

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

In the Matter

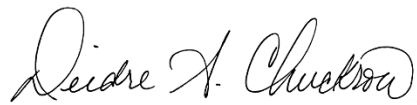
- of -

the Application of Arrow Sheet Metal Works, Inc.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 6270480

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
November 19, 2024

This matter considers the written appeal by Arrow Sheet Metal Works, Inc. (“Arrow” 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 April 7, 2023, Arrow applied for recertification as a women-owned business enterprise (“WBE”). Arrow based its application on Ms. Joan Schubring. (DED Exhibit 1).
2. On August 8, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The woman 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); and
 - (b) The 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).
3. Arrow submitted a request to appeal the denial determination, dated September 6, 2023. (DED Exhibit 4).
4. A Notice to Proceed Via Written Appeal was sent to Arrow on September 8, 2024 (DED Exhibit 3).

5. An appeal letter dated October 6, 2024, was submitted for consideration in this written appeal. (DED Exhibit 5).
6. Additional supporting documents were subsequently submitted by applicant's counsel, Ms. Patricia Mancabelli, of Mancabelli Law PLLC, after a request by the Division. (APP Exhibit 1).
7. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated October 21, 2024, and a brief of Anequa O. Pond, counsel for the Division, dated October 24, 2023¹.

FINDINGS OF FACT

8. Arrow is engaged in the business of sheet metal fabrication, including metal siding and insulated metal panels, and sheet metal roofing installation. (DED Exhibit 1).
9. Ms. Schubring, the woman owner relied upon for certification, is the CEO and 51% owner of the applicant business. Mr. Paul Schubring is the President and 49% owner of Arrow. Mr. Schubring retired from the applicant business in January of 2023. (DED Exhibit 1).
10. The critical functions of Arrow are roof installation and metal fabrication. The North American Industry Classification System codes (NAICS) listed in the application are for roofing contracting, siding contracting, commercial and institutional building construction, and other miscellaneous fabricated metal product manufacturing. (DED Exhibits 1 and 2).
11. Ms. Schubring has a Bachelor of Science degree in business from Erie Community College. In addition, she has attended a NYS Bonding initiative and Model Contract Development program, is a notary public, and has participated in trainings by the Construction Exchange in sexual harassment, blueprint reading, and suicide prevention. Ms. Schubring has worked at

¹ Brief is dated October 24, 2023, however this is a Scribner's error, as the date should read October 24, 2024.

Arrow since July 1, 2010, as President, Director, and Chief Executive Officer. Prior to working at Arrow, she worked for 25 years at Casilio Companies, a construction management corporation, as Controller. Her experience at Casilio included bookkeeping and accounting, and office management, including accounts payable and receivable, payroll, general ledger, and sales tax. Ms. Schubring's responsibilities at Arrow include the review and execution of contracts, searching for new projects, reviewing project bids and assigning profit, managing irreconcilable job issues, attending pre-bid meetings, sales of inventory items to the public, accounting, audit, tax prep and financial statement reviews with accountant, insurance, bonding, and all HR responsibilities. Ms. Schubring is responsible for the upkeep of the website and manages the applicant business' banking relationships. (DED Exhibits 1, 6, and 9).

12. Mr. Paul Schubring, the owner not relied upon for certification, retired from the business in January of 2023². Mr. Schubring has a degree in mechanical design, continued his education in welding and sheet metal layout from 1975 to 1989, and has an OSHA 10-Hour certification. Mr. Schubring worked at the applicant business for more than 47 years, and the application lists him as the President of Arrow. During his tenure at the applicant business, he worked in the fabrication shop, forming gutters, downspouts, flashing, ventilators, and louvers, and managed the shop. He was the company safety officer, engaged in contract review, and worked in all aspects of estimating, including blueprint specifications, site visits, project submittals, and CAD drafting. (DED Exhibits 1 and 7).

13. Mr. Jeff Brzyski is the Vice President of Arrow and has worked for the business since June of 2000. He has an associate degree in civil engineering and is accredited by the Technology

² Mr. Schubring's resume lists his retirement date as December 31, 2022, while the application lists his retirement as January of 2023.

Accreditation Commission of the Accreditation Board for Engineering and Technology (TAC/ABET). Mr. Bryski also has experience in roofing, siding, and in assembly of abrasive tools. His responsibilities at Arrow include project management, estimating, sales, and purchasing. His work in project management includes overseeing and helping to prepare materials for architect approval, coordination of materials procurement and material deliveries, coordinating and scheduling subcontractor labor, developing shop drawings, overseeing preparation of bids, preparing and reviewing bids, and managing the fabrication shop. (DED Exhibits 1, 6, 7, 10, and 12).

14. Ms. Schubring holds weekly staff meetings to discuss new jobs, including details regarding material delivery, labor, and miscellaneous job issues. She meets with Mr. Brzyski to determine material needs for projects, and for certain projects to determine the necessary quantities of materials. Once information is gathered a formal quote is submitted to the general contractor, and Ms. Schubring will follow up on the bid after 30 days. Ms. Schubring's experience in bidding comes from her work at the applicant business, where she has reviewed "plans and specs, discuss[ed] product . . . [and] review[ed] subcontractor bids." In addition, when at Arrow's warehouse Ms. Schubring pulls stock for sales or inventory review but does not participate in the labor of bending or cutting the materials. (APP Exhibit 1).

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.

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 Arrow for recertification 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. Prior Certification

The Division acknowledges that Arrow was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by Applicant, Division staff correctly determined that applicant was not eligible for certification.

The Division is correct that it is not obligated to certify Arrow based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Arrow had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted its April 7, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. Industry-Specific Competence

The Division denied Arrow's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Schubring possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5

NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-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)).

The Applicant bears the burden of establishing that the woman-owner 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).

Among the factors considered by the regulation are:

- (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.

Ms. Schubring does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. Ms. Schubring's education and

professional background, prior to working at the applicant business, was in business and office management. Her resume lists no courses or training relating to the field of sheet metal fabrication or roofing. Her professional experience, while extensive, is all in general business management, including HR and accounting. (DED Exhibits 1, 6, and 9).

By contrast, Mr. Schubring, the President of the applicant business, has a degree in mechanical design, has completed courses in welding and sheet metal layout, and worked in the field of metal fabrication, for the applicant business, for almost 50 years. He worked in a fabrication shop forming gutters, downspouts, flashing, ventilators, and louvers for 15 years, and worked in estimating and sales, which included knowledge of blueprint specifications, bid documents, engaging in site visits, project submittals, and CAD drafting. Mr. Schubring was also the manager of the business' fabrication shop and the company's safety officer, has a 10-hour OSHA certification and engaged in continuous product trainings. (DED Exhibits 1 and 7).

Mr. Jeffrey Bryski, Jr., the Vice-President of Arrow has worked for the applicant business since June of 2000. He has an associate degree in civil engineering and is accredited by TAC/ABET. He has experience in the installation of roofing, siding, exterior trim, framing, drywall, interior trim and insulation for MMS since 2002. He works in project management and is responsible for overseeing and preparing materials for architects' approval, the procurement of materials, coordination of both inbound and outbound material deliveries, coordinating and scheduling of subcontractor labor, the development of shop drawings for installation, and manages the fabrication shop, which includes the coordination of scheduling of deliveries and of field labor. In addition, he also works in sales and estimating where he engages in the initial review of projects with management, oversees the preparation of bids, prepares bids, and reviews bids with management. (DED Exhibits 1, 6, 7, 10, and 12).

Ms. Schubring is involved in obtaining projects for Arrow by searching a website to find specific projects to bid on. In addition, she does meet with estimators and reviews and modifies bids when necessary, however, the information provided evidences that she works with others on bids. However, there is no evidence that Ms. Schubring, the woman owner relied upon for certification has sufficient trainings, certifications, academic credentials, or experience to make critical business decisions without relying upon these other persons. All the information provided with the application regarding Ms. Schubring concerns her work as the office and financial manager. (APP Exhibit 1; DED Exhibits 6 and 9).

On appeal, Ms. Schubring argues that the Division “made incorrect assumptions about what it means to have industry specific competence in the sheet metal industry. . .,” and alleges that she does possess that competence. Ms. Schubring acknowledges that estimating and fabrication are not listed on her resume but asserts now that she has knowledge of and is involved in those processes. She also admits that she does not manage projects and asserts that is because she already employs a “capable project manager.” In the appeal submission Ms. Schubring explains that she reviews drawings and specs and then meets with Mr. Brzyski to determine “what materials will/should be used for [the] project.” In addition, Applicant states that additional materials, to be submitted with the appeal, will demonstrate that Ms. Schubring possesses adequate industry specific competence, without having to rely on others. Those materials which include a letter from an architectural firm, a letter from a general contracting firm for which Arrow is a subcontractor, and a letter from the business applicant’s accounting firm. (See, *Scherzi Systems*, supra). While some of the information provided is clarifying, information regarding specific contracts and meetings is new information, which was not before the Division at the time of application and therefore is now inadmissible under *Scherzi*, supra. (APP Exhibit 1; DED Exhibits 6 and 9).

Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

III. Operation

The Division also denied Arrow's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Schubring 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). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders." 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division determined that the critical functions of Arrow, based on the application and what products and services the applicant business provides to clients, is sheet metal fabrication and roofing installation. (DED Exhibits 1 and 2). Ms. Schubring's experience is in accounting and office management, and her role at Arrow is financial and administrative in nature, as evidenced by her resume and the description of her day-to-day duties in the narratives provided with the application. (DED Exhibits 6 and 9). Ms. Schubring has no licenses or certifications related to the business, and by her own admission does no field or shop work. (APP Exhibit 1).

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). In the instant case, in relation to daily duties, Mr. Brzyski “oversee[s] and helps prepare submission of materials to architects for approval,” procures materials and verifies compliance of those materials with specifications, coordinates and schedules subcontractor labor, develops “shop drawings for installation of material,” prepares bids and oversees estimator’s preparation of bids, and manages the shop. (DED Exhibit 10).

By contrast, Ms. Schubring’s responsibilities, as described in a narrative included in the application and her resume submitted with the application, all specify her financial and office management responsibilities, and support the fact that she relies on others to perform the critical functions of the business. (DED Exhibits 6 and 9). In addition, in the appeal submission Ms. Schubring’s explanation regarding the removal of subcontractors, while new information and therefore not admissible, even if considered provides that she communicated with the project manager and estimator prior to any decision to remove the subcontractor, which further evidences her reliance on others, in the field, to make business decisions. (APP Exhibit 1).

Here, the evidence presented establishes that Ms. Schubring’s role, while important to Arrow, is administrative and financial while another, namely Mr. Bryski, is responsible for the day-to-day operations of the business enterprise. Based on the foregoing, I find that the Division’s determination that Arrow has not demonstrated that the woman owner relied upon for certification 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)(2) is supported by substantial evidence.

CONCLUSION

Arrow did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-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.

RECOMMENDATION

The Division's determination to deny Arrow Sheet Metal Works, Inc.'s application for recertification as a woman-owned business enterprise should be affirmed.

In the Matter of Arrow Sheet Metal Works, Inc.
 DED File ID No. 6270480
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Appellant's Appeal Form	Y	Y
DED 5	Appellant's Appeal Statement	Y	Y
DED 6	Joan Schubring Resume	Y	Y
DED 7	Paul Schubring Resume	Y	Y
DED 8	Jeff Brzyski Resume	Y	Y
DED 9	Narrative of day-to-day for Ms. Schubring	Y	Y
DED 10	Narrative of day-to-day for Jeff Brzyski	Y	Y
DED 11	D'Agostino General Contractors, Inc. Contract	Y	Y
DED 12	Crane Hogan Contract	Y	Y
DED 13	Scrufani Construction Co., Inc. Invoice	Y	Y
DED 14	Scrufani Construction Co., Inc. Purchase Order	Y	Y