

**NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501**

In the Matter

- of -

**the Application of P&M Electrical Contracting Corporation
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 64640

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
June 13, 2023**

This matter considers the written appeal by P&M Electrical Contracting Corporation (“PMEC”, 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. Lyudmila Mereshensky, as the Secretary/Treasurer, applied on behalf of PMEC for certification as a WBE on September 11, 2018 (DED Exhibit 1).
2. In a letter dated June 17, 2020, the Division denied PMEC’s application (DED Exhibit 2) and set forth four grounds for the denial:
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2);
 - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i) and 5 NYCRR former § 144.2(b)(1)(ii); and

(d) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).

3. P MEC timely filed a notice of appeal on July 16, 2020 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to P MEC on August 4, 2020 (DED Exhibit 3).
5. Applicant submitted its written appeal by letter dated October 29, 2020 (APP Exhibit 2).
6. The Division responded by filing an Affidavit of Robyn Clarke dated April 19, 2023 and a brief submitted by Michael Livolsi, Esq., counsel for the Division, dated April 21, 2023.

FINDINGS OF FACT

7. P MEC manufactures customized medium voltage switchgear and switchgear enclosures, and provides electrical construction and low voltage cabling installation, and is located in Lynbrook, New York (DED Exhibits 1 and 2).
8. P MEC was founded by Gregory (aka Grigory) Mereshensky and Moshe Potchin in 1986, as equal 50% owners (DED Exhibits 1 and 2).
9. On July 12, 2005, Mr. Potchin transferred his 50% ownership interest to Mr. Mereshensky, making Mr. Mereshensky the sole owner (DED Exhibits 4 and 5).
10. On December 31, 2016, Mr. Mereshensky gifted 60% ownership interest to Lyudmila Mereshensky, his spouse (DED Exhibit 4).
11. In 2017, Ms. Mereshensky received a salary of \$ [REDACTED], while nine (9) non-owner employees received salaries over three times that amount (DED Exhibit 6).
12. In 2018, Ms. Mereshensky received a salary of \$ [REDACTED], while eight (8) non-owner employees received salaries over three times that amount (DED Exhibit 7).
13. In 2019, Ms. Mereshensky received a salary of \$ [REDACTED], while six (6) non-owner employees received salaries over three times that amount (DED Exhibit 9).

14. The 2019 Form 1125-E, Compensation of Officers, shows that Ms. Mereshensky received \$ [REDACTED], while Gregory Mereshensky received \$ [REDACTED] (DED Exhibit 8).
15. Ms. Mereshensky's resume states that from 1988 to present, she maintains, organizes and supervises office services, payroll, and accounts payable and receivable. She has a diploma in Office Management and Accounting (DED Exhibit 10).
16. Gregory Mereshensky's resume states that he is an engineering professional with over 40 years of experience. His expertise includes strategic planning and project management. He holds an Electrical Engineering Degree (DED Exhibit 11).
17. Frank Mereshensky is a Master Electrician, licensed by the State of New York. He has over 18 years of experience supervising electricians. He also has an Electrical Engineering Degree. His responsibilities include project and staff oversight, material and equipment procurement, scheduling, safety protocols and client communication (DED Exhibit 12).
18. PMEC Bylaws state that the Board of Directors manages the Corporation. The Company's Directors are Gregory Mereshensky and Lyudmila Mereshensky. Gregory Mereshensky is the President/CEO and Ms. Mereshensky is the Secretary/Treasurer. Article IV, Section 3 of the Bylaws state that the President/CEO shall manage the business of the Corporation (DED Exhibit 13).

APPLICABLE LAW

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) 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 former §144.2(c)(2) states as follows:

...The minority group member or woman owner must 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 former §144.2(b)(1)(i) states as follows:

Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.

5 NYCRR former §144.2(b)(1)(ii) states as follows:

Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

5 NYCRR §144.2(b)(2) states as follows:

Articles of incorporation, corporate bylaws...or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

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 PMEC 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" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

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)). Accordingly, applicant's attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR former §144.2(a)(1) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

Ms. Mereshensky made no capital contribution for her equity interest which she received in 2016 (DED Exhibits 1, 2, 4, 5, and 13). Applicant takes the position that it is immaterial that consideration was not paid for her ownership interest due to the marital relationship between Mr. and Ms. Mereshensky (APP Exhibit 2). It is well settled that ownership acquired solely by virtue of marital property does not satisfy the requirements of 5 NYCRR former §144.2(a)(1). See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017).

The Division's determination to deny the application on the basis that PMEC failed to demonstrate that Ms. Mereshensky made contributions to PMEC in proportion to her ownership interest, as required under 5 NYCRR former §144.2(a)(1) is supported by substantial evidence.

5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion

with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

The financial records submitted by applicant show that Ms. Mereshensky is one of the lowest paid employees of PMEC and is the lowest paid director. She was paid less than one-third of what other employees were paid in the years 2017-2019. The 2019 Form 1125-E, Compensation of Officers, shows that she received \$ [REDACTED], while Gregory Mereshensky received \$ [REDACTED] (DED Exhibits 6-9).

Applicant stated that Ms. Mereshensky takes a “minimum salary” to preserve eligibility for a pension plan and that “in effect, the \$ [REDACTED] (salary for Gregory Mereshensky) included \$ [REDACTED] for Mr. Mereshensky and \$ [REDACTED] for Ms. Mereshensky” (APP Exhibit 2). Ms. Mereshensky does not share in the profits and losses in proportion to her equity interest.

The Division’s determination to deny the application on the basis that PMEC failed to demonstrate that the woman-owner shares in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR former §144.2 (c)(2) is supported by substantial evidence.

II. Operations

The Division cites two operational criteria under 5 NYCRR former §144.2(b) as bases for the denial (DED Exhibit 2). First, PMEC has not demonstrated that Ms. Mereshensky has adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i). Second, PMEC has not demonstrated that Ms. Mereshensky has the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(ii).

With regard to technical competence, where the woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate*

Electrical, LLC, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

Gregory Mereshensky’s resume states that he is an engineering professional with over 40 years of experience in electrical design and power systems. His expertise includes strategic planning and project management. He holds an Electrical Engineering Degree (DED Exhibit 11).

Frank Mereshensky is a Master Electrician with a license granted by the State of New York. He has over 18 years of experience in the supervision of electricians. He is responsible for project and staff oversight, material and equipment procurement, scheduling, safety protocols and client communication. He also holds an Electrical Engineering Degree (DED Exhibit 12).

Ms. Mereshensky is responsible for maintaining, organizing and supervising office services, payroll, accounts payable and accounts receivable (DED Exhibit 11). She has a diploma in Office Management and Accounting (DED Exhibit 11). Her “updated resume” states she is responsible for “business and financial decisions” (APP Exhibit 2).

Ms. Mereshensky is primarily responsible for the administrative and financial aspects of the business. Gregory and Frank Mereshensky are responsible for the core, revenue generating functions of the business.

III. Control

5 NYCRR former §144.2(b)(2) requires that the relevant business agreements must permit the woman-owner to make decisions without restrictions. In determining whether the applicant

meets this requirement, the Division may consider the company's bylaws. See *Matter of S.C. Spencer Electric, Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 31, 2022.

Article III of applicant's bylaws states that the Board of Directors manages the company. Gregory and Lyudmila Mereshensky are the Board members. Article IV states that the President and CEO manages the business of the corporation. Gregory Merenshensky is the President and CEO (DED Exhibit 13).

Applicant argues that "the fact that the President is also named CEO and has management over the corporation... does not signify that Ms. Mereshensky was not permitted to make decisions without restrictions" (APP Exhibit 2). This argument is contradicted by the holding in *Matter of S.C. Spencer Electric, Inc.*, Supra. Applicant submitted a resolution naming Ms. Mereshensky as President and CEO, dated September 1, 2020, which is after the April 21, 2020 date of the denial letter. This confirms that Ms. Mereshensky was not the President and CEO at the time of the denial and did not have the ability to make decisions without restrictions pursuant to the bylaws.

CONCLUSION

P&M Electrical Contracting Corporation did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §144.2(a)(1), 144.2(c)(2), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(2) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny P&M Electrical Contracting Corporation's application for certification as a woman-owned business enterprise.

In the Matter of P&M Electrical Contracting Corporation
 NYS DED File No 64640
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification dated September 11, 2018
DED 2	Division's denial letter dated June 17, 2020
DED 3	Notice to Proceed via written appeal dated August 4, 2020
DED 4	Stock Ledger
DED 5	December 12, 1986 Shareholder Agreement
DED 6	2017 quarterly wage reports
DED 7	2018 quarterly wage reports
DED 8	2018 Form 1125-E
DED 9	2019 quarterly wage reports
DED 10	Lyudmila Mereshensky Resume
DED 11	Gregory Mereshensky Resume
DED 12	Frank Mereshensky Resume
DED 13	PMEC Bylaws
DED 14	2017 and 2018 Lyudmila Mereshensky W-2 Forms
APP 1	Applicant's Notice of Appeal dated July 16, 2020
APP 2	Applicant's Appeal letter dated October 29, 2020