

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12207**

**In the Matter**

**- of -**

**the Application of Giacorp Contracting, Inc.**  
**for Certification as a Woman-Owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 63282**

**RECOMMENDED ORDER**

**-by-**



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**Deidre A. Chuckrow**  
**Administrative Law Judge**  
**March 14, 2024**

This matter considers the written appeal by Giacorp Contracting, Inc. (“Giacorp” 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 11, 2022 Giacorp applied for certification as a women-owned business enterprise (“WBE”). Giacorp based its application on Ms. Lisa Calicchia. (DED Exhibit 1).
2. On July 7, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) The woman owner relied upon for certification does not 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 woman owner relied upon for certification does not 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. Giacorp submitted a request to appeal the denial determination, dated July 11, 2023. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to Giacorp on July 14, 2023 (DED Exhibit 4).

5. A written appeal letter with submissions was submitted on September 5, 2023 by Applicant. (APP Exhibit A).
6. The Division filed an Affidavit of Eugenio Alcantara, Director of Certification, dated December 13, 2023, and a brief of Karen L. Bernstein, counsel for the Division, dated December 15, 2023.

### **FINDINGS OF FACT**

7. Giacorp is engaged in the business of commercial and residential fence installations, railing, and electric gates. (DED Exhibit 1).
8. Lisa Calicchia is the woman owner relied upon for certification and is the President and 100% owner of the applicant business. (DED Exhibit 1).
9. The critical functions of Giacorp are the installation of fencing, including chain link, vinyl, PVC, aluminum, wrought iron, privacy fencing, high-security fencing, automatic entry gates, handrails, railing, landscaping, and site prep and cleanup. (DED Exhibits 1, 5, and 6).
10. The application states that Ms. Calicchia is solely responsible for financial decisions, estimating, preparing bids, negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, supervising field operations, purchasing equipment and sales, managing and signing payroll, and shares the responsibility as a signatory for business accounts with her daughter, Lindsey Calicchia. (DED Exhibit 1).
11. Ms. Calicchia has a bachelor's degree in business administration and accounting finance. Her skills include computer applications Microsoft Word, Excel, Adobe, Project, PIP, E-Builder, and Intuit QuickBooks. She has worked in the construction industry for over 25 years in various roles including administrative, project management, and financial. Ms. Calicchia worked as a project supervisor and contract specialist for Carjen Fence Company ("CFC"), a business

which was owned by Mr. Joseph Calicchia, Ms. Calicchia's spouse, which also specialized in commercial and residential fence installation, from 2005 through 2016. Ms. Calicchia's responsibilities at CFC included administrative and financial responsibilities as well as conducting daily site visits "to report on safe working habits and progress while following OSHA guidelines. . .", responsibility for plan take-offs and interpreting specifications, and working on site work/bridge projects in and near live traffic." (DED Exhibit 9; APP Exhibit A).

12. Ms. Calicchia's work responsibilities at Giacorp include "[p]erforming all aspects of project management from construction start to completion. Including bidding, estimating, contractual documentation, AIA forms, scheduling, budgeting, permits, submittals and shop drawings, licenses, site inspections and billing." In addition, Ms. Calicchia also supervises and manages Giacorp's work force, schedules daily workload, and coordinates projects with clients and subcontractors. (DED Exhibit 9; APP Exhibit A).

13. Mr. Joseph J. Calicchia, Ms. Calicchia's son is employed by Giacorp as a Superintendent and Operator. Mr. Calicchia has worked for the applicant business since 2017 and has experience in the replacement of security fence and guardrails. (DED Exhibit 11). He has a Bachelor of Science in construction management and is certified in "OSHA 30 Construction Safety and Health", "CPR & AED", "EPA Contractor/Supervisor (Asbestos)", "Crane Signaling", and has training in suspended scaffolding, ariel liftings, work zone safety awareness and work zone traffic control. His responsibilities at Giacorp include supervising employees subcontractors, preparation of daily reports for personnel and subcontractors, prepare daily hazard analysis reports, operate "Skid Steer. . . for different phases of construction", "[o]perate Excavator (CAT

315) . . . for different phases of construction”, and load the excavator on and off equipment trailers, among others. (DED Exhibit 11).

14. The applicant states that Mr. Joseph J. Calicchia no longer works for Giacorp. (APP Exhibit A).

15. Giacorp possesses a Home Improvement License from Westchester County’s Dept. of Consumer Protection and one from Connecticut’s Dept. of Consumer Protection. (Tribunal Exhibits I and II).

### **APPLICABLE LAW**

5 NYCRR § 144.2 (c)(1) states as follows:

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.

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

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 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.

### **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 Giacorp 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. Industry-Specific Competence and Day-to-Day Operations

The Division denied Giacorp's application for certification as a WBE on the basis that the applicant failed to demonstrate that Ms. Calicchia possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1) and that the applicant failed to demonstrate that she makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). As the Division's denial based its determination on the same set of facts in its determination, they will be addressed collectively.

The Division interprets these regulations to require an applicant to demonstrate that the owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)). Notwithstanding the Division's requirements, a lack of hands-on experience is not itself enough to deny certification and industry practice should also be considered. (*Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988)).

In the instant case, the Division's denial determination was not based on substantial evidence. The Division argues that the applicant failed to provide sufficient evidence regarding Ms. Calicchia's industry-specific competence and determined that she did not make decisions on a day-to-day basis regarding the critical functions of the business enterprise. In assessing Ms. Calicchia's industry-specific competence, and her ability to make critical business decisions, the Division relied almost exclusively upon the resumes of Ms. Calicchia and Mr. Joseph J. Calicchia, her son. Aside from the resumes, the Division had no other evidence before it regarding the work experience of both Ms. Calicchia and Mr. Joseph J. Calicchia to conclude that the woman owner relied upon for certification did not possess industry-specific competence to make decisions

without relying on others, or that she was not making critical business decisions on a day to day basis as required under both 5 NYCRR §§ 144.2(c)(1) and (c)(2).

The Division now argues that Ms. Calicchia lacks necessary certifications and licenses, and that because of that, she does not have industry-specific competence, nor can she make day-to-day operational decisions. However, they provide no evidence that such licensure is required by this business, nor do they produce any licenses or certifications held by anyone else working for the business enterprise, instead relying only on information contained in the resumes. Further, the applicant business did produce copies of two licenses, one from the State of Connecticut, and one from Westchester County, both of which name the business itself, and not an individual, evidence that individual licensure is not a requirement for this business. (Tribunal Exhibits I and II).

Here, the application states that Ms. Calicchia has owned Giacorp since 2016 and is solely responsible for all managerial aspects of the applicant business, including estimating, preparing bids, negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, supervising field operations, and purchasing equipment and sales. (DED Exhibits 1; APP Exhibit A). In addition, Ms. Calicchia's resume evidences that she has worked in the construction industry since 1985, in fencing installation since 2005, that she is OSHA certified, and is currently responsible for all aspects of project management from "construction start to completion." (DED Exhibit 9). Further, Ms. Calicchia's experience includes having "responsibility for plan take-offs and interpreting specifications, and working on site. . . ." (DED Exhibit 9; APP Exhibit A).

The regulations provide that industry-specific expertise may be obtained via direct work experience, and here, Ms. Calicchia has almost 20 years of experience in the industry. (5 NYCRR 144.2(c)(1)(iii)) (DED Exhibit 9; APP Exhibit A). The Division's regulations "do not require an



applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a business.” (*Matter of Northern Scapes Inc.*, Recommended Order, May 18, 2018 (Final Order 18-31, June 5, 2018)(applicant relied on for certification, with more than 20 years in the industry, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). Here, as in *Northern Scapes*, Ms. Calicchia, manages all aspects of the business, and has been in the business since 2005. Further, there is no regulatory requirement for any formal academic training, only that the woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. (See *Northern Scapes*, supra). Where a relied upon owner possesses significant industry and managerial experience, and “retains ultimate authority to control the operations of the business enterprise seeking certification” an imposition to require more on that owner is unreasonable. (*Northern Scapes*, supra, citing to *Matter of Era Steel Const. Corp. v Egan*, 145 AD2d 795 [3d Dept 1988]).

On appeal, the applicant states that she learned the business from her father and asserts that her son is no longer is employed by Giacorp. The applicant seeks to introduce earnings statements as proof of Mr. Calicchia’s current employment status with the applicant business. (APP Exhibit A). The explanation regarding Ms. Calicchia’s learning the business from her father is admitted as clarifying, however, the additional documents submitted by Applicant on appeal, and the information regarding Mr. Calicchia’s employment status cannot now be considered, as this information is new information and was not before the Division at the time of the denial determination. (See *Scherzi, Systems*, supra, and *Matter of Lida Strategic Solutions, Inc.* Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019)).

Ms. Calicchia's managerial experience, her role in the business as presented in the application and its supporting documents, and her almost twenty years of experience in the industry, demonstrates that she possesses industry-specific competence and makes 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)(1) and (2).

### **CONCLUSION**

Applicant met its burden with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1) and 144.2(c)(2).

### **RECOMMENDATION**

The Division's determination to deny Giacorp Contracting, Inc.'s application for certification as a woman owned business enterprise should be reversed.

In the Matter of Giacorp Contracting, Inc.  
DED File ID No. 63282  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal Letter and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appellant's Appeal Request Form	Y	Y
DED 4	Notice to Proceed by Written Appeal	Y	Y
DED 5	Narrative: Business Description	Y	Y
DED 6	Narrative: NAICs Codes	Y	Y
DED 7	Business Bank Account Signature Card	Y	Y
DED 8	Narrative: Ownership Changes	Y	Y
DED 9	Resume of Lisa Calicchia, Version 1	Y	Y
DED 10	Resume of Lisa Calicchia, Version 2	Y	Y
DED 11	Resume of Joseph J. Calicchia	Y	Y
DED 12	2021 W-2 Employee Wage Earnings Statement	Y	Y
DED 13	2022 W-2 Employee Wage Earnings Statement	Y	Y
DED 14	Lisa Calicchia 2021 Personal Tax Return	Y	Y
DED 15	Lisa Calicchia 2022 Personal Tax Return	Y	Y
TRIBUNAL I	Connecticut Home Improvement License	N	Y

TRIBUNAL II	Westchester County, Dept. of Consumer Protection, Home Improvement License	N	Y
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