

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12245**

**In the Matter**

**- of -**

**the Application of Electrical Service & Systems Installation, Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 11664**

**RECOMMENDED ORDER**

**-by-**



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**Theresa Wells**  
**Administrative Law Judge**  
**March 27, 2024**

This matter considers the written appeal by Electrical Service & Systems Installation, Inc., (“ESSI, Inc.” 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 17, 2022, Norine Howard, as President, applied on behalf of ESSI, Inc. for recertification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On August 11, 2023, the Division denied the application on the grounds that (DED Exhibit 2):
  - (a) Minority group 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
  - (b) 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(c)(2).
3. ESSI, Inc. submitted a request to appeal the denial determination, dated September 1, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to ESSI, Inc. on September 6, 2023. (DED Exhibit 4).
5. ESSI, Inc. submitted its written appeal by letter dated October 6, 2023. (APP Exhibit B).

6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated January 18, 2024, and a brief of Michael Paff, Esq., counsel for the Division, dated January 24, 2024.

### **FINDINGS OF FACT**

7. ESSI, Inc. is engaged in the business of electrical contractors and other wiring installation contractors. (DED Exhibit 1).
8. Norine Howard is the President of ESSI, Inc. and has a 70% ownership interest. Her daughter, Kim Krawiec, has a 25% ownership interest, and her husband, Edward Howard, has a 5% ownership interest in the business enterprise. (DED Exhibit 1).
9. Ms. Howard has been the owner of ESSI, Inc. since 1989. (DED Exhibits 1 and 5).
10. Ms. Howard is the signatory for all contracts, documents, and checks issued and she is a IBEW Local 41 signatory for collective bargaining agreements. Ms. Howard oversees office operations, bonding and the documentation needed in the bidding process as well as being responsible for ensuring ESSI, Inc. employees have the certifications and licenses necessary for electrical jobs across the area. (Tribunal Exhibit I).
11. Ms. Howard's day-to-day activities for ESSI, Inc. include handling all correspondence for the business' contracts, projects and insurance along with banking, accounting, human resources, union reporting, and billing. (Tribunal Exhibit I).
12. Ms. Howard has an associate degree as a medical office assistant. Her prior work experience includes owning and operating a residential cleaning service for thirteen years, an instructor for a mental health organization for 47 years and working as a medical assistant for two years. (DED Exhibit 5).

13. Ms. Howard also has a Light Commercial Contractor license from the City of Buffalo Department of Permit and Inspection Services. She has also attended small business and tax workshops. (DED Exhibits 5 and 8).
14. Edward Howard is a Licensed Master Electrician in the cities of Buffalo and Lackawanna and various surrounding municipalities. Mr. Howard has completed a four-year apprenticeship with the Electricians Joint Apprenticeship Committee of Buffalo and completed a two-year apprenticeship in residential construction with Catalano Electric. (DED Exhibits 6 and 8).
15. Mr. Howard worked for Stroh Electric Construction for sixteen years and obtained a four-year apprenticeship as a Journeyman Wireman, Foreman and Supervisor. Mr. Howard worked for CIR Electric Construction for eleven years as a Serviceman, Supervisor and Project Manager. Mr. Howard has worked as an electrical contractor for over 34 years. Mr. Howard has also taken several courses ranging from electrical installation, supervisory development, Foremanship and electrical construction estimating. (DED Exhibit 6).
16. Mr. Howard's day-to-day responsibilities for ESSI, Inc. include handling job reviews with electricians, giving direction and advice, estimating and bidding of jobs, and handling all Buffalo Municipal Housing (BMHA) requests and job proposals and managing the crews and materials for those assignments. (Tribunal Exhibit II).

### **APPLICABLE LAW**

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:

- (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:

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 ESSI, Inc. 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); *300 Gramatan Ave. Association v. State Division of Human Rights*, 45 N.Y.2d 176, 180-81 (1978)).

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 *Matter of Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021)).

## **DISCUSSION**

### I. Industry Specific Competence

The Division denied ESSI, Inc.’s application for recertification as a WBE on the basis that ESSI, Inc. failed to demonstrate that Norine Howard, the woman-owner relied upon for certification, 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 consistently requires that the women owners be able to perform the core revenue generating functions of the business enterprise to determine eligibility. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021, Final Order 21-05, dated December 22, 2021). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, have the working knowledge necessary to review estimates 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 Dept. 2020), citing to *C.W. Brown, Inc. v. Canton*, 216 AD 841, 842 (1995)). The Division denies certification where the woman relied upon for certification “manages accounting and financial functions, payroll, and certain

contracting functions” but the non-qualifying owner “manages projects, estimating, and material procurement.” (See *JVR Electric, Inc. v. NYS Department of Economic Development*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016).

ESSI, Inc.’s core revenue generating function, is electrical contracting and wiring installation contracting. (DED Exhibit 1). Electrical contracting and wiring installation contracting work is technical and requires specific competency skills. (DED Exhibit 8). While Ms. Howard has a light commercial contractor license, she does not have any electrician licenses, which are required in electrical contracting and wiring installation contracting work. (DED Exhibit 8). Applicant has failed to show that she has the education, experience, or certifications related to the core, or critical, functions of ESSI, Inc. (DED Exhibit 1; APP Exhibit A). Her resume does not include any academic or technical training related to electrical contracting. (DED Exhibit 5). She does not hold certifications related to electrical installation. (DED Exhibit 5). In her appeal, Ms. Howard acknowledges that she has never had a Master Electrician License, and that her husband, Edward Howard, and other electricians that work for ESSI, Inc. have the necessary licenses to operate the business. (APP Exhibit B; Tribunal Exhibit II). Ms. Howard does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons.

In a narrative included with her initial application, Ms. Howard stated her day-to-day activities include making financial decisions and being a signatory for contracts, documents, checks and collective bargaining agreements with IBEW Local 41. (Tribunal Exhibit I). She also oversees office operations, bonding and the documentation needed in the bidding process as well as overseeing the certifications and licenses necessary for electrical jobs. (Tribunal Exhibit I). Ms. Howard handles banking, accounting, human resources and billing to ESSI, Inc.’s customers.

(Tribunal Exhibit I). These are administrative and general office management responsibilities. Applicant has not established that she possesses any expertise or experience in electrical contracting. (DED Exhibits 1 and 5; Tribunal I).

While the specific electrician licensing requirements may vary between municipalities, all of them require a form of licensing to conduct electrical work. (DED Exhibit 8). In her application, applicant acknowledges that Edward Howard has a wealth of knowledge and is a great asset to the electricians while also holding electrician licenses in the city of Buffalo and surrounding areas. (DED Exhibits 6 and 8; Tribunal Exhibit II). Mr. Howard is engaged in ESSI's core revenue generating functions specific to the electrical contracting industry. (DED Exhibit 6; Tribunal Exhibit II).

According to his resume, Mr. Howard has been actively involved in electrical construction and wiring installation contracting for decades. (DED Exhibit 6). He gained experience through apprenticeships and holds a Master Electrician license for the cities of Buffalo and Lackawanna and surrounding municipalities. (DED Exhibit 6 and 8). Mr. Howard has worked as a Journeyman Wireman, Foreman, Serviceman, Project Manager and Supervisor. (DED Exhibit 6). He has taken courses related to electrical installation, Foremanship and electrical construction estimating. (DED Exhibit 6). His education and experience are critical and core to the ESSI, Inc. on-site services.

Ms. Howard relies upon Edward Howard, and other ESSI, Inc. electricians, for their industry specific competence which was gained by their training and experience in the field. (DED Exhibits 1 and 8; APP Exhibit B; Tribunal Exhibit II). In circumstances where the non-eligible spouse has the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects, the business is considered a family-owned business and does not meet the criteria for certification. (See *Matter of Occupational Safety*



*& Environmental Association Inc. v. New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Division’s denial of Electrical Service & Systems Installation, Inc. application for recertification as a WBE on the basis that Electrical Service & Systems Installation, Inc. failed to demonstrate that the woman relied upon for certification possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

## II. Operational Decisions

The Division also denied ESSI, Inc.’s application for recertification as a WBE on the basis that ESSI, Inc. failed to demonstrate that Norine Howard, the woman-owner relied upon for certification, makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required by 5 NYCRR §144.2(c)(2). (DED Exhibit 2). The regulation states that the critical functions of a business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) “The products or services the business enterprise provides to clients; and (2) The means by which the business enterprise obtains contracts or orders.” (5 NYCRR §144.2(c)(2)).

The Division has consistently held that the woman or minority group member 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. N.Y.S. Department of Economic Development*, 163 A.D.3d 1517, 1519 (4th Dept. 2018)). The Division denies certification where the woman-owner has no training, experience or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations.

(See *Matter of Panko Electrical and Maintenance Corp. v. Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019)). Mr. Howard provides the essential on-site services to ESSI Inc.’s customers such as review of projects and supervision of the electricians. (Tribunal Exhibit II). Mr. Howard makes the day-to-day decisions with respect to ESSI Inc.’s critical core functions of electrical contracting work and the operational decisions of the business enterprise. (Tribunal Exhibit II).

While Ms. Howard does make day-to-day administrative decisions, and signs contracts, she does not make specific operational decisions related to the critical functions of the business of electrical contracting and other wiring installation contracting. (DED Exhibit 1; APP Exhibit B; Tribunal Exhibits I and II). Ms. Howard has a Light Commercial Contractors License with the City of Buffalo but the “application does not allow for electrical, plumbing or HVAC work to be performed.” (DED Exhibit 8; See *City of Buffalo, Contractor Application*, found at <https://www.buffalony.gov/DocumentCenter/View/8477/CONTRACTOR-APPLICATION?bidId=> ). Ms. Howard lacks the specific training and industry related experience in electrical and wiring contracting to make the necessary day-to-day operational decisions, which she acknowledges in her appeal. (APP Exhibit B). ESSI Inc.’s main day-to-day operational decisions regarding electrical contracting and wiring are made by Mr. Howard, who possesses the requisite licenses and knowledge.

The Division’s denial of Electrical Service & Systems Installation, Inc. application for certification as a WBE on the basis that Electrical Service & Systems Installation, Inc. failed to demonstrate that the woman relied upon for certification makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required by 5 NYCRR § 144.2(c)(2) is supported by substantial evidence.

### **CONCLUSION**

Electrical Service & Systems Installation, Inc. did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1) and (2) was not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny Electrical Service & Systems Installation, Inc. application for recertification as a woman-owned business enterprise should be affirmed.

In the Matter of Electrical Service & Systems Installation, Inc.  
 DED File ID No. 11664  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Resume of Norine Howard	Y	Y
DED 6	Resume of Edward Howard	Y	Y
DED 7	OSHA Certificates	Y	Y
DED 8	New York Licenses and Certifications	Y	Y
Tribunal I	Norine Howard Responsibilities	Y	Y
Tribunal II	Edward Howard Responsibilities	Y	Y