

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

In the Matter

- of -

the Application of **Powercom Electrical Services, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 48673

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

October 20, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (“Division”) of the New York State Department of Economic Development to deny Powercom Electrical Services, Inc. (“Powercom” or “applicant”) certification as a women-owned business enterprise (“WBE”) be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”) Parts 140-144, challenging the determination of the Division that Powercom does not meet the eligibility criteria for certification as a WBE.

The Division denied Powercom’s application for WBE certification (Exhibit 1) by letter dated November 21, 2016. Exhibit 3. As discussed below, the letter sets forth two grounds under Section 144.2 of 5 NYCRR for the denial, based upon applicant’s failure to demonstrate that the women owner operates Powercom for certification purposes. By letter dated December 19, 2016, applicant appealed from the Division's determination to deny the application. Exhibit 9. The Division responded by letter dated January 10, 2017, providing information as to the written appeal process. Exhibit 10.

On March 1, 2017, applicant filed its appeal. Exhibit 8. In response, the Division provided a memorandum of law (the “Division Response”), as well as the September 18, 2017 affidavit of Raymond Emanuel (the “Emanuel Affidavit”).

Both applicant and Division staff offered exhibits, and those exhibits were marked and received into evidence. A chart of those exhibits is attached. To the extent exhibits offered by applicant were duplicates of those offered by Division staff, those exhibits were not marked or received.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (see Section 144.2 of 5 NYCRR). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, and control 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, on information revealed in supplemental submissions, and if appropriate, on interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of Powercom’s WBE 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 argued that applicant failed to meet two operational requirements for certification as a woman-owned business, pursuant to Section 144.2 of 5 NYCRR. Specifically, the Division asserted that Rosa Kern, the woman owner, did not make decisions pertaining to Powercom’s operation, as required by Section 144.2(b)(1). In this regard, the Division cited the following “relevant facts” in the denial letter:

- Ms. Kern manages financial and administrative aspects of the business enterprise.
- Male individuals associated with the business enterprise, including Ms. Kern’s husband, Mr. Hal Kern, and Mr. Frank Bucior manage core functions of the business, including estimating projects and supervising the performance of electrical work.

Exhibit 3, at 2.

The Division went on to assert that the woman owner of the business enterprise had not demonstrated adequate technical competence to operate Powercom (see Section 144.2(b)(1)(i)). Specifically, in its denial letter, the Division contended that:

- Ms. Kern does not possess any trainings, certifications, or credentials relevant to the services provided by Powercom Electrical Services.
- Male individuals who manage core functions of the business, including Mr. Hal Kern, possess relevant trainings, certifications, and academic credentials reflecting substantive knowledge of electrical contracting.

Id.

Applicant

In its March 1, 2017 appeal, applicant stated that Ms. Kern had been the president of Powercom since its inception in 1992, and asserted that she had actively managed the business since that time. Exhibit 8, at 1. Applicant noted that Powercom was previously certified, and maintained that “[w]hile it is true that [Ms. Kern] manages the financial and administrative aspect of the business,” as president of Powercom she oversees the entire business. Id.

According to applicant, “customer relations, human resource management, assisting our project managers and contract management” are core functions of the business. *Id.*, at 2. Applicant went on to assert that “[i]n the State of New York, it is not necessary for a telecommunications contractor to possess any certifications or licenses to legally perform work.” *Id.* The appeal noted that Section 144.2(b)(1)(i) requires adequate managerial or technical competence, and applicant maintained “[i]t doesn’t say that both managerial and technical competence is required even though I do possess both.” Exhibit 8, at 4.

FINDINGS OF FACT

1. Powercom Electrical Services, Inc. is an electrical contracting business located at 37 Plain Avenue, New Rochelle, New York. Exhibit 1, at 1.

2. The business was established in 1992 by Rosa Kern and her husband, Hal Kern. Exhibit 1, at 3. Ms. Kern is the majority shareholder (51%), and Hal Kern owns 49% of Powercom.

3. In the early years of the business, Ms. Kern installed structured cabling systems, together with her husband. Since that time, her duties have been administrative. Exhibit 2, at 6:28; Exhibit 5. Her husband, Hal Kern, estimates and designs the scope of jobs, meets with customers, and runs training programs. Exhibit 2, at 10:00; Exhibit 5. Frank Bucior, Vice President (Operations), is the chief estimator and manages Powercom’s day-to-day operations. Exhibit 2, at 18:35; Exhibit 5.

4. Hal Kern has a degree in electrical engineering, and is a licensed electrical contractor. Exhibits 6 and 7. Rosa Kern is a high school graduate, with no post-secondary education, and does not possess technical certifications. Exhibit 5; Exhibit 2, at 12:45.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification to Powercom as a women-owned business enterprise¹ pursuant to Executive Law Article 15-A. Section 144.2(b)(1) of 5 NYCRR requires that an applicant demonstrate that decisions pertaining to the operations of the business enterprise are made by the woman claiming ownership of the business. Moreover, the woman owner must have adequate managerial experience or technical competence in the business enterprise seeking certification, pursuant to Section 144.2(b)(1)(i).

With respect to decision making, applicant acknowledged that Ms. Kern managed the financial and administrative aspects of the business, but went on to argue that Ms. Kern also was charged with “many non-financial responsibilities including customer relations, hiring and firing, bid selection and review, contract management, strategic planning and project

¹ 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* Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, among other things, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”).

management.” Exhibit 8, at 1. The list of key employees and their responsibilities submitted by applicant indicates that Ms. Kern handles these functions, as well as bookkeeping, human resources, insurance, document management and retention, and office management. Exhibit 5, at 1.

During the interview conducted as part of the application process, Ms. Kern indicated that, fifteen years into the business, she now “takes care of just the administrative part of the work,” although when the business first started, she performed office duties as well as “hands-on” work. Exhibit 2, at 6:28, 5:39. In Powercom’s appeal, Ms. Kern stated that “[d]uring our early years, I proudly worked with the tools in the field. I installed structured cabling systems along with my husband Hal. Hal has provided most of my ‘hand-on’ telecommunications training. . . . As I progressed, I became proficient in most aspects of structured cabling including termination, testing and troubleshooting of fiber optic cables.” Exhibit 8, at 2.

Applicant pointed out that the regulation requires either adequate managerial experience or technical competence, not both. According to Ms. Kern, “during my phone interview with the DED, I was very nervous and felt intimidated by the interviewer. I probably did not express my confidence well nor did I fully explain the role I have at Powercom.” Exhibit 8, at 4.

In its response, the Division argued that Ms. Kern did not make decisions pertaining to the core operational functions of Powercom. The Division took the position that “estimating and directing field operations relating to the performance of wireless network and telecommunications services is crucial and central to the livelihood of Powercom, and represents the core and managerial functions of the business.” Division Response, at 3. According to the Division, “[t]hese core functions all require either an electrical license, technical training, certifications or credentials relevant to the performance of electrical contracting and wireless network telecommunications jobs, all of which Ms. Kern does not possess.” Id.

The Division noted that during the interview, Ms. Kern was asked to identify Powercom’s key employees. Ms. Kern said that Mr. Kern was chiefly responsible for estimating, managing field operations for ongoing jobs, designing and editing blueprints, designing and implementing network cable solutions, engineering, and employee training. Exhibit 2, at 9:50. Ms. Kern stated that Mr. Bucior managed all of Powercom’s technicians, supervised all field operations and technician work performance, resolved any on-site issues, served as the chief estimator and conducted employee training. Exhibit 2, at 3:36. Ms. Kern’s role at Powercom, as noted above, was primarily focused on financial and administrative matters. Exhibit 2, at 5:39. The Division asserted that the information obtained during the interview was corroborated by Exhibit 5, which detailed the roles of key Powercom employees. According to the Division, Ms. Kern’s role in the core functions of Powercom was “tangential at best,” and that she relied on Powercom’s male employees for their skills and expertise to manage the business. Division Response, at 3.

The Emanuel Affidavit concluded that “[b]ased upon Ms. Kern’s description of the operations of Powercom in her interview and in the documents she provided as part of her application,” the analyst reviewing the application determined that Powercom was not eligible for WBE certification “because Ms. Kern lacked the necessary training or credentials to manage the operations of Powercom, and that she delegated the operation of the core functions of the business to Mr. Kern and the male employees of the business.” Emanuel Affidavit, ¶ 24.

The Division cited to Matter of Northeast Stud Welding Corp., 211 A.D.2d 889 (3rd Dept. 1995), in which the court concluded that an application for certification as a women-owned business was properly denied. The court reasoned that, although the woman applicant performed some functions, and made some decisions on her own, significant operations were shared and still others were performed solely by her husband. Noting that, while not dispositive, the woman owner had no training or expertise in welding, which was the construction service provided by the business, the court observed that she lacked the technical ability to evaluate her husband’s work, “be it stud welding, training others to do so or supervising field operations.” Id., at 891 (citations omitted).

The Division’s arguments are persuasive. As the Division argued, the individuals who manage the significant operations of Powercom’s business are non-minority males, who possess the requisite expertise to perform Powercom’s core functions, as opposed to Ms. Kern, whose role is primarily management of financial matters. Given Ms. Kern’s statements in the interview, as well as the list of key employees and their responsibilities provided by applicant (Exhibit 5), as well as the nature of Powercom’s business and the application as a whole, it was reasonable for the Division to conclude that applicant had not satisfied this operational requirement. As was the case in Matter of Northeast Stud Welding, Powercom is more properly viewed as a family business, rather than a women-owned business enterprise.

The Division’s denial was also based upon Ms. Kern’s lack of “relevant trainings, certifications, and academic credentials reflecting substantive knowledge of electrical contracting.” Exhibit 3, at 2. Applicant argued that it was not necessary for Ms. Kern to be a licensed electrician, given the nature of Powercom’s business. Ms. Kern stated that “perhaps our company name is misleading because originally, Hal had a NYC electrical license and the word ‘electrical’ was required to be in the legal business name.” Exhibit 8, at 3. Nevertheless, although applicant maintained that “Powercom does not do electrical work and Hal’s electrical licenses are not required,” as the Emanuel Affidavit states, the application “represented that Powercom provided a variety of electrical services and selected NAICS² 23821: Electrical Contractors and Other Wiring Installation Contractors as the code best describing the line of work in which Powercom is engaged.” Exhibit 8, at 3; Emanuel Affidavit, ¶ 10; Exhibit 1, at 4.

The Division responded that all of the licenses and certifications provided in the application pertained to male employees’ credentials. Exhibit 7. The Division asserted further that, based upon the resumes provided with the application (Exhibit 6), Ms. Kern lacks experience in the electrical contracting and wireless network telecommunication services industry.

² North American Industry Classification System.

Under the circumstances, it was reasonable for the Division to reach the conclusion that Ms. Kern lacked the necessary managerial experience or technical competence to qualify for certification. As discussed above, the core functions of the business are handled by male employees, and the application does not support the conclusion that Ms. Kern has the technical competence to operate the business, independently of her male employees. Exhibit 7 includes copies of certifications and other credentials earned by Mr. Kern and Powercom's male employees, but no certifications earned by Ms. Kern. Ms. Kern did provide certificates as exhibits to the appeal from several training courses she had attended, but these documents were not part of the application and therefore are not considered on appeal (Section 144.5(a)(1)). Despite applicant's arguments regarding the nature of the business, and that an electrical contracting license is not required, the Division's determination was based upon substantial evidence in the application that Powercom is engaged in electrical work, and that Ms. Kern lacks technical competence in that industry.

Finally, applicant argued that the fact that Powercom was previously certified should have been taken into account in reviewing the application. This assertion is unavailing. As the Division notes, a prior error by the agency does not preclude the agency from correcting that error in connection with the review of a subsequent application. See Pascual v. State Bd. of Law Examiners, 79 A.D.2d 1054, 1055 (3rd Dept. 1981) (“[a]n administrative body may correct its erroneous interpretation of the law”).

The Division's determination was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant did not meet its burden to demonstrate that the Division's determination to deny Powercom's WBE application for certification was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Powercom's application for certification as a women-owned business enterprise should be affirmed.

Matter of Powercom Electrical Services, Inc.
DED File ID No. 48673
Exhibit List

Exhibit No.	Description
1	December 7, 2013 application
2	Audio Recording – Interview of Rosa Kern
3	November 21, 2016 denial letter
4	December 7, 2013 information in support
5	November 3, 2016 list of key employees and their responsibilities
6	Resumes: Rosa Kern, Hal Kern
7	Employee Certifications
8	March 1, 2017 appeal
9	December 19, 2016 letter from Rosa Kern to Cathy Powers re: appeal
10	January 10, 2017 letter from Cathy Powers to Rosa Kern re: written appeal submission
11	December 6, 2004 letter from Brian Ansari, NYS Empire State Development, to Rosa Kern re certification as WBE
12	Training certificates
13	Sample contracts
14	Sample lien waivers
15	Mission statement