

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

In the Matter

- of -

**the Application of TPR Technical Sales, Inc. dba Lawrence Lowy Associates
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 70935

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
June 21, 2024

This matter considers the written appeal by TPR Technical Sales, Inc. dba Lawrence Lowy Associates (“TPR” 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 (“MBE”).

PROCEDURAL HISTORY

1. On March 16, 2018, Mr. Uday Mahtani, as President, applied on behalf of TPR for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On November 21, 2023, 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. TPR timely filed a Request to Appeal on November 28, 2023 (DED Exhibit 3).
 4. A notice to proceed via written appeal was sent to TPR on December 14, 2023 (DED Exhibit 4).
 5. TPR filed its written appeal by letter dated January 19, 2024, with attachments, from its attorney, Megan Muoio, Esq. of Allyn & Fortuna LLP (APP Exhibit F).
 6. The Division filed an Affidavit of Glenn Butler, Certification Director, dated May 29, 2024, and a brief of Karen Bernstein Esq., counsel for the Division, dated May 31, 2024.

FINDINGS OF FACT

7. TPR is a manufacturer's representative and wholesale distributor of steam water heaters and commercial heat trace systems (DED Exhibit 1).
8. Mr. Uday Mahtani is President and has a 75.5% ownership interest. His ownership is through a company named Pendo Capital Management, Inc. ("Pendo"). Mr. Thomas Porfilio is Vice President and has a 24.5% ownership interest (DED Exhibit 1).
9. Mr. Mahtani owns 96% of Pendo. His wife, Ms. Joyti Mahtani, owns 4% (DED Exhibit 1).
10. Pendo also owns Accardi Companies, LLC ("Accardi") and Adirondack Companies, LLC ("Adirondack"), both wholesale distributors in the same line of business as TPR. Mr. Mahtani serves as President and CEO of Pendo, Accardi and Adirondack (DED Exhibit 1).
11. In 2019, Mr. Mahtani received no compensation from TPR, while Thomas Porfilio received \$██████ and Patrick Riotto received \$██████. In 2020, Mr. Mahtani received compensation in the amount of \$██████, while Thomas Porfilio received \$██████. In 2021, Mr. Mahtani received compensation in the amount of \$██████, while Thomas

Porfilio received \$ [REDACTED]. In 2022, Mr. Mahtani received compensation in the amount of \$ [REDACTED], while Thomas Porfilio received \$ [REDACTED] (DED Exhibits 7 -12).

12. Mr. Mahtani has a bachelor's degree with a major in art history and a minor in business. In 2009, he started Pendo, which is a private equity firm that invests in other companies (DED Exhibit 17). At TPR, he "manages and oversees the day-to-day operations of a value added distributor of commercial natural gas fuel delivery systems, domestic water heating systems, electronic mixing valves, steam and natural gas boilers, steam heating equipment, and commercial heat trace systems for the New York City and New Jersey markets. He is responsible for making all financial decisions..., estimating, preparing bids, negotiating contracts...managing relationships with suppliers and customers, overseeing fabrication shop and field operations, making purchasing decisions, and managing human resources." (DED Exhibits 1, 17 and 18).

13. Mr. Mahtani has been in the business of wholesale distribution of steam water heaters and commercial heat trace systems since 2014 since he became involved with Accardi, "a similar New York-area business in the same industry as TPR" and "he has acquired ten years of directly relevant experience in the industry which makes him capable of making critical business decisions across all areas of TPR's business without relying on others." (APP Exhibit F).

14. Mr. Porfilio has a bachelor's degree in electrical technology. He has "in-depth knowledge of the Thermon heat-trace business product line." (DED Exhibit 19). His duties include "study trade journals and other relevant technical literature to maintain" such knowledge. He also "follows industry trends". (DED Exhibit 18). He has been an owner of TPR since 1994 (DED Exhibit 1).

15. The Stock Sale and Purchase Agreement dated April 17, 2017, states “The mechanism for the share purchase shall be a management fee paid to [Pendo]. [Pendo] shall use 100% of such management fee, less applicable taxes, to make purchase of the shares from the existing shareholders of TPR.” (DED Exhibit 25).
16. The By-Laws dated October 21, 2021 state (a) TPR is managed by its Board of Directors; (b) the number of Directors may be less than three but not fewer than the number of shareholders; (c) to constitute a quorum, a majority of the entire Board is required; (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act; (e) the Board may elect a President, Vice Presidents, Secretary and Treasurer; and (f) the President shall be the Chief Executive Officer. (DED Exhibit 23).
17. Applicant submitted an Amendment No. 1 to the By-Laws dated March 1, 2019 (DED Exhibit 27), and an Action by Unanimous Written Consent, both dated March 1, 2019 (DED Exhibit 28), which both predate the By-Laws.

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 TPR for certification as a MBE 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 minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to his ownership interest in the business.

The Division routinely denies certification where the majority shareholder receives less compensation than other owners of the business, and other employees of the business. See, e.g., *Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10 dated October 13, 2023; *ERS Consultants, Inc.*, Recommended Order dated September 19, 2023, Final Order 23-09 dated October 13, 2023; *Keith Titus Corp.*, Recommended Order dated October 9, 2019, Final Order 19-29 dated January 16, 2020.

In determining total compensation, the Division considers financial records such as tax returns and salary/wage statements including W-2's. See, e.g., *C.W. Brown, Inc. v. Canton*, 216 A.D. 2d 841 (3d Dept. 1995); *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County 2017).

In 2019, Mr. Mahtani received no compensation from TPR, while Thomas Porfilio received \$██████████ and Patrick Riotto received \$██████████. In 2020, Mr. Mahtani received compensation in the amount of \$██████████, while Thomas Porfilio received \$██████████. In 2021, Mr. Mahtani received compensation in the amount of \$██████████, while Thomas Porfilio received \$██████████. In 2022, Mr. Mahtani received compensation in the amount of \$██████████, while Thomas Porfilio received \$██████████ (DED Exhibits 7 -12).

On appeal, applicant argues that Mr. Mahtani received additional compensation from TPR in the form of management fees paid to Pendo for Mr. Mahtani's work on behalf of Pendo.

Applicant states that those amounts were \$ [REDACTED] in 2020, and \$ [REDACTED] per year in 2021, 2022 and 2023 (APP Exhibit F). However, no documentation was provided to show how much was paid or to be paid to Pendo in management fees. Also, the alleged management fees were paid directly to Pendo, not Mr. Mahtani, and it cannot be determined what distributions, if any, Mr. Mahtani received for the portion attributable to his work for Pendo.

Even considering the management fees, Mr. Mahtani's share of the profits is still below his 75.5% ownership interest. In 2020, his combined wages and management fees total \$ [REDACTED], and Thomas Porfilio's wages were \$ [REDACTED]. Therefore, Mr. Mahtani's percentage of total owner compensation was 62.2%. In 2021, Mr. Mahtani's combined wages and management fees were \$ [REDACTED] and Thomas Porfilio's wages were \$ [REDACTED]. Therefore, Mr. Mahtani's percentage of total owner compensation was 57.4%. In 2022, Mr. Mahtani's combined wages and management fees were \$ [REDACTED], and Thomas Porfilio's wages were \$ [REDACTED]. Therefore, Mr. Mahtani's percentage of total owner compensation was 56.86%. (DED Exhibits 7 -12 and APP Exhibit F).

In addition, the Stock Sale and Purchase Agreement dated April 17, 2017, states "The mechanism for the share purchase shall be a management fee paid to [Pendo]. [Pendo] shall use 100% of such management fee, less applicable taxes, to make purchase of the shares from the existing shareholders of TPR." (DED Exhibit 25). Therefore, TPR is paying management fees that are required to be used for the purchase of Pendo's shares. Mr. Mahtani is therefore not sharing in the profits at least until the purchase price is paid off.

The Division's determination to deny the application on the basis that TPR failed to demonstrate that Mr. Mahtani shared in the risks and profits in proportion to his 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.

Mr. Mahtani has a bachelor’s degree with a major in art history and a minor in business. He has certificates in investment banking, financial statement analysis, and credit analysis. From 1996 to 2009, he worked in trade finance, asset management, and financial products. In 2009, he started Pendo, which is a private equity firm that invests in other companies (DED Exhibit 17). At TPR, he handles HR and finances, including accounts receivable/ payable (DED Exhibit 18). The application states that Mr. Mahtani is solely responsible for marketing and sales, and shares responsibility for supervising field operations (DED Exhibit 1).

Mr. Porfilio has a bachelor’s degree in electrical technology. He has “in-depth knowledge of the Thermon heat-trace business product line.” (DED Exhibit 19). His duties include “study trade journals and other relevant technical literature to maintain” such knowledge. He also “follows industry trends”. (DED Exhibit 18). He has been an owner of TPR since 1994 (DED Exhibit 1).

On appeal, applicant argues that Mr. Mahtani has been in the business of wholesale distribution of steam water heaters and commercial heat trace systems since 2014 since he became involved with Accardi, “a similar New York-area business in the same industry as TPR” and “he

has acquired ten years of directly relevant experience in the industry which makes him capable of making critical business decisions across all areas of TPR's business without relying on others." Applicant states that Mr. Mahtani is responsible for all managerial operations, including estimating, bidding, and supervising field operations, and is responsible for warehouse operations. Applicant further states that Mr. Mahtani is "exclusively responsible" for marketing and sales, negotiating contracts, and purchasing equipment; and that he "independently" makes all financial decisions. Applicant claims that Mr. Mahtani is "fluent in TPR's product line", and "has specific knowledge of the manufacture of these products, their capabilities, and how they can be modified and installed for TPR's customers' optimal use." (APP Exhibit F).

The Division's regulations "do not require an applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a business." *Matter of Northern Scapes Inc.*, Recommended Order dated May 18, 2018, Final Order 18-31, dated June 5, 2018 (applicant relied on for certification, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). Further, there is no regulatory requirement for any formal academic training, only that the minority/woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. See *Northern Scapes*, supra.

Mr. Mahtani's ten years of experience in the industry makes him capable of making critical business decisions without relying on others.

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).

Applicant argues on appeal that Mr. Mahtani’s role is not limited to administrative work for TPR. Mr. Mahtani has “day-to-day responsibility regarding TPR’s critical functions, including but not limited to marketing and sales of steam water heaters and commercial heat trace systems for wholesale distribution, negotiation of contracts and establishment of relationships with customers, and negotiation and purchasing of products with TPR’s supplier-partners... Mr. Mahtani makes use of the technological and industry-specific knowledge that he has obtained during his decade of experience in the industry. He also oversees other critical functions of TPR’s business, including finance, human resources, insurance, and customer relations.” (APP Exhibit F). Applicant cites the Unanimous Written Consent of the Board of Directors and Shareholders dated March 1, 2019, which provides that Mr. Mahtani, as Chief Executive Officer, “shall hold the ultimate authority with respect to the decisions and direction of the Company.” (APP Exhibit F, DED Exhibit 28).

Mr. Mahtani makes operational decisions on a day-to-day basis with respect to the critical functions of the business.

The Division’s determination to deny the application on the basis that TPR failed to demonstrate that Mr. Mahtani 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 not supported by substantial evidence.

III. Control

The Division also denied certification on the ground that Mr. Mahtani is not the highest-ranking officer and does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

The By-Laws dated October 21, 2021 state (a) TPR is managed by its Board of Directors; (b) the number of Directors may be less than three but not fewer than the number of shareholders; (c) to constitute a quorum, a majority of the entire Board is required; (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act; (e) the Board may elect a President, Vice Presidents, Secretary and Treasurer; and (f) the President shall be the Chief Executive Officer. (DED Exhibit 23).

The By-Laws state that the President shall be the CEO of TPR (DED Exhibit 23). The application states that Mr. Mahtani is the President and CEO (DED Exhibit 1). However, the Unanimous Written Consent which is the only document that provided officer appointments states that Mr. Mahtani is Chairman and CEO, Mr. Riotto is President, and Mr. Porfilio is Vice President (DED Exhibit 28). Since Mr. Riotto is the elected President he would also be the CEO under the language of the By-Laws and Mr. Mahtani would not be the highest ranking officer.

Applicant argues on appeal that an Amendment to the By-Laws dated March 1, 2019, states that at “all meetings of the Board of Directors, each director shall be entitled to one vote for each share of the common stock of the corporation held by such director as a shareholder of the corporation” and therefore Mr. Mahtani, as 75.5% shareholder, controls the Board (APP Exhibit F, DED Exhibit 27). Applicant also argues that the Unanimous Written Consent dated March 1,

2019, elected Mr. Mahtani as Chairman and CEO (DED Exhibit 28). However, the Amendment and Written Consent are dated March 1, 2019, which predate the By-Laws dated October 15, 2021. Therefore, these documents do not change the provisions in the By-Laws which state that each director present at a meeting of the Board shall have one vote, regardless of the number of shares which they may hold. (DED Exhibit 23).

The Division's determination to deny the application on the basis that Mr. Mahtani is not the highest-ranking officer of TPR and does not control the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

CONCLUSION

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

RECOMMENDATION

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny TPR's application for certification as a minority-owned business enterprise, and as modified, affirm the determination.

In the Matter of TPR Technical Sales, Inc. dba Lawrence Lowy Associates
 DED File ID No. 70935
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Application for Certification	Y	Y
APP B	TPR's Responses to Request for additional information	Y	Y
APP C	Application for Pendo Capital Management, Inc.	Y	Y
APP D	Denial Letter	Y	Y
APP E	Affidavit of Uday Mahtani	Y	Y
APP F	Appeal letter dated January 19, 2024	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	Stock Ledger and Stock Certificates	Y	Y
DED 6	Stock Power Agreements	Y	Y
DED 7	2019 Business Income Taxes	Y	Y
DED 8	2020 Business Income Taxes	Y	Y
DED 9	2021 Business Income Taxes	Y	Y
DED 10	2020 Form W-2s	Y	Y
DED 11	2021 Form W-2s	Y	Y

DED 12	2022 Form W-2s	Y	Y
DED 13	Acme Industrial Inc. Invoice and Proof of Payment	Y	Y
DED 14	Parkview Plumbing & Heating Invoice and Proof of Payment	Y	Y
DED 15	TC Electric Invoice and Proof of Payment	Y	Y
DED 16	Invoices issued to TPR by Patterson-Kelley and Thermon, Inc.	Y	Y
DED 17	Resume of Uday Mahtani	Y	Y
DED 18	Narrative Regarding Duties and Responsibilities of Uday Mahtani	Y	Y
DED 19	Resume of Thomas Porfilio	Y	Y
DED 20	Narrative Regarding Duties and Responsibilities of Thomas Porfilio	Y	Y
DED 21	Resume of Timothy E. Steuerer	Y	Y
DED 22	Narrative Regarding Duties and Responsibilities of Timothy Steuerer	Y	Y
DED 23	By-Laws of TPR dated October 15, 2021	Y	Y
DED 24	Certificate of Incorporation of TPR	Y	Y
DED 25	Narrative and Documents Regarding Capitalization of TPR, Including two Stock Sale and Purchase Agreements, Promissory Notes, and Alleged Proof of Payments	Y	Y
DED 26	Chase Bank Signatory Card	Y	Y
DED 27	Amendment No. 1 to the By-Laws of TPR dated March 1, 2019	Y	Y
DED 28	Action by Unanimous Written Consent of the Board of Directors and Shareholders of TPR dated March 1, 2019	Y	Y
DED 29	2020 Personal Income Taxes of Mr. Mahtani	Y	Y
DED 30	2021 Personal Income Taxes of Mr. Mahtani	Y	Y