

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

**In the Matter**

**- of -**

**the Application of HVAC Systems, Corp.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 63454**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**August 9, 2023**

This matter considers the written appeal by HVAC Systems, Corp., (“HSC” 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 November 13, 2017, Ms. Michelle LoRusso, as President, applied on behalf of HSC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On September 7, 2021, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2).
  - (b) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
  - (c) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5);

- (d) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
  - (e) 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, as required under 5 NYCRR §144.2(c)(2); and
  - (f) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).
3. HSC timely filed a notice of appeal on October 27, 2021 (APP Exhibit 1).
  4. A notice to proceed by written appeal was sent to HSC on October 3, 2022 (DED Exhibit 3).
  5. HSC submitted its written appeal by undated letter. (APP Exhibit 2).
  6. The Division filed an Affidavit of Raymond Emanuel, Director of Certification, dated April 20, 2023, and a brief of Michael Livolsi Esq., counsel for the Division, dated May 12, 2023.

**FINDINGS OF FACT**

7. HSC is engaged in the installation of commercial heating and air conditioning equipment. (DED Exhibit 1).
8. Ms. Michelle LoRusso is the President and has a 60% ownership interest. Mr. Joseph LoRusso is the Vice President and has a 40% ownership interest (DED Exhibit 1).
9. Ms. LoRusso made a capital contribution of \$10,500 from a joint account held with Mr. LoRusso (APP Exhibit 2).

10. In 2018, Mr. LoRusso received a salary of \$123,276.97, and Ms. LoRusso received no salary from HSC. She was employed by Bay Shore Union Free School District as a teacher, receiving a salary of \$127,906.00 (DED Exhibits 1, 2, 5 and 6).
11. Mr. LoRusso holds a Master Electrical License, a Restricted Plumber License and certifications or permits in fire guard and torch use (DED Exhibits 1, 2, 7 and 8). He is solely responsible for field operations, marketing and sales, estimating, and hiring and firing (DED Exhibits 1 and 2).
12. Ms. LoRusso's duties include making financial decisions, preparing bids, negotiating bonding and insurance, purchasing equipment and supplies, signing payroll and negotiating contracts (DED Exhibits 1, 2 and 9).

### **APPLICABLE LAW**

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

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

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(b)(5) states as follows:

Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. 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 and must meet all other certification criteria described herein.

5 NYCRR §144.2(c) states as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) 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...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the 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.
- (3) 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.

### **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 HSC 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). Accordingly, applicant's attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

## **DISCUSSION**

### I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). 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).

In July 2016, Ms. LoRusso made a capital contribution of \$10,500 (APP Exhibit 2). The payment was made from a Bank of America account titled "Joseph J. LoRusso or Michelle H. LoRusso" (APP Exhibit 2). The contribution was therefore not made from assets belonging solely to Ms. LoRusso.

Applicant argues on appeal that Ms. LoRusso contributed her expertise (APP Exhibit 2). No proof was submitted to show that the expertise was uncompensated, specialized and directly applicable to the operation of the business, and no account of the fair market value of the expertise was documented. (5 NYCRR §144.2(b)(2)(i))

The Division's determination to deny the application on the basis that HSC failed to demonstrate that Ms. LoRusso made contributions to HSC in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

The tax documents submitted with the application show that in 2018, Ms. LoRusso derived no income from her employment at HSC, while Mr. LoRusso was paid \$123,376.97 (DED Exhibits 1, 2 and 9). Ms. LoRusso states that her income was received through Forms K-1. These forms are for tax years that post-date the application and are therefore not relevant as they were not before the Division at the time of the application and denial (APP Exhibit 2).

Where a woman relied upon for certification obtains her ownership interest through a transfer from another person, the applicant "must demonstrate that such transfer was supported by reasonable consideration, and must meet all other certification criteria..." 5 NYCRR §144.2(b)(5). Ms. LoRusso obtained her ownership interest from Mr. LoRusso (APP Exhibit 2). Her capital contribution came from a joint account held with Mr. LoRusso (APP Exhibit 2). Her

resume shows no prior experience in the HVAC industry and that she works as a teacher at the Bay Shore Union Free School District (DED Exhibit 9).

## II. Operation

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”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), 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.

Ms. LoRusso does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the HVAC industry (DED Exhibits 1 and 9). The critical functions of the business are installation of commercial heating and air-conditioning equipment (DED Exhibit 1). Mr. LoRusso holds a Master Electrician License and a Restricted Plumber License (DED Exhibits 7 and 8). No licenses were provided by Ms. LoRusso. Her resume also reveals that Ms. LoRusso has no prior experience in the HVAC industry and is a teacher at the Bay Shore Union Free School District (DED Exhibit 9). She does not have the training or experience in the industry necessary to supervise the work of the employees.

5 NYCRR §144.2(c)(2) states in relevant part 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 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”.

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”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

HSC’s products and services include the installation of commercial heating and air conditioning equipment (DED Exhibit 1). Mr. LoRusso’s duties include marketing, sales, hiring, firing, and supervising field operations (DED Exhibits 1, 2 and 8). Ms. LoRusso’s duties are financial decisions, bid preparations, bonding, insurance, purchasing, payroll and contracts negotiations (DED Exhibits 1, 2 and 9). Ms. LoRusso does not exercise independent operational control over the core functions of the business. Mr. LoRusso is primarily responsible for overseeing the day-to-day operations of the HVAC business.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR §144.2(c)(3). Ms. LoRusso has separate, full-time employment as a teacher (DED Exhibits 1, 2 and 9). Ms. LoRusso failed to submit any documentation to show her devoting time to the continued operations of the business. The denial on the ground of time devoted to the business was based on substantial evidence.

### **CONCLUSION**

HSC 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 §§144.2(b)(2), 144.2(b)(3), 144.2(b)(5), 144.2(c)(1), 144.2(c)(2) and 144.2(c)(3) 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 HVAC Systems, Corp.'s application for certification as a woman-owned business enterprise.

In the Matter of HVAC Systems, Corp.  
DED File ID No. 63454  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Auto Purchase Agreement	Y	Y
DED 5	Joseph LoRusso Tax Documents	Y	Y
DED 6	Michelle LoRusso Tax Documents	Y	Y
DED 7	Licenses, permits and certifications	Y	Y
DED 8	Resume of Mr. LoRusso	Y	Y
DED 9	Resume of Ms. LoRusso	Y	Y
APP 1	Notice of Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y