

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

In the Matter

- of -

the Application of Dynamic Electric System Inc.,
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62545

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

June 15, 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 the application filed by Dynamic Electric System, Inc. (Dynamic or applicant), for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the written appeal by Dynamic, 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 that the business enterprise does not meet the eligibility criteria for certification as a WBE.

Nancy Shufane, as the president, applied on behalf of Dynamic for certification as a WBE on February 28, 2017 (*see* DED Exhibit 1). In a letter dated January 25, 2018, the Division denied Dynamic's application (*see* Dynamic Exhibit A; DED Exhibit 2) and, set forth four grounds for the denial.¹ Dynamic timely filed a notice of appeal. Subsequently, in a letter dated March 7, 2018 (*see* Dynamic Exhibit B; DED Exhibit 3), the Division set May 7, 2018 as the due date for applicant's written appeal. With a cover letter dated May 4, 2018, Christopher P. Parnagian, Esq. (O'Hare Parnagian, LLP, New York, New York), filed applicant's written appeal. The Division responded with papers dated August 12, 2020. A list of the parties' papers is attached to this recommended order as Appendix A.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* former 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise.

Staff reviews the business enterprise as it existed at the time the application was filed based on representations in the application, as well as information filed in supplemental submissions. (*See* former 5 NYCRR 144.4[e] and 144.5[a].) As discussed further below, applicant's appeal includes documents not reviewed by Division staff before staff issued the January 25, 2018 denial letter. These documents are attached to Dynamic Exhibit C (Statement of Nancy Shufane) as: (a) Exhibit 2 – Amended Transfer Agreement dated August 22, 2017; (b) Exhibit 3 – Cover letter dated August 28, 2017 from TD Bank with copies of cancelled checks

¹ The Division's January 25, 2018 denial determination, applicant's May 4, 2018 written appeal, and the Division's August 12, 2020 response pre-date amendments to 5 NYCRR parts 140-145 that became effective on December 2, 2020. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this recommended order.

Nos. 130 and 131, dated August 14, 2017; (c) Exhibit 4 – Employee Earnings Report for Nancy Shufane, Aznelm Krysa, and Faud Shufane; (d) Exhibit 5 – St. John’s University Bid (undated); (e) Exhibit 6 – St. John’s University Service Agreement dated March 27, 2018 with Exhibits A and B; (f) Exhibit 7 – Payroll Reports for March 7, 14, 21, and 28, 2018 signed by Nancy Shufane for JFK Airport; and (g) Exhibit 8 – 2017 Schedule K-1 reports from personal income tax for Aznelm Krysa, Faud Shufane, and Nancy Shufane. Accordingly, these documents are irrelevant due to the limited scope of this appeal. Although identified in this recommended order, I have not considered the documents or the information provided therein.

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 Dynamic 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]).

POSITIONS OF THE PARTIES

Division Staff

In the January 25, 2018, denial letter, Division staff stated that Dynamic failed to meet four of the criteria for WBE certification set forth in former 5 NYCRR 144.2 concerning Nancy Shufane’s ownership and operation of the business enterprise. With respect to ownership, staff concluded that Ms. Shufane, as the woman-owner, did not demonstrate that her contributions were proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1). Second, staff concluded that Dynamic did not demonstrate that Ms. Shufane shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by former 5 NYCRR 144.2(c)(2). (*See* Dynamic Exhibit A; DED Exhibit 2.)

With respect to operations, Division staff concluded further that Dynamic did not show that the woman-owner makes decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1). Finally, staff determined that Ms. Shufane, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i) and 144.2(b)(1)(ii). (*See* Dynamic Exhibit A; DED Exhibit 2.)

Dynamic Electric System Inc.

Dynamic argued that the Division’s denial is not based on substantial evidence. According to applicant, Division staff did not consider pertinent information, which came into existence after Dynamic filed the certification application. In its May 4, 2018, appeal papers,

Dynamic argues that Nancy Shufane paid cash in full for her investment in the business enterprise. In addition to receiving 51% of the profits from the business enterprise, Dynamic argues further that Ms. Shufane receives total compensation each pay period which is approximately equivalent to that received by the other executive officers.

Dynamic contends that Nancy Shufane continues to be the majority owner of the business enterprise, as demonstrated by Dynamic's stock ledger and Schedule K-1 filed with Ms. Shufane's federal income tax return for 2017. According to Dynamic, Ms. Shufane has served as the president and treasurer of the business enterprise since 2016, and that she has exercised authority over development and operational performance for the business enterprise. Finally, Dynamic notes that on October 30, 2017, it obtained WBE certification from the New York City Department of Small Business Services, and that the certification remains in effect (*see* Dynamic Exhibit D).

FINDINGS OF FACT

1. Dynamic Electric System Inc. is based in Brooklyn, New York. Dynamic provides electrical contracting services in both commercial and residential settings. Dynamic specializes in electrical work for power plants, boiler rooms, HVAC systems, new fire alarms, solar systems, underground power lines, and emergency generators. (*See* DED Exhibit 1.)
2. On February 28, 2017, Nancy Shufane filed an application with the Division to certify Dynamic Electric System Inc. as a woman-owned business enterprise (*see* DED Exhibit 1 at 12 of 12).
3. By letter dated January 25, 2018, the Division denied Dynamic's application for certification as a woman-owned business enterprise (*see* Dynamic Exhibit A; DED Exhibit 2).
4. With a cover letter dated May 4, 2018, Dynamic filed a written appeal responding to the Division's January 25, 2018, denial letter. The Division responded with papers dated August 12, 2020.

I. Ownership

5. In August 2012, Faud Shufane paid ██████████ to acquire 20 shares of Dynamic's common stock from Anzelm Krysa. As a result of this transaction, Mr. Shufane obtained a 20% ownership interest in the business enterprise, and Mr. Krysa retained an 80% ownership interest. (DED Exhibits 1 at 3 of 12, and 4.)
6. On September 1, 2016, by a unanimous consent of action, Anzelm Krysa transferred 41 shares of common stock to Nancy Shufane, and Faud Shufane transferred 10 shares to Ms. Shufane. As a result, Ms. Shufane obtained a 51% ownership interest in the business enterprise. Mr. Krysa retained a 39% ownership interest, and Mr. Shufane retained a 10% ownership interest. (*See* ¶ 4 Dynamic Exhibit C; DED Exhibits 1 at 3 of 12, and 4).

7. To obtain her 41 shares, Nancy Shufane agreed to pay Aznelm Krysa [REDACTED] per share for a total of [REDACTED] with “dividends and other distributions paid by the Company.” Similarly, Nancy Shufane agreed to pay Faud Shufane [REDACTED] per share for a total of [REDACTED] with “dividends and other distributions paid by the Company.” (See DED Exhibits 1 at 3 of 12, and 4). The application materials reviewed by Division staff do not include any proof that Ms. Shufane paid [REDACTED] to Mr. Krysa for 41 shares and [REDACTED] to Mr. Shufane for 10 shares.
8. With this transfer, the shareholders agreed on the following. Nancy Shufane, as the majority shareholder, would be the president and treasurer of Dynamic. Faud Shufane would be an executive vice president and chief operating officer of the business enterprise. Aznelm Krysa would be an executive vice president and secretary. (See DED Exhibit 4.)
9. The application materials include a copy of the Dynamic’s federal tax returns for 2016. According to Form 1125-E, Mr. Krysa’s compensation, as the 39% shareholder, was [REDACTED], and Mr. Shufane’s compensation, as the 10% shareholder, was [REDACTED]. However, Nancy Shufane’s compensation, as the woman-owner and 51% shareholder, was [REDACTED] (See DED Exhibit 5 [Form 1125-E].)

II. Operations

10. Dynamic’s significant business operations, or core functions, include estimating and obtaining contracts, as well as providing electrical contracting services. In its application for certification, Dynamic identified North American Industry Classification System (NAICS) No. 238210, which refers to electrical contractors and other wiring installation contractors. (See DED Exhibit 1 at 3-4 of 12.)
11. According to his résumé, Aznelm Krysa holds a Bachelor of Mechanical Engineering. He has more than 30 years of experience as an electrician, and has held a New York City Master Electrician’s license since 2001. At Dynamic, he is a project manager and performs estimates. In addition, Aznelm Krysa conducts job inspections with staff from the New York City Department of Buildings. Aznelm Krysa was an elevator mechanic who worked on AC/DC power, high and low voltage motors, generators, and elevator controls. He has installed elevator control systems, as well as fire recall systems. (See DED Exhibits 6 and 9.)
12. Fuad Shufane has worked at Dynamic since 2012. Every day, he conducts field visits to evaluate job progress, and discusses workplan goals with the foremen and journeymen electricians in the field. On a weekly basis, he meets with general contractors, construction managers, and government owners. In addition, Mr. Shufane prepares estimates for bids, and conducts pre-bid walk-throughs. Mr. Shufane provides proposals and quotes for change orders. (See DED Exhibit 7.)
13. According to her résumé, Nancy Shufane has an associate degree in business management and accounting. Her primary duties and responsibilities at the business enterprise are administrative. For example, she is responsible for human resource

functions that include payroll and personnel. She maintains accounts payable, performs banking transactions, and oversees audits. Nancy Shufane attends weekly job progress meetings, submits bids, and finalizes contracts. Nancy Shufane's résumé does not reflect that she possesses any technical skills related to electrical contracting work in contrast to the work experiences outlined in the résumés of Messrs. Shufane and Krysa. (See DED Exhibit 8, compare DED Exhibits 6 and 7.)

DISCUSSION

This recommended order considers applicant's appeal from the Division's January 25, 2018, determination (see Dynamic Exhibit A; DED Exhibit 2) to deny the certification of Dynamic as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in former 5 NYCRR 144.2, the Division identified four bases for the denial with respect to the ownership and operation of the business enterprise. Specifically, the Division contended that:

1. Nancy Shufane's contributions are not proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1);
2. The woman-owner does not share in the risks and profits in proportion to her ownership interest in the business enterprise, as required by former 5 NYCRR 144.2(c)(2);
3. The woman-owner does not make decisions pertaining to the operation of the business enterprise, as required by former 5 NYCRR 144.2(b)(1); and
4. Ms. Shufane, as the woman-owner, does not have adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i), and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii).

Each basis is addressed below.

I. Ownership

The Division interprets former 5 NYCRR 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.

In August 2012, Faud Shufane paid ██████████ to acquire 20 shares of Dynamic's common stock from Anzelm Krysa. As a result of this transaction, Mr. Shufane obtained a 20% ownership interest in the business enterprise, and Mr. Krysa retained an 80% ownership interest. On September 1, 2016, by a unanimous consent of action, Mr. Krysa transferred 41 shares of common stock to Nancy Shufane, and Mr. Shufane transferred 10 shares to Ms. Shufane. As a result, Nancy Shufane obtained a 51% ownership interest in the business enterprise. Anzelm Krysa retained a 39% ownership interest, and Faud Shufane retained a 10% ownership interest.

To obtain her 41 shares, Ms. Shufane agreed to pay Mr. Krysa [REDACTED] per share for a total of [REDACTED] with “dividends and other distributions paid by the Company.” Similarly, Nancy Shufane agreed to pay Mr. Shufane [REDACTED] per share for a total of [REDACTED] with “dividends and other distributions paid by the Company.” (See ¶ 4 Dynamic Exhibit C; DED Exhibits 1 at 3 of 12, and 4).

The application materials reviewed by Division staff do not include any proof that Nancy Shufane paid [REDACTED] to Anzelm Krysa for 41 shares, and [REDACTED] to Faud Shufane for 10 shares. As a result, staff could not verify that Ms. Shufane provided genuine consideration in proportion to her ownership interest in the business enterprise. In addition, the statement that payment for the shares would be with “dividends and other distributions paid by the Company” is vague and speculative. Moreover, assuming that Dynamic demonstrated that Ms. Shufane paid for her shares, the application materials show that Ms. Shufane’s intended contribution of [REDACTED] for her 51% ownership interest is significantly less than Faud Shufane’s initial contribution of [REDACTED] in 2016 to acquire his 20% ownership interest. Therefore, Ms. Shufane’s contribution would have been disproportionate to her ownership interest. (See DED Exhibits 1 at 3 of 12, and 4.)

On appeal, Dynamic argues that Nancy Shufane subsequently made payments to Anzelm Krysa and Faud Shufane, and offered supporting documentation (*see* ¶ 6 Dynamic Exhibit C, *see also* Dynamic Exhibit 3).² However, applicant had not provided these documents to Division staff during staff’s review of the certification application. Because the scope of the review in this proceeding is limited to the application and supporting materials at the time Division staff issued the January 25, 2018 determination, any new information offered with the appeal cannot be considered (*see* former 5 NYCRR 144.4[e] and 144.5[a]). With a future application, however, Division staff would evaluate the merits of this additional information as it relates to applicant’s compliance with this eligibility criterion.

Therefore, Nancy Shufane’s contribution, as the woman-owner of the business enterprise was not proportionate to her equity interest in the business enterprise, as required by former 5 NYCRR 144.2(a)(1). The Director should affirm Division staff’s determination about Dynamic’s lack of compliance with the certification criterion.

Former 5 NYCRR 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 enterprise. This provision ensures that the woman owner receives the benefits that accrue to a business as a result of State contracting preferences from a WBE certification, and that non-qualifying persons do not receive a disproportionate share of such benefits.³

² Dynamic Exhibit 3 consists of a copy of a cover letter dated August 28, 2017 from TD Bank with copies of cancelled checks Nos. 130 and 131, dated August 14, 2017.

³ The Recommended Orders and Final Orders are available at the New York State Department of Economic Development website at: www.esd.ny.gov/doing-business-ny/mwbe/mwbe-appeals. *See e.g. Matter of National Recovery Solutions, LLC*, Recommended Order dated May 25, 2017 at 6-7 (business not eligible for certification where the woman-owner and majority shareholder received the same compensation as her husband), Final Order 17-31 dated June 5, 2017; *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 at 5-6 (business

The application materials include a copy of the Dynamic's federal tax returns for 2016. According to Form 1125-E, Mr. Krysa's compensation, as the 39% shareholder, was [REDACTED], and Mr. Shufane's compensation, as the 10% shareholder, was [REDACTED]. However, Nancy Shufane's compensation was [REDACTED]. (DED Exhibit 5 [Form 1125-E]). This information demonstrates that Ms. Shufane's compensation, as the woman-owner and majority shareholder, is significantly disproportionate to her ownership interest in the business enterprise, and substantially less than the compensation earned by the other co-owners, who are not women.

In her appeal statement, Nancy Shufane states that starting in February 2018, she started receiving "approximately [REDACTED] of total compensation as Anzelm [Krysa] and Fred [Faud Shufane]" (§§ 12 and 13 Dynamic Exhibit C). This information and the related supporting documentation (*see* Dynamic Exhibit 4), however, were not before Division staff when staff issued the January 25, 2018 denial letter. As previously noted, the scope of the review in this proceeding is limited to the application and supporting materials at the time Division staff issued the January 25, 2018 determination. Therefore, any new information offered with the appeal cannot be considered (*see* former 5 NYCRR 144.4[e] and 144.5[a]). With a future application, however, Division staff would evaluate the merits of this additional information as it relates to applicant's compliance with this eligibility criterion.

Moreover, Division staff correctly observed that even if Ms. Shufane's compensation is approximately within 10% of that earned by Messrs. Krysa and Shufane, Nancy Shufane's compensation, as the woman-owner, remains disproportionate to her ownership interest in the business enterprise (*see* Division's Brief in Response at 7). Such a circumstance would not satisfy the certification criterion at issue here.

In *Matter of C.W. Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), the Court held that staff's review of tax returns, such as those considered during the review of Dynamic's application for WBE certification, was substantial evidence to support the Division's consideration whether a woman-owned business enterprise meets the eligibility criterion at former 5 NYCRR 144.2(c)(2). I conclude that staff's determination that Dynamic did not demonstrate that the woman-owner shares in the risks and profits of the business enterprise in proportion to her ownership interest was based on substantial evidence, and recommend that the Director conclude the same.

II. Operations

Former 5 NYCRR 144.2(b)(1) requires that decisions pertaining to the operations of the business enterprise be made by the woman-owner. In evaluating compliance with this eligibility criterion, Division staff reviewed Section 3 of the application (*see* DED Exhibit 1) to identify the significant business operations. Significant business operations, or core functions, generate revenue for the business enterprise, and are unique to the industry compared to administrative functions, such as personnel and payroll management, and accounting, which are common to most businesses.

not eligible for WBE certification where the woman-owner's husband received significantly more compensation she did), Final Order 17-21 dated March 27, 2017.

Dynamic's significant business operations, or core functions, include estimating and obtaining contracts, as well as providing electrical contracting services. In its application for certification, Dynamic identified North American Industry Classification System (NAICS) No. 238210, which refers to electrical contractors and other wiring installation contractors. (See DED Exhibit 1 at 3 to 4 of 12.)

According to his résumé, Aznelm Krysa holds a Bachelor of Mechanical Engineering. He has more than 30 years of experience as an electrician, and has held a New York City Master Electrician's license since 2001. At Dynamic, he is a project manager and performs estimates. In addition, Mr. Krysa conducts job inspections with staff from the New York City Department of Buildings. Mr. Krysa was an elevator mechanic who worked on AC/DC power, high and low voltage motors, generators, and elevator controls. He has installed elevator control systems, as well as fire recall systems. (See DED Exhibits 6 and 9).

Fuad Shufane has worked at Dynamic since 2012. Every day, he conducts field visits to evaluate job progress, and discusses workplan goals with the foremen and journeymen electricians in the field. On a weekly basis, he meets with general contractors, construction managers, and government owners. In addition, Mr. Shufane prepares estimates for bids, and conducts pre-bid walk-throughs. Mr. Shufane provides proposals and quotes for change orders. (See DED Exhibit 7.)

According to her résumé, Nancy Shufane has an associate degree in business management and accounting. Her primary duties and responsibilities at the business enterprise are administrative. For example, she is responsible for human resource functions that include payroll and personnel. She maintains accounts payable, performs banking transactions, and oversees audits. Mr. Shufane attends weekly job progress meetings, submits bids, and finalizes contracts. Ms. Shufane's résumé does not reflect that she possesses any technical skills related to electrical contracting work in contrast to the work experiences outlined in the résumés of Messrs. Shufane and Krysa. (See DED Exhibit 8, compare DED Exhibits 6 and 7.)

The Division has consistently held that woman owners must perform significant operations, or core business functions, in order to comply with the eligibility criterion at former 5 NYCRR 144.2(b)(1).⁴ Nancy Shufane did not demonstrate that she performs the core business functions at Dynamic, which are associated with electrical contracting services. Therefore, I conclude that the Division's determination with respect to Dynamic's compliance with this eligibility criterion is based on substantial evidence.

Finally, the Division determined that Nancy Shufane does not have adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i), and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii). To evaluate compliance with these eligibility criteria, Division staff considers whether the woman-owner can

⁴ See *Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, at 4, Final Order 18-38 dated August 30, 2018, *affd Matter of Upstate Elec., LLC v New York State Dept. of Economic Dev.* 179 AD3d 1343 (2020); *Matter of JC Smith Inc.*, Recommended Order dated March 9, 2017, at 8-12, Final Order 17-10 dated March 13, 2017, *affd Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517, 1519 (2018).

perform the core functions of the business enterprise, which are identified above. Staff will review responses to information requests, as well as the owners' and employees' résumés.

As noted above, Nancy Shufane's responsibilities are administrative in nature (*see* DED Exhibit 8). In contrast, Fuad Shufane performs core business functions. For example, he conducts daily field visits to foremen and journeymen electricians, evaluates job progress, and plans daily and weekly goals. In addition, he meets weekly with general contractors, construction managers, and government owners. (*See* DED Exhibit 7.) Anzelm Krysa makes decisions in his capacity as a project manager and estimator (*see* DED Exhibit 6). Moreover, the résumés provided by Messrs. Krysa and Shufane reflect their decades of experience, ability, working knowledge, and technical expertise in providing electrical contracting services (*see* DED Exhibits 6, 7, and 9; *see also* *C.W. Brown*, 216 A.D. at 842 (operational control was lacking where persons who could not be relied upon for certification had "control of actual field operations with little involvement by" the woman owner relied upon and where woman owner's "husband's responsibilities include bidding and supervising the outside contracts and coordinating the employees on a particular job").

Dynamic's appeal includes information about Nancy Shufane's duties and responsibilities related to scheduling bid conferences, submitting bids, and finalizing contracts (*see* ¶¶ 20-24 Dynamic Exhibit C). These duties and responsibilities are not outlined in Ms. Shufane's resume (*see* DED Exhibit 8). In addition, the information outlined in Dynamic's appeal, and the related supporting documentation (*see* Dynamic Exhibits 5, 6, and 7) were not before Division staff prior to issuing the January 25, 2018 denial letter. As noted above, the scope of the review in this proceeding is limited to the application and supporting materials at the time Division staff issued the January 25, 2018 determination. Therefore, any new information offered with the appeal cannot be considered (*see* former 5 NYCRR 144.4[e] and 144.5[a]). With a future application, however, Division staff would evaluate the merits of the information as it relates to applicant's compliance with this eligibility criterion.

Accordingly, I conclude that the application and supporting materials before the Division at the time it made its January 25, 2018 determination did not demonstrate that Nancy Shufane has adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i), and did not demonstrate the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii). Accordingly, the Division's denial should be affirmed.

III. City of New York WBE Certification

Exhibit D to Dynamic's May 4, 2018, appeal is a copy of a cover letter dated October 30, 2017 from the New York City Department Small Business Services. The letter states that Department of Small Business Services certifies that Dynamic is a woman-owned business enterprise pursuant to Title 6, Chapter 11, Subchapter B of the Rules of the City of New York. According to the letter, the certification is effective until October 20, 2022. Enclosed with the October 30, 2017 cover letter is a copy of the NYC Small Business Services WBE Certificate issued to Dynamic. (*See* Dynamic Exhibit D.)

The Division is not bound to certify Dynamic because it obtained WBE certification from the NYC Division of Small Business Services. The criteria for WBE certification implemented by the NYC Division of Small Business Services are different from the certification criteria outlined in 5 NYCRR part 144, which the Division implements. To obtain WBE certification from New York State, Dynamic has the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR 144.2. Based on the foregoing, Dynamic did not meet that burden.

CONCLUSION

Dynamic Electrical System Inc. 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 former 5 NYCRR 144.2(a)(1), 144.2(c)(2), 144.2(b)(1), as well as 144.2(b)(1)(i) and 144.2(b)(1)(ii), 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 Dynamic's application for certification as a woman-owned business enterprise.

Attachments: Appendix A – Parties' Papers

Division of Minority and Women's Business Development

Parties' Papers

Matter of Dynamic Electric System Inc.
NYS DED File No. 62545

- I. Applicant's appeal dated May 4, 2018 with attached Exhibits A, B, C, and D.
 - A. Exhibit A – Division's denial letter dated January 25, 2018. (*See* DED Exhibit 2.)
 - B. Exhibit B – Division's instructions for filing written appeal dated March 7, 2018. (*See* DED Exhibit 3.)
 - C. Exhibit C – Statement of Nancy Shufane dated May 4, 2018, with attached Exhibits 1 through 8.
 1. Exhibit 1 – Original Transfer Agreements dated September 1, 2016. (*See* DED Exhibit 4.)
 2. Exhibit 2 – Amended Transfer Agreements dated August 22, 2017.
 3. Exhibit 3 – Cover letter dated August 28, 2017 from TD Bank with copies of cancelled checks Nos. 130 and 131, dated August 14, 2017.
 4. Exhibit 4 – Employee Earnings Report for Nancy Shufane from 01/03/2018 to 03/28/2018; 401K contribution for pay period 02/14/18; paystub for period ending 02/14/18; Employee Earnings Report for Aznelm Krysa from 01/03/2018 to 03/28/2018; Employee Earnings Report for Faud Shufane from 01/03/2018 to 03/28/2018.
 5. Exhibit 5 – St. John's University Bid (undated).
 6. Exhibit 6 – St. John's University Service Agreement dated March 27, 2018 with Exhibits A and B.
 7. Exhibit 7 – Payroll Reports for March 7, 14, 21, and 28, 2018 signed by Nancy Shufane for JFK Airport.
 8. Exhibit 8 – 2017 Schedule K-1 reports for Aznelm Krysa, Faud Shufane, and Nancy Shufane.
 - D. Exhibit D – WBE Certification from New York City Department of Small Business Services (MWCERT2017-913; Expires on October 30, 2022).

II. Division's Papers

A. Declaration of Clenice Mincey dated August 12, 2020 with attached Exhibits DED 1 through DED 9.

1. DED 1 – Application for Certification (Application No. 9340916) filed by Nancy Shufane on February 28, 2017.
2. DED 2 – Division's denial letter dated January 25, 2018. (*See* Dynamic Exhibit A.)
3. DED 3 – Division's instructions for filing written appeal dated March 7, 2018. (*See* Dynamic Exhibit B.)
4. DED 4 – Original Transfer Agreements dated September 1, 2016. (*See* Nancy Shufane Exhibit 1.)
5. DED 5 – 2016 Corporate Federal Tax Return (Form 1125-E Compensation of Officers).
6. DED 6 – Résumé of Aznelm Krysa.
7. DED 7 – Résumé of Faud Shufane.
8. DED 8 – Résumé of Nancy Shufane.
9. DED 9 – Master Electrician Licenses for Aznelm Krysa.

B. Brief in Response to the Appeal of Dynamic Electric System, Inc., dated August 12, 2020.