

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

In the Matter

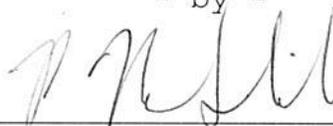
- of -

the Application of  
**New York Empire Electrical Contracting Services, Inc.**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59389

**RECOMMENDED ORDER**

- by -



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P. Nicholas Garlick  
Administrative Law Judge

May 12, 2016

## **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 of New York Empire Electrical Contracting Services, Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed, for the reasons set forth below.

## **PROCEEDINGS**

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by New York Empire Electrical Contracting Services, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

New York Empire Electrical Contracting Services, Inc.'s application was submitted on February 12, 2015 (Exh. DED2).

The application was denied by letter dated November 18, 2015, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Nancy Marji's ownership, operation and control of the applicant.

By letter dated December 14, 2015, Nancy Marji, on behalf of the applicant, filed a notice of appeal from the Division's denial determination.

By letter dated March 4, 2016, the Division notified the applicant that a hearing in this matter would be convened at 11:00 am on March 29, 2016 at the Division's NYC office located at 633 Third Avenue, 33<sup>rd</sup> floor, New York, NY 10017.

On March 24, 2016 a conference call was held with the parties to discuss preliminary matters.

On March 29, 2016 a hearing in this matter was convened at the time and place listed above. The applicant was represented by Ms. Nancy Marji, president of the applicant who appeared alone. The Division was represented by Julene Beckford, Esq., and called one witness, Division Analyst Abdul Caulker. The hearing concluded at approximately noon.

On April 1, 2016, an audio recording of the hearing was received and at this time the record in this matter closed.

#### **ELIGIBILITY CRITERIA**

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

#### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's WBE certification 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 the Division'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]).

## POSITIONS OF THE PARTIES

### Position of the Division

In its denial letter, the Division asserts that the application failed to meet four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner's, Nancy Marji's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Nancy Marji, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Nancy Marji, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

Fourth, the Division found that the applicant failed to demonstrate that the woman owner, Nancy Marji, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 6 NYCRR 144.2(b)(3).

### Position of the Applicant

New York Empire Electrical Contracting Services, Inc. asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

## **FINDINGS OF FACT**

1. New York Empire Electrical Contracting Services, Inc. was established on July 16, 2013. Nancy Marji owns 100% of the stock of New York Empire Electrical Contracting Services, Inc. (DED2 at 2).

2. Ms. Marji's husband, Farid J. Marji, is a licensed master electrician in New York City, Putnam County and Westchester County (Exh. DED6). Ms. Marji does not hold an electrical license (Exh. DED13 at 47:00). William Bauersfield, a key employee of the firm, also is an electrical licensee (Exh. DED 7 at 1).

3. Ms. Marji is solely responsible for the management at New York Empire Electrical Contracting Services, Inc. of: financial decisions, preparing bids, negotiating bonding, managing and signing payroll, and signing for business accounts. She shares the responsibility with her husband for: hiring and firing, purchasing equipment/sales, and negotiating contracts. She does not manage the firm's estimating, negotiating insurance, marketing and sales; nor does she supervise field operations (Exh. DED 2 at 3-4). Estimating is shared between her husband (Exh. DED2 at 3) and Mr. Bauersfield (Exh. DED7) who also share responsibility for project management (Exh. DED 7).

4. Ms. Marji does not sign all important business documents on behalf of New York Empire Electrical Contracting Services, Inc. Her husband signed two contracts with customers (Exhs. DED9 at 6 & DED10 at 20), a proposal was signed by both Ms. Marji and her husband (Exh. DED12) and another proposal was signed by another employee (Exh. DED11).

## **DISCUSSION**

This report considers the applicant's appeal from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth four bases related to Ms. Marji's ownership, operation and control of New York Empire Electrical Contracting Services, Inc. Each basis is discussed individually, below.

## Ownership

In its denial letter, the Division cited one ground for denial based on the applicant's failure to meet ownership criteria set forth in the applicable regulations. Specifically, that the applicant failed to demonstrate that the woman owner's, Nancy Marji's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Ms. Marji testified that she made a [REDACTED] loan to the company to start it and the money was used for accounting fees, purchasing a desk and computer, and other start-up costs (Exh. DED13 at 45:00). She stated she may not have saved the documents showing these expenditures (DED13 at 46:00).

At the hearing, Division analyst Caulker testified that the application states that Ms. Marji made a [REDACTED] capital contribution to the firm on August 20, 2013 (Exh. DED2 at 2) but that during the application process no proof of this contribution was provided to the Division (Exh. DED13 at 25:00). He stated that this proof was requested (Exh. DED2 at 8) and the document produced (Exh. DED3) describes what the contribution was used for, but not its source (Exh. DED13 at 28:20).

Mr. Caulker also testified that the application indicates that two people, listed only as "Steve" and "Frank", are guarantors for supplies provided to the applicant (Exh. DED2 at 5). Ms. Marji stated that she did not personally guarantee debts of the business (Exh. DED13 at 43:30) and seemed to indicate that the listing on the application was a mistake (Exh. DED13 at 56:00). It is not clear why the Division introduced this evidence as failure to prove a capital contribution.

The applicant has not demonstrated the source of the funds for the capital contribution used to begin the business. Based on the evidence in the record and the discussion above, the applicant has not shown that the woman owner, Nancy Marji's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

## Operation

In its denial letter, the Division asserted two grounds for denying the application for failure to meet certification criteria related to the operation of the applicant. First, the Division found that the applicant failed to demonstrate that the woman owner, Nancy Marji, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

At the hearing, Division analyst Caulker testified regarding several documents submitted by the applicant, including Ms. Marji's 2014 tax returns which list her occupation as homemaker (Exh. DED4 at 1). He also reviewed the resumes of Ms. Marji and her husband (Exh. DED 13 at 30:30). Ms. Marji's resume does not indicate that she is licensed in the electrical field (Exh. DED5). Her husband's resume shows him to be a licensed electrician in New York City, Westchester County and Putnam County (Exh. DED6). Mr. Caulker also testified that the narratives of the duties of key employees (Exh. DED7) shows that a second employee of the applicant, William Bauersfeld, also holds an electrical license (Exh. DED13 at 34:00) and has extensive experience in the electrical field (Exh. DED8).

On rebuttal, Ms. Marji testified that she did not see the tax return and that its identification of her as a homemaker was a mistake by the accountant (Exh. DED13 at 46:30). She acknowledges that she does not have an electrical license and has no plans to pursue one. She does take classes regarding electrical issues, safety issues and to meet OSHA certifications (Exh. DED13 at 47:00). She hires electricians who are certified in various municipalities where the company operates, but these men do not manage the company (Exh. DED13 at 47:30). She concluded that many owners of firms she knows do not have licenses (Exh. DED13 at 57:00).

Based on the evidence in the record and the discussion above, Ms. Marji does not meet the criteria for certification as a WBE because nothing in the record supports her knowledge and competence in the electrical field. Consequently, the applicant failed to demonstrate that the woman owner, Nancy Marji, has the experience or technical competence, working knowledge or ability

needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

The second ground asserted for denial on operational grounds was that the applicant failed to demonstrate that the woman owner, Nancy Marji, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

At the hearing, Ms. Marji testified that she makes the decisions for the applicant and introduced a series of documents to support her claim (Exh. DED13 at 2:00 - 13:00). These documents include: (1) letters from some of the applicant's clients (Exh. A1 at 1-3); (2) a letter from a supplier for the applicant (Exh. A1 at 4); (3) a letter from the applicant's attorney (Exh. A1 at 5); (4) a letter from the applicant's insurance agent (Exh. A1 at 6); and a letter from the applicant's accountant (Exh. A1 at 7). All these letters indicate that Ms. Marji is the contact person with the applicant and are dated between March 24, 2016 and March 28, 2016, after the Division denied the application on November 18, 2015 (Exh. DED1). In addition, Ms. Marji entered copies of 42 cancelled checks, all of which she signed (Exh. A1 at 8-49).

At the hearing, Division analyst Caulker testified that the resume of one of the key employees of the applicant, William Bauersfeld (Exh. DED8), indicates that he oversees day-to-day operations of the applicant (Exh. DED13 at 35:00). He also reviewed a narrative of the duties of the key employees of the applicant (Exh. DED7) and testified that this document indicates that Ms. Marji is not responsible for project management (Exh. DED13 at 33:40).

On rebuttal, Ms. Marji testified that she runs her company "from A to Z," and oversees all her employees. She deals with contractors, all administrative matters, and assigns work to her employees (Exh. DED13 at 51:00).

The application states that Ms. Marji's managerial roles do not include estimating or supervising field operations which are core functions of the business and how it generates revenue (Exh. DED2 at 3-4). Based on the evidence in the record and the

discussion above, the applicant failed to demonstrate that the woman owner, Nancy Marji, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

### Control

In its denial letter, the Division asserted one ground for denying the application for failure to meet certification criteria related to the control of the applicant, specifically that the applicant failed to demonstrate that the woman owner, Nancy Marji, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 6 NYCRR 144.2(b)(3).

Ms. Marji testified that some documents were signed by others at the firm and that none of her clients had ever complained. These other signatories are authorized to sign for the applicant when Ms. Marji is not available, but that does not change the fact that she, as owner of the applicant, is ultimately responsible for the contract (Exh. DED13 at 43:30).

At the hearing Division analyst Caulker testified that he reviewed the application materials including several documents that Ms. Marji did not sign on behalf of the applicant (DED13 at 34:30 - 41:00). At the hearing the Division entered two contracts signed by her husband (Exhs. DED9 at 6 & DED10 at 20). The Division also introduced two proposals for work to be done, one that was signed by another employee (Exh. DED11) and the other was sign by both Ms. Marji and her husband (Exh. DED12). These documents, the Division argues, show Ms. Marji is involved with the business but not in charge of it (Exh. DED13 at 54:00).

Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that that the woman owner, Nancy Marji, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 6 NYCRR 144.2(b)(3).

## **CONCLUSIONS**

1. The applicant failed to demonstrate that the woman owner's, Nancy Marji's, capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. The applicant failed to demonstrate that the woman owner, Nancy Marji, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i)&(ii).

3. The applicant failed to demonstrate that the woman owner, Nancy Marji, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

4. The applicant failed to demonstrate that the woman owner, Nancy Marji, has control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts and other business transactions, as required by 6 NYCRR 144.2(b)(3).

## **RECOMMENDATION**

The Division's determination to deny New York Empire Electrical Contracting Services, Inc.'s application for certification as a woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of  
New York Empire Electrical Contracting Services, Inc.**

**DED File ID No. 59389  
Exhibit List**

Exh. #	Description	# of pages
A1	Applicant's exhibits including: letters from the applicant's clients, supplier, lawyer, insurance agent, accountant and 42 cancelled checks	49
DED1	Denial letter dated November 18, 2015	3
DED2	Application	11
DED3	Capital contribution memo	1
DED4	2014 1040 tax form	14
DED5	Resume of Nancy Marji	1
DED6	Resume of Farid Marji	1
DED7	Narrative of functions of employees	2
DED8	Resume of William A. Bauersfeld	1
DED9	Contract for Hampton Inn	15
DED10	Contract with Sisca N.E.	20
DED11	Proposal	2
DED12	Project agreement	4
DED13	Recording of hearing	On disc