

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

In the Matter

- of -

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

NYS DED File ID No. 50604

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 29, 2024

This matter considers the appeal by Jorrey Excavating, Inc. (“Jorrey Excavating” 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 18, 2022, Ms. Mary Jorrey, as President and 100% owner, applied on behalf of Jorrey Excavating for recertification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On August 10, 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);
 - (b) 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
 - (c) 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. On September 18, 2023, Jorrey Excavating submitted a Request for a Hearing. (DED Exhibit 3).
4. On April 11, 2024, a Notice of Hearing was sent to all parties (DED Exhibit 5).
5. On August 22, 2024, a hearing was held and concluded.

FINDINGS OF FACT

6. Jorrey Excavating is engaged in the business of site construction, excavation, utility installation, concrete foundations, trucking-loose materials, and topsoil (DED Exhibit 1).
7. Ms. Mary Jorrey is the President and 100% owner of Jorrey Excavating (DED Exhibit 1).
8. Jorrey Excavating reported a net loss of \$63,237 on its 2021 tax returns and a net loss of \$304,728 on its 2022 tax returns (DED Exhibits 5 and 6).
9. Mary Jorrey received no wages or distributions from Jorrey Excavating in 2021 and 2022. Christopher Jorrey and Christopher Smith each received wages in excess of \$100,000 in each of 2021 and 2022. As a union shop, Ms. Jorrey must pay the prevailing union rates to her employees (Hearing Testimony of Mary Jorrey; DED Exhibits 5 -10).
10. Mary Jorrey handles all financial matters of the business, including insurance, accounts receivable, accounts payable, bonding, and equipment and material purchases. She also handles the assignment of employees and equipment to the jobsites (Hearing Testimony of Mary Jorrey).
11. Christopher Jorrey and Christopher Smith are licensed concrete flatwork technicians (DED Exhibit 12). Christopher Jorrey is the Operating Engineer and heavy equipment operator (Hearing Testimony of Christopher Jorrey).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states 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(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) 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...
- (2) 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 Jorrey Excavating 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

Mr. Michael McKenna, Esq., of Cohen & Seglias, appeared at the hearing on behalf of Jorrey Excavating, Inc. The following witness testified on behalf of Jorrey Excavating: Mary Jorrey, President, and owner; and Christopher Jorrey, Operating Engineer. Jorrey Excavating offered no exhibits.

Ms. Amy O'Connor, Esq., Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Folashade Olatunbosun, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 13.

I. Prior Certification

The Division acknowledges that Jorrey Excavating 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 Jorrey Excavating 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, Jorrey Excavating had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the October 18, 2022, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied Jorrey Excavating's application for recertification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Jorrey shared in the risks and profits in proportion to her equity interest therein, as required by 5 NYCRR § 144.2(b)(3). (DED Exhibit 2). 5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

Mary Jorrey testified that as the 100% owner, she assumes 100% of the risk of the business. She stated that Jorrey Excavating sustained losses in both 2021 and 2022, as reflected in DED Exhibits 5 and 6; and therefore, there were no profits from which she could pay herself any wages or distributions. The losses were passed through to her on the 2021 and 2022 personal tax returns

as reflected in DED Exhibits 7 and 8. She further stated that Jorrey Excavating is a union company and therefore she must pay the prevailing union rates to her employees (Hearing Testimony of Mary Jorrey).

Folashade Olatunbosun testified that Ms. Jorrey does not share in the profits in proportion to her ownership interest. She noted that Christopher Jorrey, Mary Jorrey's son, and Christopher Smith, both received wages from Jorrey Excavating in excess of \$100,000 in each of 2021 and 2022. These non-qualifying individuals were paid substantial wages while Mary Jorrey received no wages or distributions during those years. Therefore, the Division's position is that Ms. Jorrey did not share in the profits in proportion to her 100% ownership interest. On cross-examination, Ms. Olatunbosun acknowledged that Jorrey Excavating reported net losses on both its 2021 and 2022 tax returns and that Ms. Jorrey reported the losses on her personal tax returns (Hearing Testimony of Folashade Olatunbosun).

Mary Jorrey shares in the risks of the business in proportion to her ownership interest. After paying the prevailing union rates to her employees, there were no profits in the business from which to pay her a salary or distributions; and she bore 100% of the losses. (DED Exhibits 5 and 6).

Based on the foregoing, I find that the Division's determination with regard to 5 NYCRR § 144.2(b)(3) is not supported by substantial evidence.

III. Operation

The eligibility criteria for MWBE certification requires that the minority/woman owner "exercises the authority to control independently the day-to-day business decisions of the enterprise". See *Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 A.D. 3d 1343 (N.Y. App. Div. 2020). The minority/woman-owner "must

exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 A.D. 3d 1517 (N.Y. App. Div. 2018).

With regard to technical competence, where the minority/woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

5 NYCRR §144.2(c)(1) requires that the minority/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 *Matter of Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 179 A.D. 3d 1343 (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 more experienced employees.

Ms. Jorrey testified that she handles all financial matters of the business, including payroll, insurance, accounts receivable, accounts payable, bonding, and equipment and material purchases. She also handles the assignment of employees and equipment to the jobsites. She stated that when

she worked for M. Jorrey Trucking (“M. Jorrey”) from April 1976 to May 1977, that she was “out in the field every day”. However, her resume lists her titles at M. Jorrey as Vice President and Treasurer and lists no experience in the field. She stated that she does not operate the machinery and equipment, but she is onsite “once or twice per week”. She testified that her husband does the actual estimating, and she has no expertise to do the estimating (Hearing Testimony of Mary Jorrey). Her resume also reflects that she was a “housewife and mother” between 1985 and 2003, and lists no experience in concrete, paving and excavating (DED Exhibit 11).

Folashade Olatunbosun testified that Ms. Jorrey does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are site construction, excavation, utility installation, concrete foundations, trucking-loose materials, and topsoil, as stated in the application. She stated that Ms. Jorrey’s resume reflects that she handles administrative tasks, including insurance, accounts receivable, accounts payable, bonding, and equipment and material purchases. She does not have the education, training or experience to oversee the critical functions of the business. She testified that Christopher Jorrey and Christopher Smith are licensed concrete flatwork technicians and they have the training and experience to handle the critical functions of the business. She stated that Ms. Jorrey does not have adequate industry-specific competence as reflected in her resume and narrative, which have no mention of her experience in concrete, paving and excavating (Hearing Testimony of Folashade Olatunbosun).

The Division also found that Ms. Jorrey, as the woman-owner, did not make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required by 5 NYCRR §144.2(c)(2). The regulation states that “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 minority-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).

Here, the products and services provided by applicant include concrete, paving and excavating (DED Exhibit 1).

Folashade Olatunbosun testified that Ms. Jorrey does not have any experience, training, or certificates for the critical functions of the business which are site construction excavation, utility installation, concrete foundations, and trucking-loose materials and topsoil. She does not operate the heavy machinery and equipment, which is a critical function of the business, and is only onsite once or twice per week, so she does not supervise the work in the field or make operational decisions on a day-to-day basis (Hearing Testimony of Folashade Olatunbosun).

Ms. Jorrey testified that she handles all financial matters of the business, including insurance, accounts receivable, accounts payable, bonding, and equipment and material purchases. She also handles the assignment of employees and equipment to the jobsites. She stated that when she worked for M. Jorrey Trucking from April 1976 to May 1977, that she was “out in the field every day” (Hearing Testimony of Mary Jorrey). However, her resume lists her titles at M. Jorrey as Vice President and Treasurer, and lists no experience in the field. Her resume also reflects that she was a “housewife and mother” between 1985 and 2003, and lists no experience in concrete, paving and excavating. (DED Exhibit 11). Ms. Jorrey testified that she is solely responsible for all day-to-day operational decisions for the business. She assigns the employees and equipment to each job site, and she visits the job sites once or twice per week. She does not operate the equipment

and machinery. (Hearing Testimony of Mary Jorrey). Christopher Jorrey testified that Mary Jorrey is “the boss” and the “end all, say all, for all decisions” of the business. (Hearing Testimony of Christopher Jorrey).

The application and the testimony of Ms. Jorrey demonstrates that Ms. Jorrey handles the administrative functions of the business, but she does not make operational decisions on a day-to-day basis with regard to the critical functions of the business, which are site construction excavation, utility installation, concrete foundations, and trucking-loose materials and topsoil (DED Exhibit 1; Hearing Testimony of Mary Jorrey).

Based on the foregoing, I find that the Division’s determination to deny Jorrey Excavating’s application for recertification under 5 NYCRR §§144.2(c)(1) and 144.2(c)(2) was based on substantial evidence.

CONCLUSION

Jorrey Excavating met 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 found at 5 NYCRR §144.2(b)(3), was not based on substantial evidence. Jorrey Excavating 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 found 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 modify the Division’s determination to deny Jorrey Excavating’s application for recertification as a woman-owned business enterprise, and as modified, affirm the determination.

In the Matter of Jorrey Excavating, Inc.
DED File ID No. 50604
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Form	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	2021 Federal Tax Returns of Jorrey Excavating	Y	Y
DED 6	2022 Federal Tax Returns of Jorrey Excavating	Y	Y
DED 7	2021 Federal Tax Returns of Mary Jorrey	Y	Y
DED 8	2022 Federal Tax Returns of Mary Jorrey	Y	Y
DED 9	2021 Jorrey Excavating W-2s	Y	Y
DED 10	2022 Jorrey Excavating W-2s	Y	Y
DED 11	Resume of Mary Jorrey	Y	Y
DED 12	Key Employee Certifications	Y	Y
DED 13	Web Captures of H.O. Penn Testimonial re: Jorrey Excavating	Y	Y