

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

In the Matter


- of -

the Application of Prestige Stone & Pavers Corp.
for Recertification as a Minority and Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60968

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 19, 2024

This matter considers the appeal by Prestige Stone & Pavers Corp. (“Prestige” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a minority and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On March 10, 2023, Ms. Angela Fortich, as President, applied on behalf of Prestige for recertification as a minority and woman-owned business enterprise (“MWBE”). (DED Exhibit 1)
2. On July 24, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) 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
 - (b) 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 August 2, 2023, Prestige submitted a Request to Appeal via a Hearing. (DED Exhibit 3).
4. On April 4, 2024, a Notice of Hearing was sent to all parties scheduling the hearing for May 15, 2024. On May 10, 2024, an email was sent to all parties adjourning the hearing to August 13, 2024 (Tribunal Exhibit 1).

5. A hearing was held and concluded on August 13, 2024.

FINDINGS OF FACT

6. Prestige is engaged in the business of the installation of stone, decorative pavers, site work, masonry work, concrete grading, and drainage (DED Exhibit 1).
7. Ms. Angela Fortich is the President and 100% owner of Prestige (DED Exhibit 1).
8. Ms. Fortich's resume states that she is "Responsible for hiring, managing, directing, finalizing estimates, coordinating with field personnel through communication with company project managers and superintendents and site visits" (APP Exhibit A; DED Exhibit 4). A Narrative provided with the application describes her duties to include "Attend any kickoff, close out or important progress meetings related to any projects. Coordinate with project super which crew will mobilize to any given project to complete said work, Review all submitted time sheets and process payroll as well as all union benefit remittances. Approving which project leads will be pursued. Review Bids prior to submission to ensure accuracy in scope and pricing as well as ensure schedule availability to perform work in timely manner. Approve any invoices to be paid then cut and sign checks related to invoices. Negotiate contracts and sign once the agreement has come too [sic]. Hiring and firing of staff." (DED Exhibit 1).
9. Carl Monte's resume reflects that he is the Project Coordinator/Director. He is a Registered Landscape Architect. His duties include "Manage staff, material scheduling, project negotiation and progress, liaison with clients and other managers throughout project." (DED Exhibit 5).
10. Domingos Fernandes' resume states that he is the Site Superintendent and is "instrumental in field supervision of projects on site including field personnel. He personally addresses

all aspects of the project related to construction methods, staffing, equipment and materials.” (DED Exhibit 7).

11. Debjani Basu’s resume states that she is the Chief Estimator/Project Coordinator. “She is responsible to review drawings, perform quantity take-offs, estimate and meet bidding deadlines. She is responsible for required submittals, co-ordinate the purchasing and delivery of materials, send requisitions for payments for multiple projects. She pursues future work with new and existing clients.” (DED Exhibit 6).

APPLICABLE LAW

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 Prestige for recertification as a MWBE 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. Paul G. Ryan, Esq. of Welby, Brady & Greenblatt, LLP appeared at the hearing on behalf of Prestige. The following witnesses testified on behalf of Prestige: Angelica Fortich, President of Prestige; Carl Monte, Project Manager at Prestige; and George Matthews, Project Manager at Triumph Construction. Prestige offered APP Exhibits A, B, D, G, H and J, which were admitted into evidence.

Ms. Anequa Pond, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Colleen Barton, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 - 9.

I. Prior Certification

Prestige was previously certified as a minority and woman-owned business enterprise. The Division asserts that it is not bound to recertify a MWBE 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 Prestige 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, Prestige had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the March 10, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

II. 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 *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 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 AD 3d 1517 (4th Dept. 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-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. Fortich admitted that she does not physically perform any installation work. She has no training or experience in masonry. She stated, “I know the process, I don’t do it.” (Hearing Testimony of Angela Fortich). However, as she noted in the application, she is “Responsible for hiring, managing, directing, finalizing estimates, coordinating with field personnel through communication with company project managers and superintendents and site visits” (APP Exhibit A; DED Exhibit 4). A Narrative provided with the application describes her position as duties to include “Attend any kickoff, close out or important progress meetings related to any projects. Coordinate with project super which crew will mobilize to any given project to complete said work, Review all submitted time sheets and process payroll as well as all union benefit remittances. Approving which project leads will be pursued. Review Bids prior to submission to ensure accuracy in scope and pricing as well as ensure schedule availability to perform work in timely manner. Approve any invoices to be paid then cut and sign checks related to invoices. Negotiate

contracts and sign once the agreement has come too [sic]. Hiring and firing of staff.” (DED Exhibit 1).

Mr. George Matthews testified that he is the Executive Project Manager at Triumph Construction. He has personal experience dealing with Ms. Fortich on finalizing contracts, billing, field visits on a number of projects between Triumph Construction and Prestige (Hearing Testimony of George Matthews).

Mr. Carl Monte testified that he is the Project Manager/Project Director at Prestige. He has daily interaction with Ms. Fortich. He stated that Ms. Fortich handles all financial aspects of Prestige, reviews estimates, visits the work sites, and makes the ultimate decisions regarding the business. He testified that he oversees the office workers, regarding coordination of scheduling tasks, estimating, ordering materials, etc. (Hearing Testimony of Carl Monte).

Colleen Barton testified that Ms. Fortich does not have any industry specific expertise; her skills are related to general business or office management. The critical functions of the business are installation of stonework, sitework and masonry work, including sidewalk installation and paver installation. She stated that Ms. Fortich relies on union labor to do the work and is unable to self-perform the work. She stated that Ms. Fortich’s resume reflects that she is primarily responsible for the administrative and financial functions of the business, relying on other employees to perform the revenue generating functions of the business. She does not have the education, training, or experience to oversee the critical functions of the business. She testified that Ms. Fortich relies on and shares control of operational decisions with Carl Monte, the Project Manager, Domingos Fernandes, the Site Superintendent, and Debjani Basu, the Chief Estimator/Project Coordinator for field supervision. (Hearing Testimony of Colleen Barton).

Ms. Fortich testified that she makes all decisions and signs all contracts. She hires all personnel, manages all projects, does site visits at least once per week, and discusses the status of the projects with the foremen and project managers daily. (Hearing Testimony of Angela Fortich).

Ms. Fortich does not have the necessary training or expertise to perform the critical functions of the business. She does not have any industry construction experience and has never self-performed any of the critical functions of the business and would have to rely on the other employees who have the installation of stone and pavers, masonry work, concrete grading, and drainage experience to solve any problems. Carl Monte, as the Project Coordinator/Director, manages the staff. Domingos Fernandes, as the Site Superintendent, addresses all aspects of the project related to construction methods, staffing, equipment, and materials. Debjani Basu, as the Chief Estimator/Project Coordinator, reviews the drawings, provides estimates, and coordinates the purchase and delivery of materials. (DED Exhibits 1, 4, 5, 6, and 7).

The Division also found that the woman-owner did not make operational decisions on a day-to-day basis with respect to 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 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).

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 *In the Matter of Upstate Electrical, LLC v. New York State Department of*

Economic Development, 179 AD 3d 1343 (3rd Dept. 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 AD 3d 1517 (4th Dept. 2018).

. Colleen Barton testified that Angela Fortich’s resume and applicant’s submission listing her roles and responsibilities shows that she handles the administrative and financial functions of the business, including working on time sheets, payroll, approving leads, reviewing bids, hiring and firing staff, negotiating contracts, and working with key employees. Carl Monte, as the Project Coordinator/Director, manages the staff. Domingos Fernandes, as the Site Superintendent, addresses all aspects of the project related to construction methods, staffing, equipment, and materials. Debjani Basu, as the Chief Estimator/Project Coordinator, reviews the drawings, provides estimates, and coordinates the purchase and delivery of materials. She stated that Angela Fortich does not have the education, training or experience to supervise the workers or make decisions without relying on others (Hearing Testimony of Colleen Barton).

Ms. Fortich did not dispute that she does not have the education or experience in the installation of stonework, sitework, and masonry work. She stated that she can read and understand the designs, and that “I know the process, I don’t do it”. She testified that she makes all decisions and signs all contracts. She conducts site visits, and is briefed by the foremen and project managers. Her testimony revealed that she has extensive knowledge about the services the business provides to clients, the means by which the business obtains contracts or orders, and that she makes the operational decisions of the business on a day-to-day basis through her oversight of the foremen and project managers. (Hearing Testimony of Angela Fortich).

Ms. Fortich’s testimony together with the documents submitted reveals that she relies on Mr. Monte, Mr. Fernandes and Ms. Basu for her to ultimately make the operational decisions; and

that she lacks the training or experience to perform the work; and therefore she is unable to competently supervise field operations and make day-to-day operational decisions with respect to the critical functions of the business (Hearing Testimony of Angela Fortich; DED Exhibits 1, 4, 5, 6 and 7; APP Exhibit A).

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

CONCLUSION

Prestige did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a minority and woman-owned business enterprise with respect to the eligibility criteria 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 affirm the Division's determination to deny Prestige's application for recertification as a minority and woman-owned business enterprise.

In the Matter of Prestige Stone & Pavers Corp.
DED File ID No. 60968
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Resume of Angela Fortich	Y	Y
APP B	Certification from Port Authority of NYNJ	Y	Y
APP C	List of recently completed projects	N	N
APP D	Receipt from SWAC	Y	Y
APP E	Local 1 Union Letter	N	N
APP F	Port Authority continued eligibility letter	N	N
APP G	NYS certification letter 6/9/2018 WBE	Y	Y
APP H	NYS certification letter 6/9/2018 MBE	Y	Y
APP I	Local 1010 Union recommendation letter	N	N
APP J	OSHA 10 certification	Y	Y
APP K	OSHA 30 certification	N	N
APP L	NYC MWBE certification	N	N
APP M	Recommendation letter from NYC Parks Department	N	N
APP N	Recommendation letter from Hudson River Park Trust	N	N
APP O	Recommendation letter from JLJ IV Enterprises Inc.	N	N
APP P	Recommendation letter from NYS Parks, Recreation and Historical Preservation	N	N
APP Q	Recommendation letter from Arcadis	N	N
APP R	Recommendation letter from Prince R. Shah	N	N

APP 5	Record of site visits and meetings	N	N
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Letter	Y	Y
DED 4	Angelica Fortich Resume	Y	Y
DED 5	Carl Monte Resume	Y	Y
DED 6	Debjani Basu Resume	Y	Y
DED 7	Domingos Fernandes Resume	Y	Y
DED 8	Sunset Park Application and Certification for Payment	Y	Y
DED 9	Jerome Reservoir Application and Certification for Payment	Y	Y
Tribunal 1	Notice of Hearing and email adjourning hearing	Y	Y