

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

**In the Matter**

**- of -**

**the Application of Costello Blacktop Paving Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 20179518**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**April 8, 2024**

This matter considers the written appeal by Costello Blacktop Paving, Inc. (“CBP” 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 August 3, 2021, Ms. Nancy Costello, as President, applied on behalf of CBP for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 16, 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. CBP timely filed a Request to Appeal on September 13, 2023 (APP Exhibit A).
4. A notice to proceed via written appeal was sent to CBP on September 15, 2023 (DED Exhibit 3).

5. CBP filed its written appeal by brief of its attorneys, David Burch, Esq. and Kyra E. Ganswith, Esq. of Barclay Damon, LLP, with attachments, dated October 13, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated February 14, 2024, and a brief of Lisa Berk Esq., counsel for the Division, dated February 14, 2024.

### **FINDINGS OF FACT**

7. CBP is engaged in the business of hauling, asphalt paving and resurfacing, and production milling services (DED Exhibit 1).
8. Ms. Nancy Costello is President and has a 98% ownership interest. Ms. Caitlin Costello Hartman is the Secretary/Treasurer and has a 2% ownership interest. Both women are relied upon for certification (DED Exhibit 1).
9. The critical functions of the business are estimating construction costs, reading blueprints, bidding, negotiating contracts, supervising and managing field staff, and directing day-to-day operations of asphalt paving and resurfacing and production milling services (DED Exhibit 1).
10. Ms. Nancy Costello's resume states that she holds a Practical Nurse License, and her prior working experience was Nursing, from 1979 to 2009. She became President of CBP in 2009. As President, she plans, develops, and implements strategies for generating resources and/or revenues for the company, reviews activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. She evaluates performance of employees for compliance with established policies and objectives of the company and contributions in

attaining objectives, appoints managers and assigns or delegates responsibilities to them. (DED Exhibit 8).

11. Applicant stated “with respect to asphalt paving, owner and president, Nancy Costello visits potential job sites; identifies equipment needs for the specific jobs; acquires equipment, if needed, including through purchase or lease; identifies subcontracting needs, including union labor requirements; determines whether to bid projects and approves bids prior to their submission; and generally supervises projects through completion.” (DED Exhibit 1).
12. Ms. Caitlin Costello Hartman’s resume states that her working experience is as an Occupational Therapist (DED Exhibit 9). Her 2021 and 2022 tax returns state her occupation is “Occupational Therapist” (DED Exhibit 10). A narrative submitted with the application states “Caitlin Costello Hartman resides out of state but devotes 1-2 weeks throughout the year to the business, including having responsibility for signing business checks.” (DED Exhibit 1).
13. Mr. Jeffrey Costello’s resume reflects that he has technical experience in the construction industry as a Foreman and Operations Manager. He is a Certified Excavator in Safe Digging Best Practices and is certified in OSHA 30 Hour Training. As Operations Manager, he directs day-to-day operations by implementing short-term and long-term strategies to achieve business plan and profitability goals (DED Exhibit 11). He works with the management team, bidding projects; coordinates scheduling of milling and paving crews; monitors project productions costs; operates equipment when needed; assesses jobsite hazards; and assures onsite project safety compliance, operations and productivity management (DED Exhibit 1).

14. Mr. Joseph LaBuz's resume reflects that he has technical experience as a Project Engineer, Project Superintendent, Construction Manager, Laborer/Operator, and Construction Estimator/Project Manager. As the Construction Estimator/Project Manager, he interprets blueprints and plans and relays information to the workers; estimates construction costs; and maintains daily communications with subcontractors and inspectors (DED Exhibit 9). He orders and secures plans for projects to bid; establishes relationships with general contractors; reviews project plans and specifications; builds cost estimates based on project plans and specifications; contacts suppliers and subcontractors to secure pricing for estimates; provides support to operations as needed in the field; and assists with project close-out and billing (DED Exhibit 1).

15. Mr. William Wilcox's resume shows that he has experience in the construction industry as a Truck Foreperson/Dispatcher. He holds a NYS CDL A License. He directly supervises trucking staff; schedules, coordinates, and dispatches trucks for deliveries; records and maintains all load data and logbooks; performs pre and post trip truck inspections; and performs truck maintenance (DED Exhibit 10).

### **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 CBP 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. Prior Certification

CBP was previously certified as a woman-owned business enterprise. The Division is not obligated to certify CBP 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, CBP had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the August 3, 2021, application and supporting materials and cannot rely on the past determinations of the Division.

### 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.

Nancy Costello and Caitlin Costello Hartman do not have any industry specific expertise; their skills are related to general business or office management. They do not possess any academic

or technical training relevant to the business' critical functions of estimating construction costs, reading blueprints, bidding, negotiating contracts, supervising and managing field staff, and directing day-to-day operations of asphalt paving and resurfacing and production milling services (DED Exhibit 1).

Ms. Nancy Costello plans, develops, and implements strategies for generating resources and/or revenues for the company, reviews activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions. She evaluates performance of employees for compliance with established policies and objectives of the company and contributions in attaining objectives, appoints managers and assigns or delegates responsibilities to them. (DED Exhibit 8). Ms. Caitlin Costello Hartman's resume states that her working experience is as an Occupational Therapist (DED Exhibit 9). Her 2021 and 2022 tax returns state her occupation is "Occupational Therapist" (DED Exhibit 10). A narrative submitted with the application states "Caitlin Costello Hartman resides out of state but devotes 1-2 weeks throughout the year to the business, including having responsibility for signing business checks." (DED Exhibit 1). Their resumes reflect that each of their roles at the business is primarily business management and administrative and do 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). Jeffrey Costello, Joseph LaBuz and William Wicox have direct experience operating the equipment used by the business and supervising operations in the field (DED Exhibits 11, 12 and



13). There is no evidence that Nancy Costello and Caitlin Costello Hartman possess adequate, industry-specific competence to make critical business decision without relying on other persons, including Jeffrey Costello, Joseph LaBuz and William Wilcox.

Applicant stated “with respect to asphalt paving, owner and president, Nancy Costello visits potential job sites; identifies equipment needs for the specific jobs; acquires equipment, if needed, including through purchase or lease; identifies subcontracting needs, including union labor requirements; determines whether to bid projects and approves bids prior to their submission; and generally supervises projects through completion.” (DED Exhibit 1).

On appeal, Nancy Costello argues that she has the work experience to show she has adequate, industry-specific competence to make decisions without relying on other persons. She argues she learned the industry from the ground up which included visiting jobsites and processing payroll. She also claimed that she worked with a truck foreperson to learn all aspects of truck dispatch and scheduling (APP Exhibit B). However, there are no details showing what she did while visiting jobsites or what specific work she performed and she has no direct work experience in paving, milling production, supervising a truck staff, maintaining trucks , or in the hauling and disposal of materials (DED Exhibits 1 and 8).

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).

The critical functions of the business are estimating construction costs, reading blueprints, bidding, negotiating contracts, supervising and managing field staff, and directing day-to-day operations of asphalt paving and resurfacing and production milling services (DED Exhibit 1). Ms. Nancy Costello and Caitlin Costello Hartman do not have experience in the business’ critical functions in order to independently control or supervise the workers (DED Exhibits 1, 8 and 9). Jeffrey Costello, Joseph LaBuz and William Wilcox handle the critical functions of the business and are primarily responsible for overseeing the day-to-day operations of the business. (DED Exhibits 1, 11, 12 and 13).

On appeal, Ms. Costello argues that she has “the experience and knowledge of each of their (Jeffrey Costello, Joseph LaBuz and William Wilcox) professions and duties from 40 years in the industry.” This claim is unsupported by the record. Despite her position as President since 2009, she has not shown that she handles the critical functions of the business, which are estimating construction costs, reading blueprints, bidding, negotiating contracts, supervising and managing field staff, and directing day-to-day operations of asphalt paving and resurfacing and production milling services (DED Exhibits 1 and 8).

On appeal, applicant submitted affidavits from herself, Jeffrey Costello, Joseph LaBuz and William Wilcox dated October 11, 2021 (APP Exhibit B). These affidavits were not before the Division at the time of the denial determination. Assuming these affidavits attempt to clarify previously submitted documents, they do not show that Nancy Costello makes operational decisions on a day-to-day basis with respect to the critical functions of the business. The affidavits

state that Nancy Costello delegates their duties to them, that they report to her, and that she has the final decision. They do not show that Nancy Costello has the competence with respect to the core functions of the business or her ability to supervise these individuals who perform the critical functions of the business.

The Division's determination to deny the application on the basis that CBP failed to demonstrate that Ms. Nancy Costello and Ms. Caitlin Costello Hartman each 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**

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

In the Matter of Costello Blacktop Paving, Inc.  
DED File ID No. 20179518  
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	Subcontractor Agreements	Y	Y
DED 5	CBP contract with Higby Gold, Inc.	Y	Y
DED 6	Additional Code Request Narrative	Y	Y
DED 7	Paving Milling Equipment List	Y	Y
DED 8	Resume of Nancy Costello	Y	Y
DED 9	Resume of Caitlin Costello Hartman	Y	Y
DED 10	Caitlin Costello's personal tax returns	Y	Y
DED 11	Resume of Jeffrey Costello	Y	Y
DED 12	Resume of Joseph LaBuz	Y	Y
DED 13	Resume of William Wilcox	Y	Y