

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

In the Matter

- of -

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

NYS DED File ID No. 67756

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
June 3, 2024

This matter considers the appeal by Compuflex, Inc. dba Compuflex Security (“Compuflex” 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 14, 2020, Ms. Randa Cheaib, as President, applied on behalf of Compuflex for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On March 13, 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 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. On April 23, 2023, Compuflex submitted a Request to Appeal via a Hearing. (DED Exhibit 3; APP Exhibit A).
4. On February 23, 2024, a Notice of Hearing was sent to all parties (Tribunal Exhibit 1).
5. A hearing was held and concluded on May 29, 2024.

FINDINGS OF FACT

6. Compuflex is engaged in the business of designing, installing, maintaining, supporting and monitoring Fire and Burglary Systems, as well as Access Control and Surveillance Systems. (APP Exhibit 1).
7. Ms. Randa Cheaib is the President and 55% owner of Compuflex. Rachid Cheaib is the Vice President and 40% owner of Compuflex, and Michael Cheaib is a 5% owner of Compuflex. (DED Exhibit 1).
8. Section 2E of the certification application states that Randa and Rachid Cheaib made a capital contribution of \$██████, which was “Start Up Money from DBA” on July 17, 2017 (DED Exhibit 1).
9. A narrative provided by Ms. Cheaib states the business was founded as a dba in 1989 and operated as such until the business was incorporated in 2009. The narrative states that the \$██████ was actual cash in the dba business’ checking account, which was considered the “starting point” for the corporation. The narrative further states that “we have initially funded everything from our personal bank account.” (DED Exhibit 8). Ms. Cheaib testified that “we” meant her and Rachid Cheaib (Hearing Testimony of Randa Cheaib).
10. Section 2F of the certification application states that Randa Cheaib paid \$██████ for ██████ shares on March 14, 2014 (DED Exhibit 1).
11. The stock transfer ledger states that ██████ shares were issued for \$█ on September 22, 2009 (DED Exhibit 4).

12. Ms. Cheaib testified that Compuflex is a “family-owned business”. She admitted that she does not install, maintain, or monitor fire and burglary systems or access control and surveillance systems (Hearing Testimony of Randa Cheaib). Her resume states that she handles “Financials, Pricing, HR and Payroll. Currently I manage 5 people and process over 2000 transactions per month.” (DED Exhibit 11).
13. Rachid Cheaib’s resume reflects that he holds a Master of Science in Computer Science and Engineering and has training and experience to handle the critical functions of the business (DED Exhibit 12).
14. Michael Cheaib’s resume reflects that he holds a bachelor’s in computer information systems, holds a license for fire alarm installation, and has the work experience necessary to handle the critical functions of the business (DED Exhibit 10).

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 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(c) states in relevant part as follows:

Operation. 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 Compuflex 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

Ms. Randa Cheaib appeared at the hearing and testified on behalf of Compuflex as its sole witness. Compuflex offered APP Exhibit A which was admitted into evidence.

Ms. Dennie Byam, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Colleen Barton, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 18.

I. Ownership

The Division denied Compuflex's application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Cheaib made a contribution proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or shared in the risks and profits in proportion to her equity interest therein, as required by 5 NYCRR § 144.2(b)(2).

Randa Cheaib testified that she attempted to get the documentation from her bank, but the records were no longer kept by the bank. (Hearing Testimony of Randa Cheaib). In *Matter of Creative Connections, LLC*, Recommended Order, December 8, 2016 (Final Order 17-01, January 4, 2017) it was held that a denial for failure to demonstrate a capital contribution under former 5 NYCRR § 144.2(a)(1) based on an absence of documentation of source of funds for a transaction occurring more than ten years prior, where banking retention policy is to only maintain transaction records for seven years, was not supported by substantial evidence.

Section 2E of the certification application states that Randa and Rachid Cheaib made a capital contribution of \$██████, which was "Start Up Money from DBA" on July 17, 2017 (DED Exhibit 1). A narrative provided by Ms. Cheaib states the business was founded as a dba in 1989

and operated as such until the business was incorporated in 2009. The narrative states that the \$[REDACTED] was actual cash in the dba business' checking account, which was considered the "starting point" for the corporation. The narrative further states that "we have initially funded everything from our personal bank account." (DED Exhibit 8). Ms. Cheaib testified that "we" meant her and Rachid Cheaib (Hearing Testimony of Randa Cheaib). Section 2F of the certification application states that Randa Cheaib paid \$[REDACTED] for [REDACTED] shares on March 14, 2014 (DED Exhibit 1).

Ms. Cheaib testified that the \$[REDACTED] was from money in her account that she had saved (Hearing Testimony of Randa Cheaib). This testimony is not credible since the application states that the money was either from the joint account of Mr. and Mrs. Cheaib (DED Exhibit 8), or from the balance of the dba account (DED Exhibit 9). Also, the stock transfer ledger states that [REDACTED] shares were issued for \$[REDACTED] on September 22, 2009 (DED Exhibit 4).

Colleen Barton testified that the application provides that the purported capital contribution came from Mr. and Ms. Cheaib's joint account. She stated that no proof was submitted by applicant to show the ownership of the dba prior to establishing the corporation. She further testified that the application provides inconsistencies as to the dollar amounts and dates. She stated that a joint capital contribution is not proportional to Ms. Cheaib's ownership interest (Hearing Testimony of Colleen Barton).

Based on the foregoing, I find that the Division's determination with regard to 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. In *C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841 (3d Dept 1995), the Court affirmed the denial where the woman-owner had no training or experience in the industry, nor could she specify the "working

knowledge” necessary to review the estimates made by or evaluate the work of more experienced employees. 5 NYCRR §144.2(c)(1) states that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things.”

With regard to technical competence, where the minority/woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

Ms. Cheaib testified that Compuflex is a “family-owned business”. She admitted that she does not install, maintain, or monitor fire and burglary systems or access control and surveillance systems. She acknowledged that Michael Cheaib holds the necessary license for fire alarm installation. However, as she noted in the application, she is responsible for financial decisions, negotiating bonding and insurance, marketing and sales, hiring and firing, purchasing equipment/sales, managing and signing payroll, negotiating contracts, and acting as signatory for business accounts (Hearing Testimony of Randa Cheaib).

Colleen Barton testified that Ms. Cheaib does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are designing, installing, maintaining, supporting and monitoring Fire and Burglary Systems, as well as Access Control and Surveillance Systems, as stated in the application. She stated that Ms.

Cheib's resume reflects that she handles administrative tasks, including financials, pricing, HR and payroll. She does not have the education, training or experience to oversee the critical functions of the business. She testified that Rachid Cheib's resume reflects that he holds a Master of Science in Computer Science and Engineering and has training and experience to handle the critical functions of the business. She testified that Michael Cheib's resume reflects that he holds a bachelor's in computer information systems, holds a license for fire alarm installation, and has the work experience necessary to handle the critical functions of the business. (Hearing Testimony of Colleen Barton).

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that "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 eligibility criteria for MWBE certification requires that the minority/woman owner "exercises the authority to control independently the day-to-day business decisions of the enterprise". See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The minority/woman-owner "must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification..." *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

Colleen Barton testified that applicant's chart showing the day-to-day operations shows that Randa Cheaib handles the administrative matters, including payroll, purchasing materials, accounting and customer service, which are not the critical functions of the business. Rachid Cheaib handles project planning, coordination and oversight of the field. Michael Cheaib handles design system layout, estimates based on blueprints, and assists in the field where needed. She stated that Randa Cheaib does not have the education, training or experience to supervise the workers or make decisions without relying on others (Hearing Testimony of Colleen Barton).

Ms. Cheaib's testimony did not dispute that she does not have the education, training or experience to design or install fire alarm systems and surveillance systems (Hearing Testimony of Randa Cheaib).

Based on the foregoing, I find that the Division's determination to deny Excelsior's certification under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was based on substantial evidence.

CONCLUSION

Compuflex 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 Compuflex's application for certification as a woman-owned business enterprise.

In the Matter of Compuflex, Inc. dba Compuflex Security
DED File ID No. 67756
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
Tribunal 1	Notice of Hearing	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Letter	Y	Y
DED 4	Share Transfer Ledger	Y	Y
DED 5	Randa Cheaib Stock Certificate	Y	Y
DED 6	Michael Cheaib Stock Certificate	Y	Y
DED 7	Rachid Cheaib Stock Certificate	Y	Y
DED 8	Proof of Business Capitalization Narrative	Y	Y
DED 9	January 2010 Quickbooks Printout	Y	Y
DED 10	Michael Cheaib Resume	Y	Y
DED 11	Randa Cheaib Resume	Y	Y
DED 12	Rachid Cheaib Resume	Y	Y
DED 13	Roles and Responsibilities Narrative	Y	Y
DED 14	08/06/2021 Fire System Installation Contract	Y	Y
DED 15	08/16/2021 Fire System Installation Contract	Y	Y
DED 16	05/27/2021 Fire System Installation Contract	Y	Y

DED 17	12/20/2021 Access Control System Installation Contract	Y	Y
DED 18	Compuflex Company Overview Document	Y	Y