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**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

April 19, 2017

Agenda ID #15675

**TO PARTIES OF RECORD IN DRAFT RESOLUTION ALJ-343/K.16-12-003:**

This is the draft Resolution of Administrative Law Judge (ALJ) Katherine Kwan MacDonald regarding the Appeal K.16-12-003 by Vicki Ratto and Industrial Control and Design, Inc. of Denial of Women Business Enterprise Certification by the Supplier Clearinghouse. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft resolution, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own order. Only when the Commission acts does the resolution become binding on the parties.

You may serve comments on the draft resolution. Opening comments shall be served no later than May 9, 2017, and reply comments shall be served no later than May 15, 2017. Service is required on all persons on the attached service list. Comments shall be served consistent with the requirements of Pub. Util. Code § 311(g) and Rule 14.5 of the Rules of Practice and Procedure.

Finally, comments must be served separately on ALJ MacDonald at [kk3@cpuc.ca.gov](mailto:kk3@cpuc.ca.gov), and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ KAREN V. CLOPTON

Karen V. Clopton, Chief  
Administrative Law Judge

KVC:lil

Attachment

**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Resolution ALJ-343  
Administrative Law Judge Division

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**RESOLUTION**

RESOLUTION ALJ-343. Resolves Appeal K.16-12-003 by Vicki Ratto and Industrial Control and Design, Inc. of Denial of Women Business Enterprise Certification by the Supplier Clearinghouse.

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**BACKGROUND**

This proceeding involves the appeal by Vicki Ratto (Appellant or Ms. Ratto) and Industrial Control and Design, Inc. (iCAD), of Fresno, California (together Appellants), of the denial of certification as a Women Business Enterprise (WBE) by the Supplier Clearinghouse (Clearinghouse or Respondent). Appellant requests the California Public Utilities Commission (Commission) review the evidence and verify<sup>1</sup> appellant as a WBE.

Appellants properly exhausted their administrative remedies as required by GO 156. Following receipt of the Respondent's denial letter, Appellants filed an internal appeal with Respondent. Respondent conducted a telephone interview with Ms. Ratto prior to issuing a final determination denying WBE certification. Subsequently, Appellants timely filed the instant appeal pursuant to Resolution ALJ-299. The Commission granted the request for an appeal hearing.

On January 16, 2017, Respondent moved for acceptance of its late compliance filing.<sup>2</sup> The assigned Administrative Law Judge (Judge) granted the motion. The compliance filing contained documents marked Exhibits 1 through 34. Pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure, Respondent moved for leave to file the

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<sup>1</sup> The term "verify" and derivations thereof is a term of art utilized in connection with the Women, Minority, Disabled Veteran, and Lesbian, Gay, Bisexual and Transgender (WMDVLGTBE) program to indicate the process of certifying that a particular entity meets or has met the standards set forth in General Order (GO) 156 for designation as a WMDVLGTBE of which WBE is included.

<sup>2</sup> Respondent's late filing was caused in part by problems with the service list.

compliance filing under seal.<sup>3</sup> On February 21, 2017, both parties appeared at the hearing. During the hearing parties utilized the right to call, examine and cross-examine witnesses, and offer exhibits.

Appellants offered a binder containing 42 numbered exhibits into evidence.<sup>4</sup> Appellants provided this binder to Respondent on January 13, 2017. At the hearing, Appellant moved to place additional exhibits numbered 35 through 42 into the record. Respondent objected to their admission stating the exhibits were inadmissible because Respondent can only consider documents available at the time the application was submitted. The Judge denied the motion.

During the hearing, the Judge denied Respondents motion for confidential treatment of Exhibits 1-32 and requested Respondent narrow its motion to only those documents that required confidential treatment. After conferring with Appellants, Respondent moved for confidential treatment of Exhibits 8 through 11, and 42:

- Exhibit 8: Ms. Ratto's Birth Certificate (Confidential)
- Exhibit 9: iCAD Federal Tax Return 2014 (Confidential)
- Exhibit 10: iCAD Federal Tax Return 2015 (Confidential)
- Exhibit 11: Copy of a check and stock certificates (Confidential)
- Exhibit 42: W2 Forms for Ms. Ratto and Mr. Ratto (Confidential)

Appellants filed additional information after the hearing at the Judge's request. Appellants' provided a copy of iCAD's 2016 Federal Tax Return and moved to for leave to file the return under seal. The iCAD 2016 Federal Tax Return shall be marked Exhibit 43 and is received into evidence.

With respect to the confidential material under seal, the Commission has granted similar requests for confidential treatment in the past and does so again herein. We agree the information involves both personal and market sensitive information. We therefore authorize the confidential treatment of Exhibits 8 through 11 and 42-43 as set forth in the ordering paragraphs of this resolution.

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<sup>3</sup> This motion was addressed at the hearing.

<sup>4</sup> Exhibits 1 through 34 were provided by Respondent in its compliance filing. Appellant added Exhibits 35 through 42 and provided all in a binder at hearing.

## **PARTY POSITIONS**

Appellants contend Respondent improperly denied WBE certification. Appellants assert they established that Ms. Ratto demonstrated both ownership and management of iCAD because Ms. Ratto owns 60 percent of iCAD and serves as its Chief Executive Officer (CEO). Appellants disagree with Respondent's conclusion that an engineering degree and/or expertise is required to manage iCAD. In addition, Appellants argue that Respondent's requirement that Ms. Ratto "earn the most" at iCAD was not listed as a required qualification to become WBE certified. Appellants contend income comparison is inappropriate because Mr. Ratto worked as a full-time employee for all of 2015 and Ms. Ratto transitioned to a full-time slowly in 2015. Appellants finally conclude that Respondent improperly imposed its own standards in addition to GO 156 and, as a result, failed to follow Commission guidelines when it denied Appellants' certification.

Respondent contends it properly reviewed Appellants' application and, after due consideration, properly denied WBE certification. Respondent states its denial was based on a determination that Ms. Ratto failed to show she that managed and controlled the company.<sup>5</sup>

Respondent states the information provided and results of its verification process showed that Ms. Ratto "lacks the qualifications required to manage and control the company."<sup>6</sup> Respondent further explained that Ms. Ratto did not have a "background or qualification in electrical engineering nor installations."<sup>7</sup> Respondent specifically noted that Mr. Ratto had 11 years of engineering experience.<sup>8</sup> The Appeal Response further states that Ms. Ratto's lack experience or knowledge of the industry in which the firm operates further supports Respondent's conclusion that she did not control and operate iCAD.<sup>9</sup>

Respondent also asserts that Ms. Ratto was not the highest paid employee and that her husband received more income from iCAD and Lighthouse. Respondent reasons that if Ms. Ratto controlled and operated the business she would receive higher compensation

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<sup>5</sup> Respondent initially denied WBE Certification because it determined that Ms. Ratto did not own the requisite 51 percent interest in iCAD. Respondent stated that it no longer contested that Ms. Ratto's ownership met GO 156 requirements. See Transcript at 99.

<sup>6</sup> See Exhibit 26, Notice of Denial.

<sup>7</sup> *Ibid.*

<sup>8</sup> See, Exhibit 33 Appeal Response.

<sup>9</sup> *Ibid.*

than Mr. Ratto As a result, Respondent argues that the income distribution to Ms. Ratto and Mr. Ratto further supports its conclusion that Ms. Ratto does not control iCAD.

### **RESOLUTION OF THE APPEAL**

California Assembly Bill (AB) 3678, signed into law on September 26, 1986, now codified as California Public Utilities Code Sections 8281-8286, requires every electric, gas, and telephone utility with gross annual revenues exceeding \$25 million to implement a program developed by the Commission to encourage, recruit, and utilize WMLGBTBEs. In response to AB 3678, the Commission issued GO 156, effective May 30, 1988, amended on June 11, 2015<sup>10</sup> to provide uniform rules and guidelines for California utilities companies to develop and implement WMLGBTBE programs. As relevant here, public utilities subject to GO 156 are obliged to seek to procure, at a minimum five percent of their long-term goals for each major category of products and services from WBEs.<sup>11</sup>

GO 156 also established a clearinghouse, as a separate entity, to verify that businesses credited toward the procurement goals are, in fact, owned and controlled by qualifying women, minorities, lesbian, gay, bisexual or transgender person or persons. GO 156 further authorized the Commission to approve third party agencies to perform verifications of WMLGBTBEs. The primary purpose of the clearinghouse is to audit and verify the status of WMLGBTBEs and to establish and maintain a database of these businesses that is accessible to the Commission and participating utilities.

The Commission established use of “substantial evidence test” as its standard of review in exercising its jurisdiction of review over Respondent’s verification decisions.<sup>12</sup> In other words, the Commission will affirm the decision of Respondent if it is supported by the record when considered as a whole.<sup>13</sup> Such a review necessarily entails an examination of Respondent’s findings and conclusions and the evidence upon which those findings are based.

Pub. Util. Code § 8282(a) sets forth the definition of “Women business enterprise” as used throughout the statute, and its implementing regulation Section 1.3.2 of GO156 sets forth the definition of “Women-owned business.” Each of these definitions contains two elements, which are virtually identical in the two definitions. These elements are: (a) that the woman on whom the enterprise (business) relies to be

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<sup>10</sup> As amended by D.15-06-007, June 11, 2015.

<sup>11</sup> GO 156, Section 8.

<sup>12</sup> See D.91-12-058 at 11.

<sup>13</sup> See D.92-04-004 at 12.

characterized as a WBE must own 51 percent of the business (or stock if publically owned), and (b) the management and daily business operations of the enterprise must be controlled by a woman or women.

In this case, no one contests that the ownership criterion is satisfied. Ms. Ratto, a non-minority female, owns 60 percent of the total 1000 outstanding shares of iCAD.<sup>14</sup> The only issue before the Commission is whether Appellants have shown that Ms. Ratto, iCAD's CEO, controls the management and operation of iCAD. After review of the record in its entirety, we are of the opinion that Respondent's conclusion that iCAD's management and daily business operations are not controlled by Ms. Ratto is not supported by substantial evidence.

In attempting to determine who managed iCAD on a daily basis, Respondent emphasized and appears to have given great weight to the fact that Ms. Ratto does not hold a degree in engineering, while noting on several occasions that Mr. Ratto holds such technical expertise and a degree in this area. We do not assign the same significance to this disparity and further question the idea that possession of a degree in the technical discipline of a corporation's product line infers qualification for or possession of management responsibilities. While possessing an engineering degree might give rise to the inference that the holder of the degree knows something about the product, the lack of such a degree does not necessarily indicate a lack of knowledge about the product. If such an assumption were true, then the efforts of this nation's business schools in training liberal arts majors to be managers are wasted and doomed to failure. Ms. Ratto holds a bachelor's degree with a concentration in management from the University of North Texas.

Respondent relied on the fact that Ms. Ratto was paid less in 2015 than Mr. Ratto to support its conclusion that Mr. Ratto held a disproportionate responsibility and control in the firm, as compared to Ms. Ratto.<sup>15</sup> Again, we find income alone is not dispositive evidence of the control and management of iCAD. In 2015, Mr. Ratto's total compensation exceeded Ms. Ratto's compensation by \$11,253. Ms. Ratto, however, unlike Mr. Ratto was transitioning from prior employment to her roles as CEO during 2015.

At the hearings, Ms. Ratto testified that she did not assume her full-time duties as CEO until June 2015. Ms. Ratto confirmed in hearings that she devotes more than 40 hours per week to her duties at iCAD. Ms. Ratto further testified that the decision to purchase

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<sup>14</sup> Respondent now accepts Ms. Ratto's ownership interest satisfies the requirements of GO 156.

<sup>15</sup> Ms. Ratto received \$193,087 in shareholder distributions and compensation of \$30,900 resulting in total compensation of \$223,987. Mr. Ratto received total compensation of \$235,240, which was comprised of \$128,724 in shareholder distributions and compensation of \$128,724.

the company was made very quickly as a result of the former owner's announcement of their intent to retire. Ms. Ratto was working for Every Neighborhood Partnership at the time the Ms. Ratto decided to purchase iCAD with her husband. Ms. Ratto explained during hearing that she needed time to wind up her role with her employer. At the time that Appellants applied for WBE certification, September 2016, Ms. Ratto devoted 40 hours or more to the operation of iCAD and that 2016 income would be a more accurate measure.

We find that, although there is no requirement that the woman relied upon for WBE certification also be the individual with the highest salary, it is one factor that may be considered. However, in this case, we do not find this factor to be sufficient evidence to support a Respondent's conclusion that Appellants failed to show Ms. Ratto managed and controlled iCAD's daily business operations. Even if we were to rely on income, Ms. Ratto's salary for a 12-month period would have been greater than Mr. Ratto's in 2015.<sup>16</sup>

The Commission previously held that the legislature intended, by the legislation here involved, to insure that the women or minority owners upon whom the request for verification is based had to demonstrate that in addition to owning the required percentage of the business, they also participate to a meaningful and substantial degree, on a regular and continuing basis, in policy-making decisions of the company. Evidence provided in the WBE application showed that Ms. Ratto actively participated to a meaningful and substantial degree in the daily operation and management of iCAD.

In view of the above, we are of the opinion that Respondent erred by applying a more restrictive test for determining control than is required or contemplated by the statute.

### **SAFETY**

The Commission has broad authority with regard to safety concerns. (*See* for example Pub. Util. Code §451, 5382, and 5387.) Although designation as a WBE does not pose any direct safety concerns, integrity in the contracting process for public utilities furthers safety through regulatory compliance.

### **COMMENTS**

Public Utilities Code Section 311(g)(1) requires that a draft resolution be served on all parties, and be subject to a public review and comment period of 30 days or more, prior

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<sup>16</sup> Appellants provided the corporation's Federal Income Tax Returns for 2016, which showed Ms. Ratto's salary exceeded Mr. Ratto's salary by \$11,148. She also received greater shareholder distributions in 2016.

to a vote of the Commission on the resolution. A draft of today's resolution was distributed for comment by the interested parties.

### **FINDINGS OF FACT**

1. iCAD is an engineering firm in Fresno, California. Vicki Ratto is the owner of 60 percent of the 1000 total outstanding shares of stock of iCAD.
2. Vicki Ratto is the Chief Executive Officer of iCAD.
3. Vicki Ratto has a Bachelor of Arts degree with a Specialization in Management from the University of North Texas.
4. Vicki Ratto works full-time for and devotes over 40 hours per week to the business affairs of iCAD.
5. Appellants applied to Respondent for verification as a WBE and were denied certification.
6. Appellants exhausted, without success, all internal review and appeal rights which Respondent provides under the WBE program it administers.
7. Appellant is paid an annual salary that exceeds that paid to Mr. Ratto, a senior engineer at iCAD.
8. Ms. Ratto has final authority over all aspects of iCAD's business affairs.
9. Ms. Ratto participates on a regular, continuing and significant basis in the management and business affairs of iCAD.
10. Ms. Ratto holds broad authority and power to make policy decisions at iCAD.

### **CONCLUSIONS OF LAW**

1. Respondent is the duly appointed administrator of the WMDVLGTBE verification program established under the authority of Pub. Util. Code §§ 8281 through 8285 and GO 156.
2. The items which Respondent considers when investigating an applicant for WBE status are appropriate areas of inquiry, but no single item or specific combination of items is to be controlling on the issue of the applicant's eligibility for verification as a WBE.

3. In determining whether Vicki Ratto exercised control over the affairs of iCAD, Respondent applied a stricter test for “control” than set forth in Pub. Util. Code § 8282(d) and GO 156, § 1.3.11.
4. Respondent erred in its determination that Vicki Ratto does not operate iCAD.
5. Respondent’s denial of WBE certification is not supported by substantial evidence in the record when considered as a whole.
6. Appellants’ and Respondent’s motions to file exhibits 8, 9, 10, 11, 42, and 43 under seal should be granted.

**THEREFORE, IT IS ORDERED** that:

1. The decision of the Supplier Clearinghouse denying verification as a Woman Business Enterprise to Vicki Ratto and Industrial Control and Design, Incorporated is vacated.
2. The Supplier Clearinghouse is directed to verify Industrial Control and Design, Incorporated as a Woman Business Enterprise without further delay.
3. The motions of Vicki Ratto, Industrial Control and Design Incorporated, and The Supplier Clearinghouse to file exhibits 8, 9, 10, 11, 42, and 43 under seal are granted for a period of three years after the effective date of this Resolution. During this three year period, this information shall not be publically disclosed except on further California Public Utilities Commission order or Administrative Law Judge ruling. If Vicki Ratto, Industrial Control and Design Incorporated, or The Supplier Clearinghouse believe it is necessary for this information to remain under seal for longer than three years, they may file a new motion showing good cause for extending this order by no later than 30 days prior to the expiration of this order.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on \_\_\_\_\_, the following Commissioners voting favorably thereon:

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Timothy J. Sullivan  
Executive Director