

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

In the Matter

- of -

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

NYS DED File ID No. 55413

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 3, 2024

This matter considers the written appeal by Caysea Contracting Corp., (“Caysea” 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 September 15, 2020, Ms. Amy Jerge, as President, applied on behalf of Caysea for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 21, 2023, 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) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Caysea timely filed a Request to Appeal on May 18 , 2023 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to Caysea on May 24, 2023 (DED Exhibit 3).
5. Caysea filed its written appeal by letter dated June 20, 2023, from its attorney, Carmen Vacco, Esq., of Lippes Mathias LLP, with attachments (APP Exhibit B).
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated September

21, 2023, and a brief of Marina O’Leary Esq., counsel for the Division, dated September 26, 2023.

FINDINGS OF FACT

7. Caysea is engaged in the business of asbestos, mold and lead abatement, and general contracting (DED Exhibit 1).
8. Ms. Amy Jerge is the President and has a 100% ownership interest (DED Exhibit 1).
9. Ms. Jerge’s resume states that she is President and Director of Operations, in charge of all daily activities and operations and manages multiple projects through the region, acts as the key administrator, directs all suppliers and vendors and is the safety director. Her prior work experience was as a Quality Control Specialist for PayChoice, Inc. where she dealt with data entry and customer service from 2008 to 2010 (DED Exhibit 4).
10. Joseph Matthews is the Project Manager. He has over two decades of experience in the construction industry. He worked for Aria Contracting, Inc. from 1996 to 2007 and held the positions of laborer, Supervisor and Site Superintendent. He worked for CJ Drew Contracting, Inc. from 2009 to 2011 as the Project Manager/Estimator. He began working at Caysea in April of 2011. He has an Asbestos Supervisor license from NYS Department of Labor and is the duly authorized representative listed on the Asbestos Handling License for Scott Landscaping (DED Exhibits 5 and 6).
11. Jason Telecky is a project manager/estimator. He has over a decade of experience in the construction industry. He worked for CJ Drew Contracting, Inc. from 2009 to 2011 and began working at Caysea in April of 2011. He has an Asbestos Supervisor license from NYS Department of Labor and an Asbestos Project Monitor license, Asbestos Inspector license and Asbestos Air Monitoring Technician from the NYS Department of Labor (DED

Exhibit 8).

12. Christopher Jerge is part owner of U.S. Innovative, LLC (DED Exhibit 1). Caysea and U.S. Innovative, LLC share eight employees, including Jason Telecky and Joseph Matthews (DED Exhibit 9).
13. A subcontracting agreement between Caysea and U.S. Innovative, LLC was submitted with the application. Caysea hired U.S. Innovative Construction, LLC to aid in the replacement of windows on a Department of Veteran Affairs contract. This agreement reflects that U.S. Innovative Construction, LLC also employs Joseph Matthews and Jason Telecky (DED Exhibit 11).

APPLICABLE LAW

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

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...

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 Caysea 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. 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.

Caysea is engaged in the business of asbestos, mold and lead abatement, and general contracting (DED Exhibit 1). The critical function of the business requires experience and expertise in asbestos, mold, and lead removal to perform the work contracted by the business.

Ms. Jerge's resume states that she is President and Director of Operations, in charge of all daily activities and operations and manages multiple projects through the region, acts as the key administrator, directs all suppliers and vendors and is the safety director. Her prior work experience was as a Quality Control Specialist for PayChoice, Inc. where she dealt with data entry and customer service from 2008 to 2010 (DED Exhibit 4).

Joseph Matthews is the Project Manager. He has over two decades of experience in the construction industry. He worked for Aria Contracting, Inc. from 1996 to 2007 and held the positions of laborer, Supervisor and Site Superintendent. He worked for CJ Drew Contracting, Inc. from 2009 to 2011 as the Project Manager/Estimator. He began working at Caysea in April of 2011. He has an Asbestos Supervisor license from NYS Department of Labor and is the duly authorized representative listed on the Asbestos Handling License for Scott Landscaping (DED Exhibits 5 and 6).

Jason Telecky is a project manager/estimator. He has over a decade of experience in the construction industry. He worked for CJ Drew Contracting, Inc. from 2009 to 2011 and began working at Caysea in April of 2011. He has an Asbestos Supervisor license from NYS Department of Labor and an Asbestos Project Monitor license, Asbestos Inspector license and Asbestos Air Monitoring Technician from the NYS Department of Labor (DED Exhibit 8).

Ms. Jerges' resume makes no mention of any experience or industry specific certifications relating to asbestos, mold, and lead removal. Her resume reflects her skills related to quality control and payroll administration. She handled data entry and customer service from 2008 to 2010. Her duties included processing payroll and human services. It does not reflect any training, experience or certification in asbestos, mold, and lead removal (DED Exhibit 4). Mr. Matthews and Mr. Telecky have the training, experience and certification to supervise the work of the employees (DED Exhibits 5, 6 and 8).

On appeal, Ms. Jerge submitted an Asbestos Handling License issued to her on June 9, 2023, which was two months after the denial. She also submitted an "Asbestos Supervisor Initial Course" which was issued on October 14, 2011, and a "Mold Remediator Company License" which was issued on June 21, 2021, neither of which were provided with the application. She also submitted an updated resume reflecting these licenses (APP Exhibit B). None of this information was before the Division at the time of the application and is therefore new information and will not be considered on appeal. See *Scherzi Systems, LLC v. White*, 197 A.3d 1466 (3d Dept 2021).

The Division's determination to deny the application on the basis that Caysea failed to demonstrate that Ms. Jerge possesses adequate industry-specific competence to make critical business decisions without relying upon others, as required under 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

II. Independence

The Division further found that Caysea 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, equipment, office space, warehouse and other storage space, and yard space." 5 NYCRR §144.2(e)(1).

A business which shares office space, rents garage space and acts as a subcontractor, as well as sharing employees is not considered to operate independently. See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, Final Order dated April 21, 2020 (holding that where the same family owns two businesses, operates out of the same premises, and where one business leases space to the other, and where the applicant business is dependent on the other business for capitalization, office, and basic functions, the business is not independent as required by the regulations). See also, *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002) (holding the applicant business was so entangled with another business by sharing personnel, office, etc. that it clearly was not independent).

Caysea and U.S. Innovative Construction, LLC share eight employees, including Joseph Matthews and Jason Telecky. Applicant stated that Caysea “does not have a noncompete agreement with their employees and they are free to seek work with other businesses in the same industry when work is slow or if there are layoffs.” (DED Exhibits 7 and 9).

Applicant submitted a subcontracting agreement between Caysea and U.S. Innovative Construction, LLC for window replacement on a Department of Veteran Affairs contract. Christopher Jerge is part owner of U.S. Innovative Construction, LLC, which also employs Joseph Matthews and Jason Telecky (DED Exhibits 1 and 7).

Applicant argued on appeal that it independently performed asbestos removal and lead abatement contracts (APP Exhibit B). However, these jobs were performed with the assistance of Joseph Matthews and Jason Telecky, who were the only individuals licensed for those services at that time (DED Exhibit 1). Sharing of employees and subcontracting with U.S. Innovative Construction, LLC, a company part owned by Mr. Jerge, is not considered to be operating independently, as stated above.

The Division's determination to deny the application on the basis that Caysea failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

Caysea 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(e) 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 Caysea's application for certification as a woman-owned business enterprise.

In the Matter of Caysea Contracting Corp.
DED File ID No. 55413
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	Amy Jerge Resume	Y	Y
DED 5	Joseph Matthews Resume	Y	Y
DED 6	Jason Telecky Resume	Y	Y
DED 7	US Innovative Construction, LLC W2 Forms	Y	Y
DED 8	List of Caysea Employees	Y	Y
DED 9	Narrative Explaining Shared Employees	Y	Y
DED 10	Subcontractor agreement between US Innovative Construction and Caysea	Y	Y
DED 11	Asbestos License issued to Joseph Matthews	Y	Y
DED 12	Caysea W2 employee forms	Y	Y