

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

In the Matter

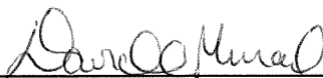
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the Application of American Auger & Ditching Co., Inc.
for Recertification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 271

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 10, 2024

This matter considers the written appeal by American Auger & Ditching Co., Inc. (“American Auger” 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 September 21, 2023, Ms. Judy Baye as President, applied on behalf of American Auger for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 20, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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); and
 - (b) 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).
3. American Auger timely filed a Request to Appeal on March 10, 2024 (DED Exhibit 3).
4. A notice to proceed via written appeal was sent to American Auger on March 11, 2024 (DED Exhibit 4).
5. American Auger filed its written appeal by letter dated March 27, 2024 (APP Exhibit A).

6. Subsequent to perfection of its appeal, applicant sent emails on October 31, 2024 and November 4, 2024 to this ALJ and counsel for the Division (Tribunal Exhibits 1 and 2).
7. The Division filed an Affidavit of Abdul Bah, Associate Certification Director, dated November 19, 2024, and a brief of Anequa Pond, Esq., counsel for the Division, dated November 20, 2024.

FINDINGS OF FACT

8. American Auger is engaged in the business of geothermal drilling and water well drilling and is a NYS Registered Driller (DED Exhibit 1).
9. Ms. Judy Baye is the President and has a 100% ownership interest (DED Exhibit 1).
10. Ms. Baye's resume reflects that she had ten years of experience in performing office and clerical duties before becoming the President and owner of American Auger. Her duties at American Auger are "Oversee and manage all Corporate duties...Execute Contracts, negotiate all purchases of equipment/vehicles, Employee hiring, handle all Tax, Insurance, Bonding, Invoicing, Bill Payments, Payroll, Credit Apps, Banking...etc." (DED Exhibit 5).
11. Mr. Rocky Baye has 46 years of drilling experience and Mr. Jeremy Baye has 25 years of drilling experience. Both are accredited by The International Ground Source Heat Pump Association (IGSHPA). (DED Exhibit 6).
12. The company's drilling work is completed by Jeremy Baye, Jesse Baye, John Pietruch, Antonio Liberature and Kyle Duggleby. (DED Exhibit 1).
13. A narrative provided with the Application states that Ms. Baye's day-to-day duties involve answering phones; responding to emails; processing payroll; banking, executing contracts

and backup documents, handling insurance renewals, project scheduling, purchasing equipment/vehicles/tooling/material and estimating projects out for bids. (DED Exhibit 1).

14. A contract provided with the Application showed the business was hired to “install a new geothermal well field with related piping to be connected to DPW building heating system infrastructure.” (DED Exhibit 7). Ms. Baye stated, “my contribution to completion of this work order included estimating and bidding, execution of the Contract with Bond and Insurance requirements, sending Submittals, Invoicing on AIA forms, completing and submitting Certified payroll, coordinating delivery of materials to the site and lodging for Employees, payment of bills, submission of close-out documents and Consent of Surety to Final Payment.” (DED Exhibit 8).

APPLICABLE LAW

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

Operation. 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) Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:
 - (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
 - (ii) The extent to which academic credentials exist for persons employed in the industry; and
 - (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

- (2) Operational decisions. 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.

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 American Auger 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 American Auger 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 American Auger 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, American Auger had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the September 21, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman/minority-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.

Certification is denied where the minority/woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or

controlling field operations. *Matter of Panko Electrical and Maintenance Corp. v. Zapata et al*, 172 AD 3d 1682 (3d Dept. 2019).

Ms. Baye's resume reflects that she had ten years of experience in performing office and clerical duties before becoming the President and owner of American Auger. Her duties at American Auger are "Oversee and manage all Corporate duties...Execute Contracts, negotiate all purchases of equipment/vehicles, Employee hiring, handle all Tax, Insurance, Bonding, Invoicing, Bill Payments, Payroll, Credit Apps, Banking...etc." (DED Exhibit 5).

Mr. Rocky Baye has 46 years of drilling experience and Mr. Jeremy Baye has 25 years of drilling experience. Both are accredited by The International Ground Source Heat Pump Association (IGSHPA). In addition, the applicant business is a NYS Registered Driller (DED Exhibit 6). The company's drilling work is completed by Jeremy Baye, Jesse Baye, John Pietruch, Antonio Liberature and Kyle Duggleby. (DED Exhibit 1).

A narrative provided with the Application states that Ms. Baye's day-to-day duties involve answering phones; responding to emails; processing payroll; banking, executing contracts and backup documents, handling insurance renewals, project scheduling, purchasing equipment/vehicles/tooling/material and estimating projects out for bids. (DED Exhibit 1)

A contract provided with the Application showed the business was hired to "install a new geothermal well field with related piping to be connected to DPW building heating system infrastructure." (DED Exhibit 7). Ms. Baye stated, "my contribution to completion of this work order included estimating and bidding, execution of the Contract with Bond and Insurance requirements, sending Submittals, Invoicing on AIA forms, completing and submitting Certified payroll, coordinating delivery of materials to the site and lodging for Employees, payment of bills, submission of close-out documents and Consent of Surety to Final Payment." (DED Exhibit 8).

Ms. Baye stated that she does not need the IGSHPA certification since it is only necessary for the “installer who is performing the field work.” She also stated that she has been “the sole Owner, functioning in complete administrative capacity for 39 years.” (APP Exhibit A). She does not go into the field; she handles the administrative aspects of the business.

There is no evidence in the record to show that Ms. Baye possesses adequate, industry-specific competence to make critical business decisions without relying on the company’s employees. She does not have any licensing, training, or job experience in geothermal drilling and water well drilling. She handles the administrative operations of the business (DED Exhibits 1, 5 and 6). A denial is supported where the minority/woman owner relied upon for certification has no training or experience and operations staff have more substantive and more significant experience. *Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3d Dept. 2020).

5 NYCRR §144.2(c)(2) states that “Minority group members and 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 minority/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).

Where the owner relied upon for certification has no training or experience in the critical functions of the business, and employees with more significant experience actively engage in the core functions of the business, denial based on lack of operational control is appropriate. *Matter of Panko Elec. and Maintenance Corp. v. Zapata*, 172 AD 3d 1682 (3d Dept. 2019).

Applicant argues on appeal that she previously worked as a Drill Helper. However, she did not include that in her application or her resume, and she did not provide any explanation regarding the tasks she performed. (APP Exhibit A, DED Exhibits 1 and 5) Therefore, there is insufficient evidence to establish that she gained competence in geothermal drilling and water well drilling. Day-to-day decisions must be operational decisions, not just administrative decisions. See *Matter of Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10, dated October 13, 2023. The critical functions of the business are geothermal drilling and water well drilling (DED Exhibits 1 and 2). Ms. Baye's resume does not reflect any experience in performing these functions (DED Exhibit 5). She does not go to the field or supervise field operations. The duties performed by employees Jeremy Baye, Jesse Baye, John Pietruch, Antonio Liberture and Kyle Duggleby, as referenced in the application, demonstrate that they perform the critical functions of the business. (DED Exhibit 1).

Subsequent to perfection of its appeal, applicant sent emails on October 31, 2024, and November 4, 2024 to this ALJ and counsel for the Division (Tribunal Exhibits 1 and 2). These emails contain new evidence which are not clarifying and therefore will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

The Division's determination to deny the application on the basis that American Auger failed to demonstrate that Judy Baye 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.

CONCLUSION

American Auger 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 at 5 NYCRR §§144.2(c)(1) and 144.2(c)(2), 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 American Auger's application for certification as a WBE.

In the Matter of American Auger & Ditching Co., Inc.
 DED File ID No. 271
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal	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	Judy Baye Resume	Y	Y
DED 6	Applicant's Qualifications and Experience Document	Y	Y
DED 7	Contract between Applicant and Johnson Controls	Y	Y
DED 8	Applicant's 2/12/24 email to the Division	Y	Y
Tribunal 1	Applicant's 10/31/24 email	Y	N
Tribunal 2	Applicant's 11/4/24 email	Y	N