

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

In the Matter

- of -

the Application of cSide Tech, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 66627

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 14, 2023

This matter considers the written appeal by cSide Tech, LLC, (“cSide” 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 January 6, 2019, Ms. Carrie Schloth, as President, applied on behalf of cSide for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 18, 2022, 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);

- (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); and
 - (e) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. On September 28, 2022, the Division sent its “final determination” on the application (APP Exhibit 1).
 4. cSide timely filed a notice of appeal on October 15, 2022 (APP Exhibit 1).
 5. A notice to proceed by written appeal was sent to cSide on November 9, 2022 (DED Exhibit 3).
 6. cSide submitted its undated written appeal (APP Exhibit 2).
 7. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated May 15, 2023, and a brief of Anequa Pond, Esq., counsel for the Division, dated May 18, 2023.

FINDINGS OF FACT

8. cSide is engaged in management consulting services in the domains of information technology, software, hardware, public safety, health and human services and education (DED Exhibit 1).
9. Ms. Carrie Schloth is the President and has a 51% ownership interest. Mr. Arthur Schloth is the Vice President and has a 49% ownership interest. (DED Exhibit 1).

10. Ms. Schloth contributed \$ [REDACTED] in start-up costs over a three-month period (DED Exhibit 1). The payments were made from a joint account she shares with her husband, Arthur Schloth (DED Exhibit 4).
11. Mr. Schloth earned a Bachelor of Science degree in Electrical Engineering and a Master of Science in Computer Software Engineering. He has over twenty years experience in information technology. He has expertise in Cybersecurity, Digital Organization and Modernization, and Data Management. In his role as Vice President and Technology Management Consultant at cSide, he institutes executive IT governance structure, analyzes alternative technology and solution framework standards (DED Exhibit 7).
12. Ms. Schloth has a Bachelor's Degree in Elementary Education and American Studies and a Masters of Education in Literacy. She works full-time as a Teacher. In her role as President of cSide, she handles accounts payable and receivable, marketing development and execution and proposal development (DED Exhibit 6 and APP Exhibit 1).

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.

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

Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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

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. Schloth contributed \$ [REDACTED] in start-up costs (DED Exhibit 1). The contribution came from a joint account she shares with her husband, Mr. Schloth (DED Exhibit 4). She failed to show that she made a contribution separate from her husband and from her own personal funds. The contribution was therefore not made from assets belonging solely to Ms Schloth.

The Division's determination to deny the application on the basis that cSide failed to demonstrate that Ms. Schloth made contributions to cSide 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 are obtaining contracts for management consulting services in the domains of information technology, software, hardware, public safety, health and human services and education (DED Exhibit 1).

Ms. Schloth 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 in information technology or computer software engineering. She handles accounts payable and receivables, marketing development and execution and proposal development. 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 5).

Mr. Schloth holds a Bachelor of Science degree in Electrical Engineering and a Master of Science in Computer Software Engineering (DED Exhibit 6). He has industry-specific experience to perform and supervise the core functions of the business. His duties include leading the consulting department, instituting executive IT governance structure, managing IT investments, modernizing IT departments for other entities and providing advice on data analytics toolsets (DED Exhibit 6).

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 (4th Dept. 2018).

The core functions of cSide’s business are obtaining contracts for management consulting services in information technology, software, hardware, public safety, health and human services and education (DED Exhibit 1).

Mr. Schloth’s education, certifications and experience demonstrate expertise in the core functions of the business. He leads the consulting department, among other duties (DED Exhibit 6).

Ms. Schloth’s duties are administrative in nature and include marketing, accounts receivable and payable, proposal development, contract negotiation and general business operation (DED Exhibit 5). Ms. Schloth does not exercise independent operational control over the core functions of the business. Mr. Schloth is primarily responsible for overseeing the day-to-day operations of the business.

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). Ms. Schloth has separate, full-time employment as a Teacher (DED Exhibits 1 and 5). The application states that she devotes 10 hours per week to the company, and Mr. Schloth devotes 45 hours per week to the Company (DED Exhibit 1). In her written appeal, she states that she works for cSide part-time, but that she meets with Mr. Schloth daily to “discuss business development and back-office operations” (APP Exhibit 1). This reflects that Mr. Schloth performs the day-to-day business functions and provides updates to Ms. Schloth. Ms. Schloth failed to submit any documentation to show her devoting time to the continued operation of the business. The denial on the ground of time devoted to the business was based on substantial evidence.

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

The contracts provided by cSide were signed by Mr. Schloth, or he is named as the Consultant performing the work on the contracts (DED Exhibit 8). Ms. Schloth’s signature did not appear on any of the contracts. Therefore, she did not demonstrate appropriate control of the business as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

cSide 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), 144.2(c)(2), 144.2(c)(3) and 144.2(d)(2) 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 cSide's application for certification as a woman-owned business enterprise.

In the Matter of cSide Tech, LLC
 DED File ID No. 66627
 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	Bank Statements	Y	Y
DED 5	Ms. Carrie Schloth's Resume	Y	Y
DED 6	Mr. Arthur Schloth's Resume	Y	Y
DED 7	Ms. Carrie Schloth W-2	Y	Y
DED 8	cSide Business Contracts	Y	Y
APP 1	Notice of Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y