

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

In the Matter

- of -

**the Application of K&G Electric Motor & Pump Corp. dba KG Power Systems
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 69688

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 18, 2024

This matter considers the written appeal by K&G Electric Motor & Pump Corp. dba KG Power Systems (“K&G” 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 September 21, 2022, Ms. Lorraine Gandolfo, as Vice President, applied on behalf of K&G for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 27, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Minority group members or women relied upon for certification 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
 - (c) 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. K&G timely filed a Request to Appeal on March 7, 2023 (APP Exhibit A; DED Exhibit 7).
4. A notice to proceed via written appeal was sent to K&G on March 20, 2023 (DED Exhibit 8).
5. K&G filed its written appeal on April 21, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director, dated October 5, 2023, and a brief of JaMone Turner Esq., counsel for the Division, dated October 6, 2023.

FINDINGS OF FACT

7. K&G is engaged in the business of sales and service of electric motors, pumps, air compressors, fans, blowers and other parts (DED Exhibit 1).
8. Ms. Lorraine Gandolfo is Vice President and has a 51% ownership interest. Mr. John Gandolfo is President and has a 49% ownership interest (DED Exhibit 1).
9. Ms. Gandolfo received her ownership interest from Mr. Gandolfo due to their “marital status”, “no money was paid for these shares” and “the reason for the transfer is my husband is experiencing poor health and will be spending less time at the office conducting the daily operations of the business.” (DED Exhibit 5).
10. Ms. Gandolfo’s duties are “attending meetings with bank, accountant, and insurance brokers; answering customer phone calls; auditing customer invoices; processing weekly payroll; ordering office supplies; and overseeing warranty claims for customer equipment (DED Exhibit 6).
11. Mr. Gandolfo has 30 years of experience rewinding and rebuilding electric motors and pumps in the shop and field at customer sites. He received training from his father and

industry seminars. He managed the purchasing, accounting, service, and sales departments of K&G as President for 22 years. He is responsible for procuring large contracts with customers and K&G sales team. (DED Exhibit 6).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
 1. Money;
 2. Property;
 3. Equipment; or
 4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR §144.2(c) states in relevant part as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a

business enterprise shall be determined by the division based upon the following factors, but is not limited to:

- (i) The products or services the business enterprise provides to clients; and
- (ii) The means by which the business enterprise obtains contracts or orders.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by K&G for certification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24,

2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. *See A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

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

Ms. Gandolfo received her ownership interest from Mr. Gandolfo due to their “marital status”, “no money was paid for these shares” and “the reason for the transfer is my husband is experiencing poor health and will be spending less time at the office conducting the daily operations of the business.” (DED Exhibit 5).

On appeal, applicant states that in 2007, she sold [REDACTED] shares of Exxon Mobil to pay down KG Power debt. However, the payment made in 2007 was fourteen years before she obtained her ownership interest, not contemporaneously, as is required under 5 NYCRR §144.2(b)(2). Applicant further argues “I hope that I have demonstrated that I offer “expertise” as one of the required components...” (APP Exhibit B). However, evidence of the value of the expertise must be provided. Such expertise must be uncompensated, specialized and directly applicable to one or more critical aspects of the business, and a reasonable assessment of the fair market value of the expertise must be clearly documented. (5 NYCRR §144.2(b)(2)(i)(4)) Also, that documentation must be provided when the woman-owner acquires her equity interest in the business, not after the

fact. See *Matter of MS Analytical, LLC*, Recommended Order dated August 8, 2018, Final Order 18-47 dated January 30, 2019, which held “When the Division evaluates capital contributions to the business enterprise in the form of expertise... the Division considers such contributions by the woman or minority owner at the time the business was formed or when the ownership interest was acquired.

The Division’s determination to deny the application on the basis that K&G failed to demonstrate that Ms. Gandolfo made capital contributions to K&G in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Gandolfo does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business’ industry. Her responsibilities include “attending meetings with bank, accountant, and insurance brokers; answering customer phone calls; auditing customer invoices; processing weekly payroll; ordering office supplies; and overseeing warranty claims for customer equipment.” She has a degree in arts psychology, but no training, licensing or experience in the commercial and industrial machinery and equipment industry. (DED Exhibit 6).

Mr. Gandolfo has 30 years of experience rewinding and rebuilding electric motors and pumps in the shop and field at customer sites. He received training from his father and industry seminars. He managed the purchasing, accounting, service, and sales departments of K&G as President for 22 years. He is responsible for procuring large contracts with customers and K&G sales team. (DED Exhibit 6).

Ms. Gandolfo's resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 6).

On appeal, Ms. Gandolfo states "To clarify, only 10% of our current business is rebuilding electric motors and pumps. I am not in the shop actually repairing motors, but I manage all the operations of the shop including preparing repair estimates and ensuring OSHA safety standards are followed. 60% of our sales are for new compressed air equipment, repair parts, and mechanical field service" (APP Exhibit B). However, no documentation was submitted to support this claim. Her duties preparing repair estimates and ensuring OSHA safety standards are administrative functions and not directly related to K&G's core functions of sales, installation and service of electric motors, pumps, air compressors, fans, blowers, and other parts (DED Exhibit 1).

Ms. Gandolfo further stated on appeal that "Six years ago, I personally created a complete website internet sales business to sell motors and pumps...I manage the entire marketing and sales part of our business which comprises 30% of our sales" (APP Exhibit B). No documentation was provided to support this claim. Also, website design and marketing are administrative or general business functions and not directly related to K&G's core functions as stated above.

5 NYCRR §144.2(c)(2) states that "... women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business

enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”.

The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

K&G’s core business functions are securing contracts and the sale, installation and service of electric motors, pumps, air compressors, fans, blowers, and other parts. Ms. Gandolfo is not responsible for several managerial duties including estimating, preparing bids, negotiating bonding, negotiating insurance, marketing, sales, supervising field operations and negotiating contracts (DED Exhibit 1). Ms. Gandolfo does not have experience in the business’ critical functions (DED Exhibit 6).

On appeal, Ms. Gandolfo states “I actually do negotiate insurance for our vehicle fleet and our healthcare group... I don’t physically prepare bids, but I manage the bid process. I oversee the pre and final bid tabulation meeting, I approve the pricing, review them for accuracy, and notarize them before the bids are submitted.” (APP Exhibit B). These duties are primarily administrative and financial in nature. She further argues “I do not go into the field on a daily basis, but I supervise the field managers back in my office... I attend weekly job progress and OSHA safety meetings to ensure that the jobs are progressing on-time and also to solve problems at the jobsite. I also do the invoicing and prepare A1A and prevailing wage forms for submittal.” (APP Exhibit B). However, the application states that Mr. Christopher Gandolfo is the person who supervises

K&G's field operations, not Ms. Gandolfo. Also, attending weekly job progress and OSHA safety meetings are administrative responsibilities.

The Division's determination to deny the application on the basis that K&G failed to demonstrate that Ms. Gandolfo possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2), is supported by substantial evidence.

CONCLUSION

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

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny K&G's application for certification as a woman-owned business enterprise.

In the Matter of K&G Electric Motor & Pump Corp. dba KG Power Systems
 DED File ID No. 69688
 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	Applicant's Stock Certificates	Y	Y
DED 4	Applicant's Stock Transfer Ledger	Y	Y
DED 5	Applicant's Stock Transfer Letter	Y	Y
DED 6	Resumes	Y	Y
DED 7	Applicant's Request to Appeal	Y	Y
DED 8	Notice to Proceed Via Written Appeal	Y	Y