

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

In the Matter

- of -

**the Application of Empire State Electric Maintenance & Data Corp.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 70556

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
July 24, 2024

This matter considers the appeal by Empire State Electric Maintenance & Data Corp. (“Empire State Electric” 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 January 16, 2023, Ms. Gloria Gristina, as President, applied on behalf of Empire State Electric for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On August 15, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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
 - (b) 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 September 11, 2023, Empire State Electric submitted a Request to Appeal via a Hearing. (DED Exhibit 3).
4. On March 14, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 4).
5. A hearing was held and concluded on July 9, 2024.

FINDINGS OF FACT

6. Empire State Electric provides electrical contracting services including switchgear installation, power distribution, service upgrades, control wiring, communications wiring, security and fire alarm systems wiring, and general electrical and lighting maintenance services (DED Exhibit 1).
7. Ms. Gloria Gristina is the President and 100% owner of Empire State Electric (DED Exhibit 1).
8. Ms. Gristina's resume states that she is "Responsible for business development, public relations, finances, oversight of operations, delegation of responsibilities to staff, purchasing and procurement, day to day business management, and continuous communications with customer base." (DED Exhibit 7). "Her role is to oversee the operations of the business, Primary responsibilities include overseeing budgets and staff and maintaining customer relationships. Also maintaining awareness of both internal and external opportunities for growth." (DED Exhibit 8).
9. Edward Seelig's resume reflects that he is a Licensed Master Electrician. He has been employed with Empire State Electric since May 2022. His duties include "apply for/obtain electrical project permits, verify code compliance, attend inspections with DOB and FDNY inspectors to successfully pass project inspections. Coordinate with project management and job supervision personnel to create a harmonious and code compliant outcome on all projects. Regularly interact with company ownership, office staff project engineers and field staff (DED Exhibit 5). Applicant stated that Mr. Seelig "holds the license which allows us to obtain permits to perform electrical work within New York City. He oversees the installation and inspection of electrical installations." (DED Exhibit 8).

10. Eric Rojas oversees field operations, meets with clients to discuss projects, provides estimates, schedules manpower and oversees job performance through completion.” (DED Exhibit 8).

APPLICABLE LAW

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 Empire State Electric 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

Mr. Horace Flowers, Esq. appeared at the hearing on behalf of Empire State Electric. The following witness testified on behalf of Empire State Electric: Gloria Gristina, President. Empire State Electric offered APP Exhibits A and B, which were admitted into evidence.

Mr. William Chen, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler, Associate Certification Director, Division of Minority and Women’s Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 11.

I. Operation

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 *Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 A.D. 3d 1343 (N.Y. App. Div. 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 A.D. 3d 1517 (N.Y. App. Div. 2018).

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.

5 NYCRR §144.2(c)(1) requires that the minority/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 *Matter of Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 179 A.D. 3d 1343 (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 more experienced employees.

Ms. Gristina admitted that she does not physically perform switchgear installation, power distribution, service upgrades, control wiring, communications wiring, security and fire alarm systems wiring, and general electrical and lighting maintenance services. She does not have a Master Electrician license or any educational background in the industry. She acknowledged that Edward Seelig holds the necessary Master Electrician License necessary for the business to operate. 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. She testified that she didn't realize that she needed to be so specific in the

application, and her testimony served to clarify and explain her previously submitted materials. She testified that she has the knowledge and understanding of the business and that she has managed projects through oversight of project managers (Hearing Testimony of Gloria Gristina).

Glenn Butler testified that Ms. Gristina does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are providing electrical contracting services including switchgear installation, power distribution, service upgrades, control wiring, communications wiring, security and fire alarm systems wiring, and general electrical and lighting maintenance services, as stated in the application. He stated that Ms. Gristina's resume reflects that she handles administrative tasks, including business development, public relations, finances, purchasing and procurement, and communications with customer base. She does not have the education, training or experience to oversee the critical functions of the business. He testified that Edward Seelig's resume reflects that he holds a Master Electrician License and has the training and experience to handle the critical functions of the business. (Hearing Testimony of Glenn Butler).

Ms. Gristina testified that Mr. Seelig's role is very limited at the business, which she stated is typical of the industry. He has no role in any jobs, is not physically present, and she pays him for the use of his license. She stated the owner does not have to be the holder of the license in order to operate the business. She stated that all issues are brought to her attention. She participates in "walk throughs" and site visits. She has bi-weekly meetings on all projects, monthly job cost meetings and quarterly meetings with Mr. Seelig (Hearing Testimony of Gloria Gristina).

Ms. Gristina does not have the necessary training, expertise, or licensure to perform the critical functions of the business. Applicant states that Mr. Seelig "holds the license for the company which allows us to obtain permits to perform electrical work within New York City. He

oversees the installation and inspection of electrical installations.” Additionally, Eric Rojas provides estimates and oversees job performance through completion (DED Exhibit 8).

Although Ms. Cristina has demonstrated business expertise, the record supports the Division’s determination that she does not exert independent control over the applicant’s business. See *Matter of Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 179 A.D. 3d 1343, 1346 (N.Y. App. Div. 2020); (Executive Law § 310[15][c])

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).

Glenn Butler testified that Gloria Gristina’s resume and applicant’s submission listing her roles and responsibilities shows that Gloria Gristina handles the administrative matters, including

business development, public relations, finances, purchasing and procurement, overseeing budgets and staff, and maintaining customer relationships, which are not the critical functions of the business. Eric Rojas oversees field operations and Edward Seelig oversees the installation and inspection of electrical installations. He stated that Gloria Gristina does not have the education, training or experience to supervise the workers or make decisions without relying on others (Hearing Testimony of Glenn Butler).

Ms. Gristina did not dispute that she does not have the education or hold any electrician license. Again, she stated that she is not required to hold a license in order to operate the business, as long as she has an employee who is a Master Electrician. As stated above, she testified that “all issues are brought to her attention”, that she conducts site visits, does periodic “walk-throughs”, and is briefed by the foreman and project manager. All “change orders go through her”. She “does have knowledge of electrical work”. She hires/fires the master electrician. Her testimony revealed that she has extensive knowledge about the services the business provides to clients, the means by which the business obtains contracts or orders, and that she makes the operational decisions of the business on a day-to-day basis through her oversight of the foremen and project managers. (Hearing Testimony of Gloria Gristina).

Ms. Gristina’s testimony that she relies on the foreman, project manager and master electrician for her to ultimately make the operational decisions; and that she lacks the licensure to obtain permits and perform electrical wiring services, reflects that she is unable to adeptly supervise field operations and make day-to-day operational decisions with respect to the critical functions of the business (Hearing Testimony of Gloria Gristina).

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

CONCLUSION

Empire State Electric 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(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 Empire State Electric's application for certification as a woman-owned business enterprise.

In the Matter of Empire State Electric & Maintenance Corp.
 DED File ID No. 70556
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Finaly General Contracting Corp.: Subcontract	Y	Y
APP B	J.A. Jennings: Subcontract	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Letter	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	Ed Seelig Master Electrician License	Y	Y
DED 6	Ed Seelig Resume	Y	Y
DED 7	Gloria Gristina Resume	Y	Y
DED 8	Roles and Responsibilities	Y	Y
DED 9	Gloria Gristina's Expertise NAICS Codes	Y	Y
DED 10	Business Description	Y	Y
DED 11	Eric Rojas Resume	Y	Y