

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**655 THIRD AVENUE**  
**NEW YORK, NEW YORK 10017**

**In the Matter**

**- of -**

**the Application of MUNICIPAL SOLUTIONS, INC.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 55031**

**RECOMMENDED ORDER**

**-by-**



---

**Keely D. Parr**  
**Chief Administrative Law Judge**  
**September 5, 2024**

This matter considers the written appeal by Municipal Solutions, Inc. (“MSI” 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 May 11, 2023, Theresa Smith, as CEO, applied on behalf of MSI for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On November 28, 2023, the Division denied the application on the grounds that:
  - (a) The 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, pursuant to 5 NYCRR § 144.2(c)(1);
  - (b) The 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, pursuant to 5 NYCRR § 144.2(c)(2);
  - (c) The minority group members or women relied upon for certification must be the highest-ranking officer(s) of the business enterprise, and, where applicable, control the board of directors or serve as a general partner, pursuant to 5 NYCRR § 144.2(d)(1); and
  - (d) The minority group members or women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of the business

enterprise, as demonstrated by full executed business agreements, pursuant to 5 NYCRR § 144.2(d)(2). (DED Exhibit 2)

3. Applicant submitted a request to appeal dated December 27, 2023 and initially requested a virtual hearing, however clarified that applicant wished to proceed via a written appeal on January 12, 2024. (DED Exhibits 3 and 19)
4. A notice to proceed via written appeal was sent to applicant on January 17, 2024. (DED Exhibit 4)
5. MSI submitted its written appeal by letter dated April 24, 2024. (APP Exhibit A)
6. The Division filed an Affirmation of Raymond Emanuel, Certification Director dated July 19, 2024, and a brief of Dennie Byam, Esq., counsel for the Division, dated July 23, 2024.

#### **FINDINGS OF FACT**

7. MSI is engaged in Municipal Financial Advisory Services, loan and grant writing and administration, MWBE reporting assistance, water and sewer rate setting and long-range municipal budgeting and long-range financial planning. (DED Exhibit 1).
8. Theresa Smith, the woman relied upon for certification is the CEO and 51% owner of the applicant business. Jeffrey Smith is the President and 49% owner of the applicant business. (DED Exhibit 2).
9. The critical functions of the applicant business based on the products or services provided and the means by which the applicant business obtains contracts or orders, are to provide financial advisory services to municipal entities, bond anticipation note borrowing, long-term serial bond borrowing, preparation of state aid forms and assist with continuing disclosure filings and regulations as set forth in submitted contracts with Pine Valley

Central School District, Town of Lansing, and Sweet Home Central School District. (DED Exhibit 2)

10. Jeffery Smith and Margaret Augugliaro both hold Series 50 licenses as Municipal Advisor Representatives and Series 54 licenses as Municipal Advisor Principals (DED Exhibits 5, 6 and, 11)
11. Article V, Officers; Section 1. Executive Officers of the by-laws state: “The officers of the Corporation shall be a President, one or more Vice-Presidents, a Treasurer and a Secretary and such Assistant Treasurers and Assistant Secretaries or other officers as the Board of Directors may determine.” (DED Exhibit 9)
12. Section 6 of Article V of the by-laws state “The President shall be the chief executive officer of the Corporation and shall have general charge of the business and affairs of the Corporation, subject, however, to the right of the Board of Directors to confer specified powers on officers and subject generally to the direction of the Board.” (DED Exhibit 9)
13. The contracts submitted by applicant as part of the application process were all signed by Jeffrey Smith as President of MSI and as a “Certified Independent Professional Municipal Advisor”. (DED Exhibits 1, 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) 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) states in relevant part 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.

(2) Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

### **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 MSI 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. Operation

5 NYCRR §144.2(c)(1) requires that the woman owner, relied upon for certification 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”. 5 NYCRR § 144.2(c)(2) requires that the woman relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise.

The Division determined that the critical functions of the applicant business based on the products or services provided and the means by which the applicant business obtains contracts or orders, are to provide financial advisory services to municipal entities, bond anticipation note borrowing, long-term serial bond borrowing, preparation of state aid forms and assist with continuing disclosure filings and regulations as set forth in submitted contracts with Pine Valley Central School District, Town of Lansing, and Sweet Home Central School District. (DED Exhibit 2)

In Section 3.A. of the Application, the Appellant confirmed that Series 50 and Series 54 licenses issued by the U.S. Securities and Exchange Commission (SEC) are required to conduct business for MSI. (DED Exhibit 1) At MSI, Jeffery Smith and Margaret Augugliaro both hold Series 50 licenses as Municipal Advisor Representatives and Series 54 licenses as Municipal Advisor Principals (DED Exhibits 5, 6 and, 11).

In applicant's written appeal submission applicant admits that she does not possess the Series 50 or 54 licenses however states that it is not necessary. However, the Municipal Securities Rulemaking Board in MSRB Rule G-44(a)(11) requires that a municipal advisor principal must carry out the firm's supervisory responsibilities. (APP Exhibit A) In addition, applicant argues that the financial advisory services constitute only 50% of the applicant's business with the remaining revenue derived from low interest loan and grant writing, grant administration, project planning, etc. However, applicant Ms. Smith is unable to carry out the critical functions of the business as it relates to municipal advisory services, even if only 50% of the business without relying upon either John Smith and/or Margaret Augugliaro who hold the requisite licenses. In addition, applicant Ms. Smith cannot make operational decisions on a day-to day basis with respect to this part of the business as there is no evidence in the record that she possesses adequate training. Both the Series 50 and the Series 54 licenses requires taking an exam to pass and studying the underlying training materials in order to do so. "A municipal advisor principal must pass the MSRB's Municipal Advisor Representative Qualification Examination (Series 50) as required under MSRB Rule G-3 and any subsequent principal-level qualification examination developed by the MSRB". (APP Exhibit A)

Based upon the above, I find that the Division's determination to deny applicant's certification as a WBE pursuant to 5 NYCRR §144.2(c)(1) and 5 NYCRR § 144.2(c)(2) was based upon substantial evidence.

## II. Control

The Division also denied applicant's certification as a WBE as the woman relied upon is not the highest-ranking member of the business nor control the Board of Directors as required by 5 NYCRR §144.2(d)(1)

Jeffrey Smith is listed as the President of the applicant business both in the application and on the stock certificates. (DED Exhibits 1 and 17) The application also lists both Ms. Smith and Mr. Smith as being on the Board of Directors. However, Article V, Officers; Section 1. Executive Officers of the by-laws state: “The officers of the Corporation shall be a President, one or more Vice-Presidents, a Treasurer and a Secretary and such Assistant Treasurers and Assistant Secretaries or other officers as the Board of Directors may determine.” Section 6 of Article V of the by-laws state “The President shall be the chief executive officer of the Corporation and shall have general charge of the business and affairs of the Corporation, subject, however, to the right of the Board of Directors to confer specified powers on officers and subject generally to the direction of the Board.” (DED Exhibit 9)

Accordingly, Ms. Smith is not the highest-ranking member of the applicant business nor control the Board of Directors as the by-laws are devoid of any powers of the business granted to her and the President is listed as the chief executive officer, not Ms. Smith.

On appeal, applicant submitted Amended and Restated By-laws dated September 7, 2017 which adds the position of CEO as an officer of the Corporation, however this is new information that was not before the Division at the time of the denial determination and is not clarifying, thus is not now being considered in accord with 5 NYCRR §145.2(b)(1) and Scherzi Systems, LLC v. White, supra. (APP Exhibit A)

The Division also denied MSI’s application for certification as Ms. Smith did not negotiate business contracts and represent themselves to clients as the principal of business entities for which certification is sought, as demonstrated by fully executed business agreements. 5 NYCRR §144.2(d)(2)



The contracts submitted by applicant as part of the application process were all signed by Jeffrey Smith as President of MSI and as a “Certified Independent Professional Municipal Advisor”. (DED Exhibits 1, 12 and 13). On appeal, applicant submitted additional contracts signed by Ms. Smith, however this is new information that was not before the Division at the time of the denial determination and does not seek to explain previously submitted material and will therefore not now be considered in accord with 5 NYCRR §145.2(b)(1) and *Scherzi Systems, LLC v. White, supra.* (APP Exhibit A)

Based upon the above, I find that the Division’s determination to deny applicant’s certification as a WBE pursuant to 5 NYCRR §144.2(d)(1) and 5 NYCRR § 144.2(d)(2) was based upon substantial evidence.

### **CONCLUSION**

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

### **RECOMMENDATION**

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

In the Matter of Municipal Solutions, Inc  
 DED File ID No. 55031  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant's Written Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Request to Appeal Form	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Jeffrey Smith Resume	Y	Y
DED 6	Margaret Augugliaro Resume	Y	Y
DED 7	Theresa K. Smith Resume	Y	Y
DED 8	Question #3 Narrative	Y	Y
DED 9	Municipal Solutions, Inc.'s By-Laws	Y	Y
DED 10	Magalmar Properties, LLC Lease dated January 1, 2022	Y	Y
DED 11	Municipal Solutions Professional Certificates	Y	Y
DED 12	Various 2022 Municipal Solutions, Inc. executed contracts	Y	Y
DED 13	Town of Lansing, NY Contracts	Y	Y
DED 14	Office of the CEO Narrative	Y	Y
DED 15	Day-to-Day Responsibilities Narrative	Y	Y
DED 16	Municipal's Meeting Minutes, various dates	Y	Y

DED 17	Municipal's Stock Certificates and Stock Transfer Ledger	Y	Y
DED 18	Certification Application Affidavit	Y	Y
DED 19	January 12, 2024 Appellant Email Request for Appeal Form Change	Y	Y