

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

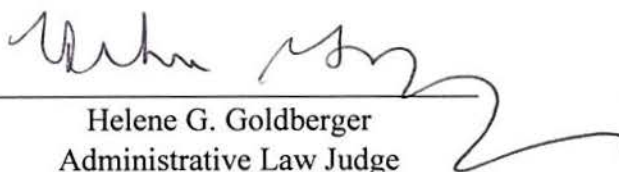
In the Matter

-of-

The Application of **C & B PLUMBING AND HEATING, INC.**,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 777

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

October 15, 2019

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 (DED) to deny the application filed by C & B Plumbing and Heating, Inc. (C & B or applicant) for certification as a woman-owned business enterprise (WBE) be modified for the reasons set forth below.

PROCEEDINGS

C & B applied for certification as a woman-owned business enterprise on August 14, 2017. *See*, Exhibit DED-1. By letter dated December 22, 2017 (Exhibit DED-2), the Division determined that C & B does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. By letter dated January 11, 2018, on behalf of the applicant, Edward Fogarty, Jr., Esq. appealed from the Division's determination to deny C & B's application for WBE certification (Exhibit DED-3). By letter dated May 24, 2019, the Division notified C & B that a hearing had been scheduled for June 25, 2019 at 1:30 p.m. at the Division's offices located at 633 Third Avenue, New York, New York (Exhibit DED-4).

Due to transportation delays, I convened the hearing at 2:30 p.m. Simon Wynn, Esq., Senior Counsel, appeared on behalf of the Division and Raymond Emanuel, Director of Certification Operations, testified for the Division. Edward Fogarty, Jr., Esq. appeared on behalf of the applicant and Ms. Cynthia Courtien testified for C & B. An audio recording of the proceedings was made available on July 17, 2019. I received four compact audio disks containing four track files on July 29, 2019. The recording is referred to in this recommended order as CD File, Disc __, 0:00. As agreed to at the hearing, the parties were to submit post-hearing briefs on August 26, 2019. Mr. Fogarty emailed C & B's post hearing brief on that date. In an email dated August 27, 2019, Mr. Wynn sent the Division's closing memorandum explaining that he had thought he had sent it weeks prior. Hearing no objection to the one-day delay and given that I do not find any prejudice resulting, I accept the Division's submission.

During the hearing, the Division offered 17 exhibits and 16 were received into evidence. The applicant objected to the admission of Exhibit DED-2A and because I deemed it not relevant to the proceedings, I did not take it into evidence. Exhibit DED-11 was made part of Exhibit DED-8. Because the applicant's Exhibits 15 and 16 were duplicative of DED's Exhibit 15, I did not admit Exhibit DED-15. The applicant offered Applicant (App) Exhibits 9, 12, 15 and 16 and there was no objection. A list of the exhibits is attached to this recommended order.¹

¹ On July 9, 2019, Mr. Wynn emailed to me a letter dated April 27, 2010 from Scott J. Munson, Associate Certification Analyst to Mrs. Courtien concerning the then pending certification application that he sought to add to the Division's exhibits. Mr. Fogarty objected to this document via email dated July 9, 2019. I determined not to admit the correspondence as it pertains to an earlier application and therefore, its relevancy is questionable.

At the conclusion of the hearing, the parties agreed to submit closing briefs within three weeks of the date that the parties received the CD files for the hearing recording. The hearing was adjourned at 6:30 p.m. As noted, I have received both post-hearing briefs and the hearing record closed. Via email dated July 2, 2019, I had asked both attorneys for additional documentation that was referenced during the hearing. On July 12, 2019, Mr. Wynn emailed me a number of documents that I did not find relevant to the current proceedings. With respect to the financial information I sought from the applicant, on July 12, 2019, Mr. Fogarty confirmed that it was not available. By e-mail dated July 16, 2019, I asked Mr. Wynn to submit a one-page chronology of the history of the applicant's applications and certification status. By e-mail dated July 17, 2019, Mr. Wynn asked me to reconsider this request and on July 23, 2019, I confirmed my request. Via e-mail on October 9, 2019, Mr. Wynn provided me and Mr. Fogarty with a one page document entitled "*C & B Plumbing and Heating, Inc. Summary NYS WBE Certification History.*" I have identified this document as Exhibit DED-17. No additional records were received.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied by the applicant through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, C & B bears the burden of proving that the Division's denial for 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 the 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

The Division

The Division denied the application filed by C & B for certification as a woman-owned business enterprise with a letter dated December 22, 2017 (*see*, Exhibit DED-2). The Division

determined that C & B failed to demonstrate: (1) the contributions of women are proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise as required by 5 NYCRR § 144.2(a)(1); (2) women make decisions pertaining to the operation of the business enterprise as required by 5 NYCRR § 144.2(b)(1); (3) the woman owner of the business enterprise has adequate managerial experience or technical competence to operate the business enterprise as required by 5 NYCRR § 144.2(b)(1)(i); and (4) the woman owner has the working knowledge and ability needed to operate the business enterprise as required by 5 NYCRR § 144.2(b)(1)(ii). In its closing memorandum, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989), the Division stressed the legal requirement that because the MWBE program uses racial and gender criteria to certify businesses, it must be sure to narrow its determinations so that only those in classes that have previously suffered discrimination benefit. The Division also set forth in its memorandum that it is the obligation of an applicant to establish that it has met the regulatory requirements in each application and that if the agency had previously erred in granting certification, it was not bound to repeat that mistake. And, the Division reiterated in its memorandum that C & B did not meet the cited requirements because Ms. Courtien had not provided documentation of her contribution to the company in proportion to her interest nor demonstrated her decisionmaking and related technical expertise.

C & B

C & B emphasized throughout these proceedings that the company had been certified as a WBE since 1992 and that there has been no change in circumstances or business practices that should undermine the applicant's WBE status. C & B stands by all the documentation that was submitted with the application and Ms. Courtien testified at length to her leadership role at the company. In its post hearing brief, C & B reiterated that Ms. Courtien owned 52% of the company and while she was not able to produce the documentation of her contribution, it was sufficient at the outset and, therefore, the Division should be bound by its earlier determinations. In addition, C & B emphasizes that Ms. Courtien's application thoroughly established her control of the company and expertise.

FINDINGS OF FACT

1. C & B Plumbing and Heating, Inc. is located at 19 Second Avenue, Pelham, New York 10803 and is a commercial plumbing and heating contractor as well as a safety consultant and material supplier. Exhibit DED-1, § 3.C.
2. C & B was established in 1991 and Cynthia Courtien has been with the company since that time. Exhibits DED-1, § 1.R and DED-5.
3. In 1992, C & B received certification as a MWBE.

4. Ms. Courtien owns 52% of the company's shares and Robert Courtien, her husband, owns 24 % with Mark Courtien, Robert's brother, owning 24%. Exhibit DED-1, § 2.A.
5. The 2008 Application for certification identifies Cynthia Courtien as the President, Robert Courtien as the Chief Executive Officer, and Mark R. Courtien as the owner. Exhibit DED-16, § 4a.
6. The 2017 Application for certification identifies Cynthia Courtien as President, Robert Courtien as Vice President and Mark Courtien as "Estimating." Exhibit DED-1, § 2.A.
7. In the 2008 and 2017 Applications, in response to the question asking for identification of cash and capital contributions by the identified owners, the responses are "none" and "not available" respectively. Exhibits DED-16, § 8; DED-1, § 2.C.
8. In Cynthia and Robert's 2015 federal tax return, Robert is identified as a plumber and Cynthia as an office manager. Exhibit App 16.
9. In the 2014, 2015 and 2016 federal and State tax filings for C & B Plumbing and Heating, Inc., Robert Courtien is identified as the President of this S Corporation. Exhibit App 15.
10. From 1979 until 1985, Ms. Courtien served as a personnel manager for J. Walter Thompson Co., Inc. Exhibit DED-5. Her Associate's degree is in marketing. *Id.* She is a member of several trade organizations - Professional Women in Construction, Mechanical Contractors Association of America, Inc., and the Builders Trade Association. *Id.*
11. Robert Courtien has also been with C & B Plumbing and Heating, Inc. from its inception in 1991. Exhibit DED-6. From 1987 until 2000, he was the owner of a contracting firm that acquired properties and built homes. *Id.* From 1979 until 1987, he worked for two different plumbing companies as a plumber and as a foreman, respectively. *Id.* He graduated from a New York State program with a certification in Apprenticeship Plumbing. *Id.*
12. Prior to his involvement with C & B Plumbing and Heating, Inc., Mark Courtien worked for a plumbing company as a general foreman (B & L Plumbing and Heating, Inc.) and then for the same construction company with which Robert was associated. Exhibits DED-7, 13. He graduated from the New York State Plumbing Apprenticeship program, has a Masters Plumbing License, and a certificate in OSHA/HAZCOM Training. *Id.* He is also a member of the Plumbing and Mechanical Contractors Association. *Id.*
13. Ms. Courtien reports to having a wide range of duties and supervision at C & B including morning meetings on daily job schedule and project review with field personnel, accounting/finance of operation as needed for payroll, taxes, insurance, review of purchasing, submittals, drawings, cost control, contract review and responses, meeting for

schedule for next day, field and office personnel, and addressing whatever arises in the day. Exhibit DED-8. She devotes herself to the business Monday through Friday from 8 a.m to 6 p.m. including meetings related to development and marketing and with industry business organizations. *Id.*

14. Robert Courtien is involved at C & B as an advisor every weekday for eight hours. Exhibit DED-8. He opens up the office daily at 6 a.m. and assists in setting up the manpower. *Id.* He visits the project sites as needed and also makes deliveries as needed. *Id.*
15. Mark Courtien serves as an estimator for C & B, coordinates and oversee manpower, provides project management that includes supervision of coordination drawings, submissions, and purchasing. He works at the business weekdays from 6:30 a.m. to 5:30 p.m. at the office or job site. Exhibit DED-8.
16. Prior to 2012, the Division only asked for verification by companies that had previously been certified. Now, there is a full on-line application required each time a company seeks certification or re-certification. Disc 2, 8:16 – 11:57.

DISCUSSION

This recommended order considers C & B's January 11, 2018 appeal from the Division's December 22, 2017 determination to deny C & B's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's December 22, 2017 denial letter (*see*, DED-2), C & B did not demonstrate that women's contributions were proportionate to their equity interest in the business; C & B did not demonstrate that women make decisions pertaining to the operation of the business enterprise; and C & B did not demonstrate that the woman of the business had adequate managerial experience or technical competence to operate the business nor that the woman owner had the working knowledge and ability needed to operate the business enterprise as required by 5 NYCRR §§ 144.2(a)(1), 144.2 (b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii), respectively.

I. Contributions

The eligibility criterion with respect to contributions is whether C & B demonstrated compliance with 5 NYCRR § 144.2(a)(1) which requires that "[t]he contributions of women are proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise." Although Ms. Courtien owns fifty-two percent of the outstanding common stock of C & B, there is no documentation of what she contributed to obtain those shares. Exhibit DED-1, § 2C; CD File, Disc 1, 29:58 –

30:41. The applicant has responded several times that the information is no longer available. Exhibit DED-9. In C & B's post hearing brief, counsel argues that because it has been 27 years since the company initially received certification, it should not be prejudiced by failing to produce documentation that was not maintained for this extended period. However, it would seem that such foundation documentation would be maintained. Even if no longer available in written form, it would appear important enough that Ms. Courtien would be able to explain her contributions and she did not. Without any citation to the hearing record, C & B's counsel states that the Division conceded at the hearing that the contribution made in 1992 was deemed sufficient for certification. Rather, Director Emanuel testified that a more rigorous application was installed after 2012 and it appears the Division erred with respect to C & B's certification. CD File, Disc 2, 8:16 – 8:28, Disc 3, 10:17 – 10:26.

At the hearing, I had inquired of the Division's counsel and witness the explanation for the change in the Division's position with respect to this company in light of the past certifications. *See*, Exhibit DED-17. At that time and also in the Division's closing memorandum, Mr. Wynn emphasized that the Division was not bound to recertify C & B based on these prior certifications. Pursuant to Executive Law § 314(5), a WBE certification is effective for three years. Businesses must re-apply in order to continue certification status and each time they maintain the burden to meet the requisites of the program. *See*, Recommended Order, *Application of Coverco, Inc.* (Administrative Law Judge Daniel P. O'Connell, 1/23/17). Case law does require the Division to set forth a reasoned determination for its decision. *Matter of Charles A. Field Delivery Service*, 66 NY2d 516 (1985). However, as noted by Mr. Emanuel, the Division had made a mistake in its prior determinations by failing to note the lack of proof of contribution. Disc 3, 10:17 – 10:26. A governmental entity is not estopped from discharging its statutory duties even in the face of having erred. *See*, *Parkview Associates v. City of New York*, 71 NY2d 274 (1988); *Matter of McLaughlin v. Berle*, 71 AD2d 707, 708 (3d Dep't 1979), *aff'd*, 51 NY2d 917 (1980) (agency's original classification of employee was *ultra vires* and therefore, estoppel cannot prevent it from correcting the original mistake).

Based on the inability of C & B to provide the critical information with respect to Ms. Courtien's contributions, I find that the Division's position is supported by substantial evidence and I recommend that the Director conclude the same.

II. Control

The eligibility requirement with respect to decisionmaking requires that “[d]ecisions pertaining to the operation of the business enterprise must be made by . . . women claiming ownership of that business enterprise.” 5 NYCRR § 144.2(b)(1). The regulation points to several factors for the Division to consider with respect to this requirement including whether the woman has adequate managerial experience or relevant technical competence; has knowledge and ability to operate the business enterprise; and has expended time on an ongoing basis to the daily operation. 5 NYCRR §§ 144.2(b)(1)(i), (ii), (iii).

Ms. Courtien testified at length with respect to her years of experience at the company and her diverse responsibility at C & B. CD File, Disc 3, 15:00 – 50:00. While she does not have a background in plumbing prior to her involvement with the applicant, she now has had 28 years with C & B and she testified credibly to her daily involvement with job assignments, project review, supervision of financial matters, review of purchases, submissions, drawing, cost control, contract review and responses in addition to project development, marketing meetings and involvement with trade organizations. CD File, Disc 3, 15:00 – 50:00; Exhibits DED-5, 8.

As noted by ALJ O’Connell in the *Application of Coverco, Inc.* (Recommended Order, Jan. 23, 2017, Final Order, Jan. 30, 2017), “the wording of the eligibility criterion [5 NYCRR § 144.2(b)(1)(i)] requires an applicant for WBE certification . . . demonstrate that the woman-owner has either adequate managerial experience or technical competence in the business enterprise.” Based upon Ms. Courtien’s years of experience with C & B and her stated daily involvement with a wide range of activities, I do find that she has sufficiently demonstrated relevant expertise. While it is documented that both Mark and Robert have significant experience in plumbing as well as relevant training in the trade, that does not necessarily lessen the role of Ms. Courtien’s on-the-job training given the number of years she has worked at the company. Ms. Courtien testified credibly to her knowledge and ability to operate C & B as well as her substantial time commitment to the company. CD File, Disc 3, 15:00 – 50:00. Counsel states in C & B’s post hearing brief that at the hearing the Division conceded that a plumbing license was not relevant to the running of the business. There is no citation given to this conclusion and I do not recall such admission. I do find however that the license is not mandatory to a showing of expertise and ability to run C & B.

In C & B’s post hearing brief, the company maintains that Ms. Courtien runs the business. However, given the discrepancy of the roles identified on the tax returns as well as Ms. Courtien’s equivocal responses on cross-examination concerning her decisionmaking role, I do not find that she is truly the main decisionmaker at C & B.² In response to questions on her duties at C & B with respect to her role in purchasing, she responded, “**he** gets three prices and she meets . . .”, CD File, Disc 3, 22:05 – 22:25 and “**we** negotiate . . .”, CD File, Disc 3, 23:00. With respect to running the daily job meetings, she answered, “**we** are all there . . .” CD File, Disc 3, 26:45 – 28:16. Concerning estimating, she testified, “**we’ll** decide if **we’ll** bid . . .” and “**Bobby** and I . . .” CD File, Disc 3, 29:27 – 39:02. Regarding preliminary review of plumbing portion of projects, she said, “**Marc and I** . . . go to those . . .” CD File, Disc 3, 30:49 – 31:01. And she spoke about a “**team**” including “**Marc and I**”. CD File, Disc 3, 32:00 – 32:07. While she emphasized that she had the final decisionmaking authority with respect to contract changes (CD File, Disc 3, 38:43), the overall impression is one of a family collaborative enterprise that

² The Division’s counsel focused on the Ms. Courtien’s activities to indicate that her role was mainly “back office” and “administrative” and not related to the core functions of the company. However, her stated roles in bidding, quotes and estimates are related to income generating functions. See, *Application of J.C. Smith, Inc.*, Recommended Order (ALJ P. Nicholas Garlick, 3/9/2017). In addition, Ms. Courtien testified that she was the signer of contracts and there was no evidence produced to the contrary. See, *Application of Mahopac Auto Paint Body Supply Corp.* (Recommended Order, ALJ Lisa A. Wilkinson, 1/30/19) (Division considers who signs contracts in evaluation). However, as noted above, other evidence suggests that Ms. Courtien is only one of several decisionmakers.

does not meet the certification requirements. *See, Matter of J.C. Smith*, 163 AD3d 1517, 1520 (4th Dep't 2018).

In addition, the federal and State tax returns submitted for the years 2014, 2015, and 2016 indicate that it was her husband Robert, not her, who was the President of the company; thus, undermining C & B's claim that Ms. Courtien held that position. Exhibits App 15 and 16.

Accordingly, while I do not agree with the Division's finding that Ms. Courtien does not have technical competence or working knowledge and ability to operate the business enterprise, I do find that the Division's determination that Ms. Courtien is not the sole decisionmaker at C & B is supported by the majority of the documentation and is therefore based on substantial evidence, and I recommend that the Director conclude the same.

CONCLUSION

For the reasons set forth above, C & B failed to demonstrate that that Ms. Courtien made any contribution in proportion to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR § 144.2(a)(1). In addition, Ms. Courtien does not make decisions pertaining to the operation of the business enterprise pursuant to 5 NYCRR § 144.2(b)(1). I did find however, that Ms. Courtien demonstrated adequate managerial expertise as well as a working knowledge and ability to operate the business enterprise (5 NYCRR §§ 144.2(b)(1)(i), (ii)). From the testimony of Ms. Courtien and the documentation submitted by both parties, it appears that while Ms. Courtien fulfills many core functions at the company, it is run as a collaborative family business which does not fulfill the requirements of the applicable regulations.

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's December 22, 2017 determination to deny C & B's application for certification as a woman-owned business enterprise based on the failure to demonstrate a contribution in proportion to her equity interest (5 NYCRR § 144.2(a)(1)) and failure to demonstrate that she makes the decisions in operation of the company (5 NYCRR § 144.2(b)(1)). I recommend the Director modify the Divisions' determination with respect to its determination to reflect that Ms. Courtien did demonstrate adequate managerial experience, working knowledge and ability to operate the business enterprise (5 NYCRR §§ 144.2(b)(1)(i), (ii)).

Attachment: Exhibit Chart

MATTER OF C&B PLUMBING & HEATING, INC.
DED FILE No. 777
EXHIBIT LIST

| Exhibit No. | Description | ID | Rec'd | Offered by | Notes |
|-------------|---|----|-------|------------|----------------------------|
| DED 1 | Certification Application | √ | √ | | |
| DED 2 | Denial Letter for WBE Application | √ | √ | | |
| DED 2A | DED Letter dated 4/10/17 | √ | | | not accepted into evidence |
| DED 3 | 1/11/18 Notice of Appeal | √ | √ | | |
| DED 4 | 5/24/19 Appeal Hearing Letter | √ | √ | | |
| DED 5 | Cynthia Courtien Resume | √ | √ | | |
| DED 6 | Robert Courtien Resume | √ | √ | | |
| DED 7 | Mark Courtien Resume | √ | √ | | |
| DED 8 | Statement of Daily Activities and 10/2/17 Letter from Ms. Courtien | √ | √ | | |
| DED 9 | August 1, 2017 Applicant Letter to the Division re no record of share payment | √ | √ | | |

| Exhibit No. | Description | ID | Rec'd | Offered by | Notes |
|-------------|---|----|-------|------------|--|
| DED 10 | September 18, 2017 Applicant Letter to the Division re CMB and Daily Activities | √ | √ | | |
| DED 11 | Oct. 2, 2017 Applicant Letter to the Division re % ownership and Daily Activities | | | | Made part of DEC Ex. 8 |
| DED 12 | Oct. 9, 2017 Applicant Letter to the Division | √ | √ | | |
| DED 13 | Master Plumber License (Mark Courtien) | √ | √ | | |
| DED 14 | C&B Plumbing & Heating, Inc. Stock Certificates and Transfer Ledger | √ | √ | | |
| DED 15 | 2015/2016 Corporate & Personal Tax Returns | | | | See, App Exs. 15 & 16 |
| DED 16 | C&B Plumbing 2008 Application to DED | √ | √ | | |
| DED 17 | Summary NYS WBE Certification History – C & B Plumbing and Heating Inc. | √ | √ | | Division staff prepared and submitted ALJ as per her request |
| APP 9 | Building Lease | √ | √ | | |
| APP 12 | Letter dated 12/5/17 from Edward Fogarty, Jr. to Drina Holden | √ | √ | | |
| APP 15 | Corporate Tax Returns 2014 through 2016 | √ | √ | | |

| Exhibit No. | Description | ID | Rec'd | Offered by | Notes |
|-------------|--|----|-------|------------|-------|
| APP 16 | Individual Tax Returns 2015 through 2016 | √ | √ | | |