

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12245

In the Matter

- of -

the Application of Contracting & Estimating, LLC
for Certification as a Minority Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70142

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
April 10, 2024

This matter considers the written appeal by Contracting & Estimating, LLC, (“C&E” 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 woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On December 3, 2022, Sumaiya Imam, as President, applied on behalf of C&E for certification as a minority woman-owned business enterprise (“MWBE”). (DED Exhibit 1).
2. On August 21, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
 - (a) Minority group or women relied upon for certification do 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) Minority group members or women relied upon for certification do 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(c)(2).
3. C&E submitted its request for written appeal by letter dated September 19, 2023. (DED Exhibit 3; APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent to C&E on September 20, 2023. (DED Exhibit 4).

5. C&E submitted its written appeal by letter dated October 20, 2023. (APP Exhibit B).
6. The Division filed an Affidavit of Eugenio Alcantara, Director of Certification, dated January 23, 2024, and a brief of Karen Bernstein, Esq., counsel for the Division, dated January 26, 2024.

FINDINGS OF FACT

7. C&E is engaged in the business of construction-related contracting and estimating, providing cost estimating and sub-contractor management services in the New York City and Long Island areas. Sumaiya Imam is the President of C&E and has a 100% ownership interest. (DED Exhibit 1).
8. The critical functions of C&E are construction management, cost estimating, electrical engineering, and general contracting relating to the supply of steel rebar, carpentry and painting. The Applicant provides clients with a hands-on subject matter expert as a project manager, assistant project manager, office engineer and construction supervisor. (DED Exhibits 1, 5 and 6).
9. Sumaiya Imam's responsibilities include sales and marketing, connecting with prospective clients, designing a website, creating a social media presence, and responding to emails. Ms. Imam is C&E's only managerial employee and the only member of C&E's Board of Directors. (DED Exhibits 1, 9 and 14).
10. Ms. Imam has a Bachelor of Science degree (course of study unknown) and has a certificate in landscape design. Her prior work experience includes working as a Case Investigator, which included communicating with patients and data collection and entry, related to COVID-19. Ms. Imam has additional work experience as a construction consultant, where

she performed quantity take-offs and cost estimating. The extent of her experience as a construction consultant is not detailed in the application. (DED Exhibits 9 and 10).

11. Ms. Iman's computer skills include working with Microsoft Teams, Word, Excel, and PowerPoint, along with internet and email and Allscripts software. (DED Exhibits 9).

12. Ms. Iman's husband, Mohammad Asim Jaffery, provides services as needed and has over 20 years of experience in project management and estimating. His duties include completing project estimates, responding to requests for proposals and soliciting potential clients. He has two Associate of Applied Science Degrees, one in Environmental Control Technology and another in Construction Engineering Technology, and a Bachelor of Science Degree in Construction Management Engineering Technology. His prior work experience includes being a Project Engineer, Estimator, Project Manager, Senior Estimator and an independent consultant performing project management and estimating. His computer skills include experience working with specific software programs relating to construction, project management and estimating. Mr. Jaffery works on commission for C&E. He has a Construction Superintendent License with NYC Dept. of Buildings. (DED Exhibits 6, 11 and 15).

13. Both Ms. Imam and Mr. Jaffery are signatories for C&E's bank accounts. (DED Exhibit 13).

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 C&E for certification as a 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 C&E's application for certification as a MWBE on the basis that C&E failed to demonstrate that Sumaiya Imam, the minority woman-owner relied upon for certification, 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 consistently requires that the minority women owners be able to perform the core revenue generating functions of the business enterprise to determine eligibility. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021, Final Order 21-05, dated December 22, 2021). The Division interprets this regulation to require an applicant to demonstrate that the minority woman-owner, relied on for certification, has the working knowledge necessary to review estimates 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 A.D. 3d 1343 (3d Dept. 2020), citing to *C.W. Brown, Inc. v. Canton*, 216 AD 841, 842 (1995)). The Division denies certification where the woman relied upon for certification "manages accounting and financial functions, payroll, and certain contracting functions" but the non-qualifying owner "manages projects, estimating, and material

procurement.” (See *JVR Electric, Inc. v. NYS Department of Economic Development*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016).

C&E’s critical revenue generating functions, are construction management, cost estimating, electrical engineering, and general contracting related to the supply of steel rebar, carpentry, and painting. In the application, C&E is described as a business enterprise that provides design consulting and cost estimating for projects in commercial, private, public and residential construction, on a fee basis for clients. Their clients include general contractors, architects, government agencies, engineering firms, building/land developers and subcontractors. (DED Exhibits 1, 5 and 6).

Ms. Imam is responsible for C&E’s office management or general business administration. In a narrative included with the application, Ms. Imam stated that her day-to-day activities include sales and marketing, connecting with prospective clients, designing a website, creating a social media presence and responding to e-mail. Ms. Imam’s resume does not detail the extent of her experience in the construction industry. In response to the Division’s request for copies of all licenses, permits, certifications and/or accreditations, the applicant provided a certificate in Landscape Design. Accordingly, the record does not establish that Ms. Imam has the education, experience, or certifications related to the core, or critical, functions of C&E. (DED Exhibits 6, 9, 10 and 14).

Ms. Imam’s husband, Mr. Jaffery, has the academic training, experience and expertise to perform the core revenue generating functions of construction management and cost estimating. Mr. Jaffery has two Associate of Applied Science Degrees, one in Construction Engineering Technology, and another in Environmental Control Technology, and has a Bachelor of Science Degree in Construction Management Engineering Technology. He has over 20 years of experience

in the field, including experience as a senior estimator, a project engineer and as an independent consultant for estimating/project management. He has been an estimator for multi-million-dollar projects. Construction management is Mr. Jaffery's expertise. His responsibilities at C& E include assembling a complete project estimate as per the client's requirements, and the industry standard, along with responding to requests for proposal from clients, and soliciting firms and agencies for future work. Mr. Jaffery has a construction superintendent license from the New York City Dept. of Buildings. (DED Exhibits 1, 5, 6, 9, 11 and 15).

In circumstances where the non-eligible spouse has the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects, the business is considered a family-owned business and does not meet the criteria for certification. (See *Matter of Occupational Safety & Environmental Association Inc. v. New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)). Ms. Imam relies upon her husband, Mr. Jaffery, for his industry specific competence, which was gained by his, education, training and experience and expertise in his respective fields. (DED Exhibits 1, 6, 11 and 15). The record does not support that Ms. Imam possesses adequate, industry-specific competence in construction management and cost-estimating to make critical business decisions without relying upon other persons.

In the appeal, Applicant provides new information for consideration. Applicant states Ms. Imam has received a certificate in Foundations of Project Management from Google, through Coursera, dated September 29, 2023, which is a 24-hour course. It is unknown whether the course is related to the construction or cost estimate industries. Applicant also states Ms. Imam received a certificate in Construction Project Management from Columbia University through Coursera dated September 21, 2023. This is also a 24-hour course. (APP Exhibit B). These certifications

were received after the Applicant's submission of the application on December 3, 2022, and after the Division's Notice of Denial Determination dated August 21, 2023. (DED Exhibits 1 and 2).

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)). Under *Scherzi, LLC v. White, supra*, the certifications are not seeking to clarify but rather seeking to add new information. While in *Scherzi*, the Court found there are instances whereby new information shall be considered, *Scherzi* is clear those circumstances are limited to matters that seek to clarify documents and information that were submitted with the certification application. These certifications are first offered on appeal and will not be considered.

On appeal, Applicant states that Ms. Imam is an experienced Manager/Estimator with a decade of involvement in the general construction industry. Applicant states Ms. Imam's expertise encompasses estimating for infrastructure projects, public buildings, and commercial construction, collaborating with both construction management firms and contractors. As a Manager/Estimator, Applicant states that Ms. Imam is responsible for project-wide cost control, estimation, and time-cost projections for completion. Applicant states Ms. Imam oversees work activities, conducts material quantity assessments, and monitors and track estimates progress for project deliverables for C&E. Applicant also included a bid submission from C&E to the Central Ohio Transit Authority for the purchase of 250 blank signs which was completed by Ms. Imam. (APP Exhibit B).

The arguments are first offered on appeal and will not be considered. In the present case, these arguments are not seeking to clarify but rather seeking to add new information. (See *Scherzi, LLC v. White, supra*). The analysis does not change with this new information. The record did not

establish that Ms. Imam's has the education, experience, or certifications related to the core, or critical, functions of C&E. (DED Exhibit 1, 9, and 14).

The Division's denial of C&E's application for certification as a MWBE on the basis that C&E failed to demonstrate that the minority woman owned business relied upon for certification possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

II. Operational Decisions

The Division also denied C&E's application for certification as a MWBE on the basis that C&E failed to demonstrate that Sumaiya Imam, the minority 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 by 5 NYCRR §144.2(c)(2). (DED Exhibit 2). The regulation states that the critical functions of a 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 has consistently held that the woman or minority group member 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. N.Y.S. Department of Economic Development*, 163 A.D.3d 1517, 1519 (4th Dept. 2018)). The Division 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)).

The record establishes that Mr. Jaffery provides the essential services for C&E's customers. He makes the day-to-day decisions with respect to C&E's core functions of construction management consulting and cost estimating. He assembles a complete project estimate according to the client's specifications and industry standards. He responds to the requests for proposals from clients, firms and agencies. Mr. Jaffery makes the operational day-to-day decisions for the business enterprise. (DED Exhibits 6 and 15).

While Ms. Imam makes decisions regarding sales and marketing, website design, social media and emails for C&E, these are administrative functions. The record does not establish that Ms. Imam has the education, experience, or certifications related to the core, or critical, functions of C&E to make the necessary day-to-day operational decisions. (DED Exhibits 1, 9, 10 and 14; APP Exhibit B).

This 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). On appeal, Applicant states Ms. Imam received certifications in Foundations of Project Management, dated September 29, 2023, and in Construction Project Management dated September 21, 2023. These certifications were received after submission of the application and will not now be considered. (APP Exhibit B).

Additionally, on appeal, Applicant states that Ms. Imam is an experienced Manager/Estimator, responsible for project-wide cost control, estimation, and time-cost

projections for completion. Applicant states Ms. Imam oversees work activities, conducts material quantity assessments, and monitors and track estimates progress for project deliverables for C&E. (APP Exhibit B).

This is new information that was not before the division at the time of the denial determination and will not now be considered. (See *Scherzi Systems, LLC, supra*)

The Division's denial of C&E's application for certification as a MWBE on the basis that C&E failed to demonstrate that the minority 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 by 5 NYCRR § 144.2(c)(2) is supported by substantial evidence.

CONCLUSION

C&E did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1) and (2) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny C&E's application for certification as a minority woman-owned business enterprise should be affirmed.

In the Matter of Contracting & Estimating, LLC
 DED File ID No. 70142
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Appeal Submission	Y	Y
DED 1	Application for Certification	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	Narrative re: description of products and services	Y	Y
DED 6	First Narrative re: duties and responsibilities of Mr. Jaffery and Mr. Hussain	Y	Y
DED 7	Narrative re: W-2's and W-3's	Y	Y
DED 8	2021 Tax Return of Ms. Imam and Mr. Jaffery	Y	Y
DED 9	Resume of Ms. Imam	Y	Y
DED 10	Certificate of Landscape Design – Ms. Imam	Y	Y
DED 11	Resume of Mr. Jaffery	Y	Y
DED 12	2021 W-2's for Ms. Imam and Mr. Jaffery	Y	Y
DED 13	Bank Signature Card	Y	Y
DED 14	Narrative re: duties and responsibilities of employees of Ms. Imam	Y	Y
DED 15	Additional Narrative re: duties and responsibilities of employees Mr. Jaffery and Mr. Hussain	Y	Y

DED 16	Contracts and Proof of Payment: Invoices, 2021 1099 issued by MDS Construction Management LLC, and ADP Earnings Statement issued by MDS Construction Management LLC	Y	Y
DED 17	Emails re: Bidding	Y	Y