

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

**In the Matter**

**- of -**

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

**NYS DED File ID No. 64002**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**November 2, 2023**

This matter considers the written appeal by Usmail Electric, Inc, (“Usmail Electric” 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 June 2, 2021, Ms. Noreen Usmail, as President, applied on behalf of Usmail Electric for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 21, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
  - (b) Minority group members or women relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
  - (c) Minority group members or women relied upon for certification do not make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and

- (d) Minority group members or women relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).
3. Usmail Electric timely filed a Request to Appeal on March 21, 2023 (APP Exhibit 1).
  4. A Notice to Proceed Via Written Appeal was sent to Usmail Electric on March 22, 2023 (DED Exhibit 3).
  5. Usmail Electric submitted its written appeal by letter dated May 12, 2023 (APP Exhibit 2).
  6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated July 27, 2023, and a brief of Diedre Chuckrow, Esq., counsel for the Division, dated July 28, 2023.

#### **FINDINGS OF FACT**

7. Usmail Electric is engaged in electrical contracting and services to industrial and commercial businesses, whose services include providing high voltage systems, fire alarms, tele/data, fiber optics, and security and control services (DED Exhibit 1).
8. Ms. Noreen Usmail is the President and has a 60% ownership interest. Mr. Todd Usmail is the Vice President and has a 40% ownership interest. (DED Exhibit 1).
9. Usmail Electric was originally formed in 1977 by Mr. Dennis Usmail. Mr. Todd Usmail purchased a 100% ownership interest in 2012 from Mr. Dennis Usmail, his father. Mr. Todd Usmail transferred a 60% ownership interest to Ms. Usmail, his wife on April 1, 2017. (DED Exhibits 1 and 5)
10. Ms. Usmail stated that she “did not make a monetary contribution to purchase Usmail Electric Inc. from Todd [Usmail]”, but agreed to “take less in wages”, by a reduction of [REDACTED] per month, build on her experience gained within the family business, and to take

over the remaining payments for the treasury securities and rent, as provided in the original agreement between Mr. Todd Usmail and Mr. Dennis Usmail (APP Exhibit 2). The checks used to make these payments were drawn on the Usmail business account for which Mr. and Ms. Usmail are signers (DED Exhibits 9 and 10). Ms. Usmail further stated that she contributed an additional [REDACTED] through her management in cost savings (DED Exhibit 5).

11. Ms. Usmail's duties include "unilateral authority to submit bids on small projects" and leading a four-person team for high-value bids, with an ability to exercise an "ultimate veto." Her duties also include the examination of manpower requirements, tracking the effect of new projects on staff, the selection and supervision of vendors, evaluating expense reports, and holding weekly staff meetings to gather field-level information. Prior to working at Usmail Electric, she was a case manager for Drug Court (DED Exhibit 12).
12. Mr. Todd Usmail's resume reflects that he is OSHA 10 certified and a licensed master electrician. He is skilled as a project estimator and manager and in security and fire alarm installation. He was previously the President of the business between August 2012 and April 2017, where he ran the day-to-day operations of the business (DED Exhibit 11).

#### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

5 NYCRR §144.2(c) states as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group

members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. 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.
- (3) Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

### **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 Usmail Electric 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 §144.2(b)(2) 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 MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Ms. Usmail did not provide sufficient evidence regarding her capital contribution for her ownership shares (DED Exhibits 1, 6 and 7). She confirmed on appeal that she “did not make a monetary contribution to purchase Usmail Electric Inc. from Todd [Usmail]” and agreed instead to “take less in wages” by a reduction of [REDACTED] per month, build on her experience gained within the family business, and to take over the remaining payments for the treasury securities and rent, as provided in the original agreement between Mr. Todd Usmail and Mr. Dennis Usmail (APP Exhibit 2). The checks used to make these payments were drawn on the Usmail business account for which Mr. and Ms. Usmail are signers; therefore, the contribution is not from assets belonging solely to the woman-owner (DED Exhibits 9 and 10). Ms. Usmail further stated that she contributed an additional [REDACTED] through her management in cost savings (DED Exhibit 5). There

is insufficient documentation as to how this [REDACTED] is fair market value in accord with 5 NYCRR Part 144.2(b)(2)(i)(4).

In order to qualify expertise as a capital contribution, the contribution must not only be uncompensated, but also “specialized and directly applicable to one or more critical aspects of the operation of the business enterprise.” 5 NYCRR §144.2(b)(2)(1)(4). Ms. Usmail’s expertise is not in the critical aspects of the business, electrical contracting, but instead relates to human resources, accounting, and collections (DED Exhibit 12). It is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is considered a capital contribution.” *In the Matter of Scherzi Systems*, Final Order 19-16 dated September 6, 2019; *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Applicant failed to clearly identify, quantify, and explain her capital contribution.

The Division’s determination to deny the application on the basis that Usmail Electric failed to demonstrate that Ms. Usmail made contributions to Usmail Electric in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

## II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

The critical functions of the business involve providing high voltage, fire alarm, tele/data,

fiber optics, security, and temperature control services to commercial and industrial companies (DED Exhibit 1).

Ms. Usmail does not have any industry specific expertise; her skills are related to general business or office management. There are no documents showing that she has any training or experience regarding providing electrical contracting services. Applicant acknowledges that Ms. Usmail is not “well versed in high voltage, fire alarm, tele-data, etc.” and that she relies on the master electricians and journeymen licensed electricians to assist in the day-to-day operations of the business (APP Exhibit 2). She does not possess any academic or technical training relevant to the industry to make her qualified to supervise the work of the employees (DED Exhibits 1 and 12).

Mr. Todd Usmail’s resume reflects that he is OSHA 10 certified and a licensed master electrician. He is skilled as a project estimator and manager and is proficient in security and fire alarm installation. He was previously the President of the business between August 2012 and April 2017, where he ran the day-to-day operations of the business (DED Exhibit 11).

5 NYCRR §144.2(c)(2) states that “... 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 for which certification is sought. 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”.

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”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).



The core functions of Usmail Electric’s business are estimating and obtaining contracts for electrical contracting work (DED Exhibit 1). Ms. Usmail’s duties are administrative and financial in nature and include marketing, accounts receivable and payable, proposal development, contract negotiation and general business operation (DED Exhibit 5). Ms. Usmail does not exercise independent operational control over the core functions of the business. She relies on others “who play a vital role in the day-to-day operations” of the business for overseeing the day-to-day operations of the business (APP Exhibit 2).

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The Division acknowledges in its brief that this section was cited in error and is not a basis for denial. The denial on the ground of time devoted to the business was not based on substantial evidence.

### **CONCLUSION**

Usmail Electric 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 §§144.2(b)(2), 144.2(c)(1) and 144.2(c)(2) was not based on substantial evidence. The eligibility criteria at 5 NYCRR §§144.2(c)(3) was cited in error and is not a basis for denial.

### **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director affirm the Division’s determination to deny Usmail Electric’s application for certification as a woman-owned business enterprise.

In the Matter of Usmail Electric, Inc.  
DED File ID No. 64002  
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	Applicant's Explanation regarding Application Question 4	Y	Y
DED 5	Usmail Application Narrative	Y	Y
DED 6	Signed Agreement between Dennis Usmail and Noreen Usmail	Y	Y
DED 7	Letter Transferring Stock and Rent	Y	Y
DED 8	Amortization Schedule for Stock Payments	Y	Y
DED 9	Cancelled Rent Checks	Y	Y
DED 10	Letter from M&T Bank	Y	Y
DED 11	Todd Usmail's Resume	Y	Y
DED 12	Noreen Usmail's Resume	Y	Y
APP 1	Request To Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y