

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

In the Matter

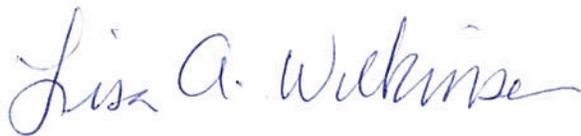
- of -

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

NYS DED File ID No. 10619

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink that reads "Lisa A. Wilkinson". The signature is written in a cursive style and is positioned above a horizontal line.

Lisa A. Wilkinson
Administrative Law Judge

June 14, 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 Beach Erectors, Inc. ("Beach Erectors" or "applicant") certification as a women-owned business enterprise ("WBE") be reversed, 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 Beach Erectors does not meet the eligibility criteria for certification as a WBE.

Karlise Murphy, president, submitted an application on behalf of Beach Erectors for recertification as a WBE on January 27, 2016 (WBE Exhibit 1). The Division denied Beach Erector's application by letter dated September 2, 2016 (WBE Exhibit 2). The denial letter sets forth two grounds under 5 NYCRR 144.2(b)(1) for the denial. Specifically, the Division maintains that applicant failed to demonstrate that Ms. Murphy has adequate managerial experience or technical competence to operate the enterprise as required by 5 NYCRR 144.2(b)(1)(i), and failed to show that Ms. Murphy makes decisions pertaining to the operation of the enterprise in accordance with 5 NYCRR 144.2(b)(1).

Henry C. Chan, Esq. (Wilson & Chan, LLP, 733 Third Avenue 15th Floor, New York, New York 10017) filed a notice of appeal from the denial on behalf of applicant by letter dated September 28, 2016, and provided supplemental information to the Division on October 13, 2016. The Division responded by letter dated February 16, 2017, informing applicant that a hearing was scheduled for April 11, 2017 at the Division's New York City office.

The hearing convened as scheduled. Mr. Chan represented applicant and Karlise Murphy testified on behalf of applicant. Phillip Harmonick, Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Robyn Clarke, Senior Certification Analyst, testified for the Division. During the hearing, the parties offered 12 exhibits, all of which were received into evidence. An exhibit chart is attached to this recommended order.

An audio recording of the administrative adjudicatory hearing was made. The Office of Hearings and Mediation Services received a copy of one compact audio disk on June 2, 2017 containing two MP3 files. Whereupon, the hearing record closed.

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 interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Beach Erector's WBE certification 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 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 NY 3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Division

In the September 2, 2016 denial letter, the Division asserted that applicant failed to meet two criteria for WBE certification set forth in 5 NYCRR 144.2 concerning Ms. Murphy's operation of Beach Erectors. The Division found that Beach Erectors did not demonstrate that Ms. Murphy makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division also found that Beach Erectors failed to demonstrate that Ms. Murphy has adequate managerial experience or technical competence to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

Applicant

Applicant asserts that Beach Erectors has been certified and re-certified by the Division as a WBE since 1996 and by the Division's partner organizations including the Port Authority of New York and New Jersey (2007 to present), the New York City Small Business Services (2012

to present), the County of Nassau Office of Minority Affairs (2013 to present) (*see* Exhibit 3 at 2; CD File 1 at 9:47-12:30).

Applicant contends that Ms. Murphy established Beach Erectors in 1989, is the sole shareholder of Beach Erectors, and oversees all business operations (CD File 1 at 9:18). In 1986, Ms. Murphy operated the Beach Iron Erection Company and prior to that she operated Beach Fence Company (*see id.*). Ms. Murphy has over 40 years of experience in the installation of architectural, fencing, and ornamental metal products and possesses the requisite experience in estimating and project management, including preparing bid documents and negotiating contracts (*see* Letter dated September 28, 2016 from Henry Chan to Cathy Powers at 2). Applicant further contends that Ms. Murphy has final approval of all bids, estimates, and sales; manages and oversees all business projects; and designates and coordinates with project managers for the duration of each project (*see* CD File 1 at 14:16-20:45). As the business has grown, Ms. Murphy has had to delegate work to other employees.

With respect to the involvement of Ms. Murphy's son and husband in the business enterprise, applicant contends that both are union members whom Ms. Murphy trained in project management and estimating (CD File 1 at 27:55, 31:58). Neither Ms. Murphy's husband nor her son has an ownership interest or is a corporate officer of Beach Erectors or is authorized to make decisions on behalf of Beach Erectors (*see* WBE Exhibit 1 [Ownership Information for Corporation]).

FINDINGS OF FACT

1. Beach Erectors, Inc. (Beach Erectors) is located in Island Park, New York (*see* WBE Exhibit 1, § 1.E) and furnishes and installs miscellaneous metals, including stairs, railings, partitions, window guards, detention and security products (*see* WBE Exhibit 1, § 3.C).
2. Karlise Murphy established Beach Erectors on June 27, 1989. From 1987 to 1989, Ms. Murphy operated, and was the president of, Beach Iron Erection Company. In 1976, Ms. Murphy established Beach Fence Company as a small fence and ornamental metal products business. She has been the sole proprietor of Beach Fence Company since then. (*See* CD File 1 at 9:18; WBE Exhibit 3 [resume Karlise Murphy]; WBE Exhibit 1, §§ 1.R and 2.A.)
3. Beach Erectors was first certified by the New York State Department of Economic Development as a WBE in 1995 and remained certified until the denial of its application for certification on September 2, 2016 (*see* CD File 1 at 12:00).
4. Beach Erectors is a union shop and wages are set by the union contract with the ornamental ironworkers union local 580 (*see* WBE Exhibit 1, § 4.F; CD File 2 at 0:01-1:38).

5. Beach Erectors employs 8 full time employees and 15 seasonal full time (Exhibit 1 § 1.W).
6. Ms. Murphy is the president of Beach Erectors and the sole shareholder of the business (WBE Exhibit 1 §§ 2.D and 2.F). She has worked full-time in the business since its formation 1989. Prior to that she was the sole proprietor of Beach Iron Erection Company from 1987 to 1989. Since 1976 she has been the president of Beach Fence Company. (*See* WBE Exhibit 3).
7. As the president and sole corporate officer, Ms. Murphy is responsible for managing financial decisions, estimating, preparing bids, negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, supervising field operations, purchasing equipment and sales, managing and signing payroll, and negotiating contracts, and is the signatory on business accounts. (*See* WBE Exhibit 1 § 4.A and page 11 of 11 [response to Robyn Clarke]; WBE Exhibit 3; CD File 1 at 14:16-20:45.)
8. Ms. Murphy reviews and approves all estimates submitted by internal staff before project bids are sent out. As part of the estimating process, Ms. Murphy reviews project blueprints to determine what items would apply to her business. She determines how much each item will cost if she has to supply materials and how much labor is necessary to install an item and then factors in her labor costs and a profit margin, which is usually set by the government contracting entity. (*See* CD File 1 at 17:02 [prepares bids], 17:13 [prepares and finalizes estimates], 17:20 [negotiates all contracts], 17:30 [approves all bid estimates and contracts], 39:54 [estimating]; WBE Exhibit 1 at 11 of 11 [response to Robyn Clarke]).
9. Beach Erectors has projects throughout the New York City area. As of April 2017, Beach Erectors had two active projects. In 2016, Beach Erectors had four active projects and two projects with contracts underway. At any time, Beach Erectors can be involved in five or more projects. Initially, Ms. Murphy managed all of the projects at Beach Erectors. With multiple projects, Ms. Murphy delegates responsibility for project management because she cannot be on all the project sites every day. Ms. Murphy assigns project managers to projects and communicates with them on a daily basis by telephone, email, text messaging, weekly meetings and reports. (*See* CD Part 1 at 18:16-20:15.)
10. Robert Murphy, Ms. Murphy's husband, is a member of the local ornamental ironworkers union and received training in ironworking through the Local 580 Apprenticeship program. He worked as an ironworker and ironworker supervisor at Beach Iron Erection Company from 1986 to 2000. From 2000 to 2016, he worked at Beach Erectors in project management, sales and estimating for Beach Erectors. He retired from the company in October 2016. (*See* WBE Exhibit 4 and Applicant [A] Exhibit 6.)
11. Mr. Murphy's job at Beach Erectors included "knowledge of upcoming projects that may require miscellaneous metals, procuring drawings, plans and specifications for estimates.

Also to include representation to clients, sales of prepared packaged bids” (WBE Exhibit 4). He was responsible for “maintaining communications between Beach Erectors and the general contractor, coordinating work flow with other trades, maintaining communications with the field supervisor regarding production schedule, manpower and supply needs, keeping records of hours worked, monthly billing, reporting to office with employment records required for payroll” (WBE Exhibit 1 at 10 of 11[reply to Robyn Clarke]).

12. When Beach Erectors had more than one project at a time, Ms. Murphy trained Robert Murphy in project management based on her experience in the field so that Beach Erectors could handle the workload (*see* CD File 1 22:57)
13. Mr. Murphy did not have authority to make financial or contractual decisions, sign project estimates or bid out projects while employed at Beach Erectors. His wages were set by union contract. (*See* CD File 1 at 22:57, CD File 2 at 0:01-1:37; *see also* WBE Exhibit 1).
14. Robert Murphy Jr., Ms. Murphy’s son, is 41 years old. He was an ironworker at Beach Erectors from January 1998 to December 2000, an administrative assistant from January 2000 to December 2000, and an estimator and project manager from January 2001 to the present (*see* WBE 6; CD File 1 at 37:20).
15. Ms. Murphy trained Robert Murphy, Jr. in project management (CD: File 1 at 27:25). Robert Murphy, Jr. does not have authority to make financial or contractual decisions for Beach Erectors, sign project estimates or bid out projects. His wages are set by union contract. (CD File 1 at 22:57, CD File 2 at 0:01-1:37; *see also* WBE Exhibit 1).
16. Beach Erectors has a surety bond line from Colonial Surety Company. Both Karlise Murphy and Robert Murphy signed the surety agreement with Colonial Surety Company. (*See* WBE Exhibit 5; CD File 1 28:30.)

Technical Competence and Managerial Experience

17. Since 1989, Ms. Murphy has overseen the operation of Beach Erectors in every respect, decided what contracts to bid, prepared estimates and bid documents, ordered material, scheduled work, purchased equipment, hired and fired employees, signed contracts, and made other decisions related to the operation of the business. (*See* CD File 1 at 14:16-20:45, 34:02).
18. Beach Fence Company grossed \$50,000 in sales in 1976 (CD File 1 at 35:40).
19. In 2016, Beach Erectors grossed [REDACTED] in sales (CD File 1 at 35:40).

20. Ms. Murphy oversees all projects at Beach Erectors, assigning project managers
21. Beach Fence Company initially did about \$50,000 a year in gross sales. In 2016, Beach Erectors did ██████████ a year in gross sales. (*See* CD File 1 at 35:40.)
22. Ms. Murphy completed a Construction Management course and certification at Pace University in October 2012, but did not include the certificate information with the application for WBE certification. (*See* CD File 1 at 2:34 and 14:16; *see also* Exhibit A-1.)

DISCUSSION

This recommended order considers applicant's appeal from the Division's September 2, 2016 determination to deny recertification of Beach Erectors as a women-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified the two bases for the denial with respect to the operation of the business enterprise. First, the Division determined that Karlise Murphy does not make decisions for the business enterprise as required by 5 NYCRR 144.2(b)(1). Second, the Division determined that Karlise Murphy does not have the managerial expertise or technical competence to operate the business as required by 5 NYCRR 144.2(b)(1)(i). Each basis is addressed below.

Based on the application and the hearing record, I find that applicant has met its burden to demonstrate that the Division's denial of recertification to Beach Erectors is not based on substantial evidence and should be reversed.

a. Prior Certification

At the outset, applicant notes that it has been continuously certified as a women-owned business enterprise since 1996 and that the operation and management of the corporation has not changed since 1996. (*See* CD File 1 at 9:47, 10:15, 10:56, 11:32, 12:00; Exhibit A-2, A-3, A-4)

The Division acknowledges that Beach Erectors was previously certified as a woman-owned business enterprise. The Division asserts, however, 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 Beach Erectors 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 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] [State could correct and retroactively reduce nursing home reimbursement rates which had been calculated in error]; *Matter of Dear v New York State & Local Retirement Sys.*, 115 AD3d 1141, 1143 [2014], *lv denied* 23 NY3d 905 [2014]; *Atlantic States Legal Found., Inc. v New York State Dept. Env'tl. Conservation*, 119 AD3d 1172, 1173 [2014]).

With the expiration of its certification, Beach Erectors had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR 144.2 when it submitted the January 1, 2017 application and supporting materials and cannot rely on the past determinations of the Division.

Nonetheless, the Division's determination must be supported by substantial evidence. The Division, in its denial, did not discuss any prior errors it had made with respect to the certification of Beach Erectors or explain why it was changing course with the recertification application that is the subject of this appeal. Applicant's past certifications are relevant in terms of evaluating the woman owner's experience managing and operating the subject business enterprise, especially given the format of the WBE application. Based on the application submittals and hearing record, I conclude that Beach Erectors has met its burden of demonstrating that it meets the eligibility criteria for certification and that the Division's denial of recertification is not supported by substantial evidence.

b. Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise seeking certification be made by the woman owner. According to the Division, Mrs. Murphy primarily oversees financial and administrative matters while male individuals, particularly her husband and son, oversee the core functions of the business enterprise, including, but not limited to estimating and project management (*see* Exhibit WBE Exhibit 2 at 2). The Division's denial on this ground is not based on substantial evidence.

Ms. Murphy has been the president and sole shareholder of Beach Erectors since its inception on June 27, 1989, and has directed all business operations since that time. For many years, Ms. Murphy operated Beach Erectors without her husband or her son (*see* WBE Exhibits 3, 4, and 6). Ms. Murphy testified that initially she managed all the projects for Beach Erectors and performed all the core functions of the business herself (CD File 1 at 21:14-24:30). As the number of projects grew and the geographic location of the projects expanded throughout the New York City area, Ms. Murphy trained other employees, including her son and husband, to be project managers and delegated tasks to them so she could manage her increasing workload (*see* CD File 1 at 19:10, 21:21). Ms. Murphy oversees all projects at Beach Erectors, but assigns project managers and other staff to do the work. Ms. Murphy testified that she is in constant communication with her project managers through telephone calls, text messages, emails, and

weekly status reports, and visits project sites on a regular basis to check on progress and ensure safety measures are being followed (*see* CD File 1 at 24:31).

Ms. Murphy credibly testified about the detailed evaluative process she undertakes when she prepares or reviews an estimate, which requires a substantial knowledge of ironworks projects, labors and materials. Ms. Murphy must inventory each item Beach Erectors will install and determine how long it will take to install and how many people are required for the job. Ms. Murphy also considers the cost of an item and calculates the allowable profit she can take. Ms. Murphy stated that she prepares the majority of the bid documents and reviews and approves all of them before she signs them. That Ms. Murphy may rely on project managers to provide her information to use in formulating bids does not mean that she is uninvolved or plays a secondary role in the process. As Ms. Murphy testified, any errors in preparing bids or estimates could ruin her company and, thus, provides a strong incentive for her to conduct a very detailed and careful review. While Ms. Murphy failed to submit the certificate she received for completing a class at Pace University in construction management with her application materials, I conclude that the class was in the nature of continuing education and not essential to demonstrate Ms. Murphy's expertise. (*See* CD File 1 at 14:16-18:15, 39:54.)

Ms. Murphy's hearing testimony is corroborated by Beach Erector's WBE application filed with the Division. Significantly, Ms. Murphy is solely responsible for managing all twelve core business operations including: financial decisions; estimating; preparing bids; negotiating bonding; negotiating insurance; marketing and sales; hiring and firing; supervising field operations; purchasing equipment and sales; managing and signing payroll; and negotiating contracts. She is the signatory on all business accounts. Neither Ms. Murphy's husband nor her son had, or currently has, the authority to sign bid proposals, sign estimates, enter into contracts, or make binding financial decisions on behalf of the business. (*See* WBE Exhibit 1 § 4.A; CD File 1 at 22:57, 25:17).

Ms. Murphy's resume also supports her claim that she alone operates and makes decisions for Beach Erectors. Ms. Murphy, according to her resume, "directs all business operations, prepare[s] bid documents to promote profitability and stability, oversee[s] all facets of the business dynamics, vision and mission"; has "responsibility for all banking and financial decisions"; researches and solicits bid opportunities; prepares bid documents, including estimate[es]; negotiate[es] contracts and approves all bids, estimates, and sales; oversees and approves all estimating by internal staff; manages and oversees all business projects and designates and coordinates with project managers from start to finish of project; hires and fires employees; allocates labor to projects; negotiates labor contracts as necessary; negotiates, procures and secures all necessary insurance policies; purchases large equipment; and has responsibility for all company payroll and taxes and all government compliance reporting and filings (*See* WBE Exhibit 3.)

Ms. Clarke testified on behalf of the Division that Ms. Murphy's son and husband primarily oversee the core functions of the business enterprise, including estimating and project management and are involved in field supervision (CD File 2 at 5:42-12:04). According to Ms. Clarke, Ms. Murphy's duties mostly relate to administrative and human resources matters (CD File 2 at 3:55-5:41). Ms. Clarke testified that based on her review of Ms. Murphy's resume, she concluded Ms. Murphy did not perform the core functions of the business such as estimating (CD File 2 at 3:25-12:04). She further testified Robert Murphy negotiated insurance contracts, prepared bids, ordered materials and did things requiring more of a technical background, while Robert Murphy, Jr. manages critical estimating and field work and project management (CD File 2 at 7:05-12:04).

Ms. Clarke's dismissal of Ms. Murphy's role in Beach Erectors is contradicted by the record and does not reflect the nature of Ms. Murphy's role in the corporation. Ms. Murphy has worked in the fencing industry since 1976 and in ornamental ironworks specifically since 1986. At the time Ms. Murphy established Beach Erectors, her son was a teenager and her husband was working at Beach Iron Erection Company (*see* WBE Exhibits 3, 4 and 6). Her husband did not join the company until 2000 (*see* WBE Exhibit 4) and her son started in 1998 as an ironworker and became an administrative assistant in 2000 (*see* WBE Exhibit 6).

Ms. Murphy's testimony that she has directed the operations of Beach Erectors since its founding in 1989 was credible. Initially, Ms. Murphy prepared all the estimates, supervised all field operations and managed all projects by herself (*see* CD File 1 21:21). As Beach Erectors took on multiple projects that were geographically dispersed across the New York City area, Ms. Murphy reasonably delegated tasks to her employees and assigned project managers. That Ms. Murphy now delegates more tasks to her employees than she did in the past is reasonable given the growth of the company and her expanded management responsibilities, and is not sufficient evidence to conclude that she lacks the detailed knowledge of core functions necessary to make decisions for the company. Rather, the evolution of Ms. Murphy's involvement in Beach Erectors over the years is a sign that Ms. Murphy allocates her time to priority tasks so that she is able to effectively manage the operation of Beach Erectors.

Ms. Murphy's testimony regarding her preparation of bids and estimates, her oversight of other employees' estimates and bid proposals, and how important it is to her business to ensure that these documents are accurate, demonstrates her high degree of involvement in these core business functions. Ms. Murphy's detailed knowledge of these processes reflects her years of experience in the ornamental ironworks industry. Ms. Murphy could not conduct as thorough review of project estimates and bid proposals as she testified she does without significant field and industry experience. I find her testimony supports the representations in the application and is persuasive in demonstrating that she is directly involved in and makes significant decisions for Beach Erectors in these core areas.

Ms. Clarke testified that she consulted the regulations of the New York State Department of Labor for the definition of an estimator and found that job description on Robert Murphy, Jr.'s resume more closely aligned with the Department of Labor's definition than Ms. Murphy's resume. She concluded that Ms. Murphy's son performs the estimating function for Beach Erectors and that Ms. Murphy's involvement is cursory. While Robert Murphy Jr. may perform such activities, he does not do so to the exclusion of Ms. Murphy. The Division's regulations do not mandate that a women owner meet a particular job description for her business to be eligible for certification. Estimating is one of twelve managerial functions listed on the WBE application (WBE Exhibit 1, § 4.A). It is reasonable that Ms. Murphy, as president and sole corporate officer, would delegate more detailed, time consuming estimating tasks to other employees so that she is able oversee the management and operation of the business enterprise.

Ms. Clarke also testified as to the discrepancy between the letter from Colonial Surety Company addressed to Robert Murphy discussing the terms of the surety bond provided to Beach Erectors, and the application which listed Ms. Murphy as solely responsible for managing insurance (see WBE Exhibits 1, § 4.A. and 5). Ms. Clarke concluded that Mr. Murphy, not Ms. Murphy was actually in charge of insurance matters. Other than a single letter addressed to Mr. Murphy, the Division presented no evidence that Mr. Murphy is in charge of insurance matters.

Ms. Murphy testified, and her attorney also represented, that Mr. Murphy's name is on the surety bond because New York State law requires, and industry practice is, that when a married person obtains a performance bond and provides a personal guarantee, the spouse must also provide a personal guarantee (*see* CD File 2 28:30). Ms. Murphy stated that the surety company erred in not addressing the letter to her because her name is also on the bond. Ms. Murphy's explanation for WBE Exhibit 5 only being addressed to Robert Murphy is credible. The application, moreover, corroborates Ms. Murphy's claim that she alone manages insurance matters (WBE Exhibit 1, § 4.A). Even if her husband assisted her in with insurance, that would not defeat Beach Erector's eligibility for WBE certification because Ms. Murphy is the only legally authorized person to handle insurance matters. The fact that Colonial Surety Company addressed the letter to Mr. Murphy, and not Ms. Murphy, does not constitute substantial evidence that Mr. Murphy is in charge of insurance.

In sum, the application and hearing testimony demonstrate that Ms. Murphy has a high degree of engagement in all aspects of Beach Erector's business operations and makes critical decisions for the business enterprise. Applicant has met its burden of showing that the Division's denial based on 5 NYCRR 144.2(b)(1) is not based on substantial evidence. I recommend that the Division's determination with respect to 5 NYCRR 144.2(b)(1) be overturned.

c. Managerial Experience and Technical Competence

The Division also determined that Ms. Murphy lacks adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR 144.2(b)(1)(i). The Division stated in its denial letter that Ms. Murphy “has no technical or academic training relevant to the work performed by the business, and has no managerial experience in project management,” whereas her “husband and son possess relevant technical and academic training and have prior experience managing the installation or architectural and ornamental metal products” (WBE Exhibit 2 at 2). The Division’s determination with respect to this criteria is not supported by substantial evidence.

An important consideration in this recertification application is the experience of the woman owner in the industry. As discussed above, the record establishes that Ms. Murphy has operated companies that install fence and architectural and ornamental metal products since 1976 and, moreover, has operated Beach Erectors since 1989 (*see* WBE Exhibits 1 and WBE Exhibit 3; *see also* CD File 1 9:18, 14:16-22:30). She has been the sole proprietor at Beach Fence Company and, by necessity, directed sales, estimates, contracts, personnel, hiring and firing, job scheduling and supervision, equipment purchasing, and accounting, payroll, insurance when the company was still active. She was also president of Beach Iron Erection Company from 1987-1989, where she similarly directed business operations. (*See* WBE Exhibit 3).

Ms. Murphy had thirteen years’ experience managing fencing and ornamental ironworks companies when she established Beach Erectors in 1989, and has directed the operations of Beach Erectors since that time (*see* WBE Exhibit 1, § 4.A and WBE-3; *see also* CD File 1 at 14:16:22:30). Ms. Murphy assigns project managers and determines appropriate staffing levels, and once a project is underway remains in constant contact with project managers through meetings, reports and site visits to ensure that the project proceeds to completion (*see* CD File 1 at 19:10). She prepares bid documents and estimates, negotiates contracts, and approves all bids, estimates and sales before they are sent out (*see* CD File 1 at 17:02-18:15; *see also* WBE Exhibit 3). She also handles insurance, major equipment purchases, hiring and firing (*see* WBE Exhibits 1, § 4.A. and 3). Ms. Murphy testified that initially she “did everything” herself at Beach Erectors, but as the number of projects and the geographic reach of the projects expanded, she needed to delegate tasks to others because she could not be everywhere at once (*see* CD File 1 19:10).

Ms. Murphy’s son and husband received training through the ironworkers’ union apprentice program and initially worked as iron workers at Beach Iron Fence Company and Beach Erectors before they became project managers (*see* CD File 1 at 22:57-24:30, 27:25-28:25). Robert Murphy worked as an ironworker supervisor at Beach Iron Erection Company prior to joining Beach Erectors in 2000 (*see* WBE Exhibit 4). Robert Murphy, Jr. joined Beach Erectors as an ironworker in 1998, and became a project manager in 2001, twelve years after the

business was established and 25 years after Ms. Murphy began her career in the industry (*see* WBE Exhibit 6). Ms. Murphy, who had been managing projects at Beach Erectors since 1989, trained her son and husband in project management based on what she learned through her years of work experience (CD 22:57, 25:17). She continues to oversee and manage projects to the present day (*see* CD File 1 18:16-20:15). I conclude that Ms. Murphy has demonstrated the requisite degree of managerial experience and technical competence to operate Beach Erectors.

I note that a plain reading of 5 NYCRR 144.2(b)(1)(i) supports the interpretation that adequate managerial experience and technical competence in the business enterprise are two independent bases for certification. While I believe Ms. Murphy can satisfy both criteria for certification, satisfying either criteria is sufficient for Beach Erectors to be eligible for recertification as a WBE. With respect to Ms. Murphy's managerial experience, the facts presented on this record, and discussed above, unequivocally demonstrate that Ms. Murphy has worked in the field of ornamental ironworks for more than thirty years, has managed projects both in the field and through oversight of project managers, and possesses the requisite business and technical acumen to operate Beach Erectors (*see* WBE Exhibits 1 and 3 and hearing record).

I conclude that Ms. Clarke's contention that Ms. Murphy lacks technical competence because she has no formal academic or apprenticeship training is unavailing (*see* CD File 2 at 10:00-12:00). Ms. Murphy has demonstrated her technical competence through more than three decades operating ornamental ironworks companies. The Division's regulations do not require an applicant to possess formal academic or have completed apprenticeship training in order to demonstrate technical competence to operate a business. It would be unreasonable to impose such a requirement on a woman owner who possesses significant industry and managerial experience acquired over more than three decades, as does Ms. Murphy, and retains ultimate authority to control the operations of the business enterprise seeking certification. (*See Matter of Era Steel Const. Corp. v Egan*, 145 AD2d 795 [3d Dept 1988].)

In sum, the application, supporting materials and hearing testimony demonstrate that Ms. Murphy has the technical competence and managerial experience to operate Beach Erectors as required by 5 NYCRR 144.2(b)(1)(i). Beach Erectors has met its burden of demonstrating the Division's denial based upon applicant's failure to meet 5 NYCRR 144.2(b)(1)(i) is not based on substantial evidence.

CONCLUSION

As discussed above, applicant has met its burden to demonstrate that the Division's determination to deny Beach Erector's application for recertification was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Division's determination to deny Beach Erector's application for certification as a women-owned business enterprise be reversed.

Attachment: Exhibit Chart

Matter of Beach Enterprises, Inc.
DED File ID No. 10619
Exhibit Chart

| Exhibit No. | Description |
|-------------|--|
| WBE-1 | Beach Erectors, Inc. Application for WBE Recertification January 27, 2016 |
| WBE-2 | Division Denial Letter September 2, 2016 |
| WBE-3 | Karlise Murphy Resume |
| WBE-4 | Robert Murphy Resume |
| WBE-5 | Colonial Surety Co. Letter dated March 20, 2013 |
| WBE-6 | Robert J. Murphy, Jr. Resume |
| A-1 | Pace University Construction Management Certificate dated October 6, 2012 |
| A-2 | New York City Certified Business Directory Entity Beach Erectors, Inc. |
| A-3 | New York City WBE Certificate |
| A-4 | Disadvantaged Business Entity Certificate Port Authority and Nassau County |
| A-5 | New York State Comptroller's Office Research Brief regarding New York State's MWBE Program |
| A-6 | Beach Erector's Employee Log October 2016 |