

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

In the Matter

- of -

the Application of KRMC, Inc. dba Mac-Son Industrial Services, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 66230

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 3, 2023

This matter considers the written appeal by KRMC, Inc. dba Mac-Son Industrial Services, Inc. (“KRMC” 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 April 30, 2019, Ms. Patricia Vanalstyne, as President, applied on behalf of KRMC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On November 30, 2021, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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);
 - (b) 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
 - (c) 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).
3. KRMC timely filed a notice of appeal on December 30, 2021 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to KRMC on October 3, 2022 (DED

Exhibit 3).

5. The Division filed an Affidavit of Glenn Butler, Assistant Certification Director, dated June 29, 2023, and a brief of Candace Williamson, Esq., counsel for the Division, dated June 29, 2023.

FINDINGS OF FACT

6. KRMC is engaged in the business of tank and vessel cleaning, oil and water separators, jack hammering, sand blasting, oil spill cleanup, wet and dry vacuum truck services, and tank removal (DED Exhibit 1).
7. Ms. Patricia Vanalstyne is the President and 100% owner of KRMC (DED Exhibit 1).
8. In 2019, Ms. Vanalstyne received \$ [REDACTED] in wages from KRMC, while Mr. Charles Meisner, a Supervisor/Estimator received \$ [REDACTED], Mr. David Dooley, a Supervisor, Estimator and Operator, received \$ [REDACTED], Mr. Edward Hart, Jr., the foreman, received \$ [REDACTED] and Chris Sawyer, the foreman received \$ [REDACTED] in wages (DED Exhibits 1 and 4).
9. Ms. Vanalstyne's resume reflects that she manages the daily operation of the business, processes accounts payable and accounts receivable, manages payroll and staff leave, enforces safety protocols, handles staffing issues, works with dispatch and field supervisors to plan weekly workflow, processes incoming mail, reconciles cash receipts, maintains safety training, and oversees other compliance matters. She was an office manager from 1985 to 2018, when she became the owner and President of KRMC (DED Exhibit 5).
10. Mr. Charles Meisner is the Supervisor of Field Operations. His duties include working with the terminal managers, setting up jobs including manpower and equipment, and ensuring safety procedures are taken on jobsites (DED Exhibit 6).

11. Mr. David Dooley is the Supervisor of Field Operations. He works with residential customers on tank removal, supervising labor employees, tends to emergency calls, works with heavy machinery, digging and trenching, completing tank closure reports, job bidding, taking soil/fuel samples, oil spill cleanups, cleaning tank and vessels, and operating wet/dry vacuum trucks (DED Exhibit 6).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states as follows:

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:

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) 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...
- (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.

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 KRMC 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

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 *Matter of C.W. Brown, Inc. v. Canton*, 216 AD2d 841 (3rd Dept. 1995), the Court found that the Division’s review of tax returns provided substantial evidence supporting the Division’s

consideration of whether a woman-owned business met the eligibility criterion at former 5 NYCRR §144.2(c)(2) concerning sharing of risks and profits.

The tax documents show that in 2019, Ms. Vanalstyne received \$ [REDACTED] in wages from KRMC, while Mr. Charles Meisner received \$ [REDACTED], Mr. David Dooley received \$ [REDACTED], Mr. Edward Hart, Jr. received \$ [REDACTED] and Mr. Chris Sawyer received \$ [REDACTED] in wages (DED Exhibits 1 and 4).

This is a disproportionate allocation and supports the conclusion that Ms. Vanalstyne did not share in the profits of KRMC in proportion to her equity interest as required by 5 NYCRR §144.2(b)(3).

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.

Ms. Vanalstyne does not have any industry specific expertise. She was an Office Manager from 1985 to 2018. As Office Manager, she processed accounts receivable and accounts payable, made weekly payroll and time sheet reports, enforced safety policies, worked with dispatch and field supervisors regarding the daily operation, maintained schedules and trainings, processed incoming mail, and kept track of financial matters. As President, she added the role of managing the daily operation of the business (DED Exhibit 5). Her skills pertaining to KRMC are related to

general business or office management. She does not possess any academic or technical training relevant to the industry (DED Exhibits 1 and 5). The core functions of the business are tank and vessel cleaning, oil and water separators, and operation of heavy machinery (DED Exhibit 1). Ms. Vanalstyne does not have training or experience in those areas. As President, she oversees the general running of KRMC. She does not have the training or experience in the industry necessary to supervise the work of the employees.

Mr. Meisner's daily duties include him working closely with the terminal managers to fulfill their work needs, setting up jobs including manpower and equipment, and ensuring safety procedures are taken on jobsites. Mr. Dooley's daily responsibilities include working with residential customers on tank removal, supervising labor employees, tending to emergency calls, working with heavy machinery, digging and trenching, completing tank closure reports, job bidding, taking soil/fuel samples, oil spill cleanups, cleaning tank and vessels, and operating a wet/dry vacuum truck (DED Exhibit 6).

Mr. Meisner and Mr. Dooley are responsible for performing the core revenue-generating functions of the business.

5 NYCRR §144.2(c)(2) states that "... 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".

The 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).

KRMC's critical functions are to estimate and bid jobs to generate revenue and perform tank and vessel cleaning, oil and water separation, operation of heavy machinery, sand blasting, oil spill cleanup, wet and dry vacuum truck services and tank removal (DED Exhibit 1). Mr. Meisner and Mr. Dooley solely makes decisions with regard to estimating, bid preparation and supervising field operations (DED Exhibit 6). Ms. Vanalstyne has no experience in the industry, and she failed to demonstrate that she can bid on or complete any work related to KRMC's critical functions.

CONCLUSION

KRMC 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)(3), 144.2(c)(1) and 144.2(c)(2) 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 KRMC's application for certification as a woman-owned business enterprise.

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Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	KRMC 2019 W-2s	Y	Y
DED 5	Resume of Patricia Vanalstyne	Y	Y
DED 6	Narrative Responses	Y	Y
APP 1	Request to Appeal	Y	Y