

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

In the Matter

- of -

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

NYS DED File ID No. 48583

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

July 14, 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 Pequa Insulation Mechanical, Inc. (“Pequa” or “applicant”) certification as a women-owned business enterprise¹ (“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 Pequa does not meet the eligibility criteria for certification as a WBE.

The Division denied Pequa’s application for WBE certification (Exhibit 1) by letter dated June 15, 2016. Exhibit 5. The denial letter sets forth two grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division, applicant failed to demonstrate that Ms. Nelson has the experience or technical competence, working knowledge or ability needed to operate the enterprise, that she makes decisions pertaining to the operation of the enterprise, or that she devotes time on an ongoing basis to the enterprise’s daily operations (see 5 NYCRR Section 144.2(b)(1)(i) – (iii) (“Operation”)).

On July 12, 2016, applicant requested the opportunity to submit a written appeal (“Hearing Request”). By letter dated August 3, 2016, the Division advised applicant of the procedures for filing a written appeal (Exhibit 7), and applicant sent a second letter dated September 12, 2016, with attached exhibits (the “Appeal”).² The Division responded in a memorandum of law dated June 22, 2017 (the “Division Response”).

A list of exhibits is attached to this recommended order. Exhibits submitted by Pequa were not marked or received if those exhibits were duplicates of exhibits submitted by the Division and already received into the record.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application

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 Section 140.1(tt) of 5 NYCRR (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”)).

² Attached to both the Hearing Request and the Appeal are copies of a letter dated July 14, 2016 from Matthew P. Aracich, Business Manager, International Association of Heat & Frost Insulators and Allied Workers. The letter recommends that Pequa’s WBE status be renewed, and encloses signature pages of collective bargaining agreements. The letter and the enclosures have been marked as Exhibit 8, collectively.

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 any interviews that the Division's analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Pequa's application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addressed the bases cited by the Division for the denial of Pequa's WBE application. Applicant noted that Pequa was previously certified, and maintained that nothing had changed since the prior certification, which had lapsed. Applicant asserted that Ms. Nelson operates the business, that she makes decisions pertaining to Pequa's operation, and devotes time to that operation on an ongoing basis.

Division

The Division contended that its determination was supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman owner. Specifically, the Division asserted that with respect to operation, applicant failed to show that Ms. Nelson has the technical expertise or technical competence, working knowledge or ability to operate Pequa. Moreover, the Division maintained that Ms. Nelson does not devote time on a daily basis to Pequa's operations. Accordingly, the Division requested that its determination to deny WBE certification to Pequa be upheld.

FINDINGS OF FACT

1. Pequa Insulation Mechanical Inc. is located at 64 Swan Drive, Massapequa, New York. Exhibit 1, at 1.
2. Pequa is a construction related company that installs insulation (commercial pipe and duct covering). Exhibit 1, at 3.
3. Christine Nelson, the woman owner, does not possess any relevant certifications, and has not taken any training relevant to Pequa's field operations. The two other employees of the business, Mr. Nelson and Mr. Ciuffo, have decades of work

experience in the industry, have taken relevant training, and hold certifications relevant to Pequa's operation.

4. Ms. Nelson is employed by Farmingdale Care as a part time bookkeeper. Mr. Nelson and Mr. Ciuffo work full-time for Pequa.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification to Pequa as a women-owned business enterprise pursuant to Executive Law Article 15-A.

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 provided in supplemental submissions and interviews that are conducted by Division analysts.

Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

With respect to operation, the Division's denial letter set forth the following "relevant facts":

- Ms. Nelson maintains outside employment during the regular business hours of Pequa Insulation Mechanical, Inc. ("Pequa").
- Pequa employs two male individuals, James Nelson and Michael Ciuffo, as field supervisors.
- Ms. Nelson's duties are limited to financial and clerical tasks.
- Mr. Nelson and Mr. Ciuffo are solely responsible for estimating projects and supervising field operations.
- Ms. Nelson possesses no relevant certifications, training, or managerial experience in insulation installation.
- Mr. Nelson and Mr. Ciuffo have substantial prior managerial experience in insulation installation.
- Mr. Nelson and Mr. Ciuffo possess certifications relevant to the installation of insulation, including completion of required OSHA courses and scaffolding training.

Exhibit 5, at 2.

On its appeal, applicant stated that Mr. Ciuffo “is not a field supervisor and he cannot make any decisions pertaining to Pequa under any circumstances. James Nelson does not make any decisions without consulting me first. . . . My duties are not limited, I run the entire company.” Hearing Request at 2. Ms. Nelson went on to acknowledge that she cannot install insulation, but contended that because the business is a union shop, she is not permitted to install insulation herself; “it’s considered a conflict of interest.” *Id.*; Appeal at 2. This statement is not explained, nor is any supporting citation provided.

Both the Hearing Request and the Appeal attach copies of a letter from the International Association of Heat & Frost Insulators & Allied Workers in support of applicant’s WBE certification, as well as copies of the signature pages of collective bargaining agreements from the past several years. The Hearing Request and the Appeal do not explain the relevance of these documents, and in fact do not refer to the documents in any way. In any event, the letter post-dates the Division’s denial, and therefore the letter and attachments are not considered on appeal.

In response, the Division stated that estimating and supervision of field operations were the significant operations of Pequa, because, in the Division’s view, “these two functions are central to how Pequa obtains work and delivers services to clients.” Division Response at 4. Citing to Ms. Nelson’s resume, the Division observed that her role in the management of Pequa was limited to “the financial and clerical operations of my business.” *Id.*; Exhibit 2. The Division went on to note that according to Ms. Nelson’s response to the Division’s request for additional information, Mr. Nelson and Mr. Ciuffo estimate and manage their respective projects, while Ms. Nelson handles the financial and administrative aspects of the business. Division Response at 4; Exhibit 4.

The Division’s determination was supported by substantial evidence. As the Division notes, “women do not meet the operations criteria for certification when they are primarily engaged in back office roles, and defer management of significant operations associated with obtaining and performing revenue-generating work to non-minority male individuals.” Division Response, at 1. In this case, it is undisputed that Ms. Nelson manages clerical and back office functions, while Mr. Nelson and Mr. Ciuffo are responsible for the significant, revenue generating work of Pequa. See Matter of Northeastern Stud Welding Corp., 211 A.D.2d 889, 890 (3rd Dept. 1995) (affirming the Division’s determination where woman owner performed some functions and made some decisions on her own, but significant operations were shared and still others were performed by her husband alone; and concluding that the enterprise was a family-owned business).

Moreover, as the Division points out, Ms. Nelson does not possess relevant training or certifications, in contrast to Mr. Nelson and Mr. Ciuffo. The Division’s conclusion that the record contains no evidence establishing that Ms. Nelson possesses “adequate managerial experience or technical competence” or “working knowledge and ability” within the meaning of the regulations is supported by substantial evidence. With respect to the requirement that a woman owner devote time on an ongoing basis to the daily operations of the enterprise, the Division noted that Ms. Nelson is only available to perform work for Pequa on a part-time basis, while Mr. Nelson and Mr. Ciuffo are primarily employed by Pequa and manage its operations full-time.

Applicant's argument that Pequa "does not require a 40 hour work week to operate effectively" (Appeal, at 1) was effectively rebutted by the Division's observation that while a home-based, three-employee firm does not require a full time bookkeeper and clerical worker, "the management of the significant operations of Pequa, as demonstrated by Mr. Nelson and Mr. Ciuffo, requires full-time work." Division Response at 5. The Division's conclusion that Ms. Nelson's part-time administrative and bookkeeping work does not satisfy the requirements of Section 144.2(b)(1)(iii) of 5 NYCRR was supported by substantial evidence.

Finally, applicant contended that because Pequa was previously certified as a woman-owned business on similar facts in 1995, Pequa's application was improperly denied. As the Division points out, "[t]he facts in the administrative record clearly establish that Ms. Nelson does not operate Pequa for the purposes of WBE certification, and any prior certification of Pequa as a WBE on similar facts would have been an erroneous misapplication of the law pertaining to the eligibility of businesses for MWBE certification." Division Response at 5. The Division is not bound by a prior error, and applicant's arguments with respect to this point are unavailing.

The record supports the Division's determination regarding the operation of Pequa. The significant functions of the business are handled by male employees, who work full time for Pequa, while Ms. Nelson has other employment and no relevant experience working in the field. The Division's denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

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

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Pequa's application for certification as a women-owned business enterprise should be affirmed.

Matter of Pequa Insulation Mechanical, Inc.
DED File ID No. 48583
Exhibit Chart

Exhibit No.	Description
1	February 27, 2014 application
2	Resume: Christine M. Nelson
3	April 28, 2016 letter from Cleneice Mincey, NYS DED, to Christine Nelson re: request for additional information
4	May 5, 2016 letter from Christine Nelson to Cleneice Mincey
5	June 15, 2016 denial letter
6	Certifications: James Nelson and Michael Ciuffo
7	August 3, 2016 letter re: written appeal procedure
8	July 14, 2016 letter from Michael Aracich, Business Manager, International Association of Heat & Frost Insulators and Allied Workers, with attached copies of signature pages of collective bargaining agreements