

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

In the Matter

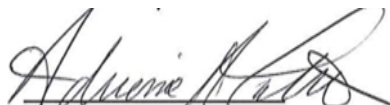
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the Application of Bright Choice Electric and Controls, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62355

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read 'Adrienne R. Lotson', written over a horizontal line.

Adrienne R. Lotson
Administrative Law Judge
September 5, 2023

This matter considers the written appeal by Bright Choice Electric and Controls, Inc., (“Bright Choice” 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 June 8, 2019, Samantha Xydias, as President and Secretary, applied on behalf of Bright Choice for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On April 12, 2022, 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).
3. Bright Choice submitted its request to appeal a denial determination, dated May 5, 2022 (DED Exhibit 4).
4. A notice to proceed by written appeal was sent to Bright Choice on October 5, 2022. (DED Exhibit 3)

5. The Division filed an Affidavit of Victoria Sawall, Senior Certification Analyst dated May 24, 2023, and a brief of Candace C. Williamson Esq., counsel for the Division, dated May 26, 2023.

FINDINGS OF FACT

6. Bright Choice is engaged in all stages of electrical installations in residential, commercial, and industrial environments. (DED Exhibit 1).
7. Samantha Xydias is the President and Secretary of Bright Choice and has a 51% ownership interest. She works at Bright Choice 40 hours per week. Her primary responsibilities include bookkeeping, record-keeping, ensuring licenses and insurances are maintained and up-to-date, fielding customer calls, providing invoices, and paying bills. In addition, she is solely responsible for negotiating bonding, hiring and firing personnel, and managing payroll. (DED Exhibit 1)
8. Christopher Xydias, Samantha Xydias' husband, is the Vice-President and Treasurer of Bright Choice and has a 49% ownership interest. His primary responsibilities include field supervision and completing all projects, including installations, estimating jobs, creating material lists, and maintaining all licenses. (DED Exhibit 1).
9. Samantha and Christopher Xydias shared in the following business operations: financial decisions, preparing bids, purchasing equipment, sales, negotiating contracts, and serving as a signatory for business accounts. (DED Exhibit 1).
10. The critical function of the business includes estimations, obtaining contracts and orders, performing wiring, start-ups, supervising field operations, commissioning and troubleshooting complicated control systems including power plants, sewer treatment facilities, boiler controls, and building management systems. (DED Exhibit 1)

11. Samantha Xydias holds degrees in liberal arts and legal studies. She has over 10 years of experience in administrative support roles including as a receptionist, front desk assistant, and administrative secretary. (DED Exhibit 5)
12. Christopher Xydias has over 20 years of experience in the electrical installation and construction industries. He is a licensed Master Electrician who holds a degree and several certificates in electrical instrumentation and controls, electrical construction and maintenance, and trade electricity. (DED Exhibits 5 and 7)
13. In their 2017 – 2020 personal income tax filings, Samantha Xydias lists her occupation as administrator, while Christopher Xydias lists his occupation as an electrician. (DED Exhibit 6)
14. From February 2009 until August 2020, Samantha Xydias was an employee of Complete Women’s Imaging PC as a Front Desk Assistant (DED Exhibits 1 and 5)
15. Christopher Xydias works 40 hours per week as a Journeyman Wiremen/Instrumentation and Controls Technician at Fresh Meadows Electrical Contractors, LLC. (DED Exhibit 1).

APPLICABLE LAW

5 NYCRR § 144.2 (c) (1) states as follows:

(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.

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

- (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 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.

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 Bright Choice 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. Industry-specific competence

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.” Further, the Division’s denial of certification has been upheld in cases where the party relied upon failed to show training or experience in the industry and failed to specify the working knowledge necessary to review or evaluate the work of more experienced employees. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 A.D.3d 1343 (3d Dep’t. 2020) (citing to *C.W. Brown, Inc. v. Canton*, 216 A.D. 841, 842 (1995) where 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.

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

The critical functions of the business are estimations, obtaining contracts and orders, performing wiring, start-ups, supervising field operations, and commissioning and troubleshooting complicated control systems including power plants, sewer facilities, boiler controls, and building management systems (DED Exhibit 1).

Ms. Xydias does not have any industry-specific expertise: her skills are related to general business or office management. There are no documents showing that she has any training or

experience in electrical installations. Her responsibilities include managing and operating the office, engaging with customers, and maintenance of business records. Specifically, she handles bookkeeping, record-keeping, license and insurance management, fielding customer calls, invoicing and paying bills. In addition, she negotiates bonding, hires and fires personnel, and manages the payroll. Along with her husband, the non-qualifying male owner, she prepares bids, purchases equipment, handles sales, negotiates contracts, and serves as a signatory for business accounts. She does not possess any academic or technical training relevant to the industry to make her qualified to supervise the work of the employees (DED Exhibits 1, 4 and 5).

Mr. Xydias is a licensed Master Electrician who holds a degree as an electrician and several certificates in electrical instrumentation and controls, electrical construction and maintenance, and trade electricity. He has over 20 years of industry-specific experience to perform and supervise the core function of the business. His duties include field supervision, installations, estimating jobs, creating material lists, and maintains all licenses for Bright Choice (DED Exhibits 1, 5 and 7).

The Division's determination to deny the application on the basis that Ms. Xydias does 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) is supported by substantial evidence.

II. Operation

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 the business enterprise shall be determined by the division based upon the following factors but is not limited to: (1) the products or services the business enterprise provides to the 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 requisite control for WBE certification.” See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

The core functions of the business are estimations, obtaining contracts and orders, performing wiring, start-ups, supervising field operations, and commissioning and troubleshooting complicated control systems including power plants, sewer facilities, boiler controls, and building management systems (DED Exhibit 1).

Mr. Xydias’ education, certifications, and experience demonstrate expertise in the core functions of the business. He is responsible for completing all projects from estimations, to creating material lists, to installations. He maintains all licenses for Bright Choice and is solely responsible for supervising field operations (DED Exhibit 1).

Ms. Xydias’ duties are administrative in nature and include managing the office, engaging with customers, and maintaining records (DED Exhibits 1 and 4). Ms. Xydias does not exercise independent operational control over the core functions of the business. Mr. Xydias is primarily responsible for overseeing the day-to-day operations of the business.

The Division’s determination to deny the application on that basis that Bright Choice failed to demonstrate that Ms. Xydias does 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) is supported by substantial evidence.

CONCLUSION

Bright Choice 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

eligibility criteria at 5 NYCRR §144.2(c)(1) and 5 NYCRR §144.2(c)(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 Bright Choice application for certification as a woman-owned business enterprise.

In the Matter of Bright Choice Electric and Controls, Inc.
 DED File ID No. 62355
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification, Dated June 8, 2019	Y	Y
DED 2	Denial Determination Letter, Dated April 12, 2022	Y	Y
DED 3	Notice to Proceed via Written Appeal, Dated October 5, 2022	Y	Y
DED 4	Request to Appeal a Denial Determination, Dated May 5, 2022	Y	Y
DED 5	Resumes of Samantha Xydias and Christopher Xydias	Y	Y
DED 6	2017 – 2021 Personal Income Tax Returns: Samantha and Christopher Xydias	Y	Y
DED 7	Christopher Xydias' Professional Licenses	Y	Y