

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

In the Matter

- of -

**the Application of Jupiter Environmental Services, Inc.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 45698

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
May 28, 2024

This matter considers the appeal by Jupiter Environmental Services, Inc., (“Jupiter” 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) former 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 18, 2016, Annabel Pierce, as President/CEO/CFO, applied on behalf of Jupiter for recertification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On January 3, 2020, the Division denied the application on the grounds that: (DED Exhibit 2)
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former § 144.2(a)(1); and
 - (b) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR former § 144.2(b)(1)(i); and
 - (c) Minority group members or women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former § 144.2(b)(1)(ii); and

(d) The business enterprise has failed to demonstrate that the ownership and control by the minority group member or woman is real, substantial and continuing and goes beyond the pro forma ownership of business reflected in the ownership documents, as required under 5 NYCRR former § 144.2(b)(1¹); and

(e) Jupiter is not an independent business enterprise, as required under 5 NYCRR former §§ 144.2(a)(2) and 144.2(c)(2).

3. Jupiter submitted a request for a hearing by letter dated January 24, 2020. (APP Exhibit A).
4. On July 13, 2023, a Notice of Hearing was sent to all parties. (TRIBUNAL Exhibit I).
5. On November 13, 2023, a hearing was held before Administrative Law Judge (“ALJ”) John Scott and concluded.
6. The Applicant and the Division both submitted post hearing briefs dated February 13, 2024 and February 14, 2024, respectively.
7. On May 6, 2024, this matter was re-assigned to ALJ Theresa Wells.

FINDINGS OF FACT

8. Jupiter is a business providing asbestos abatement services. Jupiter is based in New Jersey with additional business locations in Albany and Rochester, New York. (DED Exhibit 1).
9. Annabel Pierce is the President/CEO/CFO of Jupiter and has a 100% ownership interest. (DED Exhibit 1).

¹ 5 NYCRR former §144.2(c)(2) addresses pro forma ownership. 5 NYCRR former §144.2(b)(1) states: The decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise.

10. Jupiter was incorporated in 2000 by Lijiljana Novlovic and Pane Repic. On June 29, 2004, Ms. Pierce received a 51% ownership interest from Ms. Novlovic for \$[REDACTED]. On January 1, 2007, Ms. Pierce received the remaining 49% ownership interest from Pane Repic, Ms. Pierce's husband, for \$[REDACTED]. (DED Exhibits 9 and 28; Hearing Testimony of Ms. Pierce, Tr. pg 64, Hearing Testimony of Ms. Brennan, Tr. pg. 160).
11. On August 17, 2004, Ms. Pierce paid \$[REDACTED] to Jupiter by check. On April 7, 2005, Ms. Pierce paid \$[REDACTED] to Jupiter by check. In a prior application, the checks were offered by Jupiter as evidence of Ms. Pierce's capital contribution. (DED Exhibit 28; APP Exhibit A).
12. Ms. Pierce's duties and responsibilities as President/CEO/CFO include managing all corporate activity, operations management, profit and loss status, budgeting, estimating, contract review and negotiation, client interface, corporate quality control and safety program oversight. She is also responsible for purchasing, resource management, employee hiring and oversight, risk evaluation, regulatory compliance, scheduling, and job progress monitoring. (DED Exhibit 6).
13. Ms. Pierce does not have an asbestos abatement license or certification. She is named as the authorized representative on Jupiter's business asbestos removal license. (DED Exhibits 1, 4, 6, and 22; Hearing Testimony of Ms. Pierce, Tr. pgs. 58, 61-62).
14. Ms. Pierce started with Jupiter in 2001 as a project manager and was responsible for overall management of field-based work, including setting up project sites, hiring local personnel, establishing accounts, interfacing with clients and was responsible for field change orders and contract modifications. In 2003, Ms. Pierce became Jupiter's Director of Operations and was responsible for the management of personnel, equipment and project oversight on a variety of remediation and demolition projects. She also developed operations programs

for the company, handled major equipment purchases, and recruited/hired personnel. Her additional responsibilities included estimating, contract review, client negotiation, and billing. (DED Exhibit 6; Hearing Testimony of Ms. Pierce, Tr. pgs. 55-61).

15. Andrew Angel has been a Supervisor for Jupiter since 2013. His duties and responsibilities include overseeing asbestos abatement projects, and making sure all projects are done properly in accordance with State and Federal regulations. Mr. Angel has a New Jersey Department of Labor and Workforce Development Asbestos Control and Licensing supervisor license and an asbestos supervisor certificate from the State of New York Department of Labor. (DED Exhibits 5, 7, and 17).

16. Guillermo Angel is an asbestos abatement handler and the supervisor of Juniper's employees since 2000. He has worked as an asbestos abatement worker since 1986. He has completed a 40-hour hazardous materials handling training and a 40-hour asbestos abatement supervisor training. He has an asbestos supervisor license from the State of New Jersey Department of Labor and Workforce Development Asbestos Control and Licensing and an asbestos supervisor certificate from the State of New York Department of Labor. (DED Exhibits 8, 15 and 18).

17. Juan Betances has an asbestos handler and supervisor certificate from the State of New Jersey Department of Labor and Workforce Development Asbestos Control and Licensing and has an asbestos supervisor certificate from the State of New York Department of Labor. He has an OSHA 10 Hour Course certificate. (DED Exhibits 16, 19, and 20).

18. Currently, Pane Repic, the prior owner, does not receive a salary from Jupiter. He has experience in estimating and supervising field operations at job sites and reviewing testing logbooks. Mr. Repic provides unpaid consulting services to Ms. Pierce regarding

contracting procurement, bidding, and other operational matters, has been delegated signatory responsibilities, and has spoken about Jupiter's operations at a planning board meeting. (DED Exhibits 1, 9, 12, and 28; Hearing Testimony of Ms. Pierce, Tr. pgs. 113-119).

19. Pane Repic owns additional businesses including Highpoint Construction Services, Inc., ("Highpoint") a general construction service company, and Repic Realty. Mr. Repic is the only employee at Highpoint. In 2018, he received \$[REDACTED] in wages from Highpoint, and a K1 income for \$[REDACTED]. (DED Exhibits 4, 9; and 24; Tr. pgs. 130-138).
20. OLI, LLC is a family trust that was created by the Applicant and Pane Repic for the benefit of their children. The children are the owners of the trust, and Pane Repic is the primary member/holder. OLI, LLC does not have any personnel. (DED Exhibits 4 and 26; Hearing Testimony of Ms. Pierce, Tr. Pgs. 134-137).
21. Jupiter leases space from OLI, LLC, located at 323 Changebridge Road, Suite 100, Pine Brook, New Jersey. The lease is for a five-year period, with a cost of \$[REDACTED] monthly to OLI, LLC for 1,850 sq. ft. of office space and 5,000 square feet of warehouse/yard space. On November 15, 2014, Ms. Pierce signed the lease agreement on behalf of Jupiter and Pane Repic signed on behalf of OLI, LLC. (DED Exhibits 4 and 26; Tr. pgs. 40, 134-137).
22. Highpoint also leases space at the 323 Changebridge Road location from OLI, LLC. (DED Exhibit 4; Tr. pgs. 40 and 138).
23. Jupiter also leases space at 17 Warehouse Row in Albany, New York 12205 from Repic Realty. (DED Exhibit 28; Tr. pg. 138).

APPLICABLE LAW

5 NYCRR former §§ 144.2(a)(1) and (a)(2) state in relevant part as follows:

Ownership. For the purposes of determining whether an applicant should be granted or denied minority-or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

- (1) The contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise.
- (2) The business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities.

5 NYCRR former § 144.2(b)(1), (b)(1)(i), and (b)(1)(ii) state in relevant part as follows:

Control. Determinations as to whether minority group members or women control the business enterprise will be made according to the following criteria:

- (1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:
 - (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
 - (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

5 NYCRR former § 144.2(c)(2) states in relevant part as follows:

Additional requirements. An eligible minority group member or woman applicant must be an independent business enterprise. The ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

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 Jupiter 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

Annabel Pierce appeared and testified at the hearing on behalf of Jupiter. Jupiter did not offer any additional exhibits to be admitted into evidence.

Dennie Byam, Esq., Appeals Counsel, appeared at the hearing on behalf of the Division. Amanda Brennan, MWBE Project Director, testified on behalf of the Division. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1-12, and 14-28.

I. Prior WBE Certification

Ms. Pierce testified that Jupiter has been certified as a WBE since 2010. In the 2016 application, and in the follow-up interview, and at the hearing, Ms. Pierce consistently stated that she relied heavily on her prior certifications, and previously submitted applications and supporting documentation, and the outcome of a prior appeal, *In the Matter of the Application for Certification of Jupiter Environmental Services, Inc. v. New York State Department of Economic Development*, Recommended Order dated January 11, 2010, Final Order 10-09 dated February 11, 2010, to support her 2016 application for recertification. During the application process and appeal, Ms. Pierce stated that any of the Division's concerns regarding Jupiter's eligibility have been previously determined and resolved by the Division. (DED Exhibits 1, 3, 9 and 10; APP Exhibit A; Hearing Testimony of Ms. Pierce, Tr. pgs. 33-34).

Ms. Brennan testified that the Division is not bound to recertify a WBE if its prior determinations were made in error and each certification application must meet all of the eligibility criteria. Ms. Brennan testified that based on her review of the 2016 application, and the limited documentation submitted by applicant, the Division correctly determined that applicant was not eligible for re-certification. (DED Exhibits 1, 2 4, 11, 28; Hearing Testimony of Ms. Brennan, Tr. pgs. 145-152).

The Division is correct that it is not obligated to certify Jupiter 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)).

Jupiter had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted its August 18, 2016, application and supporting materials, and Jupiter cannot rely on the past determinations of the Division.

II. Ownership

The Division denied Jupiter's application for recertification as a WBE on the basis that the contributions of the woman owner were not proportionate to the equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR former §144.2(a)(1). The Division interprets the regulation to require an applicant to demonstrate that the woman-owner's contribution came from assets belonging solely to the woman-owner and the failure to satisfy this burden is proof that the denial was supported by substantial evidence. (5 NYCRR former §144.2(a)(1)); See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017, Final Order 17-28 dated May 2, 2017; *Matter of Hertel Steel Inc.*, Recommended Order dated February 10, 2017, Final Order 17-12 dated March 10, 2017).

As part of their application review, the Division "looks to whether the contribution came from funds personally held by the woman owner" and will routinely deny certification where the source of the capital contribution is marital property or from a joint bank account. (See *Matter of MLJ Painting Corp.*, Recommended Order dated May 2, 2019, Final Order 19-09 dated May 6, 2019). The burden of proving that the capital contribution was made, the source of the funds, and that the contribution was proportionate to their equity interest is on the applicant. (See *Matter of A.A.C. Contracting, Inc. v New York State of New York Department of Economic Development*, Recommended Order dated September 23, 2019, Final Order 19-23 dated October 22, 2019; see also *Matter of Marinelli Construction Corp. v. State of New York*, 200 A.D.2d 294, 297 (1994)).

It is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution.” (See *Matter of Scherzi Systems*, Recommended Order dated July 25, 2019; Final Order 19-16 dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021)).

For evidence of a capital contribution, the Division interprets the regulation requirement at 5 NYCRR former §144.2(a)(1) to include money, property, equipment or expertise conferred upon the business without consideration. The Division also interprets the regulation to mean that compensated work would not be consistent with the plain meaning of the term “contribution.” (See *Matter of MS Analytical, LLC*, Recommended Order dated August 6, 2018, Final Order 18-47 dated January 30, 2019; *Matter of Coverco*, Recommended Order dated January 23, 2017, Final Order 17-06 dated January 30, 2017). 5 NYCRR former §144.2(b)(1)(i) distinguishes experience from expertise. While managerial experience may be obtained from prior work experience, the capital contributions of expertise must be given to the business without compensation. (See *Matter of MLJ Painting, Corp.*, supra). The Division interprets the regulations to state that simply working for the business enterprise is not a contribution of expertise. (See *Matter of Hertel*, supra).

The record before the Division included evidence that in 2004, Ms. Pierce received 51% ownership in Jupiter for \$[REDACTED]. In 2007, she received the remaining 49% ownership for \$[REDACTED]. In her appeal, and at the hearing, Ms. Pierce stated, in addition to the nominal exchange, she made additional capital contributions to the business. A prior application’s record included copies of two cancelled checks, dated after the initial exchange in 2004, as evidence of these additional contributions. The first check was for \$[REDACTED] drawn from Fleet Bank dated August 17, 2004, and a second check for \$[REDACTED] drawn from Bank of America dated April 7, 2005, both were made payable to Jupiter. Ms. Pierce is named as the remitter of the checks, and as the remitter, she

testified that she believed she was the source of the funds. She testified that the checks were drawn from her personal account. Documentation showing proof of ownership of the bank accounts was not included with the application. (DED Exhibits 3, 4, and 28; APP Exhibit A; Hearing Testimony of Ms. Pierce, Tr. pgs. 30-31, 92-94).

Ms. Pierce testified that although these payments were made to the business, and not paid directly to Lijiljana Novlovic, the cancelled checks provide substantial evidence the contributions were made. Ms. Pierce contended that she also made a professional contribution of her experience and expertise in the field. She testified that her professional background experience before her ownership in Jupiter is evidence to support that she made capital contributions of experience and expertise to Jupiter. (DED Exhibits 3 and 6; APP Exhibit A; Hearing Testimony of Ms. Pierce, Tr. pgs. 30, 33, 92-94, 197).

Ms. Brennan testified that the regulations require that the capital contribution needed to be in proportion to the equity interest the Applicant received, and that she compared the value paid (i.e., \$████) versus the value of the business in 2004. A review of the 2004 business tax returns showed the business was already an established company, was engaged in work projects, had a clientele, and assets. The 2004 income tax returns showed that Jupiter had \$████ in assets and had substantial retained earnings. Based on the Applicant's own assertions that she grew the business between 2004 and 2007, Ms. Brennan believed that the value of the business would be even greater in 2007, when Ms. Pierce purchased the remaining 49% interest in the business for \$████ Ms. Brennan testified that the Division looks at the transaction or exchange between the person who is purchasing the business and the person the applicant is receiving the interest from for evidence of capital contributions. In this case, the record showed Ms. Pierce paid \$████ for each of these transactions, and the Division determined these nominal exchanges made in 2004,

and then in 2007, were not in proportion to the equity interest Ms. Pierce received. (DED Exhibits 1, 4, and 28; Hearing Testimony of Ms. Brennan, Tr. pgs. 157-164).

Ms. Brennan additionally testified that she could not substantiate or reconcile that the two cancelled checks included in the prior application were capital contributions. The two checks were not made contemporaneously with the exchange of ownership between Ms. Novlovic and Ms. Pierce, and the checks did not clearly identify the source of the funds. The Division could not determine whether the funds were from a solely owned bank account or from a joint bank account, and a review of Jupiter's 2004 income tax returns do not reflect receipt of \$[REDACTED] as paid-in capital to verify the payments were received by Jupiter. The Division does not consider paid in capital to the business as a qualifying capital contribution because it is not a contribution proportionate to an exchange in the ownership interest between the parties. Ms. Brennan explained at the time of payment of \$[REDACTED], Ms. Novlovic no longer had ownership interest in the business. Ms. Pierce also did not clearly identify, explain or quantify how her experience or expertise in the industry should be considered part of her capital contribution. Ms. Pierce's resume showed her work experience was related primarily to managing the executive administrative operations at Jupiter. Ms. Brennan testified that she audited the information provided in the Applicant's current application against information provided in prior certification applications and found inconsistencies between the applications about ownership changes at Jupiter and the existence of other family-owned businesses. Previous applications indicated there was a change in ownership, and that her husband owned several other businesses, whereas the currently application stated there were no changes. (DED Exhibits 1, 6, and 28; Hearing Testimony of Ms. Brennan, Tr. pgs. 157-169).

Ms. Pierce testified and clarified that she made clerical errors in the application and she misunderstood what information and documentation was required, and relied on information that was provided in prior applications. Regarding why Jupiter's tax returns did not show receipt of the \$ [REDACTED] Ms. Pierce stated Ms. Brennan never asked her for evidence of that information. (See *Scherzi*, supra); (DED Exhibit 1; APP Exhibit A; Hearing Testimony of Ms. Pierce, Tr. pgs. 36-40).

I find the Division's determination is supported by substantial evidence. The record before the Division did not identify the sources of the capital contributions attributable solely to Ms. Pierce. The Division's consistent position has been that the capital contribution must be made from the woman-owner's own assets and in proportion to her equity interest. Here, the two checks were not paid contemporaneously with the exchange in ownership interest. The application did not include documentation about the receipt or reconciliation of those funds, and the 2004 corporate tax returns did not show there was paid-in capital to the business. The record did not include any additional banking account or business record documentation as evidence of the contributions. The lack of documentation regarding the source of the cash contribution, and receipt by Jupiter, is proof the denial was supported by substantial evidence. The record also did not sufficiently identify, quantify and explain how Ms. Pierce's experience or expertise satisfies the regulation requirements, nor did it include evidence of a contribution of uncompensated expertise.

Based on the foregoing, the Division's determination to deny the application on the basis that the contributions of minority group members or women were not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR former 144.2(a)(1), is supported by substantial evidence.

III. Operation

The Division denied Jupiter's application for recertification as a WBE on the basis that the woman relied upon for certification has not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR §144.2(b)(1)(i). The Division also denied the application on the basis that the woman relied upon for certification has not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former § 144.2(b)(1)(ii). The Division also denied certification on the basis that the business enterprise has failed to demonstrate that the ownership and control by the minority group member or woman is real, substantial and continuing and goes beyond the pro forma ownership of business reflected in the ownership documents, as required under 5 NYCRR §144.2(b)(1).

The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019)). The Division interprets the regulations to require an applicant to demonstrate that the woman-owner, relied on for certification, have the working knowledge necessary to review or evaluate the work of more experienced employees. (See *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.) When evaluating a woman-owner's managerial experience, the Division reviews the applicant's subject matter expertise to supervise the work. (See *Matter of Otone Mechanical Construction*, supra). The Division consistently requires that women owners be

able to perform the core revenue generating functions of the business enterprise. (See *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; industry practice should also be considered. (*Matter of Era Steel Construction Corp. v Egan*, 145 AD2d 795 (1988)).

Ms. Pierce testified that she does not have a license or certification to handle or supervise the asbestos work, that she has never done the actual hands-on asbestos work, stating "that's not what I do," that she has visited job sites and knows how to enter and exit an asbestos removal site, that the hands-on work is delegated to other Jupiter employees, that she does not provide supervision or control field operations, and that she does not oversee performance of the work. She testified the work is delegated to other employees so she can manage and grow Jupiter's business. (DED Exhibits 1, 4 and 6; APP Exhibit A; Hearing Testimony of Ms. Pierce, Tr. pgs. 58, 60-62, 64, 89-90, 98, 164, 195, 205-206).

Ms. Pierce stated that she has oversight and final approval on all decisions for Jupiter, that she knows how the process is done, is familiar with the procedures and regulations required to perform the work, and that she created Jupiter's safety manual and operation procedure manuals for the business. She clarified at the hearing that her responsibilities as a project manager in 2001 included scheduling, speaking with owners, and review of projects to determine whether any changes were needed. She explained that in that capacity she was not on-site every day, and she did not supervise the handlers. She clarified because she is not licensed as an asbestos supervisor, she could not go into the site to supervise. (DED Exhibit 4; Hearing Testimony of Ms. Pierce, Tr. pgs. 58, 60-62, 64, 89-90, 98 and 195).

Regarding pro forma ownership, Ms. Pierce testified her husband, Pane Repic, does not hold a title at Jupiter, and no longer has an ownership interest in Jupiter, and does not receive a salary from the business. Ms. Pierce testified that Mr. Repic does help her out “occasionally” with the business and she has delegated clerical responsibilities to him, such as filling out forms and notifications, and that Mr. Repic will review proposals from time to time and he will help her out when she is “in a bind”. Ms. Pierce testified that she does take her husband’s input and seeks his knowledge from his previous work experience in the industry, and that she learned a lot from Mr. Repic in the beginning. She clarified that Mr. Repic’s appearance at a planning board meeting, was on behalf of OLI, LLC, as the landlord, to get the necessary site permits for its tenant, Jupiter. (Hearing Testimony of Ms. Pierce, Tr. pgs. 78-80, 112-113, 116-120, 129, 136-137).

Ms. Brennan testified that the Division’s denial is supported by Ms. Pierce’s lack of an asbestos license or certification and a lack of experience or training as a handler of asbestos. Given the nature of the asbestos work, it is industry practice to having a license to perform the work. Ms. Pierce’s resume was evidence Applicant did not have prior education or specialized training, experience or expertise directly related to asbestos abatement, which is the core business function. The record did not show Ms. Pierce has the working knowledge necessary to review or evaluate the work of the more experienced employees, and all of Ms. Pierce’s responsibilities are, and have always been, administrative in nature and not industry specific. Ms. Brennan testified that the Division wants to ensure that the woman owner has the experience in the actual industry and be able to demonstrate that the woman owner could step in and do the actual physical work if necessary. (DED Exhibits 1, 2, 4, 6, and 28; Hearing Testimony of Ms. Brennan, Tr. pgs. 165-168).

Ms. Brennan testified that, in her interactions with Ms. Pierce, she was inconsistent and had difficulty answering direct questions about Jupiter's operations, and questions about Jupiter's relationships with Highpoint and OLC, LLC. When Ms. Brennan asked Ms. Pierce about Mr. Repic's involvement with Jupiter, Ms. Pierce referred to him as an unpaid consultant, but she delegated responsibilities to him. When asked about Mr. Repic's company Highpoint, Ms. Pierce stated that the business was "dormant," but when the Division reviewed Ms. Pierce and Mr. Repic's 2018 personal income tax returns, it showed Mr. Repic received income and distributions from Highpoint. Ms. Brennan found a news article describing Mr. Repic as the owner of Jupiter and referenced him making public statements at a zoning planning board meeting in 2011, four years after transfer of his ownership interest, regarding Jupiter's asbestos business operation, contamination concerns, cleaning vehicles and air testing. The Division found public documents online, called "Notification of Asbestos Abatement" forms, that were filed with the State of New Jersey and the State of New York by Jupiter. Mr. Repic signed the documents as Jupiter's general manager. Ms. Brennan testified that when she requested copies of these filed State of New Jersey forms, Ms. Pierce provided the same forms, but they were unsigned. The Division determined that given the lack of consideration in exchange for ownership, along with the consultant and signatory responsibilities, and Mr. Repic identifying himself as Jupiter's owner and the general manager, and Ms. Pierce's inability to answer direct questions about the business operations, along with the absence of additional documentation to support the application, suggested Ms. Pierce had pro forma ownership of the business. (DED Exhibits 1, 4, 12, 23, 24, 28; Hearing Testimony of Ms. Brennan, Tr. pgs. 164-175).

Ms. Pierce testified that she was asked for the filed copies of the notification of asbestos forms, which she differentiates from signed copies. Furthermore, the publicly disclosed asbestos

notifications forms were outside the time frame for the current certification. Ms. Pierce argues that it is reasonable for her to delegate the handling and supervision of asbestos abatement to others and consistent with industry practice. Ms. Pierce states that the Division's denial for certification is inconsistent with the findings in the *Matter of Scherzi Systems, LLC v. White*, supra, which she argues indicated that the Division may not deny an application solely on the grounds that the applicant failed to provide a particular piece of information where that information was not requested in the application or by the Division. (Hearing Testimony of Ms. Pierce, Tr. pgs. 116-120, 195-197).

I find the Division's denial regarding 5 NYCRR former §§ 144.2(b)(1), (b)(1)(i) and (b)(1)(ii), is supported by substantial evidence. The record does not support that Ms. Pierce is making the industry specific operational decisions for Jupiter. Ms. Pierce does not have a license or certification to handle or supervise asbestos work. Ms. Pierce delegates the work and supervision of employees to other people, such as Andrew Angel, Guillermo Angel, and Juan Betances. Applicant delegates the work because the licensed employees have more substantive experience, and they exercise that experience in the field, and the Applicant does not have a license or training or experience to perform or supervise the work. The fact that Ms. Pierce could not speak to Jupiter's operations is evidence.

The present case is distinguishable from the *Matter of Scherzi Systems, LLC v. White*, supra, holding where the hearing testimony Ms. Scherzi gave did not constitute new evidence that was previously unavailable at the time of the application but served to explain and clarify technical terms and documentation Ms. Scherzi submitted as part of her application. In this case, the record did not include evidence detailing, explaining or quantifying Ms. Pierce's previous experience to show industry specific expertise or explain and clarify the documentation. Ms. Pierce testified that

she has never engaged in hands-on work experience in the field which is evidence Ms. Pierce is not able to perform the core revenue generating functions of the business enterprise and is not authorized to supervise the work of other employees. The record did not allow the Division to independently verify the information provided to support the certification. (DED Exhibits 1, 2, 4, 6, and 28; Hearing Tstimony of Ms. Pierce).

The record before the Division included evidence of Mr. Repic making various representations indicating he is Jupiter's owner or general manager. While Mr. Repic may be called an unpaid consultant or employee for Jupiter, Ms. Pierce testified that she delegates signatory responsibilities to him and relies on him to help her out "occasionally," and when she "is in a bind," and has him review proposals, and offer input and knowledge of the industry, which supports the Division's denial. The Division reasonably concluded that ownership was allocated at the time of purchase to obtain certification and the Division's determination that Ms. Pierce has pro forma ownership is reasonable and plausible. (DED Exhibits 1, 4, and 12; Hearing Testimony of Ms. Pierce, Tr. pgs. 116-120; Hearing Testimony of Ms. Brennan, Tr. pgs. 173-175).

Based on the foregoing, the Division's determination to deny the application on the basis that the minority group members or women relied upon for certification did not demonstrate adequate managerial experience or technical competence to operate the business enterprise, as required under 5 NYCRR §144.2(b)(1)(i), and on the basis that the minority group members or women relied upon for certification have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former § 144.2(b)(1)(ii) and on the basis that the business enterprise has failed to demonstrate that the ownership and control by the minority group member or woman is real, substantial and continuing and goes

beyond the pro forma ownership of business reflected in the ownership documents, as required under 5 NYCRR §144.2(b)(1), is supported by substantial evidence.

IV. Independence

The Division also denied the application for certification on the basis that Jupiter is not an independent business enterprise, as required under 5 NYCRR former §§ 144.2(a)(2) and 144.2(c)(2). The Division consistently denies certification where the business is inextricably linked to other family-owned businesses, and where another family business is a revenue source, and for which both companies shared office space, supplies, equipment, or staff. (See *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD2d 742 (3d Dept 2002); *Matter of Twist Management, LLC*, Recommended Order dated May 14, 2019, Final Order 19-25 dated October 9, 2019; See also *Matter of KI Direct LLC*, Recommended Order dated June 25, 2018, Final Order 18-37 dated July 30, 2018). The Division will deny certification in circumstances where the owner spouse relied upon for certification handles the administrative aspects of the business, and the non-eligible spouse has the experience and expertise to perform the specialized work, and the business is considered a family-owned business. (See *Matter of Occupational Safety & Environmental Association Inc. v State of New York Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Division denied certification because the Applicant did not provide consistent information, and supplied limited documentation, to verify that Jupiter was an independent business enterprise. The record included evidence showing shared employees, key personnel or owners and shared space, which was contrary to information provided in the application. Jupiter leases space from OLI, LLC, the family trust, created by Applicant and Mr. Repic. Mr. Repic is the primary “holder” or “member” of the trust. Ms. Pierce testified that although Jupiter is OLI’s

tenant, Jupiter does not have any contracts or projects with OLI, LLC, and does not share employees or equipment with OLI, LLC. She testified she was never asked for additional information to explain or clarify OLI, LLC's operations. Jupiter pays rent to the family trust, controlled by Mr. Repic, for the benefit of Ms. Pierce's children. (DED Exhibit 26; Hearing Testimony of Ms. Pierce, Tr. pgs. 130-138).

Highpoint, owned by Mr. Repic, also leases office space from the trust in the same location. Mr. Repic acts as a consultant and a signatory for Jupiter, and Ms. Pierce relies on him to help her out "occasionally," "when she is in a bind," has him review proposals, and offer input and knowledge. While Mr. Repic may be an "unpaid consultant" or "unpaid employee," he is acting in the capacity as Jupiter personnel. When asked about Highpoint, Ms. Pierce testified that the company was "dormant." She testified that Highpoint is simply just another tenant in the building, and Jupiter and Highpoint do not have any contracts together, and do not share equipment or employees and Jupiter and Highpoint have different entrances at the building. Jupiter also leases space from Mr. Repic through Repic Realty for the Albany and Rochester locations. (DED Exhibits 1, 2, 4, 26, and 28; Hearing Testimony of Ms. Pierce, Tr. pgs. 78-80, 114, 117-120, 128-139).

I find the Division's denial based on 5 NYCRR former §§ 144.2(a)(2) and 144.2(c)(2) is supported by substantial evidence. The record before the Division lacked consistent information or documentation to support the assertion that these businesses have arms-length relationships. The entangled relationships between Jupiter and Mr. Repic's various businesses are consistent with family-owned businesses. These arrangements are evidence that the family-owned businesses are paying each other for their leased spaces. Ms. Pierce's reliance on Mr. Repic for his

working knowledge and ability to operate the business along with the shared spaces and personnel are tangible benefits to Jupiter and substantial evidence supporting the Division's denial.

Based on the foregoing, the Division's determination to deny the application on the basis that Jupiter is not an independent business enterprise, as required under 5 NYCRR former §§ 144.2(a)(2) and 144.2(c)(2) is supported by substantial evidence.

CONCLUSION

Jupiter 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 former §§ 144.2 (a)(1), (a)(2), (b)(1), (b)(1)(i), (b)(1)(ii), and (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 Jupiter's application for recertification as a woman-owned business enterprise.

In the Matter of Jupiter Environmental Services, Inc.
DED File ID No. 45698
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Letter dated January 24, 2020	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Appeal Letter dated January 24, 2020	Y	Y
DED 4	October 15, 2019 MWBE Site Visit ²	Y	Y
DED 5	Andrew Angel Asbestos License	Y	Y
DED 6	Annabel Pierce Resume	Y	Y
DED 7	Andrew Angel Resume	Y	Y
DED 8	Guillermo Angel Resume	Y	Y
DED 9	January 11, 2010 Jupiter Recommended Order	Y	Y
DED 10	February 11, 2010 Jupiter Final Order	Y	Y
DED 11	Certification Application Affidavit	Y	Y
DED 12	March 25, 2011 Montville, NJ Patch Article	Y	Y
DED 13	October 12, 2018 Times Union Article	Y	N
DED 14	Sandra Schork Asbestos License	Y	Y
DED 15	Guillermo Angel Asbestos License	Y	Y

² October 15, 2019 MWBE site visit was a telephone call between the MWBE analyst and the Applicant.

DED 16	Juan Betances Asbestos License	Y	Y
DED 17	Andrew Angel Asbestos Certificate	Y	Y
DED 18	Guillermo Angel Asbestos Certificate	Y	Y
DED 19	Juan Betances Asbestos Certificate	Y	Y
DED 20	Juan Betances OSHA Certificate	Y	Y
DED 21	2017 Jupiter Federal Tax Return	Y	Y
DED 22	May 23, 2016 Jupiter Asbestos License	Y	Y
DED 23	Asbestos Project Notification	Y	Y
DED 24	2018 Personal Tax Returns	Y	Y
DED 25	Dutchess County Bid Form	Y	Y
DED 26	OLI Commercial Lease Agreement	Y	Y
DED 27	NJ Motor Vehicle Commission Registration – 03/17	Y	Y
DED 28	Historical File: 2002-2010	Y	Y
Tribunal I	Notice of Hearing	Y	Y