

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

In the Matter

- of -

the Application of

**Solar Energy Haus, Inc., dba Energy Haus**

For recertification as a Minority and Woman-owned  
Business Enterprise pursuant to Executive Law Article 15-A.

NYS DED File ID NO.: 54857

**RECOMMENDED ORDER**

Marshall H. Day  
Administrative Law Judge

4/5/2023

## 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 ("DED" or "Department") to deny the application filed by Solar Energy Haus, Inc., dba Energy Haus (hereafter; "Solar Energy" or "Appellant") for recertification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

## PROCEEDINGS

Solar Energy applied for recertification as a woman-owned business enterprise on July 8, 2016. *See*, Exhibit (Ex.) DED 1. By letter dated November 25, 2019, the Division determined that Solar Energy does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application (5 NYCRR § 140-147)<sup>1</sup>. Ex. DED 2. The grounds for the Division's determination were:

- Pursuant to § 144.2(c)(2) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), the woman owner does not share in the risks and profits in proportion with her ownership interest in the business enterprise.
- Pursuant § 144.2(b)(1)(i) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), the woman owner did not demonstrate that she had adequate managerial experience or technical competence to operate the business enterprise seeking certification.

By an undated letter received by the Division on December 27, 2019, Kimberly Bauer, President, wrote requesting an appeal from the Division's determination to deny Solar Energy's application for WBE recertification. Ex. DED 11. Pursuant to Solar Energy's decision to pursue

---

<sup>1</sup> The Division's November 19, 2019, denial determination and Appellant's December 27, 2019, appeal pre-date the December 2, 2020, amendments made to 5 NYCRR Parts 140 et al. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this response.

its appeal in writing, by letter dated January 16, 2020, the Division notified Solar Energy that its written appeal was due by March 16, 2020. Ex. DED 3. DED received Solar Energy's timely written appeal on March 11, 2020. With its appeal Solar Energy (APP) provided a three-part written submission covering multiple items not included in the original application package. Ex. AAP 1. In the Division's responding papers, Attorney JaMone Turner stated that the Appellant's written submittals were not provided with the company's application for recertification and therefore, should not be considered pursuant to 5 NYCRR § 144.4(e).

Respondent DED, by counsel JaMone Turner, submitted its response to the appeal dated December 6, 2022. This response includes the affidavit (Aff.) of Robyn Clarke, an Associate Certification Analyst for the Division. Ms. Clarke's duties at the Division include examination and review of applications that are received from business entities that seek to be certified as Minority and Women-owned Businesses. Aff., ¶ 1. Attached to Ms. Clarke's affidavit are the Division's exhibits 1-12. In addition, Mr. Turner submitted the Division's Memorandum of Law in Response to the Appeal (MOL) dated December 6, 2022.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to recertification as a woman-owned business enterprise are set forth in the regulations (*See*, former 5 NYCRR § 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself and information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR § 144.4(e).

### **STANDARD OF REVIEW**

On this administrative appeal, appellant bears the burden of proof to establish that the Division's denial of the application for WBE recertification is not supported by substantial

evidence (*See*, State Administrative Procedure Act § 306[1]). The substantial evidence standard “demands only that a given inference is reasonable and plausible, not necessarily the most probable,” and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation and citations omitted]).

## **POSITIONS OF THE PARTIES**

### The Division

The Division denied the application filed by Solar Energy for recertification as a woman-owned business enterprise with a letter dated November 25, 2019. *See*, Ex. DED 2. The Division determined that Solar Energy failed to demonstrate: (1) the woman owner shares in the risks and profits in proportion with her ownership interest in the business enterprise, and (2) the woman owner relied upon for certification has demonstrated adequate managerial experience or technical competence to operate the business enterprise seeking certification as required by 5 NYCRR §§ 144.2(c)(2) and 144 (b)(1)(i).

The Division concluded that Ms. Bauer failed to establish adherence to these requirements at the time Solar Energy’s Application was submitted to the Division.

Regarding the first basis of denial, Solar Energy’s Application establishes that Ms. Kimberly Bauer owns 60% of the outstanding common stock of Solar Energy and her husband, Mr. Ronald Bauer, owns 40% of the outstanding common stock. *See*, Ex. DED 1. In support of the Application, and to assist in meeting this portion of the regulations, Ms. Bauer provided copies of her, and her husband’s Form W-2 wage and tax statements for years 2015 through 2018. *See*, Exs. DED 5, 6, 7, and 8. The Division used the W-2 wage information for the years enumerated to compare the compensation between the owners to see if it coincided with the equity interests outlined above, and determined that it did not match, because those W-2 wage statements showed that Mr. Bauer was the recipient of a greater annual share of income from the

business during those years then Ms Bauer received. The Division used this comparison in compensation between the owners as its main basis of support that Ms. Bauer did not share in the risks and profits in proportion with their ownership interest in the business enterprise as the non-qualifying owner received a greater share of profit from the business than the qualifying owner, making Solar Energy ineligible for recertification.

Regarding the second basis of denial, the Division went on to conclude that Ms. Bauer did not demonstrate adequate managerial or technical competence to operate the business at the time Solar Energy' application was submitted to the Division. Solar Energy is a construction related entity which provides energy consulting services. Its core revenue generating functions, include, but are not limited to, energy and environmental consulting service, solar panel installation, duct work (e.g., cooling, dust collection, exhaust, heating, ventilation) installation, and dry wall installation. *See, Ex. DED 1 § 5.* Solar Energy submitted the resumes of Mr. and Ms. Bauer in support of their application. Ms. Bauer's resume states she has "over 30 years of experience in accounting and business administration" and is responsible for hiring employees, maintaining records and billing, among other duties. While Mr. Bauer's resume states he has nearly two decades of technical expertise to manage the core functions of the business related to day-to-day operations, installations, energy assessments, and the delivery of special trade construction services. The Division contrasted the experience listed in the resumes of the two owners to finally conclude that Ms. Bauer is responsible for managing the administrative and financial functions of the business while Mr. Bauer has the necessary expertise to manage the core functions of the business related the energy assessment and the delivery of construction services.

Additionally, the Division argues that the extensive submissions of Solar Energy on its appeal were not part of its application and therefore, could not be considered on this review.

### Solar Energy

In its appeal received by the Division on September 8, 2017, Ms. Bauer explained in her letter that she is 100% vested in the company. That she solicits, signs and is liable for every

contract the company enters into, that she is everyone's point of contact and she is responsible for every bid the company submits. Going on to state that her husband who is a 40% owner of the company had not solicited a contract or bid, or signed any documents as a responsible party in over ten years. Further stating "I believe its discriminatory that just because I am not the general contractor working on the job, I am less involved and bear less of the liability." Ms. Bauer states that she uses her husband Ron to complete the work required in administering an energy audit and if there is an insulation required.

Throughout her letter she claims that she is the primary decision maker and key person and risk taker because she alone signs all the contracts and if something is not being done right, she is the person who is contacted. Finally, she states in her appeal response that: "I so share in the profits by recognizing 60 percent of the income. Please note there is no-where in IRS code that says owners must recognize wages in the same proportion as ownership." That she paid her husband more because he had the dirtier job, not because he did more work, and in the end it didn't matter who got paid more because they file jointly. What is relevant according to Ms. Bauer is that she is the person who solicits each of contracts and signs her name as the responsible person.

In regard to managerial responsibility, Ms. Bauer states she takes care of all the administrative functions of the business; completing bids, RFP's, contracts, accreditations, licenses, insurance, staffing, appointments, scheduling, pricing, vouchering and submitting required forms to get paid. "In the nutshell I run everything short of conducting the energy audit myself." That since she performs all these administrative functions as the responsible party to all the contracts and bids Solar Energy enters into, this proves that she doesn't need her husband's certifications or knowledge to fulfill the companies contract obligations.

## **FINDINGS OF FACT**

1. Solar Energy is located at 6 Chicago Place, Huntington Station, New York. Ex. DED 1, § 1 E.

2. The company operates as a Construction Special Trade Contractor specializing in Building Performance Services (i.e., energy auditing and energy efficiency). Additional services include solar panel installation, duct work (e.g., cooling, dust collection, exhaust, heating, ventilation) installation, dry-wall and insulation. Ex. DED 1, §§ 5A, 5B, 5C.
3. Ms. Kimberly Bauer owns sixty percent (60%) of the outstanding common stock of Solar Energy and is the principal upon whom the WBE certification is based due to her status as a woman. Ex. DED 1, § 3 A
4. Mr. Ronald Baur, the owner of forty percent (40%) of the outstanding common stock of Solar Energy. Ex. DED 1, § 3 A
5. W-2 wage and tax statements for Ms. Kimberly Baur show that she received a salary from the applicant business in the amount of \$ [REDACTED] in 2015, \$ [REDACTED] in 2016, \$ [REDACTED] in 2017, and \$ [REDACTED] in 2018. In contrast, Mr. Ronald Baur received a salary from the applicant business of \$ [REDACTED] in 2015, \$ [REDACTED] in 2016, \$ [REDACTED] in 2017 and \$ [REDACTED] in 2018. Exs. DED 5, 6, 7 and 8.
6. Yearly Form W-2 Wage and Tax Statements from a secondary source included with the application dated 2013 through 2018 show that Ms. Kimberly Bauer has maintained outside employment with the accounting firm, Adams & Becker P.C. Exs. DED 5, 6 and 8.
7. A completed personal income tax return included with the application states that Mr. Ronald Bauer is a contractor and Ms. Kimberly Bauer is an accountant /executive. Ex. DED 10.
8. According to Ms. Bauer's resume and narratives provided with the application, Ms. Bauer has over thirty (30) years of general office management and financial accounting experience. Ex. DED 9

9. Mr. Ronald Bauer's resume states that he is certified by the Building Performance Institute as a Building Analyst, Envelope Professional, Heating Professional, and Air Conditioning and Heat Pump Professional. He is also a NASBAP - Certified Sustainable Building Advisor. Mr. Bauer's additional technical expertise includes solar electric, solar hot water, solar pool technology, and solar panel installation. He also holds more than one county home improvement contracting license, and is certified to handle lead based paints. *Id.*
  
10. According to his resume, licenses, and certifications included with the application, Mr. Ronald Bauer has nearly two decades of the necessary technical expertise to manage the core functions of the business related to day-to-day operations, energy assessments, and the delivery of special trade construction services. *Id.*

## **DISCUSSION**

This recommended order considers Solar Energy's appeal from the Division's November 25, 2019, determination to deny Solar Energy's application for recertification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in the regulations. (*See*, former 5 NYCRR § 144.2). According to the Division's November 25, 2019 denial letter (*See*, Ex. DED 2), Solar Energy did not demonstrate that (1) the woman owner shared in the risks and profits in proportion with her ownership interest in the business enterprise; and (2) that the woman owner had adequate managerial experience or technical competence in the business enterprise seeking recertification as required by 5 NYCRR §§ 144.2(c)(2) and 144(b)(1)(i).

## I. Ownership

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. Despite Ms. Bauer's objection here, the Division has consistently held that the woman-owner must realize the majority of profits from the business enterprise to satisfy this criterion.<sup>2</sup>

In response to document requests from Division staff, Ms. Bauer provided copies of her, and husband's W-2 wage and tax statements showing that she received a salary from the applicant business in the amount of \$ [REDACTED] in 2015, \$ [REDACTED] in 2016, \$ [REDACTED] in 2017, and \$ [REDACTED] in 2018. In contrast, Mr. Ronald Baur received a salary from the applicant business of \$ [REDACTED] in 2015, \$ [REDACTED] in 2016, \$ [REDACTED] in 2017 and \$ [REDACTED] in 2018.

For all the years enumerated, the W-2 wage compensation that Mr. Bauer received was greater than the W-2 wage compensation that Ms. Bauer, the woman-owner of the business enterprise, received.

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 Solar Energy's application for WBE recertification, was substantial evidence to support the Division's consideration of whether a woman-owned business enterprise meets the eligibility criterion at former 5 NYCRR 144.2(c)(2).

---

<sup>2</sup> 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 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.

Solar Energy also provided their 2017 Federal Corporate Income Tax Return (Form 1120 S) and their 2016 New York State Resident Income Tax Return (IT-201)<sup>3</sup>. Exs. DED 4 and 10. The 2017 Federal Return shows the company filed as a S Corporation for informational and tax purposes. An S Corporation is a pass-through entity, meaning S Corporations are corporations that elect to pass corporate income, losses, deductions, and credits through to their shareholders for tax purposes. Shareholders of S Corporations report the pass-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates as opposed to being taxed at the higher corporate tax rate, avoiding double taxation. Owners of S Corporations can also qualify as employees of the business and receive W-2 wage and tax statements showing their earnings. When assessing whether an owner shares in the risks and profits in proportion to her ownership interest in this type of business enterprise, the assessment should encompass both forms of income; first taking into consideration the amount of W-2 wages received by the corporate officers/shareholders, and second taking into consideration the amount of ordinary business income passed through and received by those same officers/shareholders (owner) of that business. Both of these sources are considered income to the shareholder but are taxed differently. The wage information is taken off of the W-2 statements and the pass-through information can be garnered off of Schedule K-1 attached to the Corporate Return, Form 1120S, then this business income or shareholder's share and W-2 wage information must be compared to the individual tax return for that year to see if the total amount income received and reported (whether profit or loss) match the shareholders' equity interests in the business.

For example, in 2017, there were W-2 wages from the corporation of \$ [REDACTED] for Ms. Bauer and \$ [REDACTED] for Mr. Bauer<sup>4</sup>, and ordinary business income from the corporate return of \$ [REDACTED]. Schedule K-1 of Form 1120S shows that Ms. Bauer received a shareholder share of current year income of \$ [REDACTED] and Mr. Bauer received a shareholder share of \$ [REDACTED] (60%

---

<sup>3</sup> Although the 2016 NYS Return was provided, the associated Federal Schedule E, Form 1040, required to be attached to that form was excluded, as well as the Federal Corporate return and Schedule K-1 for that tax year. The failure of the Appellant to include these documents, inhibits the review and makes the tax documents submitted incomplete.

<sup>4</sup> The \$54,000.00 combined salary of Mr. and Mrs. Bauer is consistent with the total compensation of officers listed on line 7 of Form 1120S.

and 40%, respectively from the ordinary business income of \$ [REDACTED] )<sup>5</sup>. This additional amount should have been included on their Federal U.S. Individual Tax Return (Form 1040 and Schedule E, both of which the appellant failed to provide) to show all income from every source derived. Even given the owners the benefit of the doubt, without all the information they should have provided to make a valid assessment of the risks and/or profits of the business, the person relied upon for certification did not fully share in the risks and profits of the business enterprise for which certification is sought in proportion to her ownership interest therein. Combining the totals above, Mr. Bauer still would have received a greater proportional share of W-2 wages and business income than Ms. Bauer (\$ [REDACTED] and \$ [REDACTED], respectfully)<sup>6</sup>, and as pointed out in the prior Recommended Orders alluded to above, the business is not eligible for WBE status based on the disparity in compensation between the qualifying and non-qualifying individuals when the non-qualifying individuals share is greater.

Although it was requested, Solar Energy did not provide the complete corporate and individual tax returns to the Division for the tax years 2015, 2016 and 2017, and without the benefit of being able to access the multiple corporate and individual tax returns to make a proper assessment of the profits and/or losses of the business, the appellant fails to meet their burden and their appeal fails.

Based on the entirety of the record regarding this issue, I conclude that staff's determination that Solar Energy did not demonstrate that the woman-owner shares in the risks

---

<sup>5</sup> In this case there was 200 outstanding shares of the corporation, 120 shares held by Ms. Bauer and 80 shares held by Mr. Bauer, a 60/40 split. Distributions mentioned on the K-1 are also slightly different than the business income, but still maintain the 60/40 split. Consistent with loans and health insurance apportionments listed on the K-1.

<sup>6</sup> This ties into Ms. Bauer's statement that "I so share in the profits by recognizing 60 percent of the income. Please note there is no where in IRS code that says owners must recognize wages in the same proportion as ownership.", although maybe not clearly stated, this statement is correct, the Internal Revenue Code regulating S Corporations (essentially small corporations with shareholders of 100 or less) does not regulate the wages paid to an employee/officer of the corporation, however wages paid to an officer/shareholder does affect the overall ordinary income received by the shareholders of that company (the more W-2 wages taken by the employees/officers/shareholders the less ordinary income earned by the corporation and passed through), and when these two income sources received by the shareholders are combined it ultimately ties into the assessment of whether the woman-owner shares in the risks and profits of the business enterprise in proportion to her ownership interest as required under the regulatory provisions governing the MBE certification program.

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. Managerial Experience

The applicable regulatory criteria state that the woman owner “must have adequate managerial experience of technical competence in the business enterprise seeking certification [and] must demonstrate the working knowledge and ability needed to operate the business enterprise.” 5 NYCRR § 144.2(b)(1)(i). To evaluate compliance with these eligibility criteria, Division staff consider whether the woman owner can perform the core functions of the business enterprise. Staff will review responses to information requests, tasks performed, as well as the owners’ and employees’ résumés. This specific company operates as a Construction Special Trade Contractor specializing in Building Performance Services (i.e., energy auditing and energy efficiency). Additional services include solar panel installation, duct work (e.g., cooling, dust collection, exhaust, heating, ventilation) installation, dry-wall and insulation, none of which Ms. Bauer performed. Ms. Bauer is primarily responsible for managing the administrative and financial functions of the business enterprise, and according to her resume and narratives provided with the application, Ms. Kimberly Bauer has over thirty (30) years of general office management and financial accounting experience. She has no relevant technical expertise in the core revenue generating functions of the business enterprise.

According to Ronald Bauer’s resume, licenses, and certifications included with the application, Mr. Bauer has nearly two decades of the necessary technical expertise to manage the core revenue generating functions of the business related to day-to-day operations, energy assessments, and the delivery of special trade construction services. Ex. DED 9.

Mr. Bauer’s resume also states that he is certified by the Building Performance Institute as a Building Analyst, Envelope Professional, Heating Professional, and Air Conditioning and Heat Pump Professional. He is also a NASBAP - Certified Sustainable Building Advisor. Mr. Bauer’s additional technical expertise includes solar electric, solar hot water, solar pool technology, and

solar panel installation. He also holds more than one county home improvement contracting license, and is certified to handle lead-based paints. *Id.*

While Ms. Bauer sets forth in her submittals on Solar Energy's appeal that she is the owner and individual principally in charge of administrative and financial functions of the business entity and the chief contact person who contracts with all the outside vendors, she does not perform or have the necessary expertise associated with the core function of the business. Those functions reside with her husband, Ronald, who according to this resume provides the actual energy assessments and delivery of the construction services. As alluded to above, his resume specifically states he is hands on in running the day-to-day operations of the business; installing solar panels, training personnel, ordering material, setting appointments, and marketing/advertising. All the key aspects of core function of the business which drives the revenue generating aspect of the businesses allowing the corporation the ability to thrive. *Id.*

Accordingly, I conclude that the application and supporting materials before the Division at the time it made its determination did not demonstrate that Kimberly Bauer has adequate managerial experience or technical competence to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(i)<sup>7</sup>.

## CONCLUSION

1. With respect to the operation criterion at 5 NYCRR § 144.2(c)(2), Solar Energy did not meet its burden to show that the Division's November 25, 2019 determination to deny the application for WBE recertification is not based on substantial evidence.

---

<sup>7</sup> Please note, the vast majority of the appellant's submittals were not included in the initial recertification application and outlined information which occurred years after the application process began. Although reviewed, these documents proffered for the first time on appeal, added no clarity on the issues presented and were not considered in this recommendation. Additional documents submitted and relied upon for the first time on appeal should not be considered unless it serves to explain and clarify technical terms and documentation the petitioner had submitted as part of its application. *Scherzi Sys., LLC v. White*, (197 A.D.3d 1466 [3d Dept 2021]).

2. With respect to the managerial criterion at 5 NYCRR § 144.2(b)(1)(i), Solar Energy did not meet its burden to show that the Division's November 25, 2019 determination to deny the application for WBE recertification is not based on substantial evidence.

### **RECOMMENDATION**

Based upon the administrative record as a whole, the Division's determination to deny Solar Energy's application for recertification as a woman owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

In the Matter of Solar Energy Haus, Inc., dba Energy Haus  
 DED File ID No. 48550  
 Exhibit Chart

| Exhibit #: | Description of the Exhibits                        |
|------------|--|
| APP 1      | Three Part Written Submittal - undated             |
| DED 1      | Reapplication for Certification - 07/08/2016       |
| DED 2      | Denial Letter – 11/25/2019                         |
| DED 3      | Notice to Proceed with Written Appeal – 01/16/2020 |
| DED 4      | 2017 Corporate Income Tax Returns                  |
| DED 5      | 2015 W-2 Forms                                     |
| DED 6      | 2016 W-2 Forms                                     |
| DED 7      | 2017 W-2 Forms                                     |
| DED 8      | 2018 W-2 Forms                                     |
| DED 9      | Resumes  |
| DED 10     | 2016 Resident Income Tax Return                    |
| DED 11     | Applicant’s Notice of Appeal Letter - undated      |
| DED 12     | Applicant’s Appeal Letter Response                 |