

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

In the Matter

- of -

**the Application of Jamestown Industrial Trucks, Inc. dba JIT Toyota-Lift
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 60386

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 25, 2024

This matter considers the written appeal by Jamestown Industrial Trucks, Inc. dba JIT Toyota-Lift (“JIT” 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 October 6, 2022, Ms. Joyce Schwob, as President, applied on behalf of JIT for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 27, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4); and
 - (b) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. JIT timely filed a Request to Appeal on August 14, 2023 (APP Exhibit A/ DED Exhibit 5).
4. A notice to proceed via written appeal was sent to JIT on August 17, 2023 (DED Exhibit 6).

5. JIT filed its written appeal by letter dated September 25, 2023, from its attorney, Elliott Ehrenreich, Esq. of Phillips Lytle LLP, with attachments (APP Exhibit B).
6. The Division filed an Affidavit of Robyn Clarke, Associate Certification Director, dated January 18, 2024, and a brief of JaMone Turner, Esq., counsel for the Division, dated January 24, 2024.

FINDINGS OF FACT

7. JIT is engaged in the business of sales, parts and repair services for forklifts, aerial lifts, personnel lifts, floor sweepers, floor scrubbers, industrial batteries, pallet jacks, pallet racking, dock levelers and dock equipment (DED Exhibit 1).
8. Ms. Joyce Schwob is the President and has a 100% ownership interest. (DED Exhibit 1).
9. The application included a copy of JIT's dealer agreement with Toyota Material Handling, Inc. ("TMH" or "Distributor") dated March 27, 2023 ("Dealer Agreement") (DED Exhibit 3) which included the following provisions:
 - (a) Section 5 of the Dealer Agreement states that "Distributor, therefore, enters into this Agreement upon Dealer's representation that Joyce E. Schwob, and no other person, exercises the function of General Manager and is in complete charge of Dealer's Toyota operations with authority to make all decisions on behalf of Dealer with respect to Dealer's operations...Dealer agrees not to appoint a new General Manager, without securing the prior approval of Distributor..."
 - (b) Section 6 of the Dealer Agreement states that "Because Distributor has entered into this Agreement in reliance upon these representations and Dealer's assurances of the active involvement of such person in Dealer operations, any change in Ownership, no matter

what the share or relationship between the parties, from the person(s) specified herein, requires the prior written approval of Distributor...”

(c) Section 8 of the Dealer Agreement states that “Distributor will assign Dealer’s geographic area called the area of primary responsibility (“APR”). The APR is used by Distributor to evaluate Dealer’s performance of its obligations, among other things. Dealer agrees that it has no exclusive right to any such APR. Distributor may add new dealers, relocate dealers, or adjust Dealer’s APR as it reasonably determines is necessary.”

Addendum B of the Dealer Agreement states that “Distributor hereby designates the following area as the Dealer’s Area of Primary Responsibility: The following counties in the state of New York: Alleghany, Cattaraugus, Chautauqua, Erie, Niagara, Wyoming.” (DED Exhibit 3).

10. No contracts or agreements reflecting Ms. Schwob’s signature were submitted with the application (DED Exhibit 1).

APPLICABLE LAW

5 NYCRR §144.2(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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

Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 JIT 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

The Division acknowledges that JIT was previously certified as a woman-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 JIT 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, JIT had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the October 6, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest.

Section 5 of the Dealer Agreement states that “Distributor, therefore, enters into this Agreement upon Dealer’s representation that Joyce E. Schwob, and no other person, exercises the function of General Manager and is in complete charge of Dealer’s Toyota operations with authority to make all decisions on behalf of Dealer with respect to Dealer’s operations...Dealer agrees not to appoint a new General Manager, without securing the prior approval of Distributor...” (DED Exhibit 3). This section hinders Ms. Schwob’s ability to hire a General Manager without prior written approval. She is therefore not unencumbered in her ability to realize that benefit of ownership.

Section 6 of the Dealer Agreement states that “Because Distributor has entered into this Agreement in reliance upon these representations and Dealer’s assurances of the active involvement of such person in Dealer operations, any change in Ownership, no matter what the share or relationship between the parties, from the person(s) specified herein, requires the prior written approval of Distributor...” (DED Exhibit 3). By prohibiting Ms. Schwob from making any

changes in ownership without prior written approval, this provision subjects Ms. Schwob to undue restrictions against alienating her ownership interest.

Section 8 of the Dealer Agreement states that “Distributor will assign Dealer’s geographic area called the area of primary responsibility (“APR”). The APR is used by Distributor to evaluate Dealer’s performance of its obligations, among other things. Dealer agrees that it has no exclusive right to any such APR. Distributor may add new dealers, relocate dealers, or adjust Dealer’s APR as it reasonably determines is necessary.” Addendum B of the Dealer Agreement states that “Distributor hereby designates the following area as the Dealer’s Area of Primary Responsibility: The following counties in the state of New York: Alleghany, Cattaraugus, Chautauqua, Erie, Niagara, Wyoming.” (DED Exhibit 3). These sections limit JIT’s business operations to six counties. By limiting the areas where JIT can operate and sell, the Dealer Agreement encumbers Ms. Schwob’s ability to realize the benefits of ownership.

On appeal, applicant states: “The dealership agreement regulates the sale of certain branded new Toyota products, and those new products are a part of JIT’s larger inventory of products – JIT can sell used equipment from any brand...The authorized dealer relationship merely defines how the Toyota’s products are made available for sale within the geography of the United States, here withing JIT’s APR in the Western New York region... Toyota only restricts where JIT can sell new products and JIT is not otherwise restricted from selling used products or other equipment outside those geographic locales.” (APP Exhibit B). However, this statement does not refute the Dealer Agreement’s restrictions on the appointment of a new General Manager, change in ownership, or geographic areas of operation.

Applicant further argues “Articles V and VI of the Toyota dealer agreement require that in the event JIT appoints a new General Manager or Owner, that Toyota have notice and the ability

to consent in writing to such change. The purpose of these provisions is to ensure that whomever assumes the role of General Manager or Owner has the necessary experience within the industrial equipment industry to effectively carry out the services under the contract; it is a means of providing transparency to the distributor on the individuals obligated to perform under the contract..." (APP Exhibit B). However, the purpose of restrictions is not relevant. Those provisions encumber Ms. Schwob in her ability to realize the benefits of ownership and subject her to undue restrictions alienating her ownership interest.

Applicant further states on appeal: "The terms of the Toyota dealership agreement are standard industry practice for dealers such as JIT. JIT is a party to other dealership agreements whereby it is licensed to sell certain brands within a geographic region... The terms of such agreements do not limit JIT's general business operations, managerial functions or the decision making of Ms. Schwob, but define and describe the terms by which JIT sells certain products." (APP Exhibit B). Whether the terms of the agreement are standard industry practice is irrelevant. The terms including the geographic locations where JIT can operate, encumber Ms. Schwob's ability to realize the benefits of ownership.

The Division's determination to deny the application on the basis that JIT failed to demonstrate that Ms. Schwob is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4), is supported by substantial evidence.

III. Control

Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a woman-owner exercises

appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

No contracts or agreements reflecting Ms. Schwob's signature were submitted with the application (DED Exhibit 1). Therefore, applicant failed to demonstrate appropriate control of the business by the woman-owner as required by 5 NYCRR §144.2(d)(2). See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016 (substantial evidence supported denial where no evidence was presented that the woman-owner signs contracts on behalf of the business).

On appeal, applicant states: "As the sole shareholder and President of the business, Ms. Schwob is the highest-ranking officer within the company...both the relevant corporate formation documents and Ms. Schwob's resume demonstrate that Ms. Schwob [is] the face of the company and regularly performs the core business function of negotiating and signing contracts on the company's behalf as a part of her job as President." (APP Exhibit B). However, applicant failed to provide any evidence that Ms. Schwob signs contracts on behalf of the business (DED Exhibit 1).

CONCLUSION

JIT 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(b)(4) and 144.2(d)(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 JIT's application for recertification as a woman-owned business enterprise.

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 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	Applicant's Toyota Material Handling, Inc. Dealer Agreement	Y	Y
DED 4	Applicant's JIT-Sonwil Distribution Center Agreement	Y	Y
DED 5	Applicant's Request to Appeal	Y	Y
DED 6	Notice to Proceed Via Written Appeal	Y	Y