

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

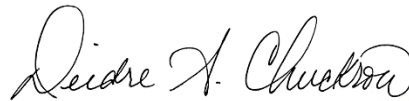
- of -

the ASAP Design & Logistics LLC
for Certification as a Minority and Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69654

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
June 5, 2024

This matter considers the written appeal by ASAP Design & Logistics LLC. (“ASAP” 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 minority and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On December 16, 2022, ASAP applied for certification as a minority and women-owned business enterprise (“MWBE”). ASAP based its application on Ms. Diana Samela. (DED Exhibit 1).
2. On May 15, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The minority and women owner relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under 5 NYCRR § 144.2(c)(1);
 - (b) The minority and woman owner relied upon for certification does not 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); and
 - (c) The minority and woman owner relied upon for certification does not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR § 144.2(d)(2).

3. ASAP submitted a request to appeal the denial determination, dated November 15, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to ASAP on November 22, 2023 (DED Exhibit 4).
5. A written appeal, with exhibits, was filed by Samantha B. Epstein, Esq., of Cole Schotz P.C., on December 18, 2023. (APP Exhibit A).
6. The Division filed an Affidavit of Raymond Emanuel, Director of Certification, dated April 23, 2024, and a brief of Michael A. Paff, counsel for the Division, dated April 26, 2024.

FINDINGS OF FACT

7. ASAP is engaged in the business of commercial flooring distribution and its primary North American Industry Classification System (NAICS) number is for “Floor coverings merchant wholesalers.” (DED Exhibits 1).
8. Diana Samela is the minority women owner relied upon for certification. Ms. Samela is the President, CEO and 100% owner of ASAP. (DED Exhibits 1 and 6; APP Exhibit A).
9. The critical functions of the business include the design, sale, and delivery of commercial flooring. (DED Exhibit 1).
10. Mr. Anthony Samela, Ms. Samela’s step-son, is the Operations Manager, and COO for ASAP. (DED Exhibits 1 and 7).
11. Ms. Samela is responsible for the following managerial functions at the applicant business: Financial Decisions, Preparing Bids, Negotiating Bonding and Insurance, Hiring & Firing, Purchasing Equipment/Sales, managing & Signing Payroll, Negotiating Contracts, and is the only signatory for the business accounts. (DED Exhibit 1).

12. Mr. Samela is responsible for Estimating and Supervising Field Operations, and Monica Stoller, ASAP's Vice President for Sales and Marketing, is responsible for Marketing & Sales.
13. ASAP has one full time employee, one part-time employee, and one seasonal employee. Ms. Samela works approximately 50 hours a week for the applicant business, Mr. Samela works between 35 and 40 hours a week, and the hours for Ms. Stoller were not provided (DED Exhibit 1).
14. Ms. Samela began working for ASAP Design LLC, in 2017, a separate company from the applicant business. She gained her experience in the flooring business through her work at both ASAP Design LLC and for the applicant business, ASAP. (DED Exhibit 1; APP Exhibit A).
15. Ms. Samela's resume, states that she began a flooring business in 2018 which generates two million dollars in sales annually, that she has created and maintained strong relationships with vendors, and opened a warehouse for inventory and client interaction. In addition, the resume states that Ms. Samela's core competencies include: Client Relations, Process Implementation, Project Management, Financial Reporting, Contractual Compliance, Team Development, Recruiting & Staffing, P&L / Budget Tracking; and Succession Planning. The applicant also submitted an updated resume with their appeal which added that Ms. Samela is the liaison with contractor and companies relating to materials and installation. (DED Exhibit 6; APP Exhibit D).
16. Ms. Samela's prior work history includes over six years as the Vice President of Operation for [REDACTED], and in managerial positions for several companies over a span of approximately 10 years, including: [REDACTED]. (DED Exhibit 6).

17. A narrative provided in response to questions from the Division states that Ms. Samela learned the flooring business through her work in beginning ASAP Design LLC. Applicant states that 60% of Ms. Samela's time has been dedicated to building the business, and 40% of her time on training, processing payments, and vendor invoices and payments. Ms. Samela lists her duties as customer sales, customer invoicing and payment, vendor purchase orders ("PO") and bill payment, company paperwork, payroll, and warehouse control and inventory. (DED Exhibit 1).
18. The narrative submitted with the application states that Mr. Samela is responsible for picking up or receiving vendor orders, preparing and delivering customer orders, coordinating freight orders, and assisting in warehouse inventory. (DED Exhibit 1)
19. Mr. Samela's resume states that he manages inventory and deliveries, creates purchase orders, estimates and invoices, follows up on customers questions, and assists in managing incoming and outgoing orders. Mr. Samela's work history includes work as a manager for flooring company from 2016 to 2013 and as a supervisor for [REDACTED] for approximately four years. (DED Exhibit 7).
20. Monica Stoller has worked for ASAP Designs since September of 2020. She is also the owner and principal of [REDACTED], a company which provides interior design consulting services for commercial and residential facilities, and is the Vice President of [REDACTED], a company she started and has worked for since 2003, which furnishes and maintains commercial interiors. (DED Exhibit 10).

APPLICABLE LAW

5 NYCRR § 144.2 (c)(1) states as follows:

Competence in the industry.

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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including but not limited to:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

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

Operational decisions.

Minority group members and 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.

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

Control. Minority group members and women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (2) Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent

themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 ASAP for certification as an MWBE 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. Industry-Specific Competence and Day-to-Day Operations

The Division denied ASAP's application for certification as an MWBE on the basis that ASAP failed to demonstrate that Diana Samela possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1) and that the applicant failed to demonstrate that she makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5

NYCRR § 144.2(c)(2). As the Division's denial based its determination on the same set of facts in its determination, they will be addressed collectively. (DED Exhibit 2).

The Division interprets these regulations to require an applicant to demonstrate that the owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)). Notwithstanding the Division's requirements, a lack of hands-on experience is not itself enough to deny certification and industry practice should also be considered. (*Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988)).

The Applicant bears the burden of establishing that the minority/woman group member relied upon for certification has met this requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

In the instant case, the Division's denial determination was not based on substantial evidence. The Division argues that the applicant failed to provide sufficient evidence regarding Ms. Samela's industry-specific competence and determined that she did not make decisions on a

day-to-day basis regarding the critical functions of the business enterprise. In assessing Ms. Samela's industry-specific competence, and her ability to make critical business decisions, the Division relied almost exclusively upon the resumes of Ms. Samela and Mr. Anthony Samela. Aside from the resumes, the Division had no other evidence before it regarding the work experience of both Ms. Samela and Mr. Samela to conclude that the woman owner relied upon for certification did not possess adequate industry-specific competence to make decisions without relying on others, or that she was not making critical business decisions on a day to day basis as required under both 5 NYCRR §§ 144.2(c)(1) and (c)(2).

Here, the business is a wholesale floor covering merchant, engaged in the business of the sale and distribution of commercial flooring for a variety of flooring manufacturers. (DED Exhibit 1). The application provides that Ms. Samela is responsible for Financial Decisions, Preparing Bids, Negotiating Bonding and Insurance, Hiring & Firing, Purchasing Equipment/Sales, Managing & Signing Payroll, Negotiating Contracts, and is the only signatory for the business accounts. The narrative provided with the application states that Ms. Samela works for the business full time, at 50 hours a week, and handles customer sales, as well as customer invoicing and vendor purchase orders, handles company paperwork and payroll, and is responsible for warehouse control and inventory. (DED Exhibit 1). Ms. Samela's resume also provides that she is the liaison with contractors and companies regarding materials and installation. (DED Exhibit 6).

The application lists Mr. Samela's responsibilities as Estimating and Supervising Field Operations, and the narrative and his resume provide that he works between 35 and 40 hours a week, and that his responsibilities include picking up or receiving vendor orders, preparing and delivering customer orders, coordinating freight orders, answering customer questions regarding materials, and assisting in warehouse inventory. (DED Exhibits 1 and 7). However, nowhere in

any of the materials supplied by the applicant, and used by the Division in its review, is Mr. Samela listed as having the responsibility for customer sales, a critical business function for a wholesaler of flooring. In addition, Ms. Samela is the company liaison for contractors and companies regarding materials and installation, handles Vendor Purchase Orders, and is responsible for the warehouse and its inventory, other critical business functions for a flooring wholesaler. (DED Exhibits 1 and 6).

The Division refers specifically to Mr. Samela's approximately two years of experience as a manager of another flooring company in its determination. In addition, the Division in their denial determination, focuses on the fact that Ms. Samela's work history, prior to beginning ASAP, is not in flooring, but instead is in the management at a bank, [REDACTED], as an Experience Manager at [REDACTED], a Client Services Manager at [REDACTED], a company specializing in print center and mailroom implementation for investment banks, work as a manager at the [REDACTED], and as a senior account operations manager for [REDACTED], a 24-hour production centers for an investment bank. (DED Exhibits 2 and 6). The Division states that Ms. Samela's resume "demonstrates her expertise is not in relation to the core revenue generating functions (flooring) of the applicant business," without consideration to her four years of experience in running the applicant business, prior to her applying for certification, or to the fact that some of her responsibilities in her years as manager for [REDACTED] was assisting with the project management and coordination in relocating banking operations from New York to Florida. (DED Exhibits 2 and 6). No consideration is given to Ms. Samela's experience in facilities management, which is listed as one of her responsibilities at both [REDACTED] and [REDACTED]. (DED Exhibit 6).

The regulations provide that industry-specific expertise may be obtained via direct work experience, and here, Ms. Samela has over 20 years of managerial experience, some of which includes facilities management and relocation. In addition, Ms. Samela has the experience she has gained in the years since beginning the applicant business in 2018. (5 NYCRR 144.2(c)(1)(iii)) (DED Exhibit 6; APP Exhibit A). The Division’s regulations “do not require an applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a business.” (*Matter of Northern Scapes Inc.*, Recommended Order, May 18, 2018 (Final Order 18-31, June 5, 2018) (applicant relied on for certification, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). Further, there is no regulatory requirement for any formal academic training, only that the woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. (See *Northern Scapes*, supra). Here, the applicant states, both in their appeal, and in materials submitted with the application, that Ms. Samela is the primary point of contact for all clients. In their appeal, applicant further explains that Ms. Samela is primarily responsible for the negotiation and preparation of all purchase orders of the business, a statement which clarifies information already before the Division. Where a relied upon owner possesses significant industry and managerial experience, and “retains ultimate authority to control the operations of the business enterprise seeking certification” an imposition to require more on that owner is unreasonable. (*Northern Scapes*, supra, citing to *Matter of Era Steel Const. Corp. v Egan*, 145 AD2d 795 [3d Dept 1988]).

Applicant, for the first time on appeal, provides a copy of an updated resume for Ms. Samela, which includes more information relating to her work at several previous employers, and argues that the updated resume clarifies the information in the resume, and expands on her

experience in connection with the core revenue generating functions of the business. In addition, letters from clients regarding Ms. Samela's work at ASAP, are also provided on appeal to clarify Ms. Samela's role in performing the critical functions of the business. The updated resume states that Ms. Samela was "[r]esponsible for Facilities Department planning and executing [o]ffice moves which included [f]looring installation across 3 building locations. . ." for ██████████, responsible for conference room design and set up while working for ██████████, and responsible for flooring plans and design while working for ██████████. (APP Exhibit A). I find that Ms. Samela's updated resume is not new information, but clarifies information already included with ASAP's application, and thus is admissible under *Scherzi, supra*.

The client letters, also submitted for the first time on appeal, are from customers and suppliers of ASAP. Ms. Karen Rossilli-Kiefer, President of TeamPar states that Ms. Samela is her "point of contact, during project negotiations, product sampling and with terms of payment. . ." (APP Exhibit A). Mr. Keith Wasylyshyn, from KMAD, states that, "KMAD has been buying material from ASAP Design & Logistics since 2017. . ." and that his contact at ASAP "for all order processing, delivery schedules and pricing" is Ms. Samela. (APP Exhibit A). Mr. Humberto Checko, of NAHB Choice, also states that he has "been doing business now with Diana Samela, owner of ASAP Logistics, for about 3 years. . ." and that Ms. Samela is his "point of contact for [his] flooring business supplies." (APP Exhibit A). Finally, Ms. Pamela Piccini, of RVP Flooring Systems (RVP Flooring), states that RVP Flooring "has been purchasing material from ASAP Design & Logistics since 2018. . ." and that Ms. Samela is their "contact for all price requests, order processing and delivery schedules." (APP Exhibit A). I find that these letters are not new information, but clarifies the information already included with ASAP's application, regarding

Ms. Samela's role as the customer liaison and her work in bidding, and thus are admissible under *Scherzi, supra*.

I find applicant's argument persuasive that Ms. Samela's managerial experience, her role in the business as presented in the application and its supporting documents, and her experience gained by working in the industry, demonstrates that she possesses adequate industry-specific competence and makes 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)(1) and (2).

II. Control

Minority/women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. (See *Matter of C EZ Key Service*, Recommended Order dated January 5, 2024; Final Order 24-01 dated February 22, 2024). Signing contracts demonstrates that a minority/woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. (See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022). Substantial evidence supports the Division's denial where no evidence was presented that the minority/woman-owner signs contracts on behalf of the business. (See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016).

Applicant was asked by the Division to produce contracts entered into by ASAP, specifically to provide a "complete copy of each Manufacturer's Distributor Agreements utilized by the business for distribution of flooring." Applicant provided a copy of a distribution plan from Forbo Flooring Systems (Forbo) in response to the Division's request. However, the plan provided names no one from ASAP in the document, nor is it signed by anyone from the applicant business.

Applicant also provided copies of invoices with their application; however, these documents are not contracts, but invoices for products, and while they include an email address for Mr. Samela, the invoices are not signed by anyone from the applicant business. The Division found that these documents do not demonstrate the authority Ms. Samela is operating under or show her control with respect to business negotiations and concluded that the minority/woman-owner does not sign contracts on behalf of the business.

On appeal, Applicant states that “the business is run primarily on a purchase order basis, which purchase orders are wholly prepared, negotiated, and executed (to the extent signed) by Diana.” (APP Exhibit A). Further, the applicant states that “the business does not have any other written agreements, contracts or other arrangements in place.” (APP Exhibit A). Applicant also provides, for the first time on appeal, what it describes as purchase orders. However, this purchase order list was not before the Division at the time of determination, and is new information, not clarifying, and therefore, cannot now be considered. (APP Exhibit A; See *Scherzi*, supra).

The record before the Division at the time of its determination to deny the MWBE application contains substantial evidence to support its finding that ASAP failed to demonstrate that Ms. Samela negotiates business contracts and represents herself to clients as the principal of the business enterprise, as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

ASAP did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a minority and woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR § 144.2(d)(2) was not based on substantial evidence. ASAP did

however, meet its burden with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1) and 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny ASAP's application for certification as a minority and woman-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of ASAP Design & Logistics, LLC
 DED File ID No. 69654
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal Denial	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Diana Samela 2021 Tax Returns	Y	Y
DED 6	Resume of Diana Samela	Y	Y
DED 7	Resume of Anthony Samela	Y	Y
DED 8	Invoice and Purchase Orders	Y	Y
DED 9	Certificate of Authority	Y	Y
DED 10	Resume of Monica Stoller	Y	Y
TRIBUNAL I	Forbo Distribution Plan	N	Y