

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**633 THIRD AVENUE**  
**NEW YORK, NEW YORK 10037**

**In the Matter**

**- of -**

**the Application of OPTIMA CONTROLS, LTD**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 62793**

**RECOMMENDED ORDER**

**-by-**

A handwritten signature in black ink, appearing to read "Adrienne R. Lotson", written in a cursive style.

**Adrienne R. Lotson**  
**Administrative Law Judge**  
**July 07, 2023**

This matter considers the written appeal by Optima Controls, Ltd., (“Optima Controls” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On May 25, 2016, Angela List, as President, applied on behalf of Optima Controls, Ltd. for certification as a woman-owned business enterprise. (DED Exhibit 1)
2. On February 4, 2019, the Division denied the application on the grounds that the party relied upon for certification did not share in the risks and profits of the business enterprise in proportion to her equity interest therein as required under 5 NYCRR former § 144.2 (c)(2); and the party did not make decisions pertaining to the operation of the business enterprise as required under 5 NYCRR former § 144.2 (b)(1) (DED Exhibit 2)
3. Optima Controls submitted its written appeal by letter dated May 16, 2019. (DED Exhibit 7)
4. The Division filed an Affidavit of Raymond Emanuel, Certification Director dated March 8, 2023, and a brief of JaMone Turner Esq., counsel for the Division, dated April 5, 2023.

### **FINDINGS OF FACT**

5. Optima Controls, Ltd. is a construction contractor that designs, builds, and installs HVAC control systems. (DED Exhibit 1).

6. Angela List is the President of Optima Controls and has a 60% ownership interest. (DED Exhibit 1).
7. Mr. Eric List, an electrical engineer, is Ms. List's husband. He is the Vice President of Optima Controls and has a 40% ownership interest (DED Exhibit 1).
8. Mr. List holds a Bachelor of Science degree in electrical engineering (DED Exhibit 4).
9. In 2017, Ms. List received a salary from the business enterprise of \$ [REDACTED] and Mr. List received a salary of \$ [REDACTED] (DED Exhibit 3).
10. Mr. List has 25 years of experience in the temperature control industry; is a member of seven professional engineering societies focused on energy, cooling, mechanical, and electrical engineering; and has received specialized training in the core revenue generating functions of the business enterprise: building and installing direct digital control systems for HVAC (DED Exhibit 4).
11. Ms. List has 16 years of office management/administrative experience in the HVAC design and installation field. (DED Exhibit 4).
12. Ms. List's resume indicates that she performs "all administrative functions to keep the office running smoothly" (DED Exhibit 4).

#### **APPLICABLE LAW**

5 NYCRR former § 144.2 (c)(2) states in relevant part as follows:

The minority group member or woman owner must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former § 144.2 (b)(1) states in relevant part as follows:

Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of the business enterprise.

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Optima Controls for certification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination. (5 NYCRR 145.2(b)(1)) Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. (*See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021))

## DISCUSSION

*The minority group member or woman owner must share in the risks and profits, in proportion with their ownership interest in the business enterprise. 5 NYCRR former § 144.2 (c)(2)*

The Division argues in its brief that the compensation afforded the parties is not proportionate to the ownership shares therein. Specifically, Ms. List, the party relied upon for certification holds a 60% ownership interest in the business enterprise (DED Exhibit 1). However, according to the company's 2017 Corporate Income Tax Returns, of the \$ [REDACTED] paid in compensation to the owners of the enterprise, only \$ [REDACTED], or 26%, was allocated to Ms. List. The other \$ [REDACTED], or 74%, was paid out to her husband, Eric List, who holds a 40% ownership

interest in the business enterprise (DED Exhibit 3). Thus, Ms. List's compensation was almost three times less than that of the non-qualifying co-owner.

In her appeal letter, Appellant argued that while it is true that her husband's compensation is higher than hers, "the amount of compensation should have no bearing on ownership percentage." Her lower salary is a result of trying to limit the company's liabilities and debt (APP Exhibit 1). She further argues that Mr. List is justified in receiving a larger amount of compensation as he is paid on a salary basis due to his college degree and years of experience, while her hourly salary is based on not having a college degree and lacking years of experience (APP Exhibit 2).

Ms. List is correct that the amount of compensation does not have a bearing on the ownership percentage allocated to the parties, this is the function of the capital contribution. However, if a company seeks to be certified as New York State Women-owned Business enterprise, the ownership percentage is relevant when considering compensation of the parties. See *In the Matter of Spring Electric, Inc.* Final Order dated March 27, 2017, where the applicant relied upon for certification argued that her husband received a larger salary in order to pay him "the true cost of his labor," the ALJ affirmed that applicant receiving a substantially smaller salary than her husband was substantial grounds for the denial of certification (at 5-6).

Ms. List's argument that her capital contribution shows that she shares in the risk and profits of the business enterprise is not pertinent here, as the issue before the tribunal is not one of capital contribution, but rather of proportionate sharing of the risks and profits. In this regard, to satisfy the requirements of the regulations, the party relied upon for certification must demonstrate their share of the risk and profits is proportionate to their ownership interest, in this case 60%. However, it is clear by both tax records and Ms. List's statements that her husband, although

holding 40% of the ownership interest received 74% of the total compensation. Said another way, Ms. List, although the holder of a 60% ownership interest received only 26% of the total compensation remitted to the owners in 2017. This does not satisfy the threshold.

Accordingly, for the above reasons, I find DED's denial determination was supported by substantial evidence.

*Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of the business enterprise. 5 NYCRR former § 144.2 (b)(1)*

The Division argues in its brief that the party relied upon for certification does not make decisions pertaining to the core revenue generating functions of the business enterprise: building and installing direct digital control systems for HVAC (DED Exhibit 1). It further argues that a perusal of Ms. List's resume shows that her responsibilities are primarily administrative such as accounting, invoicing, correspondence, and office technology (DED Exhibit 4). In addition, her occupation is noted as an office manager (DED Exhibit 5). On the other hand, Mr. List's resume shows that he has a degree in electrical engineering, has received specialized training in areas directly related to building and installing direct digital control systems for HVAC, the core revenue generating function of the business, and is a member of at least seven professional engineering organizations. In addition, Mr. List has 25 years of employment in the temperature control industry. His occupation is listed as an electrical engineer (DED Exhibits 4, 5 & 6).

The Division also argues that Ms. List's outside employment with another business, Kohl's Department Store demonstrates that she does not make decisions pertaining to the running of the business enterprise. Without additional evidence of the hours worked and time of day she is physically present at the second enterprise, I find that this argument lacks merit.

In her appeal, Ms. List argues that her resume indicates that she has HVAC industry experience dating back to 1995. However, an examination of said resume shows that her experience in the industry has been exclusively administrative. None of the experiences listed directly involve building and installing direct digital control systems for HVAC. Ms. List further argues that a subcontractor agreement issued on September 23, 2018, is proof that she makes decisions pertaining to the business (APP Exhibit 2.9). I disagree with the Division's argument that this agreement represents new information and therefore the contract should be excluded under *Scherzi Systems LLC v. White* 197 A.D. 3d 1466 (3d Dept 2021). I find that this contract, dated July 25, 2018, is submitted as clarifying information for the applicant's letter dated August 27, 2018, which was incorporated into the original application. This letter listed Ms. List's day-to-day responsibilities, one of which is "direct contact to contractors and sub-contractors" (DED Exhibit 8). I find that Appellant's letter (APP Exhibit 2.9) seeks to clarify this assertion<sup>1</sup>. It is admitted into the record. Where the contract lacks details and contains cross-outs of her husband's name and title, I do not find the contract to be persuasive in establishing that Appellant makes decision pertaining to the operation of the business enterprise (APP Exhibit 2.9).

For the above noted reasons, I find that Ms. List has not established that she makes decisions pertaining to the operation of the business enterprise. The DED denial determination is supported by substantial evidence.

### **CONCLUSION**

In conclusion, the record before the division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that Optima Controls failed

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<sup>1</sup> As this matter is not one concerning capital contributions, appellant's exhibits submitted in this regard will not be considered.

to demonstrate that the party relied upon for certification shared in the risks and profits of the business enterprise in proportion to her equity interest therein as required by 5 NYCRR former § 144.2 (c)(2); and that said party made decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR former § 144.2 (b)(1).

**RECOMMENDATION**

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



In the Matter of Optima Controls, Ltd  
DED File ID No. 62793  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification, Dated May 25, 2016	Y	Y
DED 2	Denial Letter, Dated February 4, 2019	Y	Y
DED 3	2017 Corporate Income Taxes	Y	Y
DED 4	Resumes of Angela List and Eric List	Y	Y
DED 5	2017 Resident Income Tax Returns	Y	Y
DED 6	Applicant Notice of Appeal Letter, Dated March 6, 2019	Y	Y
DED 7	Applicant's Appeal Response Letter, Dated May 16, 2019	Y	Y
DED 8	2018 Applicant Response Letter, Dated August 27, 2018	Y	Y
APP 1	Applicant's Notice of Appeal Letter, Dated March 6, 2019	Y	Y
APP 2	Notice of Written Appeal plus exhibits, Dated May 16, 2019	Y	Y
APP 2.1	Stock Sales Agreement, Dated March 2013	Y	N
APP 2.2	Sale of Stock Ledger, Dated 1993, 1994, 2013 (altered from 2016)	Y	N
APP 2.3	Stock Certificates, Dated 1993, 1994, 2013	Y	N
APP 2.4	Certified Checks issued to Donald Channing and Janette Channing dated March 14, 2013	Y	N
APP 2.5	Powerline Commitment Letter Dated January 16, 2019	Y	N
APP 2.6	Resumes: Angela List and Eric List	Y	Y

APP 2.7	Letter to NYS Contracting System (Daniel Zou), Dated August 27, 2018	Y	Y
APP 2.8	5 NYCRR §144, highlighting §144.2(c)(2)	Y	Y
APP 2.9	Subcontract Agreement, Dated July 25, 2018	Y	Y
APP 2.10	St. John's University Account Summary: Angela List, Dated January 7, 2019	Y	N
APP 2.11	Optima Controls Payroll Statements (paystubs) issued to Angela Martin, Dated May 3, 2013, September 26, 2014, October 24, 2014, December 31, 2014, March 10, 2017, December 21, 2017, June 3, 2018, and February 25, 2019.	Y	N
APP 2.12	Nationwide Signature Card, Dated May 8, 2019	Y	N
APP 2.13	Bank of America Check Images for Optima Controls, Ltd checks signed by Angela List: # 12882 – 12891, 13022, 13027 – 130230, 13138 – 13142, 13277 - 13285, 13287, 13429 - 13433, 13489, 13491 - 13497, and 13499 - 13509	Y	N