

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

**In the Matter**

**- of -**

**the Application of Royal Diamond Construction Corporation  
for Recertification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 56567**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**October 18, 2023**

This matter considers the written appeal by Royal Diamond Construction Corporation (“RDCC” 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 March 9, 2017, Evelyn Whelehan, as President/CEO, applied on behalf of RDCC for recertification as a WBE (DED Exhibit 1).
2. On August 31, 2020, the Division denied the application on the following grounds:
  - (a) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1);
  - (b) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii); and
  - (c) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).
3. RDCC timely filed a notice of appeal with written submission on September 30, 2020 (APP Exhibit 1).

4. The Division filed an Affidavit of Raymond Emanuel, Director of Certification Operations, dated June 26, 2023, and a brief of Amy O'Connor, Esq., counsel for the Division, dated June 30, 2023.

### **FINDINGS OF FACT**

5. RDCC is a general contractor and self performs carpentry work, based in Cortlandt Manor, New York (DED Exhibit 1).
6. Ms. Evelyn Whelehan is the President/CEO of RDCC and has a 55% ownership interest. Mr. James Whelehan is the Vice-President and Carpenter and has a 45% ownership interest (DED Exhibit 1).
7. Ms. Whelehan's resume reflects that she has previous experience in bookkeeping, accounting, and administrative services for various companies prior to working at RDCC. She previously owned a construction bookkeeping firm that provided IT, bookkeeping and payroll services to other businesses (DED Exhibit 4). She stated that Mr. Whelehan is responsible for the carpentry estimating, and the other work is subcontracted out (DED Exhibit 5).
8. Mr. Whelehan is the Project Manager for RDCC. He estimates job costs, "oversees projects and ensures they are completed on time and within budget" and is responsible for liaising with subcontractors and suppliers, interpreting shop drawings and blueprints, safety procedures and code compliance. He has worked as a union carpenter and has over 30 years of experience in carpentry, construction, field supervision and project management (DED Exhibit 6).
9. Article II, Section 1 of the Bylaws states "the affairs and the business of the Corporation, except as otherwise provided in the Certificate of Incorporation, shall be managed by the

Board of Directors. Article II, Section 4 states that the “Board of Directors shall have the control and general management of the affairs and business of the Corporation unless otherwise provided” (DED Exhibit 7).

10. Ms. Whelehan and Mr. Whelehan are the two members of the Board of Directors (DED Exhibit 7).

11. The Bylaws provide that the President “shall be the chief executive officer of the Corporation and shall have general charge of the business, affairs, and property thereof, subject to direction of the Board of Directors (DED Exhibit 7).

### **APPLICABLE LAW**

5 NYCRR former § 144.2(b)(1) states in relevant part as follows:

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

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

Articles of incorporation, corporate bylaws... or other agreements must permit ...women who claim ownership of the business enterprise to make those decisions without restrictions.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division’s interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

Current 5 NYCRR § 144.2(c)(2) states as follows:

- (2) Operational decisions. 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...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 RDCC for recertification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination. (5 NYCRR 145.2(b)(1)) Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. (*See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021)).

### **DISCUSSION**

#### I. Prior Certification

The Division acknowledges that RDCC 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 RDCC 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, RDCC had the burden to demonstrate compliance with the eligibility criteria outlined at former 5 NYCRR §144.2 when it submitted the March 9, 2017, 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 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 (3<sup>rd</sup> Dept. 2020). 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...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4<sup>th</sup> Dept. 2018).

RDCC provides commercial and institutional building construction services. The core revenue generating functions of the business involve “construction services to commercial, not-for-profit, schools and industrial businesses... renovations, updates, building maintenance, additions, etc.” (DED Exhibits 1 and 3). Ms. Whelehan performs no construction or carpentry work herself, nor does she supervise on site any of the RDCC workers (DED Exhibit 4). Mr.

Whelehan, as project manager, is responsible for carpentry work and the estimating, hiring and firing, and supervising of field operations for general construction jobs (DED Exhibit 6).

The Division's finding that Ms. Whelehan does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

With regard to technical competence, where the 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 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 (3<sup>rd</sup> Dept. 2021).

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

Mr. Whelehan is the project manager on site working and supervising operations and is in charge of hiring and firing the employees who perform the core revenue generating functions of RDCC. He has over 30 years of prior experience as a project manager, foreman, and carpenter for other construction businesses (DED Exhibit 6). Ms. Whelehan has no such training or work history in the industry. Her resume reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 4).

Ms. Whelehan oversees the administrative portions of the business, while Mr. Whelehan performs the revenue generating operations of the business.

The Division's finding that Ms. Whelehan did not establish that she, as the woman-owner of RDCC had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

### III. Control

5 NYCRR former §144.2(b)(2) requires that the relevant business agreements must permit the woman-owner to make decisions without restrictions. In determining whether the applicant meets this requirement, the Division may consider the company's bylaws. See *Matter of S.C. Spencer Electric, Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 21, 2022. In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (1995), unrestricted control was not established where the corporate structure did not prevent the woman-owner from making operational decisions, however, the corporate bylaws provided that the woman-owner's husband, as President and CEO, had sole management authority.

As stated above, Ms. Whelehan is the President/CEO and Mr. Whelehan is the Vice-President of RDCC (DED Exhibit 1). They are the two members of the Board of Directors (DED Exhibit 7). The corporate bylaws state that the firm's President "shall be the chief executive officer of the Corporation and "shall have general charge of the business, affairs and property thereof, subject to direction of the Board of Directors" (DED Exhibit 7). Article II, Section 1 of the Bylaws states "the affairs and the business of the Corporation, except as otherwise provided in the Certificate of Incorporation, shall be managed by the Board of Directors. Article II, Section 4 states that the "Board of Directors shall have the control and general management of the affairs and



business of the Corporation unless otherwise provided” (DED Exhibit 7). Ms. Whelehan, as one of the two Board members, is not permitted to make decisions without restrictions.

The Division’s finding that the relevant business agreements do not permit Ms. Whelehan to make decisions without restrictions, as required by 5 NYCRR former § 144.2(b)(2), is supported by substantial evidence.

### **CONCLUSION**

RDCC did not meet its burden to demonstrate that the Division’s determination to deny its application for recertification as a WBE with respect to the eligibility criteria under 5 NYCRR former §§144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(2) was not based on substantial evidence.

### **RECOMMENDATION**

The Division’s determination to deny RDCC’s application for recertification as a WBE should be affirmed.

In the Matter of Royal Diamond Construction Corporation

NYS DED File No 56567

Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Division's denial letter	Y	Y
DED 3	Narrative – Individuals Responsible for Managerial Operations	Y	Y
DED 4	Resume of Evelyn Whelehan	Y	Y
DED 5	Audio file of 6/20/20 Interview of Evelyn Whelehan	Y	Y
DED 6	Resume of James Whelehan	Y	Y
DED 7	Meeting Minutes and Bylaws	Y	Y
APP 1	Applicant's Notice of Appeal with Written Submission	Y	Y