

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

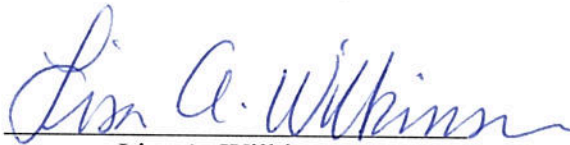
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the Application of **Krieg Construction Company, Inc.**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 53565

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge

May 5, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (“Division”) of the New York State Department of Economic Development to deny Krieg Construction Company, Inc. (“Krieg Construction” or “applicant”) certification as a women-owned business enterprise¹ (“WBE”) be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by 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 (“NYCRR”) Parts 140-144, challenging the determination of the Division that Krieg Construction does not meet the eligibility criteria for certification as a WBE.

Applicant submitted an application for WBE recertification on May 3, 2013. The Division denied Krieg Construction’s application for WBE certification by letter dated September 10, 2015 (Exhibit 2). The Division identified one ground under 5 NYCRR 144.2 for the denial, namely that applicant failed to demonstrate that corporate documents and relevant business agreements permitted the woman owner to make business decisions without restrictions (*see* 5 NYCRR 144.2[b][2]).

Applicant filed a timely notice of appeal from the denial in September 2015² and submitted a written brief to the Office of Hearings and Mediation Services on August 22, 2016. Applicant’s submission consisted of a legal brief, the denial letter, and the complete WBE application. On December 5, 2016, applicant sent a letter to Economic Development demanding that a responding brief be filed within 30 days. On April 4, 2017, applicant sent a letter to Chief Administrative Law Judge McClymonds requesting that a decision be reached based on the appeal papers filed by applicant due to the Division’s failure to file a response to applicant’s appeal.

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”]).

² Applicant’s September 2015 notice of appeal is not included among the materials provided to the Office of Hearings and Mediation Services, however, the parties do not dispute that applicant appealed from the Division’s denial.

Chief Judge McClymonds sent an email to Philip Harmonick, Assistant Counsel for the Division, on April 7, 2017, and requested that the Division indicate whether it intended to file a response and if so when. Mr. Harmonick replied that a response would be provided no later than April 28, 2017.

The Division filed a response and exhibits on April 24, 2017 and this matter was assigned to me. The Division's response included an affidavit from Matthew Lefebvre, Senior Certification Analyst for the Division sworn to April 18, 2017 [Lefebvre Affidavit] [WBE Exhibit 4]), the seven page application for WBE certification dated May 3, 2013 (WBE Exhibit 1), the denial letter dated September 10, 2015 (WBE Exhibit 2), and the corporate by-laws of Krieg Construction Company, Inc. (WBE Exhibit 3).

Bridget O'Toole, Esq. of the Zoghlin Group PLLC represents applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development represents the Division. A list of exhibits is attached to this recommended order.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a women-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division's analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Krieg Construction's application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act Section 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 the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant asserts that the Division's denial of recertification was arbitrary and capricious because the Division failed to adhere to precedent and failed to articulate its reasons for reaching a different result on the same set of facts. Applicant also claims that Barbara Thompson, the majority shareholder, chief executive officer, and vice president of Krieg Construction has and exercises the authority to make business decisions independently and without restrictions.

Division

The Division argues that its determination is supported by substantial evidence. Specifically, the Division asserts that Mr. Krieg is the president and the highest ranking officer of the corporation while Ms. Thompson is vice president and subordinate in that role to the president. The Division notes that the bylaws of Krieg Construction do not delegate any specific powers to the vice president, except where the president cannot perform his duties. Accordingly, the Division requests that its determination to deny WBE certification to Krieg Construction be upheld.

FINDINGS OF FACT

1. Krieg Construction is located at 311 Lowden Point Road, Rochester, New York (WBE Exhibit 1, at 1).
2. Krieg Construction does mechanical insulation including duct work, piping and equipment (WBE Exhibit 1, at 4).
3. The corporate bylaws of Krieg Construction provide that the president "shall be the Chief Executive Officer of the Corporation; . . . he shall have general and active management and control of business and affairs of the Corporation, subject to the control of the Board of Directors, and shall see that all orders and resolutions of the Board of Directors are carried into effect." (WBE Exhibit 3, Art. VI § 6.)
4. The bylaws provide that the vice president "shall in the absence or disability of President, perform the duties and exercise the powers of the President, and shall generally assist the President and perform such other duties as the Board of Directors or the President shall prescribe." (WBE Exhibit 3, Art. VI § 7.)

5. Brian Krieg is the president of Krieg Construction and the sister of Barbara Thompson (WBE Exhibit 1, at 3).
6. Barbara Thompson is the vice-president of Krieg Construction (WBE Exhibit 1, at 3).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Krieg Construction as a women-owned business enterprise pursuant to Executive Law Article 15-A.

I. Procedural Matters

As an initial matter, applicant argued that the denial was arbitrary and capricious, and without a rational basis, because the Division failed to adhere to its own determination to grant Krieg Construction WBE status in 2010 and the Division failed to indicate its reasons for reaching different results in its September 2015 denial even though the two applications were based on essentially the same facts as the May 3, 2010 grant of WBE status. (*See* Applicant Brief in Support of Appeal at 8 [Applicant Brief].)

The Division is not obligated to recertify Krieg Construction merely because it previously did so on the same set of facts if its previous determination was in error. 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 e.g. Matter of Daleview Nursing Home v Axelrod*, 62 NY2d 30, 33[1984]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143, *lv denied* 23 NY3d 905 [2014]; *Atlantic States Legal Foundation Inc. v New York State Dept. Envtl. Conservation*, 119 AD3d 1172, 1173 [2014]). A government agency is not obligated to perpetuate a mistake in perpetuity and is not estopped from correcting an error (*see e.g. Oxenhorn v Fleet Trust Co.*, 94 NY2d 110, 116 [1999], *citing Matter of Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1999]). Given the information that was before the Division, and taking into consideration the Division's regulations and prevailing judicial precedent, the denial was proper and should be affirmed.

II. Control

Section 144.2(b) of 5 NYCRR requires that, in order for a business to be certified as women-owned, the woman owner must control the operations of the business enterprise. Three factors are taken into equal consideration in evaluating control (*see* 5 NYCRR 144.2[b]). The criterion relevant to Division's decision in this matter is whether Ms. Thompson has the ability to

make decisions without restrictions. Section 144.2(b)(2) of 5 NYCRR states that “articles of incorporation, corporate bylaws, partnership agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make [] decisions without restrictions.”

WBE Exhibit 3 is a copy of Krieg Construction’s bylaws, which identify the corporate officers and prescribe their duties and responsibilities. The president is designated as the chief executive officer of the corporation and, subject to the direction of the board of directors, generally manages and controls the operations and the affairs of the corporation (*see* WBE Exhibit 3, Art. VI, § 6). The term chief executive officer as used in Krieg Construction’s bylaws is associated only with the duties and responsibilities of the president. Other than the president, Krieg Construction’s bylaws do not identify a separate corporate office for the chief executive officer. (*See generally* WBE Exhibit 3.) Brian Krieg is identified in the application as the president of Krieg Construction (Exhibit 1, at 3). Therefore, consistent with Krieg Construction’s bylaws, Mr. Krieg is the duly designated chief executive officer of Krieg Construction.

Ms. Thompson is identified in the application as the vice-president (WBE Exhibit 1, at 3). According to the bylaws, the vice-president steps into the role of the president when the president is unable to act and generally assists the president and perform such duties as directed by the Board of Directors or the president (WBE Exhibit 3, Art. VI, § 7; *see e.g.* Krieg Exhibit 1, at 195-196, 199-200, 208, 212-213).

Applicant argues that Ms. Thompson has and exercises the authority to independently control and operate the day to day business decisions of the enterprise as required under 5 NYCRR 140.1, because “she (1) has authority to make operational decisions, (2) is permitted by the bylaws and articles of incorporation, as Chairman of the Board of Directors, CEO, Vice-President, and Secretary of Krieg Construction, to exercise management authority, and (3) may enter into contracts on behalf of Krieg Construction, manage its funds, and otherwise act on its behalf.” In support, applicant cites to its 2010 WBE application which indicated Ms. Thompson was the CEO, vice president, and secretary of Krieg Construction. (*See* Applicant Response at 12-15; *see also* Krieg Exhibit 1, at 195-196, 199-200, 208, 212-213.)

The Division asserts that Mr. Krieg is the highest ranking officer of Krieg Construction and entrusted with overseeing the management and operations of the business enterprise, while Ms. Thompson is in the subordinate role of vice-president. The corporate bylaws, according to the Division, do not assign any powers to the vice-president except in the case of the president’s absence or upon specific delegation by the board of directors or the president. The Division further posits that “[n]othing in the record demonstrates that the office of ‘Chief Executive Officer’ exists within Krieg Construction, or that Ms. Thompson has been validly appointed to such a position.” (*See* Division Response at 3.)

The corporate bylaws of Krieg Construction clearly establish that the office of vice-president is subordinate to the office of president and that president shall assume the role of chief executive officer. Although Ms. Thompson is involved in the management and operation of Krieg Construction, Mr. Krieg is legally the highest ranking officer of the corporation and has the authority to direct her actions (*see C.W. Brown Inc. v Canton*, 216 AD2d 841, 843[1995]). Applicant's claims that Ms. Thompson became chief executive officer in 2001 and has continued in that role since, are contradicted by the bylaws and in any case insufficient to unequivocally demonstrate that Ms. Thompson has the ability to make decisions without restrictions (WBE Exhibit 3, Art. VI §§ 6-7).

The intent of 5 NYCRR 144.2(b)(2) with respect to the designation of woman owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the corporation's bylaws, ensure that the women owners are, in fact, the decision makers of the business enterprises seeking WBE certification. On this record, Division staff appropriately determined that Mr. Krieg is the highest ranking officer Krieg Construction and empowered by the bylaws to control its operations and management, and that Ms. Thompson cannot make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the Division's determination to deny Krieg Construction's application for recertification as a WBE was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Krieg Construction's application for certification as a women-owned business enterprise should be affirmed.

Matter of Krieg Construction, Inc.
DED File ID No. 53565
Exhibit Chart

Exhibit No.	Description
WBE 1	Krieg Corporation, Inc. May 3, 2013 WBE Recertification Application
WBE 2	Division's September 10, 2015 Denial Letter
WBE 3	Krieg Construction, Inc. Corporate By-Laws (undated)
Krieg 1	862 pages of exhibits numbered Krieg 1-862