

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

In the Matter

- of -

the Application of Integrity Fire Solutions, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69314

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 4, 2024

This matter considers the written appeal by Integrity Fire Solutions, Inc., (“Integrity” 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 17, 2022, Ms. Patricia Jolly, as President, applied on behalf of Integrity for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 27, 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) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (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 do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).

3. Integrity timely filed an undated Request to Appeal (APP Exhibit A/ DED Exhibit 15).
4. A notice to proceed via written appeal was sent to Integrity on May 5, 2023 (DED Exhibit 16).
5. Integrity filed its written appeal by letter dated June 28, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated December 29, 2023, and a brief of Laura Wedinger-Gyimesi Esq., counsel for the Division, dated December 29, 2023.

FINDINGS OF FACT

7. Integrity is engaged in the business of providing fire alarm systems and inspection services to businesses and institutions (DED Exhibit 1).
8. Ms. Patricia Jolly is the President and has a 51% ownership interest. Her son, David Jolly, Jr., is the Vice President and has a 49% ownership interest. (DED Exhibit 1).
9. On September 24, 2019, each owner contributed \$█ for their shares in the business. Applicant states that Ms. Jolly also contributed \$█ in startup capital on October 2, 2019 (DED Exhibits 1 and 4). The amount of \$█ was transferred from an account titled “David J. Jolly Jr. dba Integrity Fire Solutions” to the business account on October 2, 2019 (DED Exhibits 5 and 6).
10. In 2020, Ms. Jolly received no W-2 income from the business, while David Jolly Jr. received W-2 income of \$█ (DED Exhibit 7).

11. In 2021, Ms. Jolly received compensation of \$ [REDACTED], while David Jolly Jr. received \$ [REDACTED] (DED Exhibit 8).
12. Ms. Jolly's resume reflects an education with the Institute of Design and Construction in May 1978, and she completed a 30-hour OSHA certificate. She previously worked with Johnson Controls as a fire alarm technician from 1998 through September 2003, where she implemented testing procedures to make sure that equipment remained operational, tested and maintained fire protection equipment, researched various fire prevention systems and developed a database indicating the usage of equipment and inspection date tracking. From October 2003 until January 2018, she worked as an Administrative Assistant with Trinchese Construction, where her duties included write-ups of testing procedures to ensure fire alarms remained operational and scheduled testing of installed alarms. (DED Exhibits 1, 9 and 13).
13. Ms. Jolly worked for Mark J. Snyder Services as an Executive Assistant from January 2018 until the end of May 2021. She stated she spent approximately 30 hours per week working for Mark J. Snyder and approximately 25 hours per week working for Integrity "once I was done with my shift at Mark J. Snyder as well as on the weekends". (DED Exhibit 1)
14. David Jolly Jr.'s resume reflects that prior to joining Integrity, he worked as a fire alarm installer and servicer for Van Security Services from 2000 to 2005 and as a fire alarm technician inspector and installer for Johnson Controls from 2005 to August 2019. He currently monitors competitor product sales and marketing activities, provides annual sales plan and quarterly updates, establishes and implements the business unit strategy, participates in safety and security meetings and functions and leads, develops and mentors

team members. He is trained in fire alarm installations, servicing and programming and he has “top notch skills in all phases of the fire alarm industry.” (DED Exhibit 10). He holds a Certificate from the Fiber Optic Association, Inc., along with Level II Certification from the National Institute for Certification and Engineering Technologies (NICET) in fire protection engineering technology and fire alarm systems (DED Exhibit 11). He holds a license from the NYS Dept. of State Division of Licensing Services for installation, servicing and maintenance of security or fire alarm systems (DED Exhibits 1, 10, 11 and 12).

APPLICABLE LAW

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

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)(3) states in relevant part as follows:

Risks and Profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

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) 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.

... (3) Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 Integrity 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).

On September 24, 2019, Ms. Jolly and David Jolly Jr. each contributed \$ [REDACTED] for their shares in the business. Applicant states that Ms. Jolly also contributed \$ [REDACTED] in startup capital on

October 2, 2019 (DED Exhibits 1 and 4). The amount of \$ [REDACTED] was transferred from an account titled “David J. Jolly Jr. dba Integrity Fire Solutions” to the business account on October 2, 2019 (DED Exhibits 5 and 6). Ms. Jolly stated “The 0278 statement was for David J. Jolly DBA Integrity Fire Solutions. This document shows the transfer of \$ [REDACTED] on 10/2 under withdrawals (transfer to chk xxxxx9156). I am not listed on this bank statement as I was working during regular business hours and I would have no way to get to the bank during operating hours, so Dave (co-owner and Vice President) was listed for access.” (DED Exhibit 1).

On appeal, Ms. Jolly states, “It is correct that neither Dave or I paid anything for our shares in Integrity Fire Solutions, Inc.” and the start-up capital was contributed “thru a bank account that was in my son’s name” and “I myself was not on that bank account” (APP Exhibit B).

Applicant argues on appeal that the application showed Ms. Jolly’s “skill set and expertise” (APP Exhibit B). This argument that expertise should be considered as a capital contribution was not before the Division at the time of the application and is new evidence which will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Also, there is no evidence that Ms. Jolly’s contribution of expertise was uncompensated, specialized and directly applicable to one or more critical aspects of the operation of the business, and there is no documented valuation of the claimed expertise. (5 NYCRR §144.2(b)(2)(i)(4)) See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022; *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016 (applicant provided no valuation of owner’s contributions of expertise. Without such information, the Division was unable to ascertain whether the owner’s contribution was proportionate).

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

5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017 ("in reviewing W-2's and K-1's the woman owner was paid significantly less. Therefore, the Applicant's arguments were deemed insufficient to overturn the Division's determination that the woman owner does not share in the risks and profits of the business. The woman owner is not sharing in the risks and profits in proportion to her equity interest").

In 2020, Ms. Jolly received no W-2 income from the business, while David Jolly Jr. received W-2 income of \$ [REDACTED] (DED Exhibit 7). In 2021, Ms. Jolly received compensation of \$ [REDACTED], while David Jolly Jr. received \$ [REDACTED] (DED Exhibit 8). Ms. Jolly stated "David left a very lucrative position to open the business with me. I remained employed with Mark J. Snyder so that I would not need to take a large amount of wages so that we could grow the business but since David left his former position he needed to take a larger salary... He also worked in the field as well during this time. I plan on increasing my take from the business once it grows to a point

where I'm comfortable to do so" (DED Exhibit 1). Since she received substantially less compensation than the male owner at the time of the application, she did not share in the profits in proportion to her ownership interest (DED Exhibits 7 and 8).

The Division's determination to deny the application on the basis that Integrity failed to demonstrate that Ms. Jolly shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3) 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.

The critical functions of Integrity are installation of new fire alarm systems and complete fire alarm inspections (DED Exhibits 1 and 2). Ms. Jolly's resume reflects an education with the Institute of Design and Construction in May 1978, and she completed a 30-hour OSHA certificate. She previously worked with Johnson Controls as a fire alarm technician from 1998 through September 2003, where she implemented testing procedures to make sure that equipment remained operational, tested and maintained fire protection equipment, researched various fire prevention systems and developed a database indicating the usage of equipment and inspection date tracking. From October 2003 until January 2018, she worked as an Administrative Assistant with Trinchese Construction, where her duties included write-ups of testing procedures to ensure fire alarms

remained operational and scheduled testing of installed alarms. She worked for Mark J. Snyder Services as an Executive Assistant from January 2018 until the end of May 2021 (DED Exhibits 1, 9 and 13). Ms. Jolly has no training or experience in the installation of new fire alarm systems and complete fire alarm inspections.

David Jolly Jr.'s resume reflects that prior to joining Integrity, he worked as a fire alarm installer and servicer for Van Security Services from 2000 to 2005 and as a fire alarm technician inspector and installer for Johnson Controls from 2005 to August 2019. He currently monitors competitor product sales and marketing activities, provides annual sales plan and quarterly updates, establishes and implements the business unit strategy, participates in safety and security meetings and functions and leads, develops and mentors team members. He is trained in fire alarm installations, servicing and programming and he has "top notch skills in all phases of the fire alarm industry." (DED Exhibit 10). He holds a Certificate from the Fiber Optic Association, Inc., along with Level II Certification from the National Institute for Certification and Engineering Technologies (NICET) in fire protection engineering technology and fire alarm systems (DED Exhibit 11). He holds a license from the NYS Division of Licensing Services for installation, servicing and maintenance of security or fire alarm systems (DED Exhibits 1,10, 11 and 12).

On appeal, Ms. Jolly states "I am responsible for all categories of managerial operations... All scheduling, material ordering, Human Resource activities (including but not limited to hiring, firing, benefit decisions, payroll) are handled by myself." She states that "Dave is very skilled in the physical work needed" and "he does not have the knowledge for the day to day operations of the business." (APP Exhibit B)

The NYS Dept. of State Division of Licensing Services requires a license to install, service or maintain security or fire alarm systems. (N.Y. Gen. Bus. Law §69-m) David Jolly Jr. holds this

license. (DED Exhibit 12). Neither Ms. Jolly nor Integrity provided any evidence that they have the required license.

Title 19 of the NYCRR requires a license for installing, maintaining or servicing alarm systems.

19 NYCRR §195.3 provides:

“Qualifying officers or managers. An individual (qualifier) may make an application for licensure on behalf of a company, firm, partnership or corporation:

- (a) In the case of a company, firm or partnership, such application must be accompanied by evidence that the qualifier is a principal in the company to be licensed. Such individual must meet all applicable licensing requirements.
- (b) In the case of a corporation, the qualifier may be an officer or employee of the corporation. In addition to meeting all applicable licensing requirements, such individual must direct and control the operation of the corporation. Such direction and control must be real and substantial and take place on a day to day basis.”

Since David Jolly Jr.’s license states that he is the qualifier, the regulations require that he direct and control the operation of the business, which does not meet the MWBE regulations requiring the woman owner to control the day-to-day operations of the business. On appeal, Ms. Jolly states, “David is the foreman in the field that oversees the men” and “David got the license as he has the technical expertise for running the Fire Alarm wires and installing devices.” (APP Exhibit B).

Ms. Jolly failed to demonstrate that she exercises independent operational control over the core, revenue generating functions of the business or that she has the necessary capability and experience to perform or supervise the work performed by Integrity.

The Division’s determination to deny the application on the basis that Integrity failed to demonstrate that Ms. Jolly 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.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-06, dated June 2, 2020.

Ms. Jolly was employed by Mark J. Snyder at the time of the application for certification (DED Exhibits 1 and 9). She continued her employment with Mark J. Snyder into 2021, which is reflected in her W-2 for that year (DED Exhibits 1 and 14). She stated she spent approximately 30 hours per week working for Mark J. Snyder and approximately 25 hours per week working for Integrity “once I was done with my shift at Mark J. Snyder as well as on the weekends”. She was unable to open a business account for Integrity because she “was working during regular business hours and I would have no way to get to the bank during operating hours, so Dave (co-owner and Vice President) was listed for access”. (DED Exhibit 1). As Ms. Jolly was employed elsewhere during Integrity’s business hours, she has not established that she devoted time to the operation of the business on a daily basis.

On appeal, Ms. Jolly contends that she has left her employment with Mark J. Snyder and she devotes all her time to Integrity (APP Exhibit B). Since this occurred after the time of the application and denial determination, it does not meet the requirement under 5 NYCRR §144.2(c)(3) of time devoted to the business at the time of the application.

The Division’s finding that Ms. Jolly does not devote time to the daily operation of the business as required under 5 NYCRR §144.2(c)(3) is supported by substantial evidence.

CONCLUSION

Integrity 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)(3), 144.2(c)(1) and 144.2(c)(3) 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 Integrity's application for certification as a woman-owned business enterprise.

In the Matter of Integrity Fire Solutions, Inc.
DED File ID No. 69314
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	Articles of Incorporation	Y	Y
DED 4	Stock Transfer Ledger	Y	Y
DED 5	Chase Business Checking Account statement for Integrity Fire Solutions, Inc.	Y	Y
DED 6	Chase Business Checking Account statement for David J. Jolly Jr. dba Integrity Fire Solutions	Y	Y
DED 7	2020 W-2's issued by Integrity	Y	Y
DED 8	2021 Integrity Business Tax Returns	Y	Y
DED 9	Patricia Jolly Resume	Y	Y
DED 10	David Jolly Jr. Resume	Y	Y
DED 11	David Jolly Jr. Certificates	Y	Y
DED 12	David Jolly Jr. License	Y	Y
DED 13	Patricia Jolly 30-hour OSHA Certificate	Y	Y
DED 14	Patricia Jolly's 2021 NYS Personal Tax Returns	Y	Y
DED 15	Request to Appeal	Y	Y
DED 16	Notice to Proceed Via Written Appeal	Y	Y