

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

**In the Matter**

**- of -**

**the Application of Green Mechanical Corp.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 69690**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**December 19, 2023**

This matter considers the written appeal by Green Mechanical Corp., (“GMC” 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 7, 2022, Ms. Etleva Pistoli, as President, applied on behalf of GMC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 21, 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); and
  - (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).
3. GMC timely filed a Request to Appeal on May 11, 2023 (APP Exhibit A/DED Exhibit 3).
4. A notice to proceed via written appeal was sent to GMC on May 16, 2023 (DED Exhibit 3).
5. GMC filed its written appeal by letter dated June 20, 2023, with attachments (APP Exhibit B/ DED Exhibit 5).

6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated August 24, 2023, and a brief of Karen Bernstein, Esq., counsel for the Division, dated August 25, 2023.

### FINDINGS OF FACT

7. GMC is engaged in the business of heating, ventilation, and air conditioning (HVAC) contracting, including but not limited to new unit installations, duct work installations, unit modifications, and boiler installations (DED Exhibit 1).
8. Ms. Etleva Pistoli is the President and has a 100% ownership interest (DED Exhibit 1).
9. Ms. Pistoli stated she made four purchases as capital contributions totaling \$ [REDACTED] (1) \$ [REDACTED] for Quick Books accounting software; (2) \$ [REDACTED] at Best Buy for office supplies; (3) \$ [REDACTED] at Best Buy for a computer; and (4) \$ [REDACTED] at Best Buy for office supplies. These purchases were charged to a GMC business credit card (DED Exhibit 1).
10. In the application, Ms. Pistoli references a capital contribution of \$ [REDACTED] towards the purchase of her shares (DED Exhibit 1). In a subsequent document, the \$ [REDACTED] was stated to have been given to her “in lieu of compensation or wages” and “represents the time value of her organizational contribution, and not a physical monetary contribution” (APP Exhibit B/ DED Exhibit 10).
11. Ms. Pistoli’s resume states she has a Bachelor of Science Degree in Accounting and Finance and “over 20 years of experience in accounting, finance, and business development”. Her prior position was “VP of Finance” for The Lighting Design Group, Inc., listing administration and finance responsibilities (DED Exhibit 11). She is solely responsible for financial decisions, negotiating bonding, negotiating insurance, hiring and firing, managing and signing payroll, negotiating contracts, and is the sole signatory for business accounts. She shares responsibility of estimating with Mr. Nick Como, the Project

Manager. Mr. Como is solely responsible for preparing bids and purchasing equipment/sales. Mr. Rudin Pistoli, Director is solely responsible for marketing and sales (DED Exhibit 1).

12. Ms. Pistoli's 2021 Personal Tax Return lists her occupation as "VP Finance" (DED Exhibit 13).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states 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...

## **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 GMC 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. 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." *In the Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems LLC v. White*, 197 AD 3d 1466 (3de Dept. 2021). The Division routinely denies applications for WBE certification where an applicant fails to substantiate the source of the capital contribution. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017);

*Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

In the application, Ms. Pistoli references a capital contribution of \$ [REDACTED] towards the purchase of her shares (DED Exhibit 1). In a subsequent document, the \$ [REDACTED] was stated to have been given to her “in lieu of compensation or wages” and “represents the time value of her organizational contribution, and not a physical monetary contribution” (APP Exhibit B/ DED Exhibit 10). No proof was offered to support this claim.

Ms. Pistoli stated she made four purchases as capital contributions totaling \$ [REDACTED] (1) \$ [REDACTED] for Quick Books accounting software; (2) \$ [REDACTED] at Best Buy for office supplies; (3) \$ [REDACTED] at Best Buy for a computer; and (4) \$ [REDACTED] at Best Buy for office supplies. These purchases were charged to a GMC business credit card (DED Exhibit 1). No proof was offered to show the credit card was paid from the personal funds of Ms. Pistoli.

Two invoices were submitted to show payments made for the business. An invoice from JPS Inc. dba Remco Agency shows the price of a general liability policy and related charges, but the payment confirmation does not show from what account the invoice was paid. Also, invoices from ShelterPoint for Disability Benefits Leave and Paid Family Leave policies show payments by check, but there is no evidence of what account the checks were paid from. Ms. Pistoli also stated that she used her savings to start up the business and invests money back into the company. However, no proof was submitted to substantiate this claim (DED Exhibits 6 and 9).

The Division’s determination to deny the application on the basis that GMC failed to demonstrate that Ms. Pistoli made contributions to GMC 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.

The core functions of GMC’s business are heating, ventilation, and air conditioning (HVAC) contracting, including but not limited to, new unit installations, duct work installations, unit modifications, and boiler installations (DED Exhibit 1). Ms. Pistoli has not demonstrated that she possesses the required licenses or certifications to perform HVAC work, or any academic or technical training relevant to HVAC systems, in order to make critical business decisions without relying upon other persons.

Ms. Pistoli argues that her education in Civil Engineering provided her knowledge and experience in HVAC systems. However, there is no evidence to support this claim such as relevant coursework with HVAC. Her claims that her education has demonstrated academic credentials in administrative and financial work, do not support her argument concerning her industry-specific competence to run the business (APP Exhibit B/ DED Exhibit 5).

Ms. Pistoli argues she has the work experience to show her industry-specific competence (APP Exhibit B/ DED Exhibit 5). However, the only work experience she has in this field prior to starting GMC was eight years working on hydro dam projects in Albania. She states her work

at GMC includes “industry compliance and regulations” and staying abreast of industry trends and innovation (APP Exhibit B/ DED Exhibit 5). This is not evidence of direct work experience.

Ms. Pisoli is solely responsible for financial decisions, negotiating bonding, negotiating insurance, hiring, and firing, managing and signing payroll, negotiating contracts, and is the sole signatory for business accounts. She shares responsibility of estimating with Mr. Nick Como, the Project Manager. Mr. Como is solely responsible for preparing bids and purchasing equipment/sales. Mr. Rudin Pistoli is solely responsible for marketing and sales (DED Exhibit 1). Ms. Pistoli’s work experience is in office management and general business administration, which is specifically excluded from demonstrating necessary industry competence in accordance with 5 NYCRR §144.2(c)(1)

Additionally, Ms. Pistoli stated that all of GMC’s technicians are required to have EPA certifications. She provided EPA HVAC licenses for three of her employees and none for herself, further supporting that Ms Pistoli cannot perform the HVAC work required by the business. (DED Exhibit 1)

The Division’s determination to deny the application on the basis that GMC failed to demonstrate that Ms. Pistoli possesses adequate industry-specific competence to make critical business decisions without relying upon others, as required under 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

### **CONCLUSION**

GMC 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) and 144.2(c)(1) 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 GMC's application for certification as a woman-owned business enterprise.

In the Matter of Green Mechanical Corp.  
DED File ID No. 69690  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (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	GMC Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	GMC Written Appeal	Y	Y
DED 6	Proof of Capitalization 1	Y	Y
DED 7	2021 GMC Business Tax Return	Y	Y
DED 8	Narrative 1	Y	Y
DED 9	Proof of Capitalization 2	Y	Y
DED 10	Letter from Mr. Andrew Tsentides	Y	Y
DED 11	Resume of Ms. Etleva Pistoli	Y	Y
DED 12	2020 Personal Tax Return of Ms. Etleva Pistoli	Y	Y
DED 13	2021 Personal Tax Return of Ms. Etleva Pistoli	Y	Y
DED 14	Narrative 2	Y	Y
DED 15	Narrative 3	Y	Y
DED 16	Narrative 4	Y	Y
DED 17	EPA HVAC Technician Certifications	Y	Y