

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

In the Matter

- of -

**the Application of All Safe Sprinkler Company, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 64015

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 31, 2024

This matter considers the appeal by All Safe Sprinkler Company, LLC (“All Safe” 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 August 4, 2023, Ms. Emily Avery, as President, applied on behalf of All Safe for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 1, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members and women relied upon for certification must own at least fifty-one (51) percent of the business enterprise for which certification is sought. Such minority group members or women must be United States citizens or permanent resident aliens, as required under 5 NYCRR § 144.2(b)(1);
 - (b) Minority group members or women relied upon for certification must have 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);

- (c) 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
 - (d) 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 February 29, 2024, All Safe submitted a Request to Appeal. (DED Exhibit 3).
 4. On March 1, 2024, a Notice to Proceed Via Written Appeal was sent to All Safe (DED Exhibit 4).
 5. All Safe submitted its written appeal on April 22, 2024 (APP Exhibit A).
 6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated September 20, 2024, and a brief of Michael Paff Esq., counsel for the Division, dated September 23, 2024.
 7. The denial determination does not contain any facts to support NYCRR §144.2(b)(1) nor does the Division address this in their brief, therefore this ground will not be considered.

FINDINGS OF FACT

8. All Safe is engaged in the business of commercial and residential fire sprinkler installation, repair, maintenance and testing (DED Exhibit 1).
9. Ms. Emily Avery is 51% owner of All Safe. Patrick Leary is 49% owner of All Safe (DED Exhibit 1).
10. Section 2E of the certification application states that Ms. Avery made a capital contribution in 2016 of \$██████ in the form of expertise and \$██████ in the form of experience (DED Exhibit 1).

11. The amounts of capital contributions in Exhibit A to All Safe's Operating Agreement were left blank. (DED Exhibit 6).
12. The buy-sell agreement did not provide a current value of the business. (DED Exhibit 7).
13. Section 3C of the application states that the principal products/commodities sold, specialties or services offered are "commercial and residential fire sprinkler installation, repair, maintenance and testing." (DED Exhibit 1).
14. Ms. Avery is listed as responsible for all managerial operations of the company. Mr. Leary is also listed as a signatory for the business accounts (DED Exhibit 1).
15. Ms. Avery's resume states that she is responsible for all aspects of the company including daily operations, estimating and project bidding, securing contracts and contract writing, scheduling and coordination of current and future work schedule, financial control, decisions and purchases, bookkeeping, payroll, hiring and termination of employees and human resources. She has a B.A.S. in Studio Art with a concentration in Photography and an A.A.S. in commercial illustration. The resume states that Ms. Avery has Spears Flame Guard Installation Certification, Potter Fire Sprinkler Product Training, is OSHA 10 and 30 Certified, and has taken Introduction to NFPA 13. (DED Exhibit 14).
16. Ms. Avery's narrative states that she has extensive years working in business operations with direct experience in the construction and service industries (DED Exhibit 22).
17. Brandon Keleher's resume reflects that he has 15 years of experience in the plumbing industry. He is the project manager and project estimator at All Safe. He performs commercial and residential sprinkler testing and inspections, installs commercial and residential fire sprinkler systems, assists in the coordination of the daily schedule of sprinkler technicians, manages multiple job sites and assists with overseeing projects to

their completion, and assists in estimating and preparing bids to potential clients (DED Exhibit 15).

18. Patrick Leary's resume reflects that he is the owner of PM Leary LLC (dba 'Roto-Rooter, dba PM Leary Restoration, dba Shingle Street, dba The Basement Guy, dba Champagne Siding, Windows and Doors) since 2010. He is certified in IICRC Fire and Water with 22 years of construction and plumbing experience (DED Exhibit 16).

19. Two promissory notes were included with the application: (1) a business loan dated September 27, 2022, in the amount of \$[REDACTED]. This loan was personally guaranteed by Ms. Avery and Mr. Leary (DED Exhibit 22); and (2) a business loan dated July 27, 2017, in the amount of \$[REDACTED]. This loan was also personally guaranteed by Ms. Avery and Mr. Leary (DED Exhibit 18).

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 All Safe 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. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification 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).

It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution." *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

Section 2E of the certification application states that Ms. Avery made a capital contribution in 2016 of \$ [REDACTED] in the form of expertise and \$ [REDACTED] in the form of experience (DED Exhibit 1).

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.

Applicant provided an Operating Agreement, however the amounts of capital contributions in Exhibit A were left blank. (DED Exhibit 6). A buy-sell agreement delineating the sale or transfer of shares was also provided, however did not include a current value of the business. (DED Exhibit 7). Ms. Avery failed to provide a value of the company in order to determine the correct proportionate share of her contribution.

Ms. Avery argues that she contributed \$[REDACTED] in expertise to the business and that she contributed \$[REDACTED] in experience. (APP Exhibit A). However, she provided no documentation to prove how she determined the value of her expertise, and no valuation of her experience.

Ms. Avery argues on appeal that the critical functions of the business include “generating, maximizing, maintaining revenue and financial growth.” However, she agreed with the Division that the critical functions are commercial and residential fire sprinkler installation, repair, maintenance and testing. Ms. Avery contends that her expertise was obtained through “estimating, bidding, negotiating, signing contracts and retaining work, financial management of projects, as well as financial control” in the construction industry (APP Exhibit A). However, her resume does not show experience in the critical functions of the business (DED Exhibit 14).

Two promissory notes were included with the application: (1) a business loan dated September 27, 2022, in the amount of \$[REDACTED]. This loan was personally guaranteed by Ms. Avery and Mr. Leary (DED Exhibit 22); and (2) a business loan dated July 27, 2017, in the amount of \$[REDACTED]. This loan was also personally guaranteed by Ms. Avery and Mr. Leary. This loan was used to buy vehicles, equipment, material and supplies for the business. (DED Exhibit 18).

Loans do not constitute contributions to the business, as they are viewed as an extension of credit in anticipation of repayment. See *Matter of Pam Ten*, Recommended Order dated June 26, 2018, Final Order 18-38, dated July 30, 2018. When a minority/woman owner finances the purchase of the business through loans, the Division will evaluate the terms of the loan to determine if the loan is guaranteed and repaid by the minority/woman owner, and thus qualifies as a capital contribution. *Matter of Mac Fhionaghaile & Sons Electrical Contracting*, Recommended Order dated November 16, 2017, Final Order 18-01, dated January 3, 2018.

The loans were taken out by the company and repaid by the company. When a loan is taken out by the business and not by the owner, it cannot be considered as a capital contribution. See *Matter of Jason Office Products Inc.*, Recommended Order dated November 22, 2023, Final Order 23-12, dated March 8, 2024. Even if the loan is allocated to the individual owners, they are jointly and severally liable for the loan, which is not proportionate to Ms. Avery's ownership interest (DED Exhibits 18 and 22).

The Division's determination to deny the application on the basis that All Safe failed to demonstrate that Ms. Avery made capital contributions to All Safe 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. 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. Avery is listed as responsible for all managerial operations of the company. Mr. Leary is also listed as a signatory for the business accounts (DED Exhibit 1).

Ms. Avery's resume states that she is responsible for all aspects of the company including daily operations, estimating and project bidding, securing contracts and contract writing, scheduling and coordination of current and future work schedule, financial control, decisions and purchases, bookkeeping, payroll, hiring and termination of employees and human resources. She has a B.A.S. in Studio Art with a concentration in Photography and a A.A.S. in commercial illustration. She states that she has Spears Flame Guard Installation Certification, Potter Fire Sprinkler Product Training, OSHA 10 and 30 Certified, and Introduction to NFPA 13. (DED Exhibit 14).

Brandon Keleher's resume reflects that he has 15 years of experience in the plumbing industry. He is the project manager and project estimator at All Safe. He performs commercial and residential sprinkler testing and inspections, installs commercial and residential fire sprinkler systems, assists in the coordination of the daily schedule of sprinkler technicians, manages multiple

job sites and assists with overseeing projects to their completion, and assists in estimating and preparing bids to potential clients (DED Exhibit 15).

Patrick Leary's resume reflects that he is the owner of PM Leary LLC (dba 'Roto-Rooter, dba PM Leary Restoration, dba Shingle Street, dba The Basement Guy, dba Champagne Siding, Windows and Doors) since 2010. He is certified in IICRC Fire and Water with 22 years of construction and plumbing experience (DED Exhibit 16).

Ms. Avery does not have any industry specific expertise; her skills are related to general business and office management (DED Exhibit 14). The critical functions of the business are commercial and residential fire sprinkler installation, repair, maintenance and testing." (DED Exhibit 1). Ms. Avery's resume reflects that she does not have the education, training or experience to oversee the critical functions of the business. (DED Exhibit 14).

On appeal, Ms. Avery states that she "works in the field as I need to." (APP Exhibit A). However, there is nothing in her resume that supports this claim (DED Exhibit 14). She states that "not performing manual labor daily does not make me any less of an adequate, competent, industry specific business owner." (APP Exhibit A). However, there is no supporting evidence in either her resume or the application that she has the competence to be in the field or that she actually is in the field. (DED Exhibits 1 and 14). Brandon Keleher is the project manager who prepares bids, does the testing and inspections, installs the systems, schedules technicians, manages the job site and oversees the projects (DED Exhibit 15). He has "direct work experience as he performs manual labor." (APP Exhibit A).

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. Avery states that she is responsible for the day-to-day management and operations of the company, leading the executive team, and managing budgets and resources. (DED Exhibit 14). These day-to-day decisions must be operational decisions, not just administrative decisions. See *Matter of Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10, dated October 13, 2023 (denying certification to an Appellant whose duties involved administrative tasks such as issuing bills, invoices, financial statements, payroll, purchase orders, tax returns, worker’s compensation and other government documents; while other key employees involved in the business dealt with customer service, ordering parts and materials and supervising repair shop workers).

Brandon Keleher supervises field operations. He has the background, knowledge and ability to perform the tasks required in the contracts submitted with the application. He installs the fire sprinkler systems, tests and inspects the systems, coordinates the schedule of technicians,

prepares bids and manages and oversees the job sites through completion (DED Exhibits 1, 8 -11, and 15). Ms. Avery does not have the skills or knowledge necessary to accomplish the critical functions of the contracts (DED Exhibits 1, 8-11, 14 and 15).

On appeal, Ms. Avery stated “I will always employ individuals that have critical thinking skills and the ability to make some decisions, occasionally as needed, on behalf of my business as it applies to a customer and their fire sprinkler protection. Hiring quality employees that have knowledge and experience is needed as fire sprinkler protection is a crucial form of life safety and the protection of property. However, they do not make operational decisions on a day-to-day basis.” (APP Exhibit A) Nevertheless, Ms. Avery does not have the education, training or experience to supervise the workers or make decisions without relying on others (DED Exhibits 1 and 14).

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

CONCLUSION

All Safe 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. Since there are no facts in the denial determination supporting the denial ground under 5 NYCRR §§144.2(b)(1), there is not substantial evidence nor sufficient notice to support this ground.

RECOMMENDATION

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

In the Matter of All Safe Sprinkler Company, LLC
DED File ID No. 64015
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Articles of Organization	Y	Y
DED 6	Operating Agreement	Y	Y
DED 7	Buy Sell Agreement	Y	Y
DED 8	AuSable Fire Dept. Contract	Y	Y
DED 9	Cambria Contract	Y	Y
DED 10	Citizens Contract	Y	Y
DED 11	Subcontractors Narrative	Y	Y
DED 12	E. Avery 2021 Taxes	Y	Y
DED 13	E. Avery 2022 Taxes	Y	Y
DED 14	Emily Avery Resume	Y	Y
DED 15	B. Keleher Resume	Y	Y
DED 16	Patrick Leary Resume	Y	Y
DED 17	Loan Note	Y	Y

DED 18	Promissory Note	Y	Y
DED 19	Signature Cards	Y	Y
DED 20	Third Party Agreements	Y	Y
DED 21	E. Avery OSHA	Y	Y
DED 22	E. Avery Narrative	Y	Y
DED 23	Additional Narrative	Y	Y
DED 24	Leases	Y	Y