

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

**In the Matter**

**- of -**

**the Application of Frank Scobbo Contractors, Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 45929**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**August 16, 2023**

This matter considers the written appeal by Frank Scobbo Contractors, Inc. (“FSC” 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 13, 2014, Ms. Phyllis Scobbo, as majority owner, applied on behalf of FSC for recertification as a WBE (DED Exhibit 1).
2. On January 18, 2017, 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) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).
3. FSC timely filed a notice of appeal on February 21, 2017 (APP Exhibit 1).
4. A Notice of Written Appeal was sent to FSC on March 29, 2017 (DED Exhibit2).
5. FSC submitted its written appeal by letter dated May 24, 2017 (APP Exhibit 2).

6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated December 1, 2022, and a brief of Candace Williamson, Esq., counsel for the Division, dated December 20, 2022.

### **FINDINGS OF FACT**

7. FSC provides concrete foundation and installation services, based in Port Washington, New York (DED Exhibit 1).
8. FSC, at the time of the application for recertification, was owned by Ms. Phyllis Scobbo (51%), Frank J. Scobbo (39%) and Frank T. Scobbo (10%) (DED Exhibit 1).
9. Frank J. Scobbo died on October 31, 2015. His ownership interest passed to Phyllis Scobbo, leaving her with a 90% ownership interest (DED Exhibit 6).
10. Frank J. Scobbo was the President of FSC and Frank T. Scobbo was the Vice President of FSC. Upon Frank J. Scobbo's death, the office of President was vacant, while Frank T. Scobbo continued to serve as Vice President (DED Exhibit 6).
11. The corporate bylaws of FSC provide that the President is the executive officer of the corporation and has management of the corporation. In the absence of the President, the Vice President "shall perform the duties and exercise the power of the President" (DED Exhibit 8).
12. In 2015, Ms. Scobbo devoted 25% of her time to the business and received no compensation, while Frank T. Scobbo devoted 100% of his time to the business and received \$ [REDACTED] in compensation (DED Exhibit 4).
13. In the quarterly wage reporting for the first two quarters of 2016, Ms. Scobbo received \$ [REDACTED] in compensation while Frank T. Scobbo received \$ [REDACTED] in compensation (DED Exhibit 5).

14. Frank T. Scobbo is responsible for supervising and managing the field operations of the business and estimating jobs. He is a licensed United States Coast Guard Master Captain, which allows him to operate the workboats and marine equipment needed to provide those services (DED Exhibit 7).
15. Phyllis Scobbo is responsible for administrative tasks including reviewing assignments and projects, placing orders for landscaping projects and assisting with employee issues (DED Exhibit 7).

### **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.

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

Articles of incorporation, corporate bylaws... or other agreements must permit ...women who claim ownership of the business enterprise to make those decisions without restrictions.

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 FSC 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 FSC 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 FSC 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, FSC had the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR §144.2 when it submitted the June 13, 2014 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.

Frank T. Scobbo received substantially greater compensation from FSC during its 2015 tax year and the first two quarters of 2016 than Ms. Scobbo. He received \$ [REDACTED] in 2015 while Ms. Scobbo received no compensation (DED Exhibit 4). He received \$ [REDACTED] in the first two quarters of 2016 while Ms. Scobbo received \$ [REDACTED] (DED Exhibit 5).

Applicant claims that Ms. Scobbo received income from rental property (APP Exhibit 2). However, nothing in the application supports any claim that the rental property is connected to FSC's business.

Applicant argues that Ms. Scobbo shares in the risks and profits by citing various loans and guarantees she has personally assumed for FSC (APP Exhibit 2). Loans and guarantees are not enough to satisfy the requirement that the woman-owner share in the risks and profits in proportion with her ownership interest. She does not share in the profits in proportion with her ownership interest.

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 FSC, as required by 5 NYCRR former § 144.2(c)(2), is supported by substantial evidence.

### III. Operation

The Division determined that Ms. Scobbo does not make decisions pertaining to the operation of FSC as required under 5 NYCRR former §144.2(b)(1).

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).

The core revenue generating functions of FSC involve concrete foundation and installation services (DED Exhibit 1). Frank T. Scobbo supervises and manages field operations and operates equipment needed to provide services to clients. He is the only licensed United States Coast Guard Master Captain, which allows him to operate the workboats and marine equipment needed to provide those services (DED Exhibit 7).

Ms. Scobbo states that she makes the corporate decisions as majority owner of the business. She lists her duties to include reviewing leases, purchases and long-term rentals of equipment, signing contracts and assisting with the resolution of employee issues (APP Exhibit 2). These responsibilities are not the core revenue generating functions essential for the operation of the business. Frank T. Scobbo performs the core revenue generating functions of operating the equipment and supervising and managing field operations.

The Division’s finding that Ms. Scobbo does not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR former §144.2(b)(1), is supported by substantial evidence.

#### IV. Control

5 NYCRR former §144.2(b)(2) requires that the relevant business agreements must permit the woman-owner to make decisions without restrictions. In determining whether the applicant meets this requirement, the Division may consider the company’s bylaws. See *Matter of S.C. Spencer Electric, Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 21, 2022. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (1995), unrestricted control



was not established where the corporate structure did not prevent the woman-owner from making operational decisions, however, the corporate bylaws provided that the woman-owner's husband, as President and CEO, had sole management authority.

The FSC corporate bylaws submitted with the application identify Mr. Frank J. Sobbo as President, which is also defined as the executive officer of the corporation, and "shall have management of the business of the corporation". In the absence of the President, the Vice President "shall perform the duties and exercise the power of the President" (DED Exhibit 8). The office of the President has been vacant since the death of Frank J. Scobbo. Therefore, Frank T. Scobbo, as Vice President, assumed the duties and responsibilities of the President. In his role as Vice President, Frank J. Scobbo is responsible for the management of the business of FSC, and not Phyllis Scobbo. Ms. Scobbo is not permitted to make decisions without restrictions.

The Division's finding that the relevant business agreements do not permit Ms. Scobbo to make decisions without restrictions, as required by 5 NYCRR former §144.2(b)(2), is supported by substantial evidence.

### **CONCLUSION**

FSC 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), and 144.2(b)(2) was not based on substantial evidence.

### **RECOMMENDATION**

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

In the Matter of Frank Scobbo Contractors, Inc.

NYS DED File No 45929

Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Recertification dated June 13, 2014	Y	Y
DED 2	Division's denial letter dated January 18, 2017	Y	Y
DED 3	Notice to Proceed via written appeal dated March 29, 2017	Y	Y
DED 4	2015 Federal Tax Return	Y	Y
DED 5	2016 Federal Tax Return	Y	Y
DED 6	FSC Corporate History	Y	Y
DED 7	Corporate Responsibilities of Phyllis Scobbo and Frank T. Scobbo	Y	Y
DED 8	FSC Bylaws	Y	Y
DED 9	Corporate Meeting Minutes	Y	Y
APP 1	Applicant's Notice of Appeal dated February 21, 2017	Y	Y
APP 2	Applicant's Appeal letter dated May 24, 2017	Y	Y