

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

In the Matter

- of -

the Application of Mason Technologies, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50051

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 9, 2024

This matter considers the written appeal by Mason Technologies, Inc., (“Mason Technologies” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On December 21, 2022, Ms. Jennifer Mason, as President, applied on behalf of Mason Technologies for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 18, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification do not 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
 - (b) Minority group members or women relied upon for certification do not 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. Mason Technologies timely filed a Request to Appeal on August 15, 2023 (APP Exhibit A, DED Exhibit 3).
4. A notice to proceed via written appeal was sent to Mason Technologies on August 24, 2023 (DED Exhibit 4).

5. Mason Technologies filed its written appeal by letter dated October 13, 2023, from its attorney Mark Glaser, Esq. of Greenberg Traurig, LLP with attachments (APP Exhibit B, DED Exhibit 18).
6. The Division filed an Affidavit of Glenn Butler, Associate Director, dated December 13, 2023, and a brief of Misha Wright Esq., counsel for the Division, dated December 14, 2023.

FINDINGS OF FACT

7. Mason Technologies is engaged in the business of providing structured cabling and telecommunications installation (DED Exhibit 1).
8. Ms. Jennifer Mason is the President and has a 100% ownership interest. (DED Exhibit 1).
9. The Company holds multiple certifications in the structured cabling field by recognized industry experts such as Building Industry Consulting Service International (“BICSI”) and is licensed to install fire alarm systems in New York. The BICSI Certificate is issued to Jonathan R. Kugler, a Mason Technologies employee. The business is also licensed to perform security installation, servicing, or maintenance in New York, which designates Lucas M. Broza, a Mason Technologies employee (DED Exhibit 1).
10. Ms. Mason holds A.A.S and B.S. degrees in nursing, and is a registered nurse, with management experience in nursing prior to founding Mason Technologies. She states that she is a “driven professional with over 20 years of successful management experience in the Telecommunications industry.” (DED Exhibit 5). She states that she “sets all future direction for the company”, is the “final decision maker for all business decisions,” and is the company’s only signatory who “reviews, approves and signs all company contracts”. (DED Exhibit 13). She is responsible for financial decisions, negotiating bonding and

insurance, hiring and firing, purchasing equipment/sales, managing and signing payroll, negotiating contracts and as signatory of the business account (DED Exhibit 13).

11. Mr. Jonathon Kugler heads the Information Technology (“IT”) and Engineering departments at Mason Technologies, “overseeing all projects from a technical standpoint to include surveying, designing, quoting, client feedback and provides technical support as needed during installs.” (DED Exhibit 13). He holds a range of technical certifications, including AVIXA Certified Technology Specialist- Design, “CTSD” from American National Standards Institute (DED Exhibits 6 and 8). He is responsible for estimating and preparing bids (DED Exhibit 13).
12. Mr. Lucas Broza provides “direct support to field install technicians,” “involvement with programming for our security division,” all “security surveys,” and “technical support to the entire security team.” (DED Exhibit 13). He holds a Master of Science degree in electrical and computer engineering and a Bachelor of Science in physics (DED Exhibit 9).
13. Mr. David Calnan is the Vice President of Operations. His responsibilities include managing day-to-day company operations, hiring and mentoring management team, monitoring performance, and overseeing the business development and account management strategies. He is responsible for preparing bids and marketing and sales (DED Exhibit 13).
14. Ms. Dawnmarie Toral is the Director of Administration. Her responsibilities include regulatory compliance, human resources, contract review, collaboration on operational infrastructure planning, and coaching team members. She is responsible for negotiating insurance and supervising field operations (DED Exhibits 12 and 13).

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:

- (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.

- (2) Operational decisions. 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 Mason Technologies for recertification 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. Prior Certification

The Division acknowledges that Mason Technologies was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Mason Technologies based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Mason Technologies had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the December 21, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

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. See also *Matter of Aspell Services, Inc.*, Recommended Order dated September 8, 2023, Final Order 23-09 dated September 22, 2023 (minority business owner did not “possess any academic or technical training relevant to the industry to make him qualified to supervise the work of the employees”); and *Matter of B&B Premiere Contracting, LLC*, Recommended Order dated October 6, 2023 (“the Division’s denial of certification has been upheld in cases where the party relied upon failed to show training or experience in the industry and failed to specify the working knowledge necessary to review or evaluate the work of more experienced employees”).

Ms. Mason does not have any industry-specific expertise; her skills are related to nursing and general business or office management. She does not possess any academic or technical training relevant to the business’ industry. Ms. Mason holds A.A.S and B.S. degrees in nursing, and is a registered nurse, with management experience in nursing prior to founding Mason Technologies. She states that she is a “driven professional with over 20 years of successful management experience in the Telecommunications industry.” (DED Exhibit 5). She states that she “sets all future direction for the company”, is the “final decision maker for all business decisions,” and is the company’s only signatory who “reviews, approves and signs all company

contracts”. (DED Exhibit 13). She is responsible for financial decisions, negotiating bonding and insurance, hiring and firing, purchasing equipment/sales, managing and signing payroll, negotiating contracts and as signatory of the business account (DED Exhibit 13). Applicant submitted no proof of Ms. Mason possessing any direct work experience in the structured cabling and telecommunications industry.

Mason Technologies’ previous certification was issued under prior Division Regulations (former 5 NYCRR §§140 – 145). Ms. Mason’s experience as noted above in the absence of technical competence may have been sufficient under former 5 NYCRR §144.2(b), which provided “... (1) Decisions pertaining to the operations of the business enterprise must be made by members or women claiming ownership of that business enterprise. The following will be considered in this regard: (i) ...women must have adequate managerial experience or technical competence in the business enterprise seeking certification...”. See also *Matter of C.W. Brown, Inc. v. Canton*, 216 A.D. 2d 841 (3d Dept. 1995) (“...so long as the woman seeking certification retains operational control of the enterprise, technical expertise is not necessary.”) The updated regulation does not provide for a finding of adequate managerial experience to satisfy 5 NYCRR §144.2(c)(1), which requires industry-specific competence.

The voluminous industry certificates and licenses submitted as part of the application show that technical competence is required to perform the critical functions of Mason Technologies’ business in the structured cabling and telecommunications infrastructure field (DED Exhibits 6, 7, 8, 9 and 10).

Mr. Jonathon Kugler heads the Information Technology (“IT”) and Engineering departments at Mason Technologies, “overseeing all projects from a technical standpoint to include surveying, designing, quoting, client feedback and provides technical support as needed

during installs.” (DED Exhibit 13). He holds a range of technical certifications, including AVIXA Certified Technology Specialist- Design, “CTSD” from American National Standards Institute (DED Exhibits 6 and 8). He is responsible for estimating and preparing bids (DED Exhibit 13).

Mr. Lucas Broza provides “direct support to field install technicians,” “involvement with programming for our security division,” all “security surveys,” and “technical support to the entire security team.” (DED Exhibit 13). He holds a Master of Science degree in electrical and computer engineering and a Bachelor of Science in physics (DED Exhibit 9).

Mr. David Calnan is the Vice President of Operations. His responsibilities include managing day-to-day company operations, hiring and mentoring management team, monitoring performance, and overseeing the business development and account management strategies. He is responsible for preparing bids and marketing and sales (DED Exhibit 13).

Ms. Dawnmarie Toral is the Director of Administration. Her responsibilities include regulatory compliance, human resources, contract review, collaboration on operational infrastructure planning, and coaching team members. She is responsible for negotiating insurance and supervising field operations (DED Exhibits 12 and 13).

Mr. Kugler and Mr. Broza possess licenses and certifications necessary to perform services and sales of equipment in the structured cabling and telecommunications infrastructure industry (DED Exhibits 6, 7, 8, 9 and 10). Ms. Mason submitted no documentation of any academic credentials that would prepare her for making critical business decisions in the industry. Mr. Broza, not Ms. Mason, provides direct field support to install technicians. Mr. Kugler, not Ms. Mason, is responsible for estimating and preparing bids, and generates complete turnkey project designs. Ms. Toral, not Ms. Mason, is responsible for supervising field operations. (DED Exhibit 13). Ms.

Mason does not perform any technical work on projects that would be adequate to supervise or evaluate the work of the employees.

On appeal, applicant states “As Ms. Mason’s resume demonstrates, her experience in the medical field served as the foundation for her initial entry into the cabling industry. The twenty-one years Ms. Mason spent developing, growing, and operating the Company developed her expertise in the cabling industry.” (APP Exhibit B, DED Exhibit 18). However, this experience supports the argument that she has adequate managerial experience, but is not proof of technical competence.

Applicant cites *Matter of Beach Erectors, Inc.*, Recommended Order dated June 14, 2017, Final Order 17-38, dated June 20, 2017, in support of its argument that lack of formal academic and/or apprenticeship training, is not sufficient to deny certification to the woman-owner’s approximate three decades in the industry to demonstrate competency (APP Exhibit B, DED Exhibit 18). However, unlike the woman-owner in *Beach Erectors*, Ms. Mason is not responsible for estimating, preparing bids, marketing and sales, and supervising field operations (DED Exhibit 13).

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 Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that

experience, such as by supervising or controlling field operations. *Matter of Panko Electrical and Maintenance Corp. v. Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019).

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).

The critical functions of Mason Technologies’ business are providing installation, labor and equipment to all facets of the structured cabling and telecommunications industry (DED Exhibit 1). The preparation of estimates and bid proposals are the means by which the business obtains the contracts to do the work for its clients. Mr. Kugler and Mr. Calnan prepare the estimates, contract quotes, pricing and technical specifications for the projects, not Ms. Mason (DED Exhibits 13, 14 and 15).

On appeal, applicant states “Ms. Mason is responsible for negotiating and executing all contracts.” She “oversees all aspects of the Company’s operations, and all departments of the Company are directed by and report directly to her.” She “is responsible for all financial decisions, negotiating bonding, insurance, and contracts, purchasing equipment/sales, and hiring and firing.” (APP Exhibit B, DED Exhibit 18). However, as stated above, Ms. Mason is not responsible for estimating, preparing bids, and supervising field operations, which are the critical functions of the business (DED Exhibits 1 and 13).

The Division’s determination to deny the application on the basis that Mason Technologies failed to demonstrate that the women-owner 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.

CONCLUSION

Mason Technologies did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§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 Mason Technologies' application for recertification as a woman-owned business enterprise.

In the Matter of Mason Technologies, Inc.
DED File ID No. 50051
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 | Request to Appeal | Y | Y |
| DED 4 | Notice to Proceed Via Written Appeal | Y | Y |
| DED 5 | Jennifer Mason Resume | Y | Y |
| DED 6 | Jonathan Kugler Resume | Y | Y |
| DED 7 | Jonathan Kugler BICSI Certification | Y | Y |
| DED 8 | Jonathan Kugler "AVIXA Certified Technology Specialist – Design" Certificate | Y | Y |
| DED 9 | Lucas M. Broza Resume | Y | Y |
| DED 10 | NYS Dept. of State Division of Licensing Services for Installation, Servicing or Maintenance of Security or Fire Alarm Systems | Y | Y |
| DED 11 | David Calnan Resume | Y | Y |
| DED 12 | Dawnmarie Toral Resume | Y | Y |
| DED 13 | Mason Supplemental Responses to Division Questions | Y | Y |
| DED 14 | NYC DoITT FDNY's Piscataway, NJ Bid Proposal | Y | Y |
| DED 15 | NYC DoITT for a PSAC 1 UPS Installation at 11 Metrotech | Y | Y |

| | | | |
|--------|--|---|---|
| DED 16 | NYU Langone structured cabling contract | Y | Y |
| DED 17 | NYC DoITT contract for installation work at 59 Maiden Lane NYC | Y | Y |
| DED 18 | Mason's Written Appeal Submission | Y | y |