

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

In the Matter

-of-

The Application of **ACME LIGHTNING ROD, LLC**  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60997

RECOMMENDED ORDER



Helene G. Goldberger  
Administrative Law Judge

February 25, 2020

## 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 (DED) to deny the application filed by Acme Lightning Rod, LLC (Acme or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

## PROCEEDINGS

Acme applied for certification as a woman-owned business enterprise on August 27, 2015. *See*, Exhibit (Ex.) DED-B. By letter dated January 30, 2017, the Division determined that Acme does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. Ex. DED-A. The grounds for the Division's determination were:

- Pursuant to § 144.2(a)(1), of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), the contribution of women is not proportionate to their 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)(2), (c)(2), Acme is not an independent business enterprise.

By letter dated February 27, 2017, Cathy Barnard, Managing Member, appealed from the Division's determination to deny Acme's application for WBE certification. Pursuant to Acme's decision to pursue its appeal in writing, by letter dated March 29, 2017, the Division notified Acme that its written appeal was due by May 30, 2017. DED received Acme's timely written appeal dated May 24, 2017 on May 26, 2017. With its Appeal (App.), Acme included copies of the Division's March 29, 2017 letter to Ms. Barnard; the Woman-Owned Business Certifications that Acme holds for National Women Business Owners Corporation dated May 15, 2016; Massachusetts dated November 23, 2015; Connecticut (June 17, 2017 – June 17, 2019); sample of loan payment made monthly to John L. Barnard, Jr.; sample invoices from Seth Beecher for drafting services; loan agreements and cancelled checks for money given to Acme Lightning Rod by Cathy Barnard; sample rent checks paid to John (Jack) Barnard; Acme's appeal letter dated February 27, 2017, and the January 30, 2017 denial by the Division. Except for the documents related to the appeal (App. 1 and 7), the remaining documents are new and were not part of the application and therefore, not considered by the DED analyst. Accordingly, pursuant to 5 NYCRR § 144.4(e), I have not considered these documents in making this Recommended Order.

Respondent DED, by counsel Donald J. Tobias, submitted its response to the appeal on January 28, 2020. This response includes the affidavit (Aff.) of Glenn Butler, the Certification

Analyst who personally reviewed Acme's August 2015 application. Mr. Tobias submitted Mr. Butler's affidavit dated January 28, 2020 with the annexed Exhibits A-S, and the Memorandum of Law in Response to the Appeal (MOL) dated January 28, 2020.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at 5 NYCRR § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself and information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR § 144.4(e).

### **STANDARD OF REVIEW**

On this administrative appeal, Acme bears the burden of proving that the Division's denial for WBE certification is not supported by substantial evidence (*see*, State Administrative Procedures Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and the applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v. Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

### **POSITIONS OF THE PARTIES**

#### The Division

The Division denied the application filed by Acme for certification as a woman-owned business enterprise with a letter dated January 30, 2017 (*see*, Exhibit DED-A). The Division determined that Acme failed to demonstrate: (1) that the contribution of women is proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise as required by 5 NYCRR § 144.2(a)(1); and (2) that Acme is an independent enterprise as required by 5 NYCRR §§ 144.2(a)(2) and (c)(2). The Division concluded that Acme is inextricably linked to the family-owned businesses of Northeast Lightning Protection, LLC (Northeast) and has no true independent status. In addition, the Division found that the two principals of Northeast, John Barnard Jr. and James Barnard, possessed the related industry credentials while Ms. Barnard, the wife of James Barnard, did not and her occupational listing on the 2014 joint income tax return was "teacher." The Division also found that Ms. Barnard made a nominal capital contribution but was initially accorded a fifty-one percent (51%) interest in Acme, while John Barnard Jr. (brother of James), who made an initial [REDACTED] loan, was given a thirty-three percent (33%) interest and James a sixteen (16%) percent

interest. The Division points to Acme's own submissions that show it subcontracted out its work to Northeast for the drafting and designing work of the systems it provided to its customers. The Division also notes the June 2015 redistribution of shares in Acme and maintains that the record does not show "any contributions of capital or exchanges by and between the aforesaid three shareholders, to account for these re-allocations." Butler Aff., ¶ 8.

### Acme

In its appeal dated May 24, 2017, Acme provides that it is an "open shop" while Northeast is a union shop, so Acme makes every effort to keep these businesses separate in order to avoid union related fees and restrictions. App., Issue #1. Ms. Barnard represents that the money that was loaned to the company by her brother-in-law John Barnard did not qualify as a contribution of equity but rather was a "debt instrument." *Id.* She provides that she has been paying off this loan and has lent the company funds several times. *Id.* She states that all the company equipment was purchased by her. *Id.* With respect to her expertise, Ms. Barnard provides that she began working in the lightning protection business in 1989 starting as a part-time bookkeeper and then as a consultant working on matters such as personnel and converting the recordkeeping from paper to electronic. *Id.* She maintains that she has taken classes in lightning protection and has worked with her supplier to educate the public about lightning safety. *Id.* She also maintains memberships in the Lightning Safety Alliance, the Lightning Protection Institute, the United Lightning Protection Institute and has a Connecticut Home Improvement License. *Id.*

With respect to the company's independence, Ms. Barnard notes that the building occupied by Acme is not owned by Northeast and "[t]o make things easier for the landlord," Northeast would pay the rent and Acme would pay its share to Northeast. *Id.* However, now Acme writes it checks directly to the landlord. *Id.* Ms. Barnard points to the industry's rarity and that it has been difficult to find the experts she needs to run her business – particularly design, drafting and estimating. *Id.* Ms. Barnard maintains that she has "taken on all the financial risks from working without pay when money was tight, to lending the company money when needed." *Id.* She states that she makes all personnel decisions and also the day-to-day operational decisions with respect to new jobs, doing payroll and scheduling crews. *Id.* She also points to her WBE certifications with Massachusetts, Connecticut and the federal government. *Id.*

### **FINDINGS OF FACT**

1. ACME Lightning Rod, LLC, is located at 8 Peters Road, Bloomfield, Connecticut and is a construction related business focusing on lightning protection. Ex. DED-B, §§ 1D, 3B, 3D.
2. Northeast Lightning Protection, LLC is located in the same building as Acme at 10 Peters Road, Bloomfield, Connecticut. Ex. DED-B, § 6C. Northeast, which is also a lightning protection business, is owned and operated by brothers John Barnard Jr. and James Barnard. *Id.* The resumes submitted for the Barnards (they are both entitled John Barnard

Jr. which is apparently an error) indicate that the two gentlemen have been working in the industry since 1976 and 1984, respectively. Ex. DED-C. Both John and James have certifications in Thermoweld and Caldwell and other industry-related licenses and certifications. Ex. DED-C.

3. Catherine Barnard is married to James Barnard and on their 2014 jointly filed tax return, Ms. Barnard is identified as a teacher. Exs. DED-B, § 6H and E. Between 1989 and January 2017, Ms. Barnard worked part-time at [REDACTED] while also working for Northeast and then Acme. Exs. DED-F, G. She is currently working full-time for Acme. Ex. DED-D. Ms. Barnard's educational background is in commercial horticulture, business and computer programming. Her professional experience beginning in 1983 includes loan servicing and computer programming, and bookkeeping. Ex. DED-G.
4. When working for Northeast, Ms. Barnard's duties were comprised of bookkeeping, development of website presence, computer work, financial planning and management. Ex. DED-G. For Acme, Ms. Barnard's responsibilities are identified as personnel scheduling, customer communications, bookkeeping and payroll, web design and social media presence and vendor coordination and interaction. *Id.*
5. In or around January 2014, Catherine Barnard contributed [REDACTED] as starting capital. Ex. DED-B, § 2C. The purpose of establishing Acme was to run a non-union shop. Exs. DED-D, #12; DED-M; Acme appeal dated March 24, 2017, Issue #1.
6. Upon creation of Acme, Ms. Barnard was designated a fifty-one percent interest while John Barnard Jr., who made a [REDACTED] loan to the company, was given a thirty-three percent share, and husband James was provided a sixteen percent share. Exs. DED-D, #5; L. The Member's Ownership Transfer Agreement for Acme indicates this share distribution but also provides that James contributed [REDACTED] and [REDACTED] (it does not note the loan). Ex. DED-H, Ex. A.
7. On June 15, 2015, Acme's shareholder percentages were altered by a resolution adopted by the company. Ex. DED-K. Cathy Barnard was given a sixty-five percent interest and John Jr. and James were each given a nineteen and sixteen interest respectively. No information was provided with the application that shows the contributions made by the respective members to achieve this distribution. Ex. DED-K. Acme explains that the impetus for this redistribution was to satisfy Connecticut's WBE requirements. Ex. DED-D, #3.
8. Acme operates a business that provides the same services as Northeast. Acme rents office space and one garage bay from Northeast. Ex. DED-I. Acme pays Northeast for essential services such as consultation and estimating, drafting, master designer fees. Exs. DED-D,

#12; DED-J; DED-P. Acme represents that its employees do the installation. *Id.* Acme and Northeast also share one administrative employee. Ex. DED-D, #13.

## DISCUSSION

This recommended order considers Acme's appeal from the Division's January 30, 2017 determination to deny Acme's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's January 30, 2017 denial letter (*see*, Ex. DED-A), Acme did not demonstrate that the contribution of women is proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. 5 NYCRR § 144.2(a)(1). Further, in its denial, the Division found that Acme is not an independent business enterprise. 5 NYCRR §§ 144.2(a)(2), (c)(2).

### I. Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that the "contribution of the . . . woman owner must be proportionate to [her] equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." 5 NYCRR § 144.2(a)(1).

The Division argues that the woman owner, Ms. Catherine Barnard, made a minimal investment [REDACTED] in the firm especially compared to her brother-in-law's loan of [REDACTED]. And, the proof that Acme offers to substantiate its payment of this loan came belatedly in the form of a copy of a single check submitted with its appeal. However, as noted above, § 144.4(e) of 5 NYCRR limits my review to the materials submitted as part of the application process. And, as the Division notes in his response to the appeal, even if this repayment could be considered, it is clear that it was John and not Catherine who made a qualitatively more significant contribution to the firm than Ms. Barnard. DED MOL, p. 9. Yet, John Barnard, Jr. was given a much smaller share of the company than Ms. Barnard. As further explained by the Division in its responsive memorandum, this contrasts sharply with circumstances where a woman owner who was credited with borrowed funds that were secured by a mortgage on her home. *See, Matter of Kelly Contracting*, DED File No. 58554 (ALJ Molly McBride, August 5, 2016).

The allocations of interest in the company are not substantiated and Acme readily acknowledges in its own board minutes that the impetus for the changes in 2015 were related to compliance with Connecticut's requirements. Ex. DED-L. The company has not put forward any documentation of the rationale for the division in interests. Butler Aff., ¶ 15. Similarly,

while the applicant contends that all the equipment is “owned by me or my company,” there is no proof to support that these items were paid for by Ms. Barnard’s own funds. Butler Aff., ¶ 16.

Section 144.2(a)(1) of 5 NYCRR allows for the contribution of a woman owner’s expertise to be sufficient for the purposes of qualification. However, Ms. Barnard’s expertise is not in the field of lightning protection but rather in computer programming and bookkeeping. Ex. DED-H. In fact, Acme pays Northeast for much of the professional work that it supplies to clients. Ex. DED-J. Ms. Barnard notes in her appeal letter of May 24, 2017 that it has been difficult to find individuals to do the core work of the company and she recently found an individual in Massachusetts to help with drafting and design services while still relying on Northeast for estimating bids.

Based on this record, Ms. Barnard has not shown a sufficient contribution of capital or expertise to warrant her status in the company. Therefore, I conclude that the Division’s determination with regard to the requirement of 5 NYCRR § 144.2(a)(1) is supported by substantial evidence.

## II. Independence

The second eligibility criterion at issue requires that the applicant establish itself as an independent business enterprise. 5 NYCRR §§ 144.2(a)(2) and (c)(2).

The Division has concluded that Acme “is a mere adjunct of Northeast Lightning.” DED MOL, p. 12. As noted in the record, in 2014, the same family members that own Northeast established Acme. Ex. DED-B, §§ 2A, 6C. Acme conducts the same business as Northeast, operates out of the same premises, shares one administrative staff member, and Acme retains Northeast for much of the work that it provides. Exs. DED-B, §§ 3C, 5A; DED-D, Item #13, DED-J. Acme is dependent on Northeast for its capitalization, its offices and its basic functions. While Ms. Barnard appears to provide administrative support for the company and is undoubtedly learning about the lightning protection business, it is her husband and brother-in-law who have the expertise to carry out the core functions of the business. Butler Aff., ¶ 20.

As provided by Mr. Butler in his supporting affidavit, the Profit and Loss Statement provided during the application process by Acme underscores that the central functions of Acme were routinely contracted out by Acme to Northeast. Butler Aff., ¶¶ 21-22. In this Statement, it is noted that in 2015, Acme paid Northeast ██████ for “estimating and consulting,” ██████ for “drafting,” and ██████ for “Master Designing.” Ex. DED-N. In addition, as noted by Mr. Butler, John Barnard Jr. and James Barnard received payment from Acme for services they rendered to Acme despite Ms. Barnard’s claim that these individuals worked 100% of the time for Northeast. Butler Aff., ¶ 22; Ex. DED-P. In 2014, James received ██████ in “Guaranteed payments” (i.e., payments unconnected to the profits and losses of the business) from Acme and in 2015 James received ██████ and John Barnard Jr. received ██████ in “Guaranteed payments from Acme. *Id.*; Exs. DED-Q, R.

As was the case in *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD2d 742 (3d Dep't 2002), where the applicant was so entangled with another business by sharing board members, personnel, office, etc., that it clearly was not independent, so is the case here. At the very most, Acme is a tangential aspect of Northeast and, thus, not eligible for WBE certification. Acme relies on Northeast for much of its capital, expertise and implementation.

The legislative intent of Article 15-A is to serve a remedial purpose and remedy past discrimination experienced by minority and women business owners – not family businesses. The program, to pass constitutional muster, must be narrowly tailored to confer benefits exclusively to members of the protected class to redress prior discrimination – minority and women business owners who made a significant financial investment in business, enjoy the risks and profits of the business, operate the business in fact and have control over the business as a formal matter. *See, Richmond v. J.A. Croson*, 488 US 469, 506 (1989).

Based on the record, the Division's determination to deny WBE certification pursuant to 5 NYCRR §§ 144.2(a)(2) and (c)(2) is supported by substantial evidence.

### **CONCLUSION**

For the reasons outlined above, Acme failed to demonstrate that (1) the contribution of women is proportionate to their equity interest in the business enterprise pursuant to 5 NYCRR § 144.2(a)(1) and (2) the company is an independent business enterprise pursuant to 5 NYCRR §§ 144.2(a)(2), and (c)(2).

### **RECOMMENDATION**

For the reasons set forth above, the Director should affirm Division staff's January 30, 2017 determination to deny Acme's August 27, 2015 application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

**MATTER OF ACME LIGHTNING ROD LLC d/b/a ACME LIGHTNING ROD.  
DED FILE No. 60997  
EXHIBIT LIST**

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
DED A	DMWBE Denial Dated January 30, 2017	√	√		
DED B	Acme Application Submitted 2/27/2015	√	√		
DED C	Resumes of John Barnard Jr. and James Barnard (they are both entitled John Barnard Jr. however this appear to be in error)	√	√		
DED D	Catherine Barnard Letter to Mr. Butler dated 9/26/16	√	√		
DED E	Portion of 2014 Joint Income Tax Return – James and Catherine Barnard	√	√		
DED F	Acme Submission to Mr. Butler dated January 10, 2017	√	√		
DED G	Cathy Barnard's Resume	√	√		
DED H	Member's Ownership Transfer Agreement dated 1/14/2014 w/Exhibit A	√	√		
DED I	Acme Lightning Rod LLC submission regarding office rental	√	√		
DED J	Acme Lightning Rod Northeast Lightning Interaction	√	√		

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
DED K	Acme Lightning Rod membership Meeting Minutes – June 15, 2015	√	√		
DED L	Amendment to the Operating Agreement - Acme	√	√		
DED M	Loan Agreement between Acme and John L. Barnard, Jr.	√	√		
DED N	Acme Lightning Road description and Profit & Loss Statement 2015	√	√		
DED O	Acme Lightning Rod Profit & Loss 2016	√	√		
DED P	Acme Lighting Rod Jim and John Barnard Involvement	√	√		
DED Q	2014 Schedule K-1 - Acme	√	√		
DED R	2015 Schedule K-1 Acme	√	√		
DED S	Portion of John L Barnard Jr. Individual Tax Return - 2015	√	√		
APP 1	March 29, 2017 Appeal Letter – Cathy Powers to Cathy Barnard	√	√		
APP 2	Women Owned Business Certifications – Massachusetts, Connecticut, Federal Government – Acme	√			

Exhibit No.	Description	ID	Rec'd	Offered by	Notes
App 3	Sample of Loan Payments made to John L. Barnard	√			
App 4	Sample invoices from Seth Beecher for drafting invoices	√			
App 5	Loan agreements and cancelled check for money given to Acme by Cathy Barnard	√			
App 6	Sample rent checks paid to John (Jack) Barnard	√			
App 7	Undated letter to Cathy Powers from Ms. Barnard in response to denial	√	√		