

NEW YORK STATE  
DEPARTMENT OF ECONOMIC DEVELOPMENT  
625 BROADWAY  
ALBANY, NY 12245

In the Matter

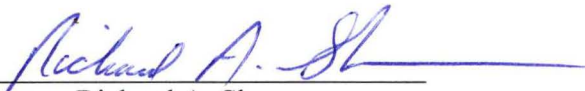
- of -

the Application of **JBS Dirt, Inc.**,  
for Recertification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57386

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, reading "Richard A. Sherman", is written over a horizontal line.

Richard A. Sherman  
Administrative Law Judge

August 2, 2023

## SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny JBS Dirt, Inc. ("JBS Dirt" or "applicant"), recertification as a women-owned business enterprise ("WBE")<sup>1</sup> be modified in part and, as modified, affirmed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that JBS Dirt does not meet the eligibility criteria for recertification as a WBE.

The Division denied the application (exhibit D) filed by JBS Dirt for WBE recertification by letter dated November 12, 2019 (exhibit F ["denial letter"]). The denial letter sets forth three bases under former 5 NYCRR 144.2<sup>2</sup> for the denial. Applicant filed a notice of appeal by letter dated December 10, 2019 (exhibit G ["notice of appeal"]). By notice of hearing dated May 8, 2023 (exhibit 3), the Division advised applicant that the appeal hearing would be held virtually on June 6, 2023, using the Webex videoconferencing platform.

I convened the virtual hearing at approximately 10:20 a.m. on June 6, 2023 and reconvened the hearing at 10:00 a.m. on June 9, 2023. Diana I. Plue, Esq., appeared on behalf of applicant and called three witnesses: John Tartaglia, CPA; Kimberly Baker, President, JBS Dirt; and James Baker, Sr., Vice President, JBS Dirt. Michael Livolsi, Esq., represented the Division and called one witness: Raymond Emanuel, Associate Certification Director. The virtual hearing was recorded via Webex and subsequently transcribed. The transcription was received by this office on July 5, 2023, whereupon the hearing record closed.

As agreed to by the parties, exhibits and witness lists were exchanged prior to the day of the hearing. There was a great deal of overlap between the exhibits submitted by applicant and those submitted by the Division and all of the exhibits that the parties proffered at the hearing were received into evidence without objection (*see* exhibit list appended to this report).

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<sup>1</sup> The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* former 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

<sup>2</sup> The Division's denial determination and applicant's appeal therefrom pre-date amendments to 5 NYCRR parts 140-145 that became effective on December 2, 2020. Accordingly, the eligibility criteria set forth under the former regulations are referenced throughout this recommended order.

## ELIGIBILITY CRITERIA

The eligibility criteria for a WBE are established by regulation (*see* former 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of JBS Dirt's WBE recertification application is not supported by substantial evidence (6 NYCRR 145.2[b], [b][5]; 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 the Division'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]).

## POSITIONS OF THE PARTIES

### Position of the Division

The Division cited three eligibility criteria for the denial of JBS Dirt's WBE recertification application. Specifically, the Division argues that applicant failed to establish that the woman owner relied upon for certification, Kimberly Baker, (i) made a contribution to JBS Dirt in proportion to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (exhibit F at 031<sup>3</sup> [citing former 5 NYCRR 144.2(a)(1)]); (ii) shares in the risks and profits of the enterprise in proportion to her ownership interest (*id.* [citing former 5 NYCRR 144.2(c)(2)]); and (iii) makes decisions pertaining to the operation of the business enterprise (*id.* at 032 [citing former 5 NYCRR 144.2(b)(1)]).

### Position of Applicant

Applicant argues that the Division "incorrectly determined" each of the factors cited by the Division for denial of the certification (exhibit G at 035). Applicant faults the Division for relying upon one year's compensation information and argues that applicant was not afforded the opportunity to explain why Kimberly Baker received less compensation than did her husband,

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<sup>3</sup> Both parties affixed Bates stamp numbers to their respective exhibits. For ease of reference, citations herein are to the exhibit letter or number designation, followed by the three-digit Bates stamp number within the exhibit.

James Baker (*id.*). With regard to decision making, applicant argues that Kimberly Baker "runs the business" and that she "is involved in the day-to-day operations, goes on site to jobs, [and] attends job meetings" (*id.* at 035-036). Applicant also argues that the denial is arbitrary and capricious because the application is for recertification and there has been no change in the business enterprise's ownership or operations, nor in the regulatory criteria for certification (*id.* at 036).

## FINDINGS OF FACT

1. JBS Dirt is a New York corporation, established on April 1, 1998, that offers numerous construction services, including site preparation, storm sewer construction, golf course construction, drainage construction, and sewer main, pipe and connection construction (exhibit D at 011-013 [application, items 1.R, 1.S, 5.A-L]).

2. Kimberly Baker is the President of JBS Dirt and has held a 51 percent interest in JBS Dirt since its inception in 1998 (exhibit D at 011-012 [application, items 1.O, 3.A, 3.C]).

3. James Baker, Kimberly Baker's husband, is the Vice President and has held a 49 percent interest in JBS Dirt since its inception (exhibit D at 012 [application, items 3.A, 3.C]; exhibit G at 036 [stating that Ms. Baker "co-owns the company with her husband"]).

4. JBS Dirt submitted IRS 1125-E forms and W-2s to the Division for Kimberly Baker and James Baker for the 2017 tax year. These documents show that in 2017 Ms. Baker received several thousand dollars less than Mr. Baker in wages and compensation (tr at 23-24, 40-41, 281-282; exhibit J at 113-114; exhibit K at 129).

5. JBS Dirt also submitted IRS 1125-E forms and W-2s for JBS Dirt for the 2013, 2014, and 2015 tax years (tr at 276-278; exhibits 5, 8). These documents show that Kimberly Baker received less than James Baker in wages and compensation each of those years (tr at 278; exhibit 5 at 068, 098, 153; exhibit 8 at 260-261, 289-290).

6. Kimberly Baker's duties at JBS Dirt include: taking care of accounts receivables; recording all invoices and making sure all payables are paid on time; assuring invoices are correct; overseeing monthly loan payments; communicating with banks, bonding companies, insurance companies, finance companies, accountant and attorney; reviewing daily sheets from the job sites from all employees; recording daily employee payroll hours; helping employees perform maintenance "if they need a hand;" meeting with supervisors each morning regarding the daily activity they will perform; visiting the job site weekly to see progress, quality of work and to talk with all employees; meeting with supervisors at the end of each day; attending job meetings with engineers to review the job; doing all the interviews for new hires; completing orientation with new employees; and performing all Mine Safety Health Administration (MSHA) training for new hires (exhibit A at 002-003).

7. James Baker's duties at JBS Dirt include: bidding the work; performing the "take off" from (i.e., reading) the prints and specks to get quantities and time frames for bid work; receiving and reviewing quotes for subcontractors and suppliers; figuring time needed to perform

each item of a bid and what equipment will be needed for the job; checking the prints and specks to make sure all information is correct; visiting the bid site to see conditions; gathering all information and entering it into the computer bid system; completing the bid; gathering information and sending it to a GPS model maker and reviewing the model of the job when it is complete; checking out equipment to make sure the GPS on equipment is working; visiting the job site to check on performance and quality of work; attending job meetings; running jobs as a supervisor when the job is large; and staying on the job site organizing employees (exhibit A at 003-004).

8. Prior to the formation of JBS Dirt in 1998, Kimberly Baker worked for United Parcel Service (1995 – 1999), loading tractor trailers and training new employees. Ms. Baker also owned and operated a logging company (1994 – 1996), produced and delivered firewood, hired out as a dump truck driver, and worked as a general laborer (exhibit C at 008).

9. Kimberly Baker is a high school graduate and has received MSHA, OSHA, first aid, and pipe fusion training. Ms. Baker also holds a Class B License (exhibit C at 008).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny recertification of JBS Dirt as a WBE pursuant to Executive Law Article 15-A. As discussed below, the Division cites two "ownership" criteria and one "operations" criteria in support of upholding the denial.

### Ownership: Contribution Proportionate to Equity Interest

The eligibility criterion at issue requires that "the contribution of the 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" (former 5 NYCRR 144.2[a][1]).

Although the Division's denial letter cites this criterion as a basis for the denial, the denial letter states no facts in support of this basis. Further, the Division proffered no testimony or other evidence in support of this basis for the denial at the hearing.

The application states that Kimberly Baker is the 51 percent owner of the business enterprise and that she has been since the enterprise was formed (exhibit D at 012, item 3.A, C). Absent any evidence to the contrary, I have no basis to hold that Ms. Baker did not contribute a proportionate amount to acquire her 51 percent interest in the enterprise. This is particularly so where, as here, the application is for recertification and, therefore, the Division had previously determined that Ms. Baker's contribution to the enterprise satisfied this criterion (*see Matter of Charles A. Field Delivery Serv., Inc.*, 66 NY2d 516, 520 [1985] [holding that "[f]rom the policy considerations embodied in administrative law, it follows that when an agency determines to alter its prior stated course it must set forth its reasons for doing so."]).

On this record, I conclude that the Division's determination to deny the application on the basis that JBS Dirt failed to demonstrate that Kimberly Baker made contributions to JBS Dirt in proportion to her ownership interest, as required under former 5 NYCRR 144.2(a)(1), is not supported by substantial evidence.

#### Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (former 5 NYCRR 144.2[c][2]).

As previously noted, Kimberly Baker holds a 51 percent ownership interest in JBS Dirt and James Baker holds a 49 percent interest. Division staff argues that Ms. Baker's compensation from JBS Dirt is not proportionate to her 51 percent ownership interest in the enterprise. Staff asserts that Ms. Baker's compensation is less than that of Mr. Baker (exhibit F at 031). Staff further asserts that this determination is supported by the enterprise's federal corporate tax return and the Bakers' W2s for 2017 (*id.*). According to these documents, Mr. Baker's total wages and compensation exceeded that of Ms. Baker by several thousand dollars in 2017 (findings of fact ¶ 4). At the hearing, staff proffered testimony and evidence from the application materials showing that Mr. Baker received greater compensation from JBS Dirt in 2013, 2014, and 2015 (findings of fact ¶ 5).

JBS Dirt concedes that Kimberly Baker's compensation is lower than that of James Baker (tr at 78, 158), but asserts that neither Ms. Baker nor Mr. Baker "get paid for the amount of time [they] put into [their] work" (exhibit A at 004). Ms. Baker's compensation reflects payment for 50 hours of work and she is "happy" with that amount (*id.*). Mr. Baker "is paid for the hours he is in the field working" (*id.*). At the hearing, Ms. Baker testified that JBS Dirt "does not pay dividends to the owners" (tr at 150; *see also* exhibit B). Accordingly, there is no dividend income to increase the owners' wages and compensation.

I also note that JBS Dirt argues that "wages are not profits" and, therefore, the Division erred in making its determination on this criterion on the basis of wages paid to the owners (tr at 331). Although profits received in the form of dividends would be considered by the Division, the record reflects that no dividends are paid by JBS Dirt. Moreover, the Division routinely considers wage and compensation data when evaluating whether an owner shares in the risks and profits of a business enterprise in proportion to their ownership interest (*see e.g. Matter of CBA Contracting Corp.*, Final Order, July 10, 2023 [incorporating the findings and conclusions of the Recommended Order]; *Matter of BRT Planning International, LLC*, Final Order, Apr. 12, 2017 [incorporating the findings and conclusions of the Recommended Order]).

The arguments raised by applicant do not undermine the Division's determination that Kimberly Baker does not share in the risks and profits of JBS Dirt in proportion to her ownership interest. The compensation documentation that was before the Division at the time of the denial supports the Division's determination on this issue and applicant did not proffer evidence of other compensation.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Kimberly Baker does not share in the risks and profits of JBS Dirt in proportion to her ownership interest as required by former 5 NYCRR 144.2(c)(2).

#### Operation: Decision Making

The eligibility criterion at issue states that "[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise" (former 5 NYCRR § 144.2[b][1]).

In its assessment of this criteria, the Division evaluates the application materials to determine whether the minority or woman owner is responsible for making operational decisions pertaining to the core revenue generating functions of the business enterprise (tr at 288-289; exhibit F at 032). Here, the Division witness testified that the core revenue generating functions of JBS Dirt are "site preparation work, excavation, drainage construction, sewer pipe connection, construction, demolition, dewatering, land clearing, [and] excavation" (tr at 289<sup>4</sup>).

In its denial letter, the Division stated that Kimberly Baker is "mostly responsible for administrative functions of the business," while James Baker is responsible for "oversee[ing] the on-site construction work" (exhibit F at 032). In support of its determination the Division cites Kimberly Baker's resume and the narratives regarding the duties and responsibilities of Ms. Baker and Mr. Baker that JBS Dirt provided with its WBE application (*id.*). At the hearing, the Division's witness testified that Ms. Baker's resume shows little training or experience in the core revenue generating functions of JBS Dirt (tr at 289-292). The Division's witness further testified that Ms. Baker's duties, as described in the narratives, are largely administrative, "such as accounting, bookkeeping, communications," while Mr. Baker "oversees the on-site construction work" (tr at 286).

The narratives confirm that the day-to-day responsibilities of Kimberly Baker are primarily administrative (exhibit A at 002-003; *see also* findings of fact ¶ 6). The narrative for Ms. Baker lists numerous administrative functions such as accounting, invoicing, payroll, finance and data entry, although it also notes that she will "visit the job site weekly to see progress, quality of work and to talk with all employees" (*id.*). In contrast, the narrative for James Baker states that his day-to-day responsibilities include reading prints and specks for potential jobs to bid work, visiting potential job sites to confirm work conditions, supervising large jobs, and staying on job sites to organize employees (exhibit A at 003; *see also* findings of fact ¶ 7).

Kimberly Baker testified that James Baker is in the field "[q]uite often" (tr at 77) and that he "oversees what the guys are doing" (tr at 121-122). She also acknowledged that the narratives JBS Dirt provided regarding the duties of the principals state that James Baker "runs jobs as a supervisor when the job is large" (tr at 120-121; *see also* exhibit A at 003). Ms. Baker further acknowledged that the narrative describing her duties does not state that she runs jobs (tr at 122-

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<sup>4</sup> Note that the witness cites to "page five" of the application, but the testimony relates to information in section five of the application (*see* exhibit D at 012-013).

123). Additionally, James Baker testified that he "watch[es] men out in the field" and that he "direct[s] field operations" (tr at 205).

Kimberly Baker contributes significantly to the success of JBS Dirt, particularly with respect to the many administrative functions necessary to run the business enterprise. Nevertheless, the Division's determination that James Baker is the primary decision maker with respect to the core revenue generating functions of the enterprise is supported by substantial evidence.

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Kimberly Baker does not make decisions pertaining to the operation of the business enterprise (*see* former 5 NYCRR 144.2[b][1]).

### CONCLUSION

I conclude that the record lacks substantial evidence to support the Division's determination to deny JBS Dirt's WBE recertification application on the basis of whether the woman owner, Kimberly Baker, made contributions to JBS Dirt in proportion to her equity interests in the enterprise (*see* former 5 NYCRR 144.2[a][1]).

I further conclude that applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny JBS Dirt's WBE application on the bases that the woman owner, Kimberly Baker, does not (i) share in the risks and profits of the enterprise in proportion to her ownership interest (*see* former 5 NYCRR 144.2[c][2]); and (ii) make decisions pertaining to the operation of the business enterprise (*see* former 5 NYCRR 144.2[b][1]).

### RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny JBS Dirt, Inc., recertification as a women-owned business enterprise should be modified by striking the ownership ground under former 5 NYCRR 144.2(a)(1) as a basis for the denial and, as modified, affirmed.



**Matter of JBS Dirt, Inc.  
DED File ID No. 57386**

**Exhibit List**

<b>Exhibit No.</b>	<b>Description</b>	<b>Received (Y/N)*</b>
A	Narratives Describing Each Owner's Responsibilities	Y
B	JBS Dirt Distribution at Year End Memorandum	Y
C	Resume of Kimberly F. Baker	Y
D	JBS Dirt WBE Application, electronic signature dated October 7, 2016	Y
E	JBS Dirt Corporate Bylaws	N
F	Division Denial Letter, dated November 12, 2019	Y
G	Applicant Notice of Appeal, dated December 10, 2019	Y
H	2013 WBE Certification Letter	N
I	JBS Dirt Financial Statements (2014 – 2015)	Y
J	Bakers' Personal Income Tax and W-2 Statements (2017)	Y
K	JBS Dirt Corporate Tax Records (2017)	Y
L	JBS Dirt Corporate Tax Records (2013)	N
M	JBS Dirt Corporate Tax Records (2014)	N
N	JBS Dirt Corporate Tax Records (2015)	N
1	JBS Dirt WBE Application, electronic signature dated October 7, 2016	Y
2	Division Denial Letter, dated November 12, 2019	Y
3	Division Notice of Hearing to JBS Dirt, dated May 8, 2023	N
4	Applicant Notice of Appeal, dated December 10, 2019	N
5	JBS Dirt Corporate Tax Records (2013 – 2015)	Y
6	JBS Dirt Financial Statements (2014 – 2015)	N
7	JBS Dirt Employer's Quarterly Fed & State Tax Return (2016)	N
8	Bakers' Personal Tax Return (2014 – 2015)	Y
9	Resume of Kimberly F. Baker	Y
10	Narrative Description of Each Owner's Responsibilities	Y
11	PA Contract Operator Approval	N
12	JBS Dirt Corporate Tax Records (2017)	Y
13	W-2 Statements (2017)	Y

\*All of the exhibits that were proffered during the hearing were admitted into evidence (marked "Y"). The exhibits that were not proffered were not received into the evidentiary record (marked "N") and, therefore, were not considered in this recommended order.