

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

In the Matter

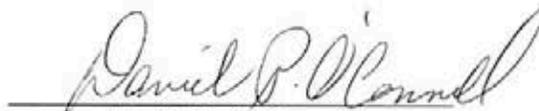
- of -

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

NYS DED File ID No. 60198

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

October 30, 2017

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny Conxx NE, Inc. (Conxx NE or applicant) certification as a woman owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

In a denial letter dated January 22, 2016, the Division determined that Conxx NE does not meet the eligibility requirements to be certified as a woman owned business enterprise, and denied its application (*see* WBE Exh. 1 and 9). In a letter dated March 24, 2016, Nicole D'Atri, as the president of Conxx NE and its majority (51%) shareholder, appealed from the Division's determination to deny WBE certification. With the March 24, 2016 letter, Ms. D'Atri included four appendices, which are identified in the attached exhibit chart. (*See* WBE Exh. 2, 2a, 2b, 2c, and 2d.) Subsequently, Ms. D'Atri agreed to file a written appeal, in lieu of a hearing.

By notice dated May 23, 2016, the Division acknowledged Conxx NE's request to proceed with a written appeal. The May 23, 2016 notice set July 6, 2016 as the due date for Conxx NE's written appeal. The notice also reiterated the Division's bases for the denial. (*See* WBE Exh. 3.)

Ms. D'Atri timely filed a written appeal on behalf of Conxx NE in the form of a letter dated June 15, 2016. The statements and arguments outlined in the June 15, 2016 appeal are the same as those presented in the initial appeal letter dated March 24, 2016. With the June 15, 2016 written appeal letter, Ms. D'Atri included the same four appendices previously submitted. (*See* WBE Exh. 4; *compare with* WBE Exh. 2, 2a, 2b, 2c, and 2d.)

Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, filed the Division's response dated July 26, 2017 (*see* WBE Exh. 5). With the July 26, 2017 response, the Division included eleven exhibits, which are identified in the attached exhibit chart (*see* WBE Exh. 6 through 16, inclusive). Among the exhibits included with the Division's response is a copy of Conxx NE's completed application for WBE certification (*see* WBE Exh. 6 [Application No. 8927966, submitted September 14, 2015]), as well as other application materials related to the bases for the Division's January 22, 2016 determination.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman owned business enterprise are established by regulation (*see* Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] § 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).

STANDARD OF REVIEW

On this administrative appeal, Conxx NE, as applicant, bears the burden of proving that the Division's denial of its application for 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

The Division

In the January 22, 2016 denial letter, the Division determined that the application failed to meet the WBE certification criteria related to Nicole D'Atri's ownership as reflected by her capital contribution to the business enterprise, her ability to operate Conxx NE, and its independence (*see* WBE Exh. 1 and 9). The Division asserted that the contribution of the woman owner is not proportionate to Ms. D'Atri's 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). With respect to Ms. D'Atri's ability to operate Conxx NE, the Division asserted further that Conxx NE failed to show that Ms. D'Atri makes decisions pertaining to operations of the business enterprise or devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1) and 144.2(b)(1)(iii). Finally, the Division asserted that Conxx NE did not demonstrate that it is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and 144.2(c)(2).

Conxx NE, Inc.

By letter dated March 24, 2016, Ms. D'Atri appealed from the Division's January 22, 2016 denial. Ms. D'Atri is the president of Conxx NE, and owns 51% of the business enterprise. Ms. D'Atri argued that Conxx NE complies with the eligibility criteria for certification as woman owned business enterprise. (*See* WBE Exh. 2.)

With Conxx NE's written appeal papers dated June 15, 2016 (*see* WBE Exh. 4), Ms. D'Atri included documentation to demonstrate that she borrowed [REDACTED] from Conxx Inc. to contribute the cash to Conxx NE, and that she has since repaid the loan in full to Conxx, Inc. With respect to operations, Ms. D'Atri said that she devotes the majority of her time (30-35 hours per week) to the daily operations of Conxx NE. In addition, Ms. D'Atri has a Master of Business Administration, and more than seven years of experience in the wireless telecommunications industry. Finally, Ms. D'Atri said that Conxx NE is a privately owned

organization with two owners. Ms. D'Atri owns 51% of the shares. According to Ms. D'Atri, Conxx NE is free from all outside control.

FINDINGS OF FACT

I. General

1. Nicole D'Atri is the president of Conxx NE, Inc. (Conxx NE), and owns 51% of the business enterprise. (*see* WBE Exh. 6 [Bates Nos. 0003-0004]).
2. Ms. D'Atri resides at 12601 Comfort Drive, Corriganville, Maryland 21524 (*see* WBE Exh. 7 and 8).
3. Conxx NE was established on November 26, 2013, and has business offices located at 201 Lackawanna Avenue, 3rd Floor, Suite 309, Scranton, Pennsylvania 18503. (*See* WBE Exh. 6 [Bates Nos. 0002-0003, 0004].)
4. Prior to establishing Conxx NE, Ms. D'Atri worked for Conxx, Inc. as its business manager and then as its finance director. Conxx Inc., which is based in Cumberland, MD, installs county-wide internet networks for local government entities. Subsequent to the installations, Conxx NE provides wireless network integration and network consulting services. Conxx NE's service territory includes northeastern Pennsylvania. Conxx NE is seeking to expand into southwestern New York. (*See* WBE Exh. 2, 4, 7, 14, and 15.)
5. On September 14, 2015, Ms. D'Atri filed an application on behalf of Conxx NE with the Division for WBE certification (*see* WBE Exh. 6).
6. By letter dated January 22, 2016, the Division denied WBE certification to Conxx NE (*see* WBE Exh 1 and 9).

II. Ownership

7. The application for WBE certification identifies two capital contributions to Conxx NE made in December 2013. The first is a cash contribution of [REDACTED] from Conxx Inc. The second is a contribution of [REDACTED] from Ms. D'Atri, which is characterized as a loan from Conxx Inc. (*See* WBE Exh. 6 [Bates No. 0004].)

III. Operation

8. Conxx NE employs Brian Wrightson is an installer. Mr. Wrightson is responsible for installing, maintaining, and repairing telecommunications equipment (*see* WBE Exh. 14 [Bates No. 0065]).
9. Conxx NE employs Daniel Risse on a part time basis as an assistant installer (*see* WBE Exh. 6 and 16).

10. At Conxx NE, Ms. D'Atri is responsible for the day-to-day supervision of operations, marketing and sales. Ms. D'Atri manages Conxx NE's financial resources, undertakes resource planning for future needs, develops the business enterprise's financial policies, monitors its accounts, and prepares financial reports (*see* WBE Exh. 7).

IV. Independence

11. Based on the professional services agreement, Ms. D'Atri from Conxx NE provides consultant services to Conxx, Inc. These consultant services are similar to the services that Ms. D'Atri performed at Conxx, Inc. as its finance director from June 2012 to March 2015. (*See* WBE Exh. 2, 2c, 4, 7, and 15.)

12. Conxx, Inc. provides payroll support to Conxx NE's employees (*see* WBE Exh. 16).

DISCUSSION

This recommended order considers Conxx NE's March 24, 2016 appeal and subsequent written filing dated June 15, 2016 with enclosed appendices from the Division's January 22, 2016 determination to deny certification of Conxx NE as a woman owned business enterprise pursuant to Executive Law Article 15-A. The bases identified in the Division's January 22, 2016 denial (*see* WBE Exh. 1 and 9) are addressed below.

I. Ownership

With respect to the ownership criteria, Division staff asserted that Conxx NE did not show that Ms. D'Atri's 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) (*see* WBE Exh. 1 and 9). Staff noted that Conxx NE's application for WBE certification identifies two capital contributions made in December 2013. The first is a cash contribution of [REDACTED] from Conxx Inc. The second is a contribution of [REDACTED] from Ms. D'Atri, which is characterized as a loan from Conxx Inc. (*See* WBE Exh. 6 [Bates No. 0004].)

In support of the application materials, Ms. D'Atri provided a copy of a bank statement for Conxx NE, from December 19, 2013 to December 31, 2013, that shows two [REDACTED] deposits. The first deposit was made on December 19, and the second was made on December 30, 2013. (*See* WBE Exh. 11 [Bates No. 0055].) In addition, Ms. D'Atri provided a copy of a cancelled check (No. 4798) dated December 27, 2013 from Conxx, Inc. payable to Conxx NE, Inc./Nicole R. Wigfield¹ in the amount of [REDACTED] (*see* WBE Exh. 12 [Bates No. 0058]). According to staff, Ms. D'Atri did not provide any proof in support of the application to show that she repaid the loan she obtained from Conxx, Inc (*see* WBE Exh. 5 at 4).

¹ Nicole Wigfield signed the December 26, 2013 promissory note. Presumably, Wigfield is Ms. D'Atri's maiden name. (*See* WBE Exh. 2a and 4.)

On Conxx NE's appeal, Ms. D'Atri stated that the source of her capital contribution was a loan from Conxx, Inc., that she repaid in full. According to Ms. D'Atri, her capital contribution of [REDACTED] was for 51% of the shares in the business enterprise. With the appeal, Ms. D'Atri provided a copy of the promissory note dated December 26, 2013, which outlines the terms of the loan from Conxx, Inc. to Ms. D'Atri. In addition, Ms. D'Atri provided a copy of a cancelled check (No. 193) dated December 28, 2015 from her personal checking account payable to Conxx Inc. in the amount of [REDACTED]. (See WBE Exh. 2, 2a, and 4.)

According to staff, Ms. D'Atri did not provide a copy of the cancelled check as part of the application for WBE certification. Therefore, staff concluded that only Conxx, Inc. capitalized the business enterprise (see WBE Exh. 5 at 4).

The issue on appeal is whether Conxx NE's WBE certification application and supporting materials demonstrate that it complies with the requirement at 5 NYCRR 144.2(a)(1). This eligibility criterion states, in full, that:

[t]he contribution of the 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.

For the following reasons, Division staff's determination should be affirmed. First, the capital contributions identified in the application for WBE certification are equal, and not proportionate. According to the application for WBE certification, Conxx, Inc. contributed [REDACTED] to Conxx NE, and Ms. D'Atri contributed the same amount (see WBE Exh. 6 [Bates No. 0004]). The information presented in the application is corroborated by the bank statement, which shows two [REDACTED] deposits made to Conxx, NE's account, respectively, on December 19 and 30, 2013 (see WBE Exh. 11 [Bates No. 0055]).² As the majority owner of 51% of the shares, Ms. Atri's contribution, proportionate to her equity interest in the business enterprise, should have been [REDACTED], and the contribution from Conxx Inc. should have been [REDACTED]

Second, not until the appeal did Conxx NE provide a copy of a cancelled check, dated December 28, 2015, from Ms. D'Atri's personal account in the amount of [REDACTED] payable to Conxx, Inc. Conxx NE offered the cancelled check to show that Ms. D'Atri repaid the loan from Conxx, Inc., the proceeds of which were intended to serve as Ms. D'Atri's capital contribution to the business enterprise. (See WBE Exh. 2, 2a, and 4.) Consequently, Division staff did not have this information during the review of the application for WBE certification prior to issuing the January 22, 2016 denial. Without the cancelled check as part of the documentation supporting the application for WBE certification, staff reasonably concluded that Conxx Inc. was the only source of capital for Conxx NE.

Due to the limited scope of this appeal proceeding, I conclude that the Division's determination that Conxx NE does not comply with the eligibility criterion at 5 NYCRR

² Conxx NE's December 2013 bank statement shows two deposits of [REDACTED]. Nevertheless, the promissory note dated December 26, 2013, states that Conxx, Inc. loaned Ms. D'Atri (née Wigfield) [REDACTED]. (Compare WBE Exh. 2a and 4 with 11 [Bates No. 0055]).

144.2(a)(1) is based on substantial evidence. Accordingly, this basis for denial should be affirmed.

II. Operation

Division staff determined that Conxx NE did not demonstrate that Ms. D'Atri makes decisions pertaining to operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1), and does not devote time on an ongoing basis to the daily operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). Staff noted that Conxx NE's offices are located in Scranton, PA, and that Ms. D'Arti resides some 250 miles away in Corriganville, MD. Staff noted further that Conxx NE's installer is Brian Wrightson. Mr. Wrightson is solely responsible for providing installation, maintenance, and repair services. Conxx NE also employs Daniel Risse as a part time installer. (See WBE Exh. 2d, 4, 6 [Bates No. 0002], 7, 8, 14, and 16.) Staff contended that Ms. D'Arti cannot meaningfully oversee the daily operations of Conxx NE due to the distance between Ms. D'Arti's residence and the location of Conxx NE's offices. Staff concluded that Ms. D'Atri does not make decisions about these operations. (See WBE Exh. 5 at 5.)

In addition, Division staff reviewed the business operations for which Ms. D'Arti is responsible. According to staff, the significant business operations of Conxx NE are installing and servicing wireless telecommunications equipment in the Scranton area. Staff noted that Messrs. Wrightson and Risse, as Conxx NE's installers, do these significant business operations in Scranton, Pennsylvania, and that Ms. D'Arti is responsible for administrative operations, from Corriganville, Maryland. (See WBE Exh. 5 at 5, 6 [Bates Nos. 0005-0006], 7, 14.)

On the appeal, Ms. D'Arti stated that she devotes the majority of her time to the daily operations of Conxx NE. Ms. D'Atri noted that she is responsible for running day to day operations, which include assigning tasks to employees, among other things. Ms. D'Atri noted further that she earned an MBA and has more than seven years of experience in the wireless telecommunications industry. (See WBE Exh. 2, 2a, 4, and 7.)

With respect to the amount of time devoted to the business enterprise, Ms. D'Atri stated that she devotes 30 to 35 hours per week to Conxx NE. Pursuant to a professional services agreement with Conxx, Inc., Ms. D'Atri also devotes 10 hours per week as a consultant, and bills Conxx, Inc. for these services. (See WBE Exh. 2, 2b, 2c, 4, 7, and 15.)

According to her résumé, Ms. D'Atri supervises the installation of wireless telecommunications equipment (see WBE Exh. 7). However, I am persuaded by Division staff's observation that Ms. D'Atri cannot meaningfully manage this significant business operation on a daily basis given the distance between Ms. D'Atri's residence in Maryland, and the location of Conxx NE's offices in Pennsylvania. In addition, Ms. D'Atri has offered no information to demonstrate that she can install and service wireless telecommunications equipment. The Division has consistently held that minority and woman owners must perform significant business operations in order to comply with the eligibility criterion at 5 NYCRR 144.2(b)(1).³

³ See e.g. *Matter of Pioneer Contractors, Inc.*, NYS DED File ID No. 60574, September 27, 2017; *Matter of Upstate Rebar, LLC*, NYS DEC File ID No. 61154, September 28, 2017; *Matter of Panko Electrical and Maintenance, Inc.*,

I conclude, therefore, that Conxx NE did not meet its burden of proof to show that the Division's determination with respect to the eligibility criterion at 5 NYCRR 144.2(b)(1) is not supported by substantial evidence. Accordingly, the Director should affirm Division staff's determination with respect to this eligibility criterion.

Although asserted in the January 22, 2016 denial letter, the Division's memorandum of law in response to the appeal did not address Conxx NE's compliance with the eligibility criterion at 5 NYCRR 144.2(b)(1)(iii). The Division did not explain the basis for staff's determination that Ms. D'Atri does not devote time on an ongoing basis to the daily operations of the business enterprise. Therefore, this recommended order does not make any conclusions about Conxx NE's compliance with this eligibility criterion.

III. Independence

In order to be eligible for WBE certification, a woman owned business enterprise must be independent of other business enterprises, as required by 5 NYCRR 144.2(a)(2) and 144.2(c)(2). This requirement ensures that program benefits do not flow to business enterprises that inordinately benefit from an impermissible connection to non-woman owned businesses. Staff contended that Conxx NE is not an independent business enterprise pursuant to the eligibility criteria. (*See* WBE Exh. 1 and 5 at 6.)

Based on the professional services agreement, Ms. D'Atri from Conxx NE provides consultant services to Conxx, Inc. According to Division staff, these consultant services appear to be similar to the services that Ms. D'Atri performed at Conxx, Inc. as its finance director from June 2012 to March 2015. (*See* WBE Exh. 2, 2c, 4, 7, and 15.)

Staff noted that documents provided to the Division in support of Conxx NE's application for WBE certification show that Conxx, Inc. compensates Conxx NE's employees. Because Conxx, Inc. provides payroll support to Conxx NE, Staff concluded that Conxx NE is not independent from Conxx, Inc. (*See* WBE Exh. 5 at 6, and 16.)

On appeal, Ms. D'Atri said that Conxx NE is a privately owned organization with two shareholders. The majority shareholder of Conxx NE is Ms. D'Atri at 51%. Ms. D'Atri contended that Conxx NE is free from all outside control because she manages all aspects of the business enterprise. (*See* WBE Exh. 2, 2d, 4.)

Conxx NE's argument that Ms. D'Atri's majority ownership in the business enterprise demonstrates its independence from Conxx, Inc. is not persuasive for the following reasons. First, the members of Conxx, Inc. are the directors of Conxx NE's board (*see* WBE Exh. 2d, and 4). Second, Conxx, Inc. provides payroll support to Conxx NE's employees (*see* WBE Exh. 16).

NYS DED File ID No. 9877, August 30, 2017. The Recommended Orders are available at the New York State Department of Economic Development website: <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings>. For the Final Orders associated with these matters, contact the Department's Division of Minority and Woman's Business Development, 625 Broadway, Albany New York 12245. *See also* *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890 (3d Dept 1995).

I conclude that the Division's determination that Conxx NE does not comply with the independence criteria as outlined at 5 NYCRR 144.2(a)(2) and 144.2(c)(2) is based on substantial evidence. Accordingly, this basis for the denial should be affirmed.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), Conxx NE did not meet its burden to show that the Division's January 22, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operational criterion at 5 NYCRR 144.2(b)(1), Conxx NE did not meet its burden to show that the Division's January 22, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
3. With respect to the independence criteria at 5 NYCRR 144.2(a)(2) and 144.2(c)(2), Conxx NE failed to meet its burden to show that the Division's January 22, 2016 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Conxx NE's application for certification as a woman owned business enterprise should be affirmed for the reasons discussed above.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart
Matter of Conxx NE, Inc.

WBE File ID No. 60198

WBE Exhibit No.	Description
1	Division's denial letter dated January 22, 2016. (See also WBE Exh. 9.)
2	Conxx, NE's notice of appeal dated March 24, 2016. (See also WBE Exh. 4.)
2a	Appendix A – Proof of capital and/or equity investment by female owner. Promissory Note dated December 26, 2013. Check # 193. (See also WBE Exh. 4.)
2b	Appendix B – Duties and Responsibilities of Nicole D'Atri. (See also WBE Exh. 4.)
2c	Appendix C – Professional Services Agreement, signed March 24, 2015. (See also WBE Exh. 4.)
2d	Appendix D – Detailed description of the relationship between Conxx NE and Conxx, Inc.
3	Division's notice of written appeal dated May 23, 2016.
4	Conxx, NE's written appeal dated June 15, 2016, with Appendices A, B, C, and D. (See also WBE Exh. 2, 2a, 2b, 2c, and 2d.)
5	Division's memorandum of law dated July 26, 2017.
6	WBE certification application (Application No. 8927966), submitted September 14, 2015. (Division Exhibit 1 [Bates Nos. 0002-0012])
7	Résumé of Nicole Renae D'Atri. (Division Exhibit 2 [Bates Nos. 0014-0015])

8	Nicole Renae D'Atri Maryland Driver's License (Division Exhibit 3 [Bates No. 0017])
9	Division's denial letter dated January 22, 2016. (<i>See also</i> WBE Exh. 1.) (Division Exhibit 4 [Bates Nos. 0019-0021])
10	US Corporation Income Tax Return – 2014 Conxx NE, Inc. IRS Form 1120 (Division Exhibit 5 [Bates Nos. 0023-0052])
11	Proof of capital and/or equity investment by female owner. (<i>Compare</i> WBE Exh. 2a with 4.) (Division Exhibit 6 [Bates Nos. 0054-0056])
12	Cancelled Check # 4798 Dated December 27, 2013 Payable to Conxx NE, Inc./Nicole Wigfield, \$5,000.00 from Conxx, Inc. (Division Exhibit 7 [Bates No. 0058])
13	Invoice # 135 dated July 17, 2014 Lackawanna County Department of Emergency Services (Division Exhibit 8 [Bates Nos. 0060-0061])
14	Response 10 Detailed history of Conxx NE (Division Exhibit 9 [Bates Nos. 0063-0065])
15	Professional Services Agreement, signed March 24, 2015 and Invoices 54910 (April 30, 2015); 54911 (May 31, 2015); 54912 (June 30, 2015); Invoices 54913 (July 31, 2015); 54926 (August 31, 2015); 54907 (September 30, 2015); 5807 (October 31, 2015); 54972 (November 30, 2015); and 54973 (December 31, 2015). (<i>Compare</i> WBE Exh. 2c with 4.) (Division Exhibit 10 [Bates Nos. 0067-0079])
16	Conxx NE, Inc. Payroll Summary and attached reports for Brian Wrightson, Nicole D'Atri, and Daniel Risse. (Division Exhibit 11 [Bates Nos. 0081-0100])