

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

In the Matter

- of -

the Application of Cyrco Construction Corp.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69747

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 2, 2024

This matter considers the written appeal by Cyrco Construction Corp. (“Cyrco” 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 31, 2022, Ms. Angela Dunbar-Cyr, as President, applied on behalf of Cyrco for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 3, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not 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);
 - (b) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5).
 - (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 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. Cyrco timely filed a Request to Appeal on May 10, 2023 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to Cyrco on May 23, 2023 (DED Exhibit 3).
5. Cyrco filed its written appeal by letter dated July 14, 2023, with attachments, from its attorney, Nora Carnes, Esq. of Pekarek Law Group, P.C. (APP Exhibit B, DED Exhibit 4).
6. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director, dated November 9, 2023, and a brief of Lisa Berk Esq., counsel for the Division, dated November 13, 2023.

FINDINGS OF FACT

7. Cyrco is engaged in the business of general construction contracting work including roof repair, and demolition and construction of residential and commercial property (DED Exhibit 1).
8. Ms. Angela Dunbar-Cyr is President and has a 100% ownership interest. (DED Exhibit 1).
9. Cyrco was initially formed in 1999 by Ms. Dunbar-Cyr's husband, Adam Cyr. Prior to September 2020, Ms. Dunbar-Cyr and Adam Cyr each had a 50% ownership interest in the business (DED Exhibit 1).
10. Section 2E of the application states that on October 23, 2020, Ms. Dunbar-Cyr contributed \$12,750 as a "daily" contribution and \$150,000 as "surplus" contribution. Applicant submitted two bank statements for the Cyrco business accounts which showed deposits on October 23, 2020, in the amount of \$12,750 and \$150,000 into the accounts (DED Exhibit

- 5). Ms. Dunbar-Cyr stated that a \$20,000 withdrawal from her personal checking account on March 3, 2021, is the source of the \$12,750 contribution, and is part of the \$23,000 deposited into the business checking account on April 6, 2021 (DED Exhibits 9 and 10).
11. Section 2F of the application states that Ms. Dunbar-Cyr paid \$0.00 for her 100% ownership interest (DED Exhibit 1). The Certificate of Directors' Action dated July 21, 2021, states that "the Corporation shall issue 100 shares in the form of common shares without par value to Angela Dunbar Cyr... that the consideration for the 100 shares of the Corporation issued to Angela Dunbar Cyr shall be her obligation to perform services as the President and Chief Executive Officer." (DED Exhibit 6).
12. Applicant stated that Ms. Dunbar-Cyr also contributed her expertise that "... although intangible and not calculated as a monetary capital contribution, is highly valuable and certainly proportionate to her equity interest." (DED Exhibits 7 and 8).
13. Ms. Dunbar-Cyr participated in programs related to business administration and management at Jamestown Community College and programs in accounting and business at Olean Business Institute. She previously worked as an office assistant for Olean Grocery Cooperative and owned and operated her own dog grooming business. Before she became President at Cyrco, her duties included "day to day office management including coordinating subcontractors, processing invoices, maintaining databases, and collecting expense data." In her role as President, she continues those duties in addition to preparing estimates, bids, invoices, change orders and contracts, obtaining all necessary permits and licenses, administer day to day operations, including accounting and budget management, business development, performance metrics and customer service, schedule contractor and material deliveries, among other listed duties (DED Exhibit 13).

14. Mr. Cyr previously worked in the construction and excavation industry. He founded Cyrco as a sole proprietorship in 1999. He worked as an OTR driver or tractor trailers for two different companies. At Cyrco, he is responsible for the development of the strategic business plan and guides employees by providing leadership with his construction background knowledge. He is skilled in carpentry, heavy equipment operation, masonry/excavating, roofing and framing, and blueprint reading. He is licensed as an asbestos contractor. (DED Exhibit 14).

15. Ms. Dunbar-Cyr and Mr. Cyr are the Directors of Cyrco (DED Exhibit 1). Section 2.2 of the bylaws state that "...the Board of Directors shall have management and control of the affairs and business of the Corporation." Section 2.7 states "a majority of the Board of Directors in office shall constitute a quorum for the transaction of business... all matters coming before any meeting of the Board shall be decided by majority vote of the Directors present at the meeting, as long as a quorum is present." (DED Exhibit 15).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part 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 of 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(b)(5) states as follows:

Pro forma Ownership. Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.

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...

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 Cyrco 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 minority/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 application states that on October 23, 2020, Ms. Dunbar-Cyr contributed \$12,750 as a “daily” contribution and \$150,000 as “surplus” contribution. Applicant submitted two bank statements for the Cyrco business accounts which showed deposits on October 23, 2020, in the amount of \$12,750 and \$150,000 into the accounts (DED Exhibit 5). Ms. Dunbar-Cyr stated that a \$20,000 withdrawal from her personal checking account on March 3, 2021, over five months after the contribution, is the source of the \$12,750 contribution, and is part of the \$23,000 deposited into the business checking account on April 6, 2021, over a month after the withdrawal. (DED Exhibits 9 and 10). Applicant also claimed that Ms. Dunbar-Cyr made a capital contribution of \$35,500 on April 6, 2021. However, the April 2021 Cyrco bank statement does not reflect a deposit of this amount (DED Exhibit 10).

Section 2F of the application states that Ms. Dunbar-Cyr paid \$0.00 for her 100% ownership interest (DED Exhibit 1). The Certificate of Directors’ Action dated July 21, 2021, states that “the Corporation shall issue 100 shares in the form of common shares without par value to Angela Dunbar Cyr... that the consideration for the 100 shares of the Corporation issued to Angela Dunbar Cyr shall be her obligation to perform services as the President and Chief Executive Officer.” (DED Exhibit 6).

Applicant stated that Ms. Dunbar-Cyr also contributed her expertise that “... although intangible and not calculated as a monetary capital contribution, is highly valuable and certainly proportionate to her equity interest.” (DED Exhibits 7 and 8). 5 NYCRR §144.2(b)(2)(i)(4)

provides that “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.” Here, applicant provided no documentation showing how she qualified the value of her expertise.

On appeal, applicant stated “While Ms. Dunbar-Cyr did not make an initial monetary contribution to the Corporation at the time she acquired ownership, a monetary contribution is not required to establish her proportionate interest in the business... due to the initial primary capital contributions of Mr. Cyr, that had occurred prior to Applicant taking ownership of the enterprise.” (APP Exhibit B, DED Exhibit 4).

A denial by the Division based on the failure of an applicant to provide documentation to substantiate a capital contribution with respect to every instance they acquired shares in the company is supported by substantial evidence. See *C & B Plumbing and Heating, Inc.*, Recommended Order dated October 15, 2019; and *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016 (woman owner provided no evidence of capital contribution for original issuance of stock or any subsequent transfer of stock).

The Division’s determination to deny the application on the basis that Cyrco failed to demonstrate that Ms. Dunbar-Cyr made capital contributions to Cyrco in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

The Division also denied certification on the ground that the woman owner relied upon for certification was only allocated majority ownership solely for the purpose of securing WBE certification, contrary to 5 NYCRR §144.2(b)(5), which states “Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of

such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.”

Applicant provided no evidence that Ms. Dunbar-Cyr made a capital contribution in exchange for her initial 50% interest in the company or when she became the 100 % owner and thus the transfer of her shares is not supported by reasonable consideration (DED Exhibit 1).

The Division’s determination to deny the application on the basis that Ms. Dunbar-Cyr did not demonstrate that she was allocated majority ownership other than solely for the purpose of securing WBE certification, as required under 5 NYCRR §144.2(b)(5) 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, 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.

Ms. Dunbar-Cyr does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business’ critical functions of roof repair, demolition and construction of residential

and commercial property. Her responsibilities include preparing estimates, bids, invoices, change orders and contracts, obtaining all necessary permits and licenses, administering day to day operations, including accounting and budget management, business development, performance metrics and customer service, scheduling contractor and material deliveries, among other listed duties. Her resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 13).

Mr. Cyr previously worked in the construction and excavation industry. He founded Cyrco as a sole proprietorship in 1999. He worked as an OTR driver or tractor trailers for two different companies. At Cyrco, he is responsible for the development of the strategic business plan, guides employees by providing leadership with his construction background knowledge. He is skilled in carpentry, heavy equipment operation, masonry/excavating, roofing and framing, and blueprint reading. He is licensed as an asbestos contractor. (DED Exhibit 14).

Applicant admits on appeal that Mr. Cyr “functions as the job site manager, overseeing the daily physical hands-on work, while also participating as a general laborer... sources out new customers and jobs, participates in the job bidding process under her supervision, selects the appropriate construction methods for the job, provides the bill of materials for the specific job and ensures work site safety compliance.” (APP Exhibit B, DED Exhibit 4). Applicant also confirms that asbestos removal now makes up a significant portion of the company’s revenue base. Mr. Cyr possesses the asbestos license, not Ms. Dunbar-Cyr (DED Exhibit 1).

The Division’s determination to deny the application on the basis that Cyrco failed to demonstrate that Ms. Dunbar-Cyr possesses adequate, industry-specific competence to make

critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

III. Control

The Division also denied certification on the ground that Ms. Dunbar-Cyr is not the highest-ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Ms. Dunbar-Cyr and Mr. Cyr are the Directors of Cyrco (DED Exhibit 1). Section 2.2 of the bylaws state that "...the Board of Directors shall have management and control of the affairs and business of the Corporation." Section 2.7 states "a majority of the Board of Directors in office shall constitute a quorum for the transaction of business... all matters coming before any meeting of the Board shall be decided by majority vote of the Directors present at the meeting, as long as a quorum is present." (DED Exhibit 15).

On appeal, Ms. Dunbar-Cyr alleges that as the sole shareholder of the stock, she is in control of the company (APP Exhibit B, DED Exhibit 4). However, the bylaws state that the Board of Directors shall have the management and control of the affairs of the business, not the shareholders. A majority of the Board of Directors is needed to constitute a quorum for the transaction of business (DED Exhibit 15). Therefore, both directors are needed to constitute a quorum and transact business on behalf of the company, and Ms. Dunbar-Cyr does not have independent control of the Board.

The Division's determination to deny the application on the basis that Cyrco failed to demonstrate that Ms. Dunbar-Cyr is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

CONCLUSION

Cyrco 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(b)(5), 144.2(c)(1) and 144.2(d)(1) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Cyrco Construction Corp.
DED File No. 69747
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	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	Appeal Submission	Y	Y
DED 5	Cyrco Bank Statements dated 10/23/20 and cancelled checks	Y	Y
DED 6	Certificate of Incorporation and Director's Action dated July 21, 2021	Y	Y
DED 7	Cyrco Narrative dated September 8, 2022	Y	Y
DED 8	Cyrco Narrative submitted February 16, 2023	Y	Y
DED 9	Community Bank Statement March 2021	Y	Y
DED 10	Cyrco Bank Statement April 2021	Y	Y
DED 11	2020 and 2021 Tax Returns	Y	Y
DED 12	Cyrco Stock Ledger	Y	Y
DED 13	Angela Dunbar-Cyr Resume	Y	Y
DED 14	Adam Cyr Resume	Y	Y
DED 15	Cyrco By-Laws	Y	Y