

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

In the Matter

- of -

the Application of **MS Analytical, LLC**  
for Certification as a Minority and Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50159

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson  
Administrative Law Judge

August 6, 2018

## SUMMARY

This report recommends that the determinations of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny MS Analytical, LLC. ("MS Analytical" or "applicant") certification as both a minority-owned business enterprise (MBE) and as a women-owned business enterprise (WBE)<sup>1</sup> (together "MWBE") be modified and, as so modified, affirmed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by MS Analytical 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that MS Analytical does not meet the eligibility criteria for certification as a MWBE.

The Division denied MS Analytical's application for MWBE certification (Exhibit DED 1) by letters dated June 14, 2017 (Exhibit DED 2 [MBE denial letter] and Exhibit DED 3 [WBE denial letter]). The MBE denial letter set forth five grounds under 5 NYCRR 144.2 for the denial, one of which is applicable to MBE certification criteria only, and the WBE letter sets four grounds for the denial, which are also included in the MBE letter. According to the Division:

- (1) with respect to the MBE certification criteria, applicant failed to demonstrate that the contributions of Rebecca Maisonet, the minority owner, are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (*see* 5 NYCRR 144.2[a][1]) ["Ownership"];
- (2) with respect to the MBE and WBE certification criteria, applicant failed to demonstrate that the minority owner and the women owners, respectively, share in the risks and profits of the business enterprise in proportion to their ownership interests (*see* 5 NYCRR 144.2(c)(2)(2) ["Ownership"]);
- (3) with respect to the MBE and WBE certification criteria, applicant failed to demonstrate that the minority owner and the women owners, respectively, make

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<sup>1</sup> The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]). A "minority-owned business enterprise" is defined as a business enterprise that is at least 51 percent owned by one or more United States citizens or permanent resident aliens who are minority group members (*see* 5 NYCRR 140.1[aa]). The certification requirements for a minority-owned business enterprise are similar to the requirements for certification as a women-owned business enterprise.

decisions pertaining to MS Analytical's operation (*see* 5 NYCRR 144.2[b][1]) ["Operation"]);

(4) with respect to the MBE and WBE certification criteria, applicant did not establish that the minority owner and the women owners, respectively, devote time on an ongoing basis to the daily operation of MS Analytical (*see* 5 NYCRR 144.2[b][1][iii]) ["Operation"]); and

(5) with respect to the MBE and WBE certification criteria, applicant is not an independent business enterprise (5 NYCRR 144.2[a][2], [c][2]).

On July 17, 2017, applicant, through its attorney, Michael R. Zosh (Nicholas, Perot, Smith, Bernhardt & Zosh, Buffalo, New York), appealed from the denial, and the Division responded by letter dated February 8, 2018, advising applicant that a hearing had been scheduled at its offices in Albany, New York for March 6, 2018 at 11:00 a.m.

The hearing took place as scheduled on March 6, 2018. Applicant was represented at the hearing by Michael R. Zosh. Division Staff was represented at the hearing by Phillip Harmonick, Esq., Assistant Counsel, and called Raymond Emanuel, a senior certification analyst employed by the Division, as a witness. Mr. Emanuel supervises Ms. Drina Holden, the analyst who reviewed MS Analytical's application for MWBE certification.

The hearing was recorded by Division staff. The recording was provided to Administrative Law Judge ("ALJ") Lisa Wilkinson on four compact discs, totaling four hours and eleven minutes in length. References to testimony from the hearing are identified by the disc number, and track number, if applicable, and the time on the recording at which the testimony occurs ("HR Disc \_\_"). The parties submitted post hearing closing briefs on June 15, 2018, at which time the record closed. On the closing brief, the Division was represented by Gretchen Robinson, Esq., Assistant Counsel.<sup>2</sup>

A list of exhibits is attached to this recommended order. By agreement of the parties, I did not receive MS Analytical exhibit 8 into evidence because it was a duplicate of exhibit DED 8 and contained personal identification information that the Division had already redacted. Applicant's exhibit 15 was also not entered into evidence as it was not included in the application materials.

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<sup>2</sup> Mr. Harmonick left Division employment in April 2018.

## ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a minority and women-owned business enterprise are established by regulation (*see* 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted MWBE status, the ownership, and control, as well as the operation, of the business enterprise are assessed 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 itself, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted (5 NYCRR 144.5[a]).

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of MS Analytical's application for MWBE certification 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

### Division

The Division's denial letters assert that applicant failed to meet five criteria for certification as a minority-owned business enterprise and four criteria for certification as a woman-owned business enterprise. With respect to the MBE application, the Division asserts that applicant failed to demonstrate that Ms. Maisonet's contributions were proportionate to her equity interest in the business enterprise, as required to satisfy the ownership criteria (5 NYCRR 144.2[a][2]). With respect to both the MBE and WBE applications, the Division asserts that the minority and women owners do not share in the risks and profits of the business enterprise in relation to their ownership interests (5 NYCRR 144.2[c][3]); that the minority and women owners do not make decisions for the business enterprise (5 NYCRR 144.2[b][1]); that the minority and women owners do not devote time on an ongoing basis to the operation of the business enterprise (5 NYCRR 144.2[b][1][iii]); and that the business enterprise is not an independent business enterprise (5 NYCRR 144.2[a][2] and [c][2]). The Division requests that its determination to deny MWBE certification to be upheld.

Applicant

Applicant contests the Division's denial of the MWBE application, asserting that the Division's determinations are inconsistent with the Division's rules and not based on substantial evidence.

Applicant argues with respect to ownership that Ms. Maisonet's contribution of [REDACTED] in the form of promissory notes to Ms. Chambers and Ms. Jacobi is sufficient to demonstrate a capital contribution for purposes of the MWBE application and that the Division has previously recognized loans guaranteed by a woman owner as capital contributions to the business enterprise. Applicant also argues that in addition to the monetary contribution of capital, Ms. Maisonet contributed her experience and license certifications to the business enterprise. (*See* MS Brief at 4-8.)

Applicant also argues that the Division applied the incorrect standard to determine that Ms. Maisonet and the other women owners do not share in the risks and profits of the business in proportion to their ownership interests and that the earnings of the woman owners are proportionate to their ownership interests for purposes of section 144.2(c)(2). (*See* MS Brief at 13-14.)

With respect to operation, applicant argues that Ms. Maisonet makes decisions pertaining to the operation of the business enterprise and possesses the ultimate authority to hire and fire employees, and that no evidence in the record establishes Mr. Scinta or Mr. Henderson have decision making authority (see MS Brief at 15-18). Applicant further asserts that Ms. Maisonet is the direct manager for the day to day operation of the business, possesses the skills and expertise to operate the business and in fact operates the business, and is available full-time during the summer months when MS Analytical performs the majority of its work. (*See* MS Brief 19-24.)

With respect to independence, applicant argues that it is accepted practice for landlord and tenant to negotiate rent, that it makes perfect business sense, and any interpretation of a regulation that ignores "perfect business sense" is irrational and unreasonable. Applicant also raises in its independence argument, with reference to 5 NYCRR 144.2(c)(2), that the women owners share in the risks and profits in proportion to their ownership interest in the business enterprise. (*See* MS Brief at 8-14.)

**FINDINGS OF FACT**

1. MS Analytical, LLC (MS Analytical) is located at 4169 Allendale Parkway, Suite 200, Blasdell, New York 14219.

2. MS Analytical is an environmental consulting company which performs laboratory analysis of asbestos air samples, conducts site inspections for asbestos, lead-based paint and PCBs, develops technical specifications for abatement projects, and conducts project and air monitoring (Exhibit DED 1, § 3.C).
3. The primary NAICS classification number for MS Analytical is NAICS 541380 environmental testing laboratories or services (Exhibit DED 1, § 3.D).
4. Additional classifications for MS Analytical are NAICS 562920, environmental consulting, and NAICS 569210, asbestos abatement services (Exhibit DED 1, §§ 3.E and 3.F).
5. MS Analytical was formed in 2006 by Maureen Chambers and Suzanne Jacobi (Exhibit DED 1, § 2.C; Exhibit MS 22). Ms. Chambers and Ms. Jacobi each contributed ██████ cash on February 24, 2006. (Exhibit DED 1, § 2.C). At that time, Ms. Chambers held a 49% membership interest in the business and Ms. Jacobi held a 51% membership interest in MS Analytical (Exhibit DED 5).<sup>3</sup>
6. MS Analytical is currently owned by Rebecca Maisonet, a Hispanic female, Suzanne Jacobi, and Maureen Chambers. At the time of the MWBE application, Ms. Maisonet held a 51% membership interest in MS Analytical, and Ms. Jacobi and Ms. Chambers held a 25% and 24% membership interest, respectively. (See Exhibit DED 1, § 2.A.)
7. Ms. Maisonet purchased her 51% interest in MS Analytical on January 16, 2015, consisting of a 25% membership interest from Ms. Chambers and a 26% membership interest from Ms. Jacobi, for a total of ██████ (see Exhibit DED 5).
8. MS Analytical provides environmental testing laboratories or services (NAICS 54130), environmental consulting services (NAICS 541620), and asbestos abatement services (NAICS 562910) (Exhibit DED 1, ¶¶ 3.D, 3.E, and 3.F).
9. On April 9, 2015, MS Analytical applied for certification as a minority-owned business enterprise (MBE) and a women-owned business enterprise (WBE) (collectively “MWBE”) (Exhibit DED 1 at 1).
10. On April 8, 2016, the Division analyst requested additional information from applicant which applicant provided on April 20, 2016 (Exhibit DED 1 at 10).

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<sup>3</sup> According to Exhibit DED 5, Ms. Chambers “is the owner of a forty-nine percent (49%) membership . . . in MS Analytical, LLC” and Ms. Jacobi “is the owner of a forty-nine percent (51%) membership . . . in MS Analytical, LLC.” There appears to be a typographical error with respect to the recitation of Ms. Jacobi’s membership interest.

11. By letters dated June 14, 2017, the Division denied MS Analytical's applications for MBE and WBE certifications (Exhibits DED 2 and 3).

Ownership: capital contribution

12. To finance the purchase of her membership interest, Ms. Maisonet executed two promissory notes, each in the amount of [REDACTED]. One note is payable to Ms. Jacobi and the other note is payable to Ms. Chambers. (See Exhibits DED 1 § 2.D, DED 5, DED 6, and DED 7.)
13. Pursuant to the promissory notes, Ms. Maisonet is required to make 48 consecutive monthly payments of principal and accrued interest in the amount of [REDACTED] beginning six months after January 16, 2015, the date of the promissory notes (see Exhibits DED 6 and 7).
14. The promissory notes provide that the "maker" of the note - Ms. Chambers or Ms. Jacobi - may declare the entire unpaid principal balance of the note immediately due and payable if the payee, Ms. Maisonet, defaults, becomes insolvent and unable to make payments, is subject to bankruptcy proceedings, is subject to an unpaid judgment, or fails to pay any indebtedness to persons other than the payees when due (see Exhibits DED 6 ¶ 4 and 7 ¶ 4).
15. Ms. Maisonet is obligated to pay on demand all costs and expenses, including reasonable legal fees and expenses, incurred by the payees in connection with enforcing the promissory note (Exhibits DED 6 ¶ 9 and Exhibit 7 ¶ 9).

Ownership: risks and profits

16. MS Analytical's 2015 partnership income tax return reports that Rebecca Maisonet's earnings were [REDACTED] from self-employment net earnings, [REDACTED] from tax-exempt income and [REDACTED] from distributions. Her ending capital account totaled minus [REDACTED] (DED-8 [Schedule K-1 Rebecca Maisonet]).
17. According to Ms. Maisonet's 2015 W-2 statements, she earned [REDACTED] from [REDACTED] [REDACTED] ([REDACTED]), [REDACTED] from [REDACTED] and [REDACTED] from the State of New York (Exhibit DED 11).
18. MS Analytical's 2015 partnership income tax return reports that Maureen Chambers's earnings were [REDACTED] from self-employment net earnings, [REDACTED] from tax-exempt income, and [REDACTED] from distributions. Her ending capital account totaled minus [REDACTED] (Exhibit DED 8 [Schedule K-1 Maureen Chambers].)

19. MS Analytical's 2015 partnership income tax return reports that Suzanne Jacobi's earnings from MS Analytical were [REDACTED] from self-employment net earnings, [REDACTED] from tax-exempt income, and [REDACTED] from distributions. Her ending capital account totaled minus [REDACTED] (DED 8 [Schedule K-1 Suzanne Jacobi]).
20. Suzanne Jacobi's and Anthony F. Franjoine's 2015 personal income tax return reports that MS Analytical paid Anthony F. Franjoine, Suzanne Jacobi's husband, [REDACTED] in wages (Exhibit DED 10 [Form IT-2 Summary of W-2 Statements Suzanne Jacobi Franjoine and Anthony Franjoine]).
21. According to MS Analytical's 2015 W-2 statements, MS Analytical paid wages to the following individuals in amounts greater than what Ms. Maisonet received in earnings and distributions:
- a. Timothy Bromund - [REDACTED];
  - b. Christopher C. Stohl - [REDACTED];
  - c. Elizabeth P. Stohl - [REDACTED];
  - d. Michael J. Scinta - [REDACTED];
  - e. Eric A. Henderson - [REDACTED] and
  - f. Garret Chambers - [REDACTED]

(see Exhibit DED-12).

22. According to the 2015 W-2 statement provided by MS Analytical, Garret Chambers has the same address as Maureen Chambers (see Exhibits DED 9 [2015 US income tax return Maureen Chambers] and DED 12 [W-2 statement Garrett Chambers]).
23. Christopher Stohl is the contact person for [REDACTED] (Exhibit DED 1, §§ 6.I and 6.K).
24. According to the 2015 W-2 statement provided by MS Analytical, Christopher Stohl resides at the same address as Elizabeth P. Stohl (see DED 12 [2015 W-2 statements for Christopher C. and Elizabeth P. Stohl]).

Operation: Decision Making

25. Ms. Maisonet started her employment with MS Analytical in 2012 as a laboratory analyst (Exhibit DED 16).



26. Ms. Maisonet is certified by the New York State Department of Labor as a project and air monitor for asbestos. With this certification, she is able to take samples in the field, analyze samples in the laboratory, create reports, and oversee asbestos projects. Ms. Maisonet has completed the New York State Department of Health Asbestos Safety Training class. (See HR, Disc 2 at 9:20-11:40; Exhibit DED 15.)
27. Ms. Maisonet, Ms. Chambers, and Ms. Jacobi are jointly responsible for financial decisions, estimating, preparing bids, negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, supervising field operations, purchasing equipment and sales, managing and signing payroll, negotiating contracts, and acting as signatories on business accounts (Exhibit DED 1, ¶ 4.A).
28. Michael Scinta is employed as a laboratory technician by MS Analytical on a half-time basis. He has a bachelor's degree in environmental science from the University of Buffalo (HR, Disc 1, 7:00-7:45).
29. Mr. Scinta does not hire or fire employees, negotiate contracts, sign checks or market the business (HR, Disc 1, track 1 at 9:27, 18:00-18:10; *see also* Exhibit DED 1, §4.A).

Control: Time Devoted to Business

30. Ms. Maisonet works full-time as a teacher at a Catholic school in the city of Buffalo, New York. She works at MS Analytical in the office at least twice a week after school during the school year, 20 to 40 hours a week during school breaks and full-time during school vacations from July 1 to August 31. (Exhibit DED 16, response 14; Exhibit MS 22; HR, Disc 1, track 1 at 30:00-33:30; Disc 2, track 1 at 18:54.)
31. Ms. Chambers works 5 to 10 hours a week at MS Analytical, 20 to 30 hours per week at [REDACTED] 2 to 5 hours per week for [REDACTED] and 2 to 5 hours per week at [REDACTED]. Except for MS Analytical, she is paid on an hourly basis at the other companies (Exhibit DED 16 [response 15]; MS 23).
32. According to Ms. Chambers's 2015 W-2 statements, she earned [REDACTED] in wages from [REDACTED], [REDACTED] in wages from [REDACTED] (Exhibit DED 9 [summary of W2 statements Maureen Chambers]).
33. Ms. Jacobi co-owns [REDACTED] (25 percent ownership interest) with Amy Stohl (50 percent ownership interest) and her son, Tony Franjoine, Jr. (25 percent ownership interest) (*see* Exhibit DED 16 [response 18]).

34. Ms. Jacobi co-owns [REDACTED] with Christopher Stohl (*see id.*).
35. Ms. Jacobi c-owns [REDACTED] (36 percent ownership interest) with Christopher Stohl (36 percent ownership interest) and Paul Gizzarelli (27 percent ownership interest) (*see id.*).
36. According to Ms. Jacobi's 2015 W-2 statements, she earned [REDACTED] from [REDACTED] from [REDACTED] from [REDACTED] from [REDACTED] and [REDACTED] from [REDACTED] (Exhibit DED 10 [Form IT-2 Summary of 2015 W-2 Statements Suzanne Jacobi Franjoine and Anthony Franjoine and Schedule E Part II Income or Loss From Partnerships and S Corporations]).

### Independence

37. MS Analytical rents office space at 4169 Allendale Parkway, Blasdell, New York, from [REDACTED] (Exhibits DED 1, § 1.E, DED 18). The monthly rent was [REDACTED] per month in 2014, [REDACTED] per month in 2015, and [REDACTED] per month in 2016 (Exhibits DED 16 [response 19] and DED 18.)
38. MS Analytical shares office space with [REDACTED], [REDACTED], and [REDACTED] (Exhibit DED 1 § 6.I).
39. MS Analytical shares a copier and general office equipment with [REDACTED]. (*See* Exhibit DED 1, §§ 6.I and 6.K.)
40. For the years 2014 and 2015, the lease agreement consisted of four terms including: (1) premises - described as "part of the building at 4169 Allendale Parkway, the two rear office spaces, along with use of the two [r]estroom facilities, the kitchen area, copy machine and phone system [hereinafter called the 'Premises']"; (2) term - one year beginning on January 1 and ending on December 31; (3) rent - an annual amount, payable in monthly installments; and (4) utilities/ taxes - payable by the landlord (Exhibit DED 18).
41. MS Analytical negotiated a reduction in monthly rent from [REDACTED] in 2016 because it could not afford to pay [REDACTED] per month. According to supplemental information provided with the application, the arrangement is beneficial to [REDACTED] the building's largest tenant, because it ensures that [REDACTED] does not have to trust its laboratory analysis with its competitors. (*See* Exhibit DED 16 [response 19]).

42. MS Analytical does not have a stable income to rent office space, hire a secretary or purchase a photocopier. (HR Disc 1 at 53:40 [testimony of Maureen Chambers]; Exhibit DED 16 [response 19].)
43. MS Analytical pays [REDACTED] per month for office supplies, including paper, file folders, pens, pencils, and other items, [REDACTED] per month for the use of clerical and receptionist staff, and [REDACTED] per month for the use of the phone system (Exhibit DED 16 [response 19]).
44. The revenue MS Analytical receives from [REDACTED] helps MS Analytical pay its utilities (Exhibit DED 16 [response 14]).
45. On January 28, 2015, Ms. Maisonet, on behalf of MS Analytical, and Christopher Stohl, on behalf of [REDACTED], entered into a Memorandum of Understanding whereby MS Analytical agreed to give [REDACTED] priority service for analysis of PCM<sup>4</sup> air samples in return for [REDACTED] placing its laboratory analysis work with MS Analytical, to the extent allowed by law (Exhibit DED 19 ¶¶ 1-2).
46. Christopher Stohl is the contact person for [REDACTED] on MS Analytical's MBWE application (Exhibit DED 1, § 6.I).
47. At the time the MWBE application was filed, the three largest accounts for MS Analytical included: [REDACTED] valued at [REDACTED] [REDACTED] valued at [REDACTED] and [REDACTED] valued at [REDACTED] (Exhibit DED 1, § 4.C). The largest active project, and only project listed on the application, for MS Analytical was a contract for asbestos lab analysis with [REDACTED] valued at [REDACTED] (Exhibit DED 1, § 4.D).
48. From January 2015 through March 2016, MS Analytical recorded sales in the amount of [REDACTED] from [REDACTED] (Exhibit DED 20). [REDACTED] was the only customer was listed on the sales ledger for the period January 2015 through March 2016 (Exhibit DED 20).
49. MS Analytical and [REDACTED] share office space and equipment (Exhibit DED 1, § 6.K).

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<sup>4</sup> PCM air sampling refers to airborne asbestos phase contrast microscopy (29 CFR 1910.1001, appendix B).

50. At the time of the application filing, MS Analytical was working on one active project. The project was for [REDACTED] and the contract was valued at [REDACTED]. (See Exhibit DED 1, ¶ 4.D.)
51. The key employees of MS Analytical are Michael Scinta, Timothy Bromund, and Eric Henderson. Mr. Scinta is the operations manager of laboratory analysis and field director. He works 21 hours per week at MS Analytical and 20 hours per week at [REDACTED]. Eric Henderson is the laboratory technician and field inspector. He works 20 hours a week for MS Analytical and 20 hours per week for [REDACTED]. (Exhibit DED 16 [response 17].)<sup>5</sup>
52. MS Analytical cannot afford to hire permanent staff and hires “individuals on an hourly basis who also work for other companies including [REDACTED]” Because MS Analytical shares employees with [REDACTED], MS Analytical does not have to hire permanent full-time staff and [REDACTED] can maintain a larger staff than it could otherwise justify to handle large projects as necessary. (See *id.*)

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a minority and women-owned business enterprise, pursuant to Executive Law Article 15-A. The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information provided in supplemental submissions and interviews that are conducted by Division analysts.

### Ownership: Capital Contribution

The Division determined, as one of the grounds for its denial of the application for MBE certification, that applicant failed to demonstrate a capital contribution by the minority group member (see Exhibit DED 2). The relevant facts cited in the Division's denial letter are:

- Ms. Rebecca Maisonet, a minority group member, owns a fifty-one percent (51%) membership interest in MS Analytical. Ms. Suzanne Jacobi, a non-minority individual owns a twenty-five (25%) membership interest in MS Analytical, and Ms. Maureen Chambers, a non-minority individual, owns a twenty-four percent (24%) interest in MS Analytical.

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<sup>5</sup> Timothy Bromund was the lab technical director and was responsible for quality control. He worked 5 hours per week for MS Analytical and 42 hours per week for [REDACTED]. Ms. Maisonet assumed the position of laboratory director in 2016.

- According to the application, Ms. Jacobi and Ms. Chambers contributed [REDACTED] each to MS Analytical in 2006 while Ms. Maisonet contributed [REDACTED] to MS Analytical on January 16, 2015.
- The proof of Ms. Maisonet's contribution consisted of two promissory notes executed by Ms. Maisonet providing for the payment of [REDACTED] each to Ms. Jacobi and Ms. Chambers over a term of three years.

(see Exhibit 2 [MBE denial letter at 2-3]). The Division did not raise this ground in connection with its denial of the application for WBE certification.

For a business to be eligible for certification as a minority or woman-owned business enterprise, the contribution of the minority group member 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 144.2[a][1]). The purpose of the capital contribution test is to ensure that the MWBE program directly benefits minority or woman business owners who have a direct financial stake in the business, and to guard against the installation of minority or woman owners as majority shareholders in a business enterprise for the purpose of obtaining certification.

At the hearing, the Division submitted documentation of the membership interest purchase agreement between Ms. Maisonet, Ms. Chambers, and Ms. Jacobi dated January 16, 2015, whereby Ms. Maisonet agreed to purchase a 26% interest from Ms. Jacobi and a 25% interest from Ms. Chambers in exchange for the execution of two promissory notes, each in the amount of [REDACTED] to payable, to Ms. Chambers and Ms. Jacobi respectively (Exhibit DED 5 [whereas clauses and paragraph 2 [consideration]]; see also Exhibit DED 1, §§ 2.C and 2.D). The promissory notes, executed on January 16, 2015, provide for monthly payments of principal and accrued interest in the amount of [REDACTED] to Ms. Chambers and Ms. Jacobi beginning six months after January 16, 2015, the date of the notes, and continuing for 48 consecutive months. (See Exhibits DED 6 and 7.) By the terms of the notes, Ms. Maisonet began making payments in July 2015 and will though July 2019.

An applicant is not automatically disqualified from MWBE certification because the woman or minority owner finances the purchase of the business through loans. The Division will evaluate the terms of the loan and whether the loan is guaranteed or repaid by the minority group member or woman owner to determine whether the loans constitute a capital contribution (see e.g., *Matter of Mac Fhionnghaile & Sons Electrical Contracting*, Final Order, January 3, 2018; Recommended Order, November 16, 2017 [interest-free loan for an indefinite term did not qualify as a capital contribution]; *Matter of North Fork Boutique Gardens Inc.*, Final Order March 16, 2017; Recommended Order, February 22, 2017 [inter-company loans from related business with no formal agreement and at an unstated level of interest did not qualify as a capital

contribution by the woman owner]). In *Matter of Alpha Drilling & Blasting, Inc.*, relied upon by applicant to assert the Division improperly denied certification based on capital contribution, Acting Executive Director Nicole Stent accepted the recommendation of the administrative law judge that the woman owner's startup of the business with loans from her parents that she personally guaranteed by a demand note executed in 2010 constituted a capital contribution within the meaning of 5 NYCRR 144.2(a)(1) and held that the Division's denial of the application on the grounds of capital contribution was not based on substantial evidence (*see Matter of Alpha Drilling & Blasting, Inc.*, Final Order, April 5, 2018; Recommended Order, March 16, 2018, at 5-6 [*Alpha Drilling*]). The woman owner testified at the appeal hearing that she needed the loans from her parents to start the business because her ex-husband had failed to pay her money he owed her pursuant to a divorce decree, and that she sold "everything and anything" she owned, except her home, to start the business in 2007 (*Matter of Alpha Drilling & Blasting*, Recommended Order at 4). The woman owner had repaid some of the loans in 2011, five years before she submitted the application for WBE certification, after she received the proceeds from her divorce settlement (*id.* at 4-5).

Similar to the woman owner in *Alpha Drilling*, Ms. Maisonet is under a legal obligation to make payments to Ms. Chambers and Ms. Jacobi pursuant to the promissory notes. In the event of a default, she would suffer financial penalties according to the terms of the promissory notes, including having to pay the balance due on the loans in full and the costs and expenses incurred by Ms. Chambers and Ms. Jacobi to recover payment on the notes (*see* Exhibits DED 6 and 7). At the time the application was filed, Ms. Maisonet had not made payments on the promissory notes, and, therefore, had not made a contribution to the business enterprise in the Division's view. The Division's position, however, ignores the legal jeopardy that would attach if Ms. Maisonet defaulted under the promissory notes. Ms. Maisonet testified at the hearing that she has been making payments of ██████ per month which, according to the promissory notes, she is scheduled to complete in 2019. The Division did not contest the terms of the promissory notes or challenge the validity of the notes (HR, Disc 2, track 1 at 28:40 [testimony of Rebecca Maisonet; Exhibits DED 6 and 7]). The Division's determination with respect to Ms. Maisonet's capital contribution does not appear consistent with its reasoning in *Alpha Drilling*.

I also note a lack of consistency in the Division's MBE and WBE denial letters with respect to capital contribution that calls into question the legal standard the Division applied to deny the application for MBE certification (*see* Exhibits DED 2 and DED 3). Section 144.2(a) of 6 NYCRR is equally applicable to MBE and WBE applications. As the majority shareholder and only minority member of MS Analytical, Ms. Maisonet's capital contribution must be proportionate to her equity interest in the business enterprise for both the MBE and WBE applications. The Division did not include capital contribution as a ground for denial of the WBE application. It is not clear from the administrative record on what basis Division staff determined MS Analytical failed to meet this certification criterion for the MBE application, but not the WBE application. Applicant must demonstrate that the contributions of the minority and

woman owners are proportionate to their equity interest in the business enterprise for both applications. On record before me, the Division's denial of the MBE application for its failure to meet the ownership criterion in 5 NYCRR 144.2(a) is not based on substantial evidence.

I address applicant's alternative argument that Ms. Maisonet contributed expertise to the business enterprise in the event the Director disagrees with my recommended decision. Applicant contends that Ms. Maisonet contributed her experience to MS Analytical, including her New York State certification for asbestos and project air monitoring and her training and certification for analysis of air samples under NIOSH protocol 7400. Applicant asserts that question 2.C of the application only asks for "cash and capital contributions to this form by the owners identified above." According to applicant, the Division's March 29, 2016 request for information asking applicant "[p]lease provide proof of all capitalization contribution to the business – for yourself, any partners or owners. It should be in the form of cancelled checks (including front and back of cancelled checks), deposit slips, or other verifiable documents, which clearly identify the original source of startup funds for this business and any and all ownership changes," referred only to question 2.C, and did not suggest that the Division was looking for a narrative of Ms. Maisonet's expertise. Applicant argues that the application did not ask it to value expertise contributed by Ms. Maisonet, that her expertise was clearly evident from supplemental information applicant submitted as part of the MWBE application, and that no requirement exists in the Division's regulations that applicants place a monetary value on the expertise contributed. Applicant also points out that Ms. Maisonet does not receive a salary from MS Analytical, and, therefore, her work at the company constitutes a capital contribution. (*See MS Brief at 5-6 Exhibit DED 1, § 2.C; Exhibit DED 1 at 10; Exhibit DED 16.*)

Division staff argues that it is applicant's responsibility to demonstrate a capital contribution by Ms. Maisonet and not the Division's responsibility to assign a value to a contribution of expertise or interpret an applicant's response to specific questions asked. According to the Division, it is "the applicant's responsibility to adhere to the requirements and to explain the genetic makeup of its company that it seeks to have certified as a MBE enterprise." (DED Brief at 26.)

Even if I accepted applicant's argument that the application establishes Ms. Maisonet's expertise in the business enterprise, applicant has not demonstrated that she made a capital contribution of such expertise to the business within the meaning 5 NYCRR 144.2(a)(2). When the Division evaluates capital contributions to the business enterprise in the form of expertise under 5 NYCRR 144.2(a)(1), the Division considers such contributions by the woman or minority owner at the time the business was formed or when the ownership interest was acquired (*see e.g., Matter of Whitman Engineering*, Recommended Order, March 20, 2017, at 3 [contribution of expertise supported by written narrative submitted as part of the application process which stated, in part, the woman owner's capital contribution was in the form of 'my services as a Professional Engineer, with 14 years' experience in the construction industry' and

‘my contacts with customers, architects and engineers’]; *Matter of Coverco*, Final Order 17-06, January 30, 2017, Recommended Order, January 23, 2017 at 12 [noting that the Division interprets the requirement at 5 NYCRR 144.2(a)(1) to include money, property, equipment or expertise conferred upon the business without consideration, that compensated work would not be consistent with the plain meaning of the term “contribution,” and that if the term “contribution” included compensated work, every employee of every business seeking WBE certification would make a contribution to the business enterprise). Ms. Maisonet was not a founding member of MS Analytical. She worked part-time at MS Analytical as a lab technician beginning in 2012. When Ms. Maisonet acquired her ownership interest in 2015, she did not have NYS asbestos certifications, and relied on male individuals at MS Analytical who had the necessary certifications to perform the work until she obtained the required certifications. Ms. Maisonet testified that she received her training from Tony Franjoine, Jr. at [REDACTED] and became the laboratory director of MS Analytical in 2016 after she obtained asbestos certifications. It is not clear from the administrative record who paid for Ms. Maisonet’s training. (See MS Brief at 5; HR, Disc 1, track 1 at 7:22; track 2 at 2:14.)

That Ms. Maisonet may have “adequate managerial experience or technical competence in the business enterprise,” or “the working knowledge and ability needed to operate the business enterprise,” to meet the certification requirement for control pursuant to 5 NYCRR 144.2 (b)(1), as applicant asserts, does not mean that she made a capital contribution of such expertise for purposes of the ownership criteria in 5 NYCRR 144.2(a)(1). Based on the administrative record, applicant has not demonstrated that the Division erred as a matter of law in failing to conclude that Ms. Maisonet made a contribution of expertise to the business enterprise.

*Ownership: Risks and Profits*

The Division determined that the minority group member and women owners of MS Analytical do not share in the risks and profits of the business enterprise in proportion to their ownership interests, as required by 5 NYCRR 144.2(c)(2), asserting the following facts:

- Michael Scinta, the laboratory operations manager for MS Analytical, receives significant compensation from MS Analytical.
- Ms. Maisonet, a minority group member, received *de minimis* distributions from MS Analytical during the 2015 tax year.
- The women owners of MS Analytical received *de minimis* distributions from MS Analytical during the 2015 tax year.

(see Exhibit 2 at 3 and Exhibit 3 at 2). The Division’s determination with respect to the MWBE applications is supported by substantial evidence in the record and should be affirmed.



Section 144.2(c)(2) of 5 NYCRR states that “an eligible minority group member or woman applicant must be an independent business enterprise. The ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. *The minority group member or woman owner shall 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 144.2[c][2][*emphasis added*]). The Division considers the distributions and compensation paid to minority and women owners to ensure that they enjoy the significant benefits that may accrue as a result of state contracting preferences, and that benefits do not flow disproportionately to persons who are not members of a protected class (*see Richmond v J.A. Croson*, 488 US 469, 506 [1989]).

The Division’s determination that Ms. Maisonet, Ms. Jacobi and Ms. Chambers received *de minimis* distributions from MS Analytical in 2015 is supported by evidence in the record. Ms. Maisonet earned [REDACTED] from MS Analytical. She states that she works full-time at MS Analytical during the summer and school vacations (*see* Exhibit DED 16, response 14). Assuming that Ms. Maisonet works 14 forty-hour weeks per year, her earnings are equivalent to approximately [REDACTED] per hour. Ms. Chambers works 5 to 10 hours per week at MS Analytical, putting her hourly compensation between [REDACTED] and [REDACTED] (*see* Exhibit DED 16, response 15). Ms. Chambers received substantially less in distributions than other MS Analytical than employees received in wages. Ms. Jacobi, who has a 25% membership interest, received less in proceeds other employees as well as Ms. Chambers, who has a 24% membership interest. (*See* Tables 1 and 2 below.)

At the same time, MS Analytical paid persons who have familial or business relationships with Ms. Jacobi greater compensation than the distributions paid to Ms. Maisonet. Ms. Jacobi’s husband, Tony Franjoine, Sr., who is also employed by [REDACTED], [REDACTED] and [REDACTED], received more than twice as much compensation from MS Analytical than Ms. Maisonet (*see* Exhibits DED 10, DED 12, and DED 16). Christopher Stohl was the fourth highest wage earner at MS Analytical in 2015 (*see* Exhibit DED 13). Both he and Elizabeth Stohl, who reside at the same address, received more compensation than Ms. Maisonet (*see* Exhibits DED 12 and DED 13). Christopher Stohl and Ms. Jacobi are co-owners of [REDACTED] and [REDACTED], and, together, own 73 percent of [REDACTED] (*see* Exhibit DED 16, response 18).<sup>6</sup> Ms. Jacobi, her son, Tony Franjoine, Jr., and Amy Stohl are member owners of [REDACTED] (*see* Exhibit DED 16). Garrett Chambers received [REDACTED] in wages, only [REDACTED] less than Ms. Maisonet and more than the other women owners. Garret Chambers resides at the same address as Maureen Chambers (*see* Exhibit DED 8).

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<sup>6</sup> Suzanne Jacobi and Amy Stohl are member owners of [REDACTED] (*see* Finding of Fact No. 31). The record does not indicate Ms. Stohl’s relationship with Christopher Stohl.

Mr. Scinta and Mr. Henderson, non-minority male individuals who have no ownership interest in MS Analytical, received [REDACTED] and [REDACTED] in wages, respectively, in 2015, significantly more than Ms. Maisonet (*see* Exhibit DED 12, W-2 statements). Mr. Scinta and Mr. Henderson split their time between MS Analytical and Stohl Environmental, a company owned by Ms. Jacobi, her son, and Amy Stohl, enabling [REDACTED] to avoid employing them on a full-time basis, and making them available to MS Analytical on a part-time basis.

Applicant argues that the appropriate comparison to make are the profits and distributions paid to the owners of the business relative to each other, and that Ms. Maisonet received proportionately more profits than Ms. Jacobi and Ms. Chambers. Applicant’s argument is not persuasive on the facts presented here. This is not a case involving wages paid in arms-length transactions to third parties, or wages by a business enterprise that is a union shop. The people who received greater compensation than Ms. Maisonet were related to Ms. Jacobi or had close business ties to companies she owned. As I discuss below, MS Analytical does not operate independently from [REDACTED] and [REDACTED], raising the possibility that if MS Analytical receives MWBE certification, benefits could flow disproportionately to persons who are ineligible to receive them, rather than to Ms. Maisonet. On this record, applicant has failed to demonstrate that the Division’s denial of the MWBE application was not supported by substantial evidence.

**TABLE 1**  
**2015 DISTRIBUTIONS TO MS ANALYTICAL OWNERS**

<b>Shareholder</b>	<b>Ordinary Business Income</b>	<b>Guaranteed Payment</b>	<b>Distributions</b>	<b>Tax Exempt Income</b>	<b>Total Distributions</b>
<b>Rebecca Maisonet</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Susan Jacobi</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Maureen Chambers</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(*see* Exhibit 8, Schedule K-1s for Rebecca Maisonet and Maureen Chambers and Suzanne Jacobi, lines 1, 4, 14, 18 and 19).

**TABLE 2**  
**HIGHEST PAID MS ANALYTICAL EMPLOYEES PER W2 STATEMENTS**

Employee	W2 Wages	Relationship(s)
Michael J. Scinta	[REDACTED]	None documented
Eric A. Henderson	[REDACTED]	None documented
Tony Franjoine	[REDACTED]	Husband of Suzanne Jacobi
Christopher Stohl	[REDACTED]	Co-owner [REDACTED] and [REDACTED] with Suzanne Jacobi. Also, contact for [REDACTED] on MWBE application.
Elizabeth Stohl	[REDACTED]	Resides at same address as Christopher Stohl
Garret Chambers	[REDACTED]	Resides at same address as Maureen Chambers

(see Exhibits DED 12 and 16).

*Control: Operation of the Business Enterprise*

To be eligible for certification, a business enterprise seeking MWBE certification must demonstrate that the minority group member and women owners control the business enterprise. One element of control the Division evaluates is whether minority group members and women operate the business enterprise, which the Division evaluates by determining whether minority group members and women owners make decisions pertaining to the operation of the business enterprise. Pursuant to 5 NYCRR 144.2(b)(1), the Division considers the following in this regard: (1) minority group members or women must have adequate managerial experience or technical competence in the business enterprise; (2) minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise; and (3) minority group members or women must devote time on an ongoing basis to the daily operation of the business (see 5 NYCRR 144.2[b][1][i], [ii], [iii]).

The Division made two determinations with respect to the certification criteria for control. First, the Division determined that the minority group member and women claiming ownership of MS Analytical do not make decisions pertaining to the operation of the business as

required under 5 NYCRR 144.2(b)(1). The Division cites the following facts in support of this determination:

- MS Analytical is primarily engaged in providing laboratory analysis of asbestos air samples;
- Mr. Scinta and Mr. Eric Henderson are primarily responsible for managing significant operations of the business related to the collecting and analyzing air samples.

(*see* Exhibit 2 [MBE Denial letter] at 3; Exhibit 3 [WBE denial letter] at 3). In essence the Division is claiming that Ms. Maisonet does not perform the core functions of the business related to collecting and analyzing asbestos air samples. The Division's determination is not supported by substantial evidence.

Rebecca Maisonet began working at MS Analytical in 2012 (HR Disc 2 at 8:45). She is certified by the New York State Department of Labor as a project and air monitor for asbestos, which allows her to take samples in the field, analyze samples in the laboratory, create reports, and oversee asbestos projects. Ms. Maisonet has also completed the New York State Department of Health Asbestos Safety Training class. As a result of this training, Ms. Maisonet is qualified to be the laboratory director at MS Analytical. (*See* HR, Disc 2 at 9:20-11:40; Exhibit DED 15.) The Division's witness conceded at the hearing that Ms. Maisonet has adequate managerial experience, technical competence and the knowledge and experience to operate MS Analytical (HR, Disc 4, track 1 at 7:30-8:25). Moreover, Mr. Scinta credibly testified that he has no involvement in the management or operation of the business and that Ms. Maisonet manages laboratory operations and oversees his work and the work of others (HR, Disc 1, at 5:35-19:00 [testimony of Michael Scinta]). Accordingly, I find that applicant has demonstrated that Ms. Maisonet manages significant operations of the business related to collecting and analyzing asbestos air samples within the meaning of 5 NYCRR 144.2(b)(1). The Division's determination to the contrary is not supported by substantial evidence.

Second, the Division determined that Ms. Maisonet, Ms. Chambers and Ms. Jacobi do not devote time on an on-going basis to the operation of the business enterprise as required under 5 NYCRR 144.2(b)(1)(iii) (*see* Exhibit 2 [WBE Denial letter at 2-3, MBE denial letter at 3]). Time devoted to a business enterprise is the third factor the Division considers in evaluating whether minority and women owners exercise make decisions pertaining to the operation of the business enterprise under 5 NYCRR 144.2(b)(1). The Division cites the following facts in its denial letters with respect to 5 NYCRR 144.2(b)(1)(iii):

- Ms. Maisonet maintains employment outside of MS Analytical and is seasonally unavailable to manage the operations of MS Analytical during normal business hours.

- The application’s representation that MS Analytical’s work is primarily performed during July and August is not supported by internally-prepared ledgers of MS Analytical submitted with the application.
- Ms. Chambers devotes five to ten hours per week to the operation of MS Analytical, and Ms. Jacobi devotes two to five hours per week to the operation of MS Analytical. (Exhibits DED 2 and 3).

At the outset, I consider the Division’s interpretation of 5 NYCRR 144.2(b)(1)(iii) that minority and women owners must be available to operate the business during normal business hours (see *Matter of KTR Trucking, LLC*, Final Order, October 28, 2016; Recommended Order, October 26, 2016, at 6-7). The Division argues that Ms. Maisonet is often not available during ordinary business hours, and her ability to work on most days after the school day ends is not sufficient to satisfy the certification criteria in 5 NYCRR 144.2(b)(1)(iii). “Outside employment is a concern of the Division when considering whether to certify an applicant as a MBE or WBE.” (See DED Brief at 27-28.) An agency’s interpretation of its regulations must be upheld unless the determination is “irrational and unreasonable” (see *Matter of Marzec v De Buono*, 95 NY2d 262, 266 [2000]; *Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d 337, 342 [2004], citing *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997] [citations omitted]). The Division’s interpretation of 5 NYCRR 144.2(b)(1)(iii) to require minority and women owners to be available to operate the business is reasonable.

Evidence in the record supports the Division’s findings that Ms. Maisonet, Ms. Chambers and Ms. Jacobi have significant professional commitments outside of MS Analytical. Ms. Maisonet states that MS Analytical is one of her two professions. She works full-time as a math teacher during the school year and at MS Analytical approximately two days a week after school (September 1 to June 30). During school vacation, Ms. Maisonet works between 20 and 40 hours a week at MS Analytical, and in the summer she works there full-time. Ms. Chambers works 5 to 10 hours per week at MS Analytical and 20 to 30 hours per week at Stohl Environmental, 2 to 5 hours per week at [REDACTED], and 2 to 5 hours a week at [REDACTED]. Ms. Jacobi works 2 to 5 hours a week at MS Analytical and 5 to 10 hours per week at [REDACTED], 2 to 5 hours a week at [REDACTED], 5 to 10 hours a week at [REDACTED] and 4 to 6 hours per week at a pool services company. (See Exhibit DED 16, Responses 15, 16, and 17 and Table 4 below.) The Division inferred from this evidence that the owners of MS Analytical are preoccupied with other professional commitments and do not make decisions with respect to the operations of the business.

The issue with the Division’s application of 5 NYCRR 144.2(b)(1)(iii) to MS Analytical’s MWBE application, however, is that it overlooks the threshold certification question whether minority group members and women owners make decisions pertaining to the operation of the business enterprise and, if they do not, whether the administrative record supports a

finding that an ineligible individual or individuals performs that function. Notwithstanding the part-time nature of Ms. Maisonet's, Ms. Chambers and Ms. Jacobi's work at MS Analytical, testimony at the hearing as well as the application materials demonstrate that Ms. Maisonet is the laboratory director and in charge of laboratory operations. She oversees projects, hires and fires employees, and develops proposals and job estimates. The application and supporting materials demonstrate that Ms. Maisonet makes decisions pertaining to the operation of the company. (*See* HR, Disc 2 at 14:03-21:40; Exhibit DED 1, § 4A.) The Division produced no evidence at the hearing that Mr. Scinta, Mr. Henderson, or any individual other than the owners of MS Analytical, manage or engage in any decision making with respect to the operation of MS Analytical.

At the hearing the parties contested whether MS Analytical is busiest during the summer months, thereby justifying the part-time nature of Ms. Maisonet's work hours. Applicant argues, based on Exhibit DED 20, that MS Analytical is busiest during the summer months when Ms. Maisonet is able to work full-time and that other times of the year business is slower, Ms. Maisonet does not have to work as many hours. An analysis of the sales ledger in Exhibit DED 20 shows that sales are higher during the summer months, but occur steadily throughout the year (*see* Table 3). Data submitted with the application and summarized in Table 5 also show that MS Analytical paid the most wages and had the greatest number of employees, reasonable indicators of business activity, in the second quarter, which covers the period April 1 to June 30 when Ms. Maisonet is teaching (*see* Exhibit DED 13). On the facts presented here, this evidence is not sufficient to conclude that Ms. Maisonet and the other women owners do not operate MS Analytical.

The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and an 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]). If the Division interprets 5 NYCRR 144.2(b)(1) to require that minority and women owners work on a full-time basis, or established hours at a business enterprise, to demonstrate they make decisions pertaining to the operation of the business, the Division could reasonably conclude based on the record evidence that Ms. Maisonet and the other women owners do not devote time on an on-going basis to the daily operation of MS Analytical. Such an interpretation of 5 NYCRR 144.2(b)(1), however, begs the question whether substantial evidence in the record supports a determination that someone other than the minority group member or women owners makes decisions pertaining to the operations of MS Analytical. I read 5 NYCRR 144.2(b)(1)(iii) as setting forth one factor the Division will consider in making its determination on control, along with other pertinent facts. In this case, nothing in the administrative record supports a conclusion that Michael Scinta and Eric Henderson make operational decisions for MS Analytical, and no evidence exists that anyone does other than Rebecca Maisonet, Maureen Chambers, and Suzanne Jacobi.

On the record before me, I conclude that the Division's determination that Rebecca Maisonet and the other women owners do not make decisions for MS Analytical is not supported by substantial evidence. The Division's determination to deny the MWBE application should be modified to eliminate the denial grounds related to 5 NYCRR 144.2(b)(1).

### Independence

The Division determined that MS Analytical does not operate as an independent business enterprise based on the following facts:

- MS Analytical does business from the same business address as [REDACTED], [REDACTED], and [REDACTED]
- [REDACTED] is an environmental consulting firm that offers air quality testing and monitoring services;
- MS Analytical obtains office supplies, equipment, and support staff from [REDACTED] for small fees;
- Ms. Maisonet, Ms. Chambers, Ms. Jacobi, Mr. Scinta, and Mr. Henderson, among others, are employed by both MS Analytical and [REDACTED]
- MS Analytical obtains the significant majority of its revenue from [REDACTED]
- [REDACTED] manages the property from which MS Analytical does business;
- The application includes a document represented to be a lease between [REDACTED] and MS Analytical. The lease does not describe any premises leased exclusively to MS Analytical; and
- MS Analytical's rent payments to [REDACTED] are based on MS Analytical's capacity to pay rent.

(See Exhibit DED 2 and 3.) The Division's determination is supported by substantial evidence.

The Division's regulations mandate that "the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities" (5 NYCRR 144.2[a][2]), and that "an eligible minority group member or woman applicant must be an independent business enterprise" (5 NYCRR 144.2[c][2]) The independence requirement ensures that the Division confers program benefits upon minority and women-owned businesses that are most likely to have experienced discrimination in the marketplace, rather than those entities that enjoy benefits from a connection to a non-MWBE company (*see Skyline Specialty, Inc. v Gargano*, 294 AD2d 742, 742 [3d Dept. 2002] [statute requires that business enterprise be independently owned and operated]).

Evidence in the record demonstrates that MS Analytical relied on companies co-owned by Suzanne Jacobi for contracts, office space, employees, and other essential services, and that in the absence of such support MS Analytical would not exist as an independent company. In response to the Division's inquiry regarding the services MS Analytical purchased from companies co-owned by Susanne Jacobi, applicant stated "[b]ecause it is to the advantage of MS Analytical LLC, certain services are purchased from [REDACTED] and [REDACTED], including the rental of office space and the purchase of office supplies, clerical services and telephone services (Exhibit DED 16 [response 19]). MS Analytical conceded that if it did not make the foregoing purchases from [REDACTED], "personnel time would be required to inventory and order and stock supplies," hiring clerical staff would "cost us more than [REDACTED] per month," and it could not obtain telephone services "on the open market at a similar price" (*see id.*).

MS Analytical also rents office space from [REDACTED] on favorable terms and at the same location where [REDACTED], and [REDACTED] operate. In 2016, MS Analytical negotiated a lower monthly rent payment of [REDACTED] because it "does not currently have the ability to pay at the [REDACTED] rate." According applicant, "the principals of [REDACTED] were convinced that a reduced rent is appropriate at this time because of MS Analytical's financial situation and consistent with MS Analytical's efforts to turn the company around." Applicant stated that "it is in the best interest of both companies" for [REDACTED] to provide inexpensive rent to MS Analytical because it is "compatible with the building's primary tenant, [REDACTED] [REDACTED]" and "[enables MS Analytical] to provide quick access to laboratory service for the primary tenant." (Exhibit DED 16, response 19.)

Mr. Emanuel testified that based on his experience reviewing MWBE applications, landlords do not typically negotiate reductions in rental payments based on a lessee's inability to pay. Mr. Emanuel noted that the MS Analytical shares office space with businesses that perform similar services and have the ability to share employees (HR, Disc 4, track 2 at 53:16). For example, MS Analytical's key employees, Michael Scinta, operations manager of laboratory analysis and field inspector, and Eric Henderson, lab technician and field inspector, split their time between MS Analytical and [REDACTED] (*see* Exhibit DED 16 [response 17]). MS Analytical states with respect to employee sharing:

MS Analytical has not been successful to date in building a large enough client base to afford regular staff other than core lab staff . . . Therefore, the way we have staffed our project requirements is to hire individuals on an hourly wage who also work for other companies, including [REDACTED]. The advantage of this arrangement to MS Analytical is that we do not have the overhead of full time staff when we do not need them. The advantage to [REDACTED] is that they can keep a larger staff than their company on its own could justify, therefore giving them capacity to handle unusual large projects that occur occasionally



(*id.*).

Mr. Emanuel testified that the lease agreement did not reflect an arms-length transaction and that, in combination with MS Analytical's ability to procure supplies and other essential services from ██████████ at below market fees, demonstrated that MS Analytical, ██████████, and ██████████ are intertwined organizations rather than independent enterprises. Mr. Emanuel's testimony, taken together with the facts and circumstances discussed above, supports the Division's decision to deny the MWBE application. (HR, Disc 4, track 2 at 39:48--51:22.)

Applicant argues that Mr. Emanuel ignores that it is accepted practice for a landlord and tenant to negotiate rent and that it makes perfect business sense to do so and any interpretation of a regulation that ignores "perfect business sense" is irrational and unreasonable (MS brief at 10). This argument is not persuasive given the evidence in the record. Certification requirements must be satisfied regardless of whether they are advantageous to a business enterprise. Applicant has not demonstrated that the Division's findings are unreasonable considering the nature of the business relationships between MS Analytical, ██████████ and ██████████ and the sharing of resources upon which MS Analytical depended to operate.

The record also demonstrates that MS Analytical depends on ██████████ for a significant portion of its income. In response the MWBE application question to "[l]ist the three largest active projects on which your firm is currently working," applicant only lists the contract with ██████████, valued at ██████████ (Exhibit DED 1, § (4.D)). Applicant submitted a proposal for a contract to the City of Buffalo in October 2015, but the contract was not executed (Exhibit DED 17). Applicant also indicated that it is owed approximately ██████████ in connection with work performed on other contracts (*id.*). These contracts are minimal compared with the value of the ██████████ contract. At the hearing, applicant presented the executed contract with the City of Buffalo (HR, Disc 1 at 41:00). Applicant argued in its brief that "the Division received documentation that MS Analytical receives more and more income from other non-██████████ sources with each passing year. To ignore that evidence would reward the Division's negligence in basing a 2017 decision on old, incomplete information that was over a year old" (MS brief at 13). The Division's regulations, however, state that the hearing shall be limited to "the information provided with the certification application and during any site visit that had been carried out" (5 NYCRR 144.5[a]). Information that was not before the Division when it made its determination on the MWBE application is beyond the scope of this appeal, and the Division did not err in failing to consider it.

Applicant also argues the Division erred in concluding that the application should be denied for failing to meet the independence certification criteria because the compensation received by Ms. Maisonet is de minimis compared to the compensation received by Michael Scinta. Applicant states that "[t]he Division has incorrectly applied the statute and ignored facts

of the situation as presented to the Division in MS Analytical's application" (MS brief at 13). Applicant misconstrues the Division's determination. The Division raised the issue of compensation in connection with the certification criteria for ownership. I have addressed this issue above. The issue implicated by Michael Scinta, Eric Henderson, as well as Maureen Chambers, Suzanne Jacobi and Rebecca Maisonet with respect to the independence criteria is whether MS Analytical depends on [REDACTED] for its employees. The Division considers employee sharing in determining whether a business enterprise operates independently or requires access to the resources of an ineligible business enterprise to operate. As noted, applicant relied hiring on employees on a part-time basis who work for other companies, including [REDACTED] (see Finding of Fact Nos. 51-53; see also Table 4, *supra*.)

The Division need only demonstrate that its interpretation is "reasonable and plausible," not that it is the most probable. On the facts presented here, the Division reasonably relied on information submitted with the application to conclude that applicant is not an independent business enterprise. The information available to the Division at the time it made its decision demonstrates that applicant derived most of its revenues from [REDACTED] shared employees with [REDACTED] because it could not afford to hire independent employees, and relied on [REDACTED] and [REDACTED] to procure essential services on favorable terms. Applicant has failed to demonstrate that the Division's determination is 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].)

## CONCLUSION

With respect to the MBE certification application, the Division's determination that applicant has not met the ownership criteria in 5 NYCRR 144.2(a)(1) and the operation criteria in 5 NYCRR 144.2(b)(1) and 5 NYCRR 144.2(b)(1)(iii) is not supported by substantial evidence. With respect to the Division's determination that the minority group member does not share in the risks and profits in proportion with her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2), and that MS Analytical is not an independent business enterprise as required by 5 NYCRR 144.2(a)(2) and 144.2(c)(2), the Division's determination is supported by substantial evidence.


With respect to the WBE certification application, the Division's determination that applicant has not met the operation criteria in 5 NYCRR 144.2(b)(1) and 5 NYCRR 144.2(b)(1)(iii) is not supported by substantial evidence. With respect to the Division's determination to that women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2), and that MS Analytical is not an independent business enterprise as required by 5 NYCRR 144.2(a)(2) and 144.2(c)(2), the Division's determination is supported by substantial evidence.

## RECOMMENDATION

For the reasons set forth above, the Division's determination to deny MS Analytical's application for MBE certification should be modified to eliminate the denial grounds with respect to the ownership criteria in 5 NYCRR 144.2(a)(1) and the operation criteria in 5 NYCRR 144.2(b)(1) and, as so modified, affirmed. The Division's determination to deny MS Analytical's application for WBE certification should be modified to eliminate the denial grounds with respect to the operation criteria in 5 NYCRR 144.2(b)(1) and, as so modified, affirmed.

Attachment: Exhibit List

**Matter of MS Analytical, LLC**  
**DEC File No. 50159**  
**Exhibit List**

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Total Pages</b>	<b>Admitted</b>
DED 1	Form Application for M/WBE Certification	11	Y
DED 2	Division MBE Denial Letter	5	Y
DED 3	Division WBE Denial Letter	5	Y
DED 4	March 24, 2006 Capital Contributions	3	Y
DED 5	Membership Interest Purchase Agreement	4	Y
DED 6	Promissory Note – Maisonet to Chambers	4	Y
DED 7	Promissory Note – Maisonet to Jacobi	4	Y
DED 8	MS Analytical 2015 U.S. Income Tax Return	47	Y
DED 9	Maureen Chambers 2015 U.S. Income Tax Return	38	Y
DED 10	Suzanne Jacobi 2015 U.S. Income Tax Return	85	Y
DED 11	Rebecca Maisonet 2015 U.S. Income Tax Return	30	Y
DED 12	MS Analytical 2015 W-2s	7	Y
DED 13	MS Analytical 2015 NYS-45s	26	Y
DED 14	MS Analytical Resumes	3	Y
DED 15	MS Analytical Licenses	6	Y
DED 16	Maisonet Duties & Resources Narratives	18	Y
DED 17	Contract Cover Letter	1	Y
DED 18	MS Analytical Lease	2	Y
DED 19		2	Y
DED 20	Sales Ledger	10	Y

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Total Pages</b>	<b>Admitted</b>
MS 1	Certification Application	7	Y
MS 2	Capitalization	49	Y
MS 3	2014 and 2015 Operating Leases	2	Y
MS 4	Operating Agreement	31	Y
MS 5	Licenses	3	Y
MS 6	2012-2013 Proposals	10	Y
MS 7	Response to Certification Analyst – 2015/2016 Contracts	30	Y
MS 8	Response to Certification Analyst – Legal Ownership	52	N
MS 9	Response to Certification Analyst – 2015 Member Minutes	3	Y
MS 10	Response to Certification Analyst – 2015 Operations/Budget Plan	3	Y
MS 11	Response to Certification Analyst – 2016 Member Minutes	3	Y
MS 12	Response to Certification Analyst – 2016 Operations/Budget Plan	3	Y
MS 13	Response to Certification Analyst – Capitalization	7	Y
MS 14	Response to Certification Analyst – Promissory Notes/Cancelled Checks	31	Y
MS 15	2017 MS Analytical Tax Return	49	N
MS 16	2016 and 2017 MS Financial Statements	9	Y
MS 17	2015 Financial Statement	7	Y
MS 18	2016 Interim Financial Statement	6	Y
MS 19	2015 & 2016 Leases	3	Y
MS 20	Cancelled Rent Checks	11	Y

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Total Pages</b>	<b>Admitted</b>
MS 21	Payroll Records	74	N
MS 22	Maisonet Job Duties	4	Y
MS 23	Chambers Job Duties	1	Y
MS2 4	Jacobi Job Duties	2	Y
MS 25	Key Employee Job Duties	1	Y
MS 26	Ownership Structure	5	Y