

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

In the Matter


- of -

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

NYS DED File ID No. 57366

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 26, 2023

This matter considers the written appeal by Morgan Specialized Contracting, Inc. (“MSC” 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 May 8, 2017, Ms. Marilyn Morgan, as President, applied on behalf of MSC for recertification as a WBE (DED Exhibit 1).
2. On April 21, 2020, 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) Minority group members or women have not demonstrated adequate managerial experience or technical competence, nor 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).
3. MSC timely filed a notice of appeal on May 11, 2020 (APP Exhibit 1).

4. A Notice of Written Appeal was sent to MSC on June 26, 2020 (DED Exhibit2).
5. MSC submitted its written appeal by letter dated August 14, 2020 (APP Exhibit 2).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated July 24, 2023, and a brief of Anequa Pond, Esq., counsel for the Division, dated July 26, 2023.

FINDINGS OF FACT

7. MSC provides construction site preparation services, based in Central Square, New York (DED Exhibit 1).
8. Ms. Marilyn Morgan is the President and has a 100% ownership interest. (DED Exhibit 1).
9. In 2019, Ms. Morgan received \$ [REDACTED] in wages, while Mr. Dakota Morgan received \$ [REDACTED] in wages, Mr. Dylan Morgan received \$ [REDACTED] and Mr. Phillip Bartlett received \$ [REDACTED] in wages. (DED Exhibit 4).
10. Ms. Morgan's duties include financial decisions, insurance and bonding, hiring and firing, managing and signing payroll, and purchasing equipment (DED Exhibit 5). Her resume indicates that she is responsible for human resource functions and financial functions (DED Exhibit 6).
11. Mr. Dakota Morgan operates heavy equipment, repairs and maintains heavy equipment and utilizes construction software. He holds a CDL Class A license and has the OSHA 40 Hazardous Waste Operations and Emergency Response training (DED Exhibit 7).
12. Mr. Dylan Morgan operates heavy equipment, performs excavation and construction site preparation. He holds a CDL Class A license and completed the OSHA 40 Hazardous Waste Operations and Emergency Response training and the Erosion and Sediment Control Training (DED Exhibit 8).

13. Mr. Phillip Bartlett has previous experience as a Foreman and Equipment Operator and is skilled in operating and maintaining heavy equipment, welding, and using GPS rover survey equipment. He attended B. Ramer Technical Career Center and has training in Heavy Equipment Operation and Repair and Outdoor Power Equipment and Technology (DED Exhibit 9).

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.

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 MSC 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 MSC 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 MSC 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, MSC had the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR §144.2 when it submitted the May 8, 2017, 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.

Ms. Morgan received substantially less compensation from MSC during its 2019 tax year than Mr. Dakota Morgan, Mr. Dylan Morgan and Mr. Phillip Bartlett. She received \$ [REDACTED] in wages, while Mr. Dakota Morgan received \$ [REDACTED] in wages, Mr. Dylan Morgan received \$ [REDACTED] in wages, and Mr. Phillip Bartlett received \$ [REDACTED] in wages (DED Exhibit 4).

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

III. Operation

The Division determined that Ms. Morgan does not make decisions pertaining to the operation of MSC as required under 5 NYCRR former §144.2(b)(1) and has not demonstrated

adequate managerial experience or technical competence, nor the working knowledge and ability needed to operate the business, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii).

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).

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).

The core revenue generating functions of MSC involve operating heavy machinery, excavation, and other site preparation services (DED Exhibit 1). Ms. Morgan is responsible for financial decisions, insurance and bonding, hiring and firing, managing and signing payroll, and purchasing equipment. She is responsible for human resource functions and financial functions (DED Exhibits 5 and 6). These responsibilities are not the core revenue generating functions

essential for the operation of the business. Her resume does not list any experience operating heavy machinery, excavation, or site preparation work (DED Exhibit 6).

Mr. Dakota Morgan operates heavy equipment, repairs and maintains heavy equipment and utilizes construction software programs. He holds a CDL Class A license and has the OSHA 40 Hazardous Waste Operations and Emergency Response training (DED Exhibit 7). Mr. Dylan Morgan also operates heavy equipment and performs excavation and construction site preparation. He holds a CDL Class A license and completed the OSHA 40 Hazardous Waste and Emergency Response training and the Erosion and Sediment Control training (DED Exhibit 8). Mr. Phillip Bartlett has previous experience as a Foreman and Equipment Operator and is skilled in operating and maintaining heavy equipment, welding, and using GPS rover survey equipment. He attended B. Ramer Technical Career Center and has training in Heavy Equipment Operation and Repair and Outdoor Power Equipment and Technology (DED Exhibit 9). Mr. Dakota Morgan, Mr. Dylan Morgan and Mr. Phillip Bartlett are responsible for the core revenue generating functions of the business, the work done on the projects and supervision of employees engaging in the core revenue generating functions.

The Division's finding that Ms. Morgan does not make decisions pertaining to the operation of the business and does not have adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1), 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

CONCLUSION

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

RECOMMENDATION

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

In the Matter of Morgan Specialized Contracting, Inc.
 NYS DED File No. 57366
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Recertification	Y	Y
DED 2	Division's denial letter	Y	Y
DED 3	Notice to Proceed via written appeal	Y	Y
DED 4	2019 W-2s	Y	Y
DED 5	Managerial Operations Document	Y	Y
DED 6	Ms. Marilyn Morgan's Resume	Y	Y
DED 7	Mr. Dakota Morgan's Resume	Y	Y
DED 8	Mr. Dylan Morgan's Resume	Y	Y
DED 9	Mr. Phillip Bartlett's Resume	Y	Y
APP 1	Applicant's Notice of Appeal	Y	Y
APP 2	Applicant's Appeal letter	Y	Y