

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

In the Matter

- of -

the Application of Axios Development Corp.
for Certification as a Minority Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70417

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
April 3, 2024

This matter considers the written appeal by Axios Development Corp. (“Axios” 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 October 28, 2022, Axios applied for certification as a minority and women-owned business enterprise (“MWBE”). Axios based its application on Ms. Jacqueline Panagiotopoulos. (DED Exhibit 1).
2. On August 14, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The 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 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. Axios submitted a request to appeal the denial determination, dated September 7, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to Axios on October 6, 2023 (DED Exhibit 4).

5. A written appeal letter with submissions was submitted on October 6, 2023 by Applicant.
6. The Division filed an Affidavit of Karim Abdul Bah, Associate Director, dated January 17, 2024, and a brief of Karen L. Bernstein, counsel for the Division, dated January 17, 2024.

FINDINGS OF FACT

7. Axios is engaged in the business of full-service general contracting. (DED Exhibit 1).
8. Jacqueline Panagiotopoulos is the minority and woman owner relied upon for certification and is the President and 100% owner of Axios. (DED Exhibit 1).
9. The critical functions of applicant business are general contracting. The application lists their commodities and services as including general contracting, plumbing, and carpentry, and a narrative submitted with the application states that the business' "work includes but is not limited to: renovations and restorations of Commercial and Residential spaces. (DED Exhibits 1 and 5).
10. Ms. Panagiotopoulos began the applicant business in February of 2020. She attended Kingsborough Community College, and her. Work experience includes five years as an executive medical receptionist, four years as a manager of a bakery, and two years as a legal assistant. (DED Exhibits 1, 8, and 9).
11. Axios and Ms. Panagiotopoulos have a Home Improvement License from the Suffolk County Department of Labor, Licensing & Consumer Affairs, a NYC Department of Consumer and Worker Protection "Home Improvement Contractor License," a "Home Improvement License" from Westchester County Department of Consumer Protection, and a NYC Dept. of Buildings General Contractor License. (DED Exhibits 9, 10 and 11; APP Exhibit A)
12. Ms. Panagiotopoulos' role at the applicant business includes engaging in general contracting projects, handling all contracts and quotes, hiring reliable sub-contractors, writing and

depositing checks, using QuickBooks for expense bills for clients and vendors, maintaining all safety and sanitation inspections to meet all standards of the company and of the Department of Buildings, and office administration. (DED Exhibit 8; APP Exhibit A).

13. Ms. Panagiotopoulos consults “with sub-contractors specialized in various projects as well as employees with specific industry experience on an as needed basis.” (APP Exhibit A).

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 Axios 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

The Division denied Axios' application for certification as an MWBE on the basis that the applicant failed to demonstrate that Ms. Panagiotopoulos 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)). A denial is supported where the owner relied upon for certification has no training or experience and operations staff have more substantive and more significant experience. (*Upstate Electrical*, supra.)

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).

Nowhere in the materials before the Division is there any evidence that Ms. Panagiotopoulos has adequate, industry-specific competence or training in general contracting, demolition, plumbing, carpentry, or concrete work, the core revenue functions of the business. (DED Exhibits 1 and 5). In response to a request by the Division for information concerning the applicant's industry competence, the applicant submitted copies of a general contractor license issued by the New York City Dept. of Buildings, and home improvement licenses issued by Suffolk County, Westchester County, and the New York City Dept. of Consumer Affairs, however those licenses have no bearing on the Division's program requirements. (DED Exhibits 9, 10,

11 and 12; APP Exhibit A) In addition, the Division determined that a general contractor license does not demonstrate competence in the construction industry. (DED Exhibit 2).

Ms. Panagiotopoulos' background and experience does not include any work or trainings in the field of general contracting, plumbing, carpentry, or renovations and restoration, all core revenue generating functions of the applicant business. (DED Exhibits 1, 8, and 12; APP Exhibit A). Her work experience prior to beginning the instant business in 2020, includes five years as an executive medical receptionist, four years as a manager of a bakery, and two years as a legal assistant. (DED Exhibit 8). While her resume states that her role in the business includes general contracting projects, handling all contracts and quotes, hiring reliable sub-contractors, writing and depositing checks, using QuickBooks for expense bills for clients and vendors, maintaining all safety and sanitation inspections to meet all standards of the company and of the Department of Buildings, and office administration, the record is devoid of any other information regarding her specific duties relating to her general contracting, plumbing, contracting, renovations, or restoration and the application and supporting materials contain no information regarding any industry specific training or education by Ms. Panagiotopoulos. (DED Exhibit 8; APP Exhibit A).

In the written appeal submission, the applicant stresses Ms. Panagiotopoulos' management experience gained in her role as a bakery manager, however, while that experience relates to general business administration is not specific to the industry-specific competence required here. (APP Exhibit A). In addition, Applicant admits that Ms. Panagiotopoulos relies on the expertise of sub-contractors with specialized skills and "employees with specific industry experience" as needed. (APP Exhibit A). The only additional information supplied by the applicant is a letter of support from a client which speaks to Ms. Panagiotopoulos' work for them in relation to "negotiation of proposals for portions of work, payment requisitions, permitting and sign offs."

(APP Exhibit A). That information is inadmissible here, as it is new information which was not before the Division at the time of denial, and even if it were admissible, it speaks to general skills, and does not reference any industry specific competencies. (See *Scherzi Systems, supra*; see also, *Lida Strategic Solutions, Inc.*, Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019 [Administrative Law Judge declined to consider documents offered by the appellant on appeal that were not part of the application and thus, not before the Division at the time of denial determination]).

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.

II. Operation

The Division also denied Axios' application for certification as an MWBE on the basis that the applicant failed to demonstrate that Ms. Panagiotopoulos 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*).

Axios' business is general contracting, and, according to the application, their commodities and services also include plumbing, carpentry, and renovations and restorations of Commercial and Residential spaces. (DED Exhibits 1 and 5). Ms. Panagiotopoulos' prior experience is devoid of any experience in general contracting. (DED Exhibit 8; APP Exhibit A). Her role at Axios is purely financial and administrative in nature, as evidenced by the information provided on her resume. (DED Exhibit 8; APP Exhibit A). No information is provided in the application regarding her role in site supervision, estimating, bidding, or any other of the core revenue generating functions of the business. In addition, the appeal submission, echoes that her role is administrative and financial, and states that that part of her "control over daily business operations and decision making" involves consultation with specialized sub-contractors and "employees with specific industry experience." (APP Exhibit A).

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*). Here, the evidence presented establishes that Ms. Panagiotopoulos' role at Axios is administrative, and no information is in the record which establishes that she has any experience or training in the core revenue generating functions of the business.

Based on the foregoing, I find that the Division's determination that Axios 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

Axios 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(c)(1), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Axios Development Corp.'s application for certification as a minority and woman-owned business enterprise should be affirmed.

In the Matter of Axios Development Corp.
DED File ID No. 70417
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 Determination	Y	Y
DED 3	Appellant's Appeal Request Form	Y	Y
DED 4	Notice to Proceed by Written Appeal	Y	Y
DED 5	Narrative Response #1 – Business Description	Y	Y
DED 6	Narrative Response #7 – Business Activity in NY	Y	Y
DED 7	Narrative Response #2 – Business Tax Returns	Y	Y
DED 8	Resume of Jacqueline Panagiotopoulos	Y	Y
DED 9	Suffolk County & NYC DOB Licenses/Reg.	Y	Y
DED 10	NYC DCWP License/Registration	Y	Y
DED 11	Westchester County License/Registration	Y	Y
DED 12	Narrative Response #8 – Industry-Specific Comp.	Y	Y
DED 13	Axios 2021 Business Tax Returns	Y	Y
DED 14	Narrative Response #10 – Subcontractors	Y	Y
DED 15	2021 Personal Tax Returns	Y	Y