

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

In the Matter

- of -

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

NYS DED File ID No. 58683

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 30, 2023

This matter considers the written appeal by TCI Systems, Inc., (“TCI” 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. On May 21, 2014, Ms. Maureen Kennedy, as CEO, applied on behalf of TCI for certification as a woman-owned business enterprise (DED Exhibit 1).
2. On August 24, 2016, the Division denied the application on the following grounds (DED Exhibit 2):
 - (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); and
 - (b) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1).
3. TCI timely filed a notice of appeal on September 16, 2016 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to TCI on January 9, 2017 (DED Exhibit 3).
5. Horace Flowers, Esq. submitted a written appeal on behalf of TCI by letter dated March 2, 2017 (APP Exhibit 2).

6. The Division responded by filing an Affidavit of Raymond Emanuel, Certification Director, dated June 12, 2023 and a brief submitted by William Chen, Esq., counsel for the Division, dated June 13, 2023.

FINDINGS OF FACT

7. TCI is a corporation that was originally formed in May, 1980, and is primarily engaged in the sale and implementation of mobile network solutions (DED Exhibit 1).
8. Ms. Maureen Kennedy is the CEO of TCI and has a 100% ownership interest.
9. Mr. Thomas Hebel was the sole owner of TCI from the formation of the Company through May 1, 2010, when Ms. Kennedy received a 100% ownership interest. The purchase price for the shares was \$█ (DED Exhibit 5). The Company Bio reflects that “The business was sold to Maureen for a nominal \$█ fee” (DED Exhibit 8).
10. Mr. Hebel’s duties are sales and marketing of the mobile network solutions (DED Exhibit 11). He also focuses on customer development, customer consulting services and new business development (DED Exhibits 7, 8 and 11). His “background in electrical engineering gives him more of an understanding of total networking” (DED Exhibit 9). He spends around 20 hours per week on sales and business development (DED Exhibit 7).
11. Ms. Kennedy’s duties include “input in the scope of work and the manner in which the job will be executed; input in the resolution of disputes related to change orders, delays, coordination with other contractors, material specifications, billing disputes...; selection of all staff involved in the execution of the work; input in critical decisions about who to solicit work with; and being the key person to make presentations to secure future work” (DED Exhibit 3). She spends around 7 hours per week on sales and business development (DED Exhibit 7).

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(b)(1) states in relevant part as follows:

- (1) Decisions pertaining to the operations of the business enterprise must be made by...women claiming ownership of the 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.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

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

- (2) Operational decisions. Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise...The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
 - (i) The products or services the business enterprise provides to clients; and
 - (ii) The means by which the business enterprise obtains contracts or orders.

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 TCI 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 to support a conclusion or ultimate fact.” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

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 and explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

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. Kennedy paid \$█ for her 100% ownership interest. Applicant stated “the business was sold to Maureen for a nominal \$█ fee” (DED Exhibit 8). She claimed a contribution of \$█ made on April 30, 1980, and an alleged contribution of \$█ in deferred salary made on April 30, 2011 (DED Exhibits 1, 6 and 7). The \$█ contribution was made 30 years prior to Ms. Kennedy obtaining her ownership shares and did not go towards the purchase of any ownership shares at

the time. Also, there was no documentation memorializing that any deferred salary was Ms. Kennedy's capital contribution made in exchange for her shares.

On appeal, Applicant argued that the Division "should have considered the net value-to-losses involving TCI profit and losses at the time of transfer" such that the \$ [REDACTED] consideration paid was a sufficient capital contribution (APP Exhibit 2). Applicant provided a letter from its accountant to support its argument. Applicant's accountant did not state the valuation method used (DED Exhibit 5). Also, Applicant generated over \$ [REDACTED] in revenue in 2010 (DED Exhibit 1). Therefore, the Division's finding that Applicant failed to prove the \$ [REDACTED] purchase price is the fair market value is supported by substantial evidence.

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

II. Operation

The eligibility criteria for MWBE certification requires that the woman-owner "exercises the authority to control independently the day-to-day business decisions of the enterprise". See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The woman-owner "must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification..." *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

TCI's core revenue generating functions of the business involve selling mobile network solutions, the equipment needed, and providing services related to getting the network up and running (DED Exhibit 1). Ms. Kennedy's resume does not reflect any prior training, experience,

or expertise in these core revenue generating functions (DED Exhibit 10). Ms. Kennedy's duties include "input in the scope of work and the manner in which the job will be executed; input in the resolution of disputes related to change orders, delays, coordination with other contractors, material specifications, billing disputes...; selection of all staff involved in the execution of the work; input in critical decisions about who to solicit work with; and being the key person to make presentations to secure future work" (DED Exhibit 3). She spends around 7 hours per week on sales and business development (DED Exhibit 7). She is not the person supervising those who are doing the work.

Mr. Hebel's duties include the core business functions of customer development, sales and marketing, system development, customer consulting services and new business development (DED Exhibits 7, 8 and 11). His "background in electrical engineering gives him more of an understanding of total networking" than the other employees (DED Exhibit 9). He spends around 20 hours per week on sales and business development (DED Exhibit 7).

Mr. Hebel oversees the core business functions and Ms. Kennedy provides input into the core business functions (DED Exhibit 7).

The Division's finding that Ms. Kennedy does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

CONCLUSION

TCI 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) and 144.2(b)(1) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny TCI's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of TCI Systems, Inc.
DED File ID No. 58683
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Press Release	Y	Y
DED 5	Paid In Capital	Y	Y
DED 6	Paid In Capital Part 2	Y	Y
DED 7	Day-to-Day Responsibilities	Y	Y
DED 8	Company Bio	Y	Y
DED 9	TCI 2010 Tax Return	Y	Y
DED 10	Maureen Kennedy's Resume	Y	Y
DED 11	Thomas Hebel's Resume	Y	Y
DED 12	Company Description	Y	Y
DED 13	Original Hebel Stock Certificate	Y	Y
DED 14	TCI Hebel Stock Certificate	Y	Y
DED 15	Kennedy Stock Certificate	Y	Y
APP 1	Appeal Letter	Y	Y
APP 2	Appeal Submission	Y	Y