

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

**In the Matter**

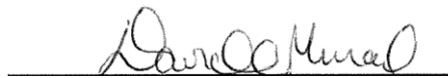
**- of -**

**the Application of Cypress King, Inc. d/b/a Aqueous Solutions  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 57256**

**RECOMMENDED ORDER**

**-by-**

A handwritten signature in black ink, appearing to read "David A. Murad", is written over a horizontal line.

**David A. Murad**  
**Administrative Law Judge**  
**August 17, 2023**

This matter considers the written appeal by Cypress King, Inc. d/b/a Aqueous Solutions (“CKI” 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 certification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On June 16, 2017, Ms. Kathryn Bliss, as majority owner and CEO, applied on behalf of CKI for recertification as a WBE (DED Exhibit 1).
2. On January 21, 2020, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2);
  - (b) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1); and
  - (c) Minority group members or women have not demonstrated adequate managerial experience or technical competence nor the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii).
3. CKI timely filed a notice of appeal on July 18, 2020 (APP Exhibit 1).
4. A Notice of Written Appeal was sent to CKI on August 4, 2020 (DED Exhibit2).

5. CKI submitted its written appeal by letter dated September 28, 2020 (APP Exhibit 2).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated April 6, 2023, and a brief of Michael Livolsi, Esq., counsel for the Division, dated May 19, 2023.

### **FINDINGS OF FACT**

7. CKI provides commercial cleaning services, based in Jamaica, New York (DED Exhibit 1).
8. Ms. Kathryn Bliss is the CEO and has a 51% ownership interest. Mr. Eric Bliss is the Vice President and has a 49% ownership interest (DED Exhibit 1).
9. In 2018, Ms. Bliss received \$ [REDACTED] in wages, while Mr. Bliss received \$ [REDACTED] in wages and Michael Garcia received \$ [REDACTED]. In 2018, Ms. Bliss received \$ [REDACTED] in distributions and Mr. Bliss received \$ [REDACTED] in distributions (DED Exhibits 4 and 5).
10. Ms. Bliss's duties include payroll, banking, insurance, bookkeeping and compliance (DED Exhibits 6 and 7). Her resume indicates that she is responsible for all office and administrative responsibilities (DED Exhibit 8).
11. Mr. Bliss is responsible for estimating, staff supervision, client relationships, purchasing equipment and soliciting new work. (DED Exhibits 6 and 7). His resume indicates that he is responsible for estimating, on-site operations, assessing potential work, building and maintaining client relationships and equipment maintenance (DED Exhibit 9).

### **APPLICABLE LAW**

5 NYCRR former § 144.2(c)(2) states in relevant part as follows:

The...woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former § 144.2(b)(1) states in relevant part as follows:

- (1) Decisions pertaining to the operations of the business enterprise must be made by...women claiming ownership of the business enterprise. The following will be considered in this regard:
  - (i)...women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
  - (ii)...women must demonstrate the working knowledge and ability needed to operate the business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

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

- (2) Operational decisions. 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...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 CKI 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)). Accordingly, applicant's attachments to APP Exhibit 2 will not be considered unless otherwise noted below.

## **DISCUSSION**

### **I. Prior Certification**

The Division acknowledges that CKI 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 CKI 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, CKI had the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR §144.2 when it submitted the June 16, 2017, application and supporting materials and cannot rely on the past determinations of the Division.

### **II. Ownership**

5 NYCRR former § 144.2(c)(2) 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 enterprise. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3d

Dept. 1995), the Court found that the Division’s review of tax returns provided substantial evidence to support the Division’s consideration of whether a woman-owned business enterprise meets the eligibility criteria.

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.

Ms. Bliss received substantially less compensation from CKI during its 2018 tax year than Mr. Bliss and employee Michael Garcia. She received \$ [REDACTED] in wages and \$ [REDACTED] in distributions, while Mr. Bliss received \$ [REDACTED] in wages and \$ [REDACTED] in distributions and Michael Garcia received \$ [REDACTED] in wages (DED Exhibits 4 and 5).

The Division’s finding that the woman-owner relied upon for certification did not share in the risks and profits in proportion with her ownership interest in CKI, as required by 5 NYCRR former § 144.2(c)(2), is supported by substantial evidence.

### III. Operation

The Division determined that Ms. Bliss does not make decisions pertaining to the operation of CKI as required under 5 NYCRR former §144.2(b)(1) and has not demonstrated adequate managerial experience or technical competence, nor the working knowledge and ability needed to operate the business, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii).

The eligibility criteria for MWBE certification requires that the woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In*

*the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3<sup>rd</sup> Dept. 2020). 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...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4<sup>th</sup> Dept. 2018).

With regard to technical competence, where the woman-owner has no training or experience and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the woman-owner must identify the management experience and day-to-day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3<sup>rd</sup> Dept. 2021).

The core revenue generating functions of CKI involve commercial cleaning services (DED Exhibit 1). Mr. Bliss supervises and manages staff and is responsible for estimating, sales, supervising field employees and purchasing equipment (DED Exhibits 6, 7 and 9).

Ms. Bliss is responsible for payroll, banking, insurance, bookkeeping, and other similar tasks. She is responsible for all office and administrative responsibilities (DED Exhibits 6, 7 and 8). These responsibilities are not the core revenue generating functions essential for the operation of the business. Her resume does not list any commercial cleaning experience (DED Exhibit 8).

Mr. Bliss is responsible for the core revenue generating functions of the business, the work done on the projects and supervision of employees engaging in the core revenue generating functions. He provides the technical competence, working knowledge and managerial experience (DED Exhibits 6, 7, and 9).

The Division's finding that Ms. Bliss does not make decisions pertaining to the operation of the business and does not have adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1), 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

### **CONCLUSION**

CKI did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a WBE with respect to the eligibility criteria under 5 NYCRR former §§ 144.2(c)(2), 144.2(b)(1), 144.2(b)(1)(i) and 144.2(b)(1)(ii) was not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny CKI's application for recertification as a WBE should be affirmed.



In the Matter of Cypress King, Inc. d/b/a Aqueous Solutions

NYS DED File No. 57256

Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Recertification	Y	Y
DED 2	Division's denial letter	Y	Y
DED 3	Notice to Proceed via written appeal	Y	Y
DED 4	W-2 and Personal Tax Returns	Y	Y
DED 5	Business Tax Returns	Y	Y
DED 6	Narrative Response 7 regarding day-to-day operations	Y	Y
DED 7	Narrative Response 8 regarding operations	Y	Y
DED 8	Ms. Bliss Resume	Y	Y
DED 9	Mr. Bliss Resume	Y	Y
DED 10	Narrative Response 9	Y	Y
DED 11	Narrative Response 5	Y	Y
DED 12	Business Loan Documents	Y	Y
APP 1	Applicant's Notice of Appeal	Y	Y
APP 2	Applicant's Appeal letter	Y	Y