

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

In the Matter

- of -

the Application of Milton Welding, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 6486

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 23, 2023

This matter considers the written appeal by Milton Welding, Inc., (“MWI” 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 September 21, 2020, Ms. Veronica Banton, as President, applied on behalf of MWI for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 3, 2022, 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 of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (b) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
 - (c) 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, as required under 5 NYCRR §144.2(c)(2); and
 - (d) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under

5 NYCRR §144.2(c)(3).

3. MWI timely filed a notice of appeal on September 7, 2022 along with a statement (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to MWI on October 6, 2022 (DED Exhibit 3).
5. MWI submitted no further papers.
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated May 19, 2023, and a brief of Amy O'Connor, Esq., counsel for the Division, dated May 19, 2023.

FINDINGS OF FACT

7. MWI is engaged in the business of boiler maintenance and repair, demolition contracting, sprinkler systems supply, steel work and welding (DED Exhibit 1).
8. The business was established in 1984 by Milton Banton, who owned 51% of the business. In 2013, he transferred his 51% interest to Veronica Banton (DED Exhibit 1).
9. Veronica Banton is the President and 51% owner of MWI. Joseph Forde is the Vice President and 49% owner of MWI (DED Exhibit 1).
10. In 2020, Mr. Forde received \$ [REDACTED] from MWI, while Ms. Banton received \$ [REDACTED] from MWI. In 2019, Ms. Banton was uncompensated, while Mr. Forde received \$ [REDACTED]. (DED Exhibit 8).
11. Mr. Forde's resume reflects an apprenticeship as a pipefitter and welder, education and training in air conditioning and refrigeration, and steamfitting. From 1999 to present, he has "managed all company jobs – steamfitting" for MWI (DED Exhibit 4).
12. Ms. Banton's resume reflects that she has been a solo practitioner in her law practice. She was the Secretary/Treasurer of MWI from 1984 to 2013. From 2013 to present, she has

been the President of MWI and “oversees the general running of the business” (DED Exhibit 4).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(c) states as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. 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.
- (3) Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 MWI for certification 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. Ownership

5 NYCRR §144.2(b)(3) 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.

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 Oder 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 Oder 17-21, dated March 27, 2017.

The tax documents submitted with the application show that in 2020, Ms. Banton received \$ [REDACTED] from her employment at MWI, while Mr. Forde received \$ [REDACTED]. In 2019, Ms. Banton was uncompensated, while Mr. Forde received \$ [REDACTED] (DED Exhibit 8). This is a disproportionate

allocation and supports the conclusion that Ms. Banton did not share in the profits of MWI in proportion to her equity interest as required by 5 NYCRR §144.2(b)(3).

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Banton does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the industry (DED Exhibits 1 and 4). The core functions of the business are the installation and repair of boilers, sprinkler systems, welding, and demolition contracting (DED Exhibit 1). Ms. Banton does not have training or experience in those areas. As President, she oversees the general running of MWI and her job includes “all of the administrative functions of the corporation” (DED Exhibits 4 and 5). She does not have the training or experience in the industry necessary to supervise the work of the employees.

Joseph Forde has apprenticeship experience and training in pipefitting and welding. He has “managed all company jobs – steamfitting”. He worked steamfitting jobs with three different businesses prior to working at MWI (DED Exhibit 4). His job includes all the field work, working with the consultant to secure contracts, and supervising the employees (DED Exhibit 7). He solely handles all the estimating, bid preparation, marketing/sales, supervising field operations, and

purchasing equipment. Mr. Forde has the training and experience relevant to providing steamfitting and welding services and estimating and supervising the employees (DED Exhibit 1).

5 NYCRR §144.2(c)(2) states that “... 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 for which certification is sought. 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”.

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”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

MWI’s critical functions are to estimate and bid jobs to generate revenue. Mr. Forde solely makes decisions with regard to estimating, bid preparation and supervising field operations (DED Exhibits 4 and 7).

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR §144.2(c)(3). Ms. LoRusso has separate, full-time employment as a solo practitioner in her law practice and oversees the general running of MWI (DED Exhibit 4). She currently spends at least 40 hours per week in her law practice and 20 – 25 hours per week at MWI (DED Exhibits 5 and 6). She is not onsite daily at MWI. Mr. Forde is “integral to the process” and “physically interacts with the people that we deal with on a daily basis” (APP Exhibit 1). Ms. Banton failed to submit any documentation to show her devoting time to the continued operations of the business. The denial on the ground of time devoted to the business was based on substantial evidence.

CONCLUSION

MWI did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(3), 144.2(c)(1), 144.2(c)(2) and 144.2(c)(3) 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 MWI's application for certification as a woman-owned business enterprise.

In the Matter of Milton Welding, Inc.
DED File ID No. 6486
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Resumes	Y	Y
DED 5	Narrative of Veronica Banton Re: Milton Welding, Inc.	Y	Y
DED 6	Narrative of Veronica Banton Re: Veronica Banton, P.C.	Y	Y
DED 7	Narrative of Joseph Forde	Y	Y
DED 8	2019/2020 Tax Returns of Milton Welding, Inc.	Y	Y
APP 1	Notice of Appeal	Y	Y