

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

**In the Matter**

**- of -**

**the Application of GC Upstate Environmental Solutions Corp.**  
**for Recertification as a Minority-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 54707**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**March 15, 2024**

This matter considers the written appeal by GC Upstate Environmental Solutions Corp. (“GC Upstate” 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 minority-owned business enterprise (“MBE”).

### **PROCEDURAL HISTORY**

1. On October 31, 2022, Mr. Gonzalo C. Cantos, as President, applied on behalf of GC Upstate for recertification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On August 7, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (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); and
  - (b) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. GC Upstate timely filed a Request to Appeal on August 17, 2023 (APP Exhibit A/ DED Exhibit 3).
4. A notice to proceed via written appeal was sent to GC Upstate on August 21, 2023 (DED Exhibit 4).

5. GC Upstate filed its written appeal by letter dated August 24, 2023 with attachment (APP Exhibit B).
6. The Division filed an Affidavit of Robyn Clarke, Associate Director, dated January 18, 2024, and a brief of William Chen Esq., counsel for the Division, dated January 19, 2024.

### **FINDINGS OF FACT**

7. GC Upstate is engaged in the business of demolition and lead and asbestos remediation and removal services (DED Exhibit 1).
8. Mr. Gonzalo C. Cantos is the President and has a 100% ownership interest (DED Exhibit 1).
9. Mr. Cantos also owns GCU Environmental Solutions Corp. (“GCU”) and Residential Driver Corp. (“Residential Driver”). GCU performs the same work as GC Upstate, except its customers are from the private sector and the workforce is non-union. Residential Driver performs deliveries for GCU. The three companies share office space. GC Upstate’s website leads to GCU’s website. GC Upstate and GCU share the same business phone number. GC Upstate uses field crew workers employed by GCU (DED Exhibits 1 and 15).
10. Mr. Gonzalo C. Cantos’ son, Gonzalo M. Cantos, is employed by both GC Upstate and GCU as a Supervisor/Project Superintendent and is key personnel at Residential Driver (DED Exhibit 15).
11. In 2021, Mr. Gonzalo C. Cantos earned \$ [REDACTED] in salary from GC Upstate while Gonzalo M. Cantos earned \$ [REDACTED] (DED Exhibits 5 and 8).
12. In 2022, Gonzalo C. Cantos received no wages from GC Upstate, while Gonzalo M. Cantos earned \$ [REDACTED] (DED Exhibits 11 and 13). In 2022, Gonzalo C. Cantos earned a salary of \$ [REDACTED] from GCU (DED Exhibit 14).

## 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(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 GC Upstate for recertification as a MBE 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**

The Division acknowledges that GC Upstate was previously certified as a minority-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 GC Upstate 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, GC Upstate had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the October 31, 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 minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to the ownership interest in the business. This provision ensures that the owner receives the benefit of the MBE certification and that a non-qualifying individual does not receive a disproportionate share of the benefits. *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

In 2021, Mr. Gonzalo C. Cantos earned \$ [REDACTED] in salary from GC Upstate and \$ [REDACTED] in ordinary business income, while Gonzalo M. Cantos earned \$ [REDACTED] (DED Exhibits 5, 6 and 8). In 2022, Gonzalo C. Cantos received no wages from GC Upstate and his share of the ordinary business income was a loss of \$ [REDACTED], while Gonzalo M. Cantos earned \$ [REDACTED] (DED Exhibits 11 and 13). In 2022, Gonzalo C. Cantos earned a salary of \$ [REDACTED] from GCU (DED Exhibit 14).

Gonzalo M. Cantos, a non-qualifying individual, earned more than Gonzalo C. Cantos, the 100% owner, in 2021 and 2022. On appeal, applicant's accountant confirmed that in 2022, Gonzalo C. Cantos took a salary from GCU, and did not take a salary from GC Upstate due to the losses at the company. There is no explanation why Gonzalo M. Cantos earned more than Gonzalo C. Cantos from GC Upstate in 2021 and 2022 (APP Exhibit B).

The Division's determination to deny the application on the basis that GC Upstate failed to demonstrate that Mr. Gonzalo C. Cantos shared in the risks and profits in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(3), is supported by substantial evidence.

### III. Independence

The Division further found that GC Upstate 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).

Applicant shares personnel with GCU. Gonzalo M. Cantos works as a Supervisor/Superintendent for both applicant and GCU and is key personnel for applicant, GCU and Residential Driver. Applicant shares field crews with GCU. All three companies share office space. Applicant’s website leads to GCU’s website (DED Exhibits 1 and 15). Applicant’s written appeal submission was submitted on letterhead belonging to GCU. The business phone number, website and email address listed on the GCU letterhead are the office phone number, website and email address provided by applicant in its application (DED Exhibits 1 and 15).

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

### **CONCLUSION**

GC Upstate did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(3) 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 GC Upstate's application for recertification as a minority-owned business enterprise.



In the Matter of GC Upstate Environmental Services Corp.  
DED File No. 54707  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Written Appeal Submission	Y	Y
DED 1	Certification Application	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	2021 GC Upstate Tax Returns, Part 1	Y	Y
DED 6	2021 GC Upstate Tax Returns, Part 2	Y	Y
DED 7	2021 GC Upstate 2021 W3	Y	Y
DED 8	2021 GC Upstate 2021 W2s	Y	Y
DED 9	GC Upstate List of Employees	Y	Y
DED 10	2022 GC Upstate Tax Returns, Part 1	Y	Y
DED 11	2022 GC Upstate Tax Returns, Part 2	Y	Y
DED 12	GC Upstate 2022 W3	Y	Y
DED 13	GC Upstate 2022 W2s	Y	Y
DED 14	Mr. Cantos 2022 W2 from GCU	Y	Y
DED 15	Mr. Cantos Narrative Response	Y	Y