

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

In the Matter

- of -

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

NYS DED File ID No. 50489

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
April 12, 2023**

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 the application filed by Modern Mechanical Fab, Inc. (MMFI or applicant), for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the written appeal by Modern Mechanical Fab, Inc., 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 that the business enterprise does not meet the eligibility criteria for certification as a WBE.

Heather Trombly, as the president, applied on behalf of MMFI for certification as a WBE on February 11, 2016 (DED 1). In a letter dated November 21, 2019, the Division denied SSI's application (DED 2) and set forth five grounds for the denial.¹ MMFI timely filed a notice of appeal on December 4, 2019 (APP 1). A notice to proceed by written appeal was sent to MMFI on January 16, 2020 (DED 3). Applicant submitted its written appeal by letter dated January 27, 2020 (APP 2/ DED 4). The Division responded by filing an Affidavit of Raymond Emanuel dated November 16, 2020 and a brief submitted by Candace Williamson, Esq., counsel for the Division, dated November 21, 2022. A list of the parties' papers is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* former 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise.

Staff review the business enterprise as it existed at the time the application was filed based on representations in the application, as well as information filed in supplemental submissions. (*See* former 5 NYCRR 144.4[e] and 144.5[a].) As discussed further below, applicant's appeal includes documents not reviewed by Division staff before staff issued the November 21, 2019 denial letter.

¹ The Division's denial determination and applicant's written appeal, pre-date amendments to 5 NYCRR parts 140-145 that became effective on December 2, 2020. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this recommended order.

Accordingly, these documents are irrelevant due to the limited scope of this appeal. Although identified in this recommended order, I have not considered the documents or the information provided therein.

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 MMFI 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" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Division Staff

In the November 21, 2019, denial letter, Division staff stated that MMFI failed to meet five of the criteria for WBE certification set forth in former 5 NYCRR 144.2 concerning Heather Trombly's ownership and operation of the business enterprise. With respect to ownership, staff concluded that Ms. Trombly, as the woman-owner, did not demonstrate that her contributions were proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1). Second, staff concluded that MMFI did not demonstrate that Ms. Trombly shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by former 5 NYCRR 144.2(c)(2). (DED 2.)

With respect to operations, Division staff concluded that MMFI did not show that Ms. Trombly, as the woman-owner, makes decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1). Staff also determined that Ms. Trombly, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i) and 144.2(b)(1)(ii). (DED 2.)

Modern Mechanical Fab, Inc.

Applicant states that Ms. Trombly personally secured a capital line of credit and she made a personal loan to the business for the purchase of equipment (DED 4). She attributes her ability to run a business to her many years of working in the business and working in her family's business (DED 14). She acknowledges the pay discrepancy, stating "I am comfortable with my salary and I feel that by taking a smaller paycheck, it is an asset as I am leaving additional money in the business" (DED 4). She states that her salary is not a reflection of her contributions to MMFI and that if she wanted a pay increase, she could grant herself one.

She states that John Trombly has the education, training and experience for metal fabricating and welding, but not the business operating skills that she has learned through working in the business (id).

FINDINGS OF FACT

1. MMFI is based in Champlain, New York. MMFI provides custom sheet metal fabrications, mechanical contractors, mechanical installation, metal fabrication, aluminum and stainless steel custom fabrication and welding (DED 1).
2. MMFI was established in 1999 with Heather Trombly as the President and having 100% ownership interest in the business (DED 7,9).
3. In 2016, MMFI ownership was divided between Ms. Trombly having a 51% interest, John Trombly having a 39% interest and Brandon Trombly having a 10% interest (DED 8).
4. The certification application indicates that none of the shareholders purchased their respective shares (DED 1).
5. Ms. Trombly is responsible for the invoicing, accounts payable and receivable, hiring, insurance and daily office functions (DED 14).
6. John Trombly is a certified welder and pipe fitter and serves as MMFI's General Foreman (DED 12). He is responsible for reading blueprints, serving as project estimator, running the shop equipment and monitoring the shop employees' production and performance (id).
7. Brandon Trombly is a draftsman and works with customers to design custom parts and projects, operating a three dimensional computer aided design program and serving as quality assurance personnel for the projects (DED 13).
8. 2016 MMFI W-2's show earnings of \$ [REDACTED] for John Trombly, \$ [REDACTED] for Brandon Trombly and \$ [REDACTED] for Heather Trombly (DED 6).

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination to deny the certification of MMFI as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in former 5 NYCRR 144.2, the Division identified five bases for the denial with respect to the ownership and operation of the business enterprise. Specifically, the Division contended that:

1. Ms. Trombly's contributions are not proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1);
2. Ms. Trombly, as the woman-owner, does not share in the risks and profits in proportion to her ownership interest in the business enterprise, as required by former 5 NYCRR 144.2(c)(2);
3. Ms. Trombly, as the woman-owner, does not make decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1);
4. Ms. Trombly, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i); and
5. Ms. Trombly did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii).

Each basis is addressed below.

I. Ownership

The Division interprets former 5 NYCRR 144.2(a)(1) 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 WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner.

The Division refers to the application, in which none of the owners listed made a cash and/or capital contribution (DED 1). The Division states the Ms. Trombly's claim of a personal loan to MMFI is not reflected in the 2016 business taxes (DED 5) and points out that loans do not constitute contributions to the enterprise, as they are viewed as an extension of credit in anticipation of repayment. *See Matter of PamTen, Inc.*, Recommended Order dated June 26, 2018.

It is well established that a woman owner relied upon for certification must be able to show a monetary contribution came from her personal funds. See *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017. Here, receipts document the withdrawal of funds from a joint account with John Trombly, and deposit of those funds into the business account (DED 11). The applicant has failed to show the contributions came from her personal funds. Applicant has also failed to show her contributions came in any other form, such as expertise.

On the record, I conclude that the Division’s determination to deny the application on the basis that MMFI failed to demonstrate that Ms. Trombly made contributions to MMFI in proportion to her ownership interest, as required under former 5 NYCRR144.2(a)(1) is supported by substantial evidence.

Former 5 NYCRR 144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

In 2016, Ms. Trombly received the least amount of compensation out of the three owners of MMFI. Ms. Trombly received \$██████, while Brandon Trombly received \$██████ and John Trombly received \$██████ (DED 6). Her argument that she could have given herself a pay increase and that John Trombly’s salary is set by industry standards, in unavailing. When the woman owner relied upon for certification makes significantly less than non-minority owners, she failed to demonstrate she shares in risks and profits of the business enterprise. See *Matter of Spring Electric, Inc.*, supra at 5.

On the record, I conclude that the Division’s determination to deny the application on the basis that MMFI failed to demonstrate that Ms. Trombly shared in the risks and profits in proportion to her ownership interest, as required under former 5 NYCRR 144.2(c)(2) is supported by substantial evidence.

II. Operations

The Division cites three separate operational criteria under former 5NYCRR 144.2(b) as bases for the denial (DED 2). The operational criteria are as follows:

1. “...women do not make decisions pertaining to the operation of the business enterprise. [Former] 5 NYCRR 144.2(b)(1)”;

2. "...women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(i)"; and
3. ...women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(ii)".

To determine who makes decisions pertaining to an enterprise's operations, the Division first identifies the core revenue generating functions of the enterprise, and then assesses who within the enterprise is primarily responsible for performing those functions and who has the expertise and knowledge necessary to perform an oversee those functions.

MMFI is a metal fabricating business specializing in the design and fabrication of custom metal projects. The core functions and revenue generating tasks of the business include the operation of machinery necessary to carry out the customization of construction projects (DED 1).

John Trombly meets with customers, designs the projects to meet the customers' needs and sends the drawings to the shop for fabrication (DED 12). Brandon Trombly operates the machinery and supervises others who operate the machinery and inspects all finished projects (DED 13).

Ms. Trombly's duties include accounting, invoices, accounts payable and receivable, payroll and employee matters (DED 14). She oversees the administrative operations of the business, while John Trombly and Brandon Trombly manage the employees and have the technical competence and knowledge necessary to operate the business enterprise

John Trombly and Brandon Trombly are responsible for performing the core revenue generating functions of MMFI and have the expertise and knowledge necessary to perform those functions. Ms. Trombly has no direct metal fabricating experience and is responsible for the administrative aspects of the business.

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Heather Trombly does not (i) make decisions pertaining to the operation of the business enterprise, as required under former 5 NYCRR 144.2(b)(1); (ii) have adequate managerial experience or technical competence to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(i); and (iii) have the working knowledge and ability needed to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(ii).

Applicant submitted additional documents for this appeal. Applicant submitted bank documents showing a transfer of funds from a joint account she holds with John Trombly to the business account (DED 4). The checks were issued and deposited after the application was submitted. Applicant also submitted a letter from MMFI's accountant for the first time on appeal stating that the 2016 tax return should have included Ms. Trombly's loan to MMFI (id).

These documents will be disregarded in their entirety since they were not before the Division during its review of the application and are dated after the denial and therefore not relevant. See *In Re: The Application of Lido Strategic Solutions, Inc.* (DED File no. 60212) (March 6, 2019) (recommended order declining to consider documents offered by the applicant on appeal that were not part of the application and thus not before DED at the time of denial), adopted on June 5, 2019 (Final Order). Only evidence which seeks to clarify or explain previously submitted materials will be considered and new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 AD 3rd 1466 (3rd Dept. 2021).

CONCLUSION

Modern Mechanical Fab, Inc. 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 former 5 NYCRR 144.2(a)(1), 144.2(c)(2), 144.2(b)(1), as well as 144.2(b)(1)(i) and 144.2(b)(1)(ii), 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 Modern Mechanical Fab, Inc's application for certification as a woman-owned business enterprise.

Division of Minority and Women's Business Development

Parties' Papers
Matter of Modern Mechanical Fab, Inc.
NYS DED File No 50489

- I. Applicant's papers
 1. APP 1 - Applicant's Notice of Appeal dated December 4, 2019
 2. APP 2 - Applicant's Appeal letter dated January 27, 2020

- II. Division's Papers
 - A. Declaration of Raymond Emanuel dated November 16, 2020 with attached Exhibits DED 1 through DED 14.
 1. DED 1 – Application for Certification dated February 11, 2016
 2. DED 2 – Division's denial letter dated November 21, 2019
 3. DED 3 – Division's instructions for filing written appeal dated January 16, 2020
 4. DED 4 – Applicant's Appeal Submission (*See APP 2*)
 5. DED 5 – 2016 Federal and State Tax Returns
 6. DED 6 – 2016 W-2's for MMFI's owners
 7. DED 7 – MMFI Articles of Incorporation
 8. DED 8 – MMFI Corporate Meeting Minutes
 9. DED 9 – MMFI Stock Certificate Transfer Ledger
 10. DED 10 -Champlain National Bank Line of Credit Letter
 11. DED 11- Bank Statements
 12. DED 12 -John Trombly resume
 13. DED 13 – Brandon Trombly resume
 14. DED 14- Heather Trombly resume

 - B. Brief in Response to the Appeal of Modern Mechanical Fab, Inc., dated November 21, 2022

