

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

**In the Matter**

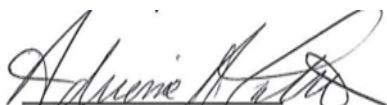
**- of -**

**the Application of B & B Premier Contracting, LLC**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 64164**

**RECOMMENDED ORDER**

**-by-**

A handwritten signature in black ink, appearing to read "Adrienne R. Lotson", written over a horizontal line.

**Adrienne R. Lotson**  
**Administrative Law Judge**  
**October 6, 2023**

This matter considers the written appeal by B & B Premier Contracting, LLC, (“B & B Premier” 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 September 26, 2018, Jessica Bondzinski, as owner, applied on behalf of B & B Premier for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On February 14, 2022, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) The minority group members or women relied upon for certification must have 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) The minority group members or women relied upon for certification must share in the risks and profits of the business enterprise in proportion to their equity interests therein as required under 5 NYCRR §144.2 (b)(3);
  - (c) The minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon another person, as required under 5 NYCRR §144.2(c)(1);

- (d) The 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. On March 18, 2022, B & B Premier submitted its request to appeal (APP Exhibit A).
  4. On July 20, 2023, a Notice of Hearing was sent to all parties (DED Exhibit 4)
  5. On August 22, 2023, a hearing was held and concluded.

### **FINDINGS OF FACT**

6. B & B Premier is engaged in the business of architectural, engineering, construction horizontal, construction vertical, environmental, facilities, maintenance, repair and building operations and utilities (DED Exhibit 1).
7. In May 2016, electrical construction company co-workers Robert Brady and Peter Bondzinski founded B & B Premier Contracting with each party holding a 50% ownership interest (DED Exhibit 1).
8. In February 2018, Mr. Brady and Mr. Bondzinski agreed to bring on Mr. Bondzinski's wife, Jessica Bondzinski as a 51% owner, at the same time, reassigning Peter Bondzinski to Project Manager, and lowering Mr. Brady's ownership interest to 49% (DED Exhibit 1).
9. Jessica Bondzinski, a 51% Owner, acquired her ownership interest on March 12, 2018, with Mr. Brady retaining a 49% ownership interest. (DED Exhibit 1)
10. Ms. Bondzinski made a capital contribution of \$ [REDACTED] toward the start-up costs through the contribution of a laptop computer on March 22, 2018. (DED Exhibit 7).
11. Mr. Brady contributed a ten-year old computer to the business enterprise on March 12, 2017. Its value is unverifiable (DED Exhibit 7).
12. The critical functions of B & B Premier are residential and commercial mechanical

heating and cooling installation and service, electrical installation and service, and plumbing installation and service. (DED Exhibits 1, 4, 8 and 22)

13. Ms. Bondzinski holds a bachelor's degree in landscape architecture. She has over five years of experience in landscape design and worked part-time at Redbud Development on residential landscape projects. (DED Exhibits 1 and 19)

14. Mr. Brady is an electrician with over 5 years of experience and has certifications and education in electronics, airframe mechanic, and plumbing. He is OSHA 10 certified. (DED Exhibit 21)

15. Peter Bondzinski holds multiple degrees in mechanical engineering. In addition, he holds an OSHA 30 card in Construction Safety and Health and is Trac Pipe and HVAC certified. He has over 10 years of mechanical, plumbing, and electrical experience (DED Exhibits 20 and 24).

16. Jessica Bondzinski's primary responsibilities include contract procurement, estimates, proposals, invoicing, billing, and handling of all paperwork. (DED Exhibits 8 and 22).

17. Mr. Brady's primary responsibilities are project management, acquiring materials, and installations (DED Exhibits 8 and 22).

18. Peter Bondzinski's primary responsibilities include project manager, material pickup and construction/installation (DED Exhibits 8 and 22).

19. In 2020, Ms. Bondzinski received \$ [REDACTED] in ordinary income, and \$ [REDACTED] in guaranteed payments from B & B Premier (DED Exhibits 1 and 10).

20. In 2020, Mr. Brady received \$ [REDACTED] in ordinary income, and \$ [REDACTED] in guaranteed payments from B & B Premier (DED Exhibits 1 and 10).

21. In 2020, Mr. Bondzinski received wages from B & B Premier of \$ [REDACTED] (DED Exhibits 1, 11, 12, 13 and 14).

### APPLICABLE LAW

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

(2) 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 a capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one or 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(b)(3) states as follows:

(3) Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein. In determining whether the profits of the business enterprise are shared proportionately with minority group members or women, the division may consider, for example and without limitation, means by which the proceeds of the business enterprise are conveyed to individuals or entities.

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

(1) 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:

- (i) 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;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

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

(2) Operational decisions. Minority group members and 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.

### **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 B & B Premier 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

Jessica Bondzinski and Robert Brady testified at the hearing on behalf of B & B Premier. B & B Premier offered the following exhibits: APP Exhibits A, B, C, D, E, F and G. The Division moved to exclude from evidence the preambles contained in Exhibits B, C, D, and E, on the basis that this was new evidence, and the applicant withdrew her exhibits, stating that they were replicas of the Division's exhibits. App Exhibits A, F and G were admitted in evidence.

Kyle Satchell, Assistant Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Abdul Karim Bah, Senior Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 24. DED Exhibit 23, the OSHA 10 card acknowledging that the recipient has successfully completed a 10-hour Occupational Safety and Health Training Course of Robert Brady was not admitted into evidence as it was objected to by the Division as illegible. The parties stipulated that Mr. Brady holds an OSHA 30 card. (DED Exhibit 24)

### I. Ownership

#### *Capital Contribution*

5 NYCRR §144.2(b)(2) requires that the party relied upon for certification must make a capital contribution proportionate to their equity interest. This contribution may be in the form of money, property, equipment, or expertise. Further, should expertise be asserted as an element of the capital contribution, such expertise must be uncompensated, 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(b)(2)(i)(4))

Additionally, 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 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).

Applicant testified that she and Mr. Brady each made a capital contribution of \$ [REDACTED] in the form of computer equipment. Ms. Bondzinski provided a Best Buy receipt dated January 30, 2018, as evidence of her capital contribution made on March 22, 2018 (DED Exhibit 7). She noted that Mr. Brady did not have a receipt for his computer equipment, but the value was approximately the same. Ms. Bondzinski argued that although their capital contributions were equal, the \$ [REDACTED] (\$ [REDACTED]) that would show her having an ownership interest of 51% was an insignificant difference. Ms. Bondzinski also argued that her knowledge in construction management was a part of her capital contribution and that because of her knowledge, the company's income rose from \$ [REDACTED] in 2018 to \$ [REDACTED] in 2020 (Hearing Testimony of Jessica Bondzinski; DED Exhibit 10). Ms.



Bondzinski did not submit documentation establishing a reasonable assessment of the fair market value of her expertise as required by (5 NYCRR §144.2(b)(2)(i)(4)).

Mr. Brady testified that he did not know how much he paid for his laptop computer; however, it was more than \$ [REDACTED]. The laptop was approximately 10 years old and did not contain any up-to-date software. Further, the \$ [REDACTED] purchase price indicated in the application was selected so that their respective capital contributions would appear equal. Mr. Brady further testified that the agreement to grant Ms. Bondzinski a 51% ownership interest was because he and Mr. Bondzinski needed her business and construction management expertise. Their business was floundering, and they were “overwhelmed with paperwork.” He and Peter Bondzinski believed that Jessica Bondzinski could help the business succeed. Mr. Brady testified that Ms. Bondzinski did not pay for her ownership interest because there was not a need for a capital infusion. Construction jobs pay money upfront for materials, so they did not need to have cash on hand. Finally, he testified that without Ms. Bondzinski’s management knowledge, B & B Premier would have gone out of business. (Hearing Testimony of Robert Brady)

Division’s witness, Mr. Bah testified that the Division does not consider an equal \$ [REDACTED] contribution by both owners to establish that the capital contribution of the party relied upon for certification was proportionate to their equity interest. Further, no documentation was presented to the Division to support Mr. Brady’s contribution, without which, the Division cannot establish the capital contribution of the 49% partner. Finally, the receipt submitted for Ms. Bondzinski’s contribution was insufficient to establish her capital contribution as it did not indicate who purchased the laptop. (Hearing Testimony of Abdul Karim Bah)

Although I find that Ms. Bondzinski made a capital contribution of \$ [REDACTED], the stated contributions of both owners are of equal value (50/50) yet the ownership interest is divided 51%

to 49%. In addition, documentation substantiating the value of Jessica Bondzinski's expertise was not supplied. Accordingly, I find that the applicant's burden to establish that the Division's determination to deny the application on the basis that Ms. Bondzinski did not demonstrate that her capital contribution to the business enterprise was proportionate to her equity interest therein, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence, has not been met.

*Risk and Profits:*

5 NYCRR §144.2(b)(3) requires that the women relied upon for certification must share in the risks and profits of the business enterprise in proportion to her equity interest

As previously noted, Jessica Bondzinski holds a 51% ownership interest and Robert Brady holds a 49% interest. Applicant's certification application indicates that in 2020 Ms. Bondzinski received \$ [REDACTED] in ordinary income and \$ [REDACTED] in total guaranteed payments. Mr. Brady, for that same time period, received \$ [REDACTED] in ordinary income and \$ [REDACTED] in total guaranteed payments. Finally, in 2020, sole employee Peter Bondzinski received \$ [REDACTED] in wages (DED Exhibit 1).

Jessica Bondzinski concedes that Peter Bondzinski received more compensation than either she or Mr. Brady. However, she argued, this was due to labor laws in the State of New York that require the business enterprise to pay Mr. Bondzinski prevailing wages for his services. As a result, the owners paid themselves what they could once employees are paid the prevailing wage rate. (Hearing Testimony of Jessica Bondzinski)

Ms. Bondzinski argued that her personal assets reflect that she shares in the risk and profits of the business enterprise. In response to her questioning, Mr. Bah testified that personal assets are not taken into consideration when looking at whether the party relied upon for certification

shares in the risks and profits of the business enterprise. (Hearing Testimony of Jessica Bondzinski and Abdul Karim Bah)

Where the business enterprise's employee received higher compensation than the party relied upon for certification, I find that the applicant's burden to establish that the Division's determination to deny the application on the basis that Ms. Bondzinski did not demonstrate that she shared in the risks and profits of the business enterprise in proportion to her equity interest therein, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence, has not been met.

## II. Operations

### *Adequate, industry-specific competence*

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." Further, the Division's denial of certification has been upheld in cases where the party relied upon failed to show training or experience in the industry and failed to specify 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 A.D.3d 1343 (3d Dep't. 2020) (citing to *C.W. Brown, Inc. v. Canton*, 216 A.D. 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 critical functions of B & B Premier are residential and commercial mechanical heating and cooling installation and service, electrical installation and service, and plumbing installation and service. (DED Exhibits 1, 4, 8 and 22)

Ms. Bondzinski, noting that she has a great deal of experience in construction management, argued that the Division denied her certification application because they lacked an understanding of the nature of her experience as a landscape architect. Her landscape architecture projects have included water elements (pools, hot tubs, etc.) as well as electrical components. Her application notes, she argued, that she worked with a variety of contractors and was involved with every step of the construction process. Although her resume does not go into the specific detail of these projects, such as structural elevations, etc., an analyst with an understanding of the industry would know that she would need to understand plumbing, electrical, HVAC and other mechanical systems in order to successfully function in said industry (DED Exhibits 5 and 19). Ms. Bondzinski argued that the Division only considered her educational background to the exclusion of her industry experience. Additionally, had the Division asked for specific documentation as to her industry experience, she would have provided said documentation. (Hearing Testimony of Jessica Bondzinski)

Ms. Bondzinski acknowledged that at her part-time employer (Redbud) she was responsible for design, estimating, material ordering, contractor communication/management, construction oversight, customer relations, and final finishing details (DED Exhibit 5). She also testified that on her landscape architecture projects she was not the one pulling wires or doing the plumbing work; rather she was involved with overseeing installations and working with contractors. (Hearing Testimony of Jessica Bondzinski)

Ms. Bondzinski argued that as with her resume, Mr. Brady's resume did not reflect any specific experience in HVAC work, rather this was something he was able to learn once in the business (DED Exhibit 21). As a result, Mr. Brady's resume should not be given priority over hers. (Hearing Testimony of Jessica Bondzinski)

Ms. Bondzinski testified that Mr. Bondzinski and Mr. Brady both work out in the field. Mr. Brady is responsible for field operations, although at times, because they are a small company, she and Mr. Brady "sometimes overlap" in this responsibility. She acknowledged that while she can perform some field duties such as pulling wire and flaring copper pipes, she would not be able to do welding, pipe fitting, or repairing a burst pipe as she "runs the business" and is not a "laborer in the field." If this work needed to be conducted, she would need to employ other workers to perform these functions if either Mr. Brady or Mr. Bondzinski were not available. (Hearing Testimony of Jessica Bondzinski)

Division's witness testified that B & B Premier's application did not show that Ms. Bondzinski had any experience in the core function of the business: plumbing installations, electrical installations, or building and maintenance operations. (Hearing Testimony of Abdul Karim Bah)

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that the women relied upon for certification possessed adequate, industry-specific competence to make critical business decisions without relying upon other persons.

*Day-to-day operational decisions*

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 the business enterprise shall be determined by the division based upon the following factors but is not limited to: (1) the products or services the business enterprise provides to the 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 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 B & B Premier are residential and commercial mechanical heating and cooling installation and service, electrical installation and service, and plumbing installation and service. (DED Exhibits 1, 4, 8 and 22)

Ms. Bondzinski argued that she is the major decision maker for the company; she can read construction documents and specifications; is in charge of daily operations, including utilization plans, requests for pricing and communicating with general contractors, vendors, and employees; works through contracts; and keeps the organization in order (DED Exhibit 8). She additionally testified that although she is not in the field “every day”, she is there on a “day-to-day” basis to check on the progress of the projects, and she is very involved in overseeing the work being performed. As noted previously, she testified that she does not have the ability to do all of the mechanical, plumbing or HVAC work in the absence of Mr. Brady and Mr. Bondzinski, however, there are a few functions that she is able to perform such as pulling wires and installing electrical wall plates. (Hearing Testimony of Jessica Bondzinski)

The Division's witness testified that Mr. Brady's and Mr. Bondzinski's education, certifications, and experience demonstrate expertise in the core functions of the business. In the field, Mr. Brady is responsible for construction installation and project oversight. Mr. Bondzinski is responsible for project estimates, material orders, project scheduling and construction installation. Ms. Bondzinski, on the other hand, is responsible for contract procurement, bonds, insurance, taxes, audits, invoices, estimates/project proposals, bids/meetings, material ordering, utilization planning, and project oversight. As such, Ms. Bondzinski's work is not a core revenue-generating function (Hearing Testimony of Jessica Bondzinski and Abdul Karim Bah; DED Exhibit 22).

I find that the applicant's burden to establish that the Division's determination to deny the application on the basis that Ms. Bondzinski did not demonstrate that she makes 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) is supported by substantial evidence, has not been met.

### **CONCLUSION**

B & B Premier 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 eligibility criteria at 5 NYCRR §144.2(b)(2), 5 NYCRR §144.2(b)(3), 5 NYCRR §144.2(c)(1) and 5 NYCRR §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 B & B Premier Contracting's application for certification as a woman-owned business enterprise.

In the Matter of B & B Premier Contracting, LLC  
 DED File ID No. 64164  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification, Dated September 26, 2018	Y	Y
DED 2	Denial Letter for WBE Application, Dated February 14, 2022	Y	Y
DED 3	DED Notice of Hearing Appeal Letter, Dated July 20, 2023	Y	Y
DED 4	Response to Q & A Question #2	Y	Y
DED 5	10/12 Response to Q & A Question #3	Y	Y
DED 6	11/12 Response to Q & A Question #3	N	N
DED 7	Response to Q & A Question #4	Y	Y
DED 8	Response to Q & A Question #5	Y	Y
DED 9	Response to Q & A Question #7	Y	Y
DED 10	B & B Premier Contracting LLC 2020 Tax Return	Y	Y
DED 11	2020 NY45 1 <sup>st</sup> Quarter Report	Y	Y
DED 12	2020 NY45 2 <sup>nd</sup> Quarter Report	Y	Y
DED 13	2020 NY45 3 <sup>rd</sup> Quarter Report	Y	Y
DED 14	2020 NY45 4 <sup>th</sup> Quarter Report	Y	Y
DED 15	2021 NY45 1 <sup>st</sup> Quarter Report	Y	Y
DED 16	2021 NY45 2 <sup>nd</sup> Quarter Report	Y	Y
DED 17	2021 NY45 3 <sup>rd</sup> Quarter Report	Y	Y



DED 18	2019 NY45 4 <sup>th</sup> Quarter Report	Y	Y
DED 19	Robbins Resume	Y	Y
DED 20	Bondzinski Resume	Y	Y
DED 21	Brady Resume	Y	Y
DED 22	Organizational Chart	Y	Y
DED 23	Brady OSHA Card	Y	N
DED 24	Pete Bondzinski OSHA 30 Card	Y	Y
APP A	Request to Appeal a Denial Determination, Dated March 18, 2023; Email dated May 17, 2022, confirming denial	Y	Y
APP B	Response to Question #4, dated October 12, 2019 with Preamble	N	N
APP C	Response to Question #7, dated October 12, 2019 with Preamble	N	N
APP D	Response to Question #3, dated October 12, 2019 with Preamble.	N	N
APP E	Response to Question #5, dated October 12, 2019 with Preamble.	N	N
APP F	Balance Sheets dated December 31, 2017, 2018, 2019 and 2020	Y	Y
APP G	Response to Question #2, dated October 12, 2019.	Y	Y