

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

In the Matter


- of -

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

NYS DED File ID No. 58044

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 16, 2024

This matter considers the appeal by AMZ Construction Services, Inc. (“AMZ” 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 June 15, 2023, Ms. Annalisa Zappia, as President, applied on behalf of AMZ for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On October 31, 2023, 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. On November 3, 2023, AMZ submitted a Request to Appeal via a Hearing. (DED Exhibit 3).

4. On May 6, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 4).
5. A hearing was held and concluded on September 10, 2024.

FINDINGS OF FACT

6. AMZ is engaged in the business of new construction and renovation services, including cast-in-place concrete, light excavation, trucking, commercial offices, and outdoor recreational facilities (DED Exhibit 1).
7. Ms. Annalisa Zappia is the President and 51% owner of AMZ. Joshua Zappia is the Vice President and 49% owner of AMZ (DED Exhibit 1).
8. Section 2E of the certification application states that Annalisa Zappia made a capital contribution of \$██████ in the form of a Business degree (DED Exhibit 1).
9. A narrative provided by Ms. Zappia states “there were no upfront investments of value.” (DED Exhibit 5).
10. The critical functions of the business are construction management; carpentry; rough framing; siding; cast-in-place concrete; foundations; exterior sidewalks; concrete slabs; concrete reinforcement; excavation; and trucking (DED Exhibit 7).
11. Ms. Zappia’s resume reflects that her responsibilities at AMZ include oversight of daily activities and employees (office and field); payroll; human resources; estimating; bid preparation; accounts receivable/ payable; contract compliance; public relations; purchasing; financial monitoring and planning; and negotiating insurance and bonding. She holds a Business Degree and has a 10-hour OSHA Safety Training Certificate (DED Exhibit 9).
12. Section 4A of the certification application provides that (1) Ms. Zappia is solely responsible for Financial Decisions; Negotiating Bonding and Insurance; Marketing and Sales; Purchasing Equipment/Sales; Managing and Signing Payroll; and Negotiating Contracts;

(2) Ms. Zappia and Joshua Zappia share responsibilities for Hiring and Firing and as Signatories of Business Accounts; (3) Ms. Zappia and Cassandra Ramos share the responsibility for Preparing Bids; (4) Ms. Zappia, Joshua Zappia and Nic Cook share responsibility for Estimating; and (5) Adam Schuffelburg and David Becker share responsibility for Supervising Field Operations (DED Exhibit 1).

13. A Narrative provided in the application lists the following day-to-day roles:

“Annalisa Zappia is AMZ’s President, working in the office/field 40+ hours a week overseeing AMZ’s daily operations. Examine & execute contracts and subcontracts. Payroll processing for all AMZ employees. Monitor financial aspects with banking manager, accountant & bonding agent. Process A/R and A/P, purchase orders, subcontractor payments, compliance paperwork required for payments. Monitor/approve equipment purchases (small & large), staff credit card spending. Review upcoming bids with estimators, review current project status and projections with project managers. Attend various project meetings to oversee project conformance.

Joshua Zappia is AMZ’s Estimator and Project Manager working in the office/field 40 hours a week. He prepares bid cost estimates for labor and materials, creates schedule conforming with project plans/specifications for pre bid projects. For awarded contracts, Mr. Zappia attends project meetings with engineers/owners, prepares submittals & coordinates with the Superintendent.

Nic Cook is AMZ’s Estimator and Project Manager working in the office/field 40 hours a week. He prepares cost estimates for labor and materials and creates schedules conforming to projects plans and specifications for pre bid projects. For awarded contracts, Mr. Cook attends projects meeting with engineers/owners, prepares submittals & coordinates with the Superintendent.

Adam Schaufelberg is AMZ's superintendent, working in the field 40+ hours a week. Mr. Schaufelberg oversees the daily work for AMZ's foreman and subcontractors onsite. Coordinates various project details with AMZ's Project Managers.

David Becker & Jesse Sells are AMZ's foreman, working in the field 40+ hours a week. Mr. Becker and Mr. Sells oversee AMZ's field journeyman and apprentices." (DED Exhibit 12).

APPLICABLE LAW

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

Capital contribution. 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.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or more of the following:
 - 1. Money;
 - 2. Property;
 - 3. Equipment; or
 - 4. Expertise, provided that the contribution of such expertise must be uncompensated, the 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.

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

Operation. 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 AMZ 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

Mr. Kevin Laurilliard, Esq., of O'Connell & Aronowitz, appeared at the hearing on behalf of AMZ. The following witness testified on behalf of AMZ: Ms. Annalisa Zappia, President of AMZ.

Ms. Amy O'Connor, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Raymond Emanuel, Associate Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 12.

I. Ownership

The Division denied AMZ's application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Zappia made a contribution 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(b)(2).

Ms. Zappia testified that she made a capital contribution of \$ [REDACTED] in the form of a business degree. She stated that the expertise she contributed was everything she learned working with her father and her business degree. She admitted on cross examination that the degree was not specific to construction (Hearing Testimony of Annalisa Zappia). A narrative provided by Ms. Zappia states "there were no upfront investments of value." (DED Exhibit 5).

Mr. Emanuel testified that for the business degree to qualify as a contribution of expertise, it must be specialized and directly applicable to one or more critical aspects of the operation of the business. He stated that the degree was not specific to construction and therefore does not qualify as a contribution of expertise (Hearing Testimony of Raymond Emanuel).

5 NYCRR §144.2(b)(2)(i) states that "Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (4) Expertise, provided that the contribution of such expertise must be uncompensated, the 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.” Where applicant provided no valuation of the owner’s expertise, the Division was not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016.

Ms. Zappia’s contribution of her business degree does not qualify as expertise that is directly applicable to one or more critical aspects of the operation of AMZ.

Based on the foregoing, I find that the Division’s determination with regard to 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. In *C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841 (3d Dept 1995), the Court affirmed the denial where the woman-owner had no training or experience in the industry, nor could she specify the “working knowledge” necessary to review the estimates made by or evaluate the work of more experienced employees. 5 NYCRR §144.2(c)(1) states that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things.”

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.

Ms. Zappia’s resume reflects that her responsibilities at AMZ include oversight of daily activities and employees (office and field); payroll; human resources; estimating; bid preparation; accounts receivable/ payable; contract compliance; public relations; purchasing; financial monitoring and planning; and negotiating insurance and bonding. She holds a Business Degree and has a 10-hour OSHA Safety Training Certificate (DED Exhibit 9).

Section 4A of the certification application provides that (1) Ms. Zappia is solely responsible for Financial Decisions; Negotiating Bonding and Insurance; Marketing and Sales; Purchasing Equipment/Sales; Managing and Signing Payroll; and Negotiating Contracts; (2) Ms. Zappia and Joshua Zappia share responsibilities for Hiring and Firing and as Signatories of Business Accounts; (3) Ms. Zappia and Cassandra Ramos share the responsibility for Preparing Bids; (4) Ms. Zappia, Joshua Zappia and Nic Cook share responsibility for Estimating; and (5) Adam Schuffelburg and David Becker share responsibility for Supervising Field Operations (DED Exhibit 1).

Ms. Zappia testified that she is responsible for the oversight of the daily activities and employees in the office and in the field. She stated there are trailers on site so she can do both office work and field work. She stated that the estimator collects the quotes and enters them in the program which she reviews and puts on a “markup” and prepares the bid documents. She stated “I make all the ultimate decisions.” She stated that she can and has worked in the field, including carpentry, cast-in-place and excavation, and is “an extra set of hands” when needed. On cross examination, she admitted that her resume does not show any experience in carpentry, cast-in-

place, or excavation; and the majority of the tasks listed on her resume are administrative tasks. (Hearing Testimony of Annalisa Zappia).

Raymond Emanuel testified that Ms. Zappia does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are construction management; carpentry; rough framing; siding; cast-in-place concrete; foundations; exterior sidewalks; concrete slabs; concrete reinforcement; excavation; and trucking. He stated that Ms. Zappia's resume reflects that she does not have the education, training or experience to oversee the critical functions of the business. He noted that Adam Schufelberg and David Becker are listed as the persons who supervise field operations, not Ms. Zappia. He noted that Ms. Zappia's resume included a detailed description of her office/administrative work, but lacked any description showing her industry-specific competence. (Hearing Testimony of Raymond Emanuel).

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that "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 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).

Ms. Zappia testified that she worked with her father in the industry since she was five (5) years old. She said she was on-site and in the office in summer months during her years in school. She stated that she can and has worked in the field as “an extra set of hands.” She acknowledged that most of her resume lists duties that are administrative in nature, but she stated that the one line listing her oversight of daily activities and employees in the office and field, included supervising field operations. She stated, “I make the ultimate decisions.” (Hearing Testimony of Annalisa Zappia).

Raymond Emanuel testified that applicant’s chart showing the day-to-day operations shows that Annalisa Zappia is solely responsible for financial decisions, negotiating bonding and insurance, marketing and sales, purchasing equipment/sale, managing and signing payroll, and negotiating contracts; and she shares responsibilities for hiring and firing, as signatory of business accounts, preparing bids, and estimating; and Adam Schuffelburg and David Becker share responsibility for Supervising Field Operations. He stated that Ms. Zappia does not have the education, training or experience to supervise the workers or make decisions without relying on others (Hearing Testimony of Raymond Emanuel; DED Exhibit 1).

Based on the foregoing, I find that the Division’s determination to deny AMZ’s certification under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was based on substantial evidence.

CONCLUSION

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

In the Matter of AMZ Construction Services, Inc.
 DED File ID No. 58044
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	Question 3 Narrative on Capital Contribution	Y	Y
DED 6	Promissory Note	Y	Y
DED 7	Question 6 Narrative on Self Performed Services	Y	Y
DED 8	Question 8 Narrative on Employees Background and Experience	Y	Y
DED 9	Resume of Annalisa Zappia	Y	Y
DED 10	Resume of Joshua Zappia	Y	Y
DED 11	Copies of OSHA Cards and Certifications	Y	Y
DED 12	Question 1 Narrative on Day-to Day Roles	Y	Y