

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

**In the Matter**

**- of -**

**the Application of Barney & Dickenson Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 51823**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**July 1, 2024**

This matter considers the written appeal by Barney & Dickenson Inc (“B&D” 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 October 27, 2022, Ms. Mary Murphy Harrison, as President, applied on behalf of B&D for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 14, 2023, the Division denied the application on the following grounds (DED Exhibit 2, APP Exhibit A):
  - (a) 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);
  - (b) 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);
  - (c) 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
  - (d) The business enterprise must operate independently, as required under 5 NYCRR §144.2(e).

3. On September 12, 2023, B&D submitted a Request to Appeal via a Hearing. (DED Exhibit 3).
4. On March 29, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 4).
5. On June 20, 2024, a hearing was held and concluded.
6. At the hearing, the Division's attorney advised that the Division withdrew its denial under 5 NYCRR §144.2(c)(1) (Hearing Statement of Amy O'Connor, Esq.).

### **FINDINGS OF FACT**

7. B&D is in the business of supplying Ready Mix Concrete, Sand & Gravel, Concrete Pumping Service. Landscaping materials, and Bulk Salt to the Southern Tier of New York (DED Exhibit 1).
8. Ms. Mary Murphy Harrison is the President and has a 51% ownership interest. Mr. Robert Murphy is the Vice President and has a 49% ownership interest (DED Exhibit 1).
9. In 2021, Mary Murphy Harrison received compensation in the amount of \$ [REDACTED] from B&D, while Robert Murphy received \$ [REDACTED]. In 2020, Mary Murphy Harrison received compensation in the amount of \$ [REDACTED], while Robert Murphy received \$ [REDACTED] (DED Exhibits 9, 10).
10. Applicant provided a Utica General Truck Co. Cash Purchase Agreement and a Terex Advance Equipment Quote, which were both solely signed by Mary Murphy Harrison (DED Exhibits 12 and 13).
11. Mary Murphy Harrison has worked at B&D since 1980. She started as an accounting clerk in 1980, became Secretary/Treasurer in 1983, then Vice President in 2004 and President in 2016. She attended concrete school in Pennsylvania in 1983 and completed the Mining Safety Health Administration training in 2017. She has extensive knowledge of concrete

testing, proper mixtures, concrete delivery and application. She goes to the jobsites, negotiates and signs all lease and rental agreements, approves pricing structure for products and services, handles all interactions with financial institutions, attorneys, accountants, local, state and federal agencies, and obtains all permits needed from NYSDEC and NYSDOT (Hearing Testimony of Mary Murphy Harrison; DED Exhibit 14).

12. Robert Murphy has worked as a diesel mechanic and a sand and gravel plant manager at B&D. His duties include equipment and plant management and managing and hiring pit and mechanic personnel (DED Exhibit 15).
13. Mary Murphy Harrison is also an owner of Bob Murphy Inc., Murphy LLC, and Prentice Road Properties LLC. The application provided the same address for all the businesses (DED Exhibit 1). This address is the mailing address used for convenience purposes. B&D has a different location from the other businesses, does not share any properties, equipment, office/shop space or employees, and receives no tangible benefits from the other businesses. (Hearing Testimony of Mary Murphy Harrison).
14. There are no subcontracts between B&D and Bob Murphy Inc. (Hearing Testimony of Mary Murphy Harrison). A narrative provided with the application states “Bob Murphy Inc. (BMI) and Barney & Dickenson Inc. (BDI) each have their own Federal ID and therefore file taxes separately. BMI is a steel fabrication, steel sales, and insulated concrete form sales company. BDI sells ready mix concrete, sand & gravel, and landscaping materials. There are no shared properties, equipment, or office/shop space between the 2 companies... There are no subcontracts between the 2 companies.” (DED Exhibit 17).
15. Mary Murphy Harrison also works for Bob Murphy Inc. (“BMI”), Murphy LLC, and Prentice Road Properties LLC (“PLLC”). She devotes an average of 10 hours per week at

BMI, and one hour per week at each of Murphy LLC and PLLC (Hearing Testimony of Mary Murphy Harrison).

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(3) states in relevant part as follows:

Risks and profits. 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:

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) 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(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;

- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

### **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 B&D 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**

Mr. Brendan Wolf, Esq. of Couch White, LLP, appeared at the hearing on behalf of B&D. The following witness testified on behalf of B&D: Mary Murphy Harrison, President. B&D offered the following exhibits, which were admitted into evidence: APP Exhibits A – I.

Ms. Amy O'Connor, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Dr.

Kanasha Blue, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 17.

I. Prior Certification

B&D 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 B&D 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, B&D had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the October 27, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

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 routinely denies certification where the majority shareholder receives less compensation than other owners of the business, and other employees of the business. See, e.g., *Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10 dated October 13, 2023; *ERS Consultants, Inc.*, Recommended Order dated September 19, 2023, Final Order 23-09 dated October 13, 2023; *Keith Titus Corp.*, Recommended Order dated October 9, 2019, Final Order 19-29 dated January 16, 2020.

In determining total compensation, the Division considers financial records such as tax returns and salary/wage statements including W-2's. See, e.g., *C.W. Brown, Inc. v. Canton*, 216 A.D. 2d 841 (3d Dept. 1995); *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County 2017).

In 2021, Mary Murphy Harrison received compensation in the amount of \$ [REDACTED] from B&D, while Robert Murphy received \$ [REDACTED]. In 2020, Mary Murphy Harrison received compensation in the amount of \$ [REDACTED], while Robert Murphy received \$ [REDACTED] (Hearing Testimony of Dr. Kanasha Blue, DED Exhibits 9, 10). Ms. Murphy Harrison testified that she contributes more to her 401K than Robert Murphy does, therefore, her compensation is greater than that listed (Hearing Testimony of Mary Murphy Harrison). However, Dr. Kanasha Blue testified that the total compensation paid to Ms. Murphy Harrison and Mr. Murphy are listed in DED Exhibits 9 and 10, which reflect that Mary Murphy Harrison and Robert Murphy received the same compensation in 2021, and Mary Murphy Harrison received \$ [REDACTED] more than Robert Murphy in 2020 (Hearing Testimony of Dr. Kanasha Blue). Mary Murphy Harrison therefore did not share in the profits in proportion to her ownership interest.

Dr. Kanasha Blue further testified that Mary Murphy Harrison also takes on a greater proportion of the risk than her 51% ownership interest. She referenced a Utica General Truck Co.



Cash Purchase Agreement and a Terex Advance Equipment Quote, which were both solely signed by Mary Murphy Harrison. (DED Exhibits 12 and 13). She stated the Division's position is that since Mary Murphy Harrison takes on more than her share of the risk, B&D failed to demonstrate that Mary Murphy Harrison shares in the risk in proportion to her ownership interest and therefore failed to meet the requirement under 5 NYCRR §144.2(b)(3). (Hearing Testimony of Dr. Kanasha Blue). The fact that Mary Murphy Harrison takes on more than her share of the risk is not a determining factor under 5 NYCRR §144.2(b)(3). This section is meant to ensure that the woman relied upon for certification takes on at least her proportionate share of the risk of the business.

The Division's determination to deny the application on the basis that B&D failed to demonstrate that Mary Murphy Harrison shared in the 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)(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).

Mary Murphy Harrison testified that she has worked at B&D since 1980. She started as an accounting clerk in 1980, became Secretary/Treasurer in 1983, then Vice President in 2004 and

President in 2016. She attended concrete school in Pennsylvania in 1983 and completed the Mining Safety Health Administration training in 2017. Her testimony revealed her extensive knowledge of concrete testing, proper mixtures, concrete delivery, and application. She testified as to the trucks and equipment needed and how they are used on the jobs. She goes to the jobsites, negotiates, and signs all lease and rental agreements, approves pricing structure for products and services, handles all interactions with financial institutions, attorneys, accountants, local, state and federal agencies, and obtains all permits needed from NYSDEC and NYSDOT. She testified that her brother Robert Murphy checks with the mechanics, runs equipment and dump trucks around the pit and that Robert Murphy reports to her. She “makes all final decisions after input from everyone.” (Hearing Testimony of Mary Murphy Harrison; DED Exhibit 14).

Dr. Kanasha Blue testified that the core functions of the business are providing Ready Mix Concrete, Sand & Gravel, Concrete Pumping Service, Landscaping Materials, and Bulk Salt. She stated Mary Murphy Harrison has a background in accounting and worked as an accounting clerk, then as the Secretary/Treasurer with administrative duties prior to becoming President of B&D. She testified that Robert Murphy is a diesel mechanic, sand and gravel pit manager, responsible for managing/hiring pit personnel, maintenance, operation and repair of equipment, and a heavy equipment operator. She found that Mary Murphy Harrison handles the administrative side of B&D and Robert Murphy is responsible for the core functions of the business (Hearing Testimony of Dr. Kanasha Blue).

Based on Ms. Harrison’s testimony, I find that Mary Murphy Harrison has extensive knowledge and experience to be able to make operational decisions relating 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; and that Mary Murphy Harrison makes operational decisions

on a day-to-day basis with respect to the critical functions of the business (Hearing Testimony of Mary Murphy Harrison).

The Division's determination to deny the application on the basis that B&D failed to demonstrate that Mary Murphy Harrison makes 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 not supported by substantial evidence.

#### IV. Independence

The Division further found that B&D is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space... 5 NYCRR §144.2(e)(1), and “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

Dr. Kanasha Blue testified that Mary Murphy Harrison is also an owner of Bob Murphy Inc., Murphy LLC, and Prentice Road Properties LLC. She stated that the application provided the same address for all the businesses, and therefore they share office space. She stated they also share personnel – the co-owners of the businesses. She admitted the Division did not conduct a site visit to determine the actual physical addresses of the businesses. (Hearing Testimony of Dr. Kanasha Blue).

The Division cited the denial determination, which stated that the Shared Resources Grid indicates that the applicant business does share some clients with affiliate business Bob Murphy Inc.... Additionally, the narrative would indicate that they share ownership and Ms. Harrison shares her time and performs the same administrative duties she performs for the applicant firm for the

other firms as well.” No testimony was adduced at the hearing to indicate what, if any tangible benefit B&D would derive from these connections. (DED Exhibit 2, APP Exhibit A).

Mary Murphy Harrison testified that the address she used for all the businesses in the application is the mailing address used for convenience purposes. She stated that B&D has a different location from the other businesses, does not share any properties, equipment, office/shop space or employees, and receives no tangible benefits from the other businesses. There are no subcontracts between B&D and Bob Murphy Inc. (Hearing Testimony of Mary Murphy Harrison). A narrative provided with the application states “Bob Murphy Inc. (BMI) and Barney & Dickenson Inc. (BDI) each have their own Federal ID and therefore file taxes separately. BMI is a steel fabrication, steel sales, and insulated concrete form sales company. BDI sells ready mix concrete, sand & gravel, and landscaping materials. There are no shared properties, equipment, or office/shop space between the 2 companies... There are no subcontracts between the 2 companies.” (DED Exhibit 17).

The fact that Ms. Harrison shares her time and performs the same administrative duties at Bob Murphy Inc. that she performs for B&D is not proof that B&D is dependent upon Bob Murphy Inc. She testified that she devotes an average of 10 hours per week at Bob Murphy Inc. and approximately 40 hours per week at B&D (Hearing Testimony of Mary Murphy Harrison).

The Division’s determination to deny the application on the basis that B&D failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is not supported by substantial evidence.

## **CONCLUSION**

B&D met 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(c)(2) and 144.2(e), was not based on substantial evidence. B&D 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)(3) was not based on substantial evidence.

## **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny B&D's application for recertification as a woman-owned business enterprise, and as modified, affirm the determination.

In the Matter of Barney & Dickenson Inc.  
DED File ID No. 51823  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Denial Letter	Y	Y
APP B	Certification Application: Company Profile	Y	Y
APP C	Certification Application: Changes Since Last Certification	Y	Y
APP D	Certification Application: Owner(s) and Principal(s)	Y	Y
APP E	Certification Application: Relationship With Other Businesses	Y	Y
APP F	Certification Application: Commodities and Services	Y	Y
APP G	Certification Application: Firm's Past Work	Y	Y
APP H	Resumes and List of Duties	Y	Y
APP I	Reference Letters	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 of Hearing	Y	Y
DED 5	Narrative Answers May 2023	Y	Y
DED 6	2020 Form W-2	Y	Y
DED 7	2021 Form W-2	Y	Y
DED 8	2022 Form W-2	Y	Y

DED 9	2020 Barney & Dickenson Corporate Tax Return	Y	Y
DED 10	2021 Barney & Dickenson Corporate Tax Return	Y	Y
DED 11	2022 Barney & Dickenson Corporate Tax Return	Y	Y
DED 12	Utica General Truck Co. Cash Purchase Agreement	Y	Y
DED 13	Terex Advance Equipment Quote	Y	Y
DED 14	Resume of Mary Murphy Harrison	Y	Y
DED 15	Resume of Robert Murphy	Y	Y
DED 16	Operational Duties of Robert Murphy	Y	Y
DED 17	Shared Resources Grid	Y	Y