

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

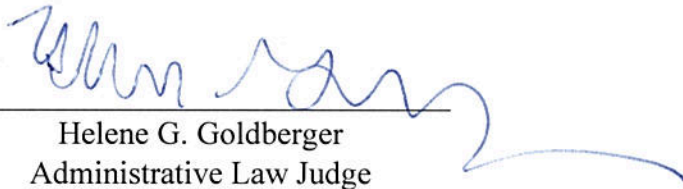
In the Matter

-of-

The Application of **Efficient Technologies, Inc.**  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52457

RECOMMENDED ORDER



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Helene G. Goldberger  
Administrative Law Judge

September 22, 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 or Division) to deny the application filed by Efficient Technologies Inc. (ETI or applicant) for recertification as a woman-owned business enterprise (WBE) be modified in part and affirmed in part for the reasons set forth below.

## PROCEEDINGS

ETI applied for recertification as a woman-owned business enterprise on July 20, 2015. *See*, Exhibit (Ex.) DED 1. By letter dated February 13, 2018, the Division determined that ETI does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. Ex. DED 2. The grounds for the Division's determination are:

- Pursuant to § 144.2(b)(1) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), women do not make decisions pertaining to the business enterprise;
- Pursuant to 5 NYCRR § 144.2(b)(2), the governing documents of the company do not permit the woman owner to make decisions without restrictions.

By letter dated May 7, 2018, Ms. Cathy Powers of the Division responded to Ms. Michelle Tew's request to file a written appeal to the Division's decision and notified Ms. Tew that ETI had until July 5, 2018 to submit said appeal. Ex. DED 3. The appeal, dated June 28, 2018, was timely received by DED on July 5, 2018.

ETI's appeal consists of a letter brief by Matthew Van Ryn, Esq. of Melvin & Melvin, PLLC and the affidavit of Michelle (Tummino) Tew dated June 28, 2018.<sup>1</sup> Attached to Ms. Tew's affidavit are the Unanimous Written Consent of the Shareholders and Unanimous Written Consent of the Director both dated June 15, 2018, electing Ms. Tew to the position of President of the Corporation both dated June 15, 2018; the New York State Department of State Division of Corporations entity information; and vendor profiles from what appears the company's certification application.

In the Division's responding papers, Attorney Fawziyyah W. Slavov submitted the Division's brief and the affidavit of Abdul Bah, a Senior Certification Analyst with DED dated

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<sup>1</sup>Because I had some questions of the attorneys, I reached out to Kenneth Bobyricki, Esq. of Melvin & Melvin, PLLC and Attorney Slavov of the Division to arrange for a conference call. Mr. Bobyricki informed me on August 17, 2020 that he did not have a record of the firm's representation of ETI on the appeal (Mr. Van Ryn had left the firm and advised Mr. Bobyricki that he did not submit an appeal on behalf of ETI). Mr. Bobyricki informed me that he would investigate the matter and get back to me. As of August 31, 2020, I had not heard back from ETI's former counsel and reached out again. Mr. Bobyricki informed me via email on August 31<sup>st</sup> that ETI rested on the papers already submitted and did not wish further representation by the firm. Accordingly, I am limiting my review to what I have before me.

August 5, 2020. Attached to Mr. Bah's affidavit are eleven exhibits which are described in the chart annexed to this recommended order.

Attorney Slavov notes that the resolutions submitted by ETI on this appeal post-dated the application and therefore were not considered in the review of the application. DED Brief (Br.), p. 9. I am limited by the regulations - 5 NYCRR § 144.5(a) - to consider only material that was submitted as part of the application. Therefore, I cannot consider the June 15, 2018 shareholders' and directors' resolutions attached to Ms. Tew's affidavit.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at 5 NYCRR § 140, *et seq.* Among the criteria are requirements that the woman owner of the company be in both a position to make decisions on behalf of the applicant company and that the governing documents of the company permit her to do so. 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(2). 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, ETI bears the burden of proving that the Division's denial for WBE recertification 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 ETI for recertification as a woman-owned business enterprise with a letter dated February 13, 2018 (*see*, Exhibit DED 2). The Division determined that ETI failed to demonstrate: (1) the woman owner controlled the operations of the business enterprise and (2) that the articles of incorporation, corporate bylaws, partnership agreements and other agreements or other agreements permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

The Division concluded that Ms. Tew did not have the requisite background to oversee the core activities of the company and instead was chiefly engaged in administrative and financial

matters at ETI. Additionally, because the existing bylaws of the company endowed the president, Mr. Robert Tew, with the principal decisionmaking authority, ETI's application did not meet the regulatory requirements.

With respect to the 2018 resolutions of ETI's shareholders and board of directors, the Division argued that these submissions on ETI's appeal were not part of its application and therefore, could not be considered on this review. Finally, in response to ETI's claim that the Division's denial was due to a complaint made as part of a union organizing effort, Ms. Slavov represented that the Division was not aware of any such activity and the determination was not based on it.

## ETI

In its appeal received by the Division on July 5, 2018, Ms. Tew explained in her affidavit that when she and Mr. Robert Tew started the HVAC installation and plumbing business, Robert was more experienced in these specialties while she had more background in sales, contracts, finance and business management. Tew Affidavit (Aff.), ¶ 5. Accordingly, Ms. Tew provides that they divided up responsibilities in this manner. *Id.* After twelve years of business, they decided to apply for WBE certification based upon the growth of the business and her increased experience "in all aspects of our business." Tew Aff., ¶¶ 6, 7, 9. Additionally, Ms. Tew explains that the bylaws and her status in the company have been changed so that they conform with the regulatory requirements and are in line with her status at ETI. Tew Aff., ¶ 10.

Ms. Tew submits that the operation of the company has not changed since ETI was granted WBE status in 2009. Tew Aff., ¶ 8. She believes that the impetus behind the change in the Division's position was sparked by a complaint related to a union drive. *Id.* Counsel for ETI, Mr. Van Ryn, argues that the company has been operating since 2015 when it submitted its last recertification application "with no action taken by the agency until October 2017, more than 2 years after the latest paperwork was submitted . . ." and no denial of any bids ETI submitted based upon "the basis that they were not registered in the WBE Program . . .". ETI Letter Brief (Br.), p. 2.<sup>2</sup>

## **FINDINGS OF FACT**

1. Efficient Technologies, Inc. is located at 5912 Commane Road, LaFayette, New York. Ex. DED 1, § 1 E.
2. The company is engaged in the installation of insulation. Ex. DED 1, §§ 5B, 5C.
3. In 1997, Robert Tew and Michelle Tummino formed this business with Robert responsible primarily for the installation and supervisory aspects of the company's work and Michelle

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<sup>2</sup> When I was assigned to this appeal, I was advised that another attorney at Melvin & Melvin was assigned to represent ETI but when I contacted him, I was informed that the law firm was no longer representing ETI.

supervising sales, contracts, finance and business management. Tew Aff., ¶¶ 2, 5; ETI Ex. 3.

4. Robert and Michelle married in or around 1998. Tew Aff., ¶ 4. Ms. Tew owns 51% of the company shares and Mr. Tew owns 49%. Ex. DED 1, § 3.A.
5. Ms. Tew graduated from SUNY Potsdam with a bachelor's degree in Philosophy. Ex. DED 7. Mr. Tew graduated with an associate's degree in Computer and Math Sciences. Ex. DED 8.
6. Ms. Tew's resume provides that she is charged with all office, financial, recordkeeping and personnel matters at ETI. Ex. DED 7. In addition, she is in contact with project managers, authorizes and reviews all contracts and when needed installs pipe and duct work. *Id.* She is responsible for all outside inquiries, is the major shareholder, principal sales contact, responsible for all invoicing, and insurance and risk management. Vendor Profiles, Ex. App. 4. Over 21 years, Ms. Tew's skills and responsibility have increased and she now quotes bids, prices work and negotiates contracts, prepares bids and manages certification and insurance requirements. ETI Br, p. 4.
7. Mr. Tew is responsible for significant operations as well as estimating and supervision of field operations. Ex. DED 8.
8. Both Mr. and Ms. Tew completed OSHA courses in Construction Safety and Health. Exs. DED 7 and 8.

## **DISCUSSION**

This recommended order considers ETI's appeal from the Division's February 13, 2018 determination to deny ETI's application for recertification 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 February 13, 2018 denial letter (*see*, Ex. DED 2), ETI did not demonstrate that (1) the woman owner controlled the operations of the business enterprise; and (2) that the governing documents of the corporation permitted the woman owner to make decisions on behalf of the enterprise without restrictions. 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(2).

### **I. Control**

To be eligible for WBE certification, the Division's regulations state that "[d]ecisions pertaining to the operation of the business enterprise must be made by . . . women claiming

ownership of that business enterprise.” 5 NYCRR § 144.2(b)(1). The Division does not make a sufficient argument to undermine Ms. Tew’s recitation of her responsibilities at the firm. As an example, relying on Mr. Tew’s resume, staff notes that he installs pipe and insulation. DED Brief (Br.), p. 7; Ex. DED 8. However, Ms. Tew’s resume contains the identical description. Ex. DED 7. Mr. Bah also points to the contracts that were signed by Mr. Tew and submitted as part of the application. Bah Affidavit (Aff.), ¶ 16; Exs. DED 4, 5. However, also submitted was a contract with Burns Bros. signed by Ms. Tew. Ex. DED 6.

As ETI’s memorandum of law notes, the woman owner does not necessarily have to possess the technical expertise if there is operational control. *Era Steel Construction Corp. v. Egan*, 145 AD2d 795 (3rd Dep’t 1988). In reviewing Ms. Tew’s resume in combination with her affidavit and the memorandum submitted by counsel in support of the appeal it appears that she is responsible for most of the company’s operations. I do not find that her husband’s activities are more substantive.

Accordingly, based on the record before me, I find that the Division failed to reasonably conclude that Ms. Tew does not control the business.

## II. Corporate Governance

The applicable regulatory criteria state that the “[a]rticles of incorporation, corporate bylaws, partnerships agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make those decisions without restrictions.” 5 NYCRR § 144.2(b)(2). This is the criterion upon which ETI’s qualifications do fail for recertification. The bylaws in effect at the time of application provide that the president of the company has the authority over the business affairs of the corporation and its officers. Ms. Tew was vice-president at the time of the application. And, although these bylaws have apparently been in effect since the 1997 incorporation of the business, the State is rarely estopped from addressing errors in order to carry out its statutory mandates. *See, Empire Air Specialties v. New York State Department of Economic Development*, 2016 NY Slip Op. 816909 (U) (7/29/26 Albany Co. Sup. Ct). The WBE status is granted for three years pursuant to Executive Law § 314(5) and the Division is charged with reviewing every application whether for certification or recertification on its merits and is not bound by prior determinations. *See, Matter of Coverco, Inc.*, Recommended Order (ALJ O’Connell, 1/27/17), Final Order 17-06 (1/30/17); 159 AD3d 1538 (4<sup>th</sup> Dep’t 2018) (court confirmed agency’s determination and dismissed Article 78 petition challenging it). While ETI has changed its bylaws subsequently; this action was performed after the application was submitted and therefore, I cannot consider this amendment on this appeal. *See*, 5 NYCRR § 144.4(e).

With respect to the statement made by ETI’s counsel regarding the company’s continuation to bid successfully on jobs based on its WBE status during the pendency of its application and appeal, the State Administrative Procedures Act (SAPA) § 401(2) allows for the continuation of the license pending the administrative review. Accordingly, while ETI was able to continue pursuant to its former certification during this period, that benefit does not entitle it to any permanent status.

On this record, I conclude that the Division's determination regarding the company's governing documents not providing the woman owner with independent decision making authority is supported by substantial evidence.

### **CONCLUSION**

1. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), ETI met its burden to show that the Division's February 13, 2018 determination to deny the application for WBE recertification is not based on substantial evidence.
2. With respect to the company's governance criterion at 5 NYCRR § 144.2(b)(2), ETI did not meet its burden to show that the Division's February 13, 2018 determination to deny the application for WBE certification is not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny ETI's application for recertification as a woman owned business enterprise should be modified in part and affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

**DIVISION OF MINORITY & WOMEN'S BUSINESS DEVELOPMENT  
NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT**

**EFFICIENT TECHNOLOGIES, INC. EXHIBIT LIST**

<b>EXHIBIT NO.</b>	<b>DESCRIPTION</b>
DED 1	Application for recertification – July 20, 2015
DED 2	Denial Letter – February 23, 2018
DED 3	Notice to Proceed with Written Appeal – May 7, 2018
DED 4	██████████ Purchase Order
DED 5	████████████████████ Bid
DED 6	██████████. Purchase Order
DED 7	Michelle Tew Resume
DED 8	Robert Tew Resume
DED 9	Corporate Bylaws
DEC 10	Return Receipt Requested Green Card – 2/20/18 – receipt of denial by Michelle Tew
DED 11	ETI Meeting Minutes – 8/7/97
APP 1	Unanimous Written Consent of the Shareholders - 6/15/18 - Not Considered by ALJ
APP 2	Unanimous Written Consent of the Director – 6/15/18 - Not Considered by ALJ
APP 3	NYS DOS Division of Corporations entity information
APP 4	Vendor Profiles