

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

In the Matter

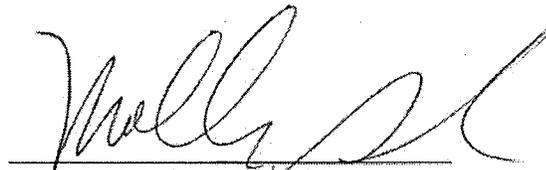
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the Application of **UPSTATE ELECTRICAL, LLC**  
for Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61808

RECOMMENDED ORDER

- by -



Molly T. McBride  
Administrative Law Judge

June 11, 2018

## 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 ("NYSEDED") to deny Upstate Electrical, LLC ("Upstate" or "applicant") recertification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by Upstate challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Upstate submitted an application to the NYSEDED on March 10, 2017 (Exhibit A). By letter dated July 12, 2017, the Division denied the application for WBE certification (Exhibit J).

Applicant filed an appeal from the denial and requested a hearing. The hearing was held on February 27, 2018 at the Albany office of the NYSEDED. The parties submitted post-hearing closing briefs and the record closed on March 9, 2018.

## ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding, among other things, the applicant's ownership and operation are applied on the basis of information supplied through the application process (see 5 NYCRR 144.2[a]). The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts. On administrative appeal, the applicant bears the burden of proving its business meets the eligibility criteria for certification as a woman-owned business enterprise (see State Administrative Procedure Act § 306[1]). To carry its burden, the applicant must show that the Division's determination is not supported by substantial evidence.

## POSITIONS OF THE PARTIES

### Position of the Division

The Division's denial letter asserts that applicant failed to meet four criteria for certification: (1) the woman owner does not make the decisions pertaining to the operations of the business enterprise; (2) the woman owner lacks the management experience or technical competence to operate the business; (3) the woman owner fails to devote sufficient time to the

daily operations; (4) the woman owner is not sharing in the risks and profits in proportion to her ownership interest.

Position of the Applicant

Upstate asserts that it meets the criteria for certification and that the Division erred in not certifying it as a woman-owned business enterprise pursuant to EL Article 15-A.

**FINDINGS OF FACT**

1. Upstate Electrical, LLC was formed by Brooke L. Spraragen (Spraragen) and her brother Christopher Spraragen in 2014 (Exhibit A, 2.A. and 2.C.). Spraragen owns 51% of the issued shares of stock and her brother Christopher owns 49% (Exhibits A, 2.A.).
2. Upstate is an electrical contractor (Exhibit A, 3.D.).
3. Spraragen is the President, Secretary and Treasurer of Upstate and Christopher is Vice President (Exhibit A, 2.C.).
4. Spraragen is solely responsible for the following managerial business operations: (1) financial decisions; (2) hiring and firing; and (3) signatory on bank accounts (Exhibit A 4.A.). Spraragen shares the following managerial operations with Upstate employees: (1) negotiating bonding; (2) negotiating insurance; (3) marketing and sales; (4) purchasing equipment/sales; (5) managing/signing payroll; (6) negotiating contracts (Exhibit A, 4.A.).
5. The business is located in New Windsor, New York (Exhibit A).
6. Spraragen is employed full time as Director of Project Planning and Marketing for the [REDACTED] in Schenectady, New York, approximately 100 miles from Upstate's location in New Windsor, New York (Division Brief at 4).
7. Spraragen works 8:30 a.m.-5:00 p.m. Monday-Friday at [REDACTED]. The hours of operation for Upstate are 7:30 a.m.- 3:30 p.m. (Disk 1 at 25:00).
8. The application indicates that the largest contract that Upstate currently has is with [REDACTED] in the amount of \$ [REDACTED] [REDACTED] is a business owned by Brooke Spraragen's mother. Her co-owner brother is the President of [REDACTED]. (Exhibit A, 4.D.)
9. Upstate employee Richard Schwarzbeck, Operations Manager, manages Upstate's day to day operations (Exhibits A & G and Disk 1 at 27:50).

11. Brooke Spraragen has a college degree in marketing and management and has been employed by [REDACTED] since 2009 in various marketing positions (Exhibit B).

12. Upstate Electric earned a profit in 2016 of \$ [REDACTED]. Brooke Spraragen took a profit distribution of \$ [REDACTED] and paid 23 employees in excess of that amount in 2016.

## DISCUSSION

This report considers the appeal of applicant from the Division's determination to deny certification as a woman-owned business enterprise (WBE) pursuant to EL Article 15-A.

## OPERATION

### 1. Decision-making

The Division denied the application on the ground that the woman owner does not make decisions pertaining to the operation of the business enterprise (5 NYCRR 144.2[b][1]). The Division concluded that certain key employees are managing the significant operations of the business related to estimating, bid preparation, and supervision of field operations (Exhibit J). According to the documents submitted by applicant and the testimony presented at the hearing, Upstate employee Richard Schwarzbeck is primarily responsible for overseeing the day to day operations of the electrical contracting firm (Exhibit D). Applicant submitted a document entitled "Day to Day Activities of Management/Office Staff" in response to a request from the Division (Exhibit G). Exhibit G confirms that employee Schwarzbeck, Operations Manager, is managing the company day to day and Brooke Spraragen, while receiving daily and weekly reports from Schwarzbeck, is not operating the business daily and not making the day to day decisions pertaining to the operation of the business operation. According to applicant, employee Schwarzbeck is the person on the project site daily, attending project site meetings, overseeing all projects, managing bidding in addition to his project management, managing all employees, overseeing building/tools/maintenance and, finally, project financial oversight (Exhibit G and Disk 1 at 27:50). As per applicant, as outlined in Exhibit G, employee David Taylor is responsible for project estimating and proposal development, and employee Tom McEwen is responsible for project management and estimating. It is clear that applicant has hired employees to do the work of Upstate Electric and they report to Brooke Spraragen (Disk 1 at 27:50). While the woman owner receives reports of the work of her employees, and has the authority to fire the employees (Disk 1 at 23:23), it is the employees who are the decision-makers day to day. Applicant has not met its burden with regards to the denial on the basis of 5 NYCRR 144.2(b)(1).

The denial on the ground of decision-making was based on substantial evidence.

## 2. Experience

The Division also denied the application on the grounds that the woman owner lacks the management experience or technical competence to operate the business, an element that is required under 5 NYCRR 144.2(b)(1)(i). The Division concluded that the woman owner did not possess any academic or technical training relevant to electrical contracting and that further, she lacks any prior professional experience managing the operations of an electrical contracting firm (Division Brief at 4 and Exhibit J). Pursuant to the holding in *Matter of Northeast Stud Welding v Webster* (211 AD2d 889, 891 [3d Dept 1995]), when the woman owner is not doing the work but supervising a male employee or co-owner, the question is whether the woman owner has the ability to evaluate the work of the male colleagues. Here, as in *Northeast Stud*, the key functions of the business are performed by male employees. The woman owner here, as in *Northeast Stud*, has no training or expertise in electrical contracting to make her qualified to supervise the work of her employees. The woman owner works full time in a position at [REDACTED] and her education and vast majority of her work experience are in the field of marketing with no education or work experience in the field of electrical contracting (Exhibits B & F and Disk 1 at 14:10). In contrast, key employees Schwarzbeck and Taylor have what the woman owner termed “experience as long as her life span” in the electric contracting business (Disk 1 at 8:50).

The denial on the ground of experience was based on substantial evidence.

## 3. Time

The application was also denied on the ground that the woman owner does not devote sufficient time to the daily operations of the business (Exhibit J, *citing* 5 NYCRR 144.2[b][1][iii]). She acknowledges that she is employed full time at a business that is located approximately 100 miles from applicant business and has very limited time to devote to Upstate during the work day. Her available time to do the work of Upstate is limited to before 8:30 am, between 12:00-1:00pm and after 5:00pm and “most of those hours are spent reviewing financials, contracts, bids and bonding” (Exhibit F). Upstate, as noted by the Division, is a multimillion dollar business that has six full-time employees with a total of 15 full time employees classified as “temporary/seasonal” (Exhibit A, 1.W.)

Applicant cited the Order in *Creative Connections LLC*, ESD 60169 (Sherman, ALJ) where ALJ Sherman found that the woman owner’s outside employment did not preclude her from devoting sufficient time to the applicant business. In *Creative Connections*, the Recommended Order found that the Division failed to establish that the woman owner was working 30 hours per week, and ALJ Sherman noted that nothing could be found in the record to establish that the Division knew how many hours the woman owner was working at the other business at the time the denial was issued (*Creative Connections* at 6). Here, the woman owner acknowledges that she is working full time at a job 100 miles from applicant business during the same hours that Upstate is operating.

The denial on the grounds of time devoted to the business was based on substantial evidence.

## **OWNERSHIP**

The application was denied on the ground that the applicant business failed to demonstrate that the woman owner shares in the risks and profits in proportion to her ownership interest, as required by 5 NYCRR 144.2(c)(2). The woman owner took a distribution of \$ [REDACTED] in 2016 and her male co-owner took a distribution of \$ [REDACTED] when the business earned a profit of \$ [REDACTED] (Exhibit 6). Her key employees were paid significantly higher wages that year (Exhibit I). By way of example, Mr. Schwarzbeck was paid \$ [REDACTED] (*id.*). The woman owner stated that she decides what profits are to be distributed and that she chose to have the business retain the majority of profits in 2016, and to pay herself and her co-owner a smaller distribution (Disk 1 at 43:00). Section 144.2(c)(2) requires that to be eligible for WBE certification, the woman owner must demonstrate that she shares in the risks and profits in proportion to her ownership interest. The Division concluded that by failing to take a distribution greater than her employees' salaries, the woman owner is not sharing in the profits of the business.

The denial on the grounds of ownership was based on substantial evidence.

## **CONCLUSION**

1. Upstate Electrical, LLC has not demonstrated that the woman owner Brooke Spraragen shares in the risks and profits in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2).
2. Upstate Electrical, LLC has not shown that the woman owner operates the business as required by 5 NYCRR 144.2(b)(1)(i)-(iii).

## **RECOMMENDATION**

The Division's determination to deny Upstate Electric, LLC application for certification as a woman-owned business enterprise should be affirmed for the reasons stated herein.

### Applicant Exhibit List

<b>Exh. #</b>	<b>Description</b>
A	Application for MWBE certification
B	Brooke Spraragen resume
C	Christopher Spraragen resume
D	Richard Schwarzbeck resume
E	David Taylor resume
F	Day to Day activities at Upstate
G	Day to Day Activities of Management
H	2016 Tax return
I	2016 W-2s of all employees of Upstate
J	Division Denial letter

### DED Exhibit List

<b>Exh. #</b>	<b>Description</b>
1	Profit and Loss statement 1/2017-3/2017
2	M & T commitment letter dated 9/6/16
3	M & T account opening records
4	Upstate Resolution
5	Commercial Loan Agreement
6	Upstate Operating Agreement
7	Letter of Assent
8	Employee Manual
9	Q & A from DED Analyst
10	Email with bonding agreement