

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12245**

**In the Matter**

**- of -**

**the Application of The Loren Group, Ltd.**  
**for Certification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 51616**

**RECOMMENDED ORDER**

**-by-**



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**Theresa Wells**  
**Administrative Law Judge**  
**May 9, 2024**

This matter considers the written appeal by The Loren Group, Ltd., (“Loren” 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 4, 2022, Bethanne Mashburn, as CEO, applied on behalf of Loren for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On June 22, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
  - (a) Minority group members or women relied upon for certification 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); and
  - (b) Minority group members or women relied upon for certification do not 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
  - (c) The business enterprise for which certification is sought does not operate independently, as required under 5 NYCRR §144.2(e).
3. Loren submitted its Request to Appeal by letter dated June 27, 2023. (APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent to the Applicant on July 26, 2023. (DED Exhibit 4).

5. Loren submitted its written appeal by undated letter. (APP Exhibit B).
6. The Division filed an Affidavit of Raymond Emanuel, Associate Director, dated February 23, 2024, and a brief of Candace C. Williamson, Esq., counsel for the Division, dated March 11, 2024.

### **FINDINGS OF FACT**

7. Loren is a business that sells custom fabricated steel for heavy highway, industrial and vertical construction, specifically, taper tubes, weights for railroad arms, baseplates and metal curb plates. (DED Exhibit 1).
8. Bethanne Mashburn is the CEO of Loren and has a 100% ownership interest. Loren was established in 1996 and was formerly owned by Loren Grober. Bethanne Mashburn purchased Loren on January 1, 2022. (DED Exhibit 1).
9. The critical functions of the business include manufacturing iron and steel pipe and tube from purchased steel and providing foundation pilings. (DED Exhibit 1).
10. Bethanne Mashburn received \$ [REDACTED] in compensation in 2022. The former owner, Loren Grober received \$ [REDACTED] in 1099-NEC compensation in 2022. Loren's project manager, Cory Grober received \$ [REDACTED] in wage compensation, and 1099-NEC additional income of \$ [REDACTED], in 2022. (DED Exhibits 5, 6 and 7; APP Exhibit B).
11. Bethanne Mashburn's duties and responsibilities, as CEO include making capital allocation decisions, setting and executing organizational strategy, negotiating contracts, overseeing the procurement, intake, storing, and staging of all raw materials used in the production cycle. She is also responsible for maintaining client relationships, and overseeing all aspects of the fabrication plant, and she tracks and evaluates the company's success and oversees the hiring and firing of Loren's employees. (DED Exhibit 8).

12. Loren Grober, the prior owner of Loren, stayed with the business for one year after Bethanne Mashburn's purchase, serving as a mentor. Ms. Grober's contract for mentoring services with the business ended on December 31, 2022. (DED Exhibits 1 and 8; APP Exhibit B).
13. The application states that Cory Grober is Loren's Sales Manager. An application narrative states that he is Loren's Project Manager. Cory Grober's duties and responsibilities include tracking products, monitoring production on-site daily, corresponding with staffing companies about employee labor requirements. He also provides production updates and production logs and arranges incoming and outgoing logistics. (DED Exhibits 1 and 8).
14. The application states that Kaelin Cobb is Loren's Financial Comptroller. An application narrative states Kaelin Cobb is Loren's Director. Her responsibilities include verifying the origin, condition, and metallurgic analysis of the materials acquired, arranging the recycling or sale of scrap products, overseeing bookkeeping, and tracking cash flow. She provides all financial record-keeping and reporting and assists with certification. (DED Exhibits 1 and 8).
15. The application states that Samuel Koss is Loren's Engineering Manager. Samuel Koss's responsibilities include analyzing Geo-technical soil reports for customers, recommending load capacities for tapered friction pilings, and he is involved in the sales and marketing for the business. (DED Exhibits 1 and 8).
16. Loren entered into a Lease Agreement on January 5, 2022 with Browning Enterprise who leases building space to Loren. As part of this Lease Agreement, Loren shall pay Browning Enterprise throughout the year, on a per fabricated part produced basis for total

amount of \$ [REDACTED] with any adjustments to be made annually on December 31. (DED Exhibit 9).

17. Loren and Browning Enterprise entered into a Labor Agreement on January 5, 2022, in which Browning Enterprise personnel perform labor for Loren for a period of ten years. Under the agreement Browning Enterprise is responsible for all expenses incurred while performing services for Loren, Browning Enterprise will perform the labor inside Loren's leased premises and Browning Enterprises will maintain all of Loren equipment in good working condition. Loren agrees to pay for labor on a per pound basis at the rate of [REDACTED] per pound of steel on outgoing weight. (DED Exhibit 10).

18. Loren is responsible for all project management and monitors production on-site daily. Loren determines and provides the production schedules. When Loren makes a request for labor from Browning Enterprise, Loren will let Browning Enterprises know what qualifications the laborers need for a specific project. (DED Exhibit 10).

### **APPLICABLE LAW**

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

Ownership. 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. In determining whether the profits of the business enterprise are shared proportionately with minority group members or women, the division may consider, for example and without limitation, means by which the proceeds of the business enterprise are conveyed to individuals or entities.

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

Operation. 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.

5 NYCRR § 144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

### **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 Loren 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. Ownership

The Division denied Loren's application for certification as a WBE on the basis that Loren failed to demonstrate that the party relied upon for certification shares 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).

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 (where woman owner intentionally received less compensation for the good of the company's finances); *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21 dated March 27, 2017.) In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3d Dept. 1995), the Court found that the Division's review of tax return statements provided substantial evidence to support the Division's consideration of whether a woman-owned business enterprise meets the eligibility criteria.

In the year she became Applicant's CEO and 100% owner, Ms. Mashburn received significantly less compensation than the former owner and another Loren employee. In 2022, Bethanne Mashburn received \$ [REDACTED] in W-2 wage compensation. That same year, the former owner/mentor Loren Grober received \$ [REDACTED] in 1099-NEC compensation. In 2022, Corey

Grober received \$ [REDACTED] in W2 wage compensation and \$ [REDACTED] in 1099-NEC income. (DED Exhibits 5, 6, and 7).

Similar to the *Matter of Quality Industries, Inc.*, supra, Ms. Mashburn concedes on appeal that she intentionally received less compensation than the other employees for the sake of the company's finances. Ms. Mashburn states she was "...trying to be prudent," and "didn't want to jeopardize the company's cashflow" in 2022. However, 5 NYCRR 144.2(b)(3) requires that the woman owner must share in both the risks and the profits in proportion to her ownership interest in the business. (DED Exhibits 5, 6, and 7; APP Exhibit B).

On appeal, Applicant states that as the owner of the business, she incurs the highest risk in the business. However, the standard is not whether the applicant has the most risk, rather it is whether the woman-owner enjoys the customary incidents of ownership and shares in both the risks and profits of the business in proportion to her ownership interest. Although Ms. Mashburn may have all of the risk, she was not compensated in proportion to her ownership interest in 2022. (5 NYCRR 144.2(b)(3); APP Exhibit 5).

On appeal, Ms. Mashburn provides information concerning 2023. However, only information concerning 2022 was before the division at the time of the denial determination and as such 2023 is not being considered. (5 NYCRR 145.2(b)(1)). (APP Exhibit B)

On appeal, Ms. Mashburn states that out of the \$ [REDACTED] that Ms. Grober received, only a portion, \$ [REDACTED], was actual compensation to Ms. Grober for her consulting fee, and the remainder was the balance paid for jobs completed before the sale of the business to Ms. Mashburn. However, although the details provide some clarification, the conclusion remains the same since Ms. Mashburn, as 100% owner, received less compensation in 2022 than the former owner and another employee. (See *Scherzi*, supra) (APP Exhibit B).



The Division's determination to deny the application on the basis that Loren failed to demonstrate that Ms. Mashburn 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.

## II. Operation

The Division also denied Loren's application for certification as a WBE on the basis that Loren failed to demonstrate that the party relied upon for certification makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required by 5 NYCRR §144.2 (c)(2). According to 5 NYCRR §144.2 (c)(2), the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders."

The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020)).

The critical functions of the business include manufacturing iron and steel pipe and tube from purchased steel and providing foundation pilings. A narrative included with the application states Ms. Mashburn's duties and responsibilities include capital allocation decisions, setting and executing organizational strategy, negotiating contracts, overseeing the procurement, intake, storing, and staging of all raw materials used in the production cycle, maintaining client relationships and overseeing all aspects of the fabrication plant. She also tracks and evaluates the

company's success and oversees the hiring and firing of Loren's employees. These are important functions of the business but are not the critical functions of the business. These responsibilities are more managerial in nature, and related to her role as a CEO and owner of the business, rather than related to the making of operational day-to-day decisions regarding the business's critical functions. (DED Exhibits 1 and 8).

Mr. Grober's responsibilities, as the sales manager/project manager, include tracking products, monitoring production on-site, corresponding with staffing companies about employee labor requirements, and arranging incoming and outgoing logistics. Kaelin Cobb is Loren's financial comptroller/director and verifies the origin, condition, and metallurgic analysis of the materials acquired, arranges the recycling or sale of scrap products, oversees bookkeeping, and tracks cash flow. Samuel Koss, as Engineering Manager, has responsibilities including analyzing Geo-technical soil reports for customers, recommending load capacities for tapered friction pilings, and is involved in the sales and marketing for the business. These three employees are responsible for making the day-to-day decisions pertaining to the critical functions of the business as they are on-site and performing the necessary analyses for the business. (DED Exhibit 8).

On appeal, Applicant states that she is the person responsible for the employees' schedules and responsible for their work. While Applicant states she is on-site at the fabrication site at least three times per week, and does travel to project sites during installation, Applicant concedes it is the other employees who are onsite, monitoring production and engaged with the manual laborers and clientele on a regular basis, and Ms. Mashburn does not engage in the manual labor involved in the business. It is Browning Enterprise who provides the manual labor and ensures that the work is compliant with business standards. While Applicant states she has some working knowledge working with a brake press and sub arc welder, these claims are not supported by the

record that was before the Division at the time of the determination and as such will not now be considered. (See *Scherzi*, supra); (APP Exhibit B)

The record before the Division at the time of its determination to deny the WBE application contains substantial evidence to support its finding that the party relied upon for certification does not 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).

### III. Independence

The Division also denied Loren's application for certification as a WBE on the basis that Loren failed to demonstrate that the business operates independently as required under 5 NYCRR §144 (2)(e).

To determine whether a business operates independently the Division shall consider, but is not limited to the following: "(1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) Whether the business enterprise transacts business primarily with one other entity; and (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices." (5 NYCRR § 144.2 (e) (1), (2), and (3)).

The Division consistently denies certification where the applicant business is so entwined with another business, such as operating out of the same space, where one business leases the space to the other under favorable terms, where the applicant business is dependent on the other for capitalization and other basic functions, and where a business primarily transacts with one other business entity. (See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6,

2020, Final Order dated April 21, 2020); see also *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002)).

Loren shares resources with another entity, Browning Enterprises, including personnel, equipment, office space, warehouse and other storage space, and yard space. Pursuant to a lease agreement and a labor agreement, Loren entered into a contractual relationship with Browning Enterprise under which Browning Enterprise leases space to Loren. The lease agreement states that Browning Enterprise will be responsible for repair and maintenance of the walls, roof and structural members of the leased property. The lease agreement is in effect for 10 years, which commenced on January 5, 2022. As part of this lease agreement, Loren agrees to pay Browning Enterprise throughout the year, on a per fabricated part produced basis, a total amount of \$ [REDACTED] with any adjustments to be made annually on December 31. Therefore, the payment of the lease is tied to the production of parts by Browning Enterprise for Loren. (DED Exhibit 9).

As part of the Labor Agreement, Browning Enterprise personnel perform all the manual labor for Loren inside the leased space. The Labor Agreement states that Browning Enterprise is responsible for all expenses incurred while performing services for Loren. When hiring for a specific project, Loren lets Browning Enterprise know what qualifications are necessary when making requests for laborers. Browning Enterprise will provide Loren with the personnel meeting Loren's qualification requirements. Browning Enterprise also agrees to maintain all of Loren's equipment in good working condition. Loren is responsible for all project management and monitors production on-site daily and determines and provides the production schedules. (DED Exhibit 10).

According to the terms of these agreements, Loren is dependent on Browning Enterprise for the leased space, production, and labor. The sharing of space, and personnel, along with

Browning Enterprise performing most of the critical functions of the business, are tangible benefits and evidence that Applicant does not operate independently.

The Division's denial of Loren's application for certification as a WBE on the basis that Loren failed to demonstrate that the business operates independently, as required by 5 NYCRR § 144.2 (e) is supported by substantial evidence.

### **CONCLUSION**

Loren 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)(3), (c)(2) and (e) was not based on substantial evidence.

### **RECOMMENDATION**

The Division's determination to deny Loren's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of The Loren Group, Ltd.  
DED File ID No. 51616  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Written Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant Request to Appeal	Y	Y
DED 4	Notice to Proceed via Written Appeal	Y	Y
DED 5	The Loren Group's 2022 W-2 Statement	Y	Y
DED 6	Ms. Loren's Grober's 1099 Form	Y	Y
DED 7	Mr. Cory Grober's 1099 Form	Y	Y
DED 8	Narrative Response – Employee Responsibilities	Y	Y
DED 9	Lease Agreement	Y	Y
DED 10	Labor Agreement and Description of Relationship	Y	Y