

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**207 GENESEE STREET**  
**UTICA, NEW YORK 13501**

**In the Matter**

**- of -**

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

**NYS DED File ID No. 11232**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**September 19, 2023**

This matter considers the written appeal by ERS Consultants, Inc. (“ERS” 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 August 3, 2018, Ms. Karen Annicaro, as President, applied on behalf of ERS for certification as a WBE (DED Exhibit 1).
2. On November 30, 2020, the Division denied the application (DED Exhibit 2) on the following grounds:
  - (a) The contributions of minority group members or women are not 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 under 5 NYCRR former §144.2(a)(1);
  - (b) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2); and
  - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former

§§144.2(b)(1)(i) and 144.2(b)(1)(ii).

3. ERS timely filed a notice of appeal on December 28, 2020 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to ERS on March 15, 2021 (DED Exhibit 3).
5. ERS submitted its written appeal by letter dated May 7, 2021 (APP Exhibit 2).
6. The Division filed an Affidavit of Kathleen Slatin, Senior Certification Analyst, dated June 14, 2023, and a brief of Dennie Byam, Esq., counsel for the Division, dated June 15, 2023.

### **FINDINGS OF FACT**

7. ERS provides environmental consulting services, specializing in the areas of wetland investigation, wetland delineation, endangered species investigation and monitoring, Phase I studies, soil testing, water testing and planning, and is located in Warwick, New York (DED Exhibit 1).
8. Ms. Karen Annicaro is the President of ERS and owns 100% of the business. (DED Exhibit 1).
9. ERS was established in 1995. Ms. Kathryn Granger was the original owner until she retired in 2017, when she transferred her ownership interest to Ms. Annicaro (DED Exhibit 1).
10. Applicant claimed that no contribution of capital was made by Ms. Annicaro when she became the owner and that the value paid for the transfer of stock was \$█ for 100 common shares on January 1, 2017 (DED Exhibit 1). The Capitalization or Investments Statement submitted by applicant states that no “sources of capitalization or investments are associated with this company at this time or previously” (DED Exhibit 7).
11. In 2018, Ms. Annicaro received wages of \$█ and Mr. David Griggs received

wages of \$ [REDACTED] (DED Exhibit 11).

12. Ms. Annicaro has a degree in Executive Office Management and was a Director of ERS for six years before she took ownership in 2017. As President, her duties include obtaining, negotiating, processing and completing all contracts, overseeing staff performance and customer satisfaction, developing business plans, building client relationships, financial management, educating and implementing company safety policies and procedures, and overseeing all day-to-day operations (DED Exhibit 14).
13. Mr. David Griggs has twenty years of professional experience in wetlands ecology and wildlife management and is a certified wildlife biologist and professional wetland scientist. He has a Bachelor of Science in wildlife biology and management. He is certified in fish and wildlife service habitat evaluation procedures and certified adams wetland functional assessment methodology. He has a license with NYS DEC for endangered/threatened species. As senior scientist for ERS, he is responsible for coordinating and supervising environmental impact statements, natural resource/endangered species inventories and assessments, wetland delineations and mitigation projects, environmental permitting, and technical training in wetland ecology (DED Exhibit 10).

### **APPLICABLE LAW**

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of 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.

5 NYCRR former §144.2(c)(2) states in relevant part as follows:

...The minority group member or woman owner must enjoy the customary

incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former §144.2(b)(1) states in relevant part as follows:

- (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.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division’s interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

Current 5 NYCRR §144.2(b)(5) states in relevant part as follows:

Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration...

Current 5 NYCRR § 144.2(c)(2) states in relevant part as follows:

- (2) Operational decisions. Minority group members or 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... 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 ERS 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. Ownership

The Division interprets 5 NYCRR former §144.2(a)(1) to require an applicant to demonstrate that the woman-owner’s contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

Ms. Granger transferred 100% of the shares in ERS to Ms. Annicaro on January 1, 2017 (DED Exhibit 4). Applicant stated that no money was exchanged for her 100% ownership interest (DED Exhibit 7). Applicant claimed no contribution of capital when she became 100% owner. Applicant further stated that the value paid for the transfer of stock was \$█ for 100 shares (DED Exhibit 1). Applicant stated that “no sources of capitalization or investments are associated with this company at this time or previously (DED Exhibit 7).

Applicant has failed to demonstrate that Ms. Annicaro made capital contributions to the business proportionate to her equity interest therein.

5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents and must share in the and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017). In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3<sup>rd</sup> Dept. 1995), the Court found that the Division's review of tax returns provided substantial evidence supporting the Division's consideration of whether a woman-owned business enterprise met the eligibility criterion at 5 NYCRR former §144.2(c)(2). See also *Matter of Darr Construction, Inc.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022; *Matter of S.C. Spencer Electric Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 31, 2022.

In 2018, Ms. Annicaro was paid \$ [REDACTED] while Mr. Griggs was paid \$ [REDACTED] (DED Exhibit 13). The tax documents submitted reflect that Ms. Annicaro, as 100% owner, makes less than Mr. Griggs, a non-owner. She is not sharing in the risks and profits in proportion to her equity interest in the business enterprise.

## II. Operations

The eligibility criteria for MWBE certification requires that the woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3<sup>rd</sup> Dept. 2020). The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE

certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4<sup>th</sup> Dept. 2018).

With regard to technical competence, where the woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3<sup>rd</sup> Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

Ms. Annicaro has a degree in Executive Office Management and was a Director of ERS for six years before she took ownership in 2017. As President, her duties include obtaining, negotiating, processing and completing all contracts, overseeing staff performance and customer satisfaction, developing business plans, building client relationships, financial management, educating and implementing company safety policies and procedures, and overseeing all day-to-day operations (DED Exhibit 14).

Mr. David Griggs has twenty years of professional experience in wetlands ecology and wildlife management and is a certified wildlife biologist and professional wetland scientist. He has a Bachelor of Science in wildlife biology and management. He is certified in fish and wildlife service habitat evaluation procedures and certified Adamus wetland functional assessment methodology. He has a license with NYS DEC for endangered/threatened species. As senior



scientist for ERS, he is responsible for coordinating and supervising environmental impact statements, natural resource/endangered species inventories and assessments, wetland delineations and mitigation projects, environmental permitting and technical training in wetland ecology (DED Exhibit 10).

Ms. Annicaro oversees the administrative portions of the business, while Mr. Griggs performs the revenue generating operations of the business.

The Division's finding that Ms. Annicaro did not establish that she, as the woman-owner of ERS had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

### **CONCLUSION**

ERS 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 the eligibility criteria at 5 NYCRR former §144.2(a)(1), 144.2(c)(2), 144.2(b)(1)(i), and 144.2(b)(1)(ii), 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 ERS's application for certification as a woman-owned business enterprise.

In the Matter of ERS Consultants, Inc.  
 DED File No. 11232  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Division's denial letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	May 10, 1995 Stock Certificate	Y	Y
DED 5	January 1, 2017 Stock Certificate	Y	Y
DED 6	Stock Ledger	Y	Y
DED 7	August 3, 2018 Capitalization or Investments Statement	Y	Y
DED 8	ERS Articles of Incorporation	Y	Y
DED 9	Ms. Karen Annicaro's Day to Day Activities Narrative	Y	Y
DED 10	Mr. David Griggs' Resume	Y	Y
DED 11	2018 W-2s	Y	Y
DED 12	2018 Salaries Narrative	Y	Y
DED 13	July 27, 2017 Bank Signature Card	Y	Y
DED 14	Ms. Karen Annicaro's Resume	Y	Y
APP 1	Applicant's Notice of Appeal	Y	Y
APP 2	Applicant's Appeal Submission	Y	Y