

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

In the Matter

- of -

the Application of G & J Contracting, Inc.
for Certification as a Minority-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 1992

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
November 30, 2023

This matter considers the written appeal by G & J Contracting, Inc. (“G&J” 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-owned business enterprise (“MBE”).¹

PROCEDURAL HISTORY

1. On August 25, 2021, G&J applied for certification as a minority-owned business enterprise (“MBE”). G&J based its application on Ms. Crystal Jonathan, the current President of G&J, and 51% owner of the business enterprise. (DED Exhibit 1).
2. On March 17, 2023, the Division denied the application on the following grounds (DED Exhibit 2):

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)
3. G&J submitted a request to appeal the denial determination, dated April 12, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to G&J on April 20, 2023 (DED Exhibit 4).
5. G&J submitted a written appeal with exhibits dated May 15, 2023, in support of their appeal.

¹ The Denial Determination states that the denial is as a woman-owned business, however, the application, affidavit of Amanda Brennan, and the Division’s brief all provide that this was an application, and subsequent denial, of a minority-owned business.

6. The Division filed an Affidavit of Amanda Brennan, Project Director for the Division's temporary Certification Processing Center, dated August 24, 2023, and a brief of Candace C. Williamson, counsel for the Division, dated August 29, 2023.

FINDINGS OF FACT

7. G&J is a contracting firm specializing in placement of rebar and mesh for concrete reinforcement. The critical functions of the business enterprise include obtaining contracts and orders and providing laborers to place and tie rebar and mesh, to reinforce concrete prior to the concrete pour performed by others, as per the contractual terms for the various projects undertaken by G&J. (DED Exhibits 1 and 5).
8. Crystal Jonathan has worked for G&J since June of 1985, was appointed as President of the business enterprise in November of 2020, and became 51% owner in February of 2021. She holds an associate degree in business administration. (DED Exhibits 1 and 6).
9. Mr. Gerrett Geartz, is a non-minority owner, with a 41% ownership interest in the business enterprise, and is a co-founder and Vice President of the business enterprise. Mr. Geartz shares in responsibilities with Ms. Jonathan and has worked in the field of ironworks since 1969 and served as a foreman on various projects prior to co-founding G&J. (DED Exhibits 1 and 7).
10. In her 38 years at G&J, Ms. Jonathan has had responsibilities which include, but are not limited to, the management of the business, jobsite safety training, hiring and firing, jobsite supervision, and project coordination, among others. (DED Exhibit 6).
11. Ms. Jonathan is currently responsible for making financial decisions, estimating, preparing bids, negotiating bonding and insurance, marketing and sales, hiring and firing, supervising field operations, managing and signing payroll, negotiating contracts, and serving as the signatory for business accounts. (DED Exhibit 1).

12. Ms. Jonathan began working on estimating and bid preparation in the early 1980s, under the direction of her father, and began working independently in that capacity in the 1990s. Ms. Jonathan is personally involved in all aspects of estimating and bidding and reviews and approves all bids. Ms. Jonathan received on the job training from her father and learned “how to walk the rebar,” how to communicate with employees, general contractors, and owners, “how to read and review the engineer’s drawings in relation to the rebar and mesh to ensure that the specified rear and mesh was provided, to verify proper placement and overlapping of materials, and to confirm that the correct ties and splicing have been used” among other job specifics. (APP Exhibit A; DED Exhibits 5 and 8).
13. Ms. Jonathan has primary responsibility for job site supervision for the entire G&J team, including unionized iron workers, and is in the field, at each job site, 3 to 4 times per week. (APP Exhibit A; DED Exhibits 1 and 5).
14. Ms. Jonathan began learning field supervision in 2014, under her father, and learned the critical business functions, and began independent field supervision in 2019. (APP Exhibit A; DED Exhibit 5).
15. Ms. Jonathan is an active committee member in the Iron Workers Union Apprenticeship Training Program and has demonstrated Iron Worker skills. The industry does not issue certificates on training; as the skill and craft is one that is learned with time and experience. Iron Workers Local 9 states that the apprentice program teaches steel erecting, rebar installation, metal siding and roofing, and that Ms. Jonathan has “clearly demonstrated these skills . . .” (APP Exhibit A; DED Exhibit 5)

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.

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 G&J for certification as an MBE 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 G&J's application for certification as an MBE on the basis that G&J failed to demonstrate that Crystal Jonathan 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 minority group member 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 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)). Notwithstanding the Division's requirements, a lack of hands-on experience is not itself enough

to deny certification and industry practice should also be considered. (Matter of *Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988)). In considering this regulation, the Division shall consider:

- (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)(1)).

The Applicant bears the burden of establishing that the minority group member 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).

The Division argues that the applicant failed to provide sufficient evidence regarding Ms. Jonathan's industry-specific competence. The application lists Ms. Jonathan as responsible for all operational controls of the business enterprise, with Mr. Gerrett Geartz also listed on all but one of the operational categories. (DED Exhibit 1). Ms. Jonathan and Mr. Andrew Burns, the Office Controller are listed as sharing responsibilities for purchasing equipment and sales, and the signatories for the business accounts include Gerrett Geartz, Todd Geartz, and Taber Geartz, as well as Ms. Jonathan. (DED Exhibit 1).

A narrative included with the application states that Ms. Jonathan controls all operational decisions at G&J, and that her duties include taking calls and responding to emails from contractors, completing paperwork, presiding over all hiring and firing, negotiating lease agreements for storage facilities, purchasing vehicles and equipment, handling financial matters,

reviewing requests for bids, daily discussions with foremen regarding current work performed on site, visiting work sites, and attending industry meetings at Ironworks Local 9 Union. (DED Exhibit 8). In her affidavit, Ms. Jonathan further explains that she received on the job training from her father and learned “how to walk the rebar,” how to communicate with employees, general contractors, and owners, “how to read and review the engineer’s drawings in relation to the rebar and mesh to ensure that the specified rear and mesh was provided, to verify proper placement and overlapping of materials, and to confirm that the correct ties and splicing have been used” among other job specifics. (APP Exhibit A and DED Exhibit 5). Ms. Jonathan also states that she knows how “to place and tie mesh” and can “personally jump in” as needed. (APP Exhibit A and DED Exhibit 5). Ms. Jonathan also explains that as a supervisor she has caught errors and corrected them, and actively monitors and verifies her crews’ work. (APP Exhibit A and DED Exhibit 5).

Mr. Geartz’s resume, which is also included in the application, is heavily relied upon by the Division. (DED Exhibits 2 and 7). The Division refers to Mr. Geartz’s involvement in the business enterprise since its founding in 1984, and highlights both his long history in the industry and that he has worked as a foreman. (DED Exhibits 1 and 7). In addition, the Division in their denial determination, focuses on Ms. Jonathan’s duties relative to office management, and does not give due consideration to her narrative which states that she is responsible for bids and site supervision, nor do they consider her 38 years of working with the business enterprise.

The Division also looks to support its decision on Ms. Jonathan’s lack of membership in the Iron Workers Union, as well as citing to a lack of training and certificates. The Division cites to *Matter of JVN Restoration, Inc.* and compares the decision in that case to the instant matter. (*Matter of JVN Restoration, Inc.*, Recommended Order, August 30, 2019 (Final Order 19-19, Sept. 12, 2019)). However, the facts of *JVN Restoration, Inc.* are far different from this case. In *JVN*

Restoration, Inc. the woman owner did not supervise field work, did not participate in estimating for the firm, and did not possess required asbestos licenses, which made her unable to enter job sites. *JVN Restoration, Inc. supra*, at pp.3-5. Here, Ms. Jonathan, is recognized and supported by the Union as an active committee member in their Apprenticeship Training Program, and as someone who has demonstrated Iron Worker skills. Further, the Iron Workers union explains that the industry does not issue certificates on training, and that the skill and craft is one that is learned with time and experience. Iron Workers Local 9 further explains that the apprentice program teaches steel erecting, rebar installation, metal siding and roofing, and that Ms. Jonathan has “clearly demonstrated these skills . . .” In addition, Ms. Jonathan, unlike the woman owner in *JVN Restoration, Inc. supra*, does engage in field supervision, handles jobsite safety, prepares and reviews bids, and has worked in the field and assisted with mesh installation. (APP Exhibit A; DED Exhibit 10).

The Division also argues that Ms. Jonathan’s affidavit should not be considered by this Tribunal, relying on the *Matter of the Application of Lida Strategic Solution, Inc.* (Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019), and *Scherzi Systems, supra*. *Lida* holds that documents offered by an applicant on appeal that were not part of the application, cannot be considered on appeal. *See Lida, supra*. However, *Scherzi Systems* holds that “it is not only appropriate for an agency to consider the testimony offered at an administrative hearing in rendering its determination, it is required, as ‘[n]o decision, determination or order shall be made except upon consideration of the record as a whole.’” *Scherzi, supra*, citing *Matter of Haug v State Univ. of NY at Potsdam*, 32 NY3d 1044, 1046 [2018]; *Matter of A.A.C. Contr., Inc. v NYS Dept. of Economic Dev.*, 179 AD3d 1343, 1344 [2020]; and SAPA § 306[1]. Further, in *Scherzi*, as in this case, the “testimony at issue did not constitute new evidence previously unavailable at the

time of the application but, instead, served to explain and clarify” information “submitted as part of [the] application . . .” *Scherzi, supra*, at 1469.

I find that Ms. Jonathan’s affidavit is not new information, but clarifies information already included with G&J’s application, and thus is admissible under *Scherzi, supra*. Here, the applicant has clearly stated in the application, through both the listing of operational responsibilities and in a narrative, that Ms. Jonathan does have adequate, industry-specific competence to make critical decisions without relying on others, information which is clarified through Ms. Jonathan’s affidavit submitted on appeal.

CONCLUSION

Based on the foregoing, I find that the Division’s determination to deny G&J’s certification was not based on substantial evidence. Applicant has met its burden with respect to the eligibility criteria at 5 NYCRR § 144.2(c)(1).

RECOMMENDATION

The Division’s determination to deny G&J Contractor, Inc.’s application for certification as a minority owned business enterprise should be reversed.

In the Matter of G&J Contracting, Inc.
 DED File ID No. 1992
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Brief and Exhibits dated May 15, 2023	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appellant's Appeal Form	Y	Y
DED 4	Notice to Proceed via Written Appeal	Y	Y
DED 5	Appellant's Written Appeal Submission	Y	Y
DED 6	Resume of Ms. Crystal Jonathan	Y	Y
DED 7	Resume of Mr. Garrett Geartz	Y	Y
DED 8	Narrative Response – Day to Day Resp.	Y	Y
DED 9	Stock Transfer Ledger	Y	Y
DED 10	Letter of Support – Iron Workers Local 9	Y	Y