

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

In the Matter

- of -

the Application of **MDS ASSOCIATES, INC.**  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A

NYS DED File ID No. 3400

RECOMMENDED ORDER

- by -

/s/

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Helene G. Goldberger  
Administrative Law Judge

December 18, 2020

## **SUMMARY**

The determination of the Division of Minority and Women's Business Development of the New York State Department of Economic Development (Division or DED) to deny MDS Associates, Inc. (MDS or applicant) recertification as a woman owned business enterprise (WBE) should be affirmed for the reasons set forth below.

## **PROCEEDINGS**

In a letter dated May 17, 2018, the Division determined that MDS does not meet the eligibility requirements to be recertified as a woman owned business enterprise and denied MDS's application. *See*, DED Exhibit (Ex.) 2; Appeal (APP) Ex. F. In this letter determination, the Division cited that MDS failed to meet the eligibility requirements of Article 15-A of the New York State Executive Law and the rules and regulations promulgated thereunder because:

- Pursuant to Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) § 144.2(a)(1), the contribution of the woman owner is not proportionate to her equity interest in the business enterprise;
- Pursuant to 5 NYCRR § 144.2(c)(2), the woman owner does not share in the risks and profits in proportion with her ownership interest in the business enterprise; and
- Pursuant to 5 NYCRR § 144.2(b)(3), the woman owner has not demonstrated control of negotiations through the production of signed contracts.

In response to MDS's request to appeal from the denial, the Division issued a Notice to Proceed dated June 21, 2018. DED Ex. 3. MDS submitted a timely appeal including an affidavit of Sarah Stec dated August 17, 2018 with Exhibits A-S described in the attached Exhibit List; an affidavit of Sherry A. Mueller, CPA dated August 15, 2018; and a brief dated August 17, 2018 submitted by David J. Colligan, Esq., Kevin T. O'Brien, Esq., and Christina J. Kennedy, Esq. of Colligan Law LLP.

Fawziyyah W. Slavov, Esq., filed the Division's brief (Br.) in response to the appeal dated November 24, 2020. In addition to the brief, the Division submitted the affidavit (Aff.) of Glen Butler, Senior Certification Analyst, with 9 exhibits (1-9) described in the attached exhibit chart.

I have considered all the exhibits and affidavits submitted by both parties except for APP S because these documents were not part of the company's submission to the Department with its application. *See*, 5 NYCRR §§ 144.4(e), 144.5(a).

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to recertification as a woman owned business enterprise are established by regulation. *See*, 5 NYCRR § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the

business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions that were elicited by DED requests for additional information and, if appropriate, from interviews conducted by Division analysts. *See*, 5 NYCRR § 144.5(a).

## STANDARD OF REVIEW

On this administrative appeal, MDS, as applicant, bears the burden of proving that the Division's denial of its application for WBE recertification 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 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

In the May 17, 2018 denial letter (DED Ex. 2), the Division determined that the application failed to meet the WBE certification criteria related to Sarah Stec's ownership as reflected by her lack of capital contribution to the business enterprise. The Division asserted that the contribution of Ms. Stec is not proportionate to her 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). According to the Division, Ms. Stec possesses a 51% interest in the business enterprise as compared to her husband Christopher Stec, who possesses a 49% interest. DED staff states that the applicant failed to provide documentation of what capital contribution Ms. Stec made to the enterprise. *See*, Butler Aff., ¶ 13; DED Br. pp. 7-9. The Division dismisses MDS's claim that Ms. Stec's contribution of her expertise stating that there was never any such claim or support for this in the application. Rather, the Division points to the company's own narrative in which it states that the company's late owner Marianne Stec gifted a majority stake in the company to Sarah in order for MDS to maintain its WBE status. APP Ex. A. In response to MDS's claim on appeal that Sarah Stec contributed monetarily through leaving a portion of profits with the company, the Division states there is no such support for this claim in the record of the application. DED Br., p. 18; APP Exs. J, K, O and M.

Concerning DED's conclusion that Ms. Stec did not share in the risks and profits in proportion with her ownership interest, DED rejects the company's interpretation of various income tax returns. Specifically, DED asserts that it rejects the submission of CPA Mueller that sets forth that DED mistakenly looked to the personal tax returns and salaries rather than relying on the respective K-1's that show each stockholder's share of profits. Relying on relevant case law, DED concludes that it is justified in relying on owners' salaries to determine whether they are receiving compensation that meets certification requirements. DED Br., pp. 17-18.

With respect to DED's denial based on its conclusion that Ms. Stec had not demonstrated control of negotiations through production of signed contracts, DED rejects MDS's claim that DED never requested contracts. MDS points to the application and notes that the resume and duties of Ms. Stec set forth in MDS's submissions do not include negotiations and argues that the contracts submitted by MDS were not part of its application. Butler Aff., ¶¶ 16-17; DED Br., pp. 11, 15.

With respect to MDS's complaints regarding the handling of its application, Division staff explains that the system is designed to receive applications through the downloading of documents rather than receipt of faxes. Butler Aff., ¶ 18; DED Br., p. 20. DED asserts that it received all of MDS's application and reviewed it in its entirety without any prejudice based on the means of transmission. Butler Aff., ¶¶ 18-19; DED Br., p. 16.

## MDS

On appeal, MDS asserts that due to her terminal illness, in 2010, the then co-owner of MDS, Marianne Stec, willed her 51% ownership in the company to Sarah Stec, her daughter-in-law. App. Br., p. 2; APP Ex. A. In response to the Division's denial based on a failure to demonstrate Sarah's contributions in proportion to her interest in MDS, the company asserts that DED failed to recognize Sarah's contributions to the company in the form of expertise and her decision to keep her equity interest in the company rather than to sell. App. Br., p. 4-7. With respect to the Division's determination regarding the failure of the company to demonstrate that Sarah shares in the risks and profits in the company commensurate with her interest, MDS argues that DED incorrectly focused on the salaries of Chris and Sarah rather than the percentage of profits and losses documented on their Schedule K-1s. App. Br., pp. 4-5, 7-11; Mueller Aff., ¶¶ 4-16. And in response to the Division's conclusion that MDS did not demonstrate that Ms. Stec controls the company due to the lack of documentation, MDS asserts that DED never requested the documents and that in any case, Sarah has the final say on contracts. App. Br., pp. 5, 14.

MDS also criticizes DED's handling of the recertification application, pointing to the length of time it had taken to process and the difficulties in transmitting the requested documentation. Stec Aff. ¶¶ 11-14; App. Exs. C, D, E; App. Br., pp. 15-18.

## **FINDINGS OF FACT**

### **I. Background**

1. At the time of the application, MDS Associates Inc. was located at 61 Innsbruck Dr., Cheektowaga, NY. *See*, DED Exhibit 1, § 1. E.
2. On the company's application for recertification, Sarah Stec is identified as president and owner of 51% of MDS. Her husband, Chris Stec is identified as vice-president and owner of 49% of MDS. *See*, DED Exhibit 1, § 3.A.

3. MDS applied to recertify MDS as a WBE on August 26, 2016 through the New York State Contract System. *See*, DED Exhibit 1 at p.11.
4. MDS is primarily engaged in the wholesale distribution of personal protection equipment, medical supplies, and geriatric, dental, hospital and janitorial equipment. *See*, DED Exhibit 1, § 5. E.

#### Ownership

5. In 1986, Marianne Stec and her husband Donald Stec incorporated MDS to distribute dental supplies. [www.mdsassociates.com](http://www.mdsassociates.com); MDS Br., p. 1. In the 1990's, MDS was certified by DED as a WBE.
6. After Marianne Stec's death in 2010, her 51% interest in the company was transferred to Sarah Stec. Stec Aff., ¶ 5; APP Ex. A.

#### Respective Duties

7. Ms. Stec is in charge of personnel, reconciliation of bank statements, monthly balance sheets, processing of weekly payroll, processing of invoices, review and execution of checks, processing of incoming payments and most/all financial decisions. APP Exs. G; H.
8. Mr. Stec is responsible for all sales management and operations at MDS, oversight of sales representatives that prospect for new clients and maintenance of base of existing clients; design and development of website; inventory management, direction of warehouse personnel; maintenance of supplies of products; negotiations with vendors and coordination of deliveries. APP Ex. H.

#### Share in Risks and Profits

9. The 2017 W-2 Wage and Tax Statements for the Stecs show that Chris Stec made \$[REDACTED] and Sarah Stec made \$[REDACTED]. APP Ex. N.
10. Form 1125-E of the Federal Tax Returns for 2017 reveals that for the first three quarters of that year, both of the Stecs received \$[REDACTED] and for the final quarter, they each received \$[REDACTED]. DED Ex. 4.
11. The Paychex reports for 2017 shows that Chris Stec earned \$[REDACTED] at the end of the fourth quarter and Sarah Stec earned \$[REDACTED]. Tax documentation for the Stecs reveal that for that year Christopher earned more than Sarah. DED Ex. 9.
12. The 2017 K-1s provide that the share of the year's income deductions, credits and other items totaled \$[REDACTED] for Sarah Stec and for Chris \$[REDACTED]. APP Ex. K.

## DISCUSSION

This recommended order considers MDS's appeal including the affidavits of Sarah Stec and CPA Mueller, App. Exs. A-R and appellate brief and the response of the Division staff including the affidavit of Glenn Butler, DED Exs 1-9 and the Division's memorandum of law. The bases identified in the Division's May 17, 2018 denial letter (*see* WBE Exhibit 2) are addressed below.

### I. Contribution

With respect to the contribution criteria, Division staff asserted that applicant failed to provide documentation showing that Ms. Stec's contributions were proportionate to her 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). *See*, WBE Exhibit 2. The Division's determination is supported by substantial evidence.

The application does not support the claim put forth by her attorneys that her expertise supplies her contribution to the company that is proportionate to her interest. App. Br., p. 4. In addition, the application does not support the allegation by her counsel and CPA Mueller that Ms. Stec refrained from withdrawing company profits – another alleged contribution. App. Br., p. 6; Mueller Aff., ¶ 16. As noted by Mr. Butler, in response to the DED staff request that MDS submit proof of Ms. Stec's capital contribution, the applicant submitted the document that is Exhibit A to Ms. Stec's affidavit. All that this record states is that "Marianne Stec ... decided upon learning that she was sick was that she wanted her company to retain its WMBE status. In order for that to happen, she gifted 50% of the company to me, Sarah Stec, her daughter-in-law . . ." Stec Aff., Ex. A.

There is no support for MDS's claim (set forth by counsel), that the company would fail without Ms. Stec's "contribution of expertise . . ." App Br, p. 4. As noted by staff, to the contrary, it is Mr. Stec's resume that demonstrates that it is he who has the significant and relevant expertise with 28 years of experience in marketing and sales in the distribution of personal protective equipment. App. Ex. H.

MDS counsel cites to *Matter of J.A. Marshall Sheet Metal & Roofing Inc. v. State of New York* in support of the applicant's claim that the mere gifting of the majority share to Ms. Stec is enough to demonstrate adequate contribution. First, counsel provided an incorrect citation to this opinion. The correct citation is 221 AD2d 759 (3d Dep't 1995). But more importantly, the dependence on this case is misplaced because the court determined that the respondent used an incorrect standard in denying certification – that being when the woman owner obtained her interest rather than the woman owner's status at the time of ownership. The Third Department sent the matter back to the agency for a review that specifically addressed the appropriate qualifying matters. Thus, this case does not offer any support for MDS's appeal. As previously acknowledged in other matters before the Division, staff frequently considers applications for WBE certification in circumstances where the female owner has either inherited or been gifted the interest. *See, e.g., Matter of Coverco, Inc.*, [https://cdn.esd.ny.gov/mwbe/Data/Hearings/01272017\\_Recommended Order.pdf](https://cdn.esd.ny.gov/mwbe/Data/Hearings/01272017_Recommended Order.pdf) (ALJ Daniel P.

O’Connell January 23, 2017), Final Order 17-06 (January 30, 2017), 159 AD3d 1538 (4<sup>th</sup> Dep’t 2018). As stated in ALJ O’Connell’s recommended order, regardless of the manner that the woman owner obtains her interest, the company must still demonstrate that her contribution is proportionate to her equity interest in the business enterprise. *Id.*

Based on the administrative record, the Division reasonably concluded that MDS did not demonstrate that Ms. Stec made a capital contribution to the business enterprise proportionate to her majority ownership interest.

## II. Share in Risks and Profits Proportionate to Ownership Interest

To be eligible for WBE certification, the Division’s regulations state that the “woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest.” 5 NYCRR § 144.2(c)(2). The reason for this provision is to ensure that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits. *See, Matter of Corporate Branding, Inc.*, Recommended Order (ALJ Lisa A. Wilkinson August 31, 2017), <https://esd.ny.gov/sites/default/files/CorporateBrandingRO.pdf>.

The applicant maintained that Division staff relied upon the wrong tax documentation in coming to its determination. Sherry A. Mueller, CPA represents in her affidavit that she prepared the income tax returns for MDS in 2016 and 2017 as well as the personal returns of Sarah and Chris Stec for those years. Mueller Aff., ¶ 3. She explains that because MDS is an S-Corporation, the tax benefits and liabilities of the company pass through to the individual stockholders and to their personal returns. *Id.*, ¶ 4. CPA Mueller relies upon the couple’s K-1 Schedules for 2016 to show that Sarah made more than Chris. *Id.*, ¶ 6. In reviewing the 2017 corporate tax return, she explains that the company made much less and this is reflected in the K-1s of Chris and Sarah which show a *de minimis* difference in income: \$█████ versus \$█████. *Id.*, ¶ 7. Ms. Mueller disputes the Division’s reliance on the Stec’s W-2s and maintains that the cost of healthcare for their son impacts the difference in taxable income for the Stecs. *Id.*, ¶¶ 8-15.

The Division sets forth in Mr. Butler’s affidavit and in its brief that it reviewed Tax Form 1125-E, NYS-45 and Paychex Payroll Reports (DED Exs. 4, 5 and 9) provided by MDS for 2017. Butler Aff., ¶ 15; DED Br., pp. 9-11. Based on the 1125-E form, Chris and Sarah received the same amount of compensation. DED Ex. 4. The 2017 W-2 Wage and Tax Statement reveal that Chris made \$█████ and Sarah \$█████. App. Ex. N. The Paychex Payroll Reports provide that for 2017 Chris made \$█████ in compensation while Sarah earned \$█████. DED Ex. 9. As for the company’s argument that the K-1s are a better gauge of the respective profits of the Stecs, staff cites to *Matter of Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225(A) (Sup Ct, NY County 2017) in which Justice St. George finds that it was reasonable for the Division staff to rely upon the wage statements and noted that company profits vary from year to year.

Based upon the foregoing, I conclude that the Division’s determination regarding the requirement of 5 NYCRR § 144.2(c)(2) is supported by substantial evidence.

### III. Control

According to 5 NYCRR § 144.2(b)(3), “[m]inority group members or women must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.” In the list of duties reported to the Division by MDS, Sarah Stec’s responsibilities are primarily centered on bookkeeping such as processing checks, paying bills, doing payroll, reconciliation of bank statements as well as personnel matters. DED Ex. 6; App. Ex. G. Ms. Stec’s resume provides a similar description of her work at MDS. DED Ex. 7; App Ex. H. In contrast, Mr. Stec’s duties are described as involving control of inventory, working with vendors to obtain quotes for bids, working with vendors to get best prices for clients and all decisions relating to marketing and sales. DED Ex. 6; App. Ex. G. The resume for Chris Stec describes him as president of MDS (in contrast to the application) and responsible for all the marketing and sales functions, supervision of employees and negotiations with vendors. DED Ex. 8; App. Ex. H. Accordingly, it appears that Chris Stec is responsible for the core functions of the business.

On the appeal, MDS argued that it was never asked to submit contracts and, therefore, did not previously provide them. Stec Aff., ¶ 32. However, as noted by Mr. Butler, the application does request copies of contracts for relevant work. Butler Aff., ¶ 17; DED Ex. 1. On the appeal, MDS submitted copies of contracts presumably to demonstrate that Ms. Stec is the signatory. However, because these records were not submitted as part of the application, I cannot consider them. 5 NYCRR § 144.5(a).

Ms. Stec may play an important backup role at MDS; however, the certification requires that the woman owner makes the decisions with respect to the core functions of the company. *See, Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD3d 1343 (3d Dep’t 2019). Based on the record before me, I find that the Division reasonably concluded that MDS failed to demonstrate Ms. Stec’s control of the business.

### IV. Submission of the Application

On its appeal, MDS devotes many pages to describing the difficulties it had in submitting its documentation for the application. Stec Aff., ¶¶ 12-14; App Exs. C, D, E; App Br. pp. 17-18. However, as noted by the staff, the Division did receive all the applicant’s documentation which was reviewed and formed the basis for the decision. Butler Aff., ¶ 18; DED Br., p. 20. Accordingly, I cannot find any procedural error that prejudiced the applicant and would warrant a reversal or modification of the Division’s determination.

## CONCLUSION

1. With respect to the ownership criterion at 5 NYCRR §§ 144.2(a)(1) and 144.2(c)(2), MDS did not meet its burden to show that the Division’s May 17, 2018 determination to deny the application for WBE certification is not based on substantial evidence.

2. With respect to the control criterion at 5 NYCRR § 144.2(b)(3), MDS did not meet its burden to show that the Division's May 17, 2018 determination to deny the application for WBE certification is not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny MDS's application for certification as a woman owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

**Matter of the Application of MDS Associates, Inc.**  
**NYS DED File ID No. 3400**  
**Exhibit Chart**

Exhibit No.	Description	ID	Rec'd
DED-1	Application for Certification	√	√
DED-2	Denial Letter	√	√
DED-3	Notice to Proceed Via Written Appeal	√	√
DED-4	1125-E Form, Compensation of Officers	√	√
DED-5	Tax Form NYS-45	√	√
DED-6	Description of Day-to-Day Responsibilities	√	√
DED-7	Resume of Ms. Sarah Stec	√	√
DED-8	Resume of Mr. Christopher Stec	√	√
DED-9	Paychex Quarterly Report – 2017	√	√
APP-A	Narrative of Transition	√	√
APP-B	March 6, 2018 Correspondence from Glenn Butler to Sarah Stec	√	√
APP-C	MDS Fax Transmittal Form dated March 22, 2018	√	√
APP-D	E-mails re: Certification Submissions dated April 4, 2018	√	√
APP-E	Fax Transmittal Form dated April 5, 2018	√	√
APP-F	Denial Letter dated May 17, 2018	√	√

Exhibit No.	Description	ID	Rec'd
APP-G	Duties of Sarah Stec and Christopher Stec	√	√
APP-H	Resumes of Sarah J. Stec and Christopher S. Stec	√	√
APP-I	List of employees and quarterly reports	√	√
APP-J	MDS Schedule K-1 – 2017	√	√
APP-K	MDS Schedule K-1 – 2016: Shareholder's Share of Income, Deductions, Credits, etc.; Nondeductible Expenses (Sarah Stec); Shareholder's Share of Income, Deductions, Credits, etc.; Nondeductible Expenses (Christopher Stec)	√	√
APP-L	Schedule E (Form 1040) 2016 – Christopher S. and Sarah J. Stec	√	√
APP-M	Form 1040 2016 – Christopher S. and Sarah J. Stec	√	√
APP-N	Employee W-2 – 2017 – Sarah J. Stec; W-2 – Christopher Stec	√	√
APP-O	Form 3-S NY Shareholder's Share of Modifications and Credits – 2017 - Sarah J. Stec	√	√
APP-P	Copies of series of six MDS checks paid to [REDACTED]	√	√
APP-Q	Signature page for tax return – 2017	√	√
APP-R	Statement that MDS does not have existing business loans	√	√
APP-S	Copies of signed contracts between MDS and [REDACTED] <sup>1</sup>		

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<sup>1</sup> Because APP-S was not submitted to the Division as part of its application for recertification, I am not considering it on this appeal.