

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

**In the Matter**

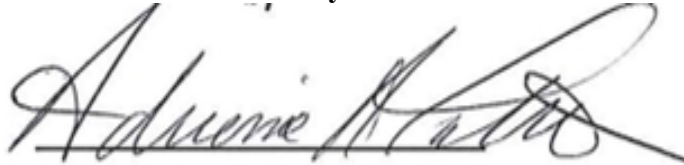
**- of -**

**the Application of ADK Water Solutions, Inc.  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 66411**

**RECOMMENDED ORDER**

**-by-**

A handwritten signature in black ink, appearing to read "Adrienne R. Lotson". The signature is written in a cursive style with a horizontal line underneath the name.

**Adrienne R. Lotson  
Administrative Law Judge**

**June 12, 2023**

This matter considers the written appeal by ADK Water Solutions, Inc. (“ADK Water” 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 (5NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of 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 June 6, 2020, Sylwia Siver, as Treasurer, applied on behalf of ADK Water Solutions, Inc. for certification as a WBE (DED Exhibit 1).
2. On February 25, 2021, the Division denied the application on six grounds: (1) the party relied upon for certification did not share in the risks and profits of the business enterprise; (2) the party relied upon for certification did not possess adequate, industry-specific competence to make critical business decisions; (3) the party relied upon for certification did not make day-to-day operational decisions with respect to critical functions of the business enterprise; (4) the party relied upon for certification did not devote time on an ongoing basis to the daily operation of the business enterprise; (5) the party relied upon was not the highest-ranking officer of the business enterprise; and (6) the party relied upon for certification does not negotiate business contracts or hold themselves out to clients as the principal of the business enterprise (DED Exhibit 2).
3. ADK Water submitted its written appeal by letter dated March 24, 2021 (DED Exhibit 4).

4. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director dated April 17, 2023, and a brief of Anequa O. Pond, Esq. counsel for the Division, dated April 21, 2023.

### **FINDINGS OF FACT**

5. ADK Water is a business specializing in providing cooling tower monitoring, cleaning, inspection, maintenance, and replacement (DED Exhibit 1).
6. Sylwia Siver is the co-founder and Secretary/Treasurer of ADK Water and has a 51% ownership interest (DED Exhibit 1).
7. Michael Siver is the co-founder and President of ADK Water and has a 49% ownership interest (DED Exhibit 1).
8. Mr. Siver earned 100% of the officer salary in 2017 and 2018. Ms. Siver received no officer compensation (DED Exhibit 5).
9. Ms. Siver works full-time as Director of Catering at Highgate Hotels. The only wages she earned in 2017 and 2018, as indicated by business and personal income tax statements, were from her job at Highgate Hotels (DED Exhibit 6).
10. Ms. Siver's resume and application do not show any experience in cooling system maintenance, analysis, or testing. She does not hold any certifications to perform or supervise these functions (DED Exhibit 7).
11. Mr. Siver has 21 years of experience in maintaining water treatment equipment, monitoring and maintaining cooling towers, performing water quality, analysis, testing and verification. He holds multiple certifications in the field (DED Exhibit 8).
12. Ms. Siver's responsibilities at the business enterprise are administrative in nature, including budgeting, managing payroll and record-keeping (DED Exhibit 7).

13. Mr. Siver's responsibilities at the business enterprise are maintaining water treatment equipment, maintaining cooling towers, recording test data, and preparing reports and assisting in water reconnaissance (DED Exhibit 8).
14. Managerial tasks, including financial decisions, estimating, preparing bids, negotiating bonds and insurance, marketing and sales are shared by the owners (DED Exhibit 1).
15. The Board of Directors of ADK Water has two members: Sylwia Siver and Michael Siver. ADK Water's application does not indicate a Chairperson of the Board (DED Exhibit 9).
16. As Secretary/Treasurer, Ms. Siver is not the highest-ranking officer of the business (DED Exhibit 9).
17. As President, Mr. Siver is the highest-ranking officer of the business (DED Exhibit 9).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(3) states as follows:

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)(1) states as follows:

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.

5 NYCRR §144.2(c)(2) states as follows:

Minority group members and 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.

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

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)(1) states as follows:

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.

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

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 ADK Water 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. See *In Re: The Application of Lido Strategic Solutions, Inc.* (DED File no. 60212) (March 6, 2019) (recommended order declining to consider documents offered by the applicant on appeal that were not part of the application and thus not before DED at the time of denial), adopted on June 5, 2019 (Final Order). 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)).

Accordingly, materials submitted as a part of Applicant's appeal that were not before the Division at the time of its determination, specifically 2020 tax returns and a NYC WBE certificate, were not considered by this tribunal.

## DISCUSSION

### PROPORTIONATE SHARE OF RISKS AND PROFITS

The first ground cited by the Division for its denial was that Sylwia Siver, party relied upon for certification, does not share in the risks and profits of the business enterprise in proportion to her equity share as required by 5 NYCRR §144.2(b)(3). In its application ADK Water indicates that Ms. Siver holds a 51% ownership interest, while Mr. Siver holds a 49% ownership interest in the business enterprise. (DED Exhibit 1)<sup>1</sup> An examination of business tax returns for 2017 and 2018, filed as a part of the application, indicated that Mr. Siver earned 100% of the officer salary paid by the business enterprise in the amounts of \$102,0000 in 2017 and \$ [REDACTED] in 2018 (DED Exhibit 5). A review of Ms. Siver's personal tax returns for 2017 and 2018, showed the only wages earned in 2017 and 2018 were generated by her work at the Highgate Hotel: \$116,735 and \$ [REDACTED] respectively (DED Exhibit 6). Importantly, the Division argues, these returns did not indicate any income or distributions from the applicant business in either 2017 or 2018 (DED Exhibit 5).

Applicant argues that she was supporting the business through her work at the hotel. At the time ADK Water had significant expenses including one to two employees, various insurances (worker's comp, general liability, commercial car, and umbrella) as well as payroll taxes. As a result, she could not "afford" to pay herself a salary. However, she states, during this time she was 100% responsible for the business' cash flow (DED Exhibit 4). I take notice that the certification

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<sup>1</sup> The Division notes that in the business taxes filed by ADK Water, the ownership interest is stated as 60% to Ms. Siver and 40% to Mr. Siver.

application indicates that the business enterprise generated gross receipts of \$ [REDACTED] in 2017 and \$ [REDACTED] in 2018; and gross profits of \$ [REDACTED] (2017) and \$ [REDACTED] (2018) (DED Exhibit 1). During this same time, Mr. Siver received \$102,000 in 2017 and \$ [REDACTED] in 2018, while Ms. Siver was uncompensated by the business enterprise (DED Exhibit 5).

I find the applicant's argument to be without merit on two grounds. First, the applicable regulation [5 NYCRR §144.2(b)(3)] does not make exceptions based on the financial condition of the business enterprise when it requires proportionate sharing of risks and profits. Second, even if such an exception did exist, in the present matter, the evidence submitted does not support the argument of economic hardship. Based on the evidence in the record, the applicant has failed to demonstrate that Ms. Siver shared in the risks and the profits of the business enterprise in proportion to her equity interest as required by 5 NYCRR §144.2(b)(3). The Division's denial is supported by substantial evidence.

#### INDUSTRY-SPECIFIC COMPETENCE

In its brief, the Division argues that Ms. Siver did not possess adequate, industry-specific competence to make critical business decisions without relying upon others, as required by 5 NYCRR §144.2(c)(1). Pointing to Ms. Siver's resume, they argue that she lacks the professional and educational knowledge and/or experience to independently make critical business decisions. They note specifically that Siver does not possess any training or certification in cooling tower cleaning, monitoring, inspection, maintenance, or replacement, or related industries (DED Exhibit 7). According to the certification application, Ms. Siver's role in the business enterprise was described as largely administrative involving managerial tasks (DED Exhibit 1).

Ms. Siver acknowledges that her husband, Michael Siver holds the licenses required to perform the critical functions of the business enterprise, while she does not hold any such licenses

or certifications. She argues, however, that her managerial tasks keep the business afloat, and this should be sufficient to meet the requirement of 5 NYCRR §144.2(c)(1) (DED Exhibit 4).

Relying upon the evidence in the record, I find Ms. Siver's experience and training are largely administrative in nature, and not in the core revenue generating functions of the business. It is clear that Ms. Siver does not have the technical expertise nor experience to conduct the core functions of the business. Mr. Siver, who has demonstrated industry-specific competence and expertise developed from over 21 years of experience, performs the critical functions of the business enterprise. Thus, Ms. Siver is not independently capable of making critical business decision regarding the core revenue generating function of the business. *See In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*. 179 A.D.3d 1343, 118 N.Y.S.3d 253 (2020). The applicant has failed to demonstrate that Ms. Siver possesses adequate, industry-specific competence to make critical business decisions without relying upon others as required by 5 NYCRR §144.2(c)(1). Accordingly, the Division's denial is supported by substantial evidence.

#### OPERATIONS

The Division argues that the party relied upon for certification does not make day-to-day operational decisions with respect to critical functions of the business enterprise as required by 5 NYCRR §144.2(c)(2) (DED Exhibit 1). Rather, co-owner, Ms. Siver's husband Michael, with 21 years of experience in the cooling tower industry, who performs the core operations of the business makes these decisions. He is the holder of several certificates and other expert qualifications in the field (DED Exhibit 8), and is well-versed in, and responsible for, water testing, cleaning, and disinfecting cooling towers, maintaining treatment equipment, etc. Ms. Siver, who lacks the technical expertise to supervise, review or evaluate her employee's work, performs an



administrative role which includes budgeting, bookkeeping, tracking expenses, etc. (DED Exhibit 7). The Division argues this is grounds for the denial of certification, as Ms. Siver does not make the critical day-to-day operational decisions. *Panko Elec. And Maintenance Corp. v. Zapata*, 172 A.D.3d 1682 (3d Dept., 2019).

Applicant argues that her full-time job at Highgate Hotel does not prevent her from putting full-time efforts in the day-to-day operations of the business enterprise as she puts in between 100-120 hours per week between both jobs (DED Exhibit 4). The certification application (DED Exhibit 1) indicates that Ms. Siver's responsibilities many of which she shares with Mr. Siver, include budgeting, record-keeping, marketing, sales, preparing bids and estimates, and negotiating contracts. In her appeals statement, she further clarifies that her specific responsibilities include client acquisition, price negotiation, and contract execution (DED Exhibit 4).

I do not credit Applicant's argument that working 100-120 hours per week on two jobs establishes that she is responsible for, and makes, day-to-day operational decisions. Further, her assertions, in both her original application and on appeal, that she is responsible for generating and negotiating business deals, does not rise to the level of making day-to-day operational decisions. Based on the evidence in the record, the applicant has failed to demonstrate that Ms. Siver makes day-to-day operational decisions with respect to critical functions of the business enterprise. Accordingly, the Division's denial is supported by substantial evidence.

#### TIME

The Division argues that the party relied upon for certification did not devote time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR §144.2(c)(3) (DED Exhibit 1). Ms. Siver's full-time position with Highgate Hotels at the title of Director reasonably suggests that she carries a great deal of responsibility that would prevent her

from putting in the time and effort to run and oversee projects at ADK Water. Additionally, although compensated by Highgate Hotels for the period represented in the certification application, Ms. Siver did not receive any compensation from the applicant business during that same period (DED Exhibit 7).

Appellant argued that she is doing both jobs on a full-time basis, typically working 100 – 120 hours weekly, as quitting her job was not possible due to the financial state of ADK Water (DED Exhibit 4).

While it is feasible that an individual can give full-time efforts to two different positions depending on the nature of the work and hours of the day required to be present at the various enterprises, in the present matter, the appellant does not provide documentation to support her claim that the number of hours worked shows that she devotes specific time on an ongoing basis to the daily operations of the present business enterprise. Thus, based on the evidence in the record, the applicant has failed to demonstrate that Ms. Siver makes day-to-day operational decisions with respect to critical functions of the business enterprise. Accordingly, the Division’s denial is supported by substantial evidence.

#### HIGHEST-RANKING OFFICIAL

In its brief, the Division argues that the party relied upon for certification was not the highest-ranking officer of the business enterprise as required by 5 NYCRR §144.2(d)(1). They note that there are two owners of the applicant business enterprise: Ms. Siver who serves as Secretary/Treasurer, and Mr. Siver who serves as President. Further, the company’s Bylaws state that the “President of the Board shall be the Chief Executive Officer of the Corporation if the position of Chairperson of the Board is vacant.” These same Bylaws identify Mr. Siver as the

President of the Board, making him the highest-ranking officer in lieu of a chairperson. Finally, a chairperson was not identified in the certification application (DED Exhibit 1).

Applicant stated that she convinced Mr. Siver that they should start ADK Water. In addition, she holds 60% of the ownership interest and represents the business enterprise at hearings before the New York City Office of Administrative Trials and Hearings (OATH) (DED Exhibit 4).

Ms. Siver's arguments do not supersede the provisions of the company's Bylaws that establish the rank of officers in the enterprise. Her claims are insufficient to overcome the company Bylaws which dictate that in the absence of a Chairperson of the Board, the President is the Chief Executive Officer. Based on the evidence in the record, the applicant has failed to demonstrate that Ms. Siver is the highest-ranking officer of the business enterprise. Accordingly, the Division's denial was supported by substantial evidence.

#### CONTROL

Finally, the Division argues that the party relied upon for certification does not demonstrate control by negotiating business contracts or representing themselves out to clients as the principal of the business enterprise as required by 5 NYCRR §144.2(d)(2) (DED Exhibit 1). They state that because Ms. Siver is a full-time employee at a site other than the location of the business enterprise, it is not likely that she is able to represent herself as a principal of the business during "normal business hours". Also, because her title is Secretary/Treasurer, while her husband's is President, she is not holding herself out to be the principal of the business. Given that she does not have the expertise, training or licenses required by the enterprise, it is highly unlikely that applicant would be able to negotiate contracts. Finally, her resume, submitted as part of the original application, does not indicate that she negotiates contracts (DED Exhibits 1, 3 and 7).

Applicant included in her original application that she negotiates contracts. On appeal, applicant indicates that she is the 60% owner of the business and responsible for 100% of its cash flow. Further, she represents the business at hearings before the NYC OATH (DED Exhibit 4).

I take judicial notice that contrary to the Division's assertions, the applicant did state in the original certification application that she and Mr. Siver negotiated contracts. However, Ms. Siver's arguments are not persuasive that her percent of ownership and representation of the enterprise before tribunals demonstrates that she represented herself to clients as the principal of the business enterprise as required by 5 NYCRR §144.2(d)(2). Therefore, I find that the Division's denial was supported by substantial evidence.

### **CONCLUSION**

I find that ADK Waters has not demonstrated that the party relied upon for certification shared in the risks and profits of the business enterprise - 5 NYCRR §144.2(b)(3); possessed adequate, industry-specific competence to make critical business decisions - 5 NYCRR §144.2(c)(1); made day-to-day operational decisions with respect to critical functions of the business enterprise - 5 NYCRR §144.2(c)(2); devoted time on an ongoing basis to the daily operation of the business enterprise - 5 NYCRR §144.2(c)(3); was the highest-ranking officer of the business enterprise - 5 NYCRR §144.2(d)(1); and did not represent herself to clients as the principal of the business enterprise - 5 NYCRR §144.2(d)(2).

### **RECOMMENDATION**

The Division's determination to deny ADK Water's application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

In the Matter of ADK Water Solutions, Inc.  
DED File ID No. 66411  
Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification – 06/06/2019
DED 2	Denial Letter – 02/25/2021
DED 3	Notice to Proceed Via Written Appeal – 06/09/2021
DED 4	Applicant’s Written Appeal Submission – 8/4/2021
DED 5	Business Taxes for 2017 and 2018
DED 6	Personal Taxes for 2017 and 2018
DED 7	Resume: Ms. Sylwia Siver
DED 8	Resume: Mr. Michael Siver
DED 9	ADK Water’s Bylaws