

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

In the Matter

- of -

the Application of Insulation Specialty, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 2476

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 15, 2023

This matter considers the written appeal by Insulation Specialty, Inc. (“ISI” 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 February 20, 2018, Ms. Tori Tabor, as President, applied on behalf of ISI for recertification as a WBE (DED Exhibit 1).
2. On April 20, 2020, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (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);
 - (c) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated 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); and

- (d) 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. ISI timely filed a notice of appeal by letter dated May 20, 2020 (APP Exhibit 1).
 4. A Notice of Written Appeal was sent to ISI on June 26, 2020 (DED Exhibit 3).
 5. ISI submitted its written appeal by letter from its attorney, Ryan Finn, Esq., dated August 27, 2020 (APP Exhibit 2).
 6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated July 10, 2023, and a brief of Dennie Byam, Esq., counsel for the Division, dated July 13, 2023.

FINDINGS OF FACT

7. ISI provides HVAC mechanical insulation installation for commercial projects, based in Bakersfield, Vermont (DED Exhibit 1).
8. Ms. Tori Tabor is the President of ISI and has an 51% ownership interest. Ms. Tori Tabor's brothers, Mr. Ralph Madison and Mr. William Madison are both Vice Presidents and each have a 24.5% ownership interest. (DED Exhibit 1).
9. The stock ownership was originally held by Ms. Tabor's parents. Mr. Ralph Madison owned 51% and Ms. Concetta Madison owned 49% (DED Exhibits 5 and 12). Upon his death in 1999, Mr. Ralph Madison's shares passed to Ms. Concetta Madison, who then owned 100% of the shares. Upon her death in 2015, the shares were distributed equally to Tori Tabor, Ralph Madison and William Madison on March 4, 2016, each having a 33 1/3 % ownership interest (DED Exhibits 4, 5 and 16). On March 22, 2016, Ralph Madison and William Madison equally gifted a total of 17 2/3 % ownership shares to Tori Tabor (DED Exhibits 5 and 12).
10. Ms. Tabor is the Chief Office Manager and is responsible for accounts payable and

receivable, purchasing equipment, assisting with proposals, maintaining schedules, preparing finances, bookkeeping, banking, payroll, human resources, insurance, and computer-based estimating, change orders, and general forms (DED Exhibits 1 and 9).

11. Michael Foley is an employee of ISI. He has 25 years of experience as an estimator and bidding projects at ISI. He is responsible for communicating with customers and estimating/bidding projects (DED Exhibit 6).
12. Ralph Madison has 25 years of experience with ISI. He works in the field installing mechanical insulation and does estimating work as needed. He also acts as a project manager, responsible for meeting with potential clients, organizing the warehouse, scheduling projects, and estimating (DED Exhibits 1, 8 and 12).
13. William Madison is a mechanical insulator responsible for ISI's warehouse. He also performs installation work (DED Exhibits 7 and 12).
14. Tori Tabor, Ralph Madison and William Madison are the three members of the Board of Directors of ISI (DED Exhibit 13). Article 3, Section 1 of the Company Bylaws states "The business and affairs of the corporation shall be managed by its Board of Directors." Article 3, Section 7 states "The action of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors." Article 3, Section 6 states "A majority of the number of directors fixed by these by-laws shall constitute a quorum for the transaction of business at any meeting of the board of directors..." (DED Exhibit 13).

APPLICABLE LAW

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

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

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 ISI 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 ISI 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 ISI 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, ISI had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the February 20, 2018 application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division interprets 5 NYCRR former §144.2(a)(1) to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. 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).

Ms. Tabor inherited a 33 1/3 % ownership interest on March 14, 2016 from her mother's estate. She made no capital contribution for those shares. She was gifted additional 17 2/3% ownership shares equally from Ralph and William Madison. She made no capital contribution for those shares. (DED Exhibits 1, 4, 5, 12 and 16). An applicant must demonstrate that the woman-owner's contribution is proportionate to her ownership interest, even if it is gifted, in order to qualify for MWBE certification. See *Matter of Beam Mack Sales & Services, Inc.* Recommended Order dated October 31, 2016, Final Order 16-55 dated November 1, 2016; *Matter of Friend Commercial Contracting Corp.*, Recommended Order dated May 11, 2016, Final Order 16-15 dated May 16, 2016.

Applicant alleges on appeal that her expertise in human resources functions, management of finances and equipment leases, and operational level control of the company should be considered as her capital contribution (APP Exhibit 1). This alleged expertise is not in the revenue generating functions of the business, which is HVAC mechanical insulation installation for commercial purposes (DED Exhibit 1). Also, this alleged expertise was contributed on June 1,

1999, 17 years before she obtained her ownership shares (DED Exhibit 1). There is no documentation to substantiate, quantify or prove the value of the alleged expertise.

Applicant also alleges that she contributed \$7,000 as a credit card line of credit on July 1, 2016 (APP Exhibit 2). This was not before the Division at the time of the denial determination, and the line of credit was opened 4 months after Ms. Tabor inherited and was gifted her ownership shares (DED Exhibit 1).

Applicant further alleges on appeal that that she contributed to the business by loaning funds to the company when she deemed it necessary to do so. Applicant provided tax returns from her mother's estate and a letter from her accountant (DED Exhibits 19-23). These documents do not show any contributions from Ms. Tabor to the business.

Applicant claims that cash infusions made by her mother before her death are attributable to Tori Tabor as her capital contributions (DED Exhibits 19 – 23). There is no supporting documentation to show any contribution was made on behalf of Ms. Tabor.

Applicant stated that she contributed \$0 for her 33 1/3% ownership shares and her 17 2/3% ownership shares (DED Exhibits 1, 5 and 16). Applicant claims on appeal that the \$100,000 line of credit balance on her mother's death was converted into a loan for which she signed as guarantor prior to obtaining her ownership interest, was her capital contribution (APP Exhibit 2). Applicant never stated to the Division that this loan was supposed to be her capital contribution prior to the denial. This is not evidence that seeks to clarify and explain previously submitted materials but is new evidence which will not be considered. (*See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021)).

The Division's determination to deny the application on the basis that ISI failed to demonstrate that Ms. Tabor made contributions to ISI in proportion to her ownership interest, as required under 5 NYCRR former §144.2(a)(1) is supported by substantial evidence.

III. Operation

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 (3rd 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 (4th Dept. 2018).

Ms. Tabor is responsible for bookkeeping, banking, legal issues, technology, human resources, payroll, payment applications, conflict resolution, account and event management, safety issues, insurance, and computer-based estimating/change orders/forms (DED Exhibits 9 and 12). Her resume states that she is the Chief Office Manager and responsible for the office work of the business (DED Exhibit 9). These are administrative functions not related to the core revenue-generating functions of the business.

Mr. Michael Foley does all the estimating work for ISI (DED Exhibit 6 and 12). He signed all the estimates provided in the certification application (DED Exhibit 17). He is responsible for communicating with customers and estimating/bidding projects with potential clients (DED Exhibit 6).

Mr. Ralph Madison is a mechanical insulator and project manager responsible for meeting with potential clients, organizing the warehouse, scheduling projects, and estimating (DED Exhibit

8). He works in the field installing mechanical insulation and does estimating work in the office as needed (DED Exhibit 12).

Mr. William Madison is a mechanical insulator responsible for organizing the warehouse (DED Exhibit 7). He also performs installation work for the business (DED Exhibit 12).

On appeal, Ms. Tabor alleges that she took college classes in business management, worked with her mother since 1994, and asserted that she does additional work for the business beyond what she originally stated in her application (APP Exhibit 2). This is new information not before the Division prior to the denial and hence will not be considered. Additionally, Ms. Tabor's resume does not reflect the education, training and experience related to the core revenue-generating functions of ISI, which is HVAC mechanical insulation installation for commercial projects (DED Exhibits 1 and 9).

The Division's finding that Ms. Tabor does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

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 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, supra at 1346.

Ms. Tabor’s resume does not reflect any experience performing HVAC insulation installation work. She is the Chief Office Manager and assists the business with clerical functions and her degree is in business management. Her resume reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 9). Ms. Tabor oversees the administrative portions of the business, while Mr. Ralph Madison, Mr. William Madison and Mr. Michael Foley perform the revenue-generating operations of the business (DED Exhibits 6, 7 and 8).

The Division’s finding that Ms. Tabor did not establish that she, as the woman-owner of ISI, had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), 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.

Tori Tabor, Ralph Madison and William Madison are the only three members of the Board of Directors (DED Exhibit 1). Article 3, Section 1 of the corporate bylaws' states that "The business and affairs of the corporation shall be managed by its Board of Directors." Article 3, Section 7 states that "The action of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors." Ms. Tabor, as one of three Board members, is not permitted to make decisions without restrictions.

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

CONCLUSION

ISI 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(a)(1), 144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(2) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Insulation Specialty, Inc.
 NYS DED File No 2476
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification dated June 2, 2016	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	State of Vermont Decree of Partial Distribution	Y	Y
DED 5	Stock Ledger	Y	Y
DED 6	Michael Foley Resume	Y	Y
DED 7	William Madison Resume	Y	Y
DED 8	Ralph Madison Resume	Y	Y
DED 9	Tori Tabor Resume	Y	Y
DED 10	Key Bank Signature Cards	Y	Y
DED 11	Question Responses from 2/28/20	Y	Y
DED 12	Question Responses, undated	Y	Y
DED 13	Minutes of Annual Directors' Meeting held on March 7, 2019	Y	Y
DED 14	Corporate Bylaws	Y	Y
DED 15	Certification Application Affidavit	Y	Y

DED 16	Shares Information and Stockholder Certificates	Y	Y
DED 17	Fort Ticonderoga Association Estimates – August 14, 2019	Y	Y
DED 18	Keybank Loan Guaranty March 3, 2016	Y	Y
DED 19	March 2, 2020 Letter from Dana I. Kittell, CPA	Y	Y
DED 20	Concetta Madison Estate US Final Action Item 12/31/19	Y	Y
DED 21	Concetta Madison Estate US Tax Return 12/31/19	Y	Y
DED 22	Concetta Madison Estate VT Final Action Item 12/31/19	Y	Y
DED 23	Concetta Madison Estate VT Tax Return 12/31/19	Y	Y
DED 24	Concetta Madison Will Authentication and Exemplification	Y	Y
APP 1	Applicant's Appeal Letter	Y	Y
APP 2	Applicant's Appeal Submission	Y	Y