

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

In the Matter

- of -

the Application of T.J. Clement Construction Co. Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 5990

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read "David A. Murad", is written over a horizontal line.

David A. Murad
Administrative Law Judge
April 17, 2025

This matter considers the written appeal by T.J. Clement Construction Co. Inc. (“T.J. Clement” 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 3, 2024, Ms. Pamela Clement as President, applied on behalf of T.J. Clement for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1)
2. On July 30, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification must demonstrate 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 must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4);
 - (c) 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);

(d) 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); and

(e) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).

3. T.J. Clement filed a Request to Appeal on August 19, 2024. (DED Exhibit 3)
4. A notice to proceed via written appeal was sent to T.J. Clement on August 20, 2024. (DED Exhibit 4)
5. T.J. Clement filed its written appeal by letter dated September 26, 2024, with attachments. (APP Exhibit A)
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated March 25, 2025, and a brief of Dennie Byam, Esq., counsel for the Division, dated March 31, 2025.
7. The Division withdrew its denial ground under 5 NYCRR §144.2(b)(2) in its March 31, 2025 brief.

FINDINGS OF FACT

8. T.J. Clement is engaged in the business of paving, excavating, site development, heavy hauling and equipment moving. (DED Exhibit 1)
9. Ms. Pamela Clement is the President and has a 55% ownership interest. Mr. Timothy Clement, the applicant's husband, is the Vice President and has a 45% ownership interest. (DED Exhibit 1)
10. The Board of Directors consists of Pamela Clement, Timothy Clement, and John Clement, the applicant's son. (DED Exhibits 9 and 20)

11. When questioned as to what types of decisions the Board of Directors make, Ms. Clement stated: “Whether or not to finance a machine. whether or not to trade in a machine, sell a machine, and which contracts we do and don't want.” (DED Exhibit 8)
12. Article II, Section 3 of the Bylaws states “The Board of Directors shall have control and management of the affairs and business of the Corporation.” Article II, Section 9 states “At any meeting of the Board of Directors, the presence of a majority of the Board shall be necessary to constitute a quorum for the transaction of business.” (DED Exhibit 13)
13. Article III, Section 4 of the Bylaws states “Any officer may be removed either with or without cause by the vote of a majority of the Board of Directors.” Article III, Section 7 states “The Officers shall receive such salary or compensation as may be fixed by the Board of Directors.” (DED Exhibit 13)
14. Article V, Section 1 of the Bylaws states “The Board of Directors may declare dividends payable out of the surplus of the Corporation, whenever in the exercise of their discretion they may deem this declaration advisable.” (DED Exhibit 13)
15. Pamela Clement’s resume reflects that she is responsible for project selection, estimates, and preparing financing with the company’s banks. She oversees accounting and daily operations by directing project scheduling, logistics, arranging field supervision, purchasing equipment, hiring subcontractors, and managing personnel matters. (DED Exhibit 11)
16. Timothy Clement’s resume reflects that he attended SUNY Canton ATC and participated in technical seminars focused on paving techniques, compaction, excavation, welding, and diesel mechanics. His resume states “I direct the field operation, supervise mechanical repairs, maintain equipment and participate in estimating projects.” (DED Exhibit 12)

17. Section 4.A of the application provides that Ms. Clement is solely responsible for financial decisions, preparing bids, negotiating bonding and insurance, negotiating contracts, and managing and signing payroll. She shares responsibilities with Mr. Clement for estimating, supervising field operations, marketing and sales, hiring and firing, purchasing equipment/sales, and as signatory on the business accounts. (DED Exhibit 1)
18. A Narrative submitted with the application states:
- “Pamela Clement is responsible for all finance matters including banking, loan applications, insurance, contract negotiations, bidding, tax filings, and any accountant related matters. She is also responsible for hiring and firing and all payroll issues.”
- “Timothy Clement oversees field operations as well as the topsoil screening operation. He road tests all drivers and oversees garage maintenance and repair operations.” (DED Exhibit 6)
19. During the interview, applicant stated that Mr. Clement “has always been a foreman on the job” and that “he'll work with the drivers on site if they need any guidance on anything.” Mr. Clement will also “drive a truck if we're short a driver.” (DED Exhibit 8)

APPLICABLE LAW

5 NYCRR §144.2(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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.

5 NYCRR §144.2(d)(1) states as follows:

Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

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 T.J. Clement for certification 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 T.J. Clement was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to certify 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 certification.

The Division is correct that it is not obligated to certify T.J. Clement 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, T.J. Clement had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the May 3, 2024, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest.

The Board of Directors consists of Pamela Clement, Timothy Clement, and John Clement. (DED Exhibit 20)

Article II, Section 3 of the Bylaws states “The Board of Directors shall have control and management of the affairs and business of the Corporation.” Article II, Section 9 states “At any meeting of the Board of Directors, the presence of a majority of the Board shall be necessary to constitute a quorum for the transaction of business.” (DED Exhibit 13)

Article III, Section 4 of the Bylaws states “Any officer may be removed either with or without cause by the vote of a majority of the Board of Directors.” Article III, Section 7 states “The Officers shall receive such salary or compensation as may be fixed by the Board of Directors.” (DED Exhibit 13)

Article V, Section 1 of the Bylaws states “The Board of Directors may declare dividends payable out of the surplus of the Corporation, whenever in the exercise of their discretion they may deem this declaration advisable.” (DED Exhibit 13)

Ms. Clement is encumbered in her ability to realize the benefits of ownership of T.J. Clement. She cannot make decisions on her own regarding compensation and dividends. She cannot remove officers on her own. She cannot control the business and affairs of the business on her own. (DED Exhibit 13)

On appeal, Ms. Clement states “my husband Timothy does not determine the amount or when dividends of our company are disbursed. This is strictly my determination.” (APP Exhibit A) However, the Bylaws are clear that the Board of Directors makes the determinations regarding

officer removal, officer compensation and dividends, and a majority of the Board is necessary to transact any business. When questioned as to what types of decisions the Board of Directors make, Ms. Clement stated: “Whether or not to finance a machine. whether or not to trade in a machine, sell a machine, and which contracts we do and don't want.” (DED Exhibits 8 and 13)

The Division’s determination to deny the application on the basis that T.J. Clement failed to demonstrate that Ms. Clement is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4) 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.

5 NYCRR §144.2(c)(2) states that “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”.

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).

Pamela Clement’s resume reflects that she is responsible for project selection, estimates, and preparing financing with the company’s banks. She oversees accounting and daily operations by directing project scheduling, logistics, arranging field supervision, purchasing equipment, hiring subcontractors, and managing personnel matters. (DED Exhibit 11)

Timothy Clement’s resume reflects that he attended SUNY Canton ATC and participated in technical seminars focused on paving techniques, compaction, excavation, welding, and diesel mechanics. His resume states “I direct the field operation, supervise mechanical repairs, maintain equipment and participate in estimating projects.” (DED Exhibit 12)

Section 4.A of the application provides that Ms. Clement is solely responsible for financial decisions, preparing bids, negotiating bonding and insurance, negotiating contracts, and managing and signing payroll. She shares responsibilities with Mr. Clement for estimating, supervising field operations, marketing and sales, hiring and firing, purchasing equipment/sales, and as signatory on the business accounts. (DED Exhibit 1)

A Narrative submitted with the application states:

“Pamela Clement is responsible for all finance matters including banking, loan applications, insurance, contract negotiations, bidding, tax filings and any accountant related matters. She is also responsible for hiring and firing and all payroll issues.”

“Timothy Clement oversees field operations as well as the topsoil screening operation. He road tests and oversees garage maintenance and repair operations.” (DED Exhibit 6)

Ms. Clement does not have any industry-specific expertise; her skills are related to general business or office management. She does not possess any education, licensing, technical training, or job experience relevant to T.J. Clement's critical functions of paving, excavating, site development, heavy hauling and equipment moving. She does not hold a CDL. Mr. Clement's education, training and direct work experience reflects that he has the competence to handle the critical functions of the business. He supervises the field operations, oversees garage maintenance and repair operations, and has a CDL. During the interview, applicant stated that Mr. Clement "has always been a foreman on the job" and that "he'll work with the drivers on site if they need any guidance on anything." Mr. Clement will also "drive a truck if we're short a driver." (DED Exhibits 1, 6, 8, 11 and 12)

On appeal, Ms. Clement did not address how her education, training, or experience gives her the necessary adequate, industry-specific competence to make critical business decisions without relying upon other persons or make operational decisions on a day-to-day basis with respect to the critical functions of the business. (APP Exhibit A)

The Division's determination to deny the application on the basis that T.J. Clement failed to demonstrate that Ms. Clement 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 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.

IV. Control

The Division also denied certification on the ground that Ms. Clement does not control the Board of Directors, as required under 5 NYCRR §144.2(d)(1).

The Board of Directors consists of Pamela Clement, Timothy Clement, and John Clement.
(DED Exhibit 20)

Article II, Section 3 of the Bylaws states “The Board of Directors shall have control and management of the affairs and business of the Corporation.” Article II, Section 9 states “At any meeting of the Board of Directors, the presence of a majority of the Board shall be necessary to constitute a quorum for the transaction of business.” (DED Exhibit 13)

Ms. Clement does not control the Board of Directors. The corporation cannot transact business without a majority of the Board present and voting together.

On appeal, Ms. Clement does not address how she purportedly controls the Board of Directors (APP Exhibit A)

The Division’s determination to deny the application on the basis that T.J. Clement failed to demonstrate that Ms. Clement controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

CONCLUSION

T.J. Clement 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)(4), 144.2(c)(1), 144.2(c)(2) and 144.2(d)(1) 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 T.J. Clement’s application for certification as a woman-owned business enterprise.

In the Matter of T.J. Clement Construction Co. Inc.
DED File ID No. 5990
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 | Applicant's Request to Appeal | Y | Y |
| DED 4 | Notice to Proceed Via Written Appeal | Y | Y |
| DED 5 | Certification Application Affidavit | Y | Y |
| DED 6 | June 11, 2024, Narrative Response for Question #8 | Y | Y |
| DED 7 | Stock Ledger and December 4, 1989, meeting minutes | Y | Y |
| DED 8 | July 12, 2024, video interview recording | Y | Y |
| DED 9 | July 26, 2024, Narrative Response for Question #2 | Y | Y |
| DED 10 | December 4, 1989, Annual Meeting Minutes | Y | Y |
| DED 11 | Pamela Clement Resume | Y | Y |
| DED 12 | Timothy Clement Resume | Y | Y |
| DED 13 | T. J. Clement's Bylaws | Y | Y |
| DED 14 | June 11, 2024, Narrative Response to Question #18 | Y | Y |
| DED 15 | June 11, 2024, Narrative Response to Question #16 | Y | Y |
| DED 16 | June 11, 2024, Narrative Response to Question #12 | Y | Y |

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|--------|---|---|---|
| DED 17 | Company History Narrative Response | Y | Y |
| DED 18 | May 28, 2022, Rivershore Development Contract Agreement | Y | Y |
| DED 19 | December 22, 2021, Canton Plant Subcontractor Agreement | Y | Y |
| DED 20 | Meeting Minutes with various dates | Y | Y |
| Ded 21 | Business Documents between T.J. Clement Construction Co., Inc. and Rycon Construction, Inc. | Y | Y |