

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NEW YORK 10017

In the Matter


- of -

the Application of J. McBain, Inc.,
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52809

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

September 26, 2024

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny the application filed by J. McBain, Inc. (Applicant) for recertification as a woman-owned business enterprise (WBE) be modified and affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers an appeal by J. McBain, Inc. 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 Division staff's determination to deny the application for recertification as a WBE. On June 10, 2021, Jackie McBain, President of J. McBain, Inc., applied on behalf of Applicant for recertification as a WBE (*see* Division Exhibit 1). Division staff issued a Notice of Denial, dated August 11, 2023 (*see* Division Exhibit 2), and identified two grounds for the denial. Applicant timely filed a Request to Appeal a Denial Determination dated September 6, 2023 (*see* Division Exhibit 2). Subsequently, the Division set 10:00 a.m. on June 10, 2024, for the administrative appeal hearing.

As scheduled, the administrative appeal hearing convened at 10:00 a.m. on June 10, 2024, via the Webex audiovisual platform. Division staff appeared by Karen L. Bernstein, Esq., Senior Counsel. Folashade Olatunbosun testified on behalf of Division staff. Ms. Olatunbosun is the Senior Certification Analyst who reviewed the recertification application.¹ Applicant appeared by Brendan Wolf, Esq. (Couch White, LLP [Albany, New York]). Jackie McBain testified on behalf of Applicant. During the hearing, the parties offered a number of exhibits. Attached to this Recommended Order is an Exhibit Chart.

The hearing was recorded, and subsequently transcribed. With an email dated July 9, 2024, I circulated an electronic copy of the transcript to the parties' attorneys, and directed them to confer about the due date for filing written closing briefs. The parties agreed to file briefs by August 30, 2024. Subsequently, with the consent of the parties, the due date for the closing brief was extended to September 6, 2024. Whereupon the hearing record closed with the timely receipt of a letter-brief from Applicant's counsel dated September 6, 2024, and a post-hearing brief from Division staff's counsel, also dated September 6, 2024.²

¹ The parties examined the witness' education and work experiences at the hearing (Tr. 130:7-131:24; 132:10-133:13; 139:5-8; 154:19-155:2).

² Neither Applicant's closing letter brief, nor Division staff's brief provided complete references to the transcript (page[s]:line[s]).

ELIGIBILITY CRITERIA AND STANDARD OF REVIEW

The eligibility criteria for recertification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2, effective December 2, 2020). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of Applicant to determine whether it should be recertified as a woman-owned business enterprise.

On this administrative appeal, Applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by J. McBain, Inc. for recertification 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" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

The review is limited to such information that was before Division staff at the time of the denial determination. New documentary evidence will not be considered. (*See* 5 NYCRR 145.2[b][1].) However, evidence that seeks to clarify and explain previously submitted materials will be considered (*see Scherzi Sys., LLC v White*, 197 A.D.3d 1466 [3d Dept 2021]).

POSITIONS OF THE PARTIES

Division Staff

In the Notice of Denial dated August 11, 2023, Division staff stated that J. McBain, Inc. failed to meet two of the criteria for WBE recertification set forth in 5 NYCRR 144.2 concerning the woman-owner's operation of the business enterprise. First, staff stated that Jackie McBain does not possess adequate industry-specific competence to make critical business decisions without relying upon other persons, pursuant to 5 NYCRR 144.2(c)(1). Second, staff stated further that Ms. McBain does not make operational decisions on a day-to-day basis concerning critical functions of the business enterprise, as required by 5 NYCRR 144.2(c)(2). (Tr. 13:22-14:12; 20:3-21; *see also* Division Exhibit 2, at 015-017.)³

With respect to the operation criteria, Division staff noted that experiences in office management and administration are expressly excluded from the certification criteria, and now require industry-specific competence, which can be demonstrated by proffering licenses and certifications, among other things (*see* 5 NYCRR 144.2[c][1], and Tr. 18:3-24; *see also*

³ Page references to the exhibits include the Bates number of the PDF documents. The Bates numbers for Division staff's exhibits are from 001 to 461 (inclusive of Division Exhibits 1 through 38). Division Exhibits 39 and 41 are separate PDF documents. The Bates numbers for McBain's exhibits are from 001 to 079 (inclusive of McBain Exhibits 1 through 15). (*See* Exhibit Chart.)

Division's closing, at 10-13, 20).⁴ With reference to several administrative decisions,⁵ Division staff argued that to comply with the referenced certification criteria, the woman-owner must also make decisions related to core revenue-generating functions. In the recently amended regulations, the term of art is "critical functions" (*see* 5 NYCRR 144.2[c][2]; Tr. 16:21-17:24; *see also* Division's closing, at 7-9, 20-24).

Division staff also identified several prior administrative decisions concerning electrical contractors.⁶ Staff argued that if the woman-owners did not meet the technical competence standard, as outlined in the prior version of the regulations related to operations, the Division did not certify those business enterprises. (Tr. 19:12-20:2.)

Division staff observed that Ms. McBain's husband, Donald Jay McBain, established the business enterprise in 1997. Jackie McBain acquired 51% of the business enterprise in 2009. Donald McBain holds an electrician's license, and has performed work in the Cities of Albany and Troy. In order to perform work in these municipalities, the municipalities require electrical contractors to be licensed. Furthermore, J. McBain, Inc. installs and services fire detection and alarm systems. According to Division staff, the installation and service of these systems is only authorized by a qualifier who has completed an 81-hour education course. For J. McBain, Inc., Donald McBain, rather than Jackie McBain, is the qualifier. (Tr. 24:18-26:25; *see also* Division Exhibit 7, at 34-37.)

J. McBain Inc.

Applicant argued that staff's denial is not based on substantial evidence. Applicant contended that the woman-owner, Jackie McBain, knows the technical aspects of the business enterprise, and makes independent, critical operational decisions. Applicant asserted that the certification criteria do not require Ms. McBain to be a licensed electrician for the business enterprise to be WBE certified. Applicant argued that Ms. McBain would violate the collective bargaining agreement with the electricians' union if she were to perform contractor functions. Applicant observed that the Division has certified J. McBain Inc. as a WBE since 2009, and asserted that the certification should continue. (Tr. 10:20-13:13.)

⁴ According to Division staff, supporting administrative decisions include *SEK Designs LLC*, Recommended Order, dated February 22, 2024, Final Order, dated May 29, 2024; *City Restoration and Maintenance, Inc.*, Recommended Order, dated December 26, 2023, Final Order, dated April 1, 2024; *Green Mechanical Corp.*, Recommended Order, dated December 19, 2023, Final Order, dated April 1, 2024; *ABC and New York Construction Inc.*, Recommended Order, dated November 30, 2023, Final Order, dated January 8, 2024 [posted under March 2024]; *Dan's Snowplowing, LLC*, Recommended Order, dated November 9, 2023, Final Order, dated March 8, 2024; and *cSide Tech, LLC*, Recommended Order, dated August 14, 2023, Final Order, dated August 17, 2023.

⁵ *See MC Environmental Services*, Recommended Order, dated April 29, 2021, Final Order, dated February 7, 2022; *Annandale Constr. Corp.*, Recommended Order, dated July 20, 2021, Final Order, dated March 31, 2022; *J.C. Smith, Inc.*, Recommended Order, dated March 9, 2017, Final Order, dated March 13, 2017, *aff'd J.C. Smith, Inc. v. New York State Dept. of Economic Development*, 163 AD 3d 1517 (2018).

⁶ *Chaim Electrical Corp.*, Recommended Order, dated June 5, 2019, Final Order, dated June 26, 2019; *Spring Electric, Inc.*, Recommended Order dated March 17, 2017, Final Order, dated March 27, 2017; *JVR Electric, Inc.*, Recommended Order, dated August 31, 2026, Final Order, dated September 9, 2016; and *New York Empire Electrical Contracting Services, Inc.*, Recommended Order dated May 12, 2016, Final Order dated May 26, 2012.

In the closing letter-brief, Applicant noted that the administrative decisions referenced by Division staff are not directly on point. Applicant disagrees with the staff's assertion the woman-owner, Ms. McBain, does not possess industry-specific competence because she is not a licensed electrician. With respect to the administrative decisions referenced by Division staff to support this assertion, Applicant contended that none expressly considered this issue. (Applicant's closing, at 4-5.)

FINDINGS OF FACT

1. J. McBain, Inc. maintains business offices at 2742 Sixth Avenue, Troy, New York 12180. Applicant provides electrical contracting services. In addition, J. McBain, Inc. installs fire detection and alarm systems. (Tr. 160:5-25; *see also* Division Exhibit 1, at 002, 005.)
2. Donald Jay McBain started the business enterprise in 1997, and served as its President until 2009. From 2001 to 2008, Jackie McBain served as the Vice-president of J. McBain, Inc. She started to work full-time at the business enterprise in 2001. In January 2009, Donald McBain transferred 51% of the ownership shares to Jackie McBain, and Mr. McBain retained 49% of the ownership shares. With the transfer, Jackie McBain became President of J. McBain, Inc., and Donald McBain became Vice-president. (Tr. 35:10-23; 38:4-5; 39:8-11; 52:10-20; 110:11-111:17; 114:19-115:21; *see also* Division Exhibit 1, at 004; Division Exhibit 6, at 031; and McBain Exhibit 14, at 074-078.)
3. In 1997, the McBains considered the enterprise to be a family business (Tr. 36:11-21). They continued to share responsibilities for the business enterprise when Ms. McBain became Vice-president in 2001. While serving as Vice-President, Jackie McBain continued to consider J. McBain, Inc. to be a family-owned business where she and her husband worked as partners. (Tr. 50:9-19).
4. Since 2009, J. McBain, Inc. has been certified as a woman-owned business enterprise. In June 2021, Ms. McBain filed an application with the Division to recertify Applicant as a woman-owned business enterprise. (Tr. 55:4-15; 56:3-15; 57:4-9; 59:23-60:12; 155:3-156:6; *see also* Division Exhibit 1, at 002-009.)
5. In a Notice of Denial Determination dated August 11, 2023, Division staff denied J. McBain Inc.'s application for recertification as a woman-owned business enterprise (*see* Division Exhibit 2, at 015-019).
6. On behalf of Applicant, Ms. McBain filed a Request to Appeal a Denial Determination dated September 6, 2023, and requested an appeal hearing (*see* Division Exhibit 2, at 022-023).

J. McBain Inc.'s Letter of Assent

7. As part of the application materials, Ms. McBain included a copy of a Letter of Assent, effective June 1, 2022, between the International Brotherhood of Electrical Workers

(IBEW) Local 236 and the Albany Electrical Contractors Association NECA,⁷ Albany Chapter. J. McBain, Inc. is a member of the Albany Electrical Contractors Association. (See Division Exhibit 1, at 011, and McBain Exhibit 2).

8. IBEW Local 236 has an apprenticeship program approved by the New York State Department of Labor (DOL). Upon the successful completion of the 5-year program, the participants receive a journeyman certificate. (Tr. 40:5-14; *see also* McBain Exhibit 2, at 026-030.)
9. Municipalities, such as the Cities of Albany and Troy, have local laws that regulate the installation of electric service and electrical equipment. These local laws may require electricians to obtain licenses from the municipality where the work will be performed. Under such circumstances, the local laws outline the parameters for individuals to obtain the required licenses including training and examinations. (Tr. 69:13-15; 194:17-201:14; 201:15-202:21; 205:6-207:8; 207:25-209:7; *see also* Division Exhibits 22, 24, and 39.)⁸
10. The terms and conditions of the Letter of Assent state that when the value of the contract for a project exceeds \$25,000, the McBains are prohibited from working at the job site. (Tr. 84:6-86:18; *see also* McBain Exhibit 2, at 012.)

Operations

11. Jackie McBain does not have an electrician's license, and has no direct experience performing electrical work. The New York State Department of State (NYS DOS), Division of Licensing Services issues licenses to install fire detection and alarm systems. Ms. McBain is not identified as the qualifier on J. McBain Inc.'s DOS license for installing fire detection and alarm systems. (Tr. 69:4-8; 120:23-121:5; 121:17-122:11; *see also* McBain Exhibit 14, at 074-075; Division Exhibit 7, at 036-037.)
12. As part of the application materials for the WBE recertification, Ms. McBain provided Division staff with copies of the following licenses and credentials. On March 11, 2021, the City of Albany issued Bruce L. Kruppenbacher a Class A Electrician License. The City of Troy issued a Master Electrician License to Donald McBain, which expired on December 31, 2021, and a second Master Electrician License, which expired on December 31, 2023. NYS DOS, Division of Licensing Services issued licenses to Donald McBain as a qualifier to install, service, or maintain security or fire detection and alarm systems with effective dates from June 19, 2020 to June 18, 2022, and from June 19, 2022 to June 18, 2024. (Tr. 98:4-99:11; 99:20-24; 185:20-187:21; 202:22-205:5; 207:9-24; *see also* Division Exhibit 6, at 031; Division Exhibit 7, at 033-037, and McBain Exhibit 12, at 64-66.)

⁷ National Electrical Contractors Association (NECA).

⁸ Division Exhibit 22 is City of Albany, Code, Chapter 171 (Electrical Licensing Ordinance). Division Exhibit 24 is City of Troy, Code, Chapter 148 (Electricians). Division Exhibit 39 is City of Troy, Electric Licenses (web site pages). *See* Exhibit Chart.

13. With respect to J. McBain, Inc., its critical functions as an electrical contracting business enterprise include, among other things, supervising field operations, preparing bids and estimates, as well as hiring people who perform electrical contracting work and those who will supervise them. (Tr. 216:24-217:6; 219:9-14).
14. Jackie McBain does not visit project sites. She may participate in an initial meeting on site, which generally focuses on the safety check. Since the pandemic, many meetings are held virtually. Nevertheless, Ms. McBain gets updates about J. McBain Inc.'s projects, as needed, from the foremen. (Tr. 81:2-23; 82:2-13; 109:25-110:10.)
15. Jackie McBain executed the following agreements where J. McBain, Inc. provided electrical contracting services: (1) AOW Construction, LLC, for a job (AOW Job Number 22-00103) at the University at Albany, Albany, New York, dated January 3, 2023 (*see* Division Exhibit 13, at 107-133); (2) Sam Greco Construction, Inc., for a project (Project No. 21049) at 110 State Street, Albany, New York, dated February 17, 2023 (*see* Division Exhibit 14, at 136-149); and (3) the Albany Port District Commissioner for electrical upgrades to Shed 1 (RFP No. 2023-03), dated March 13, 2023 (*see* Division Exhibit 15, at 151-155). Ms. McBain has prepared bids and negotiated contracts for projects such as the foregoing since becoming President of the business enterprise in January 2009. (Tr. 47:22-48:4; 49:7-50:7; 68:3-69:3; 173:20-176:22; 180:8-9; 182:7-183:15; 183:16-185:15; *see also* McBain Exhibit 14, at 074-075.)
16. When J. McBain, Inc. is awarded a contract, Ms. McBain, as the primary contact for the business enterprise, notifies Local 236, and advises the union about the number of workers needed. Subsequently, the union provides the electricians for the contract. J. McBain, Inc. may choose whether to accept the electricians provided by Local 236. (Tr. 40:15-23; 86:19-23; *see also* McBain Exhibit 2, at 023.)
17. Depending on the number of electricians required for a contract, the terms and conditions of the Letter of Assent prescribe whether a foreman is required, as well as the number of foremen needed. The foremen are members of Local 236, and Ms. McBain may select the foremen for the job sites. (*See* McBain Exhibit 2, at 018-019, 023-024.)
18. With respect to certifying an electrical contracting firm pursuant to 5 NYCRR 144.2, the following business functions are not considered critical. They include, among other things, banking and making financial decisions, managing payroll, negotiating agreements related to bonding and insurance, activities related to marketing and sales, as well as hiring and managing office personnel. (Tr. 217:7-18; 219:2-8; 221:4-10; 221:14-222:5; 230:10-16; 231:6-9).

Installation of Fire Detection and Alarm Systems

19. Some of J. McBain Inc.'s contract awards include the installation of fire detection and alarm systems. Applicant is a subcontractor for Johnson Control. J. McBain, Inc. purchases the equipment and installs it. The equipment includes the smoke detectors, and heat detectors, among other things. J. McBain, Inc. supplies the cabling. At the job site, the electricians wire the smoke detectors, heat detectors, and other associated components

up to the service panel, but do not connect the components to the panel. The manufacturer's installer makes the final connections to the panel, tests the system, and certifies that it is properly working. (Tr. 103:9-104:15; 202:22-205:5; *see also* Division Exhibit 41.)

20. For J. McBain, Inc., Donald McBain, rather than Jackie McBain, is identified as the qualifier for the installation of fire detection and alarm systems. Pursuant to the regulations, a license from the NYS DOS is required in order to supervise the installation of these systems. (Tr. 231:21-233:13; 233:21-234:12; *see also* Division Exhibit 41, at 5 [19 NYCRR 195.3].)

DISCUSSION

This recommended order considers Applicant's appeal from staff's August 11, 2023 Notice of Denial (*see* Division Exhibit 2), to deny the recertification of J. McBain, Inc. as a woman-owned business enterprise pursuant to Executive Law article 15-A. The Letter of Assent (*see* McBain Exhibit 2, at 005-039) raises a threshold legal question whether it can limit how Applicant may demonstrate compliance with the industry-specific competence criterion pursuant to 5 NYCRR 144.2(c)(1). In addition, the applicability of J. McBain Inc.'s prior WBE certifications to this recertification application is addressed.

Referring to the eligibility criteria outlined at 5 NYCRR 144.2, Division staff identified two bases for the denial with respect to the operation of the business enterprise. Each basis is addressed below. Finally, I recommended that the parties review and, as appropriate, discuss some case law related to WBE certification in the parties' respective closing briefs.

I. Letter of Assent

Applicant raised a threshold legal question whether the Letter of Assent (*see* McBain Exhibit 2, at 005-039) limits how Ms. McBain may demonstrate compliance with the industry-specific competence pursuant to 5 NYCRR 144.2(c)(1)(i). Division staff identified four administrative determinations concerning electrical contractors, and argued that the fact patterns were similar to the captioned matter.⁹ Each matter considered the former certification criteria related to operations, among other things (*see* former 5 NYCRR 144.2[b][1][i] and [ii]). In each case, the woman-owners did not have electrical licenses or direct experience performing electrical work. Rather, their respective husbands had obtained electrical licenses from local municipalities, and had many years of work experience performing electrical work. None of the exhibits proffered during these prior administrative hearings, however, included a Letter of Assent (*see* McBain Exhibit 2), which Applicant offered in this matter.

In the opening statement, Applicant asserted there is no statutory or regulatory requirement that Ms. McBain be a licensed electrician, contrary to staff's claim. Applicant maintained that an electrical license is not necessary for Ms. McBain to acquire the necessary technical knowledge to operate her business enterprise. In addition, Applicant contended that

⁹ *See* footnote 6, *supra*. *See also* Division closing, at 13-15.

Ms. McBain cannot obtain a license to perform electrical work at a job site because it would violate the terms and conditions of the Letter of Assent. (Tr. 12:10-23.)

J. McBain, Inc. is a member of the Albany Electrical Contractors Association, and participates in an agreement with IBEW Local 236. The terms and conditions of the agreement are outlined in the Letter of Assent, effective June 1, 2022 (*see* McBain Exhibit 2). As described in the Letter of Assent, the union has an apprenticeship program approved by the New York State Department of Labor (DOL). Upon the successful completion of the 5-year program, the participants receive a journeyman certificate. (Tr. 40:5-14; *see also* McBain Exhibit 2, at 026-030.)

Municipalities, such as the Cities of Albany and Troy, have local laws that regulate the installation of wiring and electrical fixtures. These local laws may require electricians to obtain licenses from the municipalities before undertaking work in these localities. Under such circumstances, the local laws outline the parameters for individuals to obtain the required licenses including training and examinations. (Tr. 69:13-15; 194:17-201:14; 201:15-202:21; 205:6-207:8; 207:25-209:7; *see also* Division Exhibits 22, 24, and 39.)

When the business enterprise is awarded a contract, Ms. McBain notifies Local 236, and advises the union about the number of electrical workers needed. Subsequently, the union provides the electricians for the job. J. McBain, Inc. may choose whether to accept the electricians provided by the union. (Tr. 40:15-23; 86:19-23; *see also* McBain Exhibit 2, at 023.) For the duration of the job, J. McBain, Inc. serves as the electricians' employer (*see* McBain Exhibit 2, at 010). Ms. McBain decides who to hire and who supervises the electricians at the job site (*see* McBain Exhibit 14, at 072-073, and Division Exhibit 5, at 028-029).

Depending on the number of electricians required for a job, the terms and conditions of the Letter of Assent prescribe whether a foreman is required, as well as the number of foremen needed. The foremen are members of the union. Ms. McBain may select the foremen at the job sites. (*See* McBain Exhibit 2, at 018-019, 023-024.)

The terms and conditions of the Letter of Assent limit the McBains' ability to work at job sites. When the value of the contract for a project exceeds \$25,000, the McBains are prohibited from working at the job site. (Tr. 84:6-86:18; *see also* McBain Exhibit 2, at 012.)

Applicant's assertion that no statute or regulation requires Ms. McBain be a licensed electrician is without merit. In order to determine whether the woman-owner has industry-specific competence, recently revised 5 NYCRR 144.2(c)(1)(i) expressly requires a consideration of whether employees must obtain licenses or certifications to provide products or services to clients. The need to demonstrate technical competence to obtain WMB certification is not new (*cf* former 5 NYCRR 144.2[b][1][i]). The December 2020 revisions, however, are very specific. Although it is not the only way to obtain industry-specific competence, it is identified as the first method. In contrast, the record of this hearing demonstrates that Ms. McBain obtained industry-specific expertise with respect to preparing bids and estimates via direct work experience (*see* 5 NYCRR 144.2[c][1][iii]).

Contrary to Applicant's contention, the Letter of Assent would not preclude Ms. McBain from obtaining an electrician's license. As noted above, the union, as a party to the Letter of Assent, has an apprenticeship program. Upon the successful completion of the 5-year program, the participants receive a journeyman certificate. (Tr. 40:5-14; *see also* McBain Exhibit 2, at 026-030.) Given Ms. McBain's status as the President of J. McBain, Inc., it may not be practical for her to forgo her ownership interest in the business enterprise at this point in her career to join the union and participate in its apprenticeship program to obtain the licenses and certificates now required by the recently revised 5 NYCRR 144.2(c)(1)(i). However, it was the career path that her husband, Donald McBain, took 45 years ago when he first served as an apprentice, joined Local 236, and eventually chose to form J. McBain, Inc. in 1997 (*see* Division Exhibit 6, at 031). With this career path, Donald McBain obtained the industry-specific competence contemplated by the recently promulgated revision to 5 NYCRR 144.2(c)(1)(i).

Applicant correctly notes that the terms and conditions of the Letter of Assent prohibit Jackie and Donald McBain from working at job sites. As the owners of J. McBain, Inc., they cannot perform union work because they are employers. Consequently, Ms. Bain may hire and fire the electricians and their foremen for the jobs awarded to J. McBain, Inc. (*See* McBain Exhibit 2, at 010, 018-019, 023-024). However, the change in circumstance from being a journeyman to becoming an employer does not discount Donald McBain's work experiences as an electrician. Therefore, Applicant's contention that Jackie McBain cannot obtain a license to perform electrical work at a job site because it would violate the terms and conditions of the Letter of Assent is without merit. Rather, Ms. McBain exercises the rights of an employer, as provided by the terms of the Letter of Assent.

Based on the foregoing discussion, I conclude that the Letter of Assent (*see* McBain Exhibit 2) does not limit how Applicant can demonstrate compliance with the industry-specific competence criterion pursuant to 5 NYCRR 144.2(c)(1)(i). The Director should conclude the same.

II. Prior Certifications

Since 2009, J. McBain, Inc. has been certified as a woman-owned business enterprise. In June 2021, Ms. McBain filed an application with the Division to recertify Applicant as a woman-owned business enterprise. (Tr. 55:4-15; 56:3-15; 57:4-9; 59:23-60:12; 155:3-156:6; *see also* Division Exhibit 1, at 002-009, and Division closing, at 26.) In the opening statement, Applicant asserted there is no reason to deny recertification now (Tr. 13:9-12). Ms. McBain noted, during her testimony, that the Dormitory Authority of the State of New York (DASNY) certified J. McBain, Inc. as a woman-owned business enterprise (Tr. 92:18-22; 94:22-96:5; *see also* McBain Exhibit 10, at 057-058.)

For the following reasons, the Division is not obligated to recertify J. McBain, Inc. as a WBE based on prior determinations or because the business enterprise obtained WBE certifications from other entities, such as DASNY. First, pursuant to Executive Law § 314(5), a WBE certification is effective for three years. Therefore, business enterprises must periodically re-apply to extend the certification, as J. McBain, Inc. did here. During the recertification process, J. McBain, Inc. has the burden to demonstrate that it complies with the eligibility

criteria outlined at 5 NYCRR 144.2.¹⁰ Second, it is well settled that the doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function.¹¹

Based on the referenced case law, J. McBain Inc.'s argument related to its prior WBE certifications is without merit. Therefore, I conclude that within the context of this renewal application for WBE recertification, Division staff properly considered the woman-owner's compliance with the eligibility criteria outlined at 5 NYCRR 144.2.

III. Industry-Specific Competence

According to Division staff, Jackie McBain, as the woman-owner, does not possess adequate industry-specific competence to make critical business decisions without relying upon other persons (*see* 5 NYCRR 144.2[c][1]). With respect to this operation criterion, experiences in office management and administration are expressly excluded from the certification criterion. In addition, the regulation identifies three factors that serve as examples to evaluate industry-specific competence. These factors are:

- 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][1]).

The parties do not dispute that Jackie McBain does not have an electrician's license, and has no direct experience performing electrical work (Tr. 69:4-8; 120:23-121:5; 121:17-22). With the application for WBE recertification, Ms. McBain provided Division staff with copies of the following: (1) a Class A Electrician License issued by the City of Albany to Bruce L. Kruppenbacher; (2) a Master Electrician License issued by the City of Troy to Donald McBain, the Vice-president of the business enterprise and minority shareholder; (3) as well as the qualifier license issued by the NYS DOS to Mr. McBain to install fire detection and alarm systems (Tr. 98:4-99:11; 99:20-24; 185:20-187:21; 202:22-205:5; 207:9-24; *see also* Division Exhibit 6, at 031; Division Exhibit 7, at 033-037, and McBain Exhibit 12, at 064-066.)

A portion of J. McBain Inc's contract awards include the installation of fire detection and alarm systems. Applicant is a subcontractor for Johnson Control. J. McBain, Inc. purchases the

¹⁰ *See Matter of Coverco, Inc.*, Recommended Order, dated January 23, 2017, at 7-8, Final Order 17-06, dated January 30, 2017; *affd Matter of Converco, Inc. v New York State Dept. of Economic Dev.*, 159 AD3d 1538, 1539 (2018).

¹¹ *See e.g. Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Envtl. Conservation*, 119 AD3d 1172, 1173 [2014].

equipment, which includes, among other things, smoke detectors and heat detectors. For jobs that require the installation of fire detection and alarm systems, J. McBain, Inc. supplies the cabling, and the electricians run the wiring and install the smoke detectors, heat detectors, and other associated components up to the service panel. (Tr. 103:9-104:15.) For the business enterprise, Donald McBain, rather than Jackie McBain, is identified as the qualifier for the installation of fire detection and alarm systems. Pursuant to the regulations, a license from the NYS DOS is required in order to supervise the installation of fire detection and alarm systems. (Tr. 202:22-205:5231:21-233:13; 233:21-234:12; *see also* McBain Exhibit 12, at 066, and Division Exhibit 7, at 036-037, Division Exhibit 41, at 5 [9 NYCRR 195.3].)

At the hearing, Ms. McBain testified about the following certificates. The first set consists of Part 1 of the national electric code through Jade Learning. Ms. McBain received a certificate as a LEED¹² Green Associate. In addition, she obtained certificates of completion from ChargePoint for the installation of electric vehicle charging stations, and from the New York State Department of Environmental Conservation (DEC) for stormwater management. (Tr. 71:17-72:3; 72:7-74:2; 75:18-77:9; 77:10-78:20; 80:2-22, *see also* McBain Exhibit 13, at 068-072.)

On behalf of Division staff, Ms. Olatunbosun testified that Ms. McBain does not possess the required licenses or certifications to perform or supervise electrical work (Tr. 193:10-16). With reference to the certificates related to the national electric code, Ms. Olatunbosun said there are several parts to the certification process, but Ms. McBain provided copies of the certificate for Part 1 (years 2017 and 2020). Without copies of the certificates for the other, related parts, Ms. Olatunbosun reasonably concluded that Ms. McBain did not complete all related parts. (Tr. 188:20-191:20.) Ms. Olatunbosun stated further that Ms. McBain did not provide any contracts to show that J. McBain, Inc. either has installed, or would be installing, electric vehicle charging stations. In any event, Ms. Olatunbosun noted that only an electrician could install the charging stations. (Tr. 188:10-19.) Finally, with respect to LEED certification and the DEC stormwater management certificate, Ms. Olatunbosun observed that these credentials do not relate to wiring and installing electrical fixtures (Tr. 191:21-193:9).

I concur with Ms. Olatunbosun's testimony, and find that Ms. McBain's certifications do not relate to activities that an electrician would undertake. In addition, Ms. McBain does not have the required license from the NYS DOS to supervise the installation of fire detection and alarm systems. (Tr. 202:22-205:5231:21-233:13; 233:21-234:12; *see also* McBain Exhibit 12, at 066, and Division Exhibit 7, at 036-037, Division Exhibit 41, at 5 [9 NYCRR 195.3].) Accordingly, with respect to 5 NYCRR 144.2(c)(1)(i), I find that Ms. McBain, as the woman-owner of the business enterprise, has not obtained the requisite licenses or certifications to provide services to clients. Ms. McBain has not demonstrated industry-specific competence with respect to performing electric work. In addition, Ms. McBain does not possess the necessary industry-specific competence to install, or supervise the installation of, fire detection and alarm systems.¹³

¹² The Leadership in Energy and Environmental Design (LEED) is a program sponsored by the US Green Building Council.

¹³ *See Integrity Fire Solutions, Inc.*, Recommended Order, dated March 4, 2024, at 9-11, *aff'd* Final Order, dated August 23, 2024.

With respect to academic credentials (*see* 5 NYCRR 144.2[c][1][ii]), Ms. McBain testified that she graduated from Catholic Central High School in 1982. She also attended the American School of Nursing and graduated in 1985. Subsequently, Ms. McBain worked as a licensed practical nurse, and then as a registered nurse at a local hospital. While working at the local hospital, Ms. McBain became an assistant nurse manager, and then a nurse manager. (Tr. 33:10- 34:18.)

Ms. McBain's résumé reflects this education and work experience (*see* McBain Exhibit 14, at 075, and Division Exhibit 5, at 029). However, these academic credentials do not relate to an approved electrical apprenticeship, or activities undertaken by an electrician. Moreover, 19 NYCRR 196.1 identifies five courses prescribed by 19 NYCRR 196.8 that must be satisfactorily completed in order to obtain the requisite license from DOS to install fire detection and alarm systems. A review of the application materials for WBE recertification shows that Ms. McBain did not demonstrate that she completed the required course work. (Tr. 210:9-211:22; *see also* Division Exhibit 41.) Accordingly, with respect to 5 NYCRR 144.2(c)(1)(ii), I find that Ms. McBain, as the woman-owner of the business enterprise, does not have the academic credentials for persons employed in the electric contracting industry. In addition, Ms. McBain has not completed the requisite training to either install fire detection and alarm systems or supervise their installation.

Finally, 5 NYCRR 144.2(c)(1)(iii) provides that industry-specific expertise may be obtained via direct work experience. Until 2019, J. McBain, Inc. employed an estimator to prepare estimates and bids (Tr. 108:17-109:4). Since then, Ms. McBain has prepared estimates and bids on behalf of J. McBain, Inc. At the hearing, Ms. McBain credibly testified that she learned this skill through her work experiences. (Tr. 48:13-49:9.) Ms. Olatunbosun acknowledged that preparing bids and estimates would be considered a critical function for this business enterprise. Ms. Olatunbosun explained, however, that the duties and responsibilities presented in Ms. McBain's résumé did not provide sufficient details to determine whether she was responsible for preparing bids and estimates, especially in light of Donald McBain's training and credentials, as well as the duties and responsibilities presented in Mr. McBain's résumé. (Tr. 165:14-166:18; 216:24-217:6; 219:19-221:3; *see also* McBain Exhibit 14, at 075-076, and *compare* Division Exhibit 4, at 024-025, *with* Division Exhibit 5, at 028-029.)

During the hearing, however, Ms. Olatunbosun discussed a set of agreements provided by Ms. McBain in response to Division staff's request for additional information. These agreements, which are part of the application materials reviewed by staff before staff issued the Notice of Denial, show that after preparing the related bids, Ms. McBain subsequently executed agreements where J. McBain, Inc. provided electrical contracting services. (Tr. 47:22-48:4; 49:7-50:7; 68:3-69:3; 173:20-176:22; 180:8-9; 182:7-183:15; 183:16-185:15; *see also* Division Exhibit 13, at 107-133, Division Exhibit 14, at 136-149, and Division Exhibit 15, at 151-155.)

Although Ms. Olatunbosun's initial assessment of the application materials was reasonable, I conclude, however, that Ms. McBain's testimony at the administrative hearing did not constitute new evidence. Rather, this testimony explained and clarified Ms. McBain's duties and responsibilities as initially outlined in the application materials and in additional information provided in response to Division staff's July 17, 2023 request (*see Matter of Scherzi Sys., LLC*, at

1470). Based on the foregoing, I find that, with respect to the preparation of estimates and bids, Ms. McBain obtained industry-specific expertise directly from work experiences as provided by 5 NYCRR 144.2(c)(1)(iii).

Division staff argued that the three factors identified at 5 NYCRR 144.2(c)(1) are a non-exhaustive list to consider when determining industry-specific competence (Tr. 18:20-23). The prior administrative determinations referenced in Division staff's opening statement considered compliance with 5 NYCRR 144.2(c)(1) in generally, but did not consider the individual factors identified the subparagraphs at 5 NYCRR 144.2(c)(1)(i),(ii), and (iii), in particular.¹⁴ Other than the three factors enumerated in the regulation, no party identified any additional or alternative factors for consideration as a way to demonstrate industry-specific competence.

During this proceeding, however, the parties developed a record about Ms. McBain's compliance with respect to each of the three factors enumerated in the regulation. However, the parties provided no arguments about how to determine compliance with this certification criterion concerning operations when an applicant demonstrates industry-specific competence about a critical function by relying on one particular subparagraph.

Here, for example, Ms. McBain does not possess the necessary industry-specific competence, pursuant to 5 NYCRR 144.2(c)(1)(i), to install, or supervise the installation of, fire detection and alarm systems because she did not complete the requirements outlined in 19 NYCRR Parts 195 and 196 (*see* Division Exhibit 41) to obtain the required license from NYS DOS. Also, Ms. McBain, as the woman-owner of the business enterprise, has not obtained the requisite licenses or certifications, pursuant to 5 NYCRR 144.2(c)(1)(i), to provide services to clients with respect to performing electric work. Nevertheless, with respect to the preparation of estimates and bids, which is a different critical function from performing electric work, Ms. McBain obtained industry-specific expertise directly from work experiences as provided by 5 NYCRR 144.2(c)(1)(iii).

Upon review of the hearing record, and this recommended decision, the Director may want to hear additional arguments from the parties about how to evaluate compliance with 5 NYCRR 144.2(c)(1) under the unique circumstances described above.

IV. Operational Decisions – Critical Functions

According to Division staff, Jackie McBain does not make operational decisions on a day-to-day basis concerning critical functions of the business enterprise (*see* 5 NYCRR 144.2[c][2]). The regulation identifies two factors that serve as examples to identify the critical functions of the business enterprise. These factors are:

- i. the products or services the business enterprise provides to clients; and
- ii. the means by which the business enterprise obtains contracts or orders (5 NYCRR 144.2[c][2]).

¹⁴ *See* footnote 4, *supra* (Tr. 18:25-19:11).

At the hearing, Ms. Olatunbosun credibly testified that the critical functions for an electrical contracting business enterprise, such as J. McBain, Inc., include supervising field operations, preparing bids and estimates, as well as hiring people who perform electrical contracting work and those who will supervise them, among other things. (Tr. 216:24-217:6; 219:9-14). In addition, Ms. Olatunbosun said that the following business functions are not considered critical. They include, among other things, banking and making financial decisions, managing the payroll, negotiating agreements related to bonding and insurance, activities related to marketing and sales, as well as hiring and managing office personnel. (Tr. 217:7-18; 219:2-8; 221:4-10; 221:14-222:5; 230:10-16; 231:6-9).

With respect to critical functions identified by Division staff, Ms. McBain does not visit project sites. She may, however, participate in an initial meeting on site, which generally focuses on the safety check. Since the pandemic, many meetings, regardless of their purpose, are held virtually. (Tr. 81:2-23; 82:2-13; 109:25-110:10.)

As mentioned above, J. McBain, Inc. employed an estimator to prepare estimates and bids until 2019 (Tr. 108:17-109:4). Since then, Ms. McBain has prepared estimates and bids on behalf of J. McBain, Inc. At the hearing, Ms. McBain credibly testified that she learned this skill through her work experiences. (Tr. 48:13-49:9.) Ms. Olatunbosun acknowledged that preparing bids and estimates would be considered a critical function for this business enterprise. However, Ms. Olatunbosun explained that the duties and responsibilities presented in Ms. McBain's résumé did not provide sufficient details to determine whether she was responsible for preparing bids and estimates, especially in light of Donald McBain's training and credentials, as well as the duties and responsibilities presented in his résumé. (Tr. 165:14-166:18; 216:24-217:6; 219:19-221:3; 228:25-230:8.)

With reference to her résumé (*see* McBain Exhibit 14, at 075-076 and Division Exhibit 5, at 028-029), Ms. McBain testified about her duties and responsibilities associated with contractual project management. According to Ms. McBain, contractual project management includes reviewing bid invitations and preparing estimates. In doing so, Ms. McBain reviews vendor and commodity sheets to complete the bids, and adds labor costs. After J. McBain, Inc. obtains the job, Ms. McBain will secure insurance and bonding. (Tr. 62:20-64:21.) As necessary, Ms. McBain renegotiates the terms of the agreements when costs change (Tr. 64:22-66:12).

As a result, Jackie McBain executes agreements on behalf of J. McBain, Inc. to provide electrical contracting services. The following are examples of the agreements included with the application materials: (1) AOW Construction, LLC, for a job (AOW Job Number 22-00103) at the University at Albany, Albany, New York, dated January 3, 2023 (*see* Division Exhibit 13, at 107-133); (2) Sam Greco Construction, Inc., for a project (Project No. 21049) at 110 State Street, Albany, New York, dated February 17, 2023 (*see* Division Exhibit 14, at 136-149; and (3) the Albany Port District Commissioner for electrical upgrades to Shed 1 (RFP No. 2023-03), dated March 13, 2023 (*see* Division Exhibit 15, at 151-155). (Tr. 47:22-48:4; 49:7-50:7; 173:20-176:22; 180:8-9; 182:7-185:15.)

Consistent with the terms and conditions of the Letter of Assent (*see* McBain Exhibit 2), Ms. McBain hires employees and supervisors when J. McBain, Inc. successfully obtains a

contract. As the primary contact for the business enterprise, Ms. McBain notifies Local 236, and advises the union about the number of workers needed. Subsequently, the union provides the electricians for the contract. Ms. McBain may choose whether to accept the electricians provided by Local 236. (Tr. 40:15-23; 86:19-23; *see also* McBain Exhibit 2, at 023.)

Depending on the number of electricians required for a contract, the terms and conditions of the Letter of Assent prescribe whether a foreman is required, as well as the number of foremen needed. The foremen are members of Local 236. Ms. McBain may select the foremen for the job sites. (*See* McBain Exhibit 2, at 018-019, 023-024.)

With respect to certifying an electrical contracting firm pursuant to 5 NYCRR 144.2(c), the following business functions are not considered critical for the purposes of certification. They include, among other things, banking and making financial decisions, managing payroll, negotiating agreements related to bonding and insurance, activities related to marketing and sales, as well as hiring and managing office personnel. (Tr. 217:7-18; 219:2-8; 221:4-10; 221:14-222:5; 230:10-16; 231:6-9). Ms. McBain's résumé and testimony at hearing demonstrate that she is responsible for these administrative business functions. (Tr. 42:10-43:16; 86:19-87:3; 88:7-22; 88:25-89:25; 90:2-18; *see also* McBain Exhibit 5, at 045, Exhibit 6, at 047, Exhibit 7, at 049, Exhibit 8, at 051, and Exhibit 14, at 074-075, and Division Exhibit 5, at 028-029).

I disagree with Ms. Olatunbosun's assessment that Ms. McBain does not make operational decisions on a day-to-day basis concerning critical functions of the business enterprise (*see* 5 NYCRR 144.2[c][2]). Ms. McBain's credible testimony explained, and clarified her duties and responsibilities as initially presented in the application materials; Applicant offered no new evidence (*see Matter of Scherzi Sys., LLC*, at 1470).

Based on the foregoing, I find that Ms. McBain performs the critical functions of preparing bids and estimates, as well as hiring people who undertake electrical contracting work and those who will supervise them. With respect to the former critical function, the business enterprise obtains contracts or orders through the preparation of bids and estimates. With respect to the latter critical function, J. McBain, Inc. provides electrical contracting services to its clients. I conclude, therefore, that Ms. McBain, as the woman-owner of the business enterprise, makes operational decisions consistent with 5 NYCRR 144.2(c)(2)(i) and (ii). I recommend that the Director conclude the same, and reverse Division staff's determination to deny WBE certification with respect to this criterion.

V. Case Law

In an email dated July 9, 2024, I provided the parties with a list of court determinations. I encouraged the parties to review the case law and, as appropriate, discuss the cases in their respective closing briefs.

Era Steel and Northeastern Stud Welding

The fact pattern of the captioned matter is similar to that considered in *Matter of Era Steel Constr. Corp. v Eagan*. In overturning the administrative determination to deny WBE certification, the court held that Lenore Janis retained full operational control because she could

hire and fire all members of the business enterprise, her lack of technical expertise notwithstanding. (See 145 AD2d 795, 797-799 [3d Dept 1988]).

Applicant argued that *Era Steel* is on point with the captioned matter. According to Applicant, Ms. McBain runs the day-to-day operations of the business enterprise, and hires the employees who undertake the electrical work. (See Applicant's closing at 2).

Division staff argued, however, that reliance upon *Era Steel* is misplaced because it was decided under a prior legal framework. In the closing brief, staff outlined the statutory history of the initial minority and woman-owned business enterprise program that began in 1983 with Executive Order No. 21, and guidelines promulgated by the New York State Office of General Services (see 9 NYCRR part 340 [repealed January 1997]). (See Division's closing at 25-26.)

I agree with Division staff that the precedential value of *Era Steel* has diminished over time. As staff pointed out, the MWBE program initially began, some 40 years ago. Since then Executive Order No. 21 has been replaced with Executive Law Article 15-A, and implementing regulations at 5 NYCRR 140-144. The current version of the MWBE certification criteria at 5 NYCRR 144.2, which became effective on December 2, 2020, expressly requires a demonstration by the minority or woman-owner of industry-specific competence. For the reasons outlined above, Applicant did not demonstrate compliance with each factor identified at 5 NYCRR 144.2(c)(1)(i), (ii), and (iii).

In contrast to *Era Steel*, the court in *Matter of Northeastern Stud Welding Corp. v Webster* (211 AD2d 889 [3d Dept 1995]) observed that the woman-owner's lack of training or expertise in construction services was significant, though not dispositive of the administrative denial. Although Jean Zelezniak was the sole shareholder, the court held that the day-to-day operations of the business enterprise were shared by Ms. Zelezniak and her husband, Frank Wright. In affirming the administrative decision to deny the application for WBE recertification, the court characterized the business enterprise as a family-owned business, where Ms. Zelezniak shared responsibilities with her spouse, Mr. Wright. Given these circumstances, the court determined that Ms. Zelezniak did not comply with the certification criteria then found at 9 NYCRR 544.2(b) and (c).¹⁵ (See *Northeastern Stud*, at 890-891.)

Applicant argued that the captioned matter is factually distinguishable from *Northeastern Stud*. Without providing any reference to the hearing transcript, Application contended that Jackie McBain testified that she controls day-to-day operations for the business enterprise, and has authority to hire and fire employees, including her husband. Ms. McBain said that all emails sent to Mr. McBain are copied to her, but the reverse is not true. Applicant concluded that Division staff did not claim that Ms. McBain lacks the ability to fire her husband or any other employee, at her discretion. (See Applicant's closing, at 2.)

Nevertheless, Ms. McBain testified that J. McBain, Inc. was initially a family business (Tr. 36:11-21). Ms. McBain further testified that she and her husband continued to share responsibilities for the business enterprise when Ms. McBain became Vice-president in 2001. As Vice-president, Ms. McBain still considered the firm to be a family-owned business where

¹⁵ Effective September 1, 1994, 9 NYCRR Part 544 was renumbered, without modification, to 5 NYCRR Part 144.

they worked as partners. (Tr. 50:9-19). According to Division staff, family-owned businesses typically do not meet WBE certification criteria (*see* Division closing, at 27-28).

JC Smith Inc.

Upon review, the court affirmed the Division's determination to deny WBE recertification to JC Smith, Inc. (*see Matter of JC Smith, Inc. v New York State Dept. of Economic Dev.* 163 AD3d 1517 [4th Dept 2018], *lv denied*, 23 NYC3d 1191 [2019]). The court acknowledged that the woman-owner's control over the core functions must be actual, rather than nominal (*see JC Smith*, at 1519, *citing Era Steel*, at 797-799). The court held that the Division has discretion to identify those operations over which the woman-owner must exercise control in order to demonstrate compliance with the certification criteria (*see JC Smith*, at 1519, *citing Northeastern Stud*, at 890-891, *et al.*). As in *Northeastern Stud*, the court determined that JC Smith was operated as a family-owned business enterprise rather than as a woman-owned firm. (*See JC Smith*, at 1519, *citing Northeastern Stud*, at 891.)

Applicant argued that *JC Smith* is distinguishable from the captioned matter. Applicant noted that the issue in *JC Smith* concerned the citing criteria related to "control," which is not at issue in this matter. By choosing not to rely on the control criteria, which was at issue in *JC Smith*, as a basis for denial (*see* Division Exhibit 2), Applicant asserted that Division staff conceded that Jackie McBain controls critical business functions. (*See* Applicant's closing, at 4.)

Division staff explained that the December 2020 regulatory revisions codified the need to identify core-revenue generating functions, which are now characterized as the "critical functions" of the business enterprise (*see* Division's closing, at 8-9, *see also* footnote 4). In addition, staff argued that the woman-owner must exercise independent operational control over these critical functions (*see* Division's closing, at 21). Division staff contended that Ms. McBain does not exercise control over critical functions because she lacks industry-specific competence as a licensed electrician (*see* Division's closing, at 10).

Panko Electrical and Maintenance Corporation

Panko Electrical and Maintenance Corporation (Panko) was an electrical contracting company. Although Barbara Panko was not a licensed electrician, her husband and their son were. Messrs. Panko served as project managers, supervised field operations, and executed contracts, while Ms. Panko was responsible for financial and administrative affairs. In 2016, the Division denied Panko's application for WBE recertification. Upon review, the court affirmed. (*See Matter of Panko Elec. & Maintenance Corp. v Zapata* 172 AD3d 1682, 1682-1683 [3d Dept 2019].)

The court acknowledged that expertise as an electrician is not required as long as the woman-owner retains operational control of the business enterprise (*see Panko*, at 1683, *citing Northeastern Stud*, at 890). The court determined, however, that Messrs. Panko performed essential business functions, and that they shared duties with Ms. Panko (*see Panko*, at 1683, *cf. Era Steel*, at 789-799). The court characterized Panko as a family-owned business because operational control was shared among Ms. Panko, her husband, and their son (*see Panko*, at 1683-1684, *citing Northeastern Stud*, at 891, and *JC Smith*, at 1519-1520).

Applicant contended that business operations of *Panko* and J. McBain, Inc. are different. With respect to operations at J. McBain, Inc., Applicant argued that the minority shareholder, Donald McBain, does not assert control over the business, unlike Panko's minority shareholders. Accordingly, Applicant asserted that the two cases are factually distinguishable. In addition, Applicant noted that staff's August 11, 2023 Notice of Denial (*see* Division Exhibit 2) does not allege that Donald McBain asserts control over J. McBain, Inc. (*See* Applicant's closing, at 3.)

Division staff correctly observed that the Director has consistently denied WBE certification under the following circumstances. First, the owner relied upon for certification has no training, experience, or working knowledge in the critical functions of the business enterprise. Second, other minority owners or employees have more significant or substantive experience. Finally, the minority owners or employees exercise their experience with respect to critical functions by supervising or controlling field operations. (*See* Division's closing, at 21.)

Upstate Electrical, LLC

Upon review, the court affirmed the Division's determination to deny WBE certification because Brook Spraragen did not demonstrate that she controlled operations at the business enterprise. (*See Matter of Upstate Electrical, LLC v New York State Dept. of Economic Dev.* 179 AD3d 1343, 1343-1345 [AD3d 2020], *citing Panko*, at 1683-1684, and *JC Smith*, at 1519.) Applicant argued that *Upstate Electrical* can be distinguished from the captioned matter. Specifically, Applicant contended that Ms. McBain has sole control over personnel and all other aspects of the business enterprise. (*See* Applicant's closing, at 3.)

Division staff asserted that *Upstate Electrical* stands for the proposition that supervising employees requires a working knowledge to review and evaluate the work of more experienced employees. Staff observed that Ms. McBain has no training or experience in electrical work and, therefore, could not properly supervise the electricians who do the work. (*See* Division's closing, at 12-13.)

Discussion

Applicant correctly argued that the certification criteria at issue in this proceeding are limited to operations (*see* 5 NYCRR 144.2[c][1] and [2]). In addition, staff's August 11, 2023 Notice of Denial identified no issue about J. McBain Inc.'s compliance with the certification criteria related to control (*cf* 5 NYCRR 144.2[d]). (*See* Division Exhibit 2, at 016.) Generally, the court's review in the foregoing matters focused on the question of whether the woman-owners controlled what is now referred to as critical functions.

However, for the reasons outlined above, J. McBain, Inc. failed to demonstrate that the woman-owner of the business enterprise possesses industry-specific competence consistent with 5 NYCRR 144.2(c)(1)(i). The record shows that Ms. McBain does not have an electrician's license, and has no direct experience performing electrical work. In addition, Ms. McBain has not obtained the required license from NYS DOS to install, or supervise the installation of, fire detection and alarm systems. Rather, her husband, who is an employee of the business enterprise, has considerable experience as an electrical contractor, and is identified as the

qualifier in J. McBain Inc.'s DOS license for the installation of fire detection and alarm systems. (Tr. 69:4-8; 120:23-121:5; 121:17-122:11; *see also* McBain Exhibit 14, at 074-075; Division Exhibit 7, at 036-037.)

Ms. McBain's proffered credentials (*see* McBain Exhibit 13, at 068-072) are not relevant to the critical functions of the business enterprise. Therefore, Applicant failed to show that Ms. McBain possesses industry-specific competence consistent with 5 NYCRR 144.2(c)(1)(ii). As to the critical function associated with the preparation of bids and estimates, Applicant showed, however, that Ms. McBain possesses industry-specific competence consistent with 5 NYCRR 144.2(c)(1)(iii) based on her direct work experiences.

Concerning operational decisions (*see* 5 NYCRR 144.2[c][2]), Applicant demonstrated that Ms. McBain makes operational decisions about some, but not all, critical functions identified by Division staff. For example, Ms. McBain does not visit project sites. However, she receives status reports from the foremen, whom she hires. (Tr. 81:2-23; 82:2-13; 109:25-110:10.) In addition, Ms. McBain does prepare bids and estimates, which staff identified as a critical function with respect to this certification criterion (Tr. 47:22-48:4; 49:7-50:7; 68:3-69:3; 173:20-176:22; 180:8-9; 182:7-183:15; 183:16-185:15; *see also* McBain Exhibit 14, at 074-075).

CONCLUSIONS

1. J. McBain, Inc. failed to meet its burden to demonstrate that Division staff'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)(i) and (ii) was not based on substantial evidence. In particular, Jackie McBain, as the woman-owner of the business enterprise, did not demonstrate compliance with 5 NYCRR 144.2(c)(1)(i) and (ii) with respect to the installation of fire detection and alarm systems.
2. J. McBain, Inc. met its burden to demonstrate that Division staff's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criterion at 5 NYCRR 144.2(c)(1)(iii) was not based on substantial evidence.
3. J. McBain, Inc. met its burden to demonstrate that Division staff's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criterion at 5 NYCRR 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director modify and affirm Division staff's determination to deny J. McBain Inc.'s application for recertification as a woman-owned business enterprise.

Attachments: Exhibit Chart

Exhibit Chart for J. McBain, Inc.

Exhibit	Exhibit Number	Description and Bates Nos.	Ruling	Transcript Ruling
McBain	1	Letter, dated January 11, 2020 from Empire State Development (Bates Nos. 1-3)	Not discussed at hearing	
McBain	2	Local 236 Letter of Assent (Bates Nos. 4-39)	Received	Tr. 125:2-127:9
McBain	3	Recertification Identification of Largest Accounts (Bates Nos. 40-41)	Not discussed at hearing	
McBain	4	Recertification Ownership/Operation Change Questions (Bates Nos. 42-43)	Not discussed at hearing	
McBain	5	Letter dated May 20, 2021 from Christine M. Tucker, CPA, P.C. (Bates Nos. 44-45)	Received	Tr. 125:2-127:9
McBain	6	Letter dated May 20, 2021, from Philip Engborg, VP, M&T Bank (Bates Nos. 46-47)	Received	Tr. 125:2-127:9
McBain	7	Letter dated March 20, 2021, from Matthew F. Spataro, CIC, Gallagher (Bates Nos. 48-49)	Received	Tr. 125:2-127:9
McBain	8	Letter dated May 19, 2021, from Gary A. Cardinale, World Wide Bonding (Bates Nos. 50-51)	Received	Tr. 125:2-127:9
McBain	9	City of Albany, Directory of Certified Minority and Women-Owned Business Enterprises (Bates Nos. 52-55)	Received	Tr. 127:7-9; 271:8-19
McBain	10	Letter dated October 7, 2020, from Charles J. Croskey, Dormitory Authority of the State of New York, MWBE Business Development Outreach Coordinator (Bates Nos. 56-58)	Received	Tr. 127:7-9; 271:8-19
McBain	11	Letter dated June 10, 2021, from Jackie McBain, President, J. McBain, Inc. (Bates Nos. 59-62)	Not discussed at hearing	
McBain	12	Electrical/Fire Alarm Licenses (Bates Nos. 63-66)	Received	Tr. 125:2-127:9
McBain	13	Certifications and Course Work by Jackie McBain (Bates Nos. 67-72)	Received	Tr. 125:2-127:9
McBain	14 (See Division Exhibit 5)	Resume of Jackie McBain (Bates Nos. 73-77)	Received	Tr. 125:2-127:9
McBain	15 (See Division Exhibit 6)	Resume of Donald Jay McBain (Bates Nos. 78-79)	Not discussed at hearing	
Division	1	J. McBain, Inc., Recertification Application (Bates Nos. 1-13)	Received	Tr. 264:14-19
Division	2	Division's Notice of Denial, dated August 11, 2023 (Bates Nos. 14-20)	Received	Tr. 127:13-128:22; 270:20-25

Exhibit Chart for J. McBain, Inc.

Division	3	Request to Appeal a Denial Determination from J. McBain, Inc., dated September 6, 2023 (Bates Nos. 21-23)	Not discussed at hearing	
Division	4	Resume of Jackie McBain (Original) (Bates Nos. 24-26)	Received	Tr. 127:13-128:22; 270:20-25
Division	5 (See McBain Exhibit 14)	Resume of Jackie McBain (Revised) (Bates Nos. 27-29)	Received	Tr. 127:13-128:22; 270:20-25
Division	6 (See McBain Exhibit 15)	Resume of Donald Jay McBain (Bates Nos. 30-31)	Received	Tr. 264:19-23
Division	7	Licenses, Permits, Certifications, and Accreditations (Bates Nos. 32-44)	Received	Tr. 264:-19-23
Division	8 (See McBain Exhibit 11)	Letter dated June 10, 2021, from Jackie McBain, President, J. McBain, Inc. (Bates Nos. 45-47)	Received	Tr. 264:24-265:10
Division	9	Letter dated July 24, 2023 from Jackie McBain, President, J. McBain Inc. (Bates Nos. 48-50)	Received	Tr.127:7-9; 264:24-265:10
Division	10	Agreement between J. McBain, Inc., and State of New York, Office of General Services. Brookwood, SC, Claverack, New York (Project 45259E) (Bates Nos. 51-55)	ID only	Tr. 127:7-9; 265:11-266:11
Division	11	Agreement between J. McBain, Inc., and Schenectady Central School District, Schenectady High School, Schenectady, New York (Bates Nos. 56-78)	ID only	Tr. 265:11-266:11
Division	12	Agreement between J. McBain, Inc., and Halfmoon-Waterford Fire District No. 1, Waterford, New York (Bates Nos. 79-105)	ID only	Tr. 265:11-266:11
Division	13	Agreement between J. McBain, Inc., and AOW Construction, LLC, University at Albany, Albany, New York (Bates Nos. 106-134)	Received	Tr. 266:3-11
Division	14	Agreement between J. McBain, Inc., and Sam Greco Construction, Inc., Project Site: 110 State Street, Albany, New York (Bates Nos. 135-149)	Received	Tr. 266:3-11
Division	15	Agreement between J. McBain, Inc., and the Albany Port District Commission, RFP# 2023-03 Electrical Upgrades to Shed 1 (Bates Nos. 150-155)	Received	Tr. 266:3-11

Exhibit Chart for J. McBain, Inc.

Division	16	New York State Department of State (NYS DOS), Division of Corporations, Entity Information, J. McBain, Inc. (Bates Nos. 156-160)	Not discussed at hearing	
Division	17	NYS DOS, Division of Corporations, Entity Filing History, J. McBain Electric, Inc. (Bates Nos. 161-165)	Not discussed at hearing	
Division	18	Company Narrative, dated July 24, 2023, by Jackie McBain, President, J. McBain, Inc. (Bates Nos. 166-168)	Not discussed at hearing	
Division	19	Division of Minority and Women's Business Development (DMWBD), Certification Application Affidavit for J. McBain, Inc., dated July 21, 2023 (Bates Nos. 169-173)	Received	Tr. 266:12-18
Division	20	Executive Law Article 15-A (Participation by Minority Group Members and Women with respect to State Contracts) (Bates Nos. 174-201)	Official Notice Taken	Tr. 140:10-17; 266:18-20
Division	21	5 NYCRR Parts 140-147 (Division of Minority and Women's Business Development (Bates Nos. 202-261)	Official Notice Taken	Tr. 148:13-17; 266:18-20
Division	22	City of Albany, Code, Chapter 171 (Electrical Licensing Ordinance) (Bates Nos. 262-273)	Official Notice Taken	Tr. 266:20-267:11
Division	23	City of Schenectady, Code, Chapter 138 (Building, Plumbing, and Electrical Standards) (Bates Nos. 274-278)	Not discussed at hearing	
Division	24	City of Troy, Code, Chapter 148 (Electricians) (Bates Nos. 279-284)	Official Notice Taken	Tr. 266:20-267:11
Division	25	19 NYCRR 195.3 (Qualifying Officers or Managers) (Bates Nos. 285-286)	Not discussed at hearing	
Division	26	Certification Application: Document List Preview for Corporation (Bates Nos. 287-291)	Not discussed at hearing	
Division	27	Certification Application: Commodities and Services (Section 5) (Bates Nos. 292-296)	Received	Tr. 267:12-20
Division	28	Certification Application: Document List (Bates Nos. 297-304)	Received	Tr. 267:12-20
Division	29	Certification Application: Sign Recertification Application (Electronic Signature) (Bates Nos. 305-307)	Received	Tr. 267:12-20

Exhibit Chart for J. McBain, Inc.

Division	30	Certification Application: Submit Recertification Application (Confirmation Page) (Bates Nos. 308-310)	Received	Tr. 267:12-20
Division	31	Empire State Development (ESD): DMWBD (Web Page) (Bates Nos. 311-320)	Not discussed at hearing	
Division	32	ESD DMWBE: How do I become certified? (Web Pages) (Bates Nos. 321-325)	Not discussed at hearing	
Division	33	ESD DWMBE: Contact Us (Web Pages) (Bates Nos. 326-331)	Not discussed at hearing	
Division	34	2023 New York State MWBE Forum: Championing our WMBE (Bates Nos. 332-450)	Not discussed at hearing	
Division	35	New York State Contract System (Log In Web Page) (Bates Nos. 451-454)	Not discussed at hearing	
Division	36	New York State Contract System: Upcoming Training Classes & Training (Bates Nos. 455-456)	Not discussed at hearing	
Division	37	New York State Contract System: Contact Us & Support (Bates Nos. 457-460)	Not discussed at hearing	
Division	38	Email from Elizabeth Callahan, Couch White, LLC, dated April 27, 2021, to Bella Satra, ESD (Bates No. 461-466)	Not discussed at hearing	
Division	39	City of Troy, Electrical Licenses (Web Page)	Received	Tr. 267:21-269:6
Division	40	19 NYCRR Part 69-q (Licenses, Display, Renewal, Duplicates) Article 6-D (Business of Installing Security or Fire Alarm Systems)	Not discussed at hearing	
Division	41	19 NYCRR Parts 195 (Licensing Regulations for the Business of Installing, Servicing or Maintaining Security or Fire Alarm Systems) and Part 196 (Approval of Security or Fire Alarm System Installer Courses)	Official Notice Taken	Tr. 269:6-270:14