

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

In the Matter

- of -

the Application of Tri-County Heating & A/C of Oneida, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69539

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 26, 2024

This matter considers the written appeal by Tri-County Heating & A/C of Oneida, Inc., (“Tri-County” 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 November 1, 2022, Ms. Shelley Sgroi, as President, applied on behalf of Tri-County for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 20, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification do 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);
 - (b) Minority group members or women relied upon for certification do 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); and
 - (c) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. Tri-County timely filed a Request to Appeal on May 5, 2023 (APP Exhibit A).

4. A notice to proceed via written appeal was sent to Tri-County on May 15, 2023 (DED Exhibit 3).
5. Tri-County filed its written appeal by letter dated June 20, 2023 (APP Exhibit B; DED Exhibit 4).
6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated October 24, 2023, and a brief of Dennie Byam Esq., counsel for the Division, dated October 24, 2023.

FINDINGS OF FACT

7. Tri-County is engaged in the sales and service of HVAC equipment to residential customers and light commercial. (DED Exhibit 1).
8. Ms. Shelley Sgroi is the President and has a 70% ownership interest. Her son, Charles J. Sgroi, is Vice President and has a 30% ownership interest. (DED Exhibit 1).
9. Ms. Sgroi is responsible for accounts payable and accounts receivable, handling advertising budgets, employee payroll, and budgets for equipment, vendors, and suppliers, and working with Tri-County's accountant (DED Exhibit 5). The narrative submitted with the application states "I currently work full time (approximately 50 hours per week) doing all day to day accounts payable/receivable. I work on budgets for all vendors and suppliers. Costing of tax exempt jobs. Profit/loss on jobs. I work on advertising and co-op reimbursement. I check on pricing of our insurance policy and other major purchases that are made. Payroll entry and data output. Work with accountant on continuing an upward trend for Tri-County." She is responsible for financial decisions, negotiating bonding and insurance, marketing and sales, hiring and firing, and purchasing equipment/sales (DED Exhibit 1).

10. Charles J. Sgroi is a HVAC Technician certified by Mainstream Engineering Corporation. He has a Universal EPA Certification, works with installers at job sites and does after hour service. He drafts sales quotes for residential customers and does some light commercial jobs. He also works with the service installation manager daily (DED Exhibits 6 and 7). He is solely responsible for estimating, preparing bids, negotiating contracts, and supervising field operations (DED Exhibit 1).
11. Peter Petreikis and Jason Collins are HVAC Installers, explain installation to customers and possess additional training as HVAC technicians. (DED Exhibits 1 and 8).
12. Business contracts and agreements submitted with the application are signed by or included Charles J. Sgroi only. (DED Exhibits 8 and 9).

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) 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.

(2) 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 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)(2) states 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 Tri-County 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 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.

Ms. Sgroi does not have any industry-specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business’ industry. She is responsible for accounts payable and accounts receivable, handling advertising budgets, employee payroll, and budgets for equipment, vendors, and suppliers, and working with Tri-County’s accountant (DED Exhibit 5). The narrative submitted with the application states “I currently work full time (approximately 50 hours per week) doing all day to day accounts payable/receivable. I work on budgets for all vendors and suppliers. Costing of tax exempt jobs. Profit/loss on jobs. I work on advertising and co-op reimbursement. I check on pricing of our insurance policy and other major purchases that are made. Payroll entry and data output. Work with accountant on continuing an upward trend for Tri-County.” (DED Exhibit 1). These are administrative functions which do not involve the critical functions of plumbing, heating, and air conditioning, which are specific to this business. Her resume does not reflect any experience or training in the critical functions of the business (DED Exhibit 5). She therefore must rely on others to perform the critical functions of the business. Her role at the business is primarily business

management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibits 1 and 5).

In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, one of the factors that the division considers includes “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” (5 NYCRR §144.2(c)(1))

Peter Petreikis and Jason Collins are HVAC Installers, explain installation to customers and possess additional training as HVAC technicians. (DED Exhibits 1 and 8).

Charles J. Sgroi is a HVAC Technician certified by Mainstream Engineering Corporation. He has a Universal EPA Certification, works with installers at job sites and does after hour service. He drafts sales quotes for residential customers and does some light commercial jobs. He also works with the service installation manager daily (DED Exhibits 6 and 7).

Ms. Sgroi relies on Charles J. Sgroi for overseeing the critical functions of the business, including estimating, preparing bids, negotiating contracts, and supervising field operations (DED Exhibit 1).

5 NYCRR §144.2(c)(2) states that “... 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 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).

Ms. Sgroi is responsible for financial decisions, negotiating bonding and insurance, marketing and sales, hiring and firing, purchasing equipment/sales. Mr. Charles J. Sgroi is solely responsible for estimating, preparing bids, negotiating contracts, and supervising field operations, which are the core functions of the business. (DED Exhibit 1).

The Division’s determination to deny the application on the basis that Tri-County failed to demonstrate that Ms. Sgroi 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.

II. Control

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

Business contracts and agreements submitted with the application are signed by or included Charles J. Sgroi only. (DED Exhibits 8 and 9). Also, Charles J. Sgroi is the only owner responsible for negotiating contracts (DED Exhibit 1).

Therefore, applicant failed to demonstrate appropriate control of the business by the woman-owner as required by 5 NYCRR §144.2(d)(2). See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016 (substantial evidence supported denial where no evidence was presented that the woman-owner signs contracts on behalf of the business).

CONCLUSION

Tri-County 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) 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 Tri-County's application for certification as a woman-owned business enterprise.

In the Matter of Tri-County Heating & A/C of Oneida, Inc.
 DED File ID No. 69539
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Appeal Submission	Y	Y
DED 5	Shelly Sgroi Resume	Y	Y
DED 6	Charles J. Sgroi Resume	Y	Y
DED 7	Employee Licenses	Y	Y
DED 8	Business Contracts	Y	Y
DED 9	Dealer Information	Y	Y
DED 10	Mortgage Deed	Y	Y