

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

**In the Matter**

**- of -**

**the Application of ABC & NY Construction, Inc.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 59090**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**November 30, 2023**

This matter considers the written appeal by ABC & NY Construction, Inc., (“ABC” 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 November 22, 2019, Ms. Yeter Sisman, as President, applied on behalf of ABC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 12, 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 must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1); and
  - (c) 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, as required under 5 NYCRR §144.2(c)(2).
3. ABC timely filed a Request to Appeal on May 9, 2022 (APP Exhibit 1).

4. A notice to proceed via written appeal was sent to ABC on October 5, 2022 (DED Exhibit 3).
5. ABC, through its attorney Petek Gunay Balatsas, filed its written appeal with exhibits on December 13, 2022 (APP Exhibit 2).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated September 21, 2023, and a brief of William Chen Esq., counsel for the Division, dated September 21, 2023.

### **FINDINGS OF FACT**

7. ABC is engaged in the business of fabrication and installation of ornamental metal and structural steel work (DED Exhibit 1).
8. Ms. Yeter Sisman is the President and has a 100% ownership interest. (DED Exhibit 1).
9. Ms. Sisman was one of the original owners of the business. In 2006 and 2007, she sold all of her ownership interest and stopped working for ABC for two years. Ms. Sisman's husband, Mr. Nevzat Sisman, had a 100% ownership interest in 2009. On September 25, 2012, Mr. Sisman transferred 100% ownership (200 shares) to Ms. Sisman for no consideration (DED Exhibit 1). The transfer of shares for \$0.00 was memorialized in a Stock Transfer Agreement (DED Exhibit 5) and Applicant's stock ledger. Ms Sisman stated "I did not make a capital contribution for the 200 shares in 2012" (DED Exhibit 1).
10. Ms. Sisman listed her occupation as Office Manager and Mr. Sisman listed his occupation as Manager on their 2017, 2019 and 2020 personal tax returns (DED Exhibits 6, 7 and 8). Ms. Sisman has a background in accounting (DED Exhibit 9). Her responsibilities include making financial decisions, following up bid results, overseeing job construction progress, reviewing and negotiating contracts, overseeing construction audits, managing marketing

and sales, hiring and firing employees, processing and approving payroll, purchasing materials and equipment (DED Exhibit 10). Mr. Sisman was the Production Manager from 2006 to 2009 and President and sole owner of ABC from 2009 to 2012 (DED Exhibit 12).

11. Mr. Sisman's responsibilities include preparing bids, supervising field operations, maintaining safe and secure worksites, preparing materials, supplies and equipment. He is an Iron Worker Union member (DED Exhibit 10).
12. Mr. Gokhab Aydogan is Project Manager (DED Exhibit 11). He was previously Construction Estimator and Project Manager with ABC since 2014 (DED Exhibit 13). His responsibilities include estimating proposals, preparing shop drawings, and supervising job sites (DED Exhibit 1).
13. All of the certificates and licenses needed to operate ABC are held by either Mr. Sisman or Mr. Aydogan (DED Exhibit 14).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states in relevant part 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.

- (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) states in relevant part 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.

### **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 ABC 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.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). 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).

On September 25, 2012, Mr. Sisman transferred 100% ownership (200 shares) to Ms. Sisman. Ms. Sisman paid \$0.00 for the 200 shares of ABC (DED Exhibit 1). The transfer of shares for \$0.00 was memorialized in a Stock Transfer Agreement (DED Exhibit 4) and applicant's stock ledger (DED Exhibit 5). Ms. Sisman stated, "I did not make a capital contribution to gain 100% ownership of the company in 2012" (DED Exhibit 1).

On appeal, ABC argues that Ms. Sisman made significant monetary contributions to the business and contributed expertise for her ownership interest (APP Exhibit 2). All of the deposits listed to substantiate monetary contributions were made prior to 2012. Therefore, the deposits were not made in 2012 to obtain the 200 shares and cannot be considered as her capital contribution.

The Stock Transfer Agreement and stock ledger are the only documents made at the time of ownership transfer to Ms. Sisman. They make no mention of Ms. Sisman contributing her expertise for her shares (DED Exhibits 4 and 5). Without evidence of an agreement detailing the

expertise and the dollar value assigned to that expertise, the claimed expertise contribution cannot be considered. See NYCRR §144.2(b)(2)(i)(4) and *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022. Applicant failed to clearly identify, quantify, and explain her capital contribution (APP Exhibit 2). See *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).

The Division's determination to deny the application on the basis that ABC failed to demonstrate that Ms. Sisman made contributions to ABC 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.

Ms. Sisman does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business's industry. Her background is in accounting. Her responsibilities include making financial decisions, following up bid results, overseeing job construction progress, reviewing and negotiating contracts, overseeing construction audits, managing marketing and sales, hiring and firing employees, processing and approving payroll, purchasing materials and equipment (DED

Exhibits 9 and 10). The critical functions of the business include the fabrication and installation of ornamental metal and structural steel. (DED Exhibit 1). She does not have the training or experience in the industry necessary to supervise the work of the employees.

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 critical functions of ABC’s business include preparing bids, supervising field operations, maintaining safe and secure worksites, preparing materials, supplies, and equipment (DED Exhibit 1). Ms. Sisman’s duties include making financial decisions, following up bid results, overseeing job construction progress, reviewing and negotiating contracts, overseeing construction audits, managing marketing and sales, hiring and firing employees, processing and approving payroll, purchasing materials and equipment (DED Exhibit 10). These duties are primarily administrative in nature.

Mr. Nevzat Sisman’s duties are preparing bids, supervising field operations, maintaining safe and secure worksites, preparing materials, supplies, and equipment. He is an Iron Worker Union member (DED Exhibits 1, 10 and 12). Mr. Gokhab Aydogan is the Project Manager and has been Construction Estimator and Project Manager since 2014. He is responsible for estimating



proposals, preparing shop-drawings, and supervising job sites (DED Exhibits 11 and 13). All the certificates and licenses needed to operate ABC are held by either Mr. Sisman or Mr. Aydogan (DED Exhibit 14). All critical functions of ABC are handled by either Mr. Sisman or Mr. Aydogan.

The Division's determination to deny the application on the basis that ABC failed to demonstrate that Ms. Sisman possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

### **CONCLUSION**

ABC 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.

### **RECOMMENDATION**

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

In the Matter of ABC & NY Construction, Inc.  
DED File ID No. 59090  
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	Stock Transfer Agreement	Y	Y
DED 5	Stock Ledger	Y	Y
DED 6	Yeter and Nevzat 2017 Personal Joint Tax Return	Y	Y
DED 7	Yeter and Nevzat 2018 Personal Joint Tax Return	Y	Y
DED 8	Yeter and Nevzat 2020 Personal Joint Tax Return	Y	Y
DED 9	Yeter Sisman Resume	Y	Y
DED 10	Job Description for President and Vice President	Y	Y
DED 11	Organization Chart	Y	Y
DED 12	Nevzat Sisman Resume	Y	Y
DED 13	Gokhab Aydogan Resume	Y	Y
DED 14	Licenses, Permits and Certifications	Y	Y
APP 1	Notice of Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y