

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

In the Matter

- of -

**the Application of Empire Scale Corp.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 49493

RECOMMENDED ORDER

-by-



**David Murad
Administrative Law Judge
June 16, 2023**

This matter considers the written appeal by Empire Scale Corp. (“Empire Scale”, 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. Margery DeMeis, as the President, applied on behalf of Empire Scale for recertification as a WBE on February 12, 2014 (DED Exhibit 1).
2. In a letter dated February 17, 2017, the Division denied Empire Scale’s application (DED Exhibit 2) on the following ground:
 - (a) The woman owner does not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1).
3. Empire Scale timely filed a notice of appeal on February 21, 2017 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Empire Scale on March 29, 2017 (DED Exhibit 3).
5. Applicant submitted its written appeal by letter dated June 12, 2017 (APP Exhibit 2).
6. The Division responded by filing an Affidavit of Raymond Emanuel dated March 8, 2023 and a brief submitted by Candace C. Williamson, Esq., counsel for the Division, dated April 6, 2023.

FINDINGS OF FACT

7. Empire Scale provides calibrations, sales and service of laboratory equipment and supplies, based in Lancaster, New York (DED Exhibit1).

8. Empire Scale was established in 1989 by Margery DeMeis. She is the President and sole shareholder of the business (DED Exhibit 1).
9. Ms. DeMeis is responsible for preparing for audits, tax filings, payroll and human resources, accounts payable and receivable, and purchase of “big ticket items” (DED Exhibit 7).
10. Michael DeMeis is the Executive Vice President of Empire Scale. He is responsible for overseeing all company departments and monitoring performance of the company, managing the Quality Management System, developing a sales and marketing plan, researching products and vendors, interviewing, hiring and training personnel, and resolving all complaints from customers and employees (DED Exhibit 6).
11. Jonathon DeMeis is the Vice President for the Scientific Products Division and is responsible for sales, evaluating projects, preparing quotes and responding to bids, and following up with customers (DED Exhibit 8).

APPLICABLE LAW

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

Decisions pertaining to the operations of the business enterprise must be made by... women claiming ownership of that 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 and 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 Empire Scale 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" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

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 or explain previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

DISCUSSION

I. Prior Certification

Applicant states that it has been continuously certified as a woman-owned business enterprise since 2006 and that the operation and management of the business has not changed since 2006 (APP Exhibit 2).

The Division acknowledges that Empire Scale 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 Empire Scale 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, Empire Scale had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the February 12, 2014 application and supporting materials and cannot rely on the past determinations of the Division.

II. Operations

5 NYCRR former §144.2(b)(1) requires that decisions pertaining to the operations of the business enterprise seeking WBE certification be made by the woman-owner. In evaluating compliance with this eligibility criterion, Division staff reviewed the application (DED Exhibit 1) to identify the significant business operations. Significant business operations, or core functions, generate revenue for the business and are unique to the industry, compared to administrative functions, such as personnel, payroll and accounting, which are common to most businesses. See *Matter of J.C. Smith, Inc.*, Recommended Order dated March 9, 2017, Final Order 17-10 dated March 13, 2017, *affd Matter of J.C. Smith, Inc. v. New York State Dept. of Economic Dev.*, 163 AD 3d 1517 (4th Dept. 2018). See also *Matter of Annandale Construction Corporation*, Recommended Order dated July 20, 2021, Final Order 22-04 dated March 31, 2022.

To determine who makes decisions pertaining to an enterprise's operations, the Division first identifies the core revenue generating functions of the enterprise, and then assesses who within the enterprise is primarily responsible for performing those functions and who has the expertise and knowledge necessary to perform and oversee those functions. *Matter of MC Environmental*

Services, Inc., Recommended Order dated April 29, 2021, Final Order 21-03, dated February 7, 2022.

Empire Scale's significant business operations, or core functions, include calibrations, sales and service of laboratory equipment and supplies (DED Exhibit 1).

Michael DeMeis is responsible for carrying out those core business functions. He is responsible for researching products and vendors, selecting equipment, preparing proposals, managing sales, overseeing the management of the quality systems, engaging with customers and employees and overseeing all company departments (DED Exhibit 6). He is "the most senior member of the leadership team with field service experience and expertise" (DED Exhibit 4).

Jonathon DeMeis is responsible for sales, preparing quotes and responding to bids, and following up with customers (DED Exhibit 4).

Margery DeMeis's primary duties and responsibilities at Empire Scale are financial and administrative. She is responsible for preparing for audits, preparing and filing tax documents, administering payroll and human resources, overseeing the accounting for the business, and purchasing "big ticket items" (DED Exhibit 7).

The Division has consistently held that woman-owners must perform significant operations, or core business functions, in order to comply with 5 NYCRR former §144.2(b)(1). See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1343 (3rd Dept. 2020) Ms. DeMeis did not demonstrate that she performs the core business functions at Empire Scale, which are associated with calibrations, sales and service of laboratory equipment and supplies.

The Division's determination with respect to Empire Scale's compliance with this eligibility criterion is based on substantial evidence.

CONCLUSION

Empire Scale Corp. did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at former 5 NYCRR §144.2(b)(1), 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 Empire Scale Corp.'s application for recertification as a woman-owned business enterprise.

In the Matter of Empire Scale Corp.
DED File ID No. 49493
Exhibit Chart

| Exhibit #: | Description of the Exhibits |
|------------|--|
| DED 1 | Application for Recertification – 2/12/2014 |
| DED 2 | Denial Letter – 2/17/2017 |
| DED 3 | Notice to Proceed via Written Appeal – 3/29/2017 |
| DED 4 | Applicant’s Secondary Letter Re: Michael DeMeis |
| DED 5 | Empire Scale Corp. Corporate Bylaws |
| DED 6 | Duties and Responsibilities of Michael DeMeis |
| DED 7 | Duties and Responsibilities of Margery DeMeis |
| DED 8 | Narrative of Key Personnel Responsibilities |
| APP 1 | Applicant’s Notice of Appeal – 2/21/2017 |
| APP 2 | Applicant’s Appeal Letter – 6/12/2017 |