

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

- of -

**the Application of Electrical Contracting Solutions Corp.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 54789

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
January 19, 2024

This matter considers the written appeal by Electrical Contracting Solutions Corp. (“ECS” 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 (“MWBE”).

PROCEDURAL HISTORY

1. On November 1, 2022, ECS applied for certification as a women-owned business enterprise (“WBE”). ECS based its application on Ms. Gina Kashinsky (DED Exhibit 1).
2. On March 30, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The woman owner relied upon for certification did not make capital contributions to the business enterprise proportionate to her equity interest therein as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise (5 NYCRR § 144.2(b)(2);
 - (b) The minority woman owner relied upon for certification does 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).
3. ECS submitted a request to appeal the denial determination, dated April 25, 2023. (DED Exhibit 9).
4. A Notice to Proceed Via Written Appeal was sent to ECS on April 27, 2023 (TRIB Exhibit I).

5. An appeal, with submissions, was filed by Aaron Boyajian, Esq., of Goetz Fitzpatrick on May 26, 2023. (APP Exhibit A).
6. The Division filed an Affidavit of Abdul Karim Bah, Associate Director of Certification, dated October 11, 2023, and a brief of Laurel A. Wedinger-Gyimesi, Esq., counsel for the Division, dated October 20, 2023.

FINDINGS OF FACT

7. ECS is engaged in electrical contracting services for both multi-family residences and commercial properties, and includes the following services: installation of electrical wiring/panels/generators, remediation for damaged infrastructure, and conversion or upgrades to energy efficient systems. (DED Exhibit 1).
8. ECS was formed in September of 2005, and Mr. Joseph Kashinsky became the owner in January of 2010. Mr. Kashinsky transferred 5 and 1/10th (5.1), “51% of the total issued and outstanding common stock of [ECS]” shares to Ms. Kashinsky on December 1, 2020. The application states that Ms. Kashinsky is the President and 51% owner and Joseph Kashinsky is the Vice-President and 49% owner of the business. (DED Exhibits 1, 3 and 4).
9. The application states that Ms. Kashinsky made a capital contribution of \$ [REDACTED], in the form of “Capital Stock/Retained Earnings”, to the business enterprise and that Mr. Kashinsky contributed \$ [REDACTED], in the form of “Capital Stock/Retained Earnings”. The application also states that Ms. Kashinsky paid \$ [REDACTED] for 5 shares of common stock on December 1, 2020, and that Mr. Kashinsky paid \$ [REDACTED] for 5 common shares on January 22, 2010. (DED Exhibit 1).
10. The Stock Assignment Agreement, submitted with the application, evidences the transfer of 51% ownership interest from Mr. Kashinsky to Ms. Kashinsky and provides that the assignor,

Mr. Kashinsky, shall file a “Gift Tax Return” for the shares being transferred, and pay any gift tax with respect to that transfer. (DED Exhibit 4). A copy of the US Gift Tax Return, submitted with the application, states that the shares of ECS, valued at \$ [REDACTED], were transferred to Ms. Kashinsky via gift. (DED Exhibit 5).

11. The critical functions of the business include the installation of electrical wiring/panels/generators for new construction, remediation of damaged infrastructure, and conversion/upgrades to energy efficient systems. (DED Exhibits 1 and 2).
12. Sabrina Giorlando, a Vice President for ECS, owns the Master Electrician License for the applicant business and “is deemed to be ECS’ responsible representative for licensing purposes.” (DED Exhibits 1 and 6).
13. Mr. Kashinsky’s experience includes the founding and development of QNCC Electric Corp., “a full-scale electrical contracting business, focusing on large scale commercial projects . . .” the founding and development of ECS, the hiring and managing of employees for QNCC, and he holds a Master Electrician License. His resume currently lists him as the President of QNCC and as the Vice President of ECS. (DED Exhibit 7).
14. The application lists Ms. Kashinsky as being responsible for all managerial operations for ESC, and lists her as sharing the responsibility for “Estimating” with Mr. Kashinsky and Andy Mohammed, Project Manager; for “Preparing Bids” with Mr. Kashinsky and Mr. Mohammed; for “Marketing & Sales” with Mr. Kashinsky; for “Supervising Field Operations” with Mr. Kashinsky and Mr. Giorlando; for “Purchasing Equipment/Sales” with Mr. Kashinsky, and as “Signatories for Business Accounts” with Mr. Kashinsky. (DED Exhibit 1)
15. Ms. Kashinsky has a bachelor’s degree in business administration for Marketing, and an MBA in Banking and Finance. Her work experience is in finance and equities, and she currently

works as the Managing Director, Head of Equities for the Global Markets Group of IMH. (DED Exhibit 8).

16. Ms. Kashinsky lists her responsibilities at ECS as: leading and supervising all firm business activities, “including but not limited to, finance, operations, marketing/sales, purchasing and employment”; defining the strategic vision of ECS; development and enforcement of company policies and procedures; networking; identifying and pursuing new sales opportunities; develop, negotiate, and authorize all customer contracts; analyze and approve budgets and accounting matters; and oversee marketing activities. (DED Exhibit 8)

APPLICABLE LAW

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

Capital Contribution. 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.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
 1. Money;
 2. Property;
 3. Equipment; or
 4. Expertise, provided that the contribution of such expertise must be uncompensated the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR § 144.2 (c)(1) states as follows:

Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including but not limited to:

- (ii) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (iii) The extent to which academic credentials exist for persons employed in the industry; and
- (iv) The extent to which industry-specific expertise may be obtained via direct work experience.

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 CR&M for certification as an MWBE 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 denied ECS's application for certification as a WBE on the basis that the applicant business failed to demonstrate that the party relied upon for certification made capital contributions proportionate to her equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the minority woman owner contributed, "as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise," in proportion "to their equity interest in the business enterprise." 5 NYCRR § 144.2(b)(2) and see *A.A.C. Contracting, Inc. v NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021). The Division requires an applicant to demonstrate that the woman-owner's contribution is proportionate to her equity interest in the business enterprise even if the interest in the business enterprise has been inherited or gifted. (See *Matter of Coverco, Inc.*, Recommended Order, December 12, 2017 (Final Order 17-06, January 30, 2017); *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order, May 25, 2017 (Final Order 16-55, November 1, 2016)). Where, as here, an applicant fails to substantiate the source of the capital contribution by the woman owner, the Division will deny the application for MWBE certification. (See *Matter of Otone Mechanical Construction, Inc.* Recommended Order, April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.* Recommended Order, March 17, 2017 (Final Order 17-21, March 27, 2017)).

The Applicant bears the burden in establishing that they have 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).

Here, the application states that Ms. Kashinsky contributed \$ [REDACTED] for her 51% ownership interest and that Joseph Kashinsky contributed \$ [REDACTED]. The applicant, both in the application, and in the appeal submission, states that the disparity in contribution amounts can be explained through aggregation as Mr. Kashinsky was an owner longer than Ms. Kashinsky. Additional documents are submitted with the appeal relating to the valuation of contributions made, however, those documents were not before the division at the time of application, and will not now be considered. (See *Scherzi, supra*, and *Matter of Lida Strategic Solution, Inc.*, Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019) (holding that documents offered by appellant on appeal, that were not part of the application and not before the Division at the time of application, were not to be considered)). Further, the denial, under the instant ground, is based on a lack of any contribution by Ms. Kashinsky, and does not rest solely on a disparity in the amount of contribution by the two owners. (DED Exhibit 2).

There is no evidence presented, either at the time of application or with the appeal submission, that Ms. Kashinsky contributed anything toward her 51% ownership interest. (DED Exhibit 1; APP Exhibit A). The Stock Assignment Agreement, submitted with the application, evidences the transfer of 51% ownership interest from Mr. Kashinsky to Ms. Kashinsky and provides that the assignor, Mr. Kashinsky, shall file a “Gift Tax Return” for the shares being transferred, and pay any gift tax with respect to that transfer. (DED Exhibit 4). Further, a copy of the US Gift Tax Return, submitted with the application, states that the shares of ECS, valued at \$ [REDACTED], were transferred to Ms. Kashinsky via gift. (DED Exhibit 5).

Based on the foregoing, I find that the applicant did not demonstrate that the woman owner relied on for certification made capital contributions to ECS in proportion to her ownership interest. Thus, the Division’s determination that the party relied upon for certification failed to

demonstrate that they made a capital contribution to the business enterprise proportionate to their equity interest therein, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Operation - Industry-Specific Competence

The Division also denied ECS' application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Kashinsky possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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 Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021)), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019). In determining who makes operational decisions, the Division identifies the core revenue generating functions of the business, and then assesses who has the primary responsibility for those functions and who has the expertise and knowledge necessary to perform and oversee those functions. (See

Matter of MC Environmental Services, Inc., Recommended Order, April 29, 2021 (Final Order 21-03, February 7, 2022)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this 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).

Nowhere in the materials before the Division is there any evidence that Ms. Kashinsky has adequate, industry-specific competence in electrical contracting. The core revenue generating functions of the business includes the installation of electrical wiring, panels, and generators among other functions involving the installation of electrical equipment. (DED Exhibits 1 and 2). Ms. Kashinsky's experience is in the finance sector, with an emphasis on equities, and there is no information that she has any training, education, or experience in the field of electrical contracting. (DED Exhibit 8). Here, Mr. Giorlando, a Vice-President for ECS holds the Master Electrician License for the business, and Mr. Kashinsky, also a Vice-President and officer for ECS, holds a Master Electrician License. (DED Exhibits 1 and 7). Mr. Kashinsky and Mr. Giorlando share the responsibility for field supervision with Ms. Kashinsky, an area where experience as an electrician is essential for the proper supervision of electrical work. In addition, Mr. Kashinsky and Mr. Mohammed share in the estimating and bidding for ECS, also an area critical to the core function of the business, and again an area where experience as an electrician is essential. (DED Exhibit 1).

While Applicant's assertion that there is no requirement that Ms. Kashinsky hold a license as a master electrician is correct, the Division does require that the owner relied on for certification, be capable of performing and overseeing the core revenue generating functions of the business. (APP Exhibit A, and see *MC Environmental Services, supra*). Here, Ms. Kashinsky has not

provided any evidence that she possesses the industry specific competence to perform and supervise those core functions. Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

CONCLUSION

ECS 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) and 144.2(c)(1), was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Electrical Contracting Solutions Corp.
 DED File ID No. 54789
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Letter Brief with Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	ECS Articles of Incorporation	Y	Y
DED 4	Stock Assignment Agreement	Y	Y
DED 5	Gift Tax Return	Y	Y
DED 6	Letter regarding Master Electrician's License	Y	Y
DED 7	Joseph Kashinsky Resume	Y	Y
DED 8	Gina Kashinsky Resume	Y	Y
DED 9	Request to Appeal Submission	Y	Y
TRIB I	Notice to Proceed Via Written Appeal	N	Y