

NEW YORK STATE
DIVISION OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

- of -

the Application of Annandale Construction Corporation
for Re-certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52889

RECOMMENDED ORDER

- by -



Daniel P. O'Connell
Administrative Law Judge

July 20, 2021

SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny Annandale Construction Corporation (Annandale Construction or applicant) re-certification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

This matter considers the appeal by Annandale Construction, 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 that the business enterprise does not meet the eligibility criteria for re-certification as a WBE.

Amy Schmidt, as president, applied on behalf of Annandale Construction for re-certification as a WBE on July 13, 2015 (*see* WBE Exhibit 1). In a letter dated October 1, 2018, the Division denied Annandale Construction's application (*see* WBE Exhibit 11) and set forth two grounds for the denial.¹

By letter dated October 19, 2018 (*see* WBE Exhibit 12), Ms. Schmidt responded, on behalf of Annandale Construction, to the Division's October 1, 2018, denial letter, and requested a hearing. The Division issued a notice of appeal hearing dated February 17, 2021, which advised applicant that an administrative appeal hearing would be held virtually on March 23, 2021, using the Webex videoconference platform. A pre-hearing conference was held on March 17, 2021. At applicant's request,² and with the consent of Division staff, the March 23, 2021, appeal hearing was adjourned to April 8, 2021.

The hearing convened as scheduled at 10:00 a.m. on April 8, 2021, via the Webex videoconference platform. Elizabeth L. Callahan, Esq. (Couch White, LLP [Albany, New York]), appeared at the hearing on behalf of Annandale Construction, and Ms. Schmidt testified. Bella Satra, Esq., Senior Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Natia Simon, Senior Certification Analyst, testified for Division staff. During the hearing, the parties offered 33 exhibits, and those that were received into evidence are noted on the attached exhibit chart (Recording IV at 18:28-19:32).

¹ The Division's October 1, 2018 denial determination and applicant's October 19, 2018 appeal 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.

² By letter dated March 15, 2021, applicant's counsel requested an adjournment due to the substitution of counsel at the firm.

At the conclusion of the hearing, the parties presented their respective closing statements orally. During the afternoon of April 8, 2021, I received notification that the recording of the video conference was available, whereupon the hearing record closed. The recording consists of four segments. The first recorded segment (No. I) is 18 minutes, and 05 seconds (18:05), the second (No. II) is 1:55:29, the third (No. III) is 1:11:28, and the fourth recorded segment (IV) is 21:01. The recording is cited by referring to the segment (Recording I, II, III, or IV), and the time at which the relevant testimony began.

ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* former 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews the business enterprise as it existed at the time the application was filed based on representations in the application, as well as information filed in supplemental submissions. (*See* former 5 NYCRR 144.4[e] and 144.5[a].)

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of the application filed by Annandale Construction for re-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 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

Division Staff

In the October 1, 2018 denial letter (WBE Exhibit 11), Division staff determined that the application failed to meet the WBE certification criteria related to Amy Schmidt's role in the company after determining that women do not make decisions pertaining to the operation of the business enterprise pursuant to former 5 NYCRR 144.2(b)(1). Division staff found that Ms. Schmidt performed administrative functions within the company rather than the core business functions of Annandale Construction. The core business functions include, among others, constructing and installing concrete curbs, sidewalks, slabs and structural concrete, and brick pavers.

Staff also determined that Ms. Schmidt, as the woman relied upon for re-certification, did not demonstrate the working knowledge and ability needed to operate the business enterprise

pursuant to former 5 NYCRR 144.2(b)(1)(ii). In contrast, her husband, Jeff Schmidt submitted proof that he is a certified concrete paver installer, and completed an Occupational Safety and Health Administration (OSHA) course on construction safety and health, among other things. (Recording I at 03:27-03:33, 09:34-11:37; *see* WBE Exhibit 11.)

Annandale Construction

On appeal, Ms. Schmidt notes that Annandale Construction first obtained WBE certification in 2009 after filing a fast-track application with the Division. Subsequently, the Division re-certified Annandale Construction in 2012. Ms. Schmidt notes further that Annandale Construction filed the WBE application for re-certification in 2015.

Ms. Schmidt argues that the burden upon an applicant for re-certification is different from one on a new application for WBE certification. Ms. Schmidt argues further that Annandale Construction's prior certification is relevant in terms of evaluating her experiences at managing and operating the business corporation because the format of the re-certification application does not seek such information. According to Ms. Schmidt, no changes occurred in key personnel, ownership, operations, and control of Annandale Construction since the prior certification.

Ms. Schmidt contends that the work undertaken by Annandale Construction does not require any mandatory licenses or certifications. Finally, Ms. Schmidt objects that Division staff did not conduct an interview as part of the review of Annandale Construction's re-certification application. (Recording II at 01:07:08-01:07:28; Recording IV at 10:38-18:18; *see also* WBE Exhibit 12.)

FINDINGS OF FACT

1. Amy and Jeff Schmidt are spouses, and established Annandale Construction in April 2003. The business enterprise has offices located at 38 Cornell Avenue, Red Hook (Dutchess County), New York 12571. (Recording II at 00:13-00:36; *see* WBE Exhibit 1 at § 1.)
2. Annandale Construction constructs and installs concrete curbs, sidewalks, flatwork, slabs and structural concrete, and brick pavers. In the application for WBE re-certification, Annandale Construction lists the following North American Industry Classification System (NAICS) numbers: 238 (specialty trade contractors), 23811 (poured concrete foundation and structure contractors), and 2381 (foundation, structure, and building exterior contractors). (Recording I at 13:23-14:10, Recording III at 06:34-07:33; *see* WBE Exhibit 1 at §§ 1 and 5.)
3. Since April 2003, Amy Schmidt has been the president of Annandale Construction, and owns 60% of the business enterprise. Jeff Schmidt has served as the secretary and treasurer since April 2002, and owns 40% of Annandale Construction. (Recording I at 13:17-13:23, Recording II at 00:37-00:50, 28:04-28:36, Recording III at 02:51-03:36; *see* WBE Exhibit 1 at §§ 1 and 3.)

4. After filing a fast-track application with the Division in 2009, Annandale Construction obtained certification as a woman-owned business enterprise. Subsequently, the Division recertified Annandale Construction as a WBE in 2012. (Recording II at 49:30-52:11.)
5. On July 13, 2015, Ms. Schmidt filed an application with the Division to re-certify Annandale Construction, as a woman-owned business enterprise (Recording II at 01:19:36-01:21:08, Recording III at 02:13-02:51; *see* WBE Exhibit 1 at 9 of 9).
6. By letter dated October 1, 2018, the Division denied Annandale Construction's application for re-certification as a woman-owned business enterprise (*see* WBE Exhibit 11).
7. In a letter dated October 19, 2018, Ms. Schmidt responded to the Division's October 1, 2018, denial letter, and requested a hearing on behalf of Annandale Construction (*see* WBE Exhibit 12).
8. Annandale Construction's core business functions are preparing bids, securing contracts, as well as constructing and installing concrete features (Recording III at 17:35-19:07, 50:46-51:17, 53:27-53:47).
9. Ms. Schmidt's daily duties and responsibilities are primarily administrative functions that include payroll operations, accounts payable and receivables, data entry and filing, as well as updating and maintaining office policies and procedures (Recording II at 08:01-08:59, 12:26-13:43, 17:23-24:33, 01:21:08-01:21:49, 01:22:58-01:27:46, Recording III at 19:57-20:08; *see also* WBE Exhibit 3).
10. In addition to the daily duties and responsibilities identified above, Amy Schmidt negotiates and signs contracts on behalf of Annandale Construction, and oversees the implementation of the terms and conditions that bind Annandale Construction (Recording II at 09:16-11:31, 14:24-17:23; 01:07:34-01:18:13, Recording III at 45:36-47:24; *see* WBE Exhibits 6, 7, 8, 9, and 10).
11. Jeff Schmidt's daily duties and responsibilities include preparing estimates and bids for jobs, scheduling meetings, conducting job site reviews, as well as maintaining field preparedness and equipment. Mr. Schmidt services as the field foreman, and supervises projects in the field. (Recording II at 28:38-33:55, Recording III at 10:18-11:59, 20:51-22:25; *see* WBE Exhibit 4.)
12. In response to staff's May 1, 2018, document request, Ms. Schmidt uploaded a file, on May 2, 2018, titled, "Certs.pdf," which is identified in the hearing record as WBE Exhibit 5. The documents in this file show, among other things, that Jeff Schmidt is a certified concrete paver installer, completed an OSHA course on construction safety and health, and has a certificate related to reducing silica exposure. (Recording II at 36:04-37:00, 38:33-40:31, 41:28-44:46, 01:29:53-01:34:59, Recording III at 22:25-25:27, 27:50-29:50; *see* WBE Exhibits 1 at 7-8 of 9, and 5.)

DISCUSSION

I. Prior Certifications and Notice

The Division acknowledges that Annandale Construction was previously certified as a woman-owned business enterprise. The Division argues, however, that it is not bound to recertify a previously certified business enterprise if the Division's prior determinations were made in error. The Division argues that based on the renewal application and supplemental materials, Division staff correctly determined that Annandale Construction was not eligible for re-certification as a WBE. (Recording III at 03:36-05:42, 35:27-36:13, Recording IV at 05:46-05:46.)

The Division is correct that it is not obligated to recertify Annandale Construction as a WBE based on prior determinations. It is well settled that the doctrine of equitable estoppel cannot be invoked against a governmental agency in the exercise of its governmental function (*see e.g. Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33 [1984]); *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Matter of Atlantic States Legal Found., Inc. v New York State Dept. of Env'tl. Conservation*, 119 AD3d 1172, 1173 [2014]).

On appeal, however, applicant raises a threshold question about the scope of the review for a renewal application. Applicant notes that the Division's October 1, 2018, denial letter does not identify any prior errors that the Division made when the Division initially decided to certify Annandale Construction as a woman-owned business enterprise in 2009, or explain why it was changing course with respect to the WBE application for re-certification (Recording II at 57:29-58:24, Recording III at 42:36-43:33, Recording IV at 13:23-13:44).

According to applicant, its prior certifications are relevant to evaluating the woman owner's compliance with the operations criteria at issue here. A basis for applicant's argument is the format of the WBE renewal application. Annandale Construction notes that the renewal application for WBE re-certification does not request information about the business enterprise's operational functions. Rather, Section 2 of the re-certification application inquires whether the currently certified business enterprise has had any material change to its key personnel, ownership, operations, or control. Applicant's response at § 2.B on the re-certification application is that no changes in operations have occurred at Annandale Construction since the last certification (*see* WBE Exhibit 1). At the hearing, Ms. Schmidt credibly testified that Annandale Construction has had no material changes in operations, and Division staff offered nothing to show otherwise. (Recording II at 55:48-57:28, Recording IV at 11:43-12:37; *see* WBE Exhibit 1 at § 2.)

Given the format of the renewal application for WBE re-certification, Annandale Construction asserts that it did not receive notice that Division staff would be reviewing the operations criteria as part of the re-certification process. Absent such notice, Annandale Construction argues that it did not have the opportunity to demonstrate its compliance with these

eligibility criteria, which are the exclusive bases for the Division's denial. (Recording IV at 12:55-13:06; *see* WBE Exhibit 11.)

To support this argument, applicant cites *Matter of Northern Scapes, Inc.* (Recommended Order dated May 18, 2018, at 8, Final Order 18-31 dated July 5, 2018; Recording IV at 13:59-14:19). In *Northern Scapes*, the ALJ concluded that Division staff inappropriately based the denial for WBE re-certification on the operations criteria, given the format of the renewal application, as described above.³ The Director agreed, and reversed the decision to deny re-certification to Northern Scapes, a landscaping business (*see Northern Scapes, Inc.*, Final Order 18-31 dated July 5, 2018).

Referring to *Matter of Beach Erectors, Inc.* (Recommended Order dated June 14, 2017, Final Order 17-38 dated June 20, 2017), Annandale Construction asserts that the experience of the woman owner in the industry is an important consideration in the re-certification process (Recording IV at 13:06-13:44, 16:54). As discussed above, the record establishes that Ms. Schmidt has operated Annandale Construction since April 2003, which shows that she has 12 years of work experience since filing the renewal application for re-certification in 2015.

However, applicant's reliance on *Northern Scapes*, and *Beach Erectors* is misplaced. Rather, the controlling cases are *Matter of JC Smith, Inc. (JC Smith)*, and *Matter of Upstate Electrical, LLC (Upstate Electrical)*. Unlike *Northern Scapes* and *Beach Erectors*, *JC Smith* and *Upstate Electrical* were subject to judicial review.⁴

Like Annandale Construction, both *JC Smith* and *Upstate Electrical* concerned WBE applications for re-certification of previously certified business enterprises. Despite the format differences between the Division's WBE application for business enterprises not previously certified, and the modified renewal application for re-certification, Division staff determined that the woman-owners of *JC Smith* and *Upstate Electric*, respectively, did not comply with the eligibility criterion at 5 NYCRR 144.2(b)(1), among other criteria. (*See JC Smith*, Recommended Order at 4; *Upstate Electrical*, Recommended Order at 1-2.) After the administrative appeal hearings, the Director accepted the ALJs' recommendations to affirm staff's respective determinations to deny re-certification of the business enterprises based, in part, on the woman-owner's failure to demonstrate compliance with the operations criterion at former 5 NYCRR 144.2(b)(1) (*see JC Smith*, Final Order 17-10 dated March 13, 2017, and *Upstate Electrical*, Final Order 18-38 dated August 30, 2018). Upon review, the court affirmed

³ In *Northern Scapes Inc.*, Division staff considered the certification criteria at former 5 NYCRR 144.2(b)(1), which is at issue here, and former 5 NYCRR 144.2(b)(1)(i), which concerns the woman-owner's managerial experience or technical competence. In the captioned matter, staff identified the subsequent criterion at former 5 NYCRR 144.2(b)(1)(ii) as the second basis for denial. This criterion considers the woman-owner's working knowledge and ability needed to operate the business enterprise.

⁴ *Matter of JC Smith Inc.*, Recommended Order dated March 9, 2017, at 8-12, Final Order 17-10 dated March 13, 2017, *affd Matter of J.C. Smith, Inc. v New York State Dept. of Economic Dev.*, 163 AD3d 1517 (4th Dept 2018), *lv denied* 32 NY3d 1191 (2019), and *Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, at 4, Final Order 18-38 dated August 30, 2018, *affd Matter of Upstate Elec., LLC v New York State Dept. of Economic Dev.*, 179 AD3d 1343 (3d Dept 2020).

the Director's determinations to deny re-certification (*see JC Smith*, 163 AD3d at 1517, and *Upstate Electrical*, 179 AD3d at 1346.)

Based on this case law, I find applicant's arguments about requirements: (1) to identify any prior errors that staff made when the Division initially decided to certify Annandale Construction as a woman-owned business enterprise in 2009, or (2) to explain why the Division changed course with respect to the WBE application for re-certification; and (3) to provide notice that Division staff would be reviewing the operations criteria as part of the re-certification process are without merit.

Therefore, I conclude that within the context of a renewal application for WBE re-certification, Division staff may properly consider the woman-owner's compliance with the operational criteria outlined at former 5 NYCRR 144.2(b)(1) including sub-provisions 144.2(b)(1)(i)-(iii). As a result, the eligibility criteria identified in the Division's October 1, 2018 denial letter, which are at issue in this proceeding, are addressed below.

II. Operations

Former 5 NYCRR 144.2(b)(1) requires 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." To evaluate compliance with this eligibility criterion, Division staff reviewed Section 5 of the application to identify the significant business operations. Significant business operations, or core functions, generate revenue for the business enterprise, and are unique to the industry compared to administrative functions, such as personnel and payroll management, and accounting, which are common to most businesses.

Section 5.A of Annandale Construction's renewal application states that it provides services related to constructing and installing concrete curbs, sidewalks, flatwork, slabs and structural concrete, and brick pavers. Section 5.B describes the enterprise's business operations, or core functions, as "construction related." With the application for WBE re-certification, Annandale lists the following North American Industry Classification System (NAICS) Numbers: 238 (specialty trade contractors), 23811 (poured concrete foundation and structure contractors), and 2381 (foundation, structure, and building exterior contractors). (Recording I at 13:23-14:10, Recording III at 06:34-07:33; *see* WBE Exhibit 1 at §§ 1 and 5.)

Based on the application materials, Division staff said that a business enterprise's core functions generate income, and include securing business as well as performing the actual work or providing specified services associated with the enterprise. With respect to Annandale Construction, the core business functions are preparing bids, securing contracts, as well as constructing and installing concrete features. (Recording III at 17:35-19:07, 50:46-51:17, 53:27-53:47.)

In response to staff's May 1, 2018 request for information, Ms. Schmidt provided a list of her daily duties and responsibilities at Annandale Construction (*see* WBE Exhibit 3), as well as a list of her husband's daily duties and responsibilities (*see* WBE Exhibit 4). Ms. Schmidt's daily duties and responsibilities are primarily administrative functions that include payroll operations,

accounts payable and receivables, data entry and filing, as well as updating and maintaining office policies and procedures (Recording II at 08:01-08:59, 12:26-13:43, 17:23-24:33, 01:21:08-01:21:49, 01:22:58-01:27:46, Recording III at 19:57-20:08; *see also* WBE Exhibit 3.)

In contrast, Jeff Schmidt's description of his duties and responsibilities show that he prepares estimates and bids for jobs, schedules meetings, conducts job site reviews, as well as maintains field preparedness and equipment. Mr. Schmidt also serves as the field foreman, and supervises projects in the field.⁵ (Recording II at 28:38-33:55, Recording III at 10:18-11:59, 20:08-20:23, 20:51-22:25, 01:21:49-01:22:22, 01:27:50-01:29:43; *see also* WBE Exhibit 4.)

At Annandale Construction, Ms. Schmidt has a significant role with respect to the preparation and implementation of contracts, which Division staff considers a core function because it secures work for the business enterprise (Recording III at 50:46-51:17). In response to staff's May 1, 2018 request for information, Ms. Schmidt provided signed and executed copies of the most recent contracts including the scope of services. These are identified in the hearing record as WBE Exhibits 6-10, inclusive. Amy Schmidt signed each document on behalf of Annandale Construction. During the hearing, Ms. Schmidt credibly testified that as president, she was the only person at Annandale Construction with the authority to negotiate and sign contracts. (Recording II at 09:16-11:31, 14:24-17:23; *see* WBE Exhibits 6-10.)⁶

Annandale Construction would not generate any revenue if Ms. Schmidt did not negotiate and sign contracts on its behalf. Nevertheless, Mr. Schmidt performs more of the core business functions at Annandale Construction.⁷ Based on the record developed during the administrative appeal hearing, Division staff's conclusions and factual determinations with respect to this eligibility criterion are reasonable and plausible. Accordingly, I conclude that Annandale Construction failed to rebut staff's conclusions with respect to the eligibility criterion outlined at former 5 NYCRR 144.2(b)(1). I recommend that the Director affirm staff's determination with respect to this eligibility criterion.

III. Working Knowledge

Staff also determined that Ms. Schmidt lacks the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii). To evaluate compliance with this eligibility criterion, staff considers whether the woman owner can perform the core functions of the business enterprise, which are identified above. Staff will review responses to information requests, as well as the owner's and employee's resumes.

⁵ For the first time at the hearing, Ms. Schmidt testified that she visits job sites usually twice a week (Recording II at 25:34-26:36, 01:49:17-01:49:28).

⁶ Some of the contracts, however, identify Jeff Schmidt, rather than Amy Schmidt, as the person to contact at Annandale with any questions or concerns about the bids and contracts (*see e.g.* Recording II at 01:36:17-01:39:17, 01:39:48-01:46:09; WBE Exhibits 7 [Exhibit B], 8, 9, and 10).

⁷ *See Matter of C.W. Brown, Inc.*, 216 A.D. 841, 842 (3d Dept 1995) (Operational control was lacking where persons who could not be relied upon for certification had "control of actual field operations with little involvement by" the woman owner relied upon, and where woman owner's "husband's responsibilities include bidding and supervising the outside contracts and coordinating the employees on a particular job").

With respect to this renewal application, staff requested, among other things, copies of all licenses, certificates and degrees showing specialized training, and permits applicable to the business enterprise for the woman-owner, any partners, other owners or employees, in a document request dated May 1, 2018. On May 2, 2018, Ms. Schmidt responded, and uploaded a file titled, "Certs.pdf," which is identified in the hearing record as WBE Exhibit 5. The documents in this file show, among other things, that Jeff Schmidt is a certified concrete paver installer, completed an OSHA course on construction safety and health, and has a certificate related to reducing silica exposure. (Recording II at 36:04-37:00, 38:33-40:31, 41:28-44:46, 01:29:53-01:34:59, Recording III at 22:25-25:27, 27:50-29:50; *see* WBE Exhibits 1 at 7-8 of 9, and 5.)

During her testimony, Ms. Schmidt acknowledged that she provided the documents identified in WBE Exhibit 5 in response to staff's May 1, 2018 information request. Ms. Schmidt also acknowledged that this documentation related to Mr. Schmidt's duties and responsibilities. However, Ms. Schmidt testified that licenses and certifications are not expressly required to operate a concrete installation business such as Annandale Construction. Like her husband, Ms. Schmidt also completed the OSHA course on construction safety and health. (Recording II at 01:43-03:06, 37:00-38:23, 44:53- 47:03.)

Until Ms. Schmidt's testimony at the hearing, Division staff did not know that the owners and employees of concrete installation businesses such as applicant's did not need any specialized licenses or certifications. As noted above, the scope of the review in this proceeding is limited to the application and supporting materials at the time Division staff issued the October 1, 2018 determination. Therefore, any new information offered subsequently cannot be considered (*see* former 5 NYCRR 144.4[e] and 144.5[a]). With a future application, however, Division staff would evaluate the merits of the information as it relates to applicant's compliance with this eligibility criterion.

Accordingly, I conclude that the application and supporting materials before the Division at the time it made the October 1, 2018, determination did not demonstrate that Amy Schmidt possesses the working knowledge and ability needed to operate the business enterprise, as required by former 5 NYCRR 144.2(b)(1)(ii). Accordingly, the Director should affirm the Division's denial with respect to this eligibility criterion.

CONCLUSIONS

1. With respect to the operational criterion at former 5 NYCRR 144.2(b)(1), Annandale Construction did not meet its burden to show that the Division's October 1, 2018, determination to deny the application for WBE re-certification is not based on substantial evidence.
2. With respect to the working knowledge criteria at former 5 NYCRR 144.2(b)(1)(ii), Annandale Construction did not meet its burden to show that the Division's October 1,

2018, determination to deny the application for WBE re-certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Annandale Construction's application for re-certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

Exhibit Chart
Matter of Annandale Construction Corporation
MWBE File No. 52889
Hearing Date: April 8, 2021

WBE Exhibit No.	Applicant Exhibit No.	DED Exhibit No	Description	Notes
1	1	2	Re-certification Application for Annandale Construction, Application No. 5360395, Submitted July 13, 2015.	Received
2	2		Certification Affidavit by Amy Schmidt, dated July 10, 2015.	Received
	3		Attachment A Individual Personal Net Worth Affidavit	ID Only
	4		2012 Annandale Tax Returns	ID Only
	5		2013 Annandale Tax Returns	ID Only
	6		2014 Annandale Tax Returns	ID Only
	7		2015 Annandale Tax Returns	ID Only
	8		2016 Annandale Tax Returns	ID Only
	9		2013 Personal Tax Returns	ID Only
	10		2014 Personal Tax Returns	ID Only
	11		2015 Personal Tax Returns	ID Only
	12		2016 Personal Tax Returns	ID Only
	13		2016 4 th Quarter Payroll Forms	ID Only
	14		2017 Payroll Forms	ID Only
3	15	3	Amy Schmidt Job Description	Received
4	16	5	Jeff Schmidt Job Description	Received

5	17	4 (Partial)	Certifications ⁸	Received
6	18		A. Colarusso & Son Contract (Hyde Park)	Received
7	19		Arnold Contract Project 45089-C (Parker Training Academy)	Received
8	20		Ben Ciccone Inc. Subcontract Agreement Project C-557-14 (Woodbury Common)	Received
9	21		Ben Ciccone Inc. Subcontract Project C-578-16 (Town of Greenburgh)	Received
10	22		Northbrook Contracting Corp. Subcontract Project 45156C (Northbrook Job #2018-01)	Received
4	23	4 (Partial)	NYS Department of State Incorporation Receipt	Received
	24		Annandale By-laws	ID Only
4	25	4 (Partial)	New York State Department of Labor Disadvantaged Business Enterprise (DBE) Approval Letter dated June 2, 2004	Received
11	26	1	Division's denial letter dated October 1, 2018	Received
12	27		Annandale's Notice of Appeal and Proof of Delivery dated October 19, 2019	Received
	28		MWBE Paper Application	Administrative Notice ⁹

⁸ DED Exhibit 4 consists of what are identified as Applicant's Exhibits 17, 23, and 25.

⁹ Recording II at 01:02:09.