

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

**In the Matter**

**- of -**

**the Application of Cornell & Company, Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 11878**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**November 21, 2023**

This matter considers the written appeal by Cornell & Company, Inc., (“CCI” 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 recertification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On July 11, 2017, Ms. Delor Cornell, as CEO, applied on behalf of CCI for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On November 4, 2021, 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 do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
  - (c) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5);

- (d) 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); and
  - (e) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. CCI timely filed a notice of appeal on December 8, 2021 (APP Exhibit 1).
  4. A notice to proceed via written appeal was sent to CCI on October 3, 2022 (DED Exhibit 3).
  5. No further documentation was received from CCI.
  6. The Division filed an Affidavit of Raymond Emanuel, Associate Director, dated August 31, 2023, and a brief of Lisa Berk Esq., counsel for the Division, dated August 31, 2023.

### **FINDINGS OF FACT**

7. CCI is engaged in the business of construction, construction management and steel work (DED Exhibit 1).
8. Ms. Delor Cornell is the CEO and has a 78% ownership interest. Her daughter, Ms. Happy Cornell is the President and has a 22% ownership interest (DED Exhibit 1).
9. The business was established by Delor Cornell's husband, Mr. Charles Cornell, in 1955. On January 12, 1995, Charles Cornell gifted a 51% ownership interest to Delor Cornell. On June 17, 1996, Charles Cornell gifted the remainder of his shares (49% ownership) to Delor Cornell (DED Exhibits 1 and 6). On June 24, 1996, Delor Cornell authorized the company to apply for certification as a WBE in New Jersey (DED Exhibit 6). Delor Cornell

has since gifted a total of 22% to her daughter, Happy Cornell. “There was no change in business capitalization made by Delor Cornell because all stock transfers were gifts” (DED Exhibits 1 and 4).

10. In 2019, Delor Cornell received a salary of \$ [REDACTED], and Happy Cornell received a salary of \$ [REDACTED]. Kevin Brockway, the CFO of CCI, earned \$ [REDACTED] and Senior Vice President Kevin Ducey earned \$ [REDACTED] (DED Exhibit 6).
11. Delor Cornell is semi-retired and works 20 hours per week for the business. She is involved at the corporate level looking for investment opportunities and strategic planning. Happy Cornell is responsible for the day-to-day operations of the business, hiring and firing, direct supervision of top-level managers and handles negotiations regarding all union contracts (DED Exhibit 7).
12. Kevin Ducey is the Senior Vice President and has the overall management of project operations, the estimating department, fabrication, contract management and development of customer base. Kevin Brockway is the Chief Financial Officer and Treasurer and oversees all financial functions and computer operations (DED Exhibit 7).
13. The Company Bylaws state that the “President shall be the chief executive officer of the Corporation” (DED Exhibit 8).
14. All executed contracts submitted with the application were signed by Senior Vice President Otto Schatz. No contracts were signed by either Delor Cornell or Happy Cornell (DED Exhibit 11).

#### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states 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.

5 NYCRR §144.2(b)(3) states as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(b)(5) states as follows:

Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.

5 NYCRR §144.2(c)(2) states as follows:

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 CCI for recertification 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. Prior Certification**

The Division acknowledges that CCI was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify CCI based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, CCI had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the July 11, 2017 application and supporting materials and cannot rely on the past determinations of the Division.

### **II. 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.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017); *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017). An applicant must demonstrate that the woman-owner's contribution is proportionate to her equity interest even if the interest in the business has been inherited or gifted. See *MDS Associates, Inc. v. New York State Department of Economic Development*, 2023 Slip Op 04011 (4<sup>th</sup> Dept. 2023); *Matter of Coverco, Inc.*, Recommended Order dated December 12, 2017; *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order dated May 25, 2017.

Delor Cornell's husband, Charles Cornell, gifted 100% ownership to Delor Cornell. Delor Cornell then gifted 22% ownership to her daughter, Happy Cornell. Applicant stated, "There was no change in business capitalization made by Delor Cornell because all stock transfers were gifts to her daughter" (DED Exhibit 4). Board meeting minutes reflect that the transfer of stocks from Charles Cornell to Delor Cornell and then to Happy Cornell were not in exchange for any value (DED Exhibit 5). Applicant stated, "there was no change in business capitalization made by Delor Cornell because all stock transfers were gifts" (DED Exhibit 4).

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

5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation

between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

The tax documents submitted with the application show that in 2019, Delor Cornell earned \$ [REDACTED], while Kevin Brockway was paid \$ [REDACTED], Kevin Ducey was paid \$ [REDACTED] and Happy Cornell was paid \$ [REDACTED] (DED Exhibit 6). The women-owners do not share in the profits in proportion to their equity interests.

Where a woman relied upon for certification obtains her ownership interest through a transfer from another person, the applicant “must demonstrate that such transfer was supported by reasonable consideration, and must meet all other certification criteria...” 5 NYCRR §144.2(b)(5).

On January 12, 1995, Charles Cornell gifted a 51% ownership interest to Delor Cornell. On June 17, 1996, Charles Cornell gifted his remaining 49% ownership interest to Delor Cornell. On June 24, 1996, Delor Cornell authorized the company to apply for WBE certification in New Jersey (DED Exhibit 5). Delor Cornell is semi-retired and has been gifting stock to her daughter, Happy Cornell (DED Exhibit 4). There was substantial evidence for the Division to conclude that Charles Cornell transferred his ownership interest in the company to Delor Cornell for the sole purpose of the company obtaining WBE certification. See *MDS Associates, Inc. v. New York State Department of Economic Development*, 2023 NY Slip Op 04011 (N.Y. App. Div. 2023).

### III. Operation

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 (4<sup>th</sup> Dept. 2018).

Delor Cornell is semi-retired and devotes 20 hours per week to the company. Her daughter, Happy Cornell handles the day-to-day activities of running the business. Delor Cornell is still involved as the sole Director and majority shareholder, and she looks for investment opportunities and is involved in strategic planning (DED Exhibit 7).

Kevin Ducey handles the overall management of project operations, estimating department, fabrication, contract management and development of customer base. Kevin Brockway oversees all financial functions and computer operations (DED Exhibit 7).

Kevin Ducey, not Delor Cornell or Happy Cornell, makes decisions with respect to the critical functions of the business which are construction, rigging and steel erection (DED Exhibit 1).

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

The contracts provided by CCI were signed by Senior Vice President Otto Schatz. No contracts were signed by either Delor Cornell or Happy Cornell (DED Exhibit 11). Therefore, applicant failed to demonstrate appropriate control of the business by the woman-owner as required by 5 NYCRR §144.2(d)(2). See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016 (substantial evidence supported denial where no evidence was presented that the woman-owner signs contracts on behalf of the business).

### **CONCLUSION**

CCI 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(b)(3), 144.2(b)(5), 144.2(c)(2) and 144.2(d)(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 CCI's application for recertification as a woman-owned business enterprise.

In the Matter of Cornell & Company, Inc.  
 DED File ID No. 11878  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Shareholder History	Y	Y
DED 5	Board of Director Meeting Minutes: 1/12/95, 6/15/96, 6/16/96, 6/24/96	Y	Y
DED 6	1125 E Forms 2019	Y	Y
DED 7	Key Employee Description	Y	Y
DED 8	Cornell & Company Bylaws	Y	Y
DED 9	2019 1040 Individual Tax Return for Happy Cornell	Y	Y
DED 10	2019 1040 Individual Tax Returns for Delor Cornell	Y	Y
DED 11	Applicant Contracts	Y	Y
APP 1	Notice of Appeal	Y	Y