

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

**In the Matter**

**- of -**

**the Application of Adirondack Combustion Technologies, Inc.**  
**for Certification as a Minority-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 70947**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**July 3, 2024**

This matter considers the written appeal by Adirondack Combustion Technologies, Inc. (“ACT” 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-owned business enterprise (“MBE”).

### **PROCEDURAL HISTORY**

1. On June 7, 2023, Mr. Uday Mahtani, as President, applied on behalf of ACT for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On November 24, 2023, the Division denied the application on the following grounds (APP Exhibit D, DED Exhibit 2):
  - (a) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR § 144.2(b)(3);
  - (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);
  - (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); and
  - (d) Minority group members or women relied upon for certification must be the highest-

- ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).
3. ACT timely filed a Request to Appeal on November 28, 2023 (DED Exhibit 13).
  4. A notice to proceed via written appeal was sent to ACT on December 15, 2023 (DED Exhibit 14).
  5. ACT filed its written appeal by letter dated January 24, 2024, with attachments, from its attorney, Megan Muoio, Esq. of Allyn & Fortuna LLP (APP Exhibit F).
  6. The Division filed an Affidavit of Glenn Butler, Certification Director, dated May 29, 2024, and a brief of Laurel Wedinger-Gyimesi Esq., counsel for the Division, dated May 31, 2024.

### **FINDINGS OF FACT**

7. ACT is engaged in the business of wholesale distribution of boilers, domestic water heating, and control solutions (DED Exhibit 1).
8. Mr. Uday Mahtani is President and has a 75.5% ownership interest. His ownership is through a company named Pendo Capital Management, Inc. (“Pendo”). Mr. John Frank is Vice President and has a 24.5% ownership interest (DED Exhibit 1).
9. Mr. Mahtani owns 96% of Pendo. His wife, Ms. Joyti Mahtani, owns 4% (DED Exhibit 1).
10. In 2019, 2020, and 2021, Mr. Mahtani received no compensation from ACT, while Mr. Frank received \$████████ in 2020, \$████████ in 2021, and \$████████ in 2022 (DED Exhibit 6).
11. Mr. Mahtani has a bachelor’s degree with a major in art history and a minor in business. He has certificates in investment banking, financial statement analysis, and credit analysis. His prior work experience was in finance, asset management, and private equity

investments. At ACT, he is responsible for making all financial decisions, estimating, preparing bids, negotiating contracts, securing insurance coverage for the business, managing relationships with suppliers and customers, overseeing the fabrication shop and field operations, making purchasing decisions, and managing human resources (APP Exhibit F, DED Exhibit 1).

12. Mr. Frank has worked as a technical and sales representative since 1975. He cofounded ACT in 1994. He is ACT's Technical Sales Representative (DED Exhibit 8).

13. Mr. Mahtani also has ownership interests in Accardi Companies, LLC ("Accardi"), TPR Technical Sales, Inc. ("TPR") and Pendo Capital Management, Inc. ("Pendo"). He devotes approximately 15 hours per week to ACT, 15 hours per week to Accardi, 20 hours per week to TPR, and 6 hours per week to Pendo (DED Exhibit 1).

14. Mr. Mahtani and Mr. Frank are the only directors of the business (DED Exhibit 11). The Amended and Restated By-Laws dated March 26, 2021 state (a) ACT is managed by its Board of Directors; (b) the number of Directors may be the number of shareholders or three, whichever is less; (c) to constitute a quorum, a majority of the entire Board is required; and (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act (DED Exhibit 10).

15. Article III, Paragraph 14 of the Amendment to the By-Laws states that "The shareholders may take any action that the Board of Directors has the power to make pursuant to New York law." (DED Exhibit 10).

## APPLICABLE LAW

5 NYCRR §144.2(b)(3) states in relevant part as follows:

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

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.

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

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

## 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 ACT for certification as a MBE 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**

5 NYCRR §144.2(b)(3) requires that the minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to his ownership interest in the business.

The Division routinely denies certification where the majority shareholder receives less compensation than other owners of the business, and other employees of the business. See, e.g., *Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10 dated October 13, 2023; *ERS Consultants, Inc.*, Recommended Order dated September 19, 2023, Final Order 23-09 dated October 13, 2023; *Keith Titus Corp.*, Recommended Order dated October 9, 2019, Final Order 19-29 dated January 16, 2020.

In determining total compensation, the Division considers financial records such as tax returns and salary/wage statements including W-2’s. See, e.g., *C.W. Brown, Inc. v. Canton*, 216

A.D. 2d 841 (3d Dept. 1995); *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County 2017).

In 2019, 2020, and 2021, and 2022, Mr. Mahtani received no compensation from ACT, while Mr. Frank received \$ [REDACTED] in 2020, \$ [REDACTED] in 2021, and \$ [REDACTED] in 2022 (DED Exhibits 1, 6).

On appeal, applicant argues that Mr. Mahtani received additional compensation from ACT in the form of management fees paid to Pendo for Mr. Mahtani's work on behalf of Pendo. Applicant states that those amounts were \$ [REDACTED] in 2021, and \$ [REDACTED] in 2022, and \$ [REDACTED] 2023 (APP Exhibit F). However, no documentation was provided to show how much was paid or to be paid to Pendo in management fees. Also, the alleged management fees were paid directly to Pendo, not Mr. Mahtani, and it cannot be determined what distributions, if any, Mr. Mahtani received for the portion attributable to his work for Pendo.

In addition, Mr. Mahtani affirmatively stated in the application that he was not receiving any income from ACT (DED Exhibit 1).

The Division's determination to deny the application on the basis that ACT failed to demonstrate that Mr. Mahtani shared in the risks and profits in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

## II. Operation

5 NYCRR §144.2(c)(1) requires that the minority-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.

Mr. Mahtani has a bachelor's degree with a major in art history and a minor in business. He has certificates in investment banking, financial statement analysis, and credit analysis. His prior work experience was in finance, asset management, and private equity investments. At ACT, he is responsible for making all financial decisions, estimating, preparing bids, negotiating contracts, securing insurance coverage for the business, managing relationships with suppliers and customers, overseeing the fabrication shop and field operations, making purchasing decisions, and managing human resources (APP Exhibit F, DED Exhibit 1).

Mr. Frank has worked as a technical and sales representative since 1975. He cofounded ACT in 1994. He is the Technical Sales Representative (DED Exhibit 8).

On appeal, applicant argues that Mr. Mahtani has been in the business of wholesale distribution of steam water heaters and commercial heat trace systems since 2014 since he became involved with Accardi, a similar New York-area business in the same industry as ACT. He "has acquired ten years of directly relevant experience in the industry which makes him capable of making critical business decisions across all areas of ACT's business without relying on others." He is primarily responsible for marketing and sales, negotiation of contracts with customers, and purchasing equipment from manufacturers. He maintains operational control over and independently makes all of ACT's financial decisions, manages all human resources functions, secures all insurance, and manages relationships with ACT's customers as the face of the business.

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 dated May 18, 2018, Final Order



18-31, dated 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 minority/woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. See *Northern Scapes*, supra.

Mr. Mahtani's ten years of experience in the industry has given him the competence to make critical business decisions without relying on others.

5 NYCRR §144.2(c)(2) states that "Minority group members... 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 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". See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

Applicant argues on appeal that Mr. Mahtani's role is not limited to administrative work for ACT. Mr. Mahtani has "day-to-day responsibility regarding ACT's critical functions, including but not limited to marketing and sales of commercial boilers, power burners, associated control systems, and aftermarket boiler service as a manufacturer's representative, negotiation of contracts and establishment of relationships with customers, and negotiation and purchasing of products with ACT's supplier-partners. In this role, Mr. Mahtani makes use of the technological and

industry-specific knowledge that he has obtained during his decade of experience in the industry.” (APP Exhibit F). Applicant cites the Amended and Restated By-laws dated March 26, 2021, which provides that Mr. Mahtani, as President and Chief Executive Officer, has control over all operational and critical functions of Act’s business on a daily basis, and “shall in general supervise and control all of the business and affairs of the Corporation.” (APP Exhibit F, DED Exhibit 10).

Mr. Mahtani makes operational decisions on a day-to-day basis with respect to the critical functions of the business.

The Division’s determination to deny the application on the basis that ACT failed to demonstrate that Mr. Mahtani possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2), is not supported by substantial evidence.

### III. Control

The Division also denied certification on the ground that Mr. Mahtani does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Mr. Mahtani and Mr. Frank are the only directors of the business (DED Exhibit 11). The Amended and Restated By-Laws dated March 26, 2021 state (a) ACT is managed by its Board of Directors; (b) the number of Directors may be the number of shareholders or three, whichever is less; (c) to constitute a quorum, a majority of the entire Board is required; and (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act (DED Exhibit 10).

Applicant argues on appeal that Article III, Paragraph 14 of the Amendment to the By-Laws states that “the shareholders may take any action that the Board of Directors has the power

to make pursuant to New York law.” Therefore, the control of the business was transferred to the shareholders, and since “Mr. Mahtani is the majority shareholder, with the power to constitute a quorum of shareholders, and vote a majority of ACT’s shares, he is able to exclusively control the management of ACT’s business.” (APP Exhibit F).

The Division argues that this provision “would require all the remaining 14 paragraphs of Article III, concerning the creation and powers of the Board of Directors to be ignored to only give effect to paragraph 14.” (See Division’s Brief).

As stated above, a majority of the Board is required for the Board to act (DED Exhibit 10). Therefore, since the Board does not have the power to act without a majority of Directors, the shareholders likewise would not have the power to act.

The Division’s determination to deny the application on the basis that Mr. Mahtani does not control the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

### **CONCLUSION**

ACT met its burden to demonstrate that the Division’s determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was not based on substantial evidence. ACT did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(3) and 144.2(d)(1), was not based on substantial evidence.

## **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny ACT's application for certification as a minority-owned business enterprise, and as modified, affirm the determination.

In the Matter of Adirondack Combustion Technologies, Inc.  
DED File ID No. 70947  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Application for Certification	Y	Y
APP B	ACT's Responses to Request for additional information	Y	Y
APP C	Application for Pendo Capital Management, Inc.	Y	Y
APP D	Denial Letter	Y	Y
APP E	Affidavit of Uday Mahtani	Y	Y
APP F	Appeal letter dated January 24, 2024	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Stock Narrative	Y	Y
DED 4	Adirondack Business Taxes 2019 – 2021	Y	Y
DED 5	Mahtani Personal Taxes 2021; 2022	Y	Y
DED 6	Adirondack 2020, 2021 and 2022 W-2's	Y	Y
DED 7	Resume of Uday Mahtani	Y	Y
DED 8	Resume of John Frank	Y	Y
DED 9	Bank Signature Card	Y	Y
DED 10	Amended and Restated Bylaws	Y	Y
DED 11	Transfer of Shares Agreement	Y	Y

DED 12	Article of Incorporation	Y	Y
DED 13	Request to Appeal	Y	Y
DED 14	Notice to Proceed Via Written Appeal	Y	Y