

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

In the Matter

- of -

the Application of **JVR Electric, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60200

RECOMMENDED ORDER

- by -



Richard A. Sherman
Administrative Law Judge

August 31, 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 JVR Electric, Inc. ("JVR" or "applicant") certification as a women-owned business enterprise ("WBE") be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that JVR does not meet the eligibility criteria for certification as a WBE.

The Division denied JVR's application for WBE certification (exhibit 4) by letter dated January 21, 2016 (exhibit 6). The denial letter sets forth four grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice") from the denial by letter dated February 18, 2016. Subsequent to the notice, the parties submitted the following documents: (1) JVR appeal ("appeal") from the denial, dated April 21, 2016; (2) Division response ("response"), dated June 14, 2016; JVR reply ("reply"), dated July 1, 2016; and Division surresponse ("surresponse"), dated July 11, 2016.

This matter was assigned to me on July 18, 2016. Upon receipt of the file, I created the attached exhibit list. The submittals noted above and the exhibits listed in the attachment constitute the entire record upon which this report is based.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, and control of the business enterprise are assessed 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 itself, and on information revealed in supplemental submissions and/or 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 JVR'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

The Division argues that applicant failed to demonstrate that:

(1) "the minority or woman owner(s) enjoy the customary incidents of ownership and share in the risks and profits in proportion with their ownership interest in the enterprise;"

(2) "the minority or woman owner(s) capital contributions are proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;"

(3) "the minority or woman owner(s) have the experience or technical competence, working knowledge or ability needed to operate the enterprise"; and

(4) "the minority or woman owner(s) make decisions pertaining to the operations of the enterprise"

(exhibit 6 at 2 [citing 5 NYCRR 144.2]).

Position of Applicant

Applicant argues that each of the bases cited by the Division for the denial is incorrect and that the Division's conclusions are "inaccurate, not based on the facts, and fail to credit the central role of Cynthia LaSala [the woman owner] in starting JVR and growing its business" (notice at 1). Applicant asserts that JVR's owners, Cynthia LaSala and her husband Stephen LaSala, did not invest significant capital into the enterprise at the outset, but rather built the business up over twenty years by contributing "their time, personal resources, expertise and 'sweat equity'" (id. at 2). Applicant asserts that "[s]ince its inception, Cynthia LaSala has been the only person in charge of essential aspects of JVR" (id.). Applicant argues that "JVR's growth over the last twenty years is proof that Ms. LaSala has the necessary expertise and technical competence to operate JVR's business" (id.).

FINDINGS OF FACT

1. JVR, incorporated on December 11, 1996, is engaged in the business of commercial electrical contracting (exhibits 1; 4 at 2 [item 1.Q]; 3 [items 4.A-D]).

2. On January 8, 1997, JVR issued 200 shares of common stock (exhibits 2 at 1-3; 3). The shares were issued to Ms. and Mr. LaSala as joint tenants with rights of survivorship (id.; appeal at 2). On April 19, 2001, Ms. and Mr. LaSala transferred their 200 shares of

common stock to Mr. LaSala alone (exhibits 2 at 2-7 ; 3). On January 1, 2014, Mr. LaSala transferred 102 shares of his common stock to Ms. LaSala and retained 98 shares for himself (exhibits 2 at 6-15; 3).

3. JVR's application materials do not identify an amount paid for the original issuance of JVR's common stock or for any subsequent transfer of the stock (see exhibits 2, 3, 7 [applicant's response to question #10, stating that "[t]here was no monetary exchange of any kind in [the] transfer of ownership" to Ms. LaSala on January 1, 2014]).

4. JVR started as a home-based business (exhibit 8 [applicant's response to question #12]; reply at 2). In 1998, as a result of the growth of its business, JVR relocated to its current offices in Medford, New York (exhibit 8 [applicant's response to question #12]).

5. At the time JVR was incorporated, Mr. LaSala was named president and worked for JVR full-time; Ms. LaSala was named corporate secretary and worked both for JVR and for Clinical Practice Management Plan ("Clinical"), an unrelated business (exhibit 5). Ms. LaSala continued to work for Clinical as an administrative assistant until 2002 (id.).

6. Mr. LaSala remained the president of JVR until sometime in 2013, when Ms. LaSala was named president (exhibit 5).

7. Mr. LaSala completed a 6-year electrical apprenticeship, is a master electrician, and worked as a foreman for electrical contractors beginning in 1992 (exhibit 5 at 2).

8. In 2014, the year of the most recent tax return submitted by applicant, Mr. LaSala received [REDACTED] and Ms. LaSala received [REDACTED] in compensation from JVR (exhibit 9 at 7 [IRS Form 1125-E]).

9. In 2014, the year of the most recent tax return submitted by applicant, Mr. LaSala received [REDACTED] [REDACTED] (appeal exhibit K [IRS Form 1120S, Schedule K-1, for Mr. and Ms. LaSala, respectively, at 1]; see also reply at 3 [REDACTED]).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of JVR as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. The Division cites four bases in support of upholding the denial, each of which is discussed below.

¹ The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]).

Division staff argues that the compensation received by Ms. LaSala is not proportionate to her ownership interest in JVR. Staff notes that applicant's 2014 tax return shows that Ms. LaSala received only [REDACTED] in compensation from JVR while Mr. LaSala received [REDACTED] (response at 3 [citing exhibit 9, IRS Form 1125-E]).

Applicant asserts that the compensation paid to Ms. and Mr. LaSala is misleading because Mr. LaSala's compensation "reflects wages and benefits he would have received as a union electrician" (reply at 2). Notably, applicant's assertion does not state that any portion of Mr. LaSala's [REDACTED] compensation was required pursuant to a union contract, only that it "reflects" what he "would have" received. Nor does applicant cite to any documentation in the record that would support the argument that Mr. LaSala's compensation was, in whole or in part, the result of non-discretionary union wages. With regard to Ms. LaSala's compensation, although applicant asserts that Ms. LaSala chose to reinvest earnings rather than be paid "the highest salary of any employee," applicant makes no assertion that Ms. LaSala's [REDACTED] compensation was limited by any financial constraints confronting the enterprise (*id.* at 3). Indeed, as applicant notes, JVR's reported profit has increased consistently over recent years and exceeded [REDACTED] in 2014 (*id.*).

Applicant also argues that Ms. LaSala received [REDACTED] from JVR in 2014 (appeal at 3). As applicant acknowledges, however, Mr. LaSala also received other benefits and distributions from JVR (*id.*). The 2014 tax return shows that Mr. LaSala received [REDACTED] (finding of fact ¶ 9). Thus, the difference between Ms. LaSala's and Mr. LaSala's [REDACTED]

Finally, applicant argues that staff failed to consider that Ms. LaSala is entitled to 51% of JVR's "ordinary business income" (appeal at 3). The Division states that earnings from the business that have not been allocated to shareholders are not considered in evaluating Ms. LaSala's profit from JVR because "[t]here is no guarantee that Ms. LaSala will ever benefit from these funds" (surreponse at 2). Of course, even if these earnings were considered by the Division, Mr. LaSala would be entitled to 49% of the funds and, therefore, these funds would result in little impact on the gross disparity in the compensation paid to Ms. and Mr. LaSala.

Given the size of the disparity between the compensation paid to Ms. and Mr. LaSala, the arguments raised by applicant are insufficient to undermine the Division's reliance on the LaSalas' respective compensation in its determination to deny the application.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(c)(2) is supported by substantial evidence.

Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise" (5 NYCRR 144.2[a][1]).

The Division argues that applicant did not identify any relevant contributions to JVR by Ms. LaSala and, therefore, applicant failed to demonstrate that Ms. LaSala's contribution of money, property, equipment or expertise is proportionate to her ownership interest in the enterprise (response at 2).

Applicant argues that the record before the Division demonstrates that "[n]either Ms. LaSala nor her husband contributed significant capital to start the company" but that they invested "their time, personal resources, expertise and 'sweat equity'" into the business (appeal at 2). Applicant further argues that the Division's determination "completely negates Ms. LaSala's 20 years of full-time engagement in building this business" (reply at 2).

To establish whether an owner's contribution of expertise to an enterprise is proportionate to the owner's equity interest, an applicant must provide evidence of the value of such contributions. Applicant asserts that the Division inappropriately valued Mr. LaSala's contributions over those of Ms. LaSala (reply at 2). As Division staff notes, however, applicant provided no valuation of either Ms. LaSala's or Mr. LaSala's contributions of expertise to the enterprise. Without such information, the Division is not able to ascertain whether Ms. LaSala's contribution is proportionate.

I note that the resume for Ms. LaSala that was provided with the application materials indicates that she was JVR's corporate secretary from 1995 through 2013 and that she also worked for another company through 2002 (exhibit 5 at 1). In contrast, Mr. LaSala's resume states that he was JVR's president from 1995 through 2013 and that, since 1996, he has been employed only by JVR (*id.* at 2). Further, Ms. LaSala's work experience prior to her ownership of JVR was as an administrative assistant and office manager while Mr. LaSala's prior work experience was as an electrician and foreman (*id.* at 1-2). Given this background, and the absence of documentation or other evidence that Ms. LaSala contributed expertise to JVR, and did so to an extent that was greater than Mr. LaSala, there is no reason to disturb the Division's determination on this criterion.

Applicant asserts that the Division failed to adequately review the application materials to ascertain the value of Ms. LaSala's contribution and that the Division should have conducted various interviews with JVR employees and business relations as part of the review process (reply at 2). As the Division notes, however, applicant was expressly asked to provide supporting material concerning Ms. LaSala's contributions to the enterprise and failed to do so (response at 2; exhibits 4 at 5 [items 10, 12, 13, 14]; 7 [applicant's statement that "[t]here was no monetary exchange of any kind in [the] transfer of ownership" to Ms. LaSala in 2014]; 8).

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(a)(1) is supported by substantial evidence.

Operation: Managerial Experience,
Technical Competence, Working Knowledge and Ability

The applicable regulatory criteria state that the woman owner "must have adequate managerial experience or technical competence in the business enterprise seeking certification [and] must demonstrate the working knowledge and ability needed to operate the business enterprise" (5 NYCRR 144.2[b][1][i-ii]).

The Division argues that, "[a]s the owner of an electrical contracting firm, Ms. LaSala must demonstrate the technical ability to evaluate the work of her employees" (response at 4). Staff further asserts that the application materials fail to demonstrate that Ms. LaSala has the experience or training in electrical contracting to oversee the critical functions of the enterprise. Staff asserts that, in contrast, Mr. LaSala "is eminently qualified to oversee JVR's core functions" (id.). Staff notes that the application materials demonstrate that Mr. LaSala has worked as an electrician since 1989, is a licensed master electrician, and worked as a foreman since 1993 (id.).

Applicant argues that "[t]he undisputed evidence shows that [Ms. LaSala] has been the only person in charge of negotiating and executing contracts, banking, insurance, legal and personnel matters, marketing and union administration [and that she] has inspected project work sites, monitored job progress, resolved technical job related issues, scheduled jobs, ran weekly estimating meetings, and supervised JVR's staff of estimators, project managers and union electricians" (reply at 5). Applicant further argues that there is no basis for the Division's determination that Mr. LaSala is the individual that is qualified to oversee JVR's core business functions (id.).

The record that was before the Division at the time of the denial does not support applicant's position. In response to an inquiry from the Division regarding Ms. LaSala's duties and responsibilities, applicant provided a statement indicating that her responsibilities were largely administrative, including "Accounts Receivables (sic)," "Accounts Payables (sic)," "Payroll," "Construction Contract Expediting," and "Bank Reconciliations" (exhibit 8 [applicant's response to question #13]). In contrast, applicant indicated that Mr. LaSala was responsible for "Project Management," "Estimating," and "Material Procurement" (id. [applicant's response to question #14]). These responses support the Division's determination that Mr. LaSala operates the core functions of the enterprise and has the ability to oversee the work of applicant's other employees in the field.

The LaSalas' resumes also support the Division's determination. As previously noted, Ms. LaSala was JVR's corporate secretary from 1995 through 2013 while Mr. LaSala was JVR's president during that time (exhibit 5). Further, Ms. LaSala's work experience prior to her ownership of JVR was as an administrative assistant and office manager while Mr. LaSala's prior work experience was as an electrician and foreman (id.). Given this background, and the absence of documentation before the Division to demonstrate that Ms. LaSala has the technical competence, working knowledge and ability to operate JVR's core business functions, the Division's determination should be upheld.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(b)(1)(i-ii) is supported by substantial evidence.

Operation: Decisions Pertaining to Operations

The applicable regulatory criterion states that "[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]).

The Division argues that project management and estimating are the core revenue generating functions of the enterprise (response at 5). The Division further argues that the application materials indicate that Ms. LaSala "manages accounting and financial functions, payroll, and certain contracting functions" but that Mr. LaSala "manages projects, estimating, and material procurement" (*id.*). The Division determined that the delegation of the management of JVR's core revenue generating functions to Mr. LaSala rendered the enterprise ineligible for certification.

Applicant argues that "Ms. LaSala is the only person in charge of essential aspects of JVR" and "has sole charge and responsibility for banking, insurance, accounts payable, accounts receivable, legal and personnel matters, marketing and union administration" (reply at 6). Applicant further argues that Ms. LaSala's role since becoming the majority owner in 2014 has increased and she now is responsible for "inspecting project work sites; monitoring job progress; resolving technical job related issues" and she "supervises JVR's staff of estimators, project managers and union electricians" (*id.*).

Some of applicant's representations regarding Ms. LaSala's responsibilities are directly contradicted by the record, and others are not supported by the documentation that was before the Division at the time of its determination to deny the application. Applicant, for example, asserts that Ms. LaSala has "sole charge and responsibility for banking" (reply at 6), but the documents submitted by applicant indicate that both Ms. and Mr. LaSala have signature authority on JVR's accounts (*see* appeal exhibit C). Applicant also asserts that Ms. LaSala has authority over JVR's leases (reply at 6), but the lease filed with the application indicates that it was signed by Mr. LaSala² (*see* appeal exhibit D). I note that applicant cites other documents in the record that show Ms. LaSala has signed certain business documents on behalf of JVR (*see* reply at 6 [citing appeal exhibits E, F, and G]).

Applicant argues that, the appeal "establishes that since becoming majority owner, Ms. LaSala assumed additional duties including, inspecting project work sites; monitoring job progress; resolving technical job related issues," among others, and that she "supervises JVR's staff of estimators, project managers and union electricians" (reply at 6). These statements are not supported by the documentation that was before the Division at the time of its denial. As previously noted, the application materials indicate that Ms. LaSala's duties and responsibilities were largely administrative, while Mr. LaSala's duties and responsibilities related to the operation of the core functions of the enterprise (*see supra* at 6).

² The signature page on the lease in the record appears to be cut off at the bottom. It is, therefore, not known whether Ms. LaSala also signed the lease.

Applicant also asserts that, at the end of 2013, "Mr. LaSala withdrew from JVR on a full-time basis" (appeal at 2). Applicant does not cite to support in the record for this assertion, and I could find no documentation that was before the Division at the time of the denial that indicates Mr. LaSala was no longer working full-time for applicant. Rather, the application materials state that Mr. LaSala continues to work full time for JVR (exhibit 8 [applicant's responses to questions #13 and #14, stating that both Ms. and Mr. LaSala work 40 hours per week for applicant]) and that he was well compensated in 2014 (findings of fact ¶ 4). Further, in response to an inquiry from the Division requesting "a detailed narrative" of the changes in ownership of JVR, applicant makes no reference to Mr. LaSala's diminished role at JVR, but rather states that Ms. LaSala was made majority owner in January 2014 "to facilitate the growth and marketing of [applicant] in the minority based diversity business community" (*id.* [applicant's response to question #12]).

Lastly, I note that applicant asserts that "there is nothing [in the record] to suggest that [Mr. LaSala] can manage a business of this size" (reply at 6). The record that was before the Division, however, shows that Mr. LaSala: was the president of JVR through 2013 when Ms. LaSala was named JVR's president (findings of fact ¶ 6); was the sole shareholder of the enterprise from 2001 until 2014 when he transferred a majority of his shares to Ms. LaSala (findings of fact ¶ 2); had worked only for JVR since its incorporation, including during its early expansion from a home-based business to its current offices (findings of fact ¶¶ 4-5); and has the technical background and oversight experience to manage JVR's field operations (findings of fact ¶ 7). I note also that in 2013, the last year that Mr. LaSala was both president and sole shareholder of JVR, the enterprise reported gross revenues of [REDACTED] (exhibit 4 at 2 [item 1.U.]). There is ample support in the record for the Division to have concluded that Mr. LaSala can and has managed JVR's operations.

On this record, I conclude that the Division's determination with regard 5 NYCRR 144.2(b)(1) is supported by substantial evidence.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny JVR's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny JVR's application for certification as a women-owned business enterprise should be affirmed, for the reasons stated herein.

**Matter of JVR Electric, Inc.
DED File ID No. 60200**

Exhibit List

Exh. #	Description
1	NYS Department of State, Division of Corporations Filing Receipt
2	JVR Stock Documents
3	JVR Stock Ledger
4	JVR Fast Track M/WBE Application, Submitted August 18, 2015
5	Resumes of Cynthia and Stephen LaSala
6	Department denial letter to JVR, Dated January 21, 2016
7	JVR Responses to Application Question #10
8	JVR Responses to Application Questions #12-14
9	JVR 2014 Federal Tax Return
10	Stephen LaSala Master Electrician License
A	Department Denial Letter to JVR, Dated January 21, 2016
B	Stock Certificates
C	Bank of America Signature Cards
D	JVR Office Lease
E	IRS E-file Forms, NYS Certificate of Capital Improvement, NYS Workers Comp Application, US Labor Department Payroll Form
F	Letter of Assent for Collective Bargaining
G	Standard Form of Agreement Between Contactor and Subcontractor
H	Preferred Subcontractor Status
I	WBENC and NWBOC Certifications
J	WBENC Standards and Procedures
K	2014 Federal and State Tax Returns
L	Listing of NYS WBE Certified Electrical Firms