

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12207**

**In the Matter**

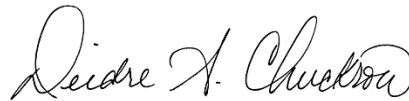
**- of -**

**the Application of Amscot Structural Products Corp.  
for Certification as a Woman-Owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 61389**

**RECOMMENDED ORDER**

**-by-**



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**Deidre A. Chuckrow**  
**Administrative Law Judge**  
**June 20, 2024**

This matter considers the written appeal by Amscot Structural Products Corp. (“ASP” 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 June 13, 2023, ASP applied for certification as a women-owned business enterprise (“WBE”).<sup>1</sup> ASP based its application on Ms. Tracy Somogyi. (DED Exhibit 1).
2. On January 10, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) The woman owner relied upon for certification does not 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) The woman owner relied upon for certification does not 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. ASP submitted a request to appeal the denial determination, dated January 17, 2024. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to ASP on January 31, 2024 (DED Exhibit 4).

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<sup>1</sup> ASP was previously certified by the Division. The prior certification expired on March 23, 2022, thus requiring a new application. (APP Exhibit A; DED Exhibit 1).

5. A written appeal letter was submitted on March 22, 2024, by Applicant. (APP Exhibit A).
6. The Division filed an Affidavit of Amanda Brennan, Vice President of Certification, dated May 29, 2024, and a brief of Dennie Byam, counsel for the Division, dated May 30, 2024.

### **FINDINGS OF FACT**

7. ASP is engaged in the manufacturing of structural bearings and custom fabricated metal components. (DED Exhibit 1).
8. Tracy Somogyi is the woman owner relied upon for certification. Ms. Somogyi is the CEO and 60% owner of ASP. Peter Somogyi, Ms. Somogyi's husband, is the President and 40% owner. (DED Exhibit 1).
9. The critical functions of ASP are the manufacturing of structural bearings and custom fabricated metal components, financial decisions, estimating, purchasing equipment/sales, supervising field operations, and negotiating contracts. (DED Exhibits 1 and 2).
10. Ms. Somogyi has 25 years of experience in financial and business management, and prior to taking ownership of the applicant business worked as an accountant for Clyne Eagen & Associates, the Morris Area Girl Scout Council, and as Vice President of National Westminster Bank. She has a Bachelor of Science Degree in Management Science, with minors in accounting and economics. She has taken courses and trainings in Engineering Mechanics, Mechanical Product Development, Metalizing, and Equipment Operator Training. She has been the CEO of the applicant business since 2008 where her responsibilities include overseeing "all aspects of the daily business activities" which include operational and strategic planning, customer relations, productivity improvement, human resources, and budgeting and forecasting. In addition, she reviews contracts for terms and conditions, to confirm pricing, delivery timetables, and payment terms, confirms the material and orders, after the shop

drawings are completed and approved, for the purpose of timing and cost accounting, and works with shipping to confirm delivery information after the project is complete. She controls accounts payable, coordinates payroll, and handles all aspects of HR. (DED Exhibits 1 and 5).

11. Mr. Somogyi has a Bachelor of Science Degree in Computer Integrated Design & Manufacturing (“C.I.D.M.”) and is a member of the Society of Manufacturing Engineers (“SME”). He has worked for ASP since 1998, where he is the President. His work for ASP includes the preparation of design documents for new and current products, including calculations, interacting with clients during the design, documentation, and fabrication process, assisting in “the set-up and running of all CNC machines for either first article, and or production runs as required,” coordinating and attending trade shows with sales staff, and the administration of the computer system for the office, including the installation and back-up of all programs and software. Mr. Somogyi has prior experience as a Quality Control Manager and CNC Programmer for the Sperro Corporation. (DED Exhibits 1 and 5).
12. James Bruno is the Foreman for ASP and has a certificate in CNC Machine Programming and has completed a robotics course for welding. He has worked in the industry for quite some time. He does some material purchases, works with quality control, and deals with staffing needs. He has taken courses in welding and AutoCAD. (DED Exhibits 1 and 7).
13. Robert Furchak works in Sales for ASP, and has a Bachelor of Science Degree in Civil Engineering. He has worked for ASP since 2002, and before that worked at the American Bearing Company from 1975 to 1995, in sales, engineering, and testing, and at Cal-Tran Associates from 1995 to 2002, as a Project Engineer. Mr. Furchak is a Senior Estimator and Sales Engineer for ASP and is involved in sales presentations and the expediting of open orders. (DED Exhibits 1 and 7).

14. Ed Greshko works as a Detailer and Draftsman for ASP. He has an Associates Degree in ACAD Tech, and has worked in the steel industry for 55 years. He has experience as a lead draftsman, worked as a drafting manager for American Detailing, and ran his own structural steel drafting services for 10 years. Mr. Greshko coordinates custom bearing devices with contractors and engineers, provides the shop with drawing for fabrication and production, and works with production to ensure products are fabricated to the standards of the customers. (DED Exhibits 1 and 7).

### **APPLICABLE LAW**

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

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.

5 NYCRR § 144.2 (c)(2) states as follows:

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 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.

### **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 ASP 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. Prior Certification**

The Division acknowledges that ASP 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 ASP 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, ASP had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the June 13, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

## II. Industry-Specific Competence

The Division denied ASP's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Somogyi possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021)), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this 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).

Among the factors considered by the regulation are:

- (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.

Ms. Somogyi does not possess adequate, industry specific competence to make critical business decisions without relying upon other persons as her skills are related specifically to finance and to general business and office management. (DED Exhibit 5). Ms. Somogyi has a Bachelor of Science degree in Management Science with a double major in accounting and economics. Her resume lists the following courses and trainings: an online, non-credit, course from Georgia Tech, entitled “Introduction to Engineering Mechanics; an online course entitled “the Manufacturing Guide for Mechanical Product Development”; and a one hour program entitled “Metalizing – From A To Zinc,” by the American Institute of Steel Construction (“AISC”). (DED Exhibit 5). No detailed information was provided regarding the content of these trainings. Ms. Somogyi’s resume states that she has “25 years of experience in financial and business management.” Her professional experience, prior to her work at Amscot, includes work as an accountant, and as Vice President for a bank where she was a portfolio manager. (DED Exhibit 5).



In contrast, Mr. Somogyi has been President of Amscot since 1998. He has a Bachelor of Science Degree in Computer Integrated Design and Manufacturing (C.I.D.M.) and is a member of SME. His professional experience is in CNC programming, including quality control. At ASP he prepares design documentation for new and current products, including calculations, and assists in the setup and running of the CNC machines for production runs. (DED Exhibit 5).

Mr. Furchak has a Bachelor of Science Degree in Civil Engineering. His professional experience includes twenty years at the American Bearing Company where he “learned the manufacturing process and then applied those operating skills necessary for drafting of the various products,” and was involved in sales, engineering, and testing. (DED Exhibit 7). Mr. Furchak also worked for seven years as a Project Engineer for Cal-Tran Associates prior to joining the applicant business. (DED Exhibit 7).

Mr. Greshko has worked in the steel industry for 55 years, and has an Associate Degree in ACAD Tech. His experience includes work as a Lead Draftsman and Drafting Manager, and he ran his own drafting service company for ten years, prior to joining ASP. (DED Exhibit 7).

Mr. Bruno has a certificate in CNC Machine Programming, has taken classes in welding and AutoCAD, and completed a robotics course in welding. (DED Exhibit 7). He has worked in the industry since graduating from high school, and states that he learned the molding and Teflon process that is still used today while working in the industry. (DED Exhibit 7).

While evidence was supplied regarding the industry-specific competence of the non-qualifying owner and other employees at ASP, there is no evidence that Ms. Somogyi, the woman owner relied upon for certification has sufficient trainings, certifications, academic credentials, or experience to make critical business decisions without relying upon these other persons. Here, on appeal, Ms. Somogyi states that she oversees “every aspect of [ASP’s] product process but

provides no details regarding her work in the process. (APP Exhibit A). She also states that she is involved in providing quotes to customers and getting quotes from vendors, reviews purchase orders, and does all the human resource work as well as financial. (APP Exhibit A). However, this information does not address her industry-specific competence, but highlights her general managerial and financial expertise.

Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

### III. Operation

The Division also denied ASP's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Somogyi makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders." 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the 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. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division determined that the critical functions of ASP, based on the application and what products and services the applicant business provides to clients, is the

manufacturing of structural bearings and custom fabricated metal components, including financial decisions, estimating, purchasing equipment/sales, supervising field operations, and negotiating contracts. (DED Exhibits 1 and 2). Ms. Somogyi's prior experience, as per her resume, is in finance and accounting, and her role at ASP is financial and administrative in nature, and not in the manufacturing process, nor in estimating and supervising field operations. (DED Exhibits 1, 5, and 6). While the application lists her as sharing responsibility for estimating, preparing bids, and supervising field operations, the other information included in the application does not support those assertions, as it attributes these functions specifically to Messrs. Somogyi, Bruno, Furchak, and Greshko. (DED Exhibits 1, 5, 6, and 7). Her duties are administrative and do not involve the critical functions of the applicant business.

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*). In the instant case, in relation to daily duties, Mr. Somogyi "reviews shop drawings and participates in ordering of material, programs all CNC machines, and schedules inspections," and is responsible for creating design documentation and engaging with clients throughout the entire process from design to fabrication. (DED Exhibits 1 and 5). Mr. Bruno, as the Foreman, "oversees and participates on the shop floor in the production of the structural bearings," as well as doing some material purchasing, working with quality control, and dealing with staffing needs. (DED Exhibits 1 and 7). Mr. Furchak a Senior Estimator for ASP prepares quotes, and follows up with customers on those quotes, is responsible for estimating, sales engineering, and sales presentations, and for expediting current open orders.

(DED Exhibits 1 and 7). Mr. Gresho, ASP's Detailer and Draftsman prepares detailed drawings and sends them to customers for approval, provides the shop with drawings for fabrication, and works with production to ensure appropriate standards are met. (DED Exhibits 1 and 7).

In contrast, Ms. Somogyi's responsibilities, as described in a narrative included in the application, states that she reviews contracts for terms and conditions, to confirm pricing, delivery timetables, and payment terms. (DED Exhibit 1). In addition, she confirms the material and orders, after the shop drawings are completed and approved, for the purpose of timing and cost accounting, and works with shipping to confirm delivery information after the project is complete. (DED Exhibit 1). In addition, she controls accounts payable, coordinates payroll, and handles all aspects of HR. (DED Exhibit 1).

Here, the evidence presented establishes that Ms. Somogyi's role at ASP is administrative and financial while others, namely Mr. Somogyi, the owner not relied on for certification, and employees Messrs. Bruno, Furchak, and Greshko, are responsible for the day-to-day operations of the business enterprise. Based on the foregoing, I find that the Division's determination that ASP has not demonstrated that the woman owner relied upon for certification makes 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) is supported by substantial evidence.

### **CONCLUSION**

ASP 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(c)(1), and 144.2(c)(2) was not based on substantial evidence.

## **RECOMMENDATION**

The Division's determination to deny Amscot Structural Products Corp.'s application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Amscot Structural Products Corp.  
 DED File ID No. 61389  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appellant's Appeal Request Form	Y	Y
DED 4	Notice to Proceed by Written Appeal Submission	Y	Y
DED 5	Resumes and Certifications	Y	Y
DED 6	Business Services Process Explanation Narrative	Y	Y
DED 7	Biographical Information Narrative	Y	Y
DED 8	Anselmi & DeCicco, Inc. Purchase Order	Y	Y
DED 9	Grace Industries Purchase Order	Y	Y
DED 10	Kinsley Steel Purchase Order	Y	Y
DED 11	Judlau Contracting Purchase Order	Y	Y