

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

**In the Matter**

**- of -**

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

**NYS DED File ID No. 62976**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**December 22, 2023**

This matter considers the written appeal by Cutlass Industrial, Inc., (“Cutlass” 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 December 2, 2022, Ms. Lisa Romano, as President, applied on behalf of Cutlass for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 27, 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 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); and
  - (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);
3. Cutlass timely filed a Request to Appeal on March 16, 2023 (APP Exhibit A).

4. A notice to proceed via written appeal was sent to Cutlass on March 17, 2023 (DED Exhibit 3).
5. Cutlass filed its written appeal by letter dated March 28, 2023 from its attorneys, Alan Pollack Esq. of Warshaw Burstein, LLP, (APP Exhibit B/ DED Exhibit 4).
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated September 21, 2023, and a brief of Dennie Byam Esq., counsel for the Division, dated September 22, 2023.

### **FINDINGS OF FACT**

7. Cutlass is engaged in the business of construction related commercial renovations (DED Exhibit 1).
8. Ms. Lisa Romano is the President and has a 100% ownership interest (DED Exhibit 1).
9. Applicant stated that Ms. Romano contributed \$ [REDACTED] as her cash contribution on May 20, 2016 (DED Exhibit 1).
10. Ms. Romano's resume reflects that between June 1986 and May 2016, her job titles have been Administrative Assistant, National Accounts Service Administrator, and Sales and Catering Administrator. Her duties as an Administrative Assistant were to schedule appointments, maintain updated calendars, create, and maintain filing systems, prepare communications, manage accounts, and perform bookkeeping. Her duties as a National Accounts Service Administrator were to provide sales and service support of office technology to Fortune 500 companies, and act as a liaison between customers and internal teams. Her duties as a Sales and Catering Administrator were to oversee sales, promotions, and campaigns, planned and directed the hiring and training of new sales representatives, directed, and coordinated sales, prepared sales budgets, projections, and approved

expenditures, tracked and analyzed sales statistics. Ms. Romano has a Bachelor of Science degree in Business Administration (DED Exhibit 5). She stated “I do not perform construction work in the field. My time and attention is devoted to managing the administrative work that is required in order for the company to be successful.” (DED Exhibit 10).

11. Mr. Vincent Romano’s resume reflects that he drafts commercial construction bid proposals, manages a team of 12 people on day-to-day operational aspects of all projects, creates, revises, and executes project work plans, and generates comprehensive cost reports. His job titles include Project Supervisor with a previous company and Field Supervisor at Cutlass. He has a Bachelor of Arts degree in Project Management (DED Exhibit 6).

### **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 Cutlass 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. 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).

It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution." *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

Ms. Romano stated that she contributed \$ [REDACTED] of her personal money to start the business on May 20, 2016 (DED Exhibit 1). However, applicant never provided any documentation to show her capital contribution. Applicant submitted a bank statement from [REDACTED] Bank, showing withdrawals totaling \$ [REDACTED]. These withdrawals were made in April 2014, which was 2 years before the claimed May 20, 2016, contribution. There was no proof as to where the money for these withdrawals went (DED Exhibits 1 and 9).

Applicant also submitted a letter and documentation from Signature Bank showing that she opened a joint business account with Mr. Romano on May 26, 2016 (DED Exhibit 10). No documentation was provided to show the \$ [REDACTED] contribution came from this account (DED Exhibit 1). Also, the funds from both the Signature Bank and the CitiGold accounts were joint accounts with Mr. Romano (DED Exhibits 8 and 10). They were therefore not from assets solely belonging to Ms. Romano. The Division has consistently denied certification where the source of the capital contribution came from a jointly owned bank account. See *Matter of Hertel Steel, Inc.*, Recommended Order dated February 10, 2017 (Final Order 17-12, dated March 15, 2017).

On appeal, Ms. Romano states that the Citigold bank statement reflects only part of the \$ [REDACTED] capital contribution. She claims she inadvertently omitted an additional withdrawal of \$ [REDACTED]. Again, this withdrawal was made two years before Cutlass was formed and there is no evidence of where the money went (APP Exhibit B/ DED Exhibit 4). Applicant claims the money went into the Signature business account. This account was not opened until six days after Ms. Romano claims she made her contribution (DED Exhibits 1 and 10).

On appeal, Ms. Romano states she contributed her “time, effort, managerial, and financial expertise that resulted in Cutlass generating over \$ [REDACTED] million dollars in annual revenues” (APP Exhibit B/ DED Exhibit 4). However, she did not submit any evidence of her expertise, or the value of the claimed expertise. To establish whether an owner’s contribution of expertise to the business is proportionate to the owner’s equity interest, an applicant must provide evidence of the value of the owner’s contributions. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022. Ms. Romano did not provide evidence of the value of her expertise in the business.

The Division's determination to deny the application on the basis that Cutlass failed to demonstrate that Ms. Romano made capital contributions to Cutlass 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. Romano 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. Ms. Romano's resume reflects that between June 1986 and May 2016, her job titles have been Administrative Assistant, National Accounts Service Administrator, and Sales and Catering Administrator. Her duties as an Administrative Assistant were to schedule appointments, maintain updated calendars, create, and maintain filing systems, prepare communications, manage accounts, and perform bookkeeping. Her duties as a National Accounts Service Administrator were to provide sales and service support of office technology to Fortune 500 companies, and act as a liaison between customers and internal teams. Her duties as a Sales and Catering Administrator were to oversee sales, promotions, and campaigns, planned and directed the hiring and training of new sales representatives, directed, and coordinated sales, prepared sales budgets, projections, and approved expenditures, tracked, and analyzed sales



statistics. Ms. Romano has a Bachelor of Science degree in Business Administration (DED Exhibit 5). She stated “I do not perform construction work in the field. My time and attention is devoted to managing the administrative work that is required in order for the company to be successful.” (DED Exhibit 10). These are administrative functions which do not involve the critical functions of construction related commercial renovations, which are specific to this business. Her resume confirms that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 5).

Mr. Romano’s resume reflects that he drafts commercial construction bid proposals, manages a team of 12 people on day-to-day operational aspects of all projects, creates, revises, and executes project work plans, and generates comprehensive cost reports. His job titles include Project Supervisor with a previous company and Field Supervisor at Cutlass. He has a Bachelor of Arts degree in Project Management (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 (4<sup>th</sup> Dept. 2018).

Cutlass is engaged in construction related commercial renovations (DED Exhibit 1). Ms. Romano does not have experience in the business's critical functions (DED Exhibits 1 and 5). Mr. Romano is relied upon for managing the core functions of the business, such as supervising field operations (DED Exhibits 1 and 6).

The Division's determination to deny the application on the basis that Cutlass failed to demonstrate that Ms. Romano 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**

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

In the Matter of Cutlass Industrial, Inc.  
DED File ID No. 62976  
Exhibit Chart

| Exhibit #: | Description of the Exhibits  | Offered<br>(Yes/No) | Admitted<br>(Yes/No) |
|------------|--|---------------------|----------------------|
| APP A      | Request to Appeal  | Y                   | Y                    |
| APP B      | Appeal Submission  | Y                   | Y                    |
| 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      | Appeal Submission  | Y                   | Y                    |
| DED 5      | Lisa Romano Resume   | Y                   | Y                    |
| DED 6      | Vincent Romano Resume  | Y                   | Y                    |
| DED 7      | Proof of Business Capitalization Narrative                         | Y                   | Y                    |
| DED 8      | Proof of Business Capitalization – Bank Statement                  | Y                   | Y                    |
| DED 9      | Signature Bank Letter and Business Profile and Account Information | Y                   | Y                    |
| DED 10     | December 1, 2022 Letter  | Y                   | Y                    |
| DED 11     | 2021 Cutlass Business Tax Returns                                  | Y                   | Y                    |