

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

In the Matter

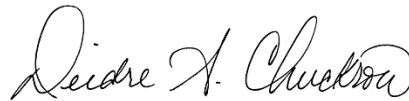
- of -

the Application of FSR Contracting, Inc.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 56806

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
June 13, 2024

This matter considers the written appeal by FSR Contracting, Inc. (“FSR” 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 15, 2023, FSR applied for certification as a women-owned business enterprise (“WBE”). FSR based its application on Ms. Mary Johnson. (DED Exhibit 1).
2. On December 6, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members 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 § 144.2(c)(2).
3. FSR submitted a request to appeal the denial determination, dated December 19, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to FSR on December 20, 2023 (DED Exhibit 4).
5. Applicant submitted a written appeal letter dated December 21, 2023. (APP Exhibit A).

6. The Division filed an Affidavit of Matthew Lefebvre, Associate Director, dated May 23, 2024, and a brief of Michael A. Paff, counsel for the Division, dated May 30, 2024.

FINDINGS OF FACT

7. FSR is a construction company engaged in masonry and related services such as Air Barrier, Caulking, Waterproofing, Patching, Cleaning, Sealing, and Vapor Barrier. (DED Exhibit 1).
8. FSR based its application on Mary Johnson. Mary Johnson is the President and 100% owner of the business enterprise. Mary Johnson and Cynthia Johnson purchased the applicant business in 2017 from Dennis Ebert, the former owner of FSR.¹ Mary Johnson became the sole shareholder and 100% owner in July of 2021. (DED Exhibit 1; APP Exhibit A).
9. Dennis Ebert was hired by Ms. Mary Johnson as the Project Manager and Estimator after the sale of the business. (DED Exhibits 1 and 8; APP Exhibit A).
10. The critical functions of the business, based on the products and services provided and the means by which contracts and orders are obtained by FSR are Air Barrier, Caulking, Waterproofing, Patching, Cleaning, Sealing, and Vapor Barrier. Estimating, supervising field, and customer contact are all critical functions of the business enterprise. (DED Exhibit 1).
11. The application states that Ms. Johnson's sole responsibilities are Financial Decisions, Negotiating Bonding, Negotiating Insurance, Marketing and Sales, Hiring and Firing, Purchasing Equipment and Sales, Managing and Signing Payroll, and Signatory for the Business Account. Ms. Johnson is listed as sharing the responsibility of supervising Field Operations and Negotiating Contracts with Dennis Ebert, the Project Manager and Estimator for FSR. Mr. Ebert is solely responsible for Estimating and Preparing Bids. (DED Exhibit 1).

¹ The record is unclear as to whether the original owner was Dennis Ebert or Dennis and Ann Ebert.

12. Applicant states that Ms. Johnson “manages the operation on a daily basis. . . [which] includes supervising project management, reviewing customer contracts, insurance requirements, equipment acquisition, and material purchases.” Ms. Johnson also manages office functions, including “accounts payable, accounts receivable, payroll and union reporting.” Mr. Ebert “manages projects, including supervision of field operations, estimating and customer contact.” (DED Exhibit 1).
13. Ms. Johnson has worked for FSR, since purchasing the company in 2017. Her resumes states that she maintains employee information, completes and files financial documentation, and provides administrative services, including phone and email correspondence, making copies, and handling mail and faxes. Ms. Johnson received a nursing degree in 1995. (DED Exhibits 1 and 7).
14. Mr. Ebert has an Associate’s Degree in Construction Technology, and has worked at FSR since 1996. He has more than thirty years of experience in the construction industry, and is experienced in project management, estimating, and reading blueprints. Mr. Ebert is the project manager and estimator for FSR, and his duties include estimating, ordering materials, providing submittals, overseeing jobs, field supervision, making decisions on purchases, and contract review and procurement. (DED Exhibits 1 and 8).
15. Dennis Ebert is the signatory to a contract between FSR and Transit Construction Services Corp. (“TCS”), signed on January 12, 2021, and is also the signatory for FSR on a contract with Picone Construction Corporation (“PCC”), dated January 26, 2022. (DED Exhibits 11 and 12).
16. Ms. Johnson has “the final say in any direction [FSR] go[es]. . .” and Ms. Johnson reviews any bids and estimates prepared by Mr. Ebert. Ms. Johnson, as part of the succession planning for

the business, is training a former field employee, who is working towards a degree, to become the Project Manager upon Mr. Ebert's retirement. (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 FSR 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. Industry-Specific Competence

The Division denied FSR’s application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Johnson 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).

Nowhere in the materials before the Division is there any evidence that Ms. Johnson has adequate, industry-specific competence, training, or licensure, in masonry and the related services of Air Barrier, caulking, waterproofing, patching, cleaning, sealing, or vapor barrier. Ms. Johnson's experience prior to becoming owner of the applicant business was not provided, other than her resume stating that she earned a degree in nursing in 1995. (DED Exhibit 7) Her resume does not list any skills relating to masonry or to the critical functions of the business. While Ms. Johnson's resume states that she has worked for FSR since 2017, her responsibilities include maintaining employee information, completing and filing financial documents for accounting purposes, and providing administrative services, such as phone and email correspondence, making copies, and managing incoming and outgoing mail and faxes. Ms. Johnson's resume is devoid of any information regarding licensing, academic credentials, or direct work experience that is relative to the critical functions of the applicant business. (DED Exhibit 7).

The application states that Ms. Johnson is responsible for Financial Decisions, Negotiating Bonding, Negotiating Insurance, Marketing and Sales, Hiring and Firing, Purchasing Equipment

and Sales, Managing and Signing Payroll, and Signatory for the Business Account. She is listed as sharing the responsibility of supervising Field Operations and Negotiating Contracts with Dennis Ebert, the Project Manager and Estimator for FSR. (DED Exhibit 1) In response to questions from the Division, the applicant stated that Ms. Johnson manages the daily operations of the applicant business, and that she supervises project management, reviews customer contracts, insurance requirements, equipment acquisition, and material purchases, as well as managing all office functions, including accounts payable and receivable, payroll and union reporting. (DED Exhibit 1).

By contrast, Mr. Ebert, FSR's Project Manager and Estimator, has over 30 years of experience in the construction industry, and his core qualifications include project management, estimating, and reading blueprints. He is the former owner of FSR, and has worked at FSR since 1996, where his responsibilities include estimating, ordering materials, providing submittals, overseeing jobs, decision making on purchases, as well as contract review and procurement. The application lists him as solely responsible for estimating and preparing bids, as primarily responsible for field operations, and as sharing responsibility for negotiating contracts. (DED Exhibits 1 and 8). In addition, the narrative included with the application also states that Mr. Ebert manages projects, including the supervision of field operations, estimating and customer contact. (DED Exhibit 1).

Ms. Johnson acknowledges Mr. Ebert's industry experience in her written appeal submission, and while she states that she reviews estimates and bids, there is nothing in the submission regarding any industry experience relating to the core functions of the business by Ms. Johnson. (APP Exhibit A). The only evidence, in both the application and in the appeal submission, regarding anyone having industry experience and competence is the information provided

regarding Mr. Ebert. (DED Exhibits 1 and 8). Here, it appears that while Mr. Ebert sold his business to Ms. Johnson, he remained on and continues to manage the core business functions, with Ms. Johnson responsible for the financial and administrative side of the business. While it is undisputed that Ms. Johnson owns FSR, all of the information presented by the applicant, evidences her experience is only on the administrative side of the business with no information provided regarding any experience in the core revenue functions of the business, which include masonry restoration, air barrier, caulking, waterproofing, patching, cleaning, sealing, and vapor barrier. (DED Exhibits 1, 7, and 8).

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 FSR's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Johnson 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, based on the application, what products and services the applicant business provides to clients. (DED Exhibits 1 and 2). FSR's business is in masonry restoration. (DED Exhibit 1). The critical functions of FSR are masonry restoration work and the related services of air barrier, caulking, waterproofing, patching, cleaning, sealing, and vapor barrier. (DED Exhibit 1). There is no evidence that Ms. Johnson is involved in the critical functions of the business. 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. Johnson's role at FSR is administrative and financial while others, namely Dennis Ebert, not relied on for certification, are responsible for the day-to-day operations of the business enterprise. Mr. Ebert is the Project Manager and Estimator for the applicant business, and is responsible for estimating, bidding, negotiating contracts, and supervising field operations. (DED Exhibits 1 and 7). While Ms. Johnson is listed as negotiating contracts, the contracts submitted with the application are both signed by Mr. Ebert, not Ms. Johnson, and thus demonstrate that it is Mr. Ebert, not Ms. Johnson who executes contracts on behalf of FSR. (DED Exhibits 1, 11, and 12). In addition, while the application lists Ms. Ebert and Ms. Johnson as supervising field operations, the narrative submitted with the application states that it is Mr. Ebert who supervises in the field, manages projects, and is responsible for customer communication.

On appeal, Ms. Johnson states that she has the “final say in any direction [FSR] go[es],” and that she reviews the bids and estimates prepared by Mr. Ebert. However, she also states that another employee is studying for a degree and is being trained to take over as Project Manager upon Mr. Ebert’s eventual retirement. (APP Exhibit A). There is no indication that Ms. Johnson will be taking on the responsibilities involving the critical functions of the applicant business currently handled by Mr. Ebert, and the fact that she is planning ahead to have someone ready to assume Mr. Ebert’s role upon his retirement, speaks to the critical nature of Mr. Ebert’s role in FSR. (APP Exhibit A). Further, while Ms. Johnson may bear the entirety of the financial responsibilities of the business, the regulations also require her to make operational decisions on a day-to-day basis regarding the critical functions of the business, without needing to rely on others. (APP Exhibit A).

Here, the evidence presented demonstrates that Ms. Johnson fulfills the administrative and financial functions of FSR. There is no evidence, anywhere in the record, that Ms. Johnson has any involvement in the critical functions of the business. (DED Exhibits 1, 7, 11, and 12). Based on the foregoing, I find that the Division’s determination that FSR 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

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

RECOMMENDATION

The Division's determination to deny FSR Contracting, Inc.'s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of FSR Contracting, Inc.
DED File ID No. 56806
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant's Written Appeal Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed by Written Appeal Submission	Y	Y
DED 5	2021 W-2s	Y	Y
DED 6	2022 W-2s	Y	Y
DED 7	Resume of Mary Johnson	Y	Y
DED 8	Resume of Dennis Ebert	Y	Y
DED 9	Air Barrier Assoc Invoice	Y	Y
DED 10	Lease Agreement	Y	Y
DED 11	Gowanda Contract	Y	Y
DED 12	State Police Fredonia Contract	Y	Y