

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

In the Matter

- of -

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

NYS DED File ID No. 63204

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
April 14, 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 Target Mechanical, Inc. (Target Mechanical 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 Target Mechanical, 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.

Julie Ballanca, as the president, applied on behalf of Target Mechanical for certification as a WBE on November 2, 2017 (DED 1). In a letter dated July 22, 2020, the Division denied SSI's application (DED 2) and set forth two grounds for the denial.¹ Target Mechanical timely filed a notice of appeal on August 4, 2020 (APP 1). A notice to proceed by written appeal was sent to Target Mechanical on September 14, 2020 (DED 3). Applicant submitted its written appeal by letter dated August 4, 2020 and received by the Division on September 28, 2020 (APP 2/ DED 4). The Division responded with papers dated February 8, 2023. A list of the parties' papers is attached to this recommended order as Appendix A.

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 July 22, 2020 denial letter.

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.

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 Target Mechanical 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 July 22, 2020, denial letter, Division staff stated that Target Mechanical failed to meet two of the criteria for WBE certification set forth in former 5 NYCRR 144.2 concerning Julie Ballanca's operation of the business enterprise.

With respect to operation, Division staff concluded that Ms. Ballanca, 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.)

Target Mechanical, Inc.

Ms. Ballanca states that she has extensive knowledge operating multiple businesses and gained knowledge of HVAC systems through buying and selling HVAC equipment and assisting other family-owned HVAC businesses. She states that she is the main financial, operations and administrative manager, and that all final decisions are made by her.

FINDINGS OF FACT

1. Target Mechanical is based in Staten Island, New York, and provides HVAC mechanical contracting services, furnishes and installs HVAC equipment and installs piping and ductwork for mechanical systems (DED 1).
2. Julie Ballanca is the President and 100% owner of Target Mechanical (id).
3. Julie Ballanca's duties include sales, financials, operation and administrative functions of the business (DED 6). Her previous experience includes marketing, sales and quality control (DED 5). She does not have HVAC contracting or HVAC equipment installation experience (id).
4. Non-owner employees perform the HVAC equipment installation services (DED5,6).

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination to deny the certification of Target Mechanical 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 two bases for the denial with respect to the operation of the business enterprise. Specifically, the Division contended that:

1. Ms. Ballanca, 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
2. Ms. Ballanca 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).

The Division states that Target Mechanical provides HVAC contracting services, furnishes and installs HVAC equipment, and installs piping and ductwork (DED 1). Ms. Ballanca's resume indicates that she prepares marketing presentations, maintains client relationships, reviews all financials of the company, oversees all major equipment and day to day purchases, and checks quality control of the work and progress (DED 6). In contrast, the non-owner employees perform the revenue generating activities of the business, including installation of HVAC equipment, pipe installation and ductwork installation. (DED 6).

The non-owner employees are responsible for performing the revenue generating functions of Target Mechanical and have the expertise and knowledge necessary to perform these functions. Ms. Ballanca has no direct HVAC 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 Julie Ballanca does not (i) have adequate managerial experience or technical competence to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(i); and (ii) 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. Additional documents submitted for the first time on appeal should be stricken or disregarded in the entirety as they were not before the Division during the review of the application and therefore could not be considered. See *In Re the Application of Lida 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). There are instances in which new information must be considered. 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).

Here, applicant does not offer clarifying materials. Ms. Ballanca's explanations do not demonstrate that she has HVAC installation experience. She states she handled "dispatching and accounting" in Mr. Ballanca's HVAC business and she has experience selling HVAC products (DED 4). This information is unsupported by any documentation. Applicant also states that Ms. Ballanca has an OSHA 30 card and an SST Supervisor Card, both of which are irrelevant to HVAC installation (id).

CONCLUSION

Target Mechanical, 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(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 Target Mechanical, Inc's application for certification as a woman-owned business enterprise.

Division of Minority and Women's Business Development

Parties' Papers
Matter of Target Mechanical, Inc.
NYS DED File No 63204

I. Applicant's papers

1. APP 1-Applicant's Notice of Appeal dated August 4, 2020
2. APP 2 -Applicant's Appeal letter dated August 4, 2020, and received by the Division on September 28, 2020

II. Division's Papers

A. Declaration of Glenn Butler dated February 8, 2023 with attached Exhibits DED 1 through DED 7.

1. DED 1 – Application for Certification dated November 2, 2017
2. DED 2 – Division's denial letter dated July 22, 2020
3. DED 3 – Division's instructions for filing written appeal dated September 14, 2020
4. DED 4 – Applicant's Appeal Submission (*See* APP 2)
5. DED 5 – Resumes of Luljeta (Julie) Ballanca and Victor Nerys
6. DED 6 – Email responses of Julie Ballanca dated 7/19/19, 7/22/19 and 8/28/19
7. DED 7 – OSHA 30 Certificate

B. Brief in Response to the Appeal of Target Mechanical, Inc., dated February 16, 2023