

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

the Application of E-Skylight, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57596

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 7, 2023

This matter considers the written appeal by E-Skylight, Inc., (“E-Skylight” 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 woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On August 11, 2022, Ms. Joanne O’Neill, as President, applied on behalf of E-Skylight for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On October 31, 2022, 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) Minority group members or women relied upon for certification do not make 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).

3. E-Skylight timely filed a notice of appeal on November 28, 2022 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to E-Skylight on December 6, 2022 (DED Exhibit 3).
5. E-Skylight submitted its written appeal by undated letter. (APP Exhibit 2).
6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated May 10, 2023, and a brief of Candace Williamson Esq., counsel for the Division, dated May 17, 2023.

FINDINGS OF FACT

7. E-Skylight is engaged in designing and furnishing skylights, including the fabrication and installation of glass and glazing, metal sidings, louvers, windows, doors and curtainwall. (DED Exhibit 1).
8. Ms. Joanne O'Neill is the President and has a 100% ownership interest (DED Exhibit 1).
9. Ms. O'Neill obtained her shares on December 27, 2017, for a purchase price of \$ [REDACTED]. The payment was made by a check issued from an E-Skylight bank account (DED Exhibit 4).
10. Mr. Mark Halloway, a male employee, manages estimates and drafting, marketing and sales, purchases equipment, negotiates contracts and oversees the projects from start to finish (DED Exhibit 1).
11. Ms. O'Neill is a licensed practical nurse. Prior to joining the business in 2015, she held positions in the health care field. Her resume states that she oversees operations and management of the business's website, handles pricing, contractual issues, and scheduling of deliveries, coordinates bid proposals for quote requests, negotiates with vendors, reviews projects and manages accounts receivable and payables (DED Exhibit 6).

APPLICABLE LAW

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

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.

5 NYCRR §144.2(c)(1) states as follows:

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...

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

Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the 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.

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 E-Skylight 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). Accordingly, applicant's attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/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 Applicant bears the burden in establishing that she has 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).

On December 27, 2017, Ms. O'Neill entered into a Stock Purchase Agreement for the purchase of 100% of the business for the sum of \$ [REDACTED] (DED Exhibit 4). The payment was made from an E-Skylight bank account (DED Exhibit 5). There is no evidence that Ms. O'Neill personally paid for the shares. The contribution was therefore not made from assets belonging solely to Ms. O'Neill.

Applicant argues on appeal that Ms. O’Neill took a partial paycheck from the business beginning on the purchase date until the \$ [REDACTED] balance was paid off (APP Exhibit 2). Even assuming such information was submitted to clarify or explain the previously submitted materials and not new evidence, no proof was submitted to show the purported reduction in salary.

The Division’s determination to deny the application on the basis that E-Skylight failed to demonstrate that Ms. O’Neill made contributions to E-Skylight in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), 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.

Ms. O’Neill does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the industry (DED Exhibits 1 and 6). The critical functions of the business are obtaining contracts for service and drafting and designing customized skylights (DED Exhibit 1). Mr. Halloway has industry-specific experience in designing and distributing skylights (DED Exhibit 7). His responsibilities include managing estimates and drafting, marketing and sales, negotiating contracts and overseeing the projects from start to finish (DED Exhibit 1). Ms. O’Neill oversees operations, handles pricing, contractual issues, scheduling of deliveries,

negotiates with vendors and manages accounts receivable and payable (DED Exhibit 6). She does not have the training or experience in the industry necessary to supervise the work of the employees.

5 NYCRR §144.2(c)(2) states that “... 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”.

The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

E-Skylight’s products and services include designing and furnishing custom skylights, and fabrication and installation of skylights (DED Exhibit 1). The critical functions of the business are obtaining contracts for service and drafting and designing customized skylights (DED Exhibit 1).

Mr. Halloway “oversees the project from start to finish” (DED Exhibit 1). He oversees estimates and drafting, develops quotes for all projects and coordinates shipments to customers (DED Exhibit 1). He analyzes skylight and curtain wall projects, develops cost estimates, develops sales contacts, assists in the design of projects and develops standards for bids and sales (DED Exhibit 7).

Ms. O'Neill oversees operations, handles pricing, contractual issues, scheduling of deliveries, negotiates with vendors and manages accounts receivable and payable (DED Exhibit 6). Ms. LoRusso does not exercise independent operational control over the core functions of the business. Mr. Halloway is primarily responsible for overseeing the day-to-day operations of the business.

CONCLUSION

E-Skylight 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), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny E-Skylight's application for certification as a woman-owned business enterprise.

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DED File ID No. 57596
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Stock Sale Agreement	Y	Y
DED 5	Unanimous Written Consent of Shareholders of E-Skylight, Inc.	Y	Y
DED 6	Resume of Ms. Joanne O'Neill	Y	Y
DED 7	Resume of Mr. Mark Halloway	Y	Y
APP 1	Notice of Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y