

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

In the Matter

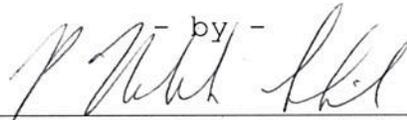
- of -

the Application of  
**Visage Construction Corp.**  
For Certification as a  
Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 5233

RECOMMENDED ORDER

- by -



---

P. Nicholas Garlick  
Administrative Law Judge

January 12, 2017

## **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 the application of Visage Construction Corp. ("applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

## **PROCEEDINGS**

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by Visage Construction Corp. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Visage Construction Corp.'s application was submitted on March 13, 2016 (Exh. DED1).

The application was denied by letter dated March 30, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Carol Lent's ownership and control of the applicant (Exh. DED2).

By letter dated April 24, 2016, the applicant requested a hearing.

By letter dated June 24, 2016, the Division notified Ms. Lent that the hearing in this matter would occur on November 8, 2016 at the Division's office located in Albany, New York.

On June 26, 2016, the matter was assigned to me.

On November 2, 2016, a conference call was held with the parties to discuss the upcoming hearing.

On November 8, 2016, a hearing in this matter was convened at the Division's office located at 625 Broadway, Albany, New York. The applicant was represented by Jeffrey Rothschild, Esq. and called one witness, Carol Lent. The Division was

represented by Phillip Harmonick, Esq. and called one witness, Carllita Bell, Senior Certification Analyst with the Division. The hearing concluded at approximately 3:00 pm.

At the close of the hearing, applicant's counsel requested an opportunity to submit additional documents relating to Ms. Lent's capital contribution to the firm. Division counsel did not object after applicant's counsel acknowledged that these documents had not been before the agency when it made its denial determination. These documents were received by email on November 18, 2016 and are listed in the attached exhibit chart as Exhibits A10a through A10n.

The record closed upon receipt of the recording of the hearing on November 30, 2016.

#### **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

#### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's 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 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**

### Position of the Division

In its denial letter, the Division asserts that the application failed to meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Carol Lent's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Carol Lent, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

### Position of the Applicant

Visage Construction Corp. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

## **FINDINGS OF FACT**

1. Visage Construction Corp. is in the business of commercial and residential site development including: blasting, installing sewer and water utilities, constructing ponds, demolition, crushing, installing septic systems, providing construction materials and screened topsoil, constructing new homes, renovating existing homes, and providing general construction services (Exh. DED1 at 3). Visage Construction Corp. has a business address of 719 Church Avenue, Germantown, New York (Exh. DED1 at 1).

2. Visage Construction Corp. was established on August 13, 1986. At the time of the application, Carol Lent owned 71% of shares of the firm and her husband Charles Lent owned the remaining 29% (Exh. DED1 at 3).

3. Charles Lent serves as the firm's president and Carol Lent serves as its vice president (Exhs. DED1, DED3 & DED5). The firm's bylaws state that the president of the corporation shall be the chief executive officer of the corporation and shall have general charge of the entire business of the corporation. Carol Lent, as vice president, only enjoys so much of the president's powers and duties as the president may from time to time delegate to her. (Exh. A4 at 13).

4. When the corporation was formed Charles and Carol Lent each contributed \$5,000 to it (Exh. DED1 at 3). Over the years a total of [REDACTED] has been paid in as capital (Exh. DED5 at 4 line 23). The contribution documents submitted with the application show various transfers into the corporation's account, but do not show that Ms. Lent is the source of the funds (Exh. A10).

#### **DISCUSSION**

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter sets forth two bases related to Ms. Lent's ownership and operation of Visage Construction Corp. Each basis is discussed individually, below.

Before discussing the merits of the denial, the applicant raised a procedural issue regarding the Division's alleged failure to contact the applicant when its existing WBE certification expired in 2013. Ms. Lent testified that Visage Construction Corp. had been certified as a WBE from 1992 until 2015 (Exh. DED6 disc 2 at 14:00). In 2013, when the latest certification expired, she claims that she never received the notices from the Division informing her that she needed to recertify (Exh. DED6 disc 2 at 13:00). These notices were sent by fax and email in March, April, and May 2015 (Exh. A16). With respect to the emails, she testified that the firm's email address had changed since the last recertification in 2010 and that she had attempted to contact the analyst who had handled the recertification at that time, who no longer works in the WBE program. With respect to the faxes, she claims she was told that the faxes originated in Albany and produced phone company records showing no faxes were received on the dates in question

(Exh. A17). As a result of her lack of notice, in 2015 the firm's certification as a WBE was rescinded, forcing the firm to submit a new application.

The Division responds that it sent three notices to the last known email address and fax number of the applicant and that Ms. Lent should have known that her certification would expire in 2013. In the following two years, until 2015, when the firm's certification was revoked, she was provided ample time to contact the Division regarding certification. The Division contends that Ms. Lent's attempt to reach the analyst who worked on her certification in 2010 was not the appropriate way to update the firm's contact information and is irrelevant to the denial determination that is the subject of this hearing. Nothing in the record indicates what other faxes the applicant may have received on the dates in question from other parts of the State where the Division has offices, such as in New York City.

The Division is correct that whatever disputes exist regarding the Division's efforts to contact the firm, the fact remains that, as discussed below, the application submitted to the Division failed demonstrate that the firm qualified for certification as a WBE. The applicant had two years to contact the Division to inquire about the status of its expired certification before it was revoked.

### **Ownership**

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner Carol Lent's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

At the hearing, Ms. Lent testified that since 1999 she had contributed over [REDACTED] to the firm (Exh. DED6, disk 1 at 7:00). Because she did not have documents going back that far, she introduced documents she claimed showed that she had contributed over [REDACTED] since October 2007 (Exh. A10). She testified about the summary of these contributions (Exh. A10 at 1), the sources of these funds, and the other documents included

in this exhibit. To summarize, she testified that over the years she had contributed: approximately [REDACTED] (Exh. DED6, disk 1 at 23:20); approximately [REDACTED] (Exh. DED6, disk 1 at 21:00, Exh. A10 at 5 & 9); over \$11,000 from the proceeds of a home equity line of credit (Exh. A10 at 25); and approximately [REDACTED] in salary she had received working as a consultant (Exh. A10 at 2, 7, 8, 14, 15, 25, 27, 29 & 30). The source of the remaining funds was not identified. Some of these monies were first deposited into a joint bank account Ms. Lent owned with her husband (Exh. A10). She also testified that during this period, her husband also made contributions to the firm of less than [REDACTED] (Exh. DED6, disk 1 at 25:00), including [REDACTED] (Exh. DED6, disk 1 at 24:30). On cross examination she acknowledged that the sources of her contributions, listed above, could not be determined from the documents which were before the Division at the time of the denial (Exh. DED6 disc 2 at 36:00 - 58:00). The record was held open to receive tax documents from the applicant that demonstrate that the source of some of these contributions was Ms. Lent's consulting job (Exh. A10a-n), but these documents were also not before the Division at the time of the denial.

In her testimony, DED analyst Carllita Bell testified that she reviewed the capital contribution information submitted by the applicant. Specifically she reviewed the information in the application stating that Ms. Lent and her husband had each contributed \$5,000 when the corporation was formed in 1986 (Exh. DED1 at 3). She also testified that other documents submitted by the application seemed to show money flowing into the business from a joint account controlled by both Ms. Lent and her husband (Exh. DED6 disc 3 at 6:45). Ms. Bell stated that she reviewed the firm's 2014 IRS form 1120S, showing capital stock of \$10,000 (Exh. DED5 at 4, line 22), and additional paid in capital of [REDACTED] (Exh. DED5 at 4, line 23), but that no documents were provided to show the source of the paid in capital (Exh. DED6 disc 3 at 8:45) or who made these contributions (Exh. DED6 disc 3 at 18:30).

Based on the evidence in the record, the applicant failed to demonstrate that the woman owner Carol Lent's capital

contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial determination on this ground was based on substantial evidence. The explanations provided at the hearing and subsequently submitted documentation may show Ms. Lent's proportionate contribution, but this information was not before the Division at the time the denial determination was made.

### **Control**

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner, Carol Lent, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

At the hearing, Ms. Lent testified that when she started the corporation she was its president, then in about 1990, her husband Charles became president and she assumed the title of vice president (Exh. DED6 disc 1 at 37:00). She continued that ever since its formation, she has had complete control of the corporation and makes all of the business decisions required (Exh. DED6 disc 1 at 37:30). She acknowledged that the company's bylaws give ultimate authority to the business's president (Exh. A4 at 13), but testified that her husband never exercised this power and delegated it to her (Exh. DED6 disc 1 at 38:00).

She also testified credibly that her husband, who is nearing retirement, has only a limited role in the company (Exh. DED6 disc 2 at 1:02:00). Through her testimony, Ms. Lent demonstrated a detailed working knowledge of every aspect of the corporation's operations and management. This included her knowledge of the details of the company's contracts (Exhs. A5, A6, A7, A8, & A9), the insurance (Exh. A12), financing needs (Exh. A15), and extensive equipment assets (Exh. A12 & A13). There is no doubt that she actually runs all aspects of the firm, but this was not the basis for the denial. Rather the denial basis involves her authority, under the corporate documents, to run the company, not whether or not she actually does.

In her testimony, DED analyst Bell testified that she reviewed the application materials and concluded that the relevant corporate documents, specifically the corporate bylaws, did not permit Ms. Lent to make business decisions without restrictions (Exh. DED6 disc 3 at 5:15). Ms. Bell noted that the application states that Mr. Lent is the president of the corporation (Exh. DED1) as do several other documents (Exhs. DED1, DED3, & DED5). She testified that the corporate bylaws state that the president shall be the chief executive officer of the corporation and have general charge of the entire business of the corporation (Exh. A4 at 13). Ms. Lent, who is the company's vice president, only has such powers and duties as the president delegates (Exh. A4 at 13). Because Ms. Lent's authority to make business decisions is limited by the power her husband enjoys as president, Ms. Bell concluded that Ms. Lent did not meet this certification criteria.

Based on the evidence in the record, specifically the titles of Mr. and Ms. Lent as president and vice president of the corporation and the powers of these offices in the bylaws, the applicant has failed to demonstrate that the woman owner, Carol Lent, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based upon substantial evidence. Applicant's counsel incorrectly characterizes the authority granted by the bylaws as a technicality; it is in fact a certification criteria. If the bylaws were amended so that Ms. Lent was named president of the corporation, this may constitute a significant change of circumstances forming the basis of the denial which would allow the applicant to reapply for WBE certification sooner than two years from the date of the written notice denying certification (5 NYCRR 144.4[d]).

#### **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owner Carol Lent's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2 The applicant failed to demonstrate that the woman owner, Carol Lent, is permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

#### **RECOMMENDATION**

The Division's determination to deny Visage Construction Corp.'s application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of  
Visage Construction Corp.**

**DED File ID No. 5233  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Application
DED2	Denial letter
DED3	Minutes of first meeting of board of directors
DED4	Contribution documents
DED5	2014 IRS form 1120S
DED6	Recording of hearing on three discs
A1	Stock certificates
A2	Stock agreement to sell shares
A3	Stock certificate
A4	Corporate bylaws
A5	NYS OGS bid document
A6	NYS OGS contract documents
A7	NYS OGS bid document
A8	NYS OGS contract documents
A9	Private contract documents
A10	Contribution document
A10-a thru A-10-n	Various financial documents submitted after the hearing and not before the Division at the time the denial letter was issued.
A11	Contact information

A12	Insurance information
A13	NYS DOT truck permits
A14	Truck registrations
A15	Financing documents
A16	ESDC communications
A17	Cable information
A18	Reserved