

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

In the Matter

- of -

**the Application of Suffolk Systems, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 57013

RECOMMENDED ORDER

-by-

**David A. Murad
Administrative Law Judge
March 30, 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 to deny the application filed by Suffolk Systems, Inc. (SSI or applicant), for recertification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

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

Lori Kempf, as the president, applied on behalf of SSI for recertification as a WBE on January 13, 2017 (DED 1). In a letter dated April 21, 2020, the Division denied SSI's application (DED 2) and set forth five grounds for the denial.¹ SSI timely filed a notice of appeal on May 1, 2020 (APP 1/ DED 3). A notice to proceed by written appeal was sent to SSI on May 19, 2021 (DED 3). Applicant submitted its written appeal by letter dated July 15, 2021 (APP 2/ DED 4). The Division responded with papers dated February 16, 2023. 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 review 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 April 21, 2020 denial letter.

¹ The Division's denial determination and applicant's written 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.

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 SSI 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 April 21, 2020, denial letter, Division staff stated that SSI failed to meet five of the criteria for WBE certification set forth in former 5 NYCRR 144.2 concerning Lori Kempf's ownership and operation of the business enterprise. With respect to ownership, staff concluded that Ms. Kempf, 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 SSI did not demonstrate that Ms. Kempf 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). (DED 2.)

With respect to operations, Division staff concluded further that SSI 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). Staff also determined that Ms. Kempf, 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). (DED 2.)

Suffolk Systems, Inc.

Applicant states that Lori Kempf was gifted her 100 percent interest in SSI from her husband, Michael Kempf (APP 1,2, /DED 4). Applicant argues that Ms. Kempf's contribution to her equity interest is irrelevant and is not indicative of her interest in SSI (*id.*). Applicant states that Ms. Kempf "has many years of sweat equity" in SSI and is the "ultimate authority in every single decision" for the business (*id.*).

With regard to salary, applicant concedes that Ms. Kempf's salary is substantially lower than that of her employee, Daniel Gerardi, but argues that this is justified because "his salary is determined by the union guidelines and their pay scale" and the difference in salaries "is not indicative of our status or our responsibilities to the company" (APP 1).

FINDINGS OF FACT

1. SSI is based in Huntington Station, New York. SSI provides heating and air conditioning contracting services (DED 1).
2. SSI was established in 1983 by Michael Kempf. He was the sole shareholder of the business until May 19, 2003, when he transferred by gift 100 percent ownership to Lori Kempf (id). No additional documentation was offered to demonstrate that Ms. Kempf made any contributions in the form of money, property, equipment or expertise.
3. Lori Kempf is the President and sole shareholder of SSI (id).
4. Lori Kempf's duties include customer assistance, scheduling, purchasing, accounts payable and receivable, and other administrative duties. Prior to working at SSI, she was a Service Manager at Pep Boys, Inc. and Office Manager at BCI Industrial Catering (DED 17).
5. Daniel Gerardi has been employed at SSI since 2001. He is responsible for designing, quoting, servicing and installing HVAC systems. He has worked in construction, HVAC and sales since 1998 (DED 16).
6. Applicant submitted several years of corporate and personal tax returns (DED 5 -DED 14). While the business reported revenue ranging from \$██████ to \$██████, Ms. Kempf reported wages of \$██████ every year except 2015, when she reported wages of \$██████ (id.).
7. In 2019, Mr. Gerardi was compensated \$██████, which is substantially more than Ms. Kempf's wages (DED 15).

DISCUSSION

This recommended order considers applicant's appeal from the Division's determination to deny the recertification of SSI 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 five bases for the denial with respect to the ownership and operation of the business enterprise. Specifically, the Division contended that:

1. Lori Kempf'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);
4. Ms. Kempf, 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
5. Ms. Kempf 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.

The Division argues that applicant failed to demonstrate that Lori Kempf made contributions to SSI in proportion to her ownership interest in the business as required under former 5 NYCRR 144.2(a)(1). Specifically, the Division states it is undisputed that Ms. Kempf was gifted her ownership interest in SSI from her husband, Michael Kempf (DED 1, 19). Applicant submitted no other documents to demonstrate that Ms. Kempf made any contributions in the form of money, property, equipment or expertise to the business. The Division states that Ms. Kempf's claim that her "sweat equity" was in exchange for her equity interest is unavailing since she was compensated for her labor and she has offered no documentation indicating any agreement to provide labor as consideration for her equity interest.

On the record, I conclude that the Division’s determination to deny the application on the basis that SSI failed to demonstrate that Lori Kempf made contributions to SSI in proportion to her ownership interest, as required under former 5 NYCRR 144.2(a)(1) is supported by substantial evidence.

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.

As previously noted, Ms. Kempf holds a 100 percent ownership interest in SSI. Division staff argues that Ms. Kempf’s compensation from SSI is not proportionate to her 100 percent ownership interest in the business. Staff asserts that Ms. Kempf’s compensation has been consistently at or around \$ [REDACTED] from 2013 to 2019 (DED 5 -15) and Mr. Gerardi’s compensation for 2019 was \$ [REDACTED] (DED 15). During that period, SSI reported revenue between \$ [REDACTED] and \$ [REDACTED] (id.). No other documentation was submitted establishing any share in the risks and profits proportional with her ownership interest.

SSI concedes that Ms. Kempf’s salary is lower than that of Mr. Gerardi, but argues that the disparity is justified because, unlike Ms. Kempf, Mr. Gerardi’s salary is based upon union pay scales. The arguments raised by applicant do not undermine the Division’s determination that Ms. Kempf does not share in the risks and profits of SSI in proportion to her ownership interest. The wage and compensation documentation that was before the Division at the time of the denial supports the Division’s determination on this issue, and applicant did not proffer evidence of other compensation.

On the record, I conclude that the Division’s determination to deny the application on the basis that SSI failed to demonstrate that Lori Kempf shared in the risks and profits in proportion to her ownership interest, as required under former 5 NYCRR 144.2(c)(2) is supported by substantial evidence.

II. Operations

The Division cites three separate operational criteria under former 5 NYCRR 144.2(b) as bases for the denial (DED 2). The operational criteria are as follows:

1. “...women do not make decisions pertaining to the operation of the business enterprise. [Former] 5 NYCRR 144.2(b)(1)”;

2. "...women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(i)"; and
3. ...women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise. [Former] 5 NYCRR 144.2(b)(1)(ii)".

To determine who makes decisions pertaining to an enterprise's operations, the Division first identifies the core revenue generating functions of the enterprise, and then assesses who within the enterprise is primarily responsible for performing those functions and who has the expertise and knowledge necessary to perform an oversee those functions.

The Division states that SSI performs HVAC work. Ms. Kempf's resume indicates that she performs the administrative work for the applicant business, including scheduling, purchasing, accounting and registering equipment for customers (DED 17). In contrast, Mr. Gerardi's resume indicates that he is responsible for designing, quoting, servicing and installing HVAC systems (DED 16). He also supervises field operations (id.).

Mr. Gerardi is responsible for performing the core revenue generating functions of SSI and has the expertise and knowledge necessary to perform those functions. Ms. Kempf has no direct HVAC experience and is responsible for the administrative aspects of the business.

Applicant submitted additional documents for this appeal:

1. July 8, 2020 correspondence from SSI's accountant;
2. July 13, 2020 correspondence from S.W. Anderson;
3. July 14, 2020 correspondence from a plumbing supply company;
4. July 13, 2020 correspondence from Johnstone Supply;
5. Amended copy of Ms. Kempf's resume; and
6. Metal Trades Branch Wage Rate Notice.

These documents will be disregarded in their entirety since they were not before the Division during its review of the application and are dated after the denial and therefore not relevant. See *In Re: The Application of Lido Strategic Solutions, Inc.* (DED File no. 60212) (March 6, 2019) (recommended order declining to consider documents offered by the applicant on appeal that were not part of the application and thus not before DED at the time of denial), adopted on June 5, 2019 (Final Order).

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Lori Kempf does not (i) make decisions pertaining to the operation of the business enterprise, as required under former 5 NYCRR 144.2(b)(1); (ii) have adequate managerial experience or technical competence to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(i); and (iii) have the working knowledge and ability needed to operate the business enterprise, as required under former 5 NYCRR 144.2(b)(1)(ii).

CONCLUSION

Suffolk Systems, 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 Suffolk Systems, Inc's application for recertification as a woman-owned business enterprise.

Division of Minority and Women's Business Development

Parties' Papers
Matter of Suffolk Systems, Inc.
NYS DED File No 57013

- I. Applicant's papers
 1. APP 1 - Applicant's Notice of Appeal date May 1, 2020
 2. APP 2 -Applicant's Appeal letter dated July 19, 2020

- II. Division's Papers
 - A. Declaration of Raymond Emanuel dated February 16, 2023 with attached Exhibits DED 1 through DED 19.
 1. DED 1 – Application for Recertification dated January 13, 2017
 2. DED 2 – Division's denial letter dated April 21, 2020
 3. DED 3 – Division's instructions for filing written appeal dated May 19, 2020
 4. DED 4 – Applicant's Appeal Submission (*See APP 2*)
 5. DED 5 – SSI's 2013 tax return
 6. DED 6 – Ms. Kempf's 2014 tax return
 7. DED 7 – SSI's 2014 tax return
 8. DED 8 – Ms. Kempf's 2015 tax return
 9. DED 9 – SSI's 2015 tax return
 10. DED 10 -Ms. Kempf's 2016 tax return
 11. DED 11- SSI's 2016 tax return
 12. DED 12 -Ms. Kempf's 2018 tax return

13. DED 13 – SSI’s 2018 tax return
14. DED 14- Ms. Kempf’s 2019 tax return
15. DED 15- Mr. Gerardi’s 2019 W-2
16. DED 16- Mr. Gerardi’s resume
17. DED 17- Ms. Kempf’s resume
18. DED 18- SSI’s narrative response dated January 28, 2020
19. DED 19 – Stock Transfer Agreement

B. Brief in Response to the Appeal of Suffolk Systems, Inc., dated March 13, 2023

