

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

In the Matter

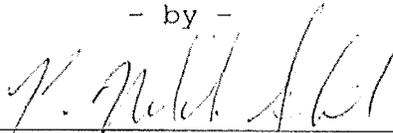
- of -

the Application of  
**Capital Demolition, LLC**  
For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58417

RECOMMENDED ORDER

- by -



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P. Nicholas Garlick  
Administrative Law Judge

June 6, 2018

## **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 the application of Capital Demolition, LLC ("applicant") for certification as a woman-owned business enterprise ("WBE") be modified and, as modified, affirmed for the reasons set forth below.

## **PROCEEDINGS**

This matter involves the appeal, pursuant to New York State Executive Law ("EL") 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, by Capital Demolition, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Capital Demolition, LLC's application was submitted on March 5, 2014 (Exh. DED1).

The application was denied by letter dated October 11, 2016, from Bette Yee, Director of Certification Operations (Exh. DED11). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to the Sherry Brown's ownership, operation, and control of the applicant.

In a five-page letter dated July 27, 2017, the applicant's counsel, William S. Nolan of the law firm Whiteman, Osterman & Hanna, LLP, submitted an appeal. Included with the appeal was the affidavit of Sherry Brown, with two attachments, and eleven other exhibits, described together in the attached exhibit chart as A1-A12.

In a nine-page memorandum dated April 9, 2018, the Division responded to the applicant's appeal. Included with the Division's papers was the affidavit of Glenn Butler, Senior Certification Analyst, and eleven exhibits described in the attached exhibit chart as DED1-DED11.

On April 9, 2018, this matter was assigned to me.

## ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time 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.

In this case, as explained below, a significant change to the ownership and management structure of the firm occurred before the denial was issued. However, this information was not shared with the Division. As a result, the Division bases its arguments based on its understanding of the firm, as presented in the application materials, while applicant's counsel argues that the firm as it is now meets certification standards. As stated above, this recommended order only reviews the firm as presented in the application and draws no conclusions about whether a new application reflecting the firm as it exists now would qualify as a WBE.

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant'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 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## POSITIONS OF THE PARTIES

### Position of the Division

In its denial letter, the Division asserts that the application failed to meet four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the contribution of the woman owner, Sherry Brown, is proportionate 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).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Sherry Brown, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Third, the Division found that the woman owner relied upon for certification, Sherry Brown, does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

Fourth, the Division found that the woman owner relied upon for certification, Sherry Brown, has not demonstrated control of negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3).

### Position of the Applicant

Capital Demolition, LLC asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

## FINDINGS OF FACT

1. Capital Demolition, LLC is in the construction business and specializes in asbestos abatement, lead removal, and both interior and exterior demolition (Exh. DED1 at 3). The firm has a business address of 2990 Amsterdam Road, Scotia, New York (Exh. DED1 at 1).

2. Capital Demolition, LLC was formed in January 2013 and at the time the application was submitted, March 5, 2014, Sherry Brown owned 25.5% of the firm, Lucinda Carr owned 25.5%, James Brown owned 24.5%, and Christopher Carr owned 24.5% (Exh. DED1 at 2-3). James and Sherry Brown are married as are Christopher and Lucinda Carr (Exh. DED2). In June 2015, the Carrs sold their interests back to the company so that after this transaction, Ms. Brown owned 51% of the firm and James Brown owned 49% (Exh. DED7).<sup>1</sup>

3. The application identifies the cash and capital contributions to the firm of the owners as: (1) a [REDACTED] loan from James/Sherry Brown; and (2) a [REDACTED] loan from Christopher/Lucinda Carr (Exh. DED1 at 3). Included with the application were two documents purporting to show capital contributions, a bank statement dated December 31, 2013 and a reconciliation report dated January 10, 2014. However, neither show any contribution (Exh. DED3). The firm's 2013 federal tax returns report that none of the owners made any capital contributions during the year (Exh. DED4 at 7-10). The tax returns also show that no loans were made to the firm during 2013 (Exh. DED4 at 5). In response to a request for additional information (Exh. DED5), the applicant provided a letter stating that: Ms. Brown's contribution of money was a mutual deposit with her husband that was withdrawn from equity in James Brown's company, James A. Edgar Company, Inc.; Ms. Brown's expertise in the construction business along with her knowledge of accounting is worthy of the shares she owns; and Ms. Brown did not actually make a capital contribution (Exh. DED6). The firm's 2015 tax return reports that Ms. Brown did not make any capital contributions during the year and that her husband had made a contribution in the amount of [REDACTED] (Exh. DED8 at 8 & 10).

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<sup>1</sup> On the appeal, applicant's counsel reports that the ownership of the firm again changed before the Division's October 11, 2016 denial. However, this change was not reported to the Division before the denial was issued, and is, therefore, irrelevant to this appeal. Counsel reports the company purchased James Brown's interest in the firm (Exh. A4) and sold a 25% interest in the firm to Joshua Brown, the son of James and Sherry Brown (Exh. A5).

4. The application states that Sherry Brown shares responsibility for managing the following operations: (1) financial decisions; (2) preparing bids; (3) negotiating insurance; (4) purchasing equipment/sales; (5) managing and signing payroll; and (6) is a signatory on business accounts. James Brown and Thomas Reed are responsible for estimating and James Brown and Randy Craven, superintendent, are responsible for supervising field operations. Exh. DED1 at 4-5.

5. James Brown's resume shows over thirty years' experience as a supervisor and owner in the roofing business (Exh. DED9 at 2). James Brown is certified as a Class G "supervisor" for asbestos abatement projects (Exh. DED10).

6. Sherry Brown's resume shows over 25 years' experience as the office manager for James A. Edgar Company, Inc. and lists her duties with Capital Demolition, LLC as making business decisions and operation of the office; performing accounting duties, including payroll, taxes, quarterly reports, insurance, general ledger, audits, and bookkeeping duties; and hiring office personnel (Exh. DED9 at 1).

#### **DISCUSSION**

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth four bases related to the Ms. Brown's ownership, operation, and control of Capital Demolition, LLC. Each basis is discussed individually, below.

#### **Ownership**

In its denial, the Division found that the applicant failed to demonstrate that the contribution of the woman owner, Sherry Brown, is proportionate 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). The relevant facts cited in the denial letter are: (1) Ms. Brown owns 51% of the firm and her husband owns the remaining 49%; and (2) Ms. Brown has not demonstrated any contribution to the firm separately from her husband.

On appeal, applicant's counsel states that Ms. Brown and James Brown made simultaneous initial capital investments in the firm. The funds used for these investments came in the form of a draw from James Brown's former construction company, which Ms. Brown states was a jointly-owned marital asset. Rather than transferring these funds into personal accounts and then into the new business, the transfer was done directly (Brown affidavit, ¶10).

In addition to Ms. Brown's monetary contribution, counsel argues that she brought invaluable management experience and administrative expertise. He also argues that she has invested considerable time in the firm and only received a small weekly salary of [REDACTED] per week. Ms. Brown describes her responsibilities at the firm as including: (1) overseeing human resource issues, payroll, finances, accounting, labor management, office management, and office administration; (2) handling all financial aspects of the firm, including banking, payroll, employee benefit funds, and insurance; (3) overseeing compliance with State and federal law with regard to labor, insurance, asbestos removal, and taxes; (4) overseeing staffing levels; (5) managing accounts receivable, accounts payable, and the general ledger; (6) coordinating requests for wage garnishments; (7) handling unemployment payments; (8) tracking and managing labor and materials for each job; (9) managing profitability; (10) preparing certified payroll; (11) managing change orders and contracts; (12) ensuring compliance with contracts relating to insurance; (13) conducting audits to verify regulatory compliance; (14) coordinating financial oversight; (15) managing the firm's retirement plan; and (16) general trouble shooting as issues arise (Brown affidavit, ¶¶12-15). In addition, since the departure of James Brown from the business, Ms. Brown oversees and supervises the firm's project manager, and reviews and approves company projects, estimates, and bids (Brown affidavit, ¶16). The only tasks she does not directly perform are on-site field management and preparing bids, which she oversees (Brown affidavit, ¶17). Applicant's counsel concludes that Ms. Brown's contribution of time and expertise, when combined with her initial capital contribution demonstrate that she has made contributions that

are proportionate to her equity interest in the business enterprise, as required by 5 NYCRR 144.2(a)(1).

In its response, the Division argues that Ms. Brown failed to demonstrate that she made any contribution to the firm and that the only proven contribution was made by James Brown. The Division notes that the application claims that Ms. Brown made a contribution in the form of a loan to the business in 2013 (Exh. DED1 at 3). However, the firm's 2013 tax returns report no such loan (Exh. DED4 at 7-10). In his affidavit, Mr. Butler states that he reviewed other documents submitted to document Ms. Brown's contribution, a bank statement and a reconciliation report (Exh. DED3), but that these documents did not show any contributions (Butler affidavit, ¶¶13-14).

In addition to the claims of monetary contributions, Ms. Brown also asserted in the application materials that she contributed expertise in the construction business and a knowledge of accounting (Exh. DED6 at 1). The Division argues that these claims were not supported by any documents and failed to assign a value to her claimed contributions. Mr. Butler states in his affidavit that Ms. Brown's claimed expertise as an office manager is not related to the services the firm provides while her husband claimed comprehensive knowledge of hazardous and safety requirements and the ability to oversee, manage, plan, design and develop all projects (Butler affidavit, ¶¶28-30). The Division also notes that applicant's claim that the Browns purchased the Carrs' shares is not accurate, and that in fact, the company redeemed the Carrs' shares (Exh. DED7).

The only contribution proven in the application materials, the Division asserts, is a [REDACTED] contribution by James Brown shown on the firm's 2015 tax returns (Exh. DED8 at 9). Based on this information, Mr. Butler states that he concluded that Ms. Brown failed to show a contribution in proportion to her equity interest in the firm (Butler affidavit, ¶31). The Division concludes that even if Ms. Brown's claim that the [REDACTED] transfer represented a joint contribution on behalf of her and her husband, this would not show that she contributed more than half the money used to start the business.

Based on the evidence in the record, specifically the fact that Ms. Brown has failed to show she made any monetary

contribution to the firm and her claims of contributions of expertise are uncorroborated and unquantified, the applicant has failed to demonstrate that the contribution of the woman owner, Sherry Brown, is proportionate 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). The Division's denial on this ground was based on substantial evidence.

### Operation

In its denial letter, the Division found that the applicant failed to demonstrate that the woman owner makes decisions pertaining to the operation of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter were: (1) Ms. Brown's managerial responsibilities at the firm are primarily office management, human resources, and financial matters; and (2) James Brown manages the core functions of the firm including estimating and supervising field operations.

On the appeal, applicant's counsel argues that the Division's interpretation of its regulations is wholly inconsistent with the language of the regulations. By requiring the woman-owner to be directly involved in the day-to-day field operations of the business enterprise, the Division is acting contrary to the regulations and addresses the current management of the firm, following James Brown leaving the firm and Joshua Brown purchasing shares, which as explained elsewhere is not relevant on appeal because this information was not provided to the Division prior to its denial and, therefore, was not before the agency when it made its determination.<sup>2</sup>

In its response, the Division argues that the firm does not qualify as a WBE because the application materials show Ms.

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<sup>2</sup> Counsel argues that under the new management structure, Ms. Brown delegates the supervision of the day-to-day field operations to her project manager and that she retains the ultimate authority to make all decisions. Whether this management structure would be sufficient to qualify the firm as a WBE is beyond the scope of this appeal because this information was not presented by the applicant to the Division prior to the denial.

Brown relies on James Brown's skills and training to manage the significant operations of the business. The Division points to the application and states that Ms. Brown defers the management of significant operations to the male owner and one key employee. In his affidavit, Mr. Butler states that based on his training, he evaluates whether the woman-owner manages how a business obtains and performs work for clients because these are the critical functions for certification purposes (Butler affidavit, ¶¶33-34). In this case, Mr. Butler states that estimating and supervision of field operations are the significant operations of the firm and that these operations are not managed by Ms. Brown (Butler affidavit, ¶38 & ¶42). The application reports that James Brown and an employee, Mr. Thomas Reed, are listed as being responsible for estimating, while James Brown and a second employee, Randy Craven, are listed as being responsible for supervising field operations (Exh. DED1 at 4-5). Ms. Brown's responsibilities included managing administrative, financial and human resource issues (Exh. DED 1 at 4-5). This information is not contradicted by other information provided with the application (Exh. DED6) and on the appeal.

Based on the evidence in the record, specifically the fact that men manage the significant operations of the firm including estimating and supervising field operations, the applicant failed to demonstrate that the woman owner makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial on this ground was based on substantial evidence.

The Division also found that the woman owner relied upon for certification does not have adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The relevant facts cited in the denial letter were: (1) the firm is engaged in the business of asbestos abatement, lead removal, and demolition; and (2) Ms. Brown has no demonstrated training or prior managerial experience in the asbestos abatement, lead removal, and demolition industry prior to becoming the majority owner of the firm.

On appeal, applicant's counsel contends that the Division's denial on this ground goes against the weight of the evidence. Counsel points to the fact that Ms. Brown has over 25 years of management experience in the construction industry, including 23 years working for James A. Edgar Company where she performed all office and administrative tasks, including: bookkeeping, office administration, compliance with State and local law, payroll, maintaining certifications and licenses, coordinating and organizing project labor, payroll, and banking (Brown affidavit, ¶¶19 & 20). These are tasks that she continues to perform at Capital Demolition, LLC. Counsel notes that since her husband left the firm, Ms. Brown has been overseeing the business essentially on her own, with some minimal assistance from the son, Joshua. She now oversees the project manager, supervises the company's projects, bids and estimates as well as having final decision-making authority over the firm. Her 25 years of on-the-job training have provided her with both the managerial experience and technical competence to operate the firm, counsel concludes.

In its response, the Division argues the application materials show that Ms. Brown lacks the necessary managerial experience or technical competence to evaluate James Brown's work. James Brown's certification as a Class G supervisor for asbestos abatement projects demonstrates his significant experience and technical knowledge (Exh. DED10). In contrast, Ms. Brown does not claim any credentials relevant to field work and her only experience is as an office manager (Exh. DED9 at 1). In his affidavit, Mr. Butler concluded that these facts demonstrate that Ms. Brown lacked the managerial experience or technical competence to operate the business enterprise (Butler affidavit, ¶49). The Division concludes that there is no evidence in the record that Ms. Brown has adequate knowledge of asbestos abatement, lead removal, or demolition to meaningfully evaluate James Brown's work and, therefore, the firm cannot qualify as a WBE.

Based on the evidence in the record, specifically Ms. Brown's lack of any experience or qualification in the asbestos abatement, lead removal, or demolition fields, the applicant failed to demonstrate that the woman owner relied upon for certification has adequate managerial experience or technical

competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i). The Division's denial on this ground was based on substantial evidence.

### **Control**

In its denial letter the Division also claimed that the woman owner relied upon for certification has not demonstrated control of negotiations through the production of signed contracts, as required by 5 NYCRR 144.2(b)(3). In its response to the appeal, the Division withdraws this ground for denial. Accordingly, the denial should be modified to remove this basis for denial.

### **CONCLUSIONS**

1. The applicant failed to demonstrate that the contribution of the woman owner, Sherry Brown, is proportionate 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).

2. The applicant failed to demonstrate that the woman owner, Sherry Brown, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

3. The applicant failed to demonstrate that the woman owner, Sherry Brown, relied upon for certification has adequate managerial experience or technical competence to operate the business enterprise seeking certification, as required by 5 NYCRR 144.2(b)(1)(i).

### **RECOMMENDATION**

The Division's determination to deny Capital Demolition, LLC's application for certification as a woman-owned business enterprise should be modified and, as modified, affirmed for the reasons stated in this recommended order.

**Matter of  
Capital Demolition, LLC**

**DED File ID No. 58417  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>
DED1	Application
DED2	2012 federal tax returns
DED3	Bank statement
DED4	2013 tax returns
DED5	Request for additional information
DED6	Response to request for additional information
DED7	Redemption, waiver and release agreement
DED8	2015 tax returns
DED9	Resumes
DED10	Asbestos certificate issued to James Brown
DED11	Denial letter
A1	Denial letter
A2	Redemption, waiver and release agreement
A3	Affidavit of Sherry Brown with request for additional information and 2014 tax returns attached
A4	Redemption agreement
A5	Membership interest purchase and sale agreement
A6	Contracts
A7	Letter of Intent
A8	Real estate lease

A9	Asbestos handling license
A10	Commercial Insurance Application
A11	Disclosure Authorization Agreement
A12	Banking customer information form
A12	Life insurance information