

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

In the Matter

- of -

the Application of **Nu-Star Electric and Controls, Inc.**
for Recertification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 55553

RECOMMENDED ORDER

- by -

/s/
Michele M. Stefanucci
Administrative Law Judge

May 19, 2021

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 Nu-Star Electric and Controls, Inc. (applicant or Nu-Star), recertification as a woman-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, of the determination of the Division that Nu-Star does not meet the eligibility criteria for certification as a WBE.

The Division denied Nu-Star's application (DED 1) for WBE recertification by letter dated October 1, 2018 (DED 2). In the denial letter, the Division set forth the following grounds for the denial:

- (1) applicant failed to demonstrate that the contribution of the woman owner is proportionate to her equity interest in the business enterprise (former 5 NYCRR 144.2[a][1]);¹ and
- (2) applicant failed to demonstrate that the woman owner relied upon for certification has adequate managerial experience or technical competence to operate the business enterprise; and, the woman relied upon for certification has not demonstrated the working knowledge and ability needed to operate the business enterprise (former 5 NYCRR 144.2[b][1][i] and 144.2[b][1][ii]).

On November 1, 2018, applicant requested a hearing on the denial (DED 4). By letter dated February 19, 2021, the Division advised applicant that a virtual hearing had been scheduled (DED 3).

The virtual hearing took place as scheduled on April 1, 2021, via the Webex video conferencing platform. Ms. Patricia Purcell appeared at the hearing on behalf of Nu-star and provided testimony. Fawziyyah Slavov, Esq., represented the Division and called one witness, Natia Simon, Senior Certification Analyst.

The five exhibits offered by the Division were received into evidence by stipulation of applicant (*see* attached exhibit list). Applicant did not proffer any exhibits. The appeal proceeding was recorded electronically on the Webex platform. References to testimony from the hearing are identified by the time on the recording at which the testimony occurs (recording at __:__).

¹ Effective December 2, 2020, 5 NYCRR parts 140-144 were amended. Because the application was filed prior to the effective date of the amendments, the substantive provisions of the former part 144 are being applied.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a WBE are established by regulation (*see* former 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed based on 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.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of the application for 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 and citations omitted]).

POSITIONS OF THE PARTIES

Division

The Division contends that its determination to deny recertification to Nu-Star as a WBE is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman owner. Specifically, the Division asserts that applicant failed to demonstrate that the contribution of Ms. Purcell, president of Nu-Star, is proportionate to her equity interest in the business enterprise (citing former 5 NYCRR 144.2[a][1]). Moreover, the Division argues that Ms. Purcell does not possess the adequate managerial experience or technical competence and the working knowledge and ability needed to operate an electrical contracting firm (citing former 5 NYCRR 144.2(b)[1][i]; 5 NYCRR 144.2[b][1][ii]).

Applicant

On appeal, Ms. Purcell asserted on behalf of the business enterprise that Nu-Star was initially approved as a WBE in 2012 and has operated, without change, since that time (DED 4 at 1). Ms. Purcell indicated that the business was started in 1992 by her husband, John Purcell, as a part-time enterprise and expanded to full-time status in 1998 (*id.*). According to Ms. Purcell, due to the growth of the business, she became involved in the company on a full-time basis as the office manager (*id.* at 3). In 2011, Mr. Purcell stepped down as president of Nu-star in order to manage the field operations and Ms. Purcell became president of the business (DED 1 at 1).

According to Ms. Purcell, since the business started slowly and took six years before it became a full-time operation, neither she nor her husband “brought any upfront monies to the business” (DED 4 at 1). Ms. Purcell alleges that although Nu-Star is an electrical contracting company and her husband is an electrician, all electrical work is performed by their employees (DED 1 at 1; DED 4 at 1). In sum, Ms. Purcell asserts that the current arrangement whereby Mr. Purcell “manages the field operations” and Ms. Purcell focuses “on the myriad details of running a successful company” is a “winning combination” (DED 1 at 1-2).

FINDINGS OF FACT

1. Nu-Star is an electrical contracting company located at 78 Pacific Dunes Court, Medford, New York (DED 1 at 1).
2. Nu-Star was initially started by John Purcell in 1992 as a side business. In 1998, Mr. Purcell began operating the company full-time (DED 1 at 3; DED 4 at 1).
3. John Purcell is a licensed electrician (DED 5). When the business was first started, Mr. Purcell performed the electrical work. At the time of the application, Nu-Star employed seven full-time foremen and journeymen to perform the electrical work (DED 1 at 2).
4. Patricia Purcell, the wife of John Purcell, began working for Nu-Star in June 1999 in order to assist her husband with the business. Ms. Purcell worked as the Office Manager and was responsible for “digitizing” the business (DED Exhibit 1 at 3). Under Ms. Purcell’s leadership, the business began to thrive (recording at 5:29)
5. Patricia Purcell holds a degree in psychology (recording at 5:10; 20:31).
6. In 2011, Ms. Purcell became the president and majority fifty-one percent owner of Nu-Star. John Purcell, the former majority owner, became the vice-president and forty-nine percent owner of Nu-Star (DED 1 at 3).
7. As the president of Nu-Star, Ms. Purcell is responsible for all office-related work, including payroll, union paperwork, bill paying, negotiating and executing contracts, as well as customer service (DED 1 at 6).
8. John Purcell is the vice-president and forty-nine percent owner of Nu-Star. Mr. Purcell is responsible for providing estimates, ordering materials and managing field operations (DED 1 at 6).
9. Nu-Star was previously certified as a WBE in July 2012 and has operated, without change, since that time (DED 4 at 1).

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination to deny Nu-Star's recertification as a WBE, pursuant to Executive Law article 15-A.

Ownership

In order to be certified as a WBE, the business entity must be owned, operated and controlled by women. To establish real, substantial and continuing majority ownership, an application for certification must demonstrate that the contribution of the women-owner is proportionate to their equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise (former 5 NYCRR 144.2[a][1]). In evaluating this criterion, the Division assesses whether the woman-owner's contribution originates from assets belonging solely to the woman-owner or is derived from assets jointly held with an ineligible individual (*see e.g. Matter of Brandt Equipment, LLC*, Recommended Order dated April 28, 2020 at 4-5; Final Order dated June 2, 2020). The Division has consistently denied certification in those cases where the capital contribution to the business enterprise originates from jointly held assets (*id.*).

Nu-Star's recertification application indicates that the company was started on a part time basis in 1992 and "did not need start-up capital as it grew slowly" (DED 1 at 6). During the hearing, Ms. Purcell testified that since she and her husband married in 1977, all monetary contributions to the business were "family money" taken from "household funds" (recording at 4:41). According to Ms. Purcell, neither she nor her husband contributed any independent funds to the business (recording at 4:57). Ms. Purcell testified that when she became the fifty-one percent owner in 2011, she continued working and managing the business as she had been doing for years (recording at 8:08).² Finally, Ms. Purcell indicated that the reason she and her husband decided to change their respective ownership interests in 2011 was to more accurately reflect their respective roles and contributions to the business, as well as to qualify for the WBE distinction (recording at 32.56).

Here, a review of the hearing record indicates that Ms. Purcell did not make an independent monetary contribution to the business enterprise in 2011 when she assumed majority ownership of Nu-Star. Moreover, all monies previously provided to Nu-Star originated from funds that were held jointly by the couple. In light of the foregoing, the Division's conclusion that the capital contribution of Ms. Purcell is not proportionate to her equity interest in the business enterprise is supported by substantial evidence.

Operation

With regard to operation of the business enterprise, former 5 NYCRR 144.2(b)(1)(i) and 144.2(b)(1)(ii), require that the woman relied upon for certification demonstrate adequate managerial or technical competence and the working knowledge and ability needed to operate

² At the hearing, Ms. Purcell indicated that she began drawing a salary from Nu-Star in 2011, however she testified that there was no formal agreement reflecting that she would work or contribute her expertise in exchange for her fifty-one percent ownership interest (recording at 19:39; 43.47).

the business enterprise. In evaluating these criteria, the Division identifies the core revenue generating functions of the business enterprise and then evaluates who within the business is primarily responsible for and has the expertise and knowledge to perform and oversee those functions (recording at 50.18).

Nu-Star is an electrical contracting company and its core functions involve the performance of electrical work (DED 1 at 4). A review of the hearing record indicates that Mr. Purcell is a licensed electrician and has worked in that capacity for many years (recording at 4:04). In his current role as vice-president, Mr. Purcell is responsible for performing estimates, ordering materials, and managing field operations for Nu-Star (DED 1 at 6). Mr. Purcell has the relevant expertise and holds the various licenses needed to perform the core revenue generating functions of the business, specifically electrical contracting work (DED 5).

In contrast, Ms. Purcell has a background in psychology (*see* finding of fact ¶ 5). The narrative detailing Ms. Purcell's day to day responsibilities includes all office related tasks including payroll, union paperwork, contracts, financial transactions as well as maintaining relations with customers and vendors (*see* finding of fact ¶ 7). At the hearing, Ms. Purcell testified that although she is not licensed as an electrician, her "contributions to the business are tremendous" and even without her husband, her management skills are such that she could keep Nu-Star going by hiring the appropriate staff to perform the necessary work (recording at 34:47).

A review of the record in this matter reveals that Ms. Purcell's contributions to the success of Nu-Star are significant and her role in the business is an important one. However, as Ms. Purcell's job duties are primarily administrative in nature, they do not satisfy the applicable eligibility criteria. Since Ms. Purcell does not possess the necessary licenses and technical expertise to perform the core revenue generating functions of the business, namely electrical work, the Division's determination to deny Nu-Star's certification as a WBE on this basis is supported by substantial evidence.

CONCLUSION

As discussed above, applicant has failed to meet its burden to demonstrate that the Division's determination to deny Nu-Star's application for recertification as a WBE was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Nu-Star's application for recertification as a WBE should be affirmed.

Matter of Nu-Star Electric and Controls, Inc.
DED File ID No. 55553
Exhibit Chart

Exhibit No.	Description	Rec'd
DED 1	Certification Application dated June 26, 2015	✓
DED 2	Denial Letter for WBE Certification dated October 1, 2018	✓
DED 3	DED Notice of Remote Hearing dated February 2, 2019	✓
DED 4	Appellant Appeal Letter dated November 1, 2018	✓
DED 5	Nu-Star Electric & Control Licenses	✓