

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

In the Matter

- of -

the Application of C. R. Murphy Landscaping, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 72121

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 29, 2025

This matter considers the written appeal by C. R. Murphy Landscaping, Inc. (“CR Murphy” 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 March 25, 2024, Ms. Cindy Murphy as President, applied on behalf of CR Murphy for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 26, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification must have 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 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);

(d) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3); 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. CR Murphy filed a Request to Appeal on August 9, 2024 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to CR Murphy on August 28, 2024 (DED Exhibit 3).
5. CR Murphy filed its written appeal by letter dated September 10, 2024 (APP Exhibit B).
6. The Division filed an Affidavit of Abdul Bah, Associate Certification Director, dated January 3, 2025, and a brief of Lisa Berk Esq., counsel for the Division, dated January 3, 2025.

FINDINGS OF FACT

7. CR Murphy is engaged in the business of Landscaping Services (DED Exhibit 1).
8. Ms. Cindy Murphy is the President and has a 55% ownership interest. Brad Murphy is the Treasurer and has a 45% ownership interest. (DED Exhibit 1).
9. Applicant stated “I originally founded this landscaping company in 1992 as sole owner of Murphy Installations. A copy of the receipt for the original equipment purchase in the amount of \$█████ was included with the application and this was outlined in Section 2.E. This was the original and only capital contribution made to get the landscaping company up and going.” (APP Exhibit B).

10. Applicant discontinued Murphy Installations on April 5, 1994, and put the business “in husband’s name”, relinquishing her ownership interest in the business. Bradley Murphy became the sole owner on March 1, 1997 (DED Exhibits 1 and 5).
11. In 2014, “the Company was renamed C. R. Murphy Landscaping, Inc. and 55% of share ownership was transferred to Cindy in recognition of her dedication for years of service of direct involvement and management.” (DED Exhibit 4).
12. Section 2A of the application states that Cindy Murphy’s ownership began on 12/3/2014 and Bradley Murphy’s ownership began on 3/1/1997. Section 2E of the application states that Cindy Murphy contributed \$█ to the business for equipment on 5/5/1992, and Bradley Murphy contributed \$█ on 12/3/2014. Section 2F of the application states that Cindy Murphy and Bradley Murphy each contributed \$█ for their ownership shares on 12/3/2014. Cindy Murphy received her shares on 12/3/2014 by gift from Bradley Murphy (DED Exhibits 1, 4, and 6).
13. A Narrative submitted with the application states “While Cindy has not made direct financial contributions to C. R. Murphy Landscaping, Inc. since the original purchase, she has instead used her inheritance and personal income to support their personal lives that allowed the company to reinvest in itself and build up to where it is today with property, structures, and equipment. In addition, Cindy’s investment of time and expertise has not been compensated by a traditional salary by C. R. Murphy while simultaneously putting the company in a position of not needing to hire an additional manager.” (DED Exhibit 4).
14. The critical functions of CR Murphy’s business are soil preparation, planting and cultivating services, hydroseeding, drill seeding, erosion control, tree planting, and wetland plantings (DED Exhibit 1).

15. Cindy Murphy's resume states her duties as "Entrepreneur for a family-oriented landscaping and paving business, providing a wide range of business development, managerial oversight and supervising strategic functions. Handle all interviewing, hiring, and terminations. Manage budgets and accounts payable." She was a Manager for [REDACTED] [REDACTED] from 1996-2008 and a Practice Manager from 2012 – present. (DED Exhibit 7).
16. Bradley Murphy's resume states "Bradley is a 1978 graduate of State University of New York Morrisville with an A.A.S. in Agronomy. Upon graduation Bradley brought his skills back to the family dairy farm until its liquidation in 1984. (DED Exhibit 8).
17. A Narrative submitted with the application states "Monday through Friday 6-7:30 am I discuss with Bradley on what we will bid, determining which projects meet our scope and what issues need attention. Late morning or midafternoon Face Time calls with each other occur almost daily to discuss business. Monday through Friday I work 9:30-4p at my other job. I'm a manager in that position, which affords me the ability to manage my time and use breaks/lunch to communicate with Bradley on C.R. Murphy Landscaping Inc. business. After work at 4pm, I head straight to the shop, and stay as late as necessary for communication, planning, and bidding with Brad, Jason, and my office staff. On the weekends, Bradley and I visit sites to be bid, work on planning the upcoming week's work and prep equipment/materials for the crew. I also goes (sp) over bookkeeping and review accounts payable/receivables. I devote approximately 30 hours a week to running C.R. Murphy Landscaping, Inc." (DED Exhibit 1).
18. A Narrative submitted with the application states "Mr. Murphy's Day consists of working 9am-4pm Monday through Friday for C. R. Murphy Landscaping, Inc. During those hours,

he spends his time scanning construction reports, reviewing new jobs posted, matching jobs with the scope of company services. Mr. Murphy also oversees shop activities, does maintenance planning, and answers questions on mechanical work for company equipment. Procuring necessary materials for the jobs takes several hours a week. Either in the mornings or afternoons, he presents the prospective jobs for bid approval and discusses the daily business functions with Cindy. Jason Philbrick is a field superintendent for C. R. Murphy and his day-to-day responsibilities include overseeing individual task completion in the field for the team of laborers...” (DED Exhibit 1).

19. Cindy Murphy and Bradley Murphy comprise the Board of Directors at CR Murphy. (DED Exhibit 9). Article II, Section 3 of the Bylaws states “The Board of Directors shall have control and management of the affairs and business of the Corporation... In the transaction of business, the act of a majority present at a meeting ... shall be the act of the Board.” Article II, Section 9 states “At any meeting of the Board of Directors, the presence of a majority of the Board shall be necessary to constitute a quorum for the transaction of business... The vote of a majority of the Board of Directors present at the time of a vote shall be the act of the Board of Directors.” (DED Exhibit 10).

APPLICABLE LAW

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

Capital Contribution. 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(c) states 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.
- (3) Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 CR Murphy 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. 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 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).

Applicant stated “I originally founded this landscaping company in 1992 as sole owner of Murphy Installations. A copy of the receipt for the original equipment purchase in the amount of \$█████ was included with the application and this was outlined in Section 2.E. This was the original and only capital contribution made to get the landscaping company up and going.” (APP Exhibit B) Applicant discontinued Murphy Installations on April 5, 1994, and put the business “in husband’s name”, relinquishing her ownership interest in the business. Bradley Murphy became the sole owner on March 1, 1997 (DED Exhibits 1 and 5).

In 2014, “the Company was renamed C. R. Murphy Landscaping, Inc. and 55% of share ownership was transferred to Cindy in recognition of her dedication for years of service of direct involvement and management.” (DED Exhibit 4).

Section 2A of the application states that Cindy Murphy's ownership began on 12/3/2014 and Bradley Murphy's ownership began on 3/1/1997. Section 2E of the application states that Cindy Murphy contributed \$[REDACTED] to the business for equipment on 5/5/1992, and Bradley Murphy contributed \$[REDACTED] on 12/3/2014. Section 2F of the application states that Cindy Murphy and Bradley Murphy each contributed \$[REDACTED] for their ownership shares on 12/3/2014. Cindy Murphy received her shares on 12/3/2014 by gift from Bradley Murphy (DED Exhibits 1, 4, and 6).

A Narrative submitted with the application states "While Cindy has not made direct financial contributions to C. R. Murphy Landscaping, Inc. since the original purchase, she has instead used her inheritance and personal income to support their personal lives that allowed the company to reinvest in itself and build up to where it is today with property, structures, and equipment. In addition, Cindy's investment of time and expertise has not been compensated by a traditional salary by C. R. Murphy while simultaneously putting the company in a position of not needing to hire an additional manager." (DED Exhibit 4).

Applicant provided no proof of any capital contribution when she acquired her 55% ownership interest by gift on 12/3/2014. The Division requires an applicant to demonstrate that the woman-owner's contribution is proportionate to her ownership interest even where the business is inherited or gifted. *Matter of Coverco, Inc.*, Recommended Order dated January 23, 2017, Final Order 17-06 dated January 30, 2017. The application clearly shows that Ms. Murphy did not make any capital contribution for her ownership interest which she acquired on 12/3/2014. (DED Exhibits 1, 4 and 6).

The Division's determination to deny the application on the basis that CR Murphy failed to demonstrate that Ms. Murphy made capital contributions to CR Murphy in proportion to her

ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

II. 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.

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 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).

Cindy Murphy’s resume states her duties as “Entrepreneur for a family-oriented landscaping and paving business, providing a wide range of business development, managerial oversight and supervising strategic functions. Handle all interviewing, hiring, and terminations. Manage budgets and accounts payable.” She was a Manager for [REDACTED]

██████████ from 1996-2008 and a Practice Manager from 2012 to present. Her resume does not reflect any experience or training in soil preparation, landscaping, erosion control, soil preparation, seeding and tree planting. (DED Exhibit 7).

Bradley Murphy's resume states "Bradley is a 1978 graduate of State University of New York Morrisville with an A.A.S. in Agronomy. Upon graduation Bradley brought his skills back to the family dairy farm until its liquidation in 1984." (DED Exhibit 8).

A Narrative submitted with the application states "Mr. Murphy's Day consists of working 9am-4pm Monday through Friday for C. R. Murphy Landscaping, Inc. During those hours, he spends his time scanning construction reports, reviewing new jobs posted, matching jobs with the scope of company services. Mr. Murphy also oversees shop activities, does maintenance planning, and answers questions on mechanical work for company equipment. Procuring necessary materials for the jobs takes several hours a week. Either in the mornings or afternoons, he presents the prospective jobs for bid approval and discusses the daily business functions with Cindy. Jason Philbrick is a field superintendent for C. R. Murphy and his day-to-day responsibilities include overseeing individual task completion in the field for the team of laborers..." (DED Exhibit 1).

Ms. Murphy stated she was "working in construction with her father throughout high school" and has "years of exposure to equipment operation along with all other hard farming tasks. She "played a pivotal role in employee procurement and retention along with all aspects of keeping Murphy Installation running smoothly, including but not limited to, providing payroll information, negotiating contracts, and filling in for any gaps in employee coverage, such as driving trucks, seed procurement, logistics, hydroseeding, and raking," However, she does not specify what work she did with her father, and she does not identify what the "exposure" was and what her actual experience was on the farm. (DED Exhibit 4).

On appeal, Ms. Murphy states “Signed contracts indicate my knowledge of adequate industry-specific competence to make critical business decisions as quoting, bidding and project management cannot occur successfully without specific knowledge of the field operations. I have been actively involved in making business decisions for 2 decades be it whatever the nature of the business or scope entails from ordering appropriate materials, ie., seed fertilizer or plants, to installation, warranty and sign off.” (APP Exhibit B). However, neither the application nor her resume shows her role in project management, or her education, training, or experience to oversee the critical functions of the business (DED Exhibits 1 and 7).

Ms. Murphy does not have any industry-specific expertise; her skills are related to general business or office management. She does not possess any education, licensing, technical training, or job experience relevant to CR Murphy’s critical functions of soil preparation, planting and cultivating services, hydroseeding, drill seeding, erosion control, tree planting, and wetland plantings (DED Exhibits 1 and 7). Mr. Murphy’s education, training and direct work experience reflects that he has the competence to handle the critical functions of the business. Bradley Murphy oversees shop activities and Jason Philbrick, a field superintendent oversees the team of laborers in the field. (DED Exhibits 1 and 8).

The Division’s determination to deny the application on the basis that CR Murphy failed to demonstrate that Ms. Murphy 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.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5

NYCRR§144.2(c)(3). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-06, dated June 2, 2020.

The Division consistently denies certification where the woman-owner relied upon does not perform full-time duties for the business. See, e.g., *Matter of HVAC Systems Corp.*, Recommended Order dated August 9, 2023, Final Order 23-08 dated August 17, 2023.

A Narrative submitted with the application states “Monday through Friday 6-7:30 am I discuss with Bradley on what we will bid, determining which projects meet our scope and what issues need attention. Late morning or midafternoon Face Time calls with each other occur almost daily to discuss business. Monday through Friday I work 9:30-4p at my other job. I’m a manager in that position, which affords me the ability to manage my time and use breaks/lunch to communicate with Bradley on C.R. Murphy Landscaping Inc. business. After work at 4pm, I head straight to the shop, and stay as late as necessary for communication, planning, and bidding with Brad, Jason, and my office staff. On the weekends, Bradley and I visit sites to be bid, work on planning the upcoming week’s work and prep equipment/materials for the crew. I also goes (sp) over bookkeeping and review accounts payable/receivables. I devote approximately 30 hours a week to running C.R. Murphy Landscaping, Inc.” Ms. Murphy works full-time away from the business as a practice manager for a “busy medical practice”. While away from CR Murphy, the crew of laborers is in the field being supervised by Jason Philbrick. (DED Exhibits 1, 4 and 7).

On appeal, Ms. Murphy states “my hours in the medical field have been reduced to ensure more time with changing business models...My devotion of time has been non-traditional in the 9-5 sense, but over the years it is what I found works effectively for the company due to the fact the crew is out in the field between 9 and 5, so the daily hours that I am physically in their presence

is in line with their hours in the shop.” (APP Exhibit B). However, Ms. Murphy did not state how many hours were reduced in job as a Practice Manager nor how many hours were increased for CR Murphy. In addition, this is new information that was not before the Division at the time of the denial determination and cannot now be considered. (5 NYCRR 145.2(b)(1))

Accordingly, the Division’s finding that Ms. Murphy does not devote sufficient time to the daily operation of the business as required under 5 NYCRR §144.2(c)(3), is supported by substantial evidence.

III. Control

The Division also denied certification on the ground that Ms. Murphy does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Cindy Murphy and Bradley Murphy comprise the Board of Directors at CR Murphy. (DED Exhibit 9). Article II, Section 3 of the Bylaws states “The Board of Directors shall have control and management of the affairs and business of the Corporation... In the transaction of business, the act of a majority present at a meeting ... shall be the act of the Board.” Article II, Section 9 states “At any meeting of the Board of Directors, the presence of a majority of the Board shall be necessary to constitute a quorum for the transaction of business... The vote of a majority of the Board of Directors present at the time of a vote shall be the act of the Board of Directors.” (DED Exhibit 10). Since the Board cannot transact business without Mr. Murphy’s presence and assent, Ms. Murphy does not control the Board of Directors.

On appeal, Ms. Murphy states “As President of C. R. Murphy Landscaping, Inc., I am the highest ranking officer of the company. This is evidenced in the Bylaws Article II – Section 1 – Officers which states that “The President shall generally supervise and control the business affairs of the business.”” (APP Exhibit B). However, this conflicts with Article II, Section 3, which states

the Board of Directors shall have control and management of the affairs and business of the Corporation. Both Ms. Murphy and Mr. Murphy are needed to constitute a quorum and vote for the transaction of business. (DED Exhibit 10).

The Division's determination to deny the application on the basis that Ms. Murphy does not control the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

CONCLUSION

CR Murphy 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(b)(2), 144.2(c)(1), 144.2(c)(2), 144.2(c)(3) 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 CR Murphy's application for certification as a woman-owned business enterprise.

In the Matter of C.R. Murphy Landscaping, Inc.
DED File ID No. 72121
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	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Narrative on Ownership Change	Y	Y
DED 5	1994 Certificate of Discontinuance of Business	Y	Y
DED 6	Assignment of Stock, Gift Agreement and Stock Certificates	Y	Y
DED 7	Cindy Murphy's Resume	Y	Y
DED 8	Bradley Murphy's Resume	Y	Y
DED 9	Company Minutes	Y	Y
DED 10	Company By Laws	Y	Y
DED 11	Photographs	Y	Y
DED 12	Wind Farm Contract	Y	Y
DED 13	Baron Winds Contract	Y	Y