

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

In the Matter

- of -

**the Application of Switchgear Power Systems, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 63890

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
June 9, 2023**

This matter considers the written appeal by Switchgear Power Systems, LLC (“SPS”, or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR parts 140-144), challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. Marisa Shallbetter, as the CEO, applied on behalf of SPS for certification as a WBE on July 31, 2018 (DED Exhibit 1).
2. In a letter dated April 21, 2020, the Division denied SPS’s application (DED Exhibit 2) and set forth four grounds for the denial:
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2);
 - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(i); and

- (d) Minority group members or women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(ii).
3. SPS timely filed a notice of appeal on July 20, 2020 (APP Exhibit 1).
 4. A notice to proceed by written appeal was sent to SPS on August 4, 2020 (DED Exhibit 3).
 5. Applicant submitted its written appeal by letter dated October 27, 2020 (APP Exhibit 2).
 6. The Division responded by filing an Affidavit of Matthew LeFebvre dated March 27, 2023 and a brief submitted by Michael Livolsi, Esq., counsel for the Division, dated April 6, 2023.

FINDINGS OF FACT

7. SPS manufactures customized medium voltage switchgear and switchgear enclosures, located in Winneconne, Wisconsin (DED Exhibit 1).
8. SPS was founded by Gregory Shallbetter as 100% owner in 2007. His equity contribution was \$ [REDACTED] (DED Exhibit 1).
9. Mr. Shallbetter gifted 51% ownership interest in SPS to Marisa Shallbetter on January 1, 2015 (DED Exhibits 1, 5 and 8).
10. Mr. Shallbetter earned a degree in Advanced Electrical Studies in 1981. He previously managed the fabrication and assembly departments at Shallbetter Industries, Inc. as Shop Foreman. He was National Sales Manager for SBI Huron. He served as Vice President of Marketing for SBI Huron and as President of SBI Oshkosh. He also served as Vice President of Sales for Multicircuits, a firm that sold printed circuit boards (DED Exhibits 1, 7 and 8).

11. Ms. Shallbetter was a homemaker from 1990 to 2006. She has a Degree in Business Administration. She previously worked as an administrative assistant, as Director of Sales for a hotel and as a real estate agent (DED Exhibits 1, 6 and 8).

APPLICABLE LAW

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

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

5 NYCRR former §144.2(c)(2) states as follows:

...The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

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

Decisions pertaining to the operations of the business enterprise must be made by... women claiming ownership of that business enterprise. The following will be considered in this regard:

- (i) ...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
- (ii) ...women must demonstrate the working knowledge and ability needed to operate the business enterprise...

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

The review is limited to such information that was before the Division at the time of the denial determination (5 NYCRR §145.2(b)(1). Evidence that seeks to clarify or explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

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

DISCUSSION

I. Ownership

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

Ms. Shallbetter made no contribution for her equity interest which she received in 2015 (DED Exhibits 1 and 8). Applicant takes the position that her capital contribution is marital property as the result of her marital status under the community property laws of the State of Wisconsin (APP Exhibit 2). It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR former §144.2(a)(1). See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017).

Even under applicant's argument regarding her ownership status under the Wisconsin community property laws, Ms. Shallbetter would only be a 50% owner and therefore not qualify as a majority owner (APP Exhibit 2). Also, applicant submitted a Transfer of Ownership Agreement, reflecting no monetary consideration, which establishes that prior to the agreement, the membership interest was separate (DED Exhibit 5).

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

5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

Applicant submitted a loan document dated December 23, 2015, which identified Mr. Shallbetter as the sole owner and member of SPS and listed him as the sole guarantor (DED Exhibit 10). This debt was incurred when Ms. Shallbetter was a 51% owner and was not also guaranteed by Ms. Shallbetter. This financial record shows a disparity in risk and reward that does not reflect a majority ownership by the woman-owner. Applicant argues that it is "grossly unfair" to rely upon this financial document when Ms. Shallbetter signed other debt agreements (APP Exhibit 2). This does not contradict the fact that the December 23, 2015 loan agreement was incurred while Ms. Shallbetter was a 51% owner and was guaranteed only by Mr. Shallbetter. (DED Exhibit 10)

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

II. Operation

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

Regarding technical competence, where the woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division's determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

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

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

Mr. Shallbetter is responsible for the day to day, core revenue generating functions of the business, the actual work done on the projects, and technical aspects of the projects. He is the person with the technical expertise and training. He has a degree in Advanced Electrical Studies, which he received in 1981. He managed the fabrication and assembly departments at Shallbetter Industries, Inc. as Shop Foreman. He worked as National Sales Manager for SBI

Huron, as Vice President of Marketing at SBI Huron, and as President of SBI Oshkosh. He also worked as Vice President of Sales for Multicircuits, a firm that sold printed circuit boards (DED Exhibits 1,7 and 8).

Ms. Shallbetter was a homemaker from 1990 to 2006. She has a degree in Business Administration. She also worked as an administrative assistant, as the Director of Sales for a hotel and as a real estate agent. Her responsibilities are deciding which jobs SPS will do and what price and units will be used to estimate the project, holding weekly meetings to assess performance, negotiating contracts and purchase orders, hiring and firing, and sales and business development (DED 1, 6 and 8). These are primarily administrative tasks and do not exhibit how Ms. Shallbetter has the technical or managerial knowledge or experience to supervise technical staff.

CONCLUSION

Switchgear Power Systems, LLC did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §§144.2(a)(1), 144.2(c)(2), 144.2(b)(1)(i) 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 Switchgear Power System's application for certification as a woman-owned business enterprise.

In the Matter of Switchgear Power Systems, LLC
 DED File ID No. 63890
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification –7/31/2018
DED 2	Denial Letter – 4/21/2020
DED 3	Notice to Proceed via Written Appeal – 8/4/2020
DED 4	Resolution Authorizing Ownership Transfer
DED 5	Ownership Interest Transfer Agreement
DED 6	Marisa Shallbetter Resume
DED 7	Gregory Shallbetter Resume
DED 8	Narrative Responses
DED 9	SPS Tax Returns 2013 - 2015
DED 10	SPS Loan Documents
APP 1	Applicant’s Notice of Appeal – 7/20/2020
APP 2	Applicant’s Appeal Letter – 10/27/2020