

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

In the Matter

- of -

the Application of Progressive Construction of Long Island, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 66750

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 11, 2023

This matter considers the written appeal by Progressive Construction of Long Island, Inc., (“Progressive” 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 December 26, 2019, Ms. Pamela Onorato, as President, applied on behalf of Progressive for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On January 28, 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 must 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 must 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. Progressive timely filed a Request to Appeal on February 24, 2022 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to Progressive on October 4, 2022 (DED Exhibit 3).
5. The Division filed an Affidavit of Rasheda Edwards, Senior Certification Analyst, dated April 20, 2023, and a brief of Candace Williamson Esq., counsel for the Division, dated June 28, 2023.

FINDINGS OF FACT

1. Progressive is engaged in the business of building new homes, remodeling residential homes, home or building elevation, and helical pile installation (DED Exhibit 1).
2. Ms. Pamela Onerato is the President and has a 60% ownership interest. Mr. Gary Onorato is the Vice President and has a 40% ownership interest (DED Exhibit 1).
3. Mr. Onorato established the business in 1998. On July 5, 2017, Mr. Onorato gifted 60 shares to Ms. Onorato for no consideration (DED Exhibits 1 and 4).
4. Ms. Onorato was the bookkeeper at Progressive Tree and Lawn Care, Inc from 1991-1998. Her duties included customer service, billing and job management. She was the bookkeeper and manager at Progressive from 1998-2017, responsible for sales, accounting, customer service, billing and contracts, hiring and purchasing. In 2017 she became a Director of Progressive. Ms. Onorato listed “Manager/Sales” as her occupation on her tax filings in 2018 and 2020 (DED Exhibit 13) She became President of Progressive in 2019. (DED Exhibit 8)
5. Ms. Onorato received a license as a real estate agent in 2001. She received a general contractor license on June 30, 2021. (DED Exhibit 9). Her daily responsibilities include checking the mail, setting up new job submissions, communicating with clients, writing up

new contracts and scheduling upcoming work, organizing files, purchasing materials, aiding in home designs and scheduling inspections (DED Exhibit 10).

6. Mr. Onorato has been working in construction since 1989. His duties include sales, design and management of all projects (DED Exhibit 8). His daily responsibilities include overseeing projects, including new home construction, pool installation and preparing for new home elevation projects (DED Exhibit 10). He is a licensed contractor for several counties in New York (DED Exhibit 9).

APPLICABLE LAW

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

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) 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...
- (2) 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 Progressive 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).

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.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). *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).

On June 5, 2017, Ms. Onorato received a 60% ownership interest by gift from Mr. Onorato

for “no consideration” (DED Exhibit 4). The record is devoid of evidence establishing that Ms. Onorato ever made a contribution in the form of money, property, equipment or expertise, (5 NYCRR §144.2(b)(2))

The Division’s determination to deny the application on the basis that Progressive failed to demonstrate that Ms. Onorato made contributions to Progressive 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. Onorato 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 construction industry (DED Exhibits 1 and 8). She submitted proof of her licensing as a real estate agent since 2001 and as a general contractor since June 30, 2021, some eighteen months after the certification application was submitted (DED Exhibit 9). The critical functions of the business include removal and replacement of wall tiles, furnishing and installing urinal screens, building new wall, applying spackle and paint, installing PVC tracks and strips, and supplying and

installing laminated safety glass (DED Exhibit 7). Ms. Onorato 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).

The critical functions of Progressive’s business include removal and replacement of wall tiles, furnishing and installing urinal screens, building new wall, applying spackle and paint, installing PVC tracks and strips, and supplying and installing laminated safety glass (DED Exhibit 8). Ms. Onorato’s duties include checking the mail, setting up new job submissions, communicating with clients, writing up new contracts and scheduling upcoming work, and purchasing new materials (DED Exhibit 10). These are not the core revenue generating functions of the business. Mr. Onorato’s duties include sales, design and management of all projects. He is a licensed contractor. (DED Exhibit 8). Ms. Onorato lists “Manager/Sales” as her occupation on her tax filings in 2018 and 2020 (DED Exhibit 13). She does not have the training or experience in the industry necessary to supervise the work of the employees. Ms. Onorato does not exercise independent operational control over the core functions of the business. Mr. Onorato is primarily responsible for overseeing the day-to-day operations of the construction business.

CONCLUSION

Progressive 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 Progressive's application for certification as a woman-owned business enterprise.

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DED File ID No. 66750
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	Business' Stock Certificates and Letter	Y	Y
DED 5	Term Note between Mr. Gary Onorato and Mr. Craig Perlman	Y	Y
DED 6	Term Note between Mr. Gary Onorato and Mr. Stephen Louro	Y	Y
DED 7	Business' Contract Descriptions	Y	Y
DED 8	Resumes of Pamela Onorato, Gary Onorato and Jeremy Paterson	Y	Y
DED 9	Company and Individual Licenses	Y	Y
DED 10	Narrative Responses re: Business History and Employee Duties	Y	Y
DED 11	Q & A Responses November 2021	Y	Y
DED 12	NYS 45 Quarterly Combined Withholding, Wage Reporting	Y	Y
DED 13	Ms. Pamela Onorato's Personal Taxes for 2018 and 2020	Y	Y
DED 14	New York City Small Business Services Application	Y	Y
APP 1	Notice of Appeal	Y	Y