports the Division’s determination that CAC’s business operations are dependent on having access to vehicles, equipment and personnel from Corazzini Asphalt and that CAC is not an independent business enterprise.

CONCLUSION

CAC did not meet its burden to show that the Division’s February 5, 2016 determination to deny the application of CAC for WBE certification based the independence criteria at 5 NYCRR 144.2(a)(2) and (c)(2) is not supported by substantial evidence.

The Division has abandoned the ownership ground for denial.

RECOMMENDATION

The Division’s determination to deny CAC’s application for certification as a woman-owned business enterprise should be modified to strike the denial on ownership grounds and, as so modified, affirmed for the reasons set forth above.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart
CAC Contracting Corp.
NYS DED File ID No. 59967

Exhibit No.	Description
1	Certification Application filed by CAC Contracting Corp. (CAC) Application No.: 4681693 Submitted: August 10, 2015
2	Division's denial letter dated February 5, 2016
3	CAC's request to appeal dated March 3, 2016
4	Division's notice of appeal dated June 6, 2016
5	CAC written appeal dated July 20, 2016
6	Division Response dated November 23, 2016 (with attached Exhibits 1-7)

Ruling: Exhibits 1 through 6 received.