

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

In the Matter

- of -

the Application of Major Systems Mechanical Corp.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51776

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 17, 2024

This matter considers the written appeal by Major Systems Mechanical Corp. (“Major” 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 February 4, 2024, Ms. Dina Murphy, as President, applied on behalf of Major for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On May 21, 2024, 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);
 - (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); and
 - (d) Minority group members or women relied upon for certification must be the highest-

- ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).
3. Major timely filed a Request to Appeal on June 17, 2024 (DED Exhibit 3).
 4. A notice to proceed via written appeal was sent to Major on June 20, 2024 (DED Exhibit 4).
 5. Major filed its written appeal by letter dated July 19, 2024, with attachments (APP Exhibit A).
 6. The Division filed an Affidavit of Abdul Bah, Associate Certification Director, dated November 21, 2024, and a brief of Dennie Byam Esq., counsel for the Division, dated November 22, 2024.

FINDINGS OF FACT

7. Major is engaged in the business of heating, air conditioning, plumbing, and related commercial services (DED Exhibit 1).
8. Ms. Dina Murphy is President and has a 51% ownership interest. Mr. Timothy Murphy is Vice President and has a 49% ownership interest (DED Exhibit 1).
9. Article 1, Section 7 of Major's By-Laws states "...any corporate action, other than the election of directors to be taken by vote of the shareholders, shall be authorized by a majority of votes cast at a meeting of shareholders by holders of shares entitled to vote thereat." Article II, Section 1 states "The affairs and the business of the Corporation... shall be managed by the Board of Directors..." Article II, Section 4 states "The Board of Directors shall have the control and general management of the affairs and business of the Corporation..." Article II, Section 9 states "...the affirmative vote of a majority of the Directors present at any meeting of the Board of Directors at which a quorum is present shall be necessary for the transaction of any item of business thereat..." Article II, Section

11 of the By-Laws states “any or all of the directors may be removed, either with or without cause at any time by a vote of the shareholders at any meeting called for such purpose, and another director.” Article III, Section 4 states “The President shall be the chief executive officer of the Corporation and shall have general charge of the business, affairs and property thereof, subject to direction of the Board of Directors.” (DED Exhibit 5).

10. The Board of Directors consists of Dina Murphy and Timothy Murphy (DED Exhibit 1).
11. Major entered into a Business Loan Agreement with Dime Community Bank in which Major borrowed \$[REDACTED]. The loan was secured by personal guarantees of each of Dina Murphy and Timothy Murphy and each signed a separate Commercial Guaranty agreement. Under the Guaranty Agreements, “Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender’s remedies against anyone else obligated to pay the indebtedness...” (DED Exhibit 9).
12. In 2023, Dina Murphy was paid wages from Major in the amount of \$[REDACTED], and Timothy Murphy was paid wages in the amount of \$[REDACTED]. (DED Exhibit 19).
13. Ms. Murphy’s resume states that she is the President and CFO of Major. She previously worked as an office manager, an export manager, and personnel manager. Her skills include “trade show coordination and sales support”, “sales and sales management: and “proficient in all aspects of business accounting.” (DED Exhibit 7).
14. Timothy Murphy’s resume reflects that his responsibilities at Major include “sales, estimating, purchasing and project management administration. He has over twenty-six (26) years of professional experience working as an HVAC mechanic and in control systems sales, and has been a member of the Metal Trades Branch of Local Union 638, since 2017 (DED Exhibits 6 and 21). His day-to-day duties and responsibilities are

coordinating with subcontractors, and in the field project management of Union Trades (DED Exhibit 8).

15. Lenny Knight is the Senior Project Manager, and he performs field coordination, labor coordination, project management, scheduling and deliveries and materials (DED Exhibit 8).

16. Ms. Murphy's day-to-day duties and responsibilities include "all sales; all financial decisions; manage billing; collections; project development; negotiating insurance; banking, lines of credit and bank records; marketing and all sales activity; bonds; preparing bids; estimating; hiring and firing; purchasing equipment and supplies; leasing vehicles; managing payroll and human resource issues; negotiating contracts and subcontracts; managing the office; signing checks; accounts receivable; accounts payable; research and administrative duties; filing all requisite tax returns and tax compliance; interfacing with CPA's; signatory to the Local Union Agreement." (DED Exhibit 8).

17. The Application lists "HVAC upgrades- Boilers", "HVAC upgrades- Chillers", and "HVAC UV Lights Install" as the "Type of Work" Major performed under the three largest contracts over the past 3 years. It lists the three largest current contracts as "HVAC- cooling tower", "HVAC Boilers", and "HVAC Chillers". (DED Exhibit 1).

18. The type of work that Major has been contracted to do is "North Building Cooling Tower Condensate Piping Renovation and Asbestos Abatement" with Hunter College; contracting work employing Second Tier Contractors with Queens Botanical Garden, in addition to mechanical, electrical, architectural, and structural work with Ramboll Americas Integrated Solutions, Inc., and boiler replacement work with JDC Energy Services, LLC. (DED Exhibits 15 -18).

APPLICABLE LAW

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) 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.

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

- (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 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 Major 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 the woman-owner does not share in the risks and profits in proportion with her ownership interest. *See Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21 dated March 27, 2017; *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 3d 841 (3d Dept. 1995).

In 2023, Dina Murphy was paid wages from Major in the amount of \$██████, and Timothy Murphy was paid wages in the amount of \$██████. (DED Exhibit 19). The Division argues that since Ms. Murphy received substantially more than Mr. Murphy, the salaries “are not proportionate to their 51/49% ownership interest”, and therefore “she does not meet the profits requirement”

criteria under 5 NYCRR §144.2(b)(3). This argument is unpersuasive. The Division cites no cases denying certification where a woman-owner's wages exceeds her percentage ownership interest.

If the owner relied upon for certification does not bear the financial risks associated with their ownership interest, they do not meet this criterion. See *Matter of Tambe Metal Products, Inc.*, Recommended Order dated January 19, 2017, Final Order 17-05 dated January 24, 2017.

Major entered into a Business Loan Agreement with Dime Community Bank in which Major borrowed \$[REDACTED]. The loan was secured by personal guarantees of each of Dina Murphy and Timothy Murphy and each signed a separate Commercial Guaranty agreement. Under the Guaranty Agreements, "Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the indebtedness..." (DED Exhibit 9).

Since Dina Murphy and Timothy Murphy are jointly and severally liable for payment of the loan, Mr. Murphy is assuming more than 49% of the risk. Also, the lender can pursue Mr. Murphy for the entire loan repayment without pursuing Ms. Murphy. (DED Exhibit 9) Therefore, Ms. Murphy does not share in the risks in proportion to her ownership interest.

Ms. Murphy argues on appeal "I am in control of the day-to-day operations and, as such, I share in the risks and potential profits of Major's business enterprise commensurate with equity interests." (APP Exhibit A). This does not contradict the fact that the Loan and Guaranty Agreements allow the Lender to pursue only Mr. Murphy for the indebtedness (DED Exhibit 9).

The Division's determination to deny the application on the basis that Major failed to demonstrate that Ms. Murphy shared in the risks 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 minority-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.

5 NYCRR §144.2(c)(2) states that “Minority group members... 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 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).

With regard to technical competence, where the minority/woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, supra at 1346.

Ms. Murphy does not have the licensing, training, or job experience in HVAC installation or general contracting work. Ms. Murphy’s resume states that she is the President and CFO of Major. She previously worked as an office manager, an export manager, and personnel manager. Her skills include “trade show coordination and sales support”, “sales and sales management: and “proficient in all aspects of business accounting.” (DED Exhibit 7).

Timothy Murphy’s resume reflects that his responsibilities at Major include “sales, estimating, purchasing and project management administration. He has over twenty-six (26) years of professional experience working as an HVAC mechanic and in control systems sales, and has been a member of the Metal Trades Branch of Local Union 638, since 2017 (DED Exhibits 6 and 21). His day-to-day duties and responsibilities are coordinating with subcontractors, and in the field project management of Union Trades (DED Exhibit 8).

Lenny Knight is the Senior Project Manager, and he performs field coordination, labor coordination, project management, scheduling and deliveries and materials (DED Exhibit 8).

Ms. Murphy submitted a general contractor license with the Application. However, this license does not demonstrate competence in the plumbing and HVAC industry (DED Exhibit 20). The license is only for New York City. The application states that Major desires to conduct business in New York City, Long Island, Mid-Hudson, and Southern Tier (DED Exhibit 1). Also, Major is doing business in Syracuse, New York, and New Jersey (DED Exhibits 17 and 18).

Ms. Murphy's day-to-day duties and responsibilities include "all sales; all financial decisions; manage billing; collections; project development; negotiating insurance; banking, lines of credit and bank records; marketing and all sales activity; bonds; preparing bids; estimating; hiring and firing; purchasing equipment and supplies; leasing vehicles; managing payroll and human resource issues; negotiating contracts and subcontracts; managing the office; signing checks; accounts receivable; accounts payable; research and administrative duties; filing all requisite tax returns and tax compliance; interfacing with CPA's; signatory to the Local Union Agreement." (DED Exhibit 8).

The Application lists "HVAC upgrades- Boilers", "HVAC upgrades- Chillers", and "HVAC UV Lights Install", as the "Type of Work" Major performed under the three largest contracts over the past three years. It lists the three largest current contracts as "HVAC- cooling tower", "HVAC Boilers", and "HVAC Chillers". (DED Exhibit 1). The type of work that Major has been contracted to do is "North Building Cooling Tower Condensate Piping Renovation and Asbestos Abatement" with Hunter College; contracting work employing Second Tier Contractors with Queens Botanical Garden, in addition to mechanical, electrical, architectural, and structural work with Ramboll Americas Integrated Solutions, Inc., and boiler replacement work with JDC Energy Services, LLC. (DED Exhibits 15 -18). Ms. Murphy does not have any training or experience to perform these tasks or supervise the work in the field. (DED Exhibit 7).

Ms. Murphy argues on appeal that she had to become "proficient in reading and understanding design blueprints, negotiating labor contracts and familiarizing myself with trade specifications and jargon." (APP Exhibit A). However, she does not have experience or training in the critical functions of the business, which are plumbing, heating and air-conditioning contracting (DED Exhibit 1).

Ms. Murphy acknowledges that Mr. Murphy is “crucial to the operation of the business.” She states that she does not need “to have the precise technical experience or expertise needed to undertake the business’s day-to-day work.” (APP Exhibit A). However, Ms. Murphy does not supervise work in the field or do the work performed by the subcontractors or union members.

The Division’s determination to deny the application on the basis that Major failed to demonstrate that Ms. Murphy possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and 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.

III. Control

The Division also denied certification on the ground that Ms. Murphy does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Dina Murphy and Timothy Murphy are the only directors of the business (DED Exhibit 1).

Article II, Section 1 of Major’s By-Laws states “The affairs and the business of the Corporation... shall be managed by the Board of Directors...” Article II, Section 4 states “The Board of Directors shall have the control and general management of the affairs and business of the Corporation...” Article II, Section 9 states “... the affirmative vote of a majority of the Directors present at any meeting of the Board of Directors at which a quorum is present shall be necessary for the transaction of any item of business thereat...” Article III, Section 4 states “The President shall be the chief executive officer of the Corporation and shall have general charge of the business, affairs and property thereof, subject to direction of the Board of Directors.”(DED Exhibit 5).

Since there needs to be a majority of the Board of Directors to transact business, Ms. Murphy cannot make decisions on behalf of the Board without Mr. Murphy.

Ms. Murphy argues on appeal that because she is a majority shareholder, she controls the affairs of the shareholders and Board of Directors. She cites By-Laws Article 1, Section 7, which states "...any corporate action, other than the election of directors to be taken by vote of the shareholders, shall be authorized by a majority of votes cast at a meeting of shareholders by holders of shares entitled to vote thereat." She argues "I possess the majority of shares in Major and, therefore, undisputedly control the Board of Directors." (APP Exhibit A). However, Article II, Section 11 of the By-Laws states "any or all of the directors may be removed, either with or without cause at any time by a vote of the shareholders at any meeting called for such purpose, and another director." (DED Exhibit 5) Therefore, directors can only be removed by a vote of the shareholders and the vote of another director. Also, even if Ms. Murphy could remove another director, it would require a separate action after the Board made a decision that required Mr. Murphy's consent.

The Division's determination to deny the application on the basis that Ms. Murphy does not control the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

CONCLUSION

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

In the Matter of Major Systems Mechanical Corp.
DED File ID No. 51776
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Letter dated July 19, 2024, with exhibits	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Major Systems Mechanical Corp. By-Laws	Y	Y
DED 6	Timothy Murphy Resume	Y	Y
DED 7	Dina Murphy Resume	Y	Y
DED 8	Day to Day Duties and Responsibilities Narrative	Y	Y
DED 9	Corporate Resolution to Borrow	Y	Y
DED 10	Certification Application Affidavit	Y	Y
DED 11	Certificate from Secretary dated January 16, 2012	Y	Y
DED 12	Certificate of Incorporation	Y	Y
DED 13	Shareholders Meeting Minutes and Shareholders Agreement	Y	Y
DED 14	Stock Certificates	Y	Y
DED 15	June 16, 2022 Hunter College Contract	Y	Y
DED 16	March 10, 2023 Queens Botanical Garden Contract	Y	Y

DED 17	December 29, 2021 Ramboll Americas Integrated Solutions, Inc. Contract	Y	Y
DED 18	December 22, 2022 JDC Energy Services, LLC Purchase Order	Y	Y
DED 19	2023 W2 and W3 statements	Y	Y
DED 20	Dina Murphy NYC Dept. of Buildings General Contractor License	Y	Y
DED 21	Enterprise Association Metal Trades Branch Local Union 638 July 1, 2017 Agreement	Y	Y