

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

**In the Matter**

**- of -**

**the Application of Shute's TJS Excavation, Inc. dba Shute's Rent Me Dumpsters  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 72416**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**July 8, 2025**

This matter considers the written appeal by Shute’s TJS Excavation, Inc. dba Shute's Rent Me Dumpsters (“Shute’s Excavation” 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 woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On May 17, 2024, Ms. Joelle Shute, as President, applied on behalf of Shute’s Excavation for certification as woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On November 20, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification must have demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
  - (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. Shute's Excavation filed a Request to Appeal on December 17, 2024. (DED Exhibit 3)
4. A Notice to Proceed via Written Appeal was sent to Shute's Excavation on December 26, 2024. (DED Exhibit 4)
5. Shute's Excavation filed its written appeal by letter dated January 17, 2025, with attachment, by its attorney, Jason Centolella, Esq. of Centolella Law, P.C. (APP Exhibit A)
6. The Division filed an Affirmation of Matthew LeFebvre, Associate Certification Director, dated May \_\_, 2025, and a brief of Candace Williamson Esq., counsel for the Division, dated May 19, 2025.

#### **FINDINGS OF FACT**

7. Shute's Excavation is a "full service site work company providing excavation services, roll off dumpster rental, waste removal services, demolition, debris removal and scrap hauling." Its primary North American Industry Classification System NAICS code is 238910: Site Preparation Contractors. (DED Exhibit 1)
8. Ms. Joelle Shute is the President and has a 51% ownership interest. Mr. Todd Shute is the COO and has a 19% ownership interest. Mr. Michael Porter is a Vice President and has a 15% ownership interest. Ms. Tracy Porter is a Vice President and has a 15% ownership interest. Ms. Shute is the only woman-owner relied upon for certification. (DED Exhibit 1)
9. Shute's Excavation was established by Mr. Shute in 2015. At that time, Mr. Shute owned 100% of the business. Mr. and Ms. Shute "made a joint capital contribution of \$█████ and transferred personal equipment and assets to commence operations in 2015. Joelle also contributed sweat equity in the form of business experience and office management skills." (DED Exhibits 1 and 5)

10. In 2020, Michael and Tracy Porter jointly invested \$ [REDACTED] into the business as “outside investment capital.” In 2021, Ms. Shute acquired 102 shares “in consideration for her expertise and experience and became the majority shareholder.” In 2022, Mr. and Ms. Porter jointly invested an additional \$ [REDACTED] and they each received a 15% ownership interest. (DED Exhibits 1, 5, 6 and 9)
11. Ms. Shute is responsible for financial decisions, negotiating bonding and insurance, hiring and firing, purchasing equipment and sales, managing and signing payroll, and negotiating contracts. Mr. Shute is responsible for supervising field operations, and shares responsibility with Ms. Shute for estimating, preparing bids, marketing and sales, and serving as signatory for business accounts. (DED Exhibit 1)
12. Ms. Shute has been with the business since 2015, where she was and still is “directly responsible for daily management of the business, dispatch of trucks, AR/AP, Human Resources, preparing proposals for clients, marketing and strategic planning of long-term company goals.” (DED Exhibit 14) She “oversees and manages the daily operations of the corporation including contractor and employee relations, financial management, resource allocation, project planning, accounts receivable and payable, sales and marketing, general management assists with customer development including negotiation and approval of contracts.” (DED Exhibit 10)
13. Mr. Shute has worked in the construction industry for over 30 years. As the Director of Field Operations, he “oversees the daily field operations of the corporation and manages the job sites. He also manages the fleet of trucks and equipment owned by the corporation and assists with customer development.” He has “reviewed project requirements to evaluate client time and budget constraints and plan workflows. Logged inventory to track

supply counts, organize equipment and calculate important materials. Conducted job sites and reviewed renovation plans to ascertain projects. Provided guidance and training to new team members as needed to meet performance goals. Dug ditches or trenches, backfilled excavations or compacted and leveled earth to grade specifications.” (DED Exhibits 10 and 15)

14. Ms. Shute does everything for the business, including accounts payable, accounts receivable, hiring and firing of employees, banking, contract negotiations, and “everyday things that run a company.” She chooses which jobs to bid, goes out on bidding jobs, works with the estimator, schedules the excavations, and makes sure materials are lined up. She has a meeting every morning to determine the scheduling of the crews. Mr. Shute “does the excavation part of the jobs and gets them under contract... he basically does the work.” Ms. Shute’s specific expertise is that she is a “people person” and has good rapport with her employees. (DED Exhibit 18)

### **APPLICABLE LAW**

5 NYCRR §144.2(b)(2) states as follows:

Capital Contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
  1. Money;
  2. Property;
  3. Equipment; or
  4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable

assessment of the fair market value of the expertise must be clearly documented.

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 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.

### **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 Shute's Excavation 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. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the woman-owner’s contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Shute’s Excavation was established by Mr. Shute in 2015. At that time, Mr. Shute owned 100% of the business. Mr. and Ms. Shute “made a joint capital contribution of \$█████ and

transferred personal equipment and assets to commence operations in 2015. Joelle also contributed sweat equity in the form of business experience and office management skills.” At the time of the claimed \$ [REDACTED] joint capital contribution and transfer of personal equipment and assets in 2015, Ms. Shute did not receive any ownership interest. (DED Exhibits 1 and 5)

In 2020, Michael. and Tracy Porter jointly invested \$ [REDACTED] into the business as “outside investment capital.” In 2021, Ms. Shute acquired 102 shares “in consideration for her expertise and experience and became the majority shareholder.” In 2022, Mr. and Ms. Porter jointly invested an additional \$ [REDACTED] and they each received a 15% ownership interest. (DED Exhibits 1, 5, 6 and 9)

On appeal, applicant argues that Ms. Shute made a capital contribution of her expertise. “Ms. Shute’s business acumen and years of experience as an entrepreneur were, and continue to be, invaluable to the business enterprise. Without the knowledge and expertise of Ms. Shute, the business enterprise would have failed.” (APP Exhibit A) However, applicant makes no attempt to quantify the value of the alleged expertise, and there is no claim that Ms. Shute was not paid for services rendered to the business.

5 NYCRR §144.2(b)(2)(i) states that “Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (4) Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.” Where applicant provided no valuation of the owner’s expertise, the Division was not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016.

There is no documentation to show the expertise was uncompensated, specialized, and directly applicable to one or more critical aspects of the operation of the business, and no reasonable assessment of fair market value of the expertise. 5 NYCRR §144.2(b)(2)(i)(4)

On appeal, applicant argues that the joint contributions made by Mr. and Ms. Shute and Mr. and Ms. Porter should be added together and the sum divided by two, and that sum should be considered as contributions “made by females to the Company.” (APP Exhibit A) However, both women are not relied upon for certification, only Ms. Shute. Also, as stated above, joint contributions do not satisfy the requirement that the woman-owner’s contribution came from assets belonging solely to the woman-owner. See *Matter of OTONE Mechanical Construction, Inc.*, Recommended Order dated April 25, 2017 (Final Order 17-28, dated May 8, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Division’s determination to deny the application on the basis that Shute’s Excavation failed to demonstrate that Ms. Shute made capital contributions to Shute’s Excavation in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

## II. 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. New York State Department. of Economic Development*, 2020 N.Y. Slip Op. 00340 (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. Shute is responsible for financial decisions, negotiating bonding and insurance, hiring and firing, purchasing equipment and sales, managing and signing payroll, and negotiating contracts. Mr. Shute is responsible for supervising field operations, and shares responsibility with Ms. Shute for estimating, preparing bids, marketing and sales, and serving as signatory for business accounts. (DED Exhibit 1)

During her interview, Ms. Shute stated that she does everything for the business, including accounts payable, accounts receivable, hiring and firing of employees, banking, contract negotiations, and “everyday things that run a company.” She chooses which jobs to bid, goes out on bidding jobs, works with the estimator, schedules the excavations, and makes sure materials are lined up. She has a meeting every morning to determine the scheduling of the crews. She stated that Mr. Shute “does the excavation part of the jobs and gets them under contract... he basically does the work. (DED Exhibit 18)

Applicant argued on appeal “Ms. Shute does have the experience and is well-versed in understanding the technical field issues that arise on each project, especially since she has final authority to approve project estimates and supply purchases, the responsibility for scheduling to ensure that the Company is completing its projects timely, the responsibility for ensuring each site has the correct equipment for a projects’ needs, and meeting staffing demands. Ms. Shute could not undertake or complete these obligations without understanding the work to be performed onsite.” (APP Exhibit A)

Ms. Shute has the necessary adequate, industry-specific competence to make critical business decisions without relying upon other persons. (DED Exhibits 1, 10, 14 and 18; APP Exhibit A)

The Division's determination to deny the application on the basis that Shute's Excavation failed to demonstrate that Ms. Shute possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), is not supported by substantial evidence.

5 NYCRR §144.2(c)(2) requires that the woman-owner 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." 5 NYCRR §144.2(c)(2)

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 A.D.3d 1517 (4<sup>th</sup> Dept. 2018).

Ms. Shute has been with the business since 2015, where she was and still is "directly responsible for daily management of the business, dispatch of trucks, AR/AP, Human Resources, preparing proposals for clients, marketing and strategic planning of long-term company goals." (DED Exhibit 14) She "oversees and manages the daily operations of the corporation including contractor and employee relations, financial management, resource allocation, project planning, accounts receivable and payable, sales and marketing, general management assists with customer development including negotiation and approval of contracts." (DED Exhibit 10)

Mr. Shute has worked in the construction industry for over 30 years. As the Director of Field Operations, he “oversees the daily field operations of the corporation and manages the job sites. He also manages the fleet of trucks and equipment owned by the corporation and assists with customer development.” He has “reviewed project requirements to evaluate client time and budget constraints and plan workflows. Logged inventory to track supply counts, organize equipment and calculate important materials. Conducted job sites and reviewed renovation plans to ascertain projects. Provided guidance and training to new team members as needed to meet performance goals. Dug ditches or trenches, backfilled excavations or compacted and leveled earth to grade specifications.” (DED Exhibits 10 and 15)

Applicant argued on appeal “Ms. Shute makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise. This is because the critical functions of the business are not limited to the provisions of the Division’s enumerated services above, they also include final authority to approve project estimates as well as supply purchases, application of the knowledge and understanding of the business to schedule projects, handling contract negotiations, hiring and firing authority, and fielding customer calls and questions, all of which are Ms. Shute’s authority as managing the day-to-day operations of the Company.” (APP Exhibit A)

However, in response to the Division’s request for information concerning the duties of the officers of the business, it was stated: “Todd Shute is the Chief Operating Officer of the corporation. In this role, Todd oversees the daily field operations of the corporation and manages the job sites. He also manages the fleet of trucks and equipment owned by the corporation and assists with customer development.” (DED Exhibit 10) Accordingly, Ms. Shute does not maintain independent operational control of the business enterprise. (Executive Law § 315 [15][a]).

The Division's determination to deny the application on the basis the Shute's Excavation failed to demonstrate that Ms. Shute makes 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**

Shute's Excavation met its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to eligibility criteria at 5 NYCRR §144.2(c)(1) was not based on substantial evidence. Shute's Excavation did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), and 144.2(c)(2), was not based on substantial evidence.

### **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny Shute's Excavation's application for certification as a woman-owned business enterprise, and as modified, affirm the determination.

In the Matter of Shute's TJS Excavation, Inc. dba Shute's Rent Me Dumpsters  
 DED File ID No. 72416  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed via Written Appeal	Y	Y
DED 5	Business Capitalization	Y	Y
DED 6	Stock Narrative	Y	Y
DED 7	Copy of Checks – Porters	Y	Y
DED 8	Narrative – Licenses	Y	Y
DED 9	Narrative – Stock Transfers	Y	Y
DED 10	Narrative – Q&A Response	Y	Y
DED 11	Black and McDonald Invoices	Y	Y
DED 12	Pack Rat Storage Invoices	Y	Y
DED 13	Lafayette Central School District Invoices	Y	Y
DED 14	Resume of Joelle Shute	Y	Y
DED 15	Resume of Todd Shute	Y	Y
DED 16	Resume of Michael Porter	Y	Y

DED 17	Resume of Tracy Porter	Y	Y
DED 18	Site Visit Interview and Transcript	Y	Y