

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

In the Matter

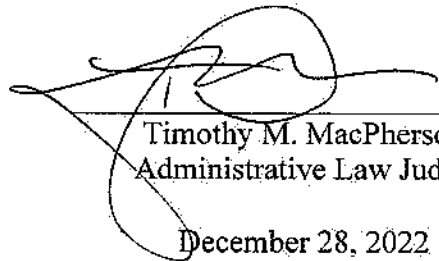
- of -

the Application of Sempronius Electric, Inc.  
for Re-certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51633

RECOMMENDED ORDER

- by -



Timothy M. MacPherson  
Administrative Law Judge  
December 28, 2022

## SUMMARY

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 re-certification of Sempronius Electric, Inc. (SEI or applicant) as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

## PROCEEDINGS

This matter considers the appeal by Sempronius Electric, Inc., 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 applicant does not meet the eligibility criteria for re-certification as a WBE.

Deborah Nelson, president of SEI, applied for re-certification as a WBE on April 23, 2015 (*see* DED Exhibit 1, SEI Exhibit 2). In a letter dated December 3, 2018, the Division denied SEI's application (*see* DED Exhibit 2) and set forth three grounds for the denial.<sup>1</sup>

By letter dated December 21, 2018, Sara E. Payne, Esq. responded to the Division's December 3, 2018, denial letter on behalf of SEI and requested a hearing. Prior to this proceeding, SEI changed counsel and retained the services of Diana Plue, Esq. to represent the organization.

The Division issued a notice of appeal hearing dated May 5, 2022, which advised applicant that an administrative appeal hearing would be held virtually on July 19, 2022, using the WebEx videoconference platform.<sup>2</sup> A pre-hearing conference was held on June 30, 2022.

The hearing convened as scheduled at 10:00 a.m. on July 19, 2022, via the Webex videoconference platform. Diana Plue, Esq. appeared at the hearing on behalf of SEI and offered testimony from Deborah Nelson as well as Dene Nelson. Kyle Satchell, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Raymond Emanuel, Associate Certification Analyst, testified for Division staff.<sup>3</sup> Prior to the hearing, SEI offered 8 exhibits contained in a single, 229-page pdf file and the Division offered 13 exhibits contained in a single, 321-page pdf file, all of which were received into evidence and noted on the attached exhibit chart. The exhibits for SEI and DED are cited by referring to the pertinent exhibit number along with the page number where that exhibit begins within the pdf file.

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<sup>1</sup> The Division's December 3, 2018, denial determination and applicant's December 21, 2018, notice of appeal 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.

<sup>2</sup> The notice document was dated "12/3/2018" but has been confirmed to have been sent on May 5, 2022, by the division and applicant.

<sup>3</sup> Mr. Emanuel has since left the Division for another department.

At the conclusion of the hearing, the parties presented their respective closing statements orally. During the afternoon of July 19, 2022, I received notification that the recording of the video conference was available, whereupon the hearing record closed. The recording consists of one continuous audio clip of the proceeding lasting two hours, nine minutes and thirty-five seconds (2:09:35) with a written, computer-generated and time stamped record accompanying the audio. The recording is cited by referring to the time at which the relevant testimony began.

### **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. The Division 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].)

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of the application filed by SEI for re-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 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 Staff:

In the December 3, 2018, denial letter (DED Exhibit 2, p. 13), Division staff determined that the application failed to meet the WBE certification criteria related to Deborah Nelson's role as president of SEI after determining that women do not share in the risks and profits in proportion with their ownership in the business enterprise as required by 5 NYCRR 144.2(c)(2). Division staff found that although Deborah Nelson holds a 51% ownership interest in SEI, she nonetheless receives significantly less compensation than her husband, Dene Nelson, who only possesses a 49% ownership interest in the company.

Staff also determined that Ms. Nelson does not make decisions pertaining to the operation of the business enterprise as required by 5 NYCRR 144.2(b)(1) because her "responsibilities in the business are primarily administrative in nature" handling "clerical, accounting, bookkeeping,

inventory tracking, customer service, banking, contract preparation and accounts payable / receivable” matters. In contrast, the Division alleges that Deborah Nelson’s husband, Dene Nelson, “has over 20 years’ experience in electrical installation as well as over 8 years’ in estimating” to go along with “an Associate’s Degree in occupational studies, with a specialization in Construction & Maintenance Electrician”. (See DED Exhibit 2, p. 15).

Finally, staff determined that Ms. Nelson has not demonstrated adequate managerial experience, technical competence, working knowledge or the ability needed to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(ii) because she failed to demonstrate that she possesses relevant experience in electrical contracting work. The Division supported this contention by noting that Ms. Nelson provided no certifications or master electrician licenses as part of the certification application. Furthermore, the Division contends that all training, expertise, and managerial experience needed to operate SEI is being provided by other non-qualifying individuals, namely Ms. Nelson’s husband, Dene Nelson.

Sempronius Electric, Inc.:

On appeal, applicant notes that SEI first obtained WBE certification status in 2008 and that the Division has recertified SEI for each of the subsequent recertification periods leading up to the December 3, 2018, denial. Throughout that period of time no changes have occurred in key personnel, ownership, operations or control of SEI.

Regarding the sharing of risks and profits, applicant argues that it has no control over Dene Nelson’s compensation because SEI only employs union electricians who are entitled to union-negotiated prevailing wages. In fact, applicant does not even dispute that Deborah Nelson receives less compensation than her husband Dene Nelson – as depicted in Form 1040 of their respective U.S. Individual Income Tax returns. Instead, applicant argues that the Division’s determination concerning the sharing of risks and profits should be based solely on the numbers reported in a business entities’ Schedule K-1 (Form 1120S) which reports the “Shareholder’s Share of Income, Credits, Deductions and Other Items”. Compensation of officers like Deborah and Dene Nelson, the argument goes, is not a measure of the sharing of risks and profits, but rather an expense of the business which is merely one of many figures used to generate the numbers ultimately reported on Schedule K-1. To further support this theory, applicant points out that there is no statutory definition or guidance as to what constitutes “risks” or “profits” applicable to 5 NYCRR 144.2(c)(2).

On the subject of decision making, contrary to the assertions made by the Division, applicant argues that Deborah Nelson makes nearly every important decision pertaining to the operation of the business and that she is in actuality the primary decision maker for all important business matters in addition to her role handling all of SEI’s administrative work.

Applicant also challenges the Division's assertion that SEI did not submit any certifications or other documents which speak to Ms. Nelson's occupational competence by noting that the work SEI performs does not require any employee to possess an electrical license or certification. In fact, none of the electricians employed by SEI possess any such certificate, license or other similar document outside of those certifications mandated by OSHA.

Finally, applicant objects to the Division's recertification denial on the grounds that Division staff did not conduct any interview or seek further clarification as to Ms. Nelson's role in the company before reaching its negative determination on SEI's recertification application. (Recording at 45:44.)

### FINDINGS OF FACT

1. Deborah and Dene Nelson are spouses who established Sempronius Electric, Inc. in March of 2007 (Recording at 20:54; SEI Exhibit 2, p. 16). The business enterprise has offices located at 6190 Sales Corners Road, Moravia, (Cayuga County), New York 13118. (Recording at 11:54; SEI Exhibit 2, p. 13.)
2. Sempronius Electric, Inc. is engaged in electrical contracting and is listed under North American Industry Classification System (NAICS) number: 238210 (Electrical contractors) (*see* SEI Exhibit 2 p. 16). As an electrical contractor, Sempronius Electric, Inc. installs control and energy management systems in New York State. (Recording at 12:51).
3. Deborah Nelson is the president of Sempronius Electric, Inc. and owns a 51% share of the business enterprise. In 2015, 2016, and 2017, Deborah Nelson received annual compensation of \$ [REDACTED] each year. (Recording at 1:00:19; DED Exhibit 5, p. 62; DED Exhibit 7, p. 115; DED Exhibit 10, p. 292.)
4. Dene Nelson is the vice president and 49% owner of Sempronius Electric, Inc. For the years 2015, 2016 and 2017, Dene Nelson received compensation of \$ [REDACTED], \$ [REDACTED], and \$ [REDACTED] respectively. (*See Id.*)
5. Raymond Emmanuel served as an associate director for Empire State Development for 14 years. In his capacity as associate director, Mr. Emmanuel's duties included supervising the work of the Sr. certification analysts and support staff who review applications for WBE certification. (Recording at 1:25:21.)
6. Sempronius Electric, Inc. was certified as a woman-owned business enterprise after its application was approved by the New York State Division of Minority and Women's Business Development in 2008 (*see* SEI Exhibit 1, p. 2; SEI Exhibit 6, p. 54).

7. Each year from 2008 to 2017, Sempronius Electric, Inc. provided tax return documentation as requested by the Division to maintain its' certification as a WBE and, where applicable, as part of the recertification process (Recording at 45:25).
8. On April 23, 2015, Deborah Nelson filed an application with the Division to re-certify Sempronius Electric, Inc. as a woman-owned business enterprise (*see* SEI Exhibit 2, p. 13; DED Exhibit 1, p. 2).
9. By letter dated December 3, 2018, the Division denied Sempronius Electric, Inc.'s application for re-certification as a woman-owned business enterprise. In the denial letter, the Division alleges that women relied on for recertification; (1) do not share in the risks and profits in proportion with their ownership interest in the business enterprise; (2) do not make decisions pertaining to the operation of the business enterprise; and (3) have not demonstrated adequate managerial experience, technical competence, working knowledge or the ability needed to operate the business enterprise (*see* DED Exhibit 2, p. 13).
10. Commensurate with her 51% ownership interest in Sempronius Electric, Inc., Deborah Nelson received a \$ [REDACTED] profit in 2015, but took losses of \$ [REDACTED] and \$ [REDACTED] respectively in the years 2016 and 2017 (*see* Recording at 58:33, DED Exhibit 5, p. 60; Recording at 56:41, DED Exhibit 7, p. 113; DED Exhibit 9 at p. 276).
11. Commensurate with his 49% ownership interest in Sempronius Electric, Inc., Dene Nelson received a \$ [REDACTED] profit in 2015, but took losses of \$ [REDACTED] and \$ [REDACTED] respectively in the years 2016 and 2017 (*see* Recording at 58:33, DED Exhibit 5, p. 61; Recording at 56:41, DED Exhibit 7, p. 114; DED Exhibit 9, p. 272).
12. For State, Federal or local government contracts, Sempronius Electric, Inc. may only hire union employees at a pre-determined hourly rate based upon the terms of various union labor agreements (Recording at 13:09).
13. When engaged in work for the private sector, Sempronius Electric, Inc. is not required to pay union-negotiated hourly wages or adhere to the terms contained in union labor agreements (Recording at 13:41).
14. Deborah Nelson's daily duties and responsibilities include such administrative tasks as the management of Sempronius Electric, Inc.'s vendor and customer accounts, the hiring and firing of employees, the payment of Sempronius Electric, Inc.'s bills and payroll management. Additionally, Ms. Nelson handles all insurance and bond related matters for Sempronius Electric, Inc. (Recording at 15:31.)
15. In addition to performing all of Sempronius Electric, Inc.'s administrative tasks, Deborah Nelson also negotiates contracts, drafts estimates for electrical work, assembles and submits bid documents, attends both opening and weekly walkthroughs on job sites,

presides over Sempronius Electric, Inc.'s corporate meetings and is the only employee at Sempronius Electric, Inc. who is authorized to sign for any financial transaction, contract agreement or estimate for work (Recording at 15:34).

16. Deborah Nelson has the knowledge and competency to work with the tools and machinery utilized by employees of Sempronius Electric, Inc. such as back hoes and forklifts. She is prohibited, however, from performing such work when Sempronius Electric, Inc. is engaged in public projects because she is not a union employee. (Recording at 21:14.)
17. Employees at Sempronius Electric, Inc. are not required to hold any electrician's license or certification as a pre-requisite to performing their job duties as electrical installers (Recording at 14:16).

## DISCUSSION

### I. Proportional Share in Risk and Profits

The eligibility requirement at issue mandates that the "woman owner ... must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]). This provision ensures that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from a MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits. (See, e.g., Matter of Corporate Branding, Inc., Recommended Order <https://esd.ny.gov/sites/default/files/CorporateBrandingRO.pdf> (ALJ Lisa A. Wilkinson, 8/31/17).

At the hearing, the Division and applicant offered differing theories about how risks and profits should be measured when considering an application for status as a woman owned business entity. According to applicant, the Division should only refer to the numbers reported in the U.S. Income Tax Return for an S Corporation on Schedule K-1 – titled "Shareholder's Share of Current Year Income, Deductions, Credits and Other Items" – to determine whether women in a business share in the risks and profits in proportion to their ownership interest. The Division, on the other hand, offered testimony focusing on the "Salaries & Wages Report" of the shareholder's U.S. Individual Income Tax Return as set forth in Form 1040. Ms. Nelson argues that the compensation SEI gives to its employees – reported as salaries and wages on that employee's individual tax return – should not be referenced when assessing whether the minority business owner shares in the risks and profits proportionately because salaries and wages are merely one of many expenses used to calculate a business's annual profit or loss, as reported on the entity's Schedule K-1. (Recording at 42:35.)

Although testimony offered by applicant focused on Schedule K-1 and testimony offered by the Division focused on Form 1040, the Division testified that it factors in the totality of the

documents submitted, including Schedule K-1, Form 1040 and all other tax documentation, when determining overall compensation. As Division witness Raymond Emmanuel puts it, the Division looks at what “the person relied on for certification gets out of the business” when deciding if the sharing of risks and profits is proportional to the woman business owner’s ownership interest. (Recording at 1:46:29).

When using the applicant’s approach, Deborah and Dene Nelson do, indeed, share in the risks and profits of the business enterprise proportionally. According to Sempronius Electric, Inc’s 2017 Schedule K-1, Deborah Nelson took a loss of \$ [REDACTED] that year while Dene Nelson took a loss of \$ [REDACTED]. These losses do, in fact, equal 51% and 49% respectively of the firm’s overall loss of \$ [REDACTED] in 2017. Likewise, in 2016 when SEI reported an overall loss of \$ [REDACTED] on its’ Schedule K-1, Deborah Nelson’s share of that loss was 51% (or \$ [REDACTED]) while Dene Nelson’s share of the loss was 49% (or \$ [REDACTED]). Finally, in 2015 when SEI reported a net profit of \$ [REDACTED], Deborah Nelson’s share of that profit was also 51% (or \$ [REDACTED]) while Dene’s share of the profit was 49% (or \$ [REDACTED]). (See Recording at 33:25; Finding of Fact Nos. 10-11.)

When, on the other hand, the individual’s Form 1040 is the only document used in making the determination, the result indicates that Deborah Nelson does not share in the risks and profits of SEI in proportion to her ownership interest in the business enterprise. In its denial letter, the Division notes that for each of the years from 2015 through 2017, Deborah Nelson received significantly less compensation than her husband, Dene Nelson (DED Exhibit 2; Finding of Fact Nos. 3-4). In fact, the individual and corporate tax return documents submitted by SEI indicate that Deborah Nelson earned annual compensation in the amount of \$ [REDACTED] in 2015, 2016, and 2017, while Dene Nelson earned \$ [REDACTED], \$ [REDACTED], and \$ [REDACTED] respectively in those same years (*see Id.*).

Admitting that her wages were less than those of Mr. Nelson, Deborah Nelson testified that her compensation of \$ [REDACTED] annually was fair because it was a livable wage for her and that taking anything above that amount would be irresponsible given the fact that SEI has, in certain years, operated at a net loss (Recording at 40:31). The Division, on the other hand, provided testimony that when reviewing documents for certification as a woman owned business entity, it is uncommon for higher ranking officers to make substantially less than lower ranking officers (Recording at 1:47:59).

Ultimately, when the Division’s holistic approach is utilized by adding Deborah and Dene Nelson’s respective wages to their respective shareholder’s share of SEI’s yearly income or loss, as reported in their individual tax returns and in SEI’s Schedule K-1, Dene Nelson does bring home significantly more overall compensation than Deborah Nelson whether SEI reports a profit that year or a loss (Recording at 1:45:59). Although Ms. Nelson was apt to point out that Mr. Nelson’s compensation as a union electrician is pre-determined by union labor agreements rather than the officers at SEI, applicant offered no provision in the code or precedent in case law creating an exception for business entities who are contractually bound to pay employees a prevailing wage. (Recording at 12:38, 42:58; Finding of Fact No. 12).



Based on this record, I find that the Division's determination with respect to Deborah Nelson's lack of proportional share in the risks and profits of the company is supported by substantial evidence and I recommend that the Director affirm the same.

## II. Operational Decision Making

Former 5 NYCRR 144.2(b)(1) requires that "[d]ecisions pertaining to the operation of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise." To evaluate compliance with this eligibility criterion, Division staff review section 5 of the application to identify core functions and significant business operations associated with the applicant. 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.

Section 5.A of SEI's renewal application states that it is an electrical contractor. Section 5.B describes the enterprise's business operations, as "construction related." With the application for WBE re-certification, SEI lists the following North American Industry Classification System (NAICS) Number: 238210 (electrical contractors). (*See* SEI Exhibit 2.) In his testimony, Mr. Emmanuel explained that when the Division evaluates the core functions of a business entity it looks at what the applicant business does or sells and those activities that bring in revenue. In his evaluation of SEI, Mr. Emmanuel reasonably concluded that the core revenue-generating functions associated with an electrical contractor are installation and wiring. (Recording at 1:32:16.)

In her testimony, Deborah Nelson described numerous tasks that she performs in her capacity as majority owner and president of SEI which included such administrative functions as hiring and firing of employees, purchasing equipment, supplies and insurance policies, and management of payroll (Recording at 15:31; Finding of Fact No. 14). Ms. Nelson's testimony, however, also demonstrated that she performs several tasks for SEI which clearly rise above the level of being purely administrative in nature (*see* Finding of Fact No. 15).

Notably, Ms. Nelson is not only the sole required signatory for all SEI estimates for electrical contracting work, but she also drafts a substantial portion of those estimates herself (Recording at 18:26). Ms. Nelson is also the only employee at SEI who prepares and submits project bid books (Recording at 17:25). To competently draft an estimate or bid book for electrical installation projects, the author would need to understand how electrical systems work and have a substantial level of expertise in project management, the interpretation of blueprints, and the tracking of materials, equipment, and labor costs. These are all skills that rise above those required to perform only basic administrative tasks.

Additionally, Ms. Nelson serves as the proverbial central nervous system for all of SEI's field supervision matters. In her testimony, Ms. Nelson explained that at any given time SEI is simultaneously performing numerous jobs at numerous different job sites. When SEI encounters

a problem at any given job site, the union electrician hired and assigned to that site is naturally the initial on-site decision maker. Sometimes that union electrician is Dene Nelson, but it is often a different union electrician hired by SEI. When the on-site electrician is unable to resolve a particular problem however, the person they contact is Deborah Nelson, not Dene Nelson. (Recording at 19:41.) Dene Nelson, like any other SEI electrician, is only responsible for the job sites assigned to him and at which he is physically present. Finally, on cross examination, Ms. Nelson testified that she oversees projects in person and that she makes on-site visits once per week but often more frequently depending on the need and the type of project in question (Recording at 1:03:11).

Although the testimony offered by Deborah Nelson effectively describes her important role in the operational decision-making process at SEI, the Division is only required to consider materials submitted by the applicant when reaching a determination on a WBE certification or re-certification application. Likewise, in an appeal from a WBE determination, the applicant's presentation of evidence is limited to relevant documentation that was before the Division at the time of the review of the application and denial determination. Therefore, any new information offered subsequently cannot be considered (*see* former 5 NYCRR 144.4[e] and 144.5[a]).

In the instant case, the re-certification application submitted by SEI along with all supplemental materials requested by the Division, do not demonstrate that Deborah Nelson makes decisions pertaining to the operation of the business enterprise. With a future application, however, Division staff would evaluate the merits of information as it relates to applicant's compliance with this eligibility criteria.

Furthermore, at a WBE appeals hearing, the burden is on the applicant to prove that the Division's denial is not supported by substantial evidence. As stated above, the substantial evidence standard merely asks that the Division's determination be "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" (*see* Matter of Ridge Rd. Fire Dist. *supra*).

Based on this record, I find that applicant has failed to demonstrate that the Division's conclusions and factual determinations are unsupported, and I therefore recommend that the Director affirm staff's determination with respect to the eligibility requirements contained in 5 NYCRR 144.2(b)(1).

### III. Working Knowledge

Staff also determined that Ms. Nelson lacks 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 this eligibility criterion, staff considers whether the woman owner can perform the core functions of the business enterprise, which are identified above.

In the period between the submission of applicant's April 23, 2015, recertification application and the Division's December 3, 2018, denial letter, the Division made three separate requests for applicant to provide additional supplemental information. First, on July 26, 2016, Division staff requested that applicant provide business and personal taxes for 2015 including all W-2's, 1099's and schedules as they were submitted to the IRS. Next on November 22, 2017, the Division requested that applicant submit the same set of documents, this time from its 2016 personal and business tax filings. Finally, a request for copies of the same documents from applicant's 2017 tax returns was made by letter dated August 15, 2018, however this time staff also requested "copies of all current licenses, permits, certifications and/or accreditations utilized by [SEI] to conduct business including those held by individuals". (See SEI Exhibit 2 at p. 20.)

Applicant provided the requested documents, to the extent that it claims was possible, in all three instances.<sup>4</sup> Most of the documents requested by the Division and submitted by the applicant are financial documents which are primarily reviewed by the Division to determine if women share in the risks and profits in proportion with their ownership interest in the business enterprise. The only document applicant provided that is responsive to the Division's August 15, 2018, request for "copies of all current licenses, permits, certifications and/or accreditations utilized by [SEI] to conduct business including those held by individuals" is a Certificate of Course Completion issued to Deborah Nelson on April 6, 2009, by the OSHA Education Center at the Rochester Institute of Technology OSHA Education Center, 31 Lomb Memorial Drive, George Eastman Building, Rochester, NY, 14623 (see SEI Exhibit 1). At the hearing, Ms. Nelson testified that no specialized license or certification is required to operate an electrical contracting and installation business such as SEI (Recording at 14:12).

Applicant also offered testimony demonstrating that she does have the working knowledge and ability needed to operate the business enterprise as required by former 5 NYCRR 144.2(b)(1)(ii). For example, Ms. Nelson plays a significant role with respect to the preparation and implementation of contracts, which Division staff considers a core function because it secures work for the business enterprise. During the hearing, Ms. Nelson credibly testified that,

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<sup>4</sup> On August 4, 2016, Ms. Nelson responded to the July 26, 2016, request by uploading files titled, "2015 personal return.pdf", "2015 SEI return.pdf", and "2015 W2.pdf" which are identified in the hearing record as DED Exhibits 4, 5 and 6 respectively. Applicant responded to the November 22, 2017, request for additional documentation on that same day by uploading files titled, "2016 corp taxes.pdf" and "2016 personal taxes (1).pdf" which are identified in the hearing record as DED Exhibits 7 and 8. Finally, on September 10, 2018, applicant responded to the Division's August 15, 2018, request by uploading files titled "2017 Personal Tax Return.pdf", "2017 Sempronius Elect. Tax return.pdf", "NYS45 4<sup>th</sup> Q for 2015 2016 2017.pdf", and "SEI certs memberships.pdf". The documents titled "2017 Personal Tax Return.pdf" and "2017 Sempronius Elect. Tax return.pdf" are identified in the hearing record as DED Exhibits 9 and 10, while the documents titled "SEI certs memberships.pdf." are identified in the hearing record as portions of SEI Exhibit 1. The document titled "NYS45 4<sup>th</sup> Q for 2015 2016 2017.pdf." was not referenced or offered for identification in the hearing record by either party.

as president, she was the only person at SEI with the authority to negotiate and sign contracts and submit bid documents (Recording at 18:26). Furthermore, as already noted in this report, Ms. Nelson drafts estimates for electrical installation work and is the sole employee at SEI with the authority to approve the same. Ms. Nelson also supervises SEI jobs on-site and is the final decision maker and problem solver for the company when things do not go according to plan. (See pp. 8-9 *supra*.)

Although the testimony offered by Deborah Nelson at the hearing arguably demonstrates that she possesses the working knowledge and ability needed to operate the business enterprise as required by former 5 NYCRR 144.2(b)(1)(ii), I note again that the scope of review in this proceeding is limited to the application and materials submitted with the re-certification application. Accordingly, the Divisions determination that applicant failed to meet the criteria was plausible.

Based on this record, I find that applicant has failed to demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate." Based on this record, I therefore recommend that the Director affirm staff's determination with respect to the eligibility requirements contained in 5 NYCRR 144.2(b)(1)(ii).

### CONCLUSIONS

1. With respect to the criteria regarding the sharing of risks and profits in proportion to the woman owner's ownership interest as required by former 5 NYCRR 144.2(c)(2), Sempronius Electric, Inc. did not meet its burden to show that the Division's December 3, 2018, determination to deny the application for WBE re-certification is not based on substantial evidence.
2. With respect to the operational decision-making criteria as required by former 5 NYCRR 144.2(b)(1), Sempronius Electric, Inc. did not meet its burden to show that the Division's December 3, 2018, determination to deny the application for WBE re-certification is not based on substantial evidence.
3. With respect to the working knowledge criteria as required by former 5 NYCRR 144.2(b)(1)(ii), Sempronius Electric, Inc. did not meet its burden to show that the Division's December 3, 2018, determination to deny the application for WBE re-certification is not based on substantial evidence.

### RECOMMENDATION

The Division's determination to deny Sempronius Electric, Inc's application for re-certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**DED File No. 51633**

**Applicant Exhibits (pdf pages 1 – 229)**

Exhibit No.	Description	pdf page Nos.
SEI 1	Licenses, permits, certifications and/or accreditation's of SEI	1 - 11
SEI 2	SEI recertification application dated April 23, 2015.	12 - 24
SEI 3	Letter (undated) from SEI to DED concerning certified business description of SEI	25 - 27
SEI 4	Historical examples of SEI proposals and quotes	28 - 44
SEI 5*	By-laws of Sempronius Electric, Inc.	45 - 52
SEI 6*	Certification application of SEI sworn to June 16, 2008	53 - 82
SEI 7	Annual minutes of board of directors of SEI January 2013 through 2017	83 - 89
SEI 8	SEI tax documents for the years 2015, 2016 and 2017	90 - 229

\*note: SEI exhibits 5 and 6 were both labeled as "Applicant/Appellant Exhibit 6". The exhibits, however, appear as the fifth and sixth exhibit in applicant's pdf. They have been renumbered accordingly for the purposes of this chart.

**DED Exhibits (pdf pages 1 – 321)**

Exhibit No.	Description	pdf page Nos.
DED 1	M/WBE Certification Application	1 - 11
DED 2	Denial letter for WBE application dated December 3, 2018	12 - 17
DED 3	Letter from applicant dated October 19, 2008	18 - 22
DED 4	2015 personal tax return	23 - 54
DED 5	2015 corporate tax return	55 - 99
DED 6	2015 W2	100 - 101
DED 7	2016 corporate tax return	102 - 169
DED 8	2016 personal tax return	170 - 258
DED 9	2017 personal tax return	259 - 282
DED 10	2017 corporate tax return	283 - 311
DED 11	SEI Payroll (January 1, 2015 through March 30, 2015)	312 - 313
DED 12	DED notice of hearing appeal letter dated May 5, 2022	314 - 318
DED 13	Certification Affidavit of Deborah Nelson sworn to March 27, 2015	319 - 321