

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

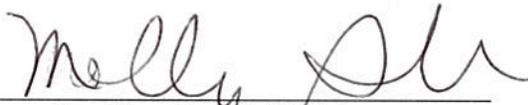
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the Application of **PRIMAE ENGINEERING, P.C. f/k/a John M.
McDonald, P.C.**
for Certification as a Minority-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60091

RECOMMENDED ORDER

- by -



Molly T. McBride
Administrative Law Judge

July 6, 2016

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development ("NYSDED") to deny PRIMAE Engineering, P.C. f/k/a John M. McDonald, P.C. ("PRIMAE" or "applicant") certification as a minority-owned business enterprise ("MBE") be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by PRIMAE challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a minority-owned business enterprise.

PRIMAE submitted an application to the New York State Minority and Women-owned Business Enterprise Program on September 1, 2015 (Exhibit A). By letter dated November 20, 2015, the Division denied the applicant's request for minority-business enterprise certification (Exhibit B).

Applicant filed an appeal from the denial by letter dated December 3, 2015 and requested a hearing which was held on March 22, 2016 at the Albany office of the NYSDDED.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts. On administrative appeal, the

applicant bears the burden of proving its business meets the eligibility criteria for certification as a minority-owned business enterprise (see State Administrative Procedure Act § 306[1]).

POSITIONS OF THE PARTIES

Position of the Division

The Division asserts that the applicant failed to meet three criteria for certification. The Division found that the applicant failed to demonstrate that the minority owner's capital contribution is proportionate to his equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise pursuant to 5 NYCRR 144.2(a)(1); applicant failed to demonstrate the minority owner makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, pursuant to 5 NYCRR 144.2(b)(1) and (b)(1)(iii); and applicant failed to demonstrate that the minority owner has control over the business operations, pursuant to 5 NYCRR 144.2(b)(3).

PRIMEAE asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. PRIMEAE Engineering, P.C. began doing business on May 11, 2015 (Exhibit A at 2.A.).
2. Kumar Buvanendaran is the sole shareholder as well as President and CEO of PRIMAE (Exhibit A at 2.A.). He is also the President and CEO of the Maryland engineering firm Prime AE Group, Inc. (Exhibit A at 6.A.).
3. PRIMAE is a professional engineering firm (Exhibit A at 3.D.).
4. Minority owner, Kumar Buvanendaran, a licensed professional engineer, formed PRIMAE in 2015 to expand his Maryland

engineering business Prime AE Group, Inc., into New York State (T. Disk 1, at 4:40)¹.

5. PRIME AE Group, Inc. and Kumar Buvanendaran contracted to purchase the Schenectady, NY engineering firm John M. McDonald Engineering, P.C. in 2015 (Exhibit C).

6. At the closing of the purchase of McDonald Engineering, Mr. Buvanendaran was advised that a New York licensed engineer must purchase the McDonald business and so he personally became the sole buyer (T. Disk 1 at 7:25).

7. The Maryland corporation Prime AE Group, Inc. funded the purchase of John M. McDonald Engineering, P.C. by Mr. Buvanendaran (T. Disk 1 at 5:00 & 7:30) and Buvanendaran personally guaranteed the funds (T. Disk 1 at 7:45). Mr. Buvanendaran testified that he reimbursed PRIME AE for the purchase but he did not supply documentation to verify that reimbursement.

8. John McDonald and Prime AE Group, Inc. executed an Executive Employment Agreement wherein Mr. McDonald agreed to remain as an employee of Prime AE Group, Inc. [REDACTED] from the date of the purchase of his firm in May 2015 (Exhibit 10).

9. Mr. McDonald has been kept on as an employee [REDACTED] to assist with the transition. Applicant "needed" Mr. McDonald to maintain its relationships with its clients (T. Disk 1 at 9:38).

10. Applicant supplied two contracts at the hearing which identify the applicant company as PRIMAE Engineering, P.C. dba John M. McDonald Engineering, P.C. (Exhibit 3). Contracts supplied with the application for MBE certification identify the company as John M. McDonald Engineering, P.C. and are executed by Mr. McDonald (Exhibit G & H).

11. Mr. McDonald is managing the projects out of the Schenectady office because "the clients know him and are giving him the

¹ Numbers in parenthesis refer to the audio transcript of the hearing held on March 22, 2016.

projects because they trust that he will be able to deliver" (T. 10:10).

12. Mr. Buvanendaran is responsible for the following managerial operations: financial decisions, estimating, preparing bids, hiring and firing, negotiating contracts, signatory for business accounts (Exhibit A at 4.A.). Mr. McDonald is responsible for supervising field operations (id.). The payroll, human resources, management of the New York business is done by Mr. Buvanendaran (T. Disk 1 at 26:00).

13. John McDonald runs all the projects from the Schenectady office of the applicant company, he brings work into the applicant company and keeps the clients happy (T. Disk 1 at 41:00). Mr. Buvanendaran is grooming two other employees to take over McDonald's duties when McDonald's employment agreement ends [REDACTED] (T. Disk 1 at 41:00).

14. Mr. Buvanendaran is solely authorized to make any financial decision related to projects, such as cost overruns or write offs (T. Disk 1 at 40:10).

15. PRIMAE began doing business in New York City in August 2015 and in September 2015 hired Karim Palomino to manage the business of PRIMAE in the New York City area (T. Disk 1 at 45:00). A sublease agreement was executed in January 2016 for office space in New York City for applicant (Exhibit 6). Mr. Buvanendaran is the face of the company for all business out of the New York City office and manages all work and is the contact for all work out of the New York City office (T. Disk 1 at 47:10).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority-owned business enterprise (MBE) pursuant to Executive Law Article 15-A.

OWNERSHIP

Capital Contribution

The Division claims that Kumar Buvanendaran did not make a capital contribution to the business that is proportionate to his equity interest in PRIMAE.

The section 144.2 eligibility criteria provides:

The following standards shall be used to determine whether a business enterprise is eligible to be certified as a minority- or woman-owned business enterprise.

(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority- or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

(1) the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

Mr. Buvanendaran wanted the Maryland corporation to purchase the New York engineering firm, John M. McDonald Engineering, P.C. as a means to expand his Maryland engineering business into New York State (T. Disk 1 at 4:45). Mr. Buvanendaran learned at the closing that he personally had to purchase the McDonald firm to comply with New York law (T. Disk 1 at 4:40). The purchaser was Mr. Buvanendaran but the purchase was funded by the Maryland corporation Prime AE Group, Inc. (T. Disk 1 at 5:00 & 7:30). Applicant presented proof that the Maryland corporation paid John McDonald the sum of [REDACTED] pursuant to the stock purchase agreement (T. Disk 2, 6:40). The applicant did not produce proof that any capital contribution was made by the minority owner and therefore applicant did not meet the requirements of 5 NYCRR 144.2(a)(1).

OPERATION

NYSDED also denied the application based upon applicant's failure to establish the minority owner met the requirement of 5 NYCRR 144.2(b)(1) which reads, in part,

(b) Control. Determinations as to whether minority group members or women control the business enterprise will be made according to the following criteria:

(1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:

(i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.

(ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

(iii) Minority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise.

The Division denied the application based upon applicant's failure to demonstrate that Kumar Buvanendaran makes the decisions pertaining to the operations of the enterprise. The Division found that business decision authority for PRIMAE has been delegated to the former owner John McDonald (T. Disk 2 at 3:30). The application states that Mr. McDonald shall be responsible for supervising field operations (Exhibit A at 4.a.) The application states that Mr. Buvanendaran is responsible for the following managerial operations: financial decisions, estimating, preparing bids, hiring and firing, negotiating contracts, signatory for business accounts (Exhibit A, 4). The applicant was asked to submit a narrative of the business operation of applicant business and same was submitted by Mr. Buvanendaran (Exhibit E). The narrative states that Mr. Buvanendaran devotes 14 hours a week to the applicant business and 26 hours a week to his Maryland business (*id.*). It also states that he has "been involved in all levels of operations ranging from business development to office management to legal affair matters" identifying his goal to be "hands-on active, and available to all of my employees in every location..." (Exhibit E). Applicant also submitted a narrative detailing the duties of key employees of applicant company (Exhibit F) and it states, in part, "Jack McDonald ... supervises the Schenectady operations...

He handles day-to-day operations of the office" (Exhibit F). The evidence presented with the application fails to demonstrate that the minority owner is the decision maker with regards to the operation of the business.

The Division also denied the application for certification based on the minority owner's failure to demonstrate his control over the business operations pursuant to 5 NYCRR 144.2(b)(3). Applicant presented two contracts with the application for certification, dated after the McDonald business was purchased by PRIMAE (Exhibits G & H). Both contracts were executed by McDonald and identified the McDonald firm as the contractor, making no mention of PRIMAE or Mr. Buvanendaran (Exhibits G & H). The Division concluded that applicant failed to meet requirements to show that the minority owner controlled business negotiations as the documentation submitted evidenced Mr. McDonald making business decisions (T. Disk 2, 13:10) (see 5 NYCRR 144.2[b][3]).

The analyst for the Division who reviewed the application for certification and recommended denial, Ilyiana Farrias, testified at the hearing. She stated that her recommendation to deny was based in part on her conclusion that applicant had delegated the management of the operation to McDonald (T. Disk 2 11:50). The narrative supplied by applicant, the application and the testimony of Mr. Buvanendaran all supported the conclusion that Mr. McDonald was the day-to-day decision-maker for the applicant business at the time of the application review. A minority owner cannot delegate substantial day to day operation to another and comply with the requirements of 5 NYCRR 144.2(b). The evidence also supports the conclusion that the minority owner is not in control of the business operation.

CONCLUSIONS

1. PRIMAE failed to demonstrate that the minority owner Kumar Buvanendaran has made a capital contribution to the business that is in proportion to his ownership interest as required by 5 NYCRR 144.2(a)(1) in the form of money, expertise, experience or knowledge.

2. PRIMAE failed to demonstrate that the minority owner, Kumar Buvanendaran makes decisions pertaining to, and controls the operations of the business as required by 5 NYCRR 144.2(b)(1)(i)-(iii) and (b)(3).

RECOMMENDATION

The Division's determination to deny PRIMAE Engineering, LLC's application for certification as a minority-owned business enterprise should be affirmed, for the reasons stated herein.

Matter of PRIMAE Engineering LLC

DED File ID No. 60091

DED Exhibit List

Exh. #	Description
A	Application submitted September 1, 2015
B	Denial letter of November 20, 2015
C	Stock Purchase Agreement
D	Prime AE group banking records
E	November 10, 2015 PRIMAE letter to Division
F	November 11, 2015 PRIMAE letter to Division
G	Contract between McDonald firm and Rotterdam
H	Contract between McDonald firm and Esperance

Applicant Exhibit List

Exh. #	Description
1	Payroll records
2	Conference Seminar Training Request Form
3	Contracts with Herkimer and Fort Plain
4	Cancelled checks
5	Corporate resolution dated November 12, 2015
6	Sublease for NYC office
7	Offer letters to employees
8	Consolidated Monthly Income
9	2 Proposals for Memorial Library
10	Executive Employment Agreement
11	May 2015 personal guaranty
12	Bylaws PRIMAE Engineering
13	Resume Karim Palomino
14	3 Affidavits
15	MBE certifications from DASNY, Port Authority, NYC
16	Prime AE Group, Inc. MBE certification