

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

In the Matter

- of -

the Application of **Lou DeStefano Electrical Contractor, Inc.**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59939

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

November 3, 2016

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny Lou DeStefano Electrical Contractor, Inc. (DeStefano Electrical or applicant) certification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

With a letter dated February 29, 2016, the Division determined that DeStefano Electrical does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied its application (*see* WBE Exh. 2). By letter dated March 4, 2016, Tina DeStefano, on behalf of DeStefano Electrical, appealed from the Division's determination to deny WBE certification.

In a notice of appeal hearing dated June 6, 2016, the Division acknowledged DeStefano Electrical's request for a hearing, and scheduled the administrative adjudicatory hearing for 11:00 AM on September 20, 2016 at the Division's offices in New York City. The notice also reiterated the Division's bases for the denial.

The administrative adjudicatory hearing convened as scheduled. Tina DeStefano represented DeStefano Electrical, and testified on its behalf. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Matthew LeFebvre, Senior Certification Analyst, testified for the Division. During the hearing, the parties offered 22 exhibits, which included a copy of the completed application for WBE certification filed by DeStefano Electrical (WBE Exh. 1 [submitted July 27, 2015]). A chart, identifying all the exhibits, is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received a copy of one compact audio disk on September 23, 2016. Whereupon, the hearing record closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (*see* Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] § 144.2). To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, DeStefano Electrical, as applicant, bears the burden of proving that the Division's denial of its application for 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

The Division

In the February 29, 2016 denial letter, the Division determined that the application failed to meet three criteria for WBE certification concerning Tina DeStefano's ownership and operation of DeStefano Electrical (*see* WBE Exh. 2). With respect to ownership, the Division asserted that DeStefano Electrical did not demonstrate that Ms. DeStefano, as the woman owner, shares in the risks and profits in proportion to her ownership interest, as required by 5 NYCRR 144.2(c)(2). With respect to operations, the Division asserted that DeStefano Electrical did not demonstrate that Ms. DeStefano has the experience or technical competence, working knowledge, or ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). Finally, the Division also determined that DeStefano Electrical failed to show that Ms. DeStefano makes decisions pertaining to operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Lou DeStefano Electrical Contractor, Inc.

With a letter dated March 4, 2016, Ms. DeStefano appealed from the Division's February 29, 2016 determination to deny DeStefano Electrical WBE certification. Tina DeStefano is the president of DeStefano Electrical, and owns 55% of the business enterprise. Ms. DeStefano said that she has been responsible for all of the administrative aspects of the business enterprise since its inception in 1985. For over 30 years, Ms. DeStefano has invested her time and money into DeStefano Electrical.

In the March 4, 2016 appeal, Ms. DeStefano listed her duties and responsibilities at DeStefano Electrical. In addition, Ms. DeStefano argued that she has shared in the risks and benefits of the business. When the business did well, Ms. DeStefano received bonuses in addition to her salary. When the business did not do well, Ms. DeStefano either limited her salary, or did not draw a salary. According to Ms. DeStefano, the business enterprise [REDACTED]. With the March 4, 2016 appeal, Ms. DeStefano included several enclosures which DeStefano Electrical offered at the hearing as exhibits.

FINDINGS OF FACT

I. General

1. Lou DeStefano Electrical Contractor, Inc. (DeStefano Electrical), has business offices located at 205 Bart Bull Road, Middletown, New York 10941. DeStefano Electrical is an electrical contractor. When the application for WBE certification was filed, DeStefano Electrical employed three people: Tina DeStefano; her husband, Louis DeStefano; and her son, Michael DeStefano. (*See* WBE Exhs. 1, 5, and 7.)
2. Tina DeStefano is the president of Lou DeStefano Electrical Contractor, Inc. and owns 55% of the business enterprise (*see* WBE Exh. 1; Compact Disk Track [CDTr] 2 00:00:58).
3. On behalf of Lou DeStefano Electrical Contractor, Inc., Ms. DeStefano submitted an application for WBE certification with the Division on July 27, 2015 (*see* WBE Exh. 1).
4. By letter dated February 29, 2016, the Division denied DeStefano Electrical's application for certification as a woman-owned business enterprise (*see* WBE Exh. 2).

II. Ownership

5. In 2014, Michael DeStefano earned [REDACTED]. Louis DeStefano earned [REDACTED], and Tina DeStefano earned [REDACTED]. (*See* WBE Exhs. 1, 4, and 5; CDTr1 00:08:57, 00:09:32).

III. Operation

6. Louis DeStefano is a master electrician. Mr. DeStefano bids jobs, provides estimates, and participates in meetings concerning jobs and safety issues. (*See* WBE Exhs. 1, 5, 6, and 7; CDTr1 00:11:07, 00:12:37, 00:14:01, 00:14:22, 00:15:53).
7. Tina DeStefano is not a licensed electrician. Ms. DeStefano is responsible for all administrative and financial responsibilities related to the business enterprise. (*See* WBE Exhs. 5, 7, 10, 11, 12, 13, 14, 16, 17, 18, and 20; CDTr1 00:11:23, 00:11:58, 00:15:58, 00:17:18, 00:17:43, CDTr2 00:03:08-00:06:34, 00:10:16-00:12:35, 00:14:24, 00:23:14).

DISCUSSION

This recommended order considers DeStefano Electrical's March 4, 2016 appeal from the Division's February 29, 2016 determination to deny certification of DeStefano Electrical as a woman-owned business enterprise pursuant to Executive Law Article 15-A. Referring to the eligibility criteria outlined at 5 NYCRR 144.2, the Division identified the following bases for the denial. According to the Division, DeStefano Electrical did not show that Ms. DeStefano enjoys the customary incidents of ownership and shares in the risks and profits in proportion to her

ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). (*See* WBE Exh. 2.)

With respect to exercising control over the business enterprise, the Division determined that Ms. DeStefano does not have either the managerial experience and technical competence, or the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). In addition, the Division determined that DeStefano Electrical did not demonstrate that Ms. DeStefano makes decisions pertaining to operations of the business enterprise, as required by 5 NYCRR 144.2(b)(1). (*See* WBE Exh. 2.) Each basis is addressed below.

I. Ownership

According to the Division's February 29, 2016 determination, DeStefano Electrical did not show that Ms. DeStefano enjoys the customary incidents of ownership, or that she shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The basis for the Division's determination is the disparity in the level of compensation that Ms. DeStefano received in 2014 compared to the other employees of the business enterprise. At the time that DeStefano Electrical filed the application for WBE certification, it employed three people. Based on the 2014 W-2 forms for those employees, Michael DeStefano earned [REDACTED]. Louis DeStefano earned [REDACTED], and Tina DeStefano, as the woman owner, earned [REDACTED]. Because Ms. DeStefano's compensation is the lowest compared to the other employees, who are men, Division staff concluded that Ms. DeStefano's compensation in 2014 was not proportionate to her ownership interest in the business enterprise. (*See* WBE Exhs. 1 and 4; CDTr1 00:08:57, 00:09:32).

At the hearing DeStefano Electrical offered copies of Ms. DeStefano's payroll cards for 2004, 2005, 2006, and 2007. For each of these years, Ms. DeStefano received [REDACTED]. (*See* WBE Exh 22; CDTr2 00:15:32). In DeStefano Electrical's closing statement, Ms. DeStefano explained that her salary in 2014 was low compared to the other years addressed in WBE Exh. 22 because recent business opportunities have been limited. As reflected by the range of her salary from 2004 to the present (*compare* WBE Exhs. 4 and 21), Ms. DeStefano argued that as the woman owner she has both enjoyed and endured the customary incidents of ownership. When the business did well, Ms. DeStefano received bonuses; however, when profits were low or cash flow was limited, Ms. DeStefano reduced her salary accordingly. (CDTr3 00:09:55.)

Ms. DeStefano credibly testified that she adjusts her salary from year to year based on the profits from the business enterprise. However, the information associated with WBE Exhibit 22 does not permit a comparison of Ms. DeStefano's compensation in 2004, 2005, 2006, and 2007 with the compensation earned by the other employees at DeStefano Electrical (CDTr3 00:05:09). In addition, Division staff did not have the information presented in WBE Exhibit 22 during the review of DeStefano Electrical's application for WBE certification.

As noted above, the scope of this appeal is limited to the application for WBE certification and its supporting documentation at the time that the Division issued the February

29, 2016 determination. Therefore, on this record, I conclude that the Division's determination with regard to 5 NYCRR 144.2(c)(2) is supported by substantial evidence, and should be affirmed.

II. Operation

The Division determined that DeStefano Electrical did not show that Ms. DeStefano has managerial experience or technical competence, as well as the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii). The Division argued that compliance with these eligibility criteria requires the woman owner to engage in the critical revenue generating functions of the business enterprise (CDTr3 00:03:29).

Division staff noted that DeStefano Electrical consists of three employees, and asserted that identifying the relevant critical revenue generating functions depends on the size and nature of the business enterprise (CDTr1 00:08:57, 00:19:45-00:20:03). According to Division staff, the critical revenue generating functions for a small electrical contracting firm, such as DeStefano Electrical, are bidding and laying out active and future jobs, and installing and repairing electric wiring and fixtures. Based on the information provided with DeStefano Electrical's application for WBE certification, Division staff observed that, on the one hand, Louis DeStefano is a master electrician and holds several electrical licensing credentials. On the other hand, Tina DeStefano's duties and responsibilities relate to the administrative and financial aspects of the business. (*See* WBE Exhs. 5, 6, and 7; CDTr1 00:11:07, 00:11:23, 00:11:58.)

Division staff concluded that Louis DeStefano, as the licensed electrician, has the technical competence, the working knowledge, and experience needed to operate the business enterprise (CDTr1 00:14:22). Because Ms. DeStefano is not a licensed electrician, Division staff concluded that she does not have the ability to supervise the field work performed by Louis and Michael DeStefano, and does not have the technical expertise to evaluate their work (CDTr1 00:17:43). Because Ms. DeStefano is not engaged in the critical revenue generating functions, as described above, Division staff determined that DeStefano Electrical does not comply with the eligibility criteria at 5 NYCRR 144.2(b)(1)(i) and (ii) for WBE certification.

DeStefano Electrical disagreed with the Division's position concerning the critical revenue generating functions. Ms. DeStefano acknowledged that she is not a licensed electrician and cannot do electrical work. As a manager, however, Ms. DeStefano has hired electricians to perform the critical revenue generating functions, and inspectors to assure that the work associated with these the critical revenue generating functions has been completed properly. According to Ms. DeStefano, the business would not operate if all the workers were electricians. Ms. DeStefano inquired, "Who would pay the taxes and prepare the payroll?" (CDTr3 00:08:12), among other things. Ms. DeStefano observed that the work associated with running DeStefano Electrical is shared (CDTr1 00:07:35-00:09:55).

As observed by Ms. DeStefano, the duties undertaken by DeStefano Electrical's three employees are shared. Such circumstances are more in the nature of a family-owned business, rather than a woman-owned business. The hearing record shows that Ms. DeStefano shares operations and management responsibilities with her husband and son. Therefore, the Division's

determination to deny WBE certification because DeStefano Electrical did not demonstrate that Ms. DeStefano has technical competence, as well as the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and (ii), is supported by substantial evidence.

As an additional basis for the denial, the Division contended that DeStefano Electrical did not demonstrate that Ms. DeStefano makes decisions pertaining to operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). With respect to this eligibility criterion, the Division argued that the woman owner must make decisions related to the critical revenue generating functions of the business enterprise (CDTr3 00:03:47). As noted above, Louis DeStefano is a master electrician, and Tina DeStefano is not, though she is responsible for all administrative and financial duties associated with the business enterprise. Based on his experience and credentials, Mr. DeStefano prepares bids, supervises employees, other than Ms. DeStefano, and schedules inspections and job meetings, among other things. (*See* WBE Exh. 5 and 6; CDTr1 00:14:22, 00:15:53.) Based on the record of this appeal, Louis DeStefano makes decision on behalf of DeStefano Electrical with respect to critical revenue generating functions. I conclude that the Division's determination that DeStefano Electrical does not comply with the eligibility criteria at 5 NYCRR 144.2(b)(1) is based on substantial evidence. Accordingly, this basis for denial should be affirmed.

III. National WBE Certification

Enclosed with the March 4, 2016 appeal, and at the hearing, DeStefano Electrical offered a copy of its National Women's Business Enterprise Certification (*see* WBE Exh. 8). As part of her testimony, Ms. DeStefano explained that she applied to the National Council based on information posted on the Division's web site concerning the "fast track" application. Ms. DeStefano understood that prior approval from the National Council was a prerequisite to applying for the Division's fast track WBE certification. (*See* CDTr1 00:24:44.)

Ms. DeStefano explained further that she filed an application with the National Council on behalf of DeStefano Electrical. After reviewing the application, staff from the National Council conducted a site visit of DeStefano Electrical, and interviewed Ms. DeStefano. Subsequently, DeStefano Electrical obtained certification from the Women's Business Enterprise National Council. (*See* WBE Exh. 8; CDTr1 00:01:34-00:01:44.)

The Division does have a fast track application process for WBE certification. According to Mr. LeFebvre, the application process can be truncated when an applicant has already obtained WBE certification from another agency such as the Port Authority of New York and New Jersey, or the City of New York, Minority and Woman-Owned Business Enterprise Program. Nevertheless, an alternative WBE certification does not guarantee that the Division would certify an applicant as a woman-owned business enterprise in New York State pursuant to the eligibility criteria outlined at 6 NYCRR 144.2. (*See* CDTr1 00:23:05-00:25:17.)

The Division is not bound to certify DeStefano Electrical because it obtained WBE certification from the National Council. To obtain WBE certification from New York State, DeStefano Electrical has the burden to demonstrate compliance with the eligibility criteria

outlined at 5 NYCRR 144.2. Based on the foregoing, DeStefano Electrical did not meet that burden. DeStefano Electrical may implement changes necessary to comply with the criteria outlined at 5 NYCRR 144.2. Subsequently, as provided by the regulations (*see* 5 NYCRR 144.5[b]), DeStefano Electrical may reapply for WBE certification.

CONCLUSIONS

1. With respect to the ownership criterion at 5 NYCRR 144.2(c)(2), DeStefano Electrical did not meet its burden to show that the Division's February 29, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the operation criteria at 5 NYCRR 144.2(b)(1)(i) and (ii), DeStefano Electrical failed to meet its burden to show that the Division's February 29, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
3. With respect to the operation criterion at 5 NYCRR 144.2(b)(1), DeStefano Electrical did not meet its burden to show that the Division's February 29, 2016 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny DeStefano Electrical's application for certification as a woman-owned business enterprise should be affirmed for the reasons discussed above.

Attachment: Exhibit List

Division of Minority and Women's Business Development

Exhibit Chart

**Matter of Lou DeStefano Electrical Contractor, Inc.
WBE File No. 59939**

Hearing Date: September 20, 2016 (NYC)

WBE Exhibit No.	Description
1	Lou DeStefano Electrical Contractor, Inc. Certification Application Application No. 1547524 Submitted: July 27, 2015
2	Division's February 29, 2016 denial letter
3	Lou DeStefano Electrical Contractor, Inc. IRS Form 1120 US Corporation Income Tax Return 2014
4	Lou DeStefano Electrical Contractor, Inc. IRS Form W-2 Wage and Tax Statement 2014 Louis J. DeStefano Michael DeStefano Tina DeStefano
5	Lou DeStefano Electrical Contractor, Inc. Résumés of Tina Marie DeStefano Louis J. DeStefano Michael J. DeStefano
6	Copies of Electrician Licenses and Certifications Louis J. DeStefano, Jr.
7	Letter/Response dated February 17, 2016 from Lou DeStefano Electrical Contractor, Inc. providing a description and history of the business enterprise.

8	National Women's Business Enterprise Certification to Lou DeStefano Electrical Contractor, Inc. Dated July 9, 2015 WBENC National Certification No. 2005127062
9	Letter dated September 19, 2016 from Richard J. Guertin, Esq. Attorney at Law Counsel for Lou DeStefano Electrical Contractor, Inc.
10	Letter dated March 4, 2016 from Lynn Predmore, Assistant Branch Manager Orange County Trust Company Bank for Lou DeStefano Electrical Contractor, Inc.
11	Letter dated August 25, 2016 from Charles G. Macias, Assistant Store Manager TD Bank Bank for Lou DeStefano Electrical Contractor, Inc.
12	Letter dated March 4, 2016 from Deborah L. Amelio, CPA Cooper Arias, LLP Accountants for Lou DeStefano Electrical Contractor, Inc. Letter dated July 19, 2016 from Deborah L. Amelio, CPA Cooper Arias, LLP Accountants for Lou DeStefano Electrical Contractor, Inc.
13	Letter dated September 15, 2016 from Gregg Kandel Kandel Brother, Inc. Electric Supplies
14	Letter dated August 3, 2016 from Michael J. Henshaw Vice President/Investments Stifel, Nicolaus & Company, Inc.
15	Letter dated September 19, 2016 from Honorable Joseph M. DeStefano, Mayor City of Middletown Former Accountant for Lou DeStefano Electrical Contractor, Inc.

16	Chase Credit Card Statement dated February 3, 2016
17	Letter dated July 27, 2016 from Howard Berman The Ruby Group, General Contractor
18	Email dated March 7, 2016 from Gary W. Zeigler Senior Marketing Representative Federated Insurance Bloomingburg, New York Insurance Brooker for Lou DeStefano Electrical Contractor, Inc.
19	Check dated September 23, 1996 \$5,000 Loan to Business
20	American Express Credit Card Statement dated July 13, 2016
21	Payroll Cards for Tina DeStefano Lou DeStefano Electrical Contractor, Inc. From 2004, 2005, 2006 and 2007
22	Orange County Community College (Spring 1988) Mini Windows Orange Ulster BOCES – Adult Continuing Education (October 20054) Advanced Quickbooks Pro

Ruling: All exhibits (1-22 inclusive) received into evidence (CDTr2 00:27:21).