

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

In the Matter

- of -

the Application of EIA Datacom, Inc.
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 64476

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 5, 2023

This matter considers the written appeal by EIA Datacom, Inc. (“EIA” 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 minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On December 8, 2017, EIA, Inc., as 100% owner, submitted its application in support of EIA Datacom, Inc.’s application for certification as a MBE (DED Exhibit 1).
2. On November 12, 2020, the Division denied the application (DED Exhibit 2) on the following grounds:
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2);
 - (c) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1);
 - (d) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the

business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii); and

(e) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(1)(iii),

3. EIA timely filed a notice of appeal on February 10, 2021 (APP Exhibit 1).
4. EIA submitted its written appeal on March 26, 2021 (APP Exhibit 2).
5. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated May 26, 2023, and a brief of Anequa Pond, Esq., counsel for the Division, dated May 31, 2023.

FINDINGS OF FACT

6. EIA provides low voltage data and voice supply and installation services and CCTV and access control installation and programming services (DED Exhibit 1).
7. EIA is 100% owned by its holding company, EIA, Inc. EIA Inc. has five owners, Yolanda Del Prado (13%), George Engel (34%), Matthew Orent (15%), David Engel (19%) and Alexandra Engel (19%) (DED Exhibit 1).
8. The certification application was based on Yolanda Del Prado (13%), Alexandra Engel (19%) and David Engel (19%) (DED Exhibit 1).
9. The Application reflects that neither Ms. Del Prado, Ms. Alexandra Engel or Mr. David Engel made a monetary contribution for their ownership interests (DED Exhibit 1).
10. Ms. Alexandra Engel is not involved in the day-to day activities. She acts as a Chief Administrative Officer on an “as needed” basis. She has experience in government bid

preparation, operations management, quality control, dispatch, purchasing, billing, safety control and office management (DED Exhibit 3). She works a full-time job at Shawnee Ridge at University Park and lists her occupation as Community Manager on her 2018 personal tax returns. She does not receive any income from EIA (DED Exhibit 6).

11. Ms. Del Prado is the President of EIA, Inc. and oversees the staff and executives, directs the company's financial goals and objectives, budgets and human resources (DED Exhibit 3).
12. Mr. David Engel holds a Bachelor of Science degree in Information Technology and holds multiple certificates including NYC Certified Alarm Installer, Cisco Certified Network Associate, and S2 Certified Technician. He built EIA's core Opensource monitoring platform, is the lead security consultant for key accounts, and built EIA's wireless design practice. He has more than 15 years of IT experience (DED Exhibit 8). He is the Chief Technology Officer, and manages network infrastructure and telecommunications and develops, updates and enhances custom applications (DED Exhibit 7).
13. Mr. George Engel, a non-qualifying owner, plays an advisory role and is not involved in the day-to-day operations of the business (DED Exhibit 7).
14. Mr. Matthew Ossont, a non-qualifying owner, is the Chief Operating Officer. He reviews bids, develops internal processes that improve customer delivery and speaks with clients to discuss opportunities (DED Exhibit 7).

APPLICABLE LAW

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

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

...The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former §144.2(b)(1) states in relevant part as follows:

- (1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:
 - (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
 - (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.
 - (iii) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

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

- (2) Operational decisions. Minority group members or 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...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 EIA for certification as a MBE 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).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR former §144.2(a)(1) to require an applicant to demonstrate that the minority-owner’s contribution came from assets belonging solely to the minority/woman-owner. Given this criterion, the Division consistently denies applications for MBE 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, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

Here, none of the three owners relied upon for certification – Ms. Del Prado, Ms. Alexandra Engel or Mr. David Engel – made any capital contribution (DED Exhibit 1). Applicant stated that “there is no evidence of any capital contributions that EIA, Inc. paid to EIA Datacom” (DED Exhibit 5).

In *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016, it was held that the applicant was properly denied certification

where the application failed to include any evidence of contribution. See also *Matter of Claim Electric Corp.*, Recommended Order dated June 5, 2019, Final Order 19-14 dated June 26, 2019, holding that the applicant failed to show that the contribution of the woman owner was proportionate to her equity interest when the owner failed to submit any proof she made a contribution.

Appellants argue on appeal that they satisfied the capital contribution requirement by contributing their expertise (DED Exhibit 7). A contribution of expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented at the time the individual acquires their ownership shares. *Matter of Darr Construction*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022. Appellant did not provide any documentation establishing that expertise was the contribution of Ms. Alexandra Engel, Ms. Del Prado or Mr. David Engel at the time they acquired their ownership interests. No valuation of their expertise contributions were provided. Mr. David Engel and Ms. Del Prado were compensated by EIA (DED Exhibit 4). Ms. Del Prado and Ms. Alexandra Engel have no expertise in the core functions of the business, which are providing low voltage data and voice supply installation services and CCTV access control installation and programming services (DED Exhibit 1).

The minority group owners have not established that as owners of EIA they made contributions proportionate to their ownership interest in the business.

5 NYCRR former §144.2(c)(2) requires that the minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to their ownership interest in the business. It is well settled that the Division may rely upon financial records as

support for the determination that an applicant does not share in the risks and profits in proportion with their ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017). In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3rd Dept. 1995), the Court found that the Division’s review of tax returns provided substantial evidence supporting the Division’s consideration of whether a minority/woman-owned business enterprise met the eligibility criterion at 5 NYCRR former §144.2(c)(2). See also *Matter of Darr Construction, Inc.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022; *Matter of S.C. Spencer Electric Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 31, 2022.

According to the Business Tax Documents and W-2’s submitted with the application, Ms. Alexandra Engel received no income from the business (DED Exhibit 5). Ms. Alexandra Engel only receives income from outside employment (DED Exhibit 7). In *Brandt Equipment, LLC*, Recommended Order dated April 28, 2020, Final Order 20-06 dated June 2, 2020, it was held that the woman owner did not share in the risks and profits of the business in proportion to her ownership interest, where review of the income tax returns and W-2s revealed that she did not receive any compensation or distributions from the business. EIA has not demonstrated that Ms. Alexandra Engel shares in the risks and profits in proportion to her ownership interest in the business enterprise.

II. Operation

The eligibility criteria for MWBE certification requires that the minority/woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The minority/woman-owner “must

exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

EIA admits in the application that Ms. Alexandra Engel is “not involved in the day-to-day activities” of the business and acts as “Chief Administrative Officer on an “as needed basis” (DED Exhibit 3). She has full-time employment outside the business and therefore does not make decisions pertaining to the day-to-day operations of the business, See *Matter of Upstate Electrical v. New York State Department of Economic Development*, 179 AD3d 1343 (3rd Dept. 2020).

The Division’s finding that Ms. Alexandra Engel does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

With regard to technical competence, where the minority/woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

EIA provides low voltage data and voice supply band installation services and CCTV access control installation and programming services (DED Exhibit 1). Mr. David Engel holds a

Bachelor of Science degree in Information Technology and holds multiple certificates including NYC Certified Alarm Installer, Cisco Certified Network Associate, and S2 Certified Technician. He built EIA's core Opensource monitoring platform, is the lead security consultant for key accounts, and built EIA's wireless design practice. He has more than 15 years of IT experience (DED Exhibit 8). Ms. Del Prado oversees staff and executives, directs the company's financial goals, objectives and budgets and handles human resources. She has experience as a Bookkeeper, Accounting Manager, and Chief Financial Officer. She holds a Bachelor of Science in Business Administration. Her resume reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 8).

Ms. Del Prado oversees the administrative portions of the business, while Mr. David Engel performs the revenue generating operations of the business. Neither Ms. Del Prado nor Ms. Alexandra Engel possess the technical expertise and working knowledge necessary to supervise, review or evaluate Mr. David Engel's work.

The Division's finding that Ms. Del Prado and Ms. Alexandra Engel did not establish that they, as minority-owners of EIA had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

The application was also denied on the ground that the minority-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR former §144.2(b)(1)(iii). Ms. Alexandra Engel provides administrative support on an "as needed" basis. She has separate full- time employment at Shawn Ridge at University Park, does not receive any income from the business and lists her occupation on her tax return as "Community Manager". EIA admits that the "business does not require Ms. Alexandra Engel's input on a daily basis"

Exhibits 3 and 6).

The Division's finding that Ms. Alexandra Engel does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR former §144.2(b)(1)(iii), is supported by substantial evidence.

CONCLUSION

EIA did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §144.2(a)(1), 144.2(c)(2), 144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(1)(iii) 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 EIA's application for certification as a minority-owned business enterprise.

In the Matter of EIA Datacom, Inc.
 NYS DED File No 64476
 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	Description of Owner's day-to-day Activities	Y	Y
DED 4	Business Tax Returns and W-2's	Y	Y
DED 5	EIA Capital Contribution Statement	Y	Y
DED 6	Ms. Alexandra Engel's Tax Documents	Y	Y
DED 7	Appellant's Narrative of Owners' Contributions	Y	Y
DED 8	Ms. Yolanda Del Prado and Mr. David Engel Resumes	Y	Y
APP 1	Appellant's Notice to Appeal	Y	Y
APP 2	Appellant's Appeal Letter	Y	Y