

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

In the Matter

- of -

the Application of Intelligent NRG Solutions, LLC
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 71122

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 21, 2024

This matter considers the appeal by Intelligent NRG Solutions, LLC (“INS” 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”).

PROCEDURAL HISTORY

1. On July 26, 2023, Mr. Tuyen Vu, as President, applied on behalf of INS for certification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1)
2. On November 27, 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. On December 20, 2023, INS submitted a Request to Appeal via a Hearing. (TRIB Exhibit I).
4. On August 7, 2024, a Notice of Hearing was sent to all parties (TRIB Exhibit II).

5. A hearing was held and concluded on October 30, 2024.
6. At the hearing, Ms. Karen Bernstein, Counsel, Department of Economic Development, advised that the Division has withdrawn the denial ground under 5 NYCRR §144.2(c)(1).

FINDINGS OF FACT

7. INS provides engineering consulting services including power systems modeling, power systems design, and power system studies (DED Exhibit 1).
8. Mr. Tuyen Vu is the CEO, and 50% owner of INS and Mr. Tuan Ngo is the CTO, and 50% owner of INS. Both of these minority-owners were relied upon for certification (DED Exhibits 1 and 2).
9. The critical functions of the business are energy storage model development, solar power consulting, wind power consulting and battery inverter model validation. (DED Exhibit 1).
10. Tuyen Vu's resume states that he obtained a Ph.D. in Electrical and Computer Engineering and a B.S. in Electrical Engineering. His experience includes Control System Design, Feasibility Studies, Engineering Design, System Modeling, System Studies, NERC Compliance and Review. (DED Exhibit 28).
11. Tuan Ngo's resume reflects that he has a Ph.D. in Electrical and Computer Engineering and B.S. in Electrical Engineering. He is the Chief Technology Officer for INS. His prior experience was as a consultant for Electric Power Engineers Consulting from 2017 to 2021. His experience includes Feasibility Studies, Engineering Design, Systems Modeling, Systems Studies and Review and Technical Support. (DED Exhibit 24).
12. Thomas Ortmeyer has agreed to join the applicant business "as a sub-consultant with the title of Technical Director starting May 2023". His resume reflects that he has a Ph.D. in Electrical Engineering, M.S. in Electrical Engineering, and a B.S. in Electrical Engineering. He has over 51 years of experience in the field, including Technical Director at INS,

Research Professor, Professor, and General Engineer. His experience includes Control System Design, Feasibility Studies, Engineering Design, System Modeling, and System Studies. (DED Exhibits 1 and 32).

13. Phil Barker will join the applicant business “as a sub-consultant starting June 2023.” His resume reflects that he has a M.S. in Electrical Engineering and a B.S. in Electrical Engineering. He has over 36 years of experience in the field, including Principal Consultant at INS, Principal Consultant, and Consulting Engineer. His experience includes Training, System Studies, System Design, System Modeling, Feasibility Studies, Standard development, and Wind and Battery Projects (DED Exhibits 1 and 32).

14. Mr. Ortmeyer is listed on INS’ website as Director, Grid Modernization with 50+ years of experience and Mr. Barker is listed on INS’ website as EMT Studies and System Studies, with 36+ years of experience. Thomas Ortmeyer and Phil Barker are the persons who respond to the requests for proposals and do the cost estimating. (Hearing Testimony of Glenn Butler; DED Exhibit 30).

15. A narrative provided with the certification application states: “Tuyen Vu is spending 40 hours a week at Clarkson University... His duties include teaching, advising undergraduate and graduate students and managing research projects.... Tuyen Vu is spending about 30 hours a week at Intelligent NRG Solutions. On a regular weekday, he spends about 4 hours a day outside of his work at Clarkson University and 5 hours each day on Saturday and Sunday to manage the company’s operation. Tuyen Vu annually submits a conflict-of-interest form to Clarkson University to ensure that his outside consulting work does not interfere with his regular teaching and research work at Clarkson. He manages the company’s regular paperwork including agreements with clients, expense reports, and invoices. He also schedules client meetings, written proposals, and manages

subcontractors' work. He plans to join Intelligent NRG Solutions with 40 hours a week starting this October.” (DED Exhibits 1 and 31).

16. A narrative provided with the certification application states: “Tuan Ngo is spending 40 hours a week at Indie Energy Inc. His duties include designing and testing software products for battery energy storage management systems. ... Tuan Ngo is spending about 30 hours a week at Intelligent NRG Solutions. On a regular weekday, he spends about 4 hours a day outside of his work at Indie Energy and 5 hours each day on Saturday and Sunday to manage the company’s client projects and consulting service enhancements. He manages the client projects’ execution including reading the projects requirements, conducting engineering studies, and writing reports... He plans to join Intelligent NRG Solutions with 40 hours a week starting this September.” (DED Exhibit 31).

17. The narratives and tax returns provided show no employees or income being paid out of the business except to subcontractors. The owners managed the company with subcontractors who performed the work. The subcontractors hired in 2022 was Intelligent Energy Solutions/Construction Limited Company, Vietnam. (DED Exhibits 1, 2, 12, 14 and 33).

18. Intelligent Energy Solutions / Construction Limited Company (“IES) is partially owned by Tuan Ngo (45%) and Tuyen Vu (35%). (DED Exhibit 1).

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:

(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 INS for certification as a 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*

DISCUSSION

Mr. Henry Chan, Esq. appeared at the hearing on behalf of INS. The following witnesses testified on behalf of INS: Tuyen Vu, CEO, and Tuan Ngo, CTO. INS offered no exhibits.

Ms. Karen Bernstein, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler, Associate Certification Director, Division of Minority and Women’s Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 2, 5, 6, 8-12, 14-19, 21-24, 28-33, 37 and 38.

Tribunal Exhibits I and II were admitted into evidence.

I. Operation

The Division found that the minority-owners did not make operational decisions on a day-to-day basis with respect to the 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 minority/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).

The eligibility criteria for MWBE certification requires that the minority/woman owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of*

Economic Development, 179 AD 3d 1343 (3rd Dept. 2020). The minority/woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

Tuyen Vu’s resume states that he obtained a Ph.D. in Electrical and Computer Engineering and a B.S. in Electrical Engineering. His experience includes Control System Design, Feasibility Studies, Engineering Design, System Modeling, System Studies, NERC Compliance and Review. (DED Exhibit 28).

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Phil Barker will join the applicant business “as a sub-consultant starting June 2023.” His resume reflects that he has a M.S. in Electrical Engineering and a B.S. in Electrical Engineering. He has over 36 years of experience in the field, including Principal Consultant at INS, Principal Consultant, and Consulting Engineer. His experience includes Training, System Studies, System

Design, System Modeling, Feasibility Studies, Standard development, and Wind and Battery Projects (DED Exhibits 1 and 32).

Mr. Ortmeyer is listed on INS' website as Director, Grid Modernization with 50+ years of experience and Mr. Barker is listed on INS' website as EMT Studies and System Studies, with 36+ years of experience. Thomas Ortmeyer and Phil Barker are the persons who respond to the requests for proposals and do the cost estimating. (Hearing Testimony of Glenn Butler; DED Exhibit 30). A narrative provided with the certification application states: "Tuyen Vu is spending 40 hours a week at Clarkson University... His duties include teaching, advising undergraduate and graduate students and managing research projects.... Tuyen Vu is spending about 30 hours a week at Intelligent NRG Solutions. On a regular weekday, he spends about 4 hours a day outside of his work at Clarkson University and 5 hours each day on Saturday and Sunday to manage the company's operation. Tuyen Vu annually submits a conflict-of-interest form to Clarkson University to ensure that his outside consulting work does not interfere with his regular teaching and research work at Clarkson. He manages the company's regular paperwork including agreements with clients, expense reports, and invoices. He also schedules client meetings, written proposals, and manages subcontractors' work. He plans to join Intelligent NRG Solutions with 40 hours a week starting this October." (DED Exhibit 31).

Tuyen Vu testified that he has been running INS for 7 years. He has over 12 years of experience in energy consulting. He stated that he manages "everything" including contract negotiations and orders, HR, accounting and payroll, hiring/firing and training of employees, procurement of insurance and vendors, project scheduling, and equipment and material purchases and leasing. He said he "makes all business decisions." He stated that he has been working more than 40 hours per week at INS since October 2023. (Hearing Testimony of Tuyen Vu). On cross-examination, he stated that he only spent approximately 20 hours per week at Clarkson,

acknowledging that the application stated that he spent 40 hours per week at Clarkson and spent about 30 hours per week at INS. (Hearing Testimony of Tuyen Vu).

A narrative provided with the certification application states: “Tuan Ngo is spending 40 hours a week at Indie Energy Inc... He is spending about 30 hours a week at Intelligent NRG Solutions. On a regular weekday, he spends about 4 hours a day outside of his work at Indie Energy and 5 hours each day on Saturday and Sunday to manage the company’s client projects and consulting service enhancements. He manages the client projects’ execution including reading the projects requirements, conducting engineering studies, and writing reports... He plans to join Intelligent NRG Solutions with 40 hours a week starting this September.” (DED Exhibit 31).

Tuan Ngo testified that he has been an owner of INS since 2018. He spent approximately 40 hours per week at Indie Energy up until September 2023, and now devotes more than 40 hours per week at INS. He acknowledged that he is part owner of IES, but he does not work for that company. (Hearing Testimony of Tuan Ngo).

Glenn Butler testified that Tuyen Vu and Tuan Ngo are both relied upon for certification. He stated that Mr. Vu and Mr. Ngo both spent 40 hours per week during business hours at employment outside of the operations of INS. He stated that Thomas Ortmeier and Phil Barker are the persons who respond to the requests for proposals and do the cost estimating. He noted that the resumes of Mr. Vu and Mr. Ngo did not reflect bids or proposals. He stated that despite what was listed in the application for management responsibilities, Mr. Vu stated that he is responsible for all management responsibilities, meaning Mr. Ngo has no role. He said that Mr. Vu has the least amount of experience relative to the critical functions of INS, as compared with Mr. Ortmeier and Mr. Barker. Therefore, the owners relied upon for certification must rely upon them. He also noted that Mr. Ngo is not even mentioned on the firm’s website. In summation, Mr. Butler testified that the applicant had no employees, that both Mr. Vu and Mr. Ngo had full time jobs, that the time

they devoted to the applicant business was outside normal business hours and that the work was subbed out, all leading to the denial for certification. (Hearing Testimony of Glenn Butler).

The Division's determination to deny the application on the basis that INS failed to demonstrate that the minority owners 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 INS is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “(1) 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; (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.”

Mr. Vu testified that since July 2023, INS self-performed over 80% of its work. He said no company self-performs 100% of its contracts. He stated that he is a silent investor of IES and does not work for IES. On cross-examination, he acknowledged that INS subcontracted work in 2022 and 2023 to IES and subcontracted work in 2023 to John Mitchell and Christopher Ritacco. (Hearing Testimony of Tuyen Vu).

Mr. Ngo testified that he is also an owner of IES and does not work for IES. (Hearing Testimony of Tuan Ngo).

The narratives and tax returns provided show no employees or income being paid out of the business except to subcontractors. The owners managed the company with subcontractors who performed the work. The subcontractors hired in 2022 was Intelligent Energy Solutions/Construction Limited Company, Vietnam. (DED Exhibits 1, 2, 12, 14 and 33).

Glenn Butler testified that Mr. Vu owns 35% of IES and Mr. Ngo owns 45% of IES. He stated that IES performs subcontracting for INS and the companies share resources; INS uses IES employees, and INS primarily transacts business with IES. He referenced the application which stated that INS had 0 employees. Mr. Butler stated that INS receives tangible benefits from IES because it does not have to perform the contracts it subcontracts to IES. Without the IES employees, INS could not perform the work. In addition, one of the three largest accounts completed in 2023 were with Indie Energy Inc. where Mr. Ngo was still employed at the time. (Hearing Testimony of Glenn Butler; DED Exhibit 1).

Therefore, INS is sharing resources with IES and receiving tangible benefits as a result of the connection with that entity.

The Division's determination to deny the application on the basis that INS failed to demonstrate that it operates independently, as required under 5 NYCRR §144.2(e) is supported by substantial evidence.

CONCLUSION

INS did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(c)(2) and 144.2(e), was not based on substantial evidence. The Division has withdrawn the denial ground pertaining to NYCRR §144.2(c)(1).

RECOMMENDATION

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

In the Matter of Intelligent NRG Solutions, LLC
DED File ID No. 71122
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
Tribunal I	Request to Appeal	Y	Y
Tribunal II	Notice of Hearing	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	N	N
DED 4	Notice of Hearing	N	N
DED 5	Certification Application Affidavit of Tuan Ngo	Y	Y
DED 6	Certification Application Affidavit of Tuyen Vu	Y	Y
DED 7	No State Tax Filing – Tuan Ngo	N	N
DED 8	2021 Personal Tax Return of Tuan Ngo	Y	Y
DED 9	2022 Personal Tax Return of Tuan Ngo	Y	Y
DED 10	2021 Personal Tax Return of Tuyen Vu	Y	Y
DED 11	2022 Personal Tax Return of Tuyen Vu	Y	Y
DED 12	2022 Business Tax Return	Y	Y
DED 13	2022 Form @-8BEN-E (IES)	N	N
DED 14	W-2 No Wage Statement	Y	Y
DED 15	Form 1099 Statement	Y	Y
DED 16	2022 Subcontract with IES	Y	Y

DED 17	2023 Subcontract with IES	Y	Y
DED 18	2023 Subcontract with Christopher Ritazzo	Y	Y
DED 19	9/8/2023 Q&A Response	Y	Y
DED 20	Business Checking Account Statement	N	N
DED 21	Contract with Arup	Y	Y
DED 22	Contract with Garnett Fleming	Y	Y
DED 23	Contract with SGC	Y	Y
DED 24	Resume of Tuan Ngo	Y	Y
DED 25	Narrative re: PE License of Tuan Ngo	N	N
DED 26	Payment Receipt for PE Application	N	N
DED 27	Tuan Ngo Certificate	N	N
DED 28	Resume of Tuyen Vu	Y	Y
DED 29	Tuyen Vu PE Certificate	Y	Y
DED 30	INS Website – About Us	Y	Y
DED 31	8/22/2023 Q&A Response	Y	Y
DED 32	8/24/2023 Q&A Response	Y	Y
DED 33	9/8/2023 Q&A Response	Y	Y
DED 34	Executive Law Article 15-A	N	N
DED 35	5 NYCRR Parts 140-147	N	N
DED 36	Blank New Certification Application	N	N

DED 37	Garnett Fleming check deposit	Y	Y
DED 38	SGC Engineering deposit	Y	Y