

Common Application Pitfalls Leading to Application Denials: Ownership, Operation, Control and Independence



Division of Minority and Women's Business Development

About the Division of Minority and Women's Business Development ("DMWBD")

New York State Executive Law Article 15-A §§ 310-317 ("Article 15-A") governs requirements for the participation of minority and women-owned business enterprises ("MWBEs") in New York State contracting. The objective of Article 15-A is to promote equality of economic opportunities for MWBEs by eliminating barriers to their participation in New York State contracting.

DMWBD's mission is to promote equality of economic opportunities for MWBEs and to eliminate barriers to their participation in state contracting. DMWBD supports New York State's leaders with information and resources that increase access to opportunities for minority and women-owned business enterprises throughout the State.

About NYS Certification

Minimum requirements for NYS MWBE Certification ("certification") for a minority and/or woman business owner ("owner") include ownership, operation, control and independence of the firm.

Ownership and Operations

Ownership & Operations Case Study

XYZ Electric was denied NYS MWBE certification for failing to meet ownership and operations criteria. The owner, Ms. Smith, failed to show that she shares in the risks and profits in proportion with her ownership interest, and that she has the experience, working knowledge or ability needed to operate the firm.

Ms. Smith received less income in 2014 compared to other employees of **XYZ Electric**. That year's tax documents show that her husband, Mr. Smith, was paid \$200,000, while Ms. Smith was paid \$100,000.

Ms. Smith has a bachelor's degree in science and has previously worked as an office administrator. However, she does not have any formal training in electrical work.

Mr. James, a licensed master electrician with 20+ years of experience, is the estimator and project manager at **XYZ Electric**.

Denial happened on two points:

1. Ms. Smith did not receive a benefit from the firm in proportion to her reported 51% ownership interest in the company.
2. Ms. Smith did not provide proof of her ability or training to evaluate work done by Mr. James.

Minority group members or women must prove direct ownership of at least 51% of a firm in order for it to be certified as an MWBE. The DMWBD looks at a number of factors to prove ownership.

Capital contributions can include money, property, equipment, or expertise. An owner's capital contribution must be comparable to their ownership interest, and inadequate documentation confirming the owner's capital contributions can lead to a denial of certification.

If the **owner's risks and profits** in the business are not equivalent to their level of ownership, denial may be recommended. For example, if the owner is a 90% owner, but only shares 50% of profits and losses, then the share of the MWBE owner is not proportionate to their ownership interest.

The owner must also prove that the core **operational business decisions** of the business are made by them. The owner must be responsible for the revenue creating activities of the business, including, as applicable, contract negotiations, estimating, purchasing equipment, financial decisions, negotiating bonding or insurance, and supervision of operational staff. For example, if a project manager has decision-making power over field work without the owner's supervision or final approval, then the owner may be deemed not to make operational decisions.

The owner must **dedicate sufficient time** on an ongoing basis for daily operations. If the owner can't devote the time necessary, holds other business interests that can conflict with managing the firm or has another full time job, their ability to run the daily operations of the firm is limited. It is the owner's responsibility to explain to the DMWBD why the time they devote is enough to run the firm's daily operations.

The owner's **technical expertise or working knowledge** of the industry is also required to prove that they can run the everyday operations of the firm. If the owner has no training or managerial experience in the industry, then it appears that they can't manage the firm's core functions and every-day activities. Expertise can be proven through resumes, trainings, credentials and licenses.

While these items do not automatically lead to a denial, they are important markers to the owner's true decision-making power in the firm.

Control and Independence

A firm's corporate documents must clearly show that the owner is in charge of making business decisions. **The bylaws, operating agreements, partnership or shareholders' agreements or articles of incorporation must give power to the owner with no limitations or restrictions.** Limitations can include minority or women owners filling subordinate officer positions or having limited voting rights. Limitations prevent the owner from having exclusive control of business activities.

The owner must have a proportionate percentage of voting rights and decision-making abilities. These documents must allow the owner to make decisions without restrictions, and must show their control of negotiations and have signature authority for business matters.

An owner should demonstrate signatory power with leases, supply agreements, loan and credit agreements and business contracts. If the owner has ownership of 51% of the business, but 66% of the vote is required for decision making, then the owner does not exclusively have decision-making powers.

Control Case Study

Mr. Will has submitted an application as owner/CEO of **Marketing Corporation A**. He states that he has the final say in all business decisions and has unrestricted decision making power in all affairs. Ms. Green is named as the President of **Marketing Corporation A** in the application.

However, the corporate documents do not allow Mr. Will to make certain business decisions without the unanimous consent of the other shareholders. Additionally, the bylaws do not establish the office of "CEO" and indicate that the President (not the CEO) has final say over all business activities.

Affidavits submitted state that Mr. Will makes business decisions for the company on a regular basis, but none address the corporate documents.

Certification focuses on who has formal control of business decisions in addition to who makes the day-to-day decisions. Under the corporate documents, Ms. Green is authorized to overrule any other officer of the corporation, so Mr. Will is not allowed to make business decisions

Independence Case Study

In the submitted application the owner, Mr. Johnson, stated that **PE Enterprises** is not connected to any other business entity. However, **PE Enterprises** only has one client, **Firm 456**.

PE Enterprises rents office space, receives office supplies from, and has access to the private database of **Firm 456**. **PE Enterprises** is also a sub-consultant to **Firm 456**.

PE Enterprises cannot exist without assistance from **Firm 456**, making **PE Enterprises** dependent upon another business for its business existence. As a non-independent firm, **PE Enterprises** cannot be certified by NYS.

The firm must also be independent of other businesses.

If the firm is reliant on another business for contracts, employees, equipment or resources, that firm is not considered an independent entity.

Reliance and dependence on another business includes receiving assistance and resources while paying less than market rate for these resources. This includes: using the basic needs from another company, such as office supplies and telephone services, having and utilizing another company's proprietary database or information and sharing space and/or staff.

Note: This guide provides generally applicable information, and is not intended to exhaustively describe all criteria or the documents that DMWBD will require in order to process your application.

HAVE QUESTIONS?

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