

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

**In the Matter**

**- of -**

**the Application of Amcon Contracting Corp.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 54469**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**January 16, 2024**

This matter considers the written appeal by Amcon Contracting Corp. (“Amcon” 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 March 16, 2018, Ms. Martyna Tarnawa-Ahmed, as President, applied on behalf of Amcon for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On September 14, 2021, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
  - (b) 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);
  - (c) 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);

- (d) 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
  - (e) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).
3. Amcon timely filed a Request to Appeal on October 15, 2021 (APP Exhibit A, DED Exhibit 3).
  4. A notice to proceed via written appeal was sent to Amcon on October 3, 2022 (DED Exhibit 4).
  5. Amcon filed its written appeal by letter dated December 16, 2021, with attachments, from its attorney, Michael Fleishman, Esq. of Goetz Fitzpatrick (APP Exhibit B).
  6. The Division filed an Affidavit of Raymond Emmanuel, Certification Director, dated November 30, 2023, and a brief of Amy O'Connor Esq., counsel for the Division, dated November 30, 2023.

**FINDINGS OF FACT**

7. Amcon is engaged in the business of masonry, façade restoration, metal fence installation, and waterproofing (DED Exhibit 1).
8. Ms. Martyna Tarnawa-Ahmed is President and has a 51% ownership interest. Mr. Ashraf Ahmed is Vice President and has a 49% ownership interest (DED Exhibit 1).
9. A January 11, 2021, Narrative submitted by applicant stated that the initial capital contribution of \$ [REDACTED] came from a joint account owned by Ms. Tarnawa-Ahmed and Mr. Ahmed. A letter signed by Ms. Tarnawa-Ahmed dated February 9, 2015, stated that

this contribution was made from a “personal account” (DED Exhibit 5). No proof on the source of funds was provided. A supplemental narrative dated January 13, 2021, stated that in 2016, \$ [REDACTED] was deposited into the business by “the stockholders” and that \$ [REDACTED] of the \$ [REDACTED] was designated as an additional capital contribution, and \$ [REDACTED] was designated as a shareholder loan (DED Exhibit 6). The source of the \$ [REDACTED] deposit was a joint bank account held by Ms. Tarnawa-Ahmed and Mr. Ahmed (DED Exhibit 7).

10. Ms. Tarnawa-Ahmed’s responsibilities include all accounting work including payroll preparation, preparing bids and payment requisitions, estimates of job costs and profits, accounts receivable, distribution of work schedules, overseeing office personnel, and budgeting and cost control. Her background is as an “Office Controller” at a contracting company with similar administrative duties (DED Exhibit 8).

11. Mr. Ahmed has ten years of experience as a foreman in the construction industry. He has led project management of 5 to 10 projects a year; visualized, analyzed, and communicated each project’s scope of work; prepared all estimates on projects; inspected field conditions and identified problems; performed project setup; created subcontracting strategies; reviewed drawings; made contract changes; and maintained daily relations with owners, architects, engineers, and subcontractors (DED Exhibit 9).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing

documentary evidence of, for example and without limitation, one of more of the following:

1. Money;
2. Property;
3. Equipment; or
4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR §144.2(b)(3) states in relevant part 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 in relevant part 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.

5 NYCRR §144.2(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business

enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

### **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 Amcon 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 Amcon 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 Amcon 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, Amcon had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the March 16, 2018 application and supporting materials and cannot rely on the past determinations of the Division.

## II. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) 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 MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution." *Matter of Scherzi*

*Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

A January 11, 2021, Narrative submitted by applicant stated that the initial capital contribution of \$ [REDACTED] came from a joint account owned by Ms. Tarnawa-Ahmed and Mr. Ahmed. A letter signed by Ms. Tarnawa-Ahmed dated February 9, 2015, stated that this contribution was made from a “personal account” (DED Exhibit 5). No proof on the source of funds was provided. A supplemental narrative dated January 13, 2021, stated that in 2016, \$ [REDACTED] was deposited into the business by “the stockholders” and that \$ [REDACTED] of the \$ [REDACTED] was designated as an additional capital contribution, and \$ [REDACTED] was designated as a shareholder loan (DED Exhibit 6). The source of the \$ [REDACTED] deposit was a joint bank account held by Ms. Tarnawa-Ahmed and Mr. Ahmed (DED Exhibit 7).

Capital contributions from a jointly owned bank account does not meet the requirement that the contribution came from assets solely belonging to the woman-owner. *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

On appeal, applicant argues “the funds in the joint marital bank account were mostly Martyna’s funds, not Ashraf’s funds” since Ms. Tarnawa-Ahmed earned more than Mr. Ahmed, proving that the majority of the funds contributed were Ms. Tarnawa’s funds (APP Exhibit B). However, no proof was submitted showing the deposits into the joint account.

The Division’s determination to deny the application on the basis that Amcon failed to demonstrate that Ms. Tarnawa-Ahmed made capital contributions to Amcon in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.



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 may rely upon financial records as support for the determination that an applicant does not share in the risks and profits proportionally. *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (N.Y. Sup. Ct. 2017). The January 13, 2021, narrative stated that \$ [REDACTED] of the \$ [REDACTED] deposited into the business was in the form of a shareholder loan (DED Exhibit 6). The bank statements provided reflect that the entire \$ [REDACTED] came from a Chase Premier checking account in the names of Ms. Tarnawa-Ahmed and Mr. Ahmed (DED Exhibit 7). There is no evidence that the loan was made proportionate to their equity interest. Also, there is no evidence that the loan would be paid back from the business proportionate to Ms. Tarnawa-Ahmed's ownership interest. No promissory note or other documentation regarding the loan terms were provided.

On appeal, applicant argues "Martyna shares in the risks and profits of Amcon in proportion to her 51% equity interest... Martyna is a guarantor for certain corporate obligations with Signature Bank which is annexed hereto as Exhibit "F". In addition, Martyna received more than her proportionate 51% share of Amcon's profits on a yearly basis through her receipt of salaries and distributions." Applicant further argued "In addition, the bank statements showing a \$ [REDACTED] loan to Amcon from Martyna's joint personal bank account show her sharing in the risks – as more than 51% of the funds in such account were Martyna's funds." However, no proof was submitted showing Ms. Tarnawa as the guarantor of the Note and no proof was submitted showing any payments made on the Note. Also, as stated above, contributions from a jointly owned bank account does not meet the requirement that the funds come from assets solely belonging to her.

The fact that Ms. Tarnawa-Ahmed made more than her proportionate share of Amcon's profits does not negate the necessity to show that she proportionally shares in the risks.

The Division's determination to deny the application on the basis that Amcon failed to demonstrate that Ms. Tarnawa-Ahmed shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

### III. 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. Tarnawa-Ahmed 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 business' critical functions of performing masonry and façade restoration and waterproofing. Her responsibilities include accounting, payroll, accounts receivable, overseeing office personnel, and budgeting. Her work experience prior to establishing Amcon was as an Office Controller where she was responsible for similar administrative duties (DED Exhibits 1 and 8). Ms. Tarnawa-Ahmed's resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 8).

Mr. Ahmed has ten years of experience as a foreman in the construction industry. He has led project management of 5 to 10 projects a year; visualized, analyzed, and communicated each project's scope of work; prepared all estimates on projects; inspected field conditions and identified problems; performed project setup; created subcontracting strategies; reviewed drawings; made contract changes; and maintained daily relations with owners, architects, engineers, and subcontractors (DED Exhibit 9).

Ms. Tarnawa-Ahmed stated that Mr. Ahmed “knows everything on the job site”, “has a lot of experience, a lot of knowledge”, and he “reads the drawings to her” because she “never did this before” (DED Exhibit 10).

On appeal, applicant claims that Ms. Tarnawa-Ahmed is a “senior-level executive” at Amcon and therefore must possess adequate, industry-specific competence in the masonry and façade restoration contracting field (APP Exhibit B). However, her experience is in the administrative and financial aspects of the business, and she relies on Mr. Ahmed's expertise to understand job renderings and evaluate what needs to be done to complete a job (DED Exhibits 8 and 10).

Applicant also stated, “During the entirety of her time period at Amcon, Martyna advises she has been involved in preparation of bids and payment requisitions, job cost estimates, and other industry-specific items” (APP Exhibit B). This information was not provided in the application and is therefore new information which will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

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 (4<sup>th</sup> Dept. 2018).

Amcon estimates and bids jobs to generate revenue (DED Exhibit 1). Ms. Tarnawa-Ahmed does not have experience in the business’ critical functions (DED Exhibit 8). Mr. Ahmed handles the critical functions of the business and is primarily responsible for overseeing the day-to-day operations of the business. (DED Exhibit 9). Ms. Tarnawa-Ahmed manages the administrative and financial aspects of the business (DED Exhibit 8).

The Division’s determination to deny the application on the basis that Amcon failed to demonstrate that Ms. Tarnawa-Ahmed possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

#### IV. Control

The Division also denied certification on the ground that Ms. Tarnawa-Ahmed is not the highest-ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Ms. Tarnawa-Ahmed and Mr. Ahmed are the only two members of the Board of Directors of Amcon (DED Exhibit 11). Article III, Section 6 of the Bylaws states that a quorum is met by the presence of half of the Directors, and the act of a majority of the Directors at any meeting at

which a quorum is present shall be the act of the Board of Directors (DED Exhibit 12). Since there are only two Directors, either Ms. Tarnawa-Ahmed or Mr. Ahmed alone could act on behalf of the Board. Therefore, Ms. Tarnawa-Ahmed does not individually control the Board of Directors.

Applicant argues on appeal that “Martyna controls the Amcon Board of Directors by virtue of her position as President and her majority shareholdings in Amcon” and “through her role as Amcon’s President, she has general charge over all the business affairs” pursuant to Article III, Section 8 of the By-Laws.” Applicant also argues that since Ms. Tarnawa-Ahmed is the majority shareholder, only she can provide the necessary quorum for a shareholder’s meeting (APP Exhibit B). As stated above, pursuant to Article III, Section 2 of the By-Laws, Mr. Ahmed has the ability to act alone on behalf of the Board and therefore Ms. Tarnawa-Ahmed does not individually control the Board.

The Division’s determination to deny the application on the basis that Amcon failed to demonstrate that Ms. Tarnawa-Ahmed is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

### **CONCLUSION**

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

In the Matter of Amcon Contracting Corp.  
DED File ID No. 54469  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	January 11, 2021 Narrative	Y	Y
DED 6	January 13, 2021 Narrative	Y	Y
DED 7	Chase Bank Statements	Y	Y
DED 8	Resume of Martyna Tarnawa-Ahmed	Y	Y
DED 9	Resume of Ashraf Ahmed	Y	Y
DED 10	Audio Recording of 2/5/21 Phone Interview	Y	Y
DED 11	Amcon Contracting Corp. 4/9/15 Meeting Minutes	Y	Y
DED 12	Bylaws of Amcon Contracting Corp.	Y	Y