

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

In the Matter

- of -

the Application of Corewood Ventures, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50693

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 6, 2024

This matter considers the written appeal by Corewood Ventures, Inc. (“Corewood” 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 November 2, 2022, Ms. Nancy Sherwood, as President, applied on behalf of Corewood for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 31, 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) 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. Corewood timely filed a Request to Appeal on August 30, 2023 (APP Exhibit A, DED Exhibit 3).
4. A notice to proceed via written appeal was sent to Corewood on August 31, 2023 (DED Exhibit 4).
5. Corewood filed its written appeal by undated letter with attachments (APP Exhibit B).

6. The Division filed an Affidavit of Abdul Karim Bah, Associate Director, dated January 17, 2024, and a brief of Michael Paff Esq., counsel for the Division, dated January 22, 2024.
7. Applicant's attorney, Robert J. Hilpert, Esq. submitted by email an "informal letter" dated February 21, 2024 (Tribunal Exhibit 1). Michael Paff, Esq. submitted a response on behalf of the Division by email dated February 22, 2024 (Tribunal Exhibit 2).

FINDINGS OF FACT

8. Corewood is engaged in the business of excavation, underground utility installation, grading, paving, and environmental cleanup projects (DED Exhibit 1).
9. Ms. Nancy Sherwood is President and has a 100% ownership interest. (DED Exhibit 1).
10. Ms. Nancy Sherwood's resume states that she is responsible for day-to-day operations, works with project managers to lead, guide and direct, and makes financial decisions (DED Exhibit 6).
11. Ms. Kathryn Sherwood is the Office Manager. She has an associate degree in business. She organizes office operations and procedures, enters, maintains, and processes information in the payroll system, handles outgoing invoices to customers, and manages accounts payable (DED Exhibit 7).
12. Mr. Robert Sherwood, Jr. is the Fleet Manager/Mechanic (DED Exhibit 1). He is the head of the Equipment Division. He plans, coordinates, and directs the maintenance and repair of a fleet of heavy equipment and construction vehicles, supervises daily operations of maintenance, shop, guide shop mechanics, and ensures safety and efficiency during all operations, and handles crew management. He has experience as a diesel mechanic and with the operation of all types of heavy equipment (DED Exhibit 5). He is Nancy Sherwood's son (APP Exhibit B).

13. Mr. David Sherwood supervises the field crews of laborers, operators, and truck drivers. He manages excavation projects and assists with planning, documentation, and implementation of projects. He has OSHA and SWPPP training (DED Exhibit 8). He is in charge of Operations and manages on-site supervisors and evaluates their performances (APP Exhibit B). He is Nancy Sherwood's son (APP Exhibit B).
14. Mr. Christopher Vilardi leads the Estimation Division. He obtains leads for new jobs and determines the scope of work and time parameters. He also prepares the formal bids and submits them for approval (APP Exhibit B).

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 Corewood 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. Procedural Matter

On February 21, 2024, Applicant's attorney, Robert J. Hilpert, Esq. submitted an "informal letter" regarding a claimed procedural defect in the Division's Affirmation. The claim was (1) that the Division should have submitted an Affidavit and not an Affirmation, and is therefore not compliant with CPLR 2106 and (2) that since the Applicant had 60 days to file its appeal, the

Division also should be held to 60 days to submit its responsive papers from the date of Applicant's appeal but submitted its papers 106 days after the date of Applicant's appeal (Tribunal Exhibit 1). The Division correctly points out that CPLR 2106 was amended effective January 1, 2024, which allows the Division to submit an Affirmation rather than an Affidavit. The Division also correctly notes that "there are no timelines within the regulations which dictate a response from the Division" and applicant was not prejudiced by the purported delay in filing the responsive papers (Tribunal Exhibit 2).

II. Prior Certification

Corewood was previously certified as a woman-owned business enterprise. The Division is not obligated to certify Corewood 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, Corewood had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the May 27, 2021, application and supporting materials and cannot rely on the past determinations of the Division.

III. 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.

Ms. Nancy Sherwood does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business’ critical functions of excavation, underground utility installation, grading, paving, and environmental cleanup projects. Ms. Nancy Sherwood is responsible for day-to-day operations, works with project managers to lead, guide and direct, and makes financial decisions. Her resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 6).

Certification is denied where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees 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). Robert Sherwood, David Sherwood and Christopher Vilardi handle on-site operations, repairs of heavy equipment and construction vehicles, and determine the scope of work and formal bids (DED Exhibits 1, 5 and 8). Businesses where the non-eligible family members have the education and expertise to perform the specialized work and the owner relied on for certification handles the administrative aspects is considered a family-owned business, which does not meet the criteria for WBE certification. *Matter of Occupational Safety & Environmental Assoc., Inc.*, Recommended Order dated April 12, 2017, Final Order 17-27, dated April 17, 2017. There is no

evidence that Nancy Sherwood possesses adequate, industry-specific competence to make critical business decision without relying on other persons, including Robert Sherwood and David Sherwood.

On appeal, Nancy Sherwood argues that she created four separate divisions of the company in which she oversees the personnel in charge of each division, and she therefore has adequate, industry-specific competence to make decisions without relying on other persons (APP Exhibit B). However, there's no proof she obtained additional education or on-site work experience related to excavation, underground utility installation, grading, paving, and environmental cleanup (DED Exhibits 1 and 6).

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 (4th Dept. 2018).

Corewood provides excavation, underground utility installation, grading, paving, and environmental cleanup services (DED Exhibit 1). Ms. Nancy Sherwood does not have experience in the business' critical functions (DED Exhibits 1 and 6). Robert Sherwood, David Sherwood and Christopher Vilardi handle the critical functions of the business and are primarily responsible for overseeing the day-to-day operations of the business. (DED Exhibits 1, 5 and 8). Ms. Nancy

Sherwood manages the administrative and financial aspects of the business (DED Exhibits 1 and 6).

On appeal, Ms. Sherwood argues that she makes day-to-day decisions for the business (APP Exhibit B). However, these must be operational decisions, not just administrative decisions. See *In Re the Matter of Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10, dated October 13, 2023. She handles administrative functions for the business as well as final approval authority. The main business operational duties are handled by other employees. (DED Exhibits 1, 5, 6, 7 and 8).

The Division's determination to deny the application on the basis that Corewood failed to demonstrate that Ms. Nancy Sherwood 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

Corewood 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(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 Corewood's application for recertification as a woman-owned business enterprise.

In the Matter of Corewood Ventures, Inc.
DED File ID No. 50693
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	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Resume of Robert Sherwood, Jr.	Y	Y
DED 6	Resume of Nancy Sherwood	Y	Y
DED 7	Resume of Kathryn Sherwood	Y	Y
DED 8	Resume of David Sherwood	Y	Y
DED 9	Central Hudson Contract	Y	Y
DED 10	Wildflower Farms Contract	Y	Y
DED 11	South Road Crossing Contract	Y	Y
DED 12	Violet Estates Contract	Y	Y
Tribunal 1	Robert J. Hilpert, Esq. letter dated February 21, 2024	Y	Y
Tribunal 2	Michael Paff, Esq. email dated February 22, 2024	Y	y