

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

In the Matter

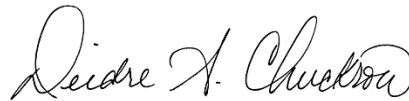
- of -

the Application of Monroe Mechanical Services Inc.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 53360

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
October 29, 2024

This matter considers the written appeal by Monroe Mechanical Services, Inc. (“MMS” 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 January 12, 2024, MMS applied for certification as a women-owned business enterprise (“WBE”). MMS based its application on Ms. Donna L. Kinney. (DED Exhibit 1).
2. On April 10, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The woman owner relied upon for certification does 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) The woman owner relied upon for certification does 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. MMS submitted a request to appeal the denial determination, dated April 24, 2024. (DED Exhibit 13).
4. A Notice to Proceed Via Written Appeal was sent to MMS on April 26, 2024 (DED Exhibit 14).

5. An appeal letter dated May 14, 2024, with accompanying materials were submitted by MMS for consideration in this written appeal.
6. The Division filed an Affidavit of Matthew Lefebvre, Associate Certification Director, dated September 26, 2024, and a brief of Laurel A. Wedinger-Gyimesi, counsel for the Division, dated September 27, 2024.

FINDINGS OF FACT

7. MMH is engaged in the business of Petroleum Equipment installation. (DED Exhibit 1).
8. Ms. Donna Kinney, the woman owner relied upon for certification, is the President, CFO and 67% owner of the applicant business. Mr. Mark Kinney, Ms. Kinney's husband, is the Vice President, CEO and 23% owner; Mr. William (Bill) Kinney, Ms. Kinney's son, is the Vice President of Sales and Service, and 5% owner; Mr. Andrew Gilbert is the Vice President of construction and 5% owner of MMS. (DED Exhibits 1 and 12).
9. The critical functions of MMS are the installation, sales, service, and repair of petroleum equipment. (DED Exhibits 1, 2, and 12).
10. Ms. Kinney has an associate's degree in accounting, over 35 years of accounting experience, has worked as an office manager and has supervised the office of MMS for more than 20 years. She supervises MMS' office manager and is responsible for all office, bookkeeping and accounting functions, including insurance, human resources (HR), safety reporting, accounts payable, payroll, annual workers compensation audits, and the hiring and management of office staff. She also oversees inventory maintained at the business' shop in Weedsport. In addition, she works with the Vice President, on bids and contracts. Ms. Kinney is a notary public but has no industry specific certifications or licenses. Ms. Kinney does not work in the

field and receives any information relating to field employees from onsite managers. (DED Exhibits 1, 6, 8, and 12).

11. Ms. Kinney is the applicant business' liaison with their accounting firm, Cuddy & Ward, LLP, their insurance carrier, J.D. Chapman Agency, Inc., their bank, M&T Bank, and their IT service provider, iCan. She maintains all corporate accounts, handles all tax and compliance matters, and reviews and approves the year-end financial statements, corporate federal and state tax returns, and has the authority to execute e-file authorizations for applicable tax returns. She communicates the financial side of the business, explains industry trends, environmental regulations, job costs and the service needs of customers, and manages the office, inventory system, purchasing, accounting, and customer relations. (APP Exhibits 1).
12. Mr. Mark Kinney has been the Vice President of MMS since 1998. He is the CEO and oversees both the administrative and field work of construction including customer acquisition, bidding, materials procurement, project scheduling, and the hiring and management of construction personnel. He has over 30 years of experience in the industry and worked as a project superintendent prior to becoming an owner and Vice President of the applicant business. Mr. Kinney holds more than a dozen certifications related to the industry, including both the 40-hour OSHA Training and the 8-hour OSHA Health and Safety at Hazardous Waste Operations refresher training, NYS DEC trainings, and a variety of manufacturer specific tank installation and piping installation certifications. Mr. Kinney also holds a Tank and Pump, Class V license, a Flammable Liquid Installer License, and licenses in light commercial construction and grade 2 demolition. (DED Exhibits 1, 6, 7, 9, and 12).
13. Mr. Bill Kinney has worked for the applicant business since 2002, first as a laborer and pipefitter, then as a service technician and electrician, as a service manager, and has been the

Vice President of Sales and Services since 2019. His responsibilities have included piping, tank installation labor, laying conduit, wiring electrical components, the installation and repair of equipment, scheduling and overseeing day-to-day operations of the service department and service technicians, obtaining bidding and pricing for repair jobs, among others. He currently runs the service department, is responsible for its management and the hiring and management of electricians and service technicians and is involved in customer acquisition and retention. He holds more than a dozen certifications related to the industry, including the OSHA 10-hour training, NYS DEC Soil Erosion certificate, and manufacturer specific pipe, tank, and electrical installation certifications. (DED Exhibits 1, 6, 7, 10, and 12).

14. Mr. Andrew Gilbert has worked for MMS since 1997 and is the Vice President of Construction. He has served as a laborer, pipefitter, and onsite equipment operator. He was a project foreman for two years and has been the Project Superintendent for the applicant business since 2004. His responsibilities include the overseeing of day-to-day operations of tank installation, site development, and safety. He is also responsible for ordering equipment and materials, arranging inspections, and supervises personnel and sub-contractors on multiple job sites. He holds a dozen industry related certifications, including an OSHA 40-hour Hazardous Waste Site, NYS DEC Soil Erosion, and several manufacturer specific certifications for pipe and tank installation. (DED Exhibits 1, 6, 11, and 12).

15. The application lists the responsibility of managerial operations as follows:

Operation	Persons Responsible
Financial Decisions	Donna Kinney, Pres. & CFO Mark Kinney, VP & CEO
Estimating	Mark Kinney, VP & CEO William Kinney, VP Service Andrew Gilbert, VP Construction
Preparing Bids	Mark Kinney, VP & CEO

	William Kinney, VP Service Andrew Gilbert, VP Construction
Negotiating Bonding	Donna Kinney, Pres. & CFO
Negotiating Insurance	Donna Kinney, Pres. & CFO
Marketing & Sales	William Kinney, VP Service
Hiring & Firing	Donna Kinney, Pres. & CFO Mark Kinney, VP & CEO William Kinney, VP Service
Supervising Field Operations	Mark Kinney, VP & CEO William Kinney, VP Service Andrew Gilbert, VP Construction Eric Godkin, Site Foreman
Purchasing Equipment / Sales	Mark Kinney, VP & CEO William Kinney, VP Service Christine Mahar, Inventory Manager
Managing & Signing Payroll	Donna Kinney, Pres. & CFO
Negotiating Contracts	Donna Kinney, Pres. & CFO Mark Kinney, VP & CEO William Kinney, VP Service
Signatories for Business Accounts	Donna Kinney, Pres. & CFO Mark Kinney, VP & CEO

(DED Exhibit 1).

16. MMS was previously certified by the Division as a WBE. MMS's certification expired in 2019.

(APP Exhibit 1).

APPLICABLE LAW

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

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.

5 NYCRR § 144.2 (c)(2) states as follows:

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 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.

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 MMS 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. Prior Certification

The Division acknowledges that MMS was previously certified as a woman-owned business enterprise, and that the prior certification had expired. 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 certification.

The Division is correct that it is not obligated to certify MMS 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, MMS had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted its January 12, 2024, application and supporting materials and cannot rely on the past determinations of the Division.

II. Industry-Specific Competence

The Division denied MMS's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Kinney possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or

evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021)), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Among the factors considered by the regulation are:

- (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.

Ms. Kinney does not possess adequate, industry specific competence to make critical business decisions without relying upon other persons as her skills are related specifically to finance and to general business and office management. Ms. Kinney has an associate's degree in accounting and holds a notary public certification. Her resume lists no courses or training relating

to the field of petroleum equipment installation, service or repair. Her professional experience, including her work for the applicant business, is all in general business management, including HR and accounting. Her title at MMS is CFO and her current responsibilities all involve office and financial management of the applicant business. (DED Exhibits 1, 6, 8, and 12).

By contrast, Mr. Kinney, the CEO of the applicant business, has worked in the field of petroleum equipment installation for more than 30 years. He holds more than a dozen certifications and licenses which include, but are not limited to, NY DEC and OSHA certifications, Tank and Pump License, Flammable Liquid Installer License, and other certifications for the installation of petroleum pipes and tanks. His professional experience includes pipe and tank installation as a laborer, project foreman, and project superintendent. At MMS he oversees all day-to-day operations, bid preparation, scheduling of projects, field supervision, and the hiring and supervising of construction personnel. (DED Exhibits 1, 6, 9, and 12).

Mr. Bill Kinney has worked for MMS since 2002. He holds more than a dozen industry related certifications, which include OSHA and NYS DEC certifications, as well as certifications in petroleum equipment pipe and tank installation, as well as electrical and cable installation certifications. His professional experience includes petroleum pipe and tank installation, as well as laying conduit and wiring, as a laborer, service technician, and supervisor. His responsibilities at MMS include the scheduling and overseeing of day-to-day operations of the service department and technicians, ordering equipment and materials, arranging inspections, and overseeing the electrical aspects of construction, as well as obtaining pricing for and creating bids for repair jobs. (DED Exhibits 1, 6, 10 and 12).

Mr. Andrew Gilbert has worked for the applicant business since 1997. He holds one dozen certifications relating to his work for MMS, which include, but is not limited to, OSHA and NYS

DEC certifications, as well as certifications in pipe and tank installation. His experience includes work as a laborer and pipefitter, as an onsite equipment operator, project foreman, and project superintendent. His work as both foreman and superintendent includes overseeing day-to-day operations of tank installation. He is also responsible for ordering equipment and materials, arranging inspections, and supervising laborers and sub-contractors. (DED Exhibits 1, 6, and 7).

There is no evidence that Ms. Kinney, the woman owner relied upon for certification has sufficient trainings, certifications, academic credentials, or experience to make critical business decisions without relying upon these other persons. All the information provided regarding Ms. Kinney concerns her work as the office and financial manager. The additional materials supplied with the appeal include a narrative further explaining Ms. Kinney's contributions to the applicant business, and letters of support from a customer, insurance carrier, bank, and accountant. (DED Exhibit 13; APP Exhibits 1-4). The information contained in both the request to appeal and the letters of support is considered clarifying and as such is admissible in this appeal, however, the information provided contains no additional information regarding Ms. Kinney's competence to make critical business decisions without relying upon other persons. (See, *Scherzi Systems*, supra). The additional information highlights Ms. Kinney's acumen in office, financial management, and in communicating the work and needs of the applicant business to others, but that experience is not industry specific, rather is experience in office management, general business administration, and finance.

Applicant argues that classifying Ms. Kinney's work as "'administrative' is grossly understated and misunderstood," and that her work is "imperative to the management of positive cash flow . . . and enables [others] to perform their jobs effectively." (DED Exhibit 13; APP Exhibit 1). However, nothing in the appeal submission addresses this specific denial ground, which

requires that the person relied on for certification have “adequate, industry specific competence to make critical business decisions without relying upon other persons.” (5 NYCRR 144.2(c)(1)). Instead, the appeal focuses on the benefits that Ms. Kinney’s office leadership and administrative role provides to the profitability and regulatory aspects of the business. (APP Exhibit 1). Here, the industry is petroleum equipment installation, and the regulation requires that Ms. Kinney be able to make critical business decisions without relying on others. Here, the critical business functions of the business are in the sales, installation, and service of petroleum equipment. (DED Exhibits 1 and 2). Nothing in the material provided, either with the application or with the appeal materials, provides evidence that Ms. Kinney has industry specific knowledge, outside of managing HR, finance, the certification status of other employees, and the contents of business paperwork.

Thus, the Division’s determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

III. Operation

The Division also denied MMS’s application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Kinney makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) “The products or services the business enterprise provides to clients; and” (2) “The means by which the business enterprise obtains contracts or orders.” 5 NYCRR § 144.2 (c)(2). 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. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division determined that the critical functions of MMS, based on the application and what products and services the applicant business provides to clients, is petroleum equipment installation, sales, and service repair. (DED Exhibits 1 and 2). Ms. Kinney's experience is in accounting and office management, and her role at MMS is financial and administrative in nature, as evidenced by her title as CFO, Chief Financial Officer. (DED Exhibits 1 and 8). In addition, the application lists others as being responsible for estimating, preparing bids, supervising field operations, marketing and sales, and purchasing equipment. (DED Exhibit 1). The only responsibilities listed in the application as solely Ms. Kinney's are negotiating bonding, negotiating insurance, and managing and signing payroll. (DED Exhibit 1). Ms. Kinney's resume, the narrative provided with the application, and in her own words, through an interview with the Division, all provide evidence of her having strong skills related to general business and office management but offer no evidence of her possessing any skills related to the critical functions of the business. (DED Exhibits 6, 8, 12, and 13; APP Exhibits 1). My Kinney, by her own admission, has no licenses or certifications related to the business, does no field work, and states that her everyday responsibilities involve "accounting functions." (DED Exhibit 12).

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). In the instant case, in relation to daily duties, Mr.

Mark Kinney “oversees both the administrative and field aspect of construction,” and his duties include “customer acquisition, bidding, procurement of materials, scheduling of jobs, inspections” and field work and supervision. (DED Exhibits 1 and 6). Mr. Bill Kinney runs the service department, and his responsibilities include field supervision, hiring and managing electricians and service technicians, and customer acquisition and retention. (DED Exhibits 6, 10, and 12). Mr. Gilbert serves as the project superintendent for MMS and his responsibilities include the overseeing of day-to-day operations of tank installation and the supervision of both employees and sub-contractors. (DED Exhibits 6, 11, and 12).

By contrast, Ms. Kinney’s responsibilities, as described in a narrative included in the application, her resume submitted with the application, section 4.A. of the application, and in her interview with the Division, all specify her financial and office management responsibilities, and support the fact that she relies on others to perform the critical functions of the business. (DED Exhibits 1, 6, 8, and 12; APP Exhibit 1). In addition, she confirms that she does no field work, and that others manage and perform all field operations. (DED Exhibit 12).

Here, the evidence presented establishes that Ms. Kinney’s role at MMS is administrative and financial while others, namely Mr. Mark Kinney, Mr. William Kinney, and Andrew Gilbert, owners not relied on for certification, are responsible for the day-to-day operations of the business enterprise. Based on the foregoing, I find that the Division’s determination that MMS has not demonstrated that the woman owner relied upon for certification makes 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) is supported by substantial evidence.

CONCLUSION

MMS 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(c)(1), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Monroe Mechanical Services, Inc.
DED File ID No. 53360
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Monroe Articles of Incorporation	Y	Y
DED 4	MMS Stock Purchase Mod. Agreement 2 (4/19/04)	Y	Y
DED 5	Agreement to be bound by the Certification Application Affidavit	Y	Y
DED 6	Narrative of Duties	Y	Y
DED 7	Licenses and Certifications	Y	Y
DED 8	Resume Donna Kinney	Y	Y
DED 9	Resume Mark Kinney	Y	Y
DED 10	Resume William Kinney	Y	Y
DED 11	Resume Andrew Gilbert	Y	Y
DED 12	Recording and Transcript of Zoom Interview	Y	Y
DED 13	Notice of Appeal, 4/24/2024	Y	Y
DED 14	Notice to Proceed Via Written Appeal, 4/26/2024	Y	Y