

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

In the Matter

- of -

the Application of **Doriguzzi Excavating, Inc.**  
for Certification as a Minority or Women-Owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58975

RECOMMENDED ORDER

- by -



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Maria E. Villa  
Administrative Law Judge

May 3, 2017

## 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 Doriguzzi Excavating, Inc. (“Doriguzzi” or “applicant”) certification as a minority or women-owned business enterprise<sup>1</sup> (“MWBE”) be affirmed, for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by 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 (“NYCRR”) Parts 140-144, challenging the determination of the Division that Doriguzzi does not meet the eligibility criteria for certification as an MWBE.

The Division denied Doriguzzi’s application for MWBE certification (Exhibit 1) by letter dated April 14, 2016. Exhibit 2. The denial letter sets forth four grounds under Section 144.2 of 5 NYCRR for the denial. Specifically, according to the Division,

- (1) applicant did not show that Josephine Doriguzzi, the minority and woman owner, enjoyed the customary incidents of ownership and shared in the risks and profits, in proportion with her ownership interest in Doriguzzi (see Section 144.2(c)(2) (“Ownership”));
- (2) applicant failed to demonstrate that Ms. Doriguzzi’s capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) (“Ownership”));
- (3) applicant failed to demonstrate that Ms. Doriguzzi had the experience or technical competence, working knowledge or ability needed to operate the enterprise (see Section 144.2(b)(1)(i) and (ii) (“Operation”)); and
- (4) applicant failed to establish that Ms. Doriguzzi made decisions pertaining to the operation of the enterprise (see Section 144.2(b)(1) (“Operation”)).

On May 6, 2016, Doriguzzi filed its notice of appeal. In lieu of a hearing, the parties agreed to submit their arguments in writing, and on August 3, 2016, Doriguzzi submitted its appeal (“Appeal”). Applicant was represented by Denise A. Sullivan, Esq., Pearl River, New York. The Division responded on March 31, 2017 (“Division Response”). The Division

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<sup>1</sup> The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”). Section 140.1(aa) of 5 NYCRR defines a minority owned business enterprise as one that is “at least 51% owned by one or more United States citizens or permanent resident aliens who are minority group members.”

Response included the affidavit of Iliana Farias, sworn to March 29, 2017 (the “Farias Affidavit”).

A list of exhibits is attached to this recommended order. Exhibits submitted by applicant were not marked or received if those exhibits were duplicates of exhibits submitted by the Division and already received into the record. This report is based upon the exhibits marked and received.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a minority or women-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). The eligibility criteria are the same for either a women-owned or a minority-owned business enterprise, or both. For the purposes of determining whether an applicant should be granted MWBE status, the ownership, operation, and control of the business enterprise are assessed 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 itself, and on information revealed in supplemental submissions and any interviews that the Division’s analyst may have conducted.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Doriguzzi’s application for MWBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

### **POSITIONS OF THE PARTIES**

#### Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Doriguzzi’s MWBE application.

With respect to ownership, Doriguzzi contends that Ms. Doriguzzi enjoys the customary incidents of ownership, and that her capital contributions are proportionate to her equity interest in the enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

With regard to operation, Doriguzzi asserted that as president and majority owner, Ms. Doriguzzi has the experience, working knowledge and ability to operate the business, and that technical expertise was not necessary. Applicant went on to argue that Ms. Doriguzzi makes decisions pertaining to Doriguzzi’s operations.

## Division

The Division argued that its determination was supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman or minority owner. The Division noted that Ms. Doriguzzi stated in the application that male individuals capitalized the business, and that she did not make any contributions. The Division stated that further that male individuals enjoyed the profits from the business, noting that her husband, Mario Doriguzzi, and her son, Robert Doriguzzi, both receive salaries, while Ms. Doriguzzi does not.

With respect to operation, the Division contended that applicant failed to show that Ms. Doriguzzi has the technical expertise or technical competence, working knowledge or ability to operate Doriguzzi, and that she does not make decisions pertaining to the operations of the enterprise. The Division took the position that Ms. Doriguzzi relied upon her husband, Mario Doriguzzi, as well as her son, Robert Doriguzzi, to manage the significant operations of the business. Accordingly, the Division requested that its determination to deny MWBE certification to Doriguzzi be upheld.

### **FINDINGS OF FACT**

1. Doriguzzi Excavating, Inc. is located at 60 North Serven Street, Pearl River, New York. Exhibit 1, at 1.
2. Doriguzzi is primarily engaged in hauling aggregates, such as sand and gravel. Exhibit 1, at 3; Farias Affidavit, ¶ 21. The company was formed in 1968 by Mario Doriguzzi. *Id.* Josephine Doriguzzi, an Hispanic female, became the president of Doriguzzi in 2012. *Id.*
3. Ms. Doriguzzi owns 51% of the company. In 2012, her husband, Mario Doriguzzi, gifted her with 102 shares of stock.
4. Mario Doriguzzi has over forty years' experience in project management and supervising field operations. Farias Affidavit, ¶ 31; Exhibit 10. Ms. Doriguzzi's resume shows that she has approximately thirty-five years' experience in office management, but no experience in supervising field operations or selecting and maintaining equipment. Farias Affidavit, ¶ 30; Exhibit 10. Robert Doriguzzi has over thirty-five years' experience in supervising field equipment and operating and maintaining excavating equipment and trucks. Farias Affidavit, ¶ 33; Exhibit 10.
5. The business was capitalized by Mario Doriguzzi and his business partner, Amerigo Doriguzzi. Ms. Doriguzzi did not demonstrate that she made a capital contribution to the enterprise. Ms. Doriguzzi does not receive a salary. Mario Doriguzzi and Robert Doriguzzi are paid salaries.

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Doriguzzi as a minority or women-owned business enterprise pursuant to Executive Law Article 15-A.

### Ownership

Section 144.2(c)(2) of 5 NYCRR requires an applicant to demonstrate that the minority or woman owner enjoys the customary incidents of ownership, and shares in the risks and profits in proportion with her ownership interest in the enterprise. Applicant stated that Doriguzzi is a small family owned company with two shareholders, and that in 2012, Ms. Doriguzzi was gifted with 102 shares of stock from her husband, who had been the sole shareholder. Ms. Doriguzzi is a majority shareholder with a 51% interest. Applicant contended that Ms. Doriguzzi currently collects a salary and also qualifies for the benefits of the customary incidents of ownership, such as: life insurance; automobile insurance; AAA auto club; fuel reimbursement; Two (2) corporate credit cards, and the ability to collect the rewards from usage; and the use of the home office deduction for gas and electric bills.” Appeal, at 3.

The evidence provided by the Division controverted applicant’s assertion that Ms. Doriguzzi collects a salary. In the Farias Affidavit, the Division’s analyst stated that the 2014 corporate tax return showed that the officers of Doriguzzi Excavating, including Ms. Doriguzzi, did not receive any compensation, and that no dividends were issued in that year. Farias Affidavit, ¶ 17; Exhibit 7. In response to a request for quarterly payroll records for 2015, Ms. Doriguzzi provided records showing that Mario and Robert Doriguzzi received salaries, but Ms. Doriguzzi did not. *Id.*, ¶¶ 19 and 20; Exhibit 8. In light of this evidence, applicant failed to carry its burden to show that the Division’s determination to deny the application was not based on substantial evidence, because Ms. Doriguzzi does not enjoy the customary incidents of ownership, or share in the risks and profits in proportion with her ownership interest in Doriguzzi.

Section 144.2(a)(1) of 5 NYCRR requires that the minority or woman owner’s contributions be proportionate to the owner’s equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

According to applicant, “[i]t should not be a factor that Josephine Doriguzzi acquired her ownership interest as a result of a gift.” Appeal, at 2. Applicant argued that Ms. Doriguzzi had been employed by the business since 1974, and has always worked full time. Applicant concluded that she shares her 42 years of experience in the business, and that she is an “indispensable employee.” Appeal, at 6.

In response, the Division pointed out that the application showed that the business was capitalized by its male founders, and Ms. Doriguzzi did not demonstrate any contributions to the business upon assuming majority ownership. The Division referred to Exhibit 6, an October 7, 2014 response by applicant to a request for additional information regarding proof of capitalization. In that document, Ms. Doriguzzi stated that “[a]s Doriguzzi is a small family owned business, I did not provide capitalization to obtain control of the company.” In light of

this statement, the Division's conclusion that applicant failed to satisfy this regulatory criteria was based on substantial evidence. The Division also referred to the 2012 corporate tax return, which indicated that prior to Ms. Doriguzzi's ownership, individuals made ██████ in capital contributions, and that this figure remained unchanged at the end of the year.

With respect to the statements in the Appeal regarding contributions of expertise, the Division pointed out that Ms. Doriguzzi never represented that she contributed expertise to Doriguzzi Excavating as part of the application, "and therefore the Appeal's attempt to reengineer the application to include such a claim is irrelevant." Division Response, at 3. The Division noted that the Appeal offered no evidence as to the nature and value of Ms. Doriguzzi's contributions of expertise, or any metric by which to compare those contributions to those of Mario Doriguzzi. Under the circumstances, it was reasonable for the Division to conclude that applicant did not satisfy the requirements of Section 144.2(a)(1). The Division's denial with respect to the ownership criteria should be affirmed.

### Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the minority or woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the minority or woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification. In addition, an applicant must show that the minority or woman owner has the working knowledge and ability needed to operate the business enterprise (see 5 NYCRR Section 144.2(b)(1)(ii)). The regulations also require a showing that the minority or woman business owner makes decisions pertaining to operation, and devotes time on an ongoing basis to the daily operation of the business enterprise (see 5 NYCRR Section 144.2(b)(1)(iii)).

Applicant argued that Ms. Doriguzzi had the necessary managerial experience and technical competence to operate the business. The Appeal stated that Ms. Doriguzzi had worked for Doriguzzi since 1974, and that she was "directly responsible for the day-to-day management of the front office." Appeal, at 3. The Appeal went on to describe Ms. Doriguzzi's duties, including her administrative role, as well as her role in acquiring permits, submitting bids, scheduling jobs and overseeing field operations. Applicant noted that for every heavy duty vehicle the business owns, Ms. Doriguzzi must obtain a Divisible Load Permit to allow those vehicles to travel on roads in New York, New Jersey, and Connecticut. Applicant stated that there is heavy client contact, and asserted that since Ms. Doriguzzi became the company's president and majority owner in 2012, Doriguzzi Excavating's revenue has increased twenty percent. Applicant emphasized that Ms. Doriguzzi conducts business with numerous companies that deal directly with her, and that she signs every contract and has signature authority for company business. Given her role as president, applicant argued that she makes decisions on a daily basis pertaining to operation.

The Division stated that with respect to the operation of an enterprise seeking certification, the Division

considers whether minority or women owners possess training and certification in disciplines related to providing services to clients of the

business for which certification is sought, whether owners have prior managerial experience in the industry that demonstrates their ability to operate the business without relying upon others, and information provided in the application related to the individuals who actively manage the core functions of the business enterprise during its regular business hours.

Division Response, at 5. The Division concluded that applicant failed to demonstrate that Ms. Doriguzzi managed significant operations of Doriguzzi Excavating “relating to selecting and maintaining equipment and supervising field operations, or that she possessed adequate managerial experience to evaluate the work of her male family members.” Id.

The Division maintained that “trucks are Doriguzzi Excavating’s greatest asset, and the maintenance and dispatch of these trucks is absolutely central to the success or failure of the business.” Division Response, at 5. The Division argued that upon review of the application and the narrative description of the roles of Josephine, Mario, and Robert Doriguzzi, the analyst concluded that male members of the family were responsible for managing the significant operations of the business. According to the Division, Robert Doriguzzi is responsible for maintaining and dispatching Doriguzzi’s fleet of trucks, while Josephine Doriguzzi “is primarily responsible for administrative and financial aspects of the business.” Division Response, at 5; Exhibit 9. The Division acknowledged that Ms. Doriguzzi submits bids and schedules construction and field operations, but went on to point out that male individuals shared in the management of these functions, as well as “more substantive operations related to equipment and field work.” Division Response, at 5.

The Division noted that Ms. Doriguzzi’s resume showed that all of her work experience prior to 2012 was in an office environment, and that “nothing in the application materials suggested that Ms. Doriguzzi would be able to determine whether equipment was properly maintained and work coordinated effectively in the field without the male members of her family.” Division Response, at 6; Exhibit 10.

Ms. Doriguzzi’s role in the operation of the business supports the Division’s denial. The record supports the Division’s conclusion that the functions that enable the business to obtain work and provide services to clients are within the purview of male employees, specifically, her husband and her son. The Division cited to *Matter of Northeastern Stud Welding Corp. v. Webster*, 211 A.D.2d 889, 890 (3<sup>rd</sup> Dept. 1995), in which the court upheld a denial where “significant operations [of the business] are shared and still others are performed” by male individuals. In this case, Mario and Robert Doriguzzi perform those significant operations for the business. As the Division points out, “[w]hile Ms. Doriguzzi need not drive a truck on a daily basis in order for Doriguzzi Excavating to be certified as a WBE, she must have demonstrated adequate managerial experience or technical training to evaluate the work of those who do maintain and operate equipment, and directly manage their work. The Appeal, rather than contradicting the Department’s findings, merely reinforces the division of labor apparent in the application; namely, men manage the work in the field and women manage the work in the office.” Division Response, at 6. The Division took the position that this division of labor is inconsistent with the remedial purpose of the MWBE program.

According to the Division, Doriguzzi Excavation is a family-owned business, in which control is shared among Ms. Doriguzzi and male individuals. The Division concluded that “the circumstances of Ms. Doriguzzi becoming the majority owner of Doriguzzi Excavating suggest that ownership interests in the business have been assigned for the purpose of obtaining WBE certification rather than because of the respective contributions of Ms. Doriguzzi and her husband. These conclusions are borne out by Ms. Doriguzzi’s lack of salary or other remuneration for her work.” Division Response, at 7.

The record supports the Division's determination regarding the operation of Doriguzzi as a family-owned business. The revenue-generating functions are handled by male employees, and Ms. Doriguzzi does not have the technical training or managerial experience to do so, as required by Section 144.2(b)(1). Moreover, even assuming that applicant satisfied the operational criteria, applicant did not establish ownership within the meaning of the regulations. The Division’s denial of certification was supported by substantial evidence, and should be affirmed.

### **CONCLUSION**

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny Doriguzzi’s application for certification was not based on substantial evidence.

### **RECOMMENDATION**

For the reasons set forth above, the Division's determination to deny Doriguzzi’s application for certification as a minority or women-owned business enterprise should be affirmed.



**Matter of Doriguzzi Inc.**  
**DED File ID No. 58975**  
**Exhibit Chart**

Exhibit No.	Description
1	September 19, 2014 application
2	April 14, 2016 denial letter
3	Stock certificates
4	TD Bank statement (May 1, 2014-May 31, 2014)
5	2012 federal corporate income tax return
6	October 7, 2014 letter from Josephine Doriguzzi to NYS DED
7	2014 federal corporate income tax return
8	April 7, 2016 list of employees; 1099s and W-2s
9	January 29, 2016 narratives re: roles of Josephine, Mario, and Robert Tate Doriguzzi
10	Resumes: Josephine, Mario, and Robert Tate Doriguzzi
11	September 19, 2014 application, with additional pages