

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

In the Matter
- of -
the Application of KLE, INC.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 71103

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
December 13, 2024

This matter considers the appeal by KLE Inc. (“KLE” 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 19, 2023, KLE applied for certification as a women-owned business enterprise (“WBE”). KLE based its application on Ms. Erika Elek. (APP Exhibit 2; DED Exhibit 1).
2. On October 30, 2023, the Division denied the application on the following grounds (APP Exhibit 1; DED Exhibit 2):
 - a. The minority group or women owner(s) relied upon for certification have not demonstrated that they are the highest-ranking officer and/or control the Board of Directors and/or serve as a general partner, as required by 5 NYCRR § 144.2(d)(1).
3. KLE submitted a request to appeal the denial determination via hearing, dated November 21, 2023. (Tribunal Exhibit I).
4. A Notice of Hearing and Conference was sent to all parties on August 21, 2024 (DED Exhibit 3).
5. A hearing was held and concluded on December 4, 2024.

FINDINGS OF FACT

6. KLE is engaged in the business of providing project services, including consulting, project management, program management, construction management, design, engineering, and field surveys for the utility industry. (APP Exhibits 1 and 2; DED Exhibits 1 and 2; Hearing Testimony of Erika Elek).
7. Erika Elek is the woman owner relied upon for certification and is the President, CEO, and 51% owner of the applicant business. TRC Companies (“TRC”) is a shareholder and 49% owner of KLE. (APP Exhibits 2, 3, and 20; DED Exhibits 1, 5, and 10; Hearing Testimony of Ms. Elek).
8. KLE’s Board of Directors has three members, Ms. Elek, Ms. Karin Hicks, and Mr. James Mayer. Ms. Elek is the President, Treasurer, and Secretary of the Board. Ms. Hicks, the Director of Business Operations was appointed to the board by Ms. Elek and Mr. Mayer is a representative of TRC. (APP Exhibits 13 and 15; DED Exhibits 7 and 8; Hearing Testimony of Erika Elek).
9. KLE’s Bylaws states that “[t]he business of the corporation shall be managed by its board of directors” and that “The President shall be the principal executive officer. . . [s]ubject to the direction and control of the board of directors.” The Bylaws also provide that a majority of the directors constitutes a quorum for the transaction of business at board meetings. (APP Exhibits 12 and 21; DED Exhibit 4).
10. The Shareholder’s Agreement (“Agreement”) provides that the Board of Directors will direct the management of the applicant business and that the board will consist of three members, two of which will be appointed by Ms. Elek and one appointed by TRC. The Directors will manage KLE by a majority vote, except for specific items which require a unanimous vote by

the Board. Those items include but are not limited to amending the Article of Incorporation, Bylaws, or Shareholder Agreement; making a general assignment or transfer for the benefit of creditors or liquidation; refinancing indebtedness; and the payment of dividends or other cash distributions to shareholders. (APP Exhibit 20; DED Exhibit 10).

11. The Shareholders Agreement also requires that a Contract Risk Committee, represented by both shareholders be established, and that the committee create standards for the acceptance of risk under contracts with customers, and that KLE “not enter into contracts that do not comply with those standards without the unanimous approval of the committee.” In addition, the Shareholders Agreement requires the establishment of a Compensation Committee, also made up of equal members of both shareholders that will “establish compensation and other terms and conditions of employment for the CEO and other employees of the applicant business who receive compensation not billed out under projects in excess of \$175,000 per year.” That compensation and other terms cannot be changed or waived without unanimous approval of the Committee. (APP Exhibit 20; DED Exhibit 10).

12. Ms. Hicks is the Director of Business Operations for KLE and is an “at will” employee. Mr. Mayer is a Professional Engineer and is an Executive Vice President of TRC. Ms. Hicks may be removed from the Board at any time by Ms. Elek. (APP Exhibits 6 and 7; Hearing Testimony of Ms. Elek).

13. The intention behind the three-member board, one member being Ms. Elek, and one appointed by Ms. Elek was to provide Ms. Elek with control over the Board and over the day-to-day operations of the business. The Contract Risk Committee has only met once since its creations and has yet to create the parameters for risk mitigation. To date, Ms. Elek has never sought

approval to enter into any contracts with the Contract Risk Committee. (Hearing Testimony of Ms. Elek).

APPLICABLE LAW

5 NYCRR § 144.2 (d)(1) states as follows:

Control. Minority group members and women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control of the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

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 KLE 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

James P. Youngs, Esq., of Hancock Estabrook, LLP, appeared at the hearing on behalf of KLE. The following witness testified on behalf of KLE: Erika Elek, Owner, CEO, and President, KLE. KLE offered the following exhibits which were admitted into evidence without objection: APP Exhibits 1 - 21.

Mr. Kyle Satchell, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Mr. Glenn Butler, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence without objection: DED Exhibits 1 – 11.

I. Control

Minority/women-owners relied on for certification must be the highest-ranking officer of the business enterprise and must control the board of directors or serve as a general partner as required by 5 NYCRR § 144.2(d)(1). In evaluating this regulation, the Division requests a list of the applicant business' corporate directors and regularly examines an applicant's by-laws and operating agreements. (See e.g. *Matter of ADK Water Solutions, Inc.*, Recommended Order, June 12, 2023 (Final Order 23-07, Aug. 10, 2023), *Matter of LHS International, Inc.*, Recommended Order, June 6, 2023 (Final Order 23-07, Aug. 11, 2023), and *Matter of S.C. Spencer Electric, Inc.* Recommended Order July 29, 2021 (Final Order 22-04, March 31, 2022).

Counsel for the applicant argued that the Division's decision to deny certification, because Ms. Elek does not control the Board of Directors, is based on speculation and not on substantial evidence, and that the only document considered by the Division in its decision were the Bylaws, as indicated in the Division's denial determination. (APP Exhibits 12 and 21; DED Exhibit 4). Counsel contends that there is no evidence that the Division considered the Shareholders Agreement in its determination, and because of that the provisions in the Shareholders Agreement should not now be considered as a basis for the denial of certification. (APP Exhibit 20; DED Exhibit 10).

The Division's position is that while Ms. Elek is highly qualified and runs the day-to-day operations of the business, she does not control the Board of Directors, a fact which the Division holds is clear in both the business applicant's Bylaws and in the Shareholder Agreement, which documents were provided by the applicant in their application. Therefore, the Division argues that there is ample substantial evidence to support the denial determination.

In this instance, as part of the initial certification application, the applicant provided copies of both KLE's Bylaws and its Shareholder Agreement, a Shareholder Resolution, and minutes from Board meetings. (APP Exhibits 12, 13, 14, 15, 20, and 21; DED Exhibits 4, 7, 8, 9, and 10). According to those documents the applicant business is managed by the Board of Directors, made up of Ms. Elek, Ms. Hicks, appointed by Ms. Elek, and Mr. Mayer, appointed by TRC. The Bylaws provide that a quorum consists of a majority of the directors for the transaction of business at board meetings. Thus, two of the three board members must be present for business. In addition, the shareholders agreement, which supersedes the Bylaws, requires that certain business decisions may only be made upon a unanimous decision by the Board, including the distribution of

dividends, the setting of certain compensation for employees, and for the signing of high-risk contracts. (APP Exhibits 12, 20, and 21; DED Exhibits 4 and 10).

At hearing, Ms. Elek testified that as a practical matter she does control the Board of Directors, as she controls two of the three board seats, that they meet infrequently, that the Contract Risk Committee, referenced in the Shareholders Agreement has yet to create standards and has never been consulted by the applicant business regarding any contracts, and that the compensation provision, also in the Shareholders Agreement, have not applied to any of KLE's employees, with the exception of Ms. Elek.. (APP Exhibit 20; DED Exhibit 10; Hearing Testimony of Ms. Elek). Ms. Elek also testified that the intention behind the makeup of the board, specifically that there are only three members, that there is no vice-president, and that she holds one seat and appoints the second of three seats, was to insure her control of the business. Ms. Elek also testified, and the Division conceded, that she runs the day-to-day operations of the business. (Hearing Testimony of Ms. Elek; Hearing Testimony of Mr. Butler). Ms. Elek's testimony, contained no new information, but clarified the operational practices of the business, is deemed both credible and admissible. (See *Scherzi*, supra).

Mr. Glenn Butler testified, on behalf of the Division, that the information before the Division, specifically citing to the quorum requirement in Article 3, Section 6 of the Bylaws supports the finding that Ms. Elek does not control the Board of Directors, as according to the provision, any two members of the Board constitute a quorum. In addition, while Mr. Butler testified that the denial letter is silent as to the Shareholders Agreement itself, and as he did not discuss this specific case with the analyst nor with the certification director who drafted the denial letter, he did testify that it is standard practice for the Division analyst assigned to any certification application to review all of the document submitted by the applicant. (Hearing Testimony of Mr.

Butler). Further, the denial letter itself, while not specifically referencing the Shareholders Agreement, does refer to additional materials submitted by the applicant, which includes the Shareholders Agreement. (APP Exhibit 1; DED Exhibit 2). Further, both the applicant offered into evidence a copy of the Shareholders Agreement for consideration by this Tribunal on appeal and did not object to the admission of the same document by the Division. (APP Exhibit 20; DED Exhibit 10).

While Ms. Elek's testimony clarified that the Board is not an active Board, nor is it consulted on a regular basis regarding the operations of the business, nonetheless the Bylaws require a quorum, which need not include Ms. Elek, and the Shareholders Agreement provides, unequivocally, that certain business decisions may only be made by unanimous consent of all the shareholders. As the regulation specifically requires that the owner relied upon for certification must control the board of directors, and as there are numerous items delineated in the Shareholders Agreement which demand that unanimous consent be obtained for certain decisions, Ms. Elek does not control the Board on all matters. (5 NYCRR §144.2(d)(1)).

Therefore, the applicant has failed to satisfy their burden. The Division's determination that KLE failed to demonstrate that the woman relied upon for certification controls the Board of Directors as required under 5 NYCRR § 144.2(d)(1) is based upon substantial evidence.

CONCLUSION

KLE 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(d)(1).

RECOMMENDATION

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

In the Matter of KLE, Inc.
DED File ID No. 71103
Exhibit Chart

| Exhibit #: | Description of the Exhibits | Offered (Yes/No) | Admitted (Yes/No) |
|------------|--|---------------------|----------------------|
| APP 1 | Denial Letter dated 7-19-2023 | Y | Y |
| APP 2 | WBE Application 7-18-23 | Y | Y |
| APP 3 | KLE Stock Transfer Ledger | Y | Y |
| APP 4 | KLE Stock Subscription Agreement - TRC Companies Erika Elek 8-16-21 | Y | Y |
| APP 5 | Erika Elek Resume | Y | Y |
| APP 6 | James Mayer Resume | Y | Y |
| APP 7 | Karin Hicks Resume | Y | Y |
| APP 8 | KLE Inc. Article of Incorp 2/19/21 | Y | Y |
| APP 9 | KLE NY Entity Formation 4-27-2023 | Y | Y |
| APP 10 | KLE NY FQ Application – Signed | Y | Y |
| APP 11 | KLE NYS Application of Authority 4-28-23 | Y | Y |
| APP 12 | KLE By Laws | Y | Y |
| APP 13 | 2021 Annual Meeting Board of Directors | Y | Y |
| APP 14 | 2021 Annual Meeting Shareholders | Y | Y |
| APP 15 | Resolution Appointment Board Members Sep 30 2021 | Y | Y |
| APP 16 | NYS MWBE Loan Statement 7-18-23 | Y | Y |
| APP 17 | TRC Master Subcontract Agreement 12-30-21 | Y | Y |

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|------------|--|---|---|
| APP 18 | Gas Transmissions Systems Inc Subcontractor Services Agreement 8-08-22 | Y | Y |
| APP 19 | TRC-KLE Master Temp Staffing Agreement 6-23-23 | Y | Y |
| APP 20 | KLE Shareholder Agreement 8-16-21 | Y | Y |
| APP 21 | KLE Amended and Restated By-Laws November 1, 2024 | Y | Y |
| APP 22 | KLE Shareholder Resolutions and Ratifications October 24, 2024 | N | N |
| DED 1 | WBE Cert Application | Y | Y |
| DED 2 | Denial Determination | Y | Y |
| DED 3 | DED Notice of Hearing Appeal | Y | Y |
| DED 4 | KLE Bylaws | Y | Y |
| DED 5 | KLE Stock Transfer Ledger | Y | Y |
| DED 6 | KLE Shareholder Interests | Y | Y |
| DED 7 | KLE Shareholder Resolution 9/30/21 | Y | Y |
| DED 8 | KLE Annual Meeting of the Board of Directors | Y | Y |
| DED 9 | KLE Annual Meeting of the Shareholders | Y | Y |
| DED 10 | KLE Shareholder Agreement | Y | Y |
| DED 11 | KLE Voting Rights | Y | Y |
| Tribunal I | Request to Appeal | N | Y |