

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

In the Matter

- of -

the Application of PE AND CONSULTANTS, NEW YORK LLC
for Certification as a Minority-Owned and Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 54660

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 2, 2024

This matter considers the written appeal by PE and Consultants, New York LLC (“PE Consultants” 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 minority-owned business enterprise and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On December 18, 2023, Ms. Renuka Nanjundappa, as President, applied on behalf of PE Consultants for certification as a minority-owned business enterprise and woman-owned business enterprise (“MWBE”) (DED Exhibit 1).
2. On March 15, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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
 - (b) 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. PE Consultants timely filed a Request to Appeal on April 16, 2024 (DED Exhibit 14).
4. A notice to proceed via written appeal was sent to PE Consultants on April 19, 2024 (DED Exhibit 15).

5. PE Consultants filed its written appeal by letter dated May 17, 2024, with attachments (APP Exhibit A).
6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated October 29, 2024, and a brief of Laurel Wedinger-Gyimesi, Esq., counsel for the Division, dated October 30, 2024.

FINDINGS OF FACT

7. PE Consultants is engaged in the business of General Contracting, and Heating, Ventilation and Air Conditioning (“HVAC”) (DED Exhibit 1).
8. Ms. Renuka Nanjundappa is President and has a 100% ownership interest (DED Exhibit 1).
9. Ms. Nanjundappa’s resume states she has “over twelve years’ experience in construction with progressively increasing responsibility. Former Licensed NYC expeditor. Computer literate... Successfully founded, owned, and operated highly profitable General Construction business for last 14 years.” The resume reflects her prior work history as an expeditor, claim processor, accounting, and as a librarian. She completed a thirteen-week course offered by the MTA. (DED Exhibit 5). She described her daily responsibilities as “I manage all project managers, the safety person at the site, and workers; have to follow up with them, asking them to get the insurance. Then speak to the accounting department, get their payrolls and also buying equipment materials suppliers. So, I sit down, and I talk with them and basically, purchase and do whatever is needed for the job... I sit down with my project manager, review [the bids] with them and then I put an estimate together.” (DED Exhibit 1).

10. Ms. Nanjundappa attended training with the MTA Small Business Mentoring Program and completed courses in How to do Business with the MTA, Estimating & bidding strategies, Project Scheduling, Construction Law, etc. (DED Exhibit 1)
11. Section 4A of the application reflects that Ms. Nanjundappa is responsible for financial decisions, negotiating insurance and bonding, marketing/sales, hiring/firing, bidding, negotiating contracts and is the sole signatory on the business account. Arvinder Atwal, the Project Manager is solely responsible for estimating, supervising field operations, purchasing equipment and sales (DED Exhibit 1).
12. Mr. Arvinder Atwal's resume reflects that he has over 30 years' experience in project management. He has a Bachelor of Science degree in Chemistry. He holds OSHA 10, OSHA 30 and NYC 8 certifications. He also holds EPA Certification for refrigerant safe handling, and a diploma from Apex Technical Institute for Refrigeration and HVAC. He has experience with commercial HVAC equipment; roof top units; split systems; refrigerant piping; ductwork; dampers; diffusers; grills; control wiring; power wiring; insulation; drain piping; brazing; soldering; evacuating refrigeration systems and charging with refrigerants, startup, testing and balancing systems for various restaurants, theaters and schools. (DED Exhibit 6). His duties are "Project Manager, Lead working foreman at job site, Installs equipment, piping, conduits, fittings, fixtures, etc. Supervises work of Journeymen & subcontractors. Manages & schedules materials, equipment, workers & subcontractors. Day to day responsibilities: Daily management, scheduling and coordinating all work in the field." (DED Exhibit 1).
13. Mr. Srinivas Thimmappa's resume reflects that he is a professional engineer with more than 25 years' experience in project management, scheduling, estimating and engineering

(DED Exhibit 7). His duties are “Quality control. Ensure that submittals for product data, shop drawings, as-builts are reviewed and in compliance with contract documents. Inspect material and equipment are as per approved submittals. Inspect all work performed quality is as per contract documents. Day to day responsibilities: Daily submittals, drawings & inspect work performed.” (DED Exhibit 1).

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.

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 PE Consultants for certification as a MWBE 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/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.

Certification is denied where the minority/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 AD 3d 1682 (3d Dept. 2019).

Ms. Nanjundappa's resume states she has "over twelve years' experience in construction with progressively increasing responsibility. Former Licensed NYC expeditor. Computer literate... Successfully founded, owned, and operated highly profitable General Construction business for last 14 years." The resume reflects her prior work history as an expeditor, claim processor, accounting, and as a librarian. She completed a thirteen-week course offered by the MTA. (DED Exhibit 5). She described her daily responsibilities as "I manage all project managers, the safety person at the site, and workers; have to follow up with them, asking them to get the insurance. Then speak to the accounting department, get their payrolls and also buying equipment materials suppliers. So, I sit down, and I talk with them and basically, purchase and do whatever is needed for the job... I sit down with my project manager, review [the bids] with them and then I put an estimate together." (DED Exhibit 1).

Section 4A of the application reflects that Ms. Nanjundappa is responsible for financial decisions, negotiating insurance and bonding, marketing/sales, hiring/firing, bidding, negotiating contracts and is the sole signatory on the business account. These duties are primarily administrative in nature and do not indicate direct work experience in the critical functions of the business. She does not have the training or experience to make her qualified to supervise the work of her employees.

Mr. Arvinder Atwal's resume reflects that he has over 30 years' experience in project management. He has a Bachelor of Science degree in Chemistry. He holds OSHA 10, OSHA 30 and NYC 8 certification. He also holds EPA Certification for refrigerant safe handling, and a diploma from Apex Technical Institute for Refrigeration and HVAC. He has experience with commercial HVAC equipment; roof top units; split systems; refrigerant piping; ductwork; dampers; diffusers; grills; control wiring; power wiring; insulation; drain piping; brazing;

soldering; evacuating refrigeration systems and charging with refrigerants, startup, testing and balancing systems for various restaurants, theaters and schools. (DED Exhibit 6). His duties are “Project Manager, Lead working foreman at job site, Installs equipment, piping, conduits, fittings, fixtures, etc. Supervises work of Journeymen & subcontractors. Manages & schedules materials, equipment, workers & subcontractors. Day to day responsibilities: Daily management, scheduling and coordinating all work in the field.” (DED Exhibit 1). Section 4A of the application reflects that Arvinder Atwal is solely responsible for estimating, supervising field operations, purchasing equipment and sales (DED Exhibit 1).

Mr. Srinivas Thimmappa’s resume reflects that he is a professional engineer with more than 25 years’ experience in project management, scheduling, estimating and engineering (DED Exhibit 7). His duties are “Quality control. Ensure that submittals for product data, shop drawings, as-builts are reviewed and in compliance with contract documents. Inspect material and equipment are as per approved submittals. Inspect all work performed quality is as per contract documents. Day to day responsibilities: Daily submittals, drawings & inspect work performed.” (DED Exhibit 1).

There is no evidence in the record to show that Ms. Nanjundappa possesses adequate, industry-specific competence to make critical business decisions without relying on Arvinder Atwal, Srinivas Thimmappa and other employees. She does not have any licensing, training, or job experience in HVAC installation or general contracting work. She handles the administrative operations of the business (DED Exhibits 1, 5, 6 and 7). A denial is supported where the minority/woman owner relied upon for certification has no training or experience and operations staff have more substantive and more significant experience. *Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3d Dept. 2020).

5 NYCRR §144.2(c)(2) states that “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”.

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).

Where the owner relied upon for certification has no training or experience in the critical functions of the business, and employees with more significant experience actively engage in the core functions of the business, denial based on lack of operational control is appropriate. *Matter of Panko Elec. and Maintenance Corp. v. Zapata*, 172 AD 3d 1682 (3d Dept. 2019).

Applicant argues on appeal that the MTA Course she took was overlooked and shows that she has the training and experience to perform the work of the business (APP Exhibit A). However, Ms. Nanjundappa attended training with the MTA Small Business Mentoring Program and completed courses such as How to do Business with the MTA, Estimating & bidding strategies, Project Scheduling, Construction Law, etc. (DED Exhibit 1) The courses failed to provide any training regarding construction or HVAC work (DED Exhibit 1). Day-to-day decisions must be operational decisions, not just administrative decisions. See *Matter of Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10, dated October 13, 2023. The critical functions of the business are estimating, preparing bids, supervising field operations, and

negotiating contracts (DED Exhibits 1 and 2). Ms. Nanjundappa's resume does not reflect any experience in performing these functions (DED Exhibit 5). She does not go to the field or supervise field operations. In the application, she referenced Mr. Atwal as performing all estimating and during her interview stated that Mr. Atwal was the main project manager and foreman, had journeymen working for him and managed the field (DED Exhibit 13). The duties performed by Mr. Atwal and Mr. Thimmappa as referenced in the application demonstrate that they perform the critical functions of the business. (DED Exhibit 1).

The Division's determination to deny the application on the basis that PE Consultants failed to demonstrate that Renuka Nanjundappa 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

PE Consultants did not meet its burden to demonstrate that the Division's determination to deny its application for certification as MWBE 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 PE Consultants' application for certification as a MWBE.

In the Matter of PE and Consultants, New York LLC
 DED File ID No. 54660
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Articles of Organization	Y	Y
DED 4	Agreement to be Bound by Certification Application	Y	Y
DED 5	Resume of Renuka Nanjundappa	Y	Y
DED 6	Resume of Arvinder Atwal	Y	Y
DED 7	Resume of Srinivas Thimmappa	Y	Y
DED 8	General Contractor Tracking Number	Y	Y
DED 9	Narrative Response 1/26/24	Y	Y
DED 10	Narrative Response 2/15/24	Y	Y
DED 11	MTA Contract	Y	Y
DED 12	LIRR SBMPZ Contract	Y	Y
DED 13	Interview Recording of Renuka Nanjundappa	Y	Y
DED 14	Request to Appeal	Y	Y
DED 15	Notice to Proceed Via Written Appeal	Y	Y