

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

In the Matter

- of -

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

NYS DED File ID No. 59368

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 28, 2024

This matter considers the written appeal by Millennium Limited Contracting, Inc. (“Millennium” 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 May 27, 2021, Ms. Renee Williams-Lutz, as President, applied on behalf of Millennium for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On July 17, 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. Millennium timely filed a Request to Appeal on August 15, 2023 (APP Exhibit A).

4. A notice to proceed via written appeal was sent to Millennium on August 18, 2023 (DED Exhibit 4).
5. Millennium filed its written appeal by letter dated September 14, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Raymond Emmanuel, Associate Director, dated January 4, 2024, and a brief of Candace Williamson Esq., counsel for the Division, dated January 5, 2024.

FINDINGS OF FACT

7. Millennium provides carpentry services to its clients (DED Exhibit 1).
8. Ms. Renee Williams-Lutz is President and has a 100% ownership interest. (DED Exhibit 1).
9. The critical functions of Millennium include rendering services that range from the installation of drywall, wood and metal stud framing, to installing windows and doors, sidings, ramps, and roof trusses (DED Exhibit 1).
10. Ms. Williams-Lutz's responsibilities include making financial decisions, preparing bids, negotiating insurance and contracts, hiring and firing, purchasing equipment, serving as the signatory for the business, and managing payroll (DED Exhibit 8). She manages the accounts receivable and payable, insurance, negotiates contracts, organizes documents and business files, handles payroll taxes and invoices (DED Exhibit 9).
11. Mr. Eric Lutz and Mr. Craig Lutz are responsible for estimating and supervising field operations, respectively. They are both licensed, union contracted foreman (DED Exhibits 1 and 9).

12. In 2021, Ms. Williams-Lutz received \$ [REDACTED] in compensation, while Eric Lutz received \$ [REDACTED], Domingos Aranjó received \$ [REDACTED] and Jorge Querido received \$ [REDACTED] in compensation (DED Exhibit 4).

13. In 2022, Ms. Williams-Lutz received \$ [REDACTED] in compensation, while Eric Lutz received \$ [REDACTED], Jose Oliveira received \$ [REDACTED] and Jorge Querido received \$ [REDACTED] in compensation (DED Exhibit 5).

APPLICABLE LAW

5 NYCRR §144.2(b)(3) states in relevant part as follows:

Risks and Profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(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) 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.

- (2) 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 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 Millennium 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

Millennium was previously certified as a woman-owned business enterprise. The Division is not obligated to certify Millennium 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, Millennium had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the May 27, 2021, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

5 NYCRR §144.2(b)(3) requires that the 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. The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

In 2021, Ms. Williams-Lutz received \$ [REDACTED] in compensation, while Eric Lutz received \$ [REDACTED], Domingos Aranja received \$ [REDACTED] and Jorge Querido received \$ [REDACTED] in compensation (DED Exhibit 4). In 2022, Ms. Williams-Lutz received \$ [REDACTED] in compensation, while Eric Lutz received \$ [REDACTED], Jose Oliveira received \$ [REDACTED] and Jorge Querido received \$ [REDACTED] in compensation (DED Exhibit 5). Ms. Williams-Lutz did not share in the profits in proportion to her ownership interest.

On appeal, applicant states that she is required to hire union carpenters whose salary is set by industry standards and that is why some employees receive more in compensation than she does (APP Exhibit B). Applicant's argument that she draws a salary and does not get paid union wages does not substitute for the fact that applicant does not share in the risks and profits in proportion to her ownership interest. (APP Exhibit B).

The Division's determination to deny the application on the basis that Millennium failed to demonstrate that Ms. Williams-Lutz shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

III. Operation

5 NYCRR §144.2(c)(1) requires that the 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 *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (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 employees.

Ms. Williams-Lutz does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business' critical functions of performing carpentry services. She is not a licensed carpenter and does not have any technical training in the construction field. Ms. Williams-Lutz's responsibilities include making financial decisions, preparing bids, negotiating insurance and contracts, hiring and firing, purchasing equipment, serving as the signatory for the business, and managing payroll (DED Exhibit 8). She manages the accounts receivable and payable, insurance,

negotiates contracts, organizes documents and business files, handles payroll taxes and invoices (DED Exhibit 9). Her resume reflects that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 6).

Mr. Eric Lutz and Mr. Craig Lutz are responsible for estimating and supervising field operations, respectively. They are both licensed, union contracted foreman (DED Exhibits 1 and 9).

On appeal, applicant states that it is common practice for business owners to hire trained employees and that she has the competence to make critical business decisions without relying on others. She states her responsibilities as “preparing bids, obtaining contracts, communications, placing orders, negotiating, office management and fulfilling the description of the contracts with drywall, framing, acoustical ceiling, roof trusses, etc.” (APP Exhibit B). However, the core revenue-generating functions of the business are providing carpentry services, including installation of construction material (DED Exhibit 1). Ms. Williams-Lutz states that she visits job sites to determine the hours needed and the scope of the work in order to prepare bids (APP Exhibit B). However, applicant has not established that she has the training necessary to make decisions regarding the scope of the work to be performed by the employees.

5 NYCRR §144.2(c)(2) states that “... 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”.

The woman-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).

Millennium provides carpentry services including installation of drywall, framing, windows, railing, fencing, and siding (DED Exhibit 1). Ms. Williams-Lutz does not have experience in the business’ critical functions (DED Exhibits 6, 8 and 9). Mr. Eric Lutz and Mr. Craig Lutz handle the critical functions of the business and are primarily responsible for overseeing the day-to-day operations of the business. (DED Exhibits 1 and 9). Ms. Williams-Lutz manages the administrative and financial aspects of the business (DED Exhibits 6, 8 and 9).

On appeal, Ms. Williams-Lutz argues that she makes operational decisions including preparing bids and negotiating contracts (APP Exhibit B). However, these are not the core revenue-generating functions of the business. She does not allege that she performs any carpentry services or supervises field operations. She is dependent upon other employees who have carpentry licenses and the skills necessary to perform the carpentry services for Millennium’s clients.

The Division’s determination to deny the application on the basis that Millennium failed to demonstrate that Ms. Williams-Lutz possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

CONCLUSION

Millennium 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)(3), 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 affirm the Division's determination to deny Millennium's application for recertification as a woman-owned business enterprise.

In the Matter of Millennium Limited Contracting, Inc.
 DED File ID No. 59368
 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	Notice to Proceed Via Written Appeal	Y	Y
DED 4	2021 Millennium W-2's	Y	Y
DED 5	2022 Millennium W-2's	Y	Y
DED 6	Renee Williams-Lutz Resume	Y	Y
DED 7	2020 -2022 Individual Tax Returns	Y	Y
DED 8	Narrative Response to Application Q3	Y	Y
DED 9	Narrative Response to Application Q4	Y	Y
DED 10	Narrative Response to Application Q9	Y	Y
DED 11	Home Improvement License	Y	Y