



New York State
Department of Economic Development
Division of Minority and Women's
Business Development

In the matter of the appeal of

**Darr Construction Equipment
Corporation**

FINAL ORDER 22-11

From a denial of certification as a Women-owned Business Enterprise pursuant to Executive Law Article 15-A.

This order arises from an administrative appeal brought on behalf of Darr Construction Equipment Corporation (“Darr Construction” or “Appellant”) pursuant to Executive Law Article 15-A and Title 5 of the New York Codes, Rules and Regulations.¹ Appellant seeks reversal of the decision of the Division of Minority and Women’s Business Development (the “Division”), dated September 13, 2018, to deny Darr Construction re-certification as a Woman-owned Business Enterprise (“WBE”).

Richard B. Ziskin, Esq., on behalf of the Appellant, requested an administrative hearing by letter dated October 19, 2018, and a virtual hearing was subsequently held on February 4, 2021 using the Webex videoconferencing platform. A pre-hearing conference was also held a week prior on January 27, 2021. Darr Construction was represented by Richard B. Ziskin, Esq. and Maureen Cannetti, President/Co-owner of Darr Construction, testified on behalf of the Appellant. The Division was represented by Fawziyyah Slavov, Esq. and Glenn Butler, Senior Certification Analyst, testified on behalf of the Division. Administrative Law Judge (“ALJ”) Daniel P. O’Connell presided over the hearing.

The issues on appeal were whether Appellant sufficiently demonstrated that the woman owner relied upon for certification (1) makes a capital contribution to the business enterprise in proportion to her equity interest demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1); (2) shares in the risks and

¹ The Division’s September 13, 2018 denial determination and Appellant’s October 19, 2018 appeal pre-date the December 2, 2020 amendments made to 5 NYCRR Parts 140 et al. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this final order.

profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2); (3) makes decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR § 144.2(b)(1); and (4) demonstrates control of negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3).

On August 30, 2022, the Division received a Recommended Order from Judge O’Connell that recommended striking the ownership ground under 5 NYCRR 144.2(c)(2) as a basis for denial and, as modified, affirming the denial of re-certification on the remaining grounds.²

After considering the appeal record, I decline to accept the recommendation to strike the ownership ground under 5 NYCRR 144.2(c)(2) as a basis for denial. 5 NYCRR § 144(c)(2) provides that a business entity seeking certification as a WBE must establish that the women share in the risks and profits, in proportion with their ownership interest in the business enterprise. Here, the Appellant’s 2017 W-2 Forms that were submitted as part of the re-certification application indicated that other employees, including the minority-owner of the business were paid more money than Ms. Cannetti who is the 51% owner of the business enterprise. Specifically, the W-2 Forms stated that for that year, the 49% male owner not relied upon for certification, Michael Cannetti, earned \$ [REDACTED]; employees/relatives Alan Cannetti and Roy Cannetti earned \$ [REDACTED] and \$ [REDACTED] respectively; Ms. Cannetti earned \$ [REDACTED]. It was later determined that Ms. Cannetti made \$ [REDACTED], which amount was still lower than Alan Cannetti’s wages and only \$ [REDACTED] higher than Michael Cannetti’s wages. The difference between the wages of the two owners was insufficient to establish Ms. Cannetti’s wages were proportionate to her 51% ownership in the business enterprise. In response to the Division’s argument, the Recommended Order stated the Division staff did not quantify what the corporate officers’ compensation should have been based on the 51% to 49% ownership distribution between them.

Despite such argument, the compensation difference in relation to each owner’s ownership interest is apparent here. The total amount of wages between the two owners is \$ [REDACTED]. Out of this amount, Ms. Cannetti received less than 51% of the wages (under \$ [REDACTED]) and Michael Cannetti received more than 49% of the wages (over \$ [REDACTED]), therefore making Ms. Cannetti’s wages not proportional to her ownership interest. Also, when looking at the total amount of wages amongst the owners and aforementioned employees paid that year (\$ [REDACTED]), Ms. Cannetti received less than 51% of the wages. Although he is not an owner of the business, Alan Cannetti’s wages are relevant in determining Ms. Cannetti’s eligibility under this denial ground as it shows that an individual that is not an owner of the business makes more than Ms. Cannetti, the woman owner relied upon for certification.

² To the extent Darr Construction requests that the Recommended Order be set aside based upon noncompliance with 5 NYCRR Part 145, deadlines imposed by statute are to be read as directory rather than mandatory. *Heller v. Chu*, 111 A.D.2d 1007 (3d Dept. 1985). Here, there is no substantial actual prejudice to Darr Construction as a result of the delay. Indeed, Darr Construction has remained on the Directory during the pendency of its appeal. *Roc’s Z-Bar, Inc. v. New York State Liquor Authority*, 189 A.D.2d 1077 (3d Dept. 1993).

5 NYCRR § 144.2(c)(2) protects the accruing benefits afforded minority and women-owned businesses that result from MWBE certification and prevents non-qualifying businesses from receiving a disproportionate share of those benefits. *See Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 at 5-6 (business not eligible for WBE certification where the woman owner’s husband received significantly more compensation than she did), Final Order 17-21 dated March 27, 2017. This regulatory provision requires that the woman-owner must enjoy the customary incidents of ownership and ensures that the woman’s ownership interest is real and substantial. It is rational and in fact necessary to review relative compensation when evaluating whether the woman owner receive a proportional “profit” to their equity interest. The Division may consider and compare the allocation of wages between the owners relied upon for certification and their non-qualifying co-owners to determine if 5 NYCRR § 144.2(c)(2) is met. *See In the Matter of the Application of JP Race Painting for WBE Certification*, DED File No. 57774 (March 27, 2018) (Recommended Order), adopted March 30, 2018 (Final Order).

I accept the recommendation to affirm the denial determination on the basis that the Appellant failed to demonstrate that the denial grounds with respect to 5 NYCRR 144.2(a)(1), (b)(1) and (b)(3) were not supported by substantial evidence. Incorporation by reference is hereby made with respect to the findings and conclusions of the Recommended Order concerning 5 NYCRR 144.2(a)(1), (b)(1) and (b)(3).

It is hereby **ORDERED** that the decision to deny certification, dated September 13, 2018, is affirmed. Accordingly, Darr Construction will be removed from the Division’s directory for Minority and Women-owned Business Enterprises.

November 7, 2022



Jerome A. DuVal
Executive Director
Division of Minority and Women’s Business Development