

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

In the Matter

- of -

the Application of D.M.I. Industries, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 71187

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 30, 2024

This matter considers the written appeal by D.M.I. Industries, Inc. (“DMI” 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 July 28, 2023, Ms. Destinee Iannotta, as President, applied on behalf of DMI for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On December 4, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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);
 - (b) 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); and
 - (c) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. DMI filed a Request to Appeal on December 21, 2023 (DED Exhibit 3).

4. A notice to proceed via written appeal was sent to DMI on December 28, 2023 (DED Exhibit 4).
5. DMI submitted its written appeal by undated letter with attachments. (APP Exhibit A).
6. The Division filed an Affidavit of Abdul Bah, Associate Certification Director, dated August 29, 2024, and a brief of Kyle Satchell Esq., counsel for the Division, dated August 30, 2024.

FINDINGS OF FACT

7. DMI is engaged in the business of excavation services as well as hauling of construction materials and debris (DED Exhibit 1).
8. Ms. Destinee Iannotta is the President and has a 100% ownership interest. (DED Exhibit 1).
9. Ms. Iannotta's resume provides that her educational background is in dental hygiene, dental auxiliary training, and pediatric first aid. In 2020, she worked as an Office Manager at Boulder Creek Landscape and a Heavy Equipment Operator at Block by Block Builder. Her previous employment included housekeeping, school counselor, childcare provider, and dental/Ortho assistant. Her duties and responsibilities at DMI include "Managing company, Filing paperwork, Invoices, Day to day operations, Dispatch drivers, Handle fleet servicing with mechanics." (DED Exhibit 7).
10. Section 4A of the application provides that Ms. Iannotta's responsibilities include financial decisions, estimating, bidding, negotiating bonds, marketing, sales, hiring, firing, supervising the field operations, purchasing equipment, managing and signing payroll, and negotiating contracts (DED Exhibit 1).

11. The application provides that the firm's largest contracts for work performed in the last three years were all done with Dumpin Loadz, Inc. ("Dumpin Loadz:), which is owned by Ms. Iannotta's uncle, Vinny Luisi. Mr. Luisi is also a consultant for DMI. (DED Exhibit 1).
12. DMI and Dumpin Loadz share storage and yard space and operate from the same lot. Dumpin Loadz makes up about 70% of DMI's business (DED Exhibits 1, 9 and 10).
13. Ms. Iannotta does not have a CDL license. She stated "I am currently waiting for my hauling license application to be processed and approved." She also stated that "As my business is still so new I do not have consistent employees yet. All drivers are subcontractors whom I hire to operate my trucks when they are rented out for hauling of materials." (DED Exhibit 10).
14. The Subcontractor Work tickets provided by DMI show all the jobs performed by DMI came from working tickets with Dumpin Loadz (DED Exhibit 8).

APPLICABLE LAW

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.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 DMI 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. 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”.

Ms. Iannotta does not have any industry specific expertise; her skills are related to general business or office management (DED Exhibits 1 and 7). Ms. Iannotta’s resume provides that her educational background is in dental hygiene, dental auxiliary training, and pediatric first aid. In 2020, she worked as an Office Manager at Boulder Creek Landscape and a Heavy Equipment Operator at Block by Block Builder. Her previous employment included housekeeping, school counselor, childcare provider, and dental/Ortho assistant. Her duties and responsibilities at DMI include “Managing company, Filing paperwork, Invoices, Day to day operations, Dispatch drivers, Handle fleet servicing with mechanics.” (DED Exhibit 7).

The critical functions of the business are excavation services and hauling of construction materials and debris. (DED Exhibit 1). Ms. Iannotta does not have a CDL license. She stated “I am currently waiting for my hauling license application to be processed and approved.” (DED

Exhibit 10). Her resume does not reflect that she ever performed any of the trucking, hauling or excavation work that are the core revenue generating functions of DMI (DED Exhibit 7).

On appeal, applicant attached a revised resume for Ms. LaCatena that contains new information that was not previously provided as part of the certification application (APP Exhibit A). This is new information that does not clarify or explain previously materials and will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

On appeal, applicant states that she is the President of the company, in charge of operating the company, managing day-to-day tasks, conducting meetings to improve and grow on a daily basis, office management, handling phone calls, job proposals organization, time management, critical decision making, problem solving, and any and all administrative tasks (APP Exhibit A). These responsibilities are administrative in nature, and do not pertain to the core revenue generating functions of the business.

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).

Here, the products and services provided by applicant include trucking and hauling work (DED Exhibit 1). Ms. Iannotta’s resume does not show any previous experience performing

trucking and hauling work, and she failed to provide that she has any academic credentials, licenses or certifications that would enable her to make operational decisions on a day-to-day basis with respect to the critical functions of the business (DED Exhibit 7). She stated that “As my business is still so new I do not have consistent employees yet. All drivers are subcontractors whom I hire to operate my trucks when they are rented out for hauling of materials.” (DED Exhibit 10).

The fact that Ms. Iannotta subcontracts out the work that constitutes the critical functions of the business confirms that she does not make operational decisions on a day-to-day basis with respect to the business.

The Division’s determination to deny the application on the basis that DMI failed to demonstrate that Ms. Iannotta possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

II. Independence

The Division further found that DMI is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space... 5 NYCRR §144.2(e)(1), and “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

The application provides that the firm’s largest contracts for work performed in the last three years were all done with Dumpin Loadz, Inc. (“Dumpin Loadz:), which is owned by Ms. Iannotta’s uncle, Vinny Luisi. Mr. Luisi is also a consultant for DMI. (DED Exhibit 1).

DMI and Dumpin Loadz share storage and yard space and operate from the same lot. Dumpin Loadz makes up about 70% of DMI's business (DED Exhibits 1, 9 and 10).

Ms. Iannotta stated "As my business is still so new I do not have consistent employees yet. All drivers are subcontractors whom I hire to operate my trucks when they are rented out for hauling of materials." (DED Exhibit 10).

The Subcontractor Work tickets provided by DMI show all the jobs performed by DMI came from working tickets with Dumpin Loadz (DED Exhibit 8).

Applicant argues on appeal that Vinny Luisi has not "contributed financially" to DMI's business. However, Dumpin Loadz performed the work as noted above and shares space with DMI as a cost-saving measure to DMI.

DMI (a) shares resources with Dumpin Loadz, including storage and yard space; (b) transacts business primarily with Dumpin Loadz; and (c) receives tangible benefits as a result of its connection with Dumpin Loadz (DED Exhibits 1, 8, 9 and 10).

The Division's determination to deny the application on the basis that DMI failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

DMI 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(c)(1), 144.2(c)(2) and 144.2(e), 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 DMI's application for certification as a woman-owned business enterprise.

In the Matter of D.M.I. Industries, Inc.
 DED File ID No. 71187
 Exhibit Chart

Exhibit #	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	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 Response to Q&A	Y	Y
DED 6	Copies of CDL Licenses	Y	Y
DED 7	Destinee Iannotta Resume	Y	Y
DED 8	Subcontractor Work Tickets	Y	Y
DED 9	Shared Resources Chart	Y	Y
DED 10	Q&A	Y	Y
DED 11	Certification Affidavit	Y	Y
DED 12	Hauling License Notice	Y	Y