

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12245

In the Matter

- of -

**the Application of The Milbourne Group – Consulting Engineers, Inc. DBA TMG – Consulting
Engineers for Recertification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 63198

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
May 24, 2024

This matter considers the written appeal by The Milbourne Group – Consulting Engineers, Inc., dba TMG – Consulting Engineers, (“TMG” 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 minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On November 9, 2022, Clement T. Milbourne, as President, applied on behalf of TMG for certification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1).
2. On August 1, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
 - a. Minority group member relied upon for certification has not demonstrated that he devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR §144.2(c)(3); and
 - b. Minority group member relied upon for certification has not demonstrated that he negotiates business contracts and represents himself to clients as the principal of the business enterprise, as required by 5 NYCRR §144.2(d)(2).
3. TMG timely filed a Request to Appeal Denial Determination on August 14, 2023. (APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent on August 17, 2023. (DED Exhibit 14).
5. TMG submitted its written appeal by letter dated September 15, 2023. (APP Exhibit B).

6. The Division filed an Affidavit of Abdul Karim Bah, Associate Certification Director dated April 24, 2024, and a brief of Laurel A. Wedinger-Gyimesi Esq., counsel for the Division, dated April 30, 2024.

FINDINGS OF FACT

7. TMG is a business providing engineering services including mechanical, electrical and plumbing, building automation, commissioning, operations and maintenance. (DED Exhibit 1).
8. Clement Milbourne is the President of TMG and has a 100% ownership interest. (DED Exhibit 1).
9. Mr. Milbourne is an engineer and works 20 hours a week, or 50% of his time, for TMG. His responsibilities include taking care of managing the business. (DED Exhibits 1, 4 and 5).
10. Nino Scafide is a Cx Engineer who works 40 hours a week and his responsibilities include working with clients, obtaining jobs and keeping the jobs moving, and assisting Mr. Milbourne. He is a designated signatory for TMG. (DED Exhibits 1 and 4).
11. Anthony Thomas is TMG's General Manager and Controls Manager who works 40 hours per week. He also manages the business and handles all of Mr. Milbourne's responsibilities when Mr. Milbourne is not available. He is a designated signatory for TMG. (DED Exhibits 1 and 4).
12. TMG does not have a physical office location in New York State. The business has a virtual office. (DED Exhibit 1).
13. TMG was issued a license to provide professional engineering services in the State of New York by the University of the State of New York Education Department. (DED Exhibit 3).

14. TMG has a sub-contractor agreement with FST-HEA to fulfill engineering consulting contracts for TMG. (DED Exhibits 7, 8, 9, 10 and 11).
15. An “Intent to Perform” contract for work on the “New Terminal One of JFK Airport,” and a change order for a contract agreement between AECOM Technical Services, Inc. and TMG, were signed by Nino Scafide. (DED Exhibits 1, 6 and 7).
16. Three invoices for work performed for the AECOM project showed Nino Scafide, as Senior Engineer, was the only TMG employee working on the contract between 2022 and March 31, 2023, and stated Mr. Scafide was the project point of contact for the work. (DED Exhibits 1 and 8).

APPLICABLE LAW

5 NYCRR § 144.2 (c)(3) states in relevant part as follows:

Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

5 NYCRR §144.2(d)(2) states in relevant part as follows:

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 TMG for certification as 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

The Division denied TMG’s application for recertification as a MBE on the basis that TMG failed to demonstrate that Applicant devotes time on an ongoing basis to the daily operations of the business, as required by 5 NYCRR §144.2(c)(3). (DED Exhibit 2).

It is well settled that the Division will deny an application for certification on the grounds that the minority group or woman owner did not devote sufficient time on an ongoing basis to the business, or in circumstances where the owner is working less than full-time for the business, and other full-time employees are operating the business and devoting more time to the business functions than the owner. (See *Matter of Dan’s Snowplowing, LLC*, Recommended Order dated November 9, 2023; Final Order, 23-11, dated March 8, 2024). Under 5 NYCRR §144.2(c)(3), a minority group owner must demonstrate that he is devoting time on an ongoing basis to the daily operation of the business and is devoting time on a daily basis. (See *Matter of Hudson River Mechanical Group Inc.*, Recommended Order May 1, 2020; Final Order 20-08, June 24, 2020). The Division has consistently stated that working part-time for the business does not meet the regulatory criteria to qualify as devoting time to the daily operation of the business. (See *Matter of Artisan AD, Inc.*, Recommended Order dated January 12, 2024; Final Order 24-01 dated

February 22, 2024; *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020; Final Order 20-06 dated June 2, 2020).

The record before the Division, including an application narrative and tax documentation, state Mr. Milbourne worked less than full-time and devoted 20 hours per week to the business. The application also indicated that Anthony Thomas works 40 hours per week and managed the business and handled all of Mr. Milbourne's responsibilities when Mr. Milbourne was not available. The Organizational Chart does not include the hours Mr. Milbourne devotes to the business. Contracts and agreements included with the application were evidence showing Mr. Thomas, and Mr. Scafide, who also works 40 hours per week, were acting as signatories for the business, and therefore they are the TMG employees devoting time on an ongoing basis to the daily operations of the business. (DED Exhibits 1, 4-11).

On appeal, Applicant states Mr. Milbourne works a full work week and not part-time, and the information provided reflected how his salary was calculated rather than the hours worked. Additionally, although the 1125E tax return evidences that Mr. Milbourne devotes 50% of his time to the business, Applicant states that this was an error. Applicant states that 95% of TMG's work is professional and since Mr. Milbourne is the licensed professional, he supervises and oversees the work done by the other employees. Applicant states that Mr. Scafide and Mr. Thomas are not licensed, but they can act as signatories for TMG after consulting with Mr. Milbourne. (APP Exhibits A and B).

The record before the Division including the application narratives and tax documentation state that Mr. Milbourne works less than full time, and he devotes 20 hours per week is to the business, and other employees work 40 hours per week. The application's various contracts and agreements are evidence that Anthony Thomas and Nino Scafide, both working full-time, are the

TMG employees devoting time on an ongoing basis to the daily operations of the business. Their signatures on the contracts and agreements are substantial evidence to support the Division's determination that TMG has not shown that Applicant is devoting time on an ongoing basis to the daily operations of the business. The information included in Applicant's appeal does not explain or clarify Mr. Milbourne's time on an ongoing basis, rather it is brand new information which contradicts previous application answers and narratives and the documents to support the application and therefore will not be considered. (See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021)).

The Division also denied TMG's application for certification as MBE on the basis that TMG failed to demonstrate that Mr. Milbourne controls business negotiations by representing himself to clients as the principal of the business enterprise seeking certification, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2). (DED Exhibit 2).

The Division will consistently deny certification where the Applicant has not shown that the minority owner exercises control over a business enterprise and business negotiations. Signed contracts, which represent the Applicant negotiating and executing agreements, are evidence that the Applicant exercises control of the business under the regulation's criteria. When an application contains a single contract executed by the Applicant, along with many more contracts and agreements signed by other employees, the Division will deny certification. (See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022).

The Division denied the certification on the basis that the evidence did not show Mr. Milbourne was controlling the business negotiations as demonstrated by fully executed contracts

or agreements. Various forms and contracts were provided with the application including an “Intent to Perform” for a contract for work on the “New Terminal One of JFK Airport,” and a change order for a contract agreement between AECOM Technical Services, Inc. and TMG. Both were signed by Nino Scafide. Three invoices were provided for work performed for the AECOM project which showed Nino Scafide, as Senior Engineer, was the only TMG employee working on the contract between 2022 and March 31, 2023. The document stated Mr. Scafide was the project point of contact for the work. (DED Exhibits 1, 6, 7 and 8).

The application also included invoices between sub-contractor FST-HEA and TMG. TMG provided a copy of the business’s Joint Agreement for Professional Services subcontract documentation for work done by FST-HEA, LLC for TMG, and work orders detailing work done by FST-HEA for TMG. These documents were signed by Anthony Thomas, TMG’s General Manager. (DED Exhibits 9-12).

On appeal, the Applicant resubmitted the contracts as evidence of Mr. Milbourne’s involvement and training of Mr. Scafide and Mr. Thomas. The appeal also included new information and documentation including copies of the signed master joint agreement contract with AECOM and Mr. Milbourne’s professional engineering license. (APP Exhibits A and B). The information included in Applicant’s appeal does not explain or clarify that Mr. Milbourne controls business negotiations, rather it is brand new information that was not before the division and therefore will not be considered. (See *Scherzi Systems, LLC v. White*, supra).

The record before the Division at the time of certification did not include documentation that demonstrated that Applicant devoted time to the negotiation or performance of the New York contracts. Most of the contracts were signed by other employees and the documentation provided to the Division did not demonstrate that Mr. Milbourne is exercising control of the business as

required by the regulations. Based on the information provided, it was Anthony Thomas and Nino Scafide, controlling the business negotiations by executing and signing contracts and agreements.

The record before the Division at the time of its determination to deny the MBE application contains substantial evidence to support its finding that Applicant was not controlling the business negotiations as demonstrated by fully executed contracts or agreements.

CONCLUSION

TMG did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(c)(3) and 144.2(d)(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 TMG's application for recertification as a minority-owned business enterprise.

In the Matter of The Milbourne Group-Consulting Engineers, Inc.
 DBA TMG – Consulting Engineers
 DED File ID No. 63198
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant’s Request to Appeal	Y	Y
APP B	Applicant’s Written Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Department of Education Professional Engineer License	Y	Y
DED 4	Organizational Chart	Y	Y
DED 5	2022 Milbourne Business Tax Returns	Y	Y
DED 6	Intent to Perform for contract titled “New Terminal One of JFK Airport”	Y	Y
DED 7	Change Order for AECOM Project dated 9/30/22	Y	Y
DED 8	Three invoices dated 4/20/23 (2203-0401; 2203-0402; 2203-0403)	Y	Y
DED 9	Joint Agreement for Professional Services subcontract between TMG and FST-HEA LLC, dated April 15, 2022	Y	Y
DED 10	Work Order (1). (TMG-Joint Agreement Professional Services with HEA Work Order-1)	Y	Y
DED 11	Work Orders (2) and (3). (TMG-Joint Agreement Professional Services with HEA Work Order- 2; Work Order-3)	Y	Y
DED 12	Unsigned Subcontract Agreement (FST-HEA JFK Subagreement)	Y	Y
DED 13	Notice of Appeal	Y	Y
DED 14	Notice to Proceed Via Written Appeal	Y	Y