

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

In the Matter

-of-

The Application of **Christian Brothers Home Improvement, Inc.**
for Certification as a Minority and Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 50119

RECOMMENDED ORDER

/s/

Helene G. Goldberger
Administrative Law Judge

September 23, 2020

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 or Division) to deny the application filed by Christian Brothers Home Improvement, Inc. (CBHI or applicant) for recertification as a minority and woman-owned business enterprise (MWBE) be affirmed for the reasons set forth below.

PROCEEDINGS

CBHI applied for recertification as a minority and woman-owned business enterprise on February 11, 2015. *See*, Exhibit (Ex.) DED 1. By letter dated March 17, 2017, the Division determined that CBHI does not meet the eligibility requirements to be certified as a minority and woman-owned business enterprise and denied its application. Ex. DED 2. The grounds for the Division's determination are:

- Pursuant to § 144.2(b)(1) of Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR), the minority and woman owner did not make decisions pertaining to the operation of the business enterprise; and
- Pursuant to 5 NYCRR § 144.2(b)(3), the company did not demonstrate control of negotiations by the minority and woman owner through production of relevant documents.

By letter dated June 9, 2017, Ms. Cathy Powers of the Division responded to Ms. Precious Dwight's request to file a written appeal to the Division's decision and notified Ms. Dwight that CBHI had until August 5, 2017 to submit said appeal. Ex. DED 3. The appeal, dated July 25, 2017, was timely received by DED on July 28, 2017.

CBHI's appeal consists of a letter by Ms. Precious Dwight with other documentation. Attached to Ms. Dwight's Letter are an April 10, 2017 letter from Senator Seward, an April 7, 2017 letter from Ms. Velga Kundzins, the Executive Director of Western Catskills – Community Revitalization Council, Inc., a letter from Anthony Scalici of Otsego Rural Housing Assistance, Inc. dated April 11, 2017, a letter from Lynda Hitt, Housing and Community Development Director of Delaware Opportunities, Inc. dated July 20, 2017, a job description dated July 27, 2017 by Precious Dwight, the Empire State Development letter dated June 15, 2010 granting CBHI status as a WMBE-Owned Business Enterprise, a construction contract signed by Ms. Dwight for [REDACTED] dated May 8, 2017, an [REDACTED] Construction Contract dated September 30, 2016 signed by Ms. Dwight, a Contract for Rehabilitation signed by Ms. Dwight on July 5, 2017, a Certificate and Release between CHBI and [REDACTED] dated November 30, 2016, a Notice to Proceed between CBHI (Sean Dwight) and [REDACTED] dated April 4, 2017 signed by Ms. Dwight, a [REDACTED] Scope of Work between [REDACTED]

██████████ and signed by Ms. Dwight, a Town of Stamford inspection report for payment for ██████████ dated May 19, 2016 and signed by Ms. Dwight, affirmation of income payments dated February 2011, January 6, 2012 and January 2, 2012 with two of these signed by both Precious and Sean Dwight and one signed only by Ms. Dwight.

In the Division's responding papers, Attorney Fawziyyah W. Slavov submitted the Division's memorandum of law and the affidavit of Glenn Butler, a Senior Certification Analyst with DED, dated September 2, 2020. Attached to Mr. Butler's affidavit are seventeen exhibits which are described in the chart annexed to this recommended order.

Attorney Slavov notes that the documentation submitted by CBHI on this appeal was not included with the company's application and therefore this information should not be considered in the review of the application. DED Brief (Br.), pp. 10-11. I am limited by the regulations - 5 NYCRR § 144.5(a) - to consider only material that was submitted as part of the application. Therefore, I cannot consider the letters of support, Ms. Dwight's description of her duties, or the contracts and associated records that she signed on behalf of CBHI.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a minority and woman-owned business enterprise are set forth in the regulations at 5 NYCRR § 140, *et seq.* Among the criteria are requirements that the minority and/or woman owner of the company be in both a position to make decisions on behalf of the applicant company and that the minority and/or women owner demonstrates control of negotiations and other functions of the company through presentation of relevant documents. 5 NYCRR § 144.2(b)(1) and (3). 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 information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR § 144.4(e).

STANDARD OF REVIEW

On this administrative appeal, CBHI bears the burden of proving that the Division's denial for MWBE recertification is not supported by substantial evidence (*see*, State Administrative Procedures 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 CBHI for recertification as a minority and woman-owned business enterprise with a letter dated March 17, 2017. (*see*, Exhibit DED 2). The Division determined that CBHI failed to demonstrate: (1) the minority and woman owner controlled the operations of the business enterprise and (2) that the minority and woman owner demonstrated such control of negotiations through production of relevant documents.

The Division concluded that Ms. Dwight did not have the requisite background to oversee the core activities of the company and instead was chiefly engaged in clerical matters at CBHI. Additionally, because all of the contracts and related documents submitted by CBHI with its application had Mr. Dwight as the signatory, the Division concluded that he was the individual in control and CBHI's application did not meet the regulatory requirements. *See*, Exs. DED 7, 8, 9, 10, 12 and 14. In the memorandum of law in support of the Division's response, Ms. Slavov notes that Mr. Dwight signed all of these contracts, estimates and notices to proceed and with respect to a non-collusion statement that was associated with the [REDACTED] contract, Sean Dwight stated he was the company's owner. DED Memorandum of Law, pp. 3-4, 9 and Ex. DED 7.

The Division also notes that in CBHI's summary of respective duties at the company submitted as part of the application, there is no distinction made between the work performed by Sean or Precious. DED Exhibit 4. Rather, the description is stated in terms of "we." Finally, the Division notes that the respective resumes submitted by Precious and Sean sharply contrast in terms of relevant experience with Mr. Dwight having contracting experience and Ms. Dwight noting clerical, painting and cleaning with an educational background in language arts. Exs. DED 5 and 6.

CBHI

In its appeal received by the Division on July 25, 2017, Ms. Dwight emphasizes that the company has been a certified member of the MWBE program since 2007 and that an employee of the Division, Susan Buckman, performed an in person visit that supported the company's status. Appeal, p. 1. Ms. Dwight lists many of the projects that the company has worked on and notes her involvement in oversight and inspection particularly with respect to lead safety work practices. Appeal, pp. 1-2. She argues that the fact that the documents submitted with the application had her husband's signature is merely happenstance and she provides several contracts and related documents that she signed. Appeal, p. 2. Ms. Dwight also criticizes the Division for taking so long to issue its denial. Appeal, p. 3.

Along with the appeal letter, the contracts and related documents noted, Ms. Dwight submitted a number of letters in support of her role by clients and a State Senator.

FINDINGS OF FACT

1. Christian Brothers Home Improvement, Inc. is located at 31 Main Street, Suite 5, Oneonta, New York. Ex. DED 1, § 1 E.
2. The company is engaged in contracting services for residential premises. Ex. DED 1, §§ 5B, 5C.
3. CBHI was established in July 2005. Ex. DED 1, § 1 R.
4. Precious Dwight is president and owns 51% of the company and Sean Dwight, her husband, owns 49% and is vice-president. Ex. DED 1, § 3.A.
5. Ms. Dwight graduated with a bachelor's degree in German as a foreign language. Ex. DED 6. Her work experience has consisted of clerical, painting, professional cleaning and unspecified day to day oversight of the operations at CBHI. *Id.* Mr. Dwight attended a pre-employment program at BOCES. Ex. DED 5. His work experience has consisted of estimating, operations, training, hiring, general contracting duties and "running all phases of the construction business." *Id.*
6. The contracts, bids and related documents that CBHI submitted as part of its application were all signed by Mr. Dwight. Exs. DED 7-17.

DISCUSSION

This recommended order considers CBHI's appeal from the Division's March 17, 2017 determination to deny CBHI's application for recertification as a minority and 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 minority and woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's March 17, 2017 denial letter (*see*, Ex. DED 2), CBHI did not demonstrate that (1) the minority and woman owner controlled the operations of the business enterprise; and (2) that it produced the supporting documents to demonstrate that the minority and woman owner negotiated on behalf of the company and controlled the other vital functions. 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(3).

I. Control

To be eligible for MWBE certification, the Division's regulations state that "[d]ecisions pertaining to the operation of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise." 5 NYCRR § 144.2(b)(1). While Ms. Dwight has submitted many letters of support from clients as well as an elected official that state Ms. Dwight is actively involved in making decisions on behalf of the company, this information was not before the Division at the time of the application and therefore it cannot be considered. *See*, 5 NYCRR § 144.4(e).

Moreover, as the Division emphasizes in its response to the appeal, the resume submitted by Ms. Dwight provides that she was engaged in clerical, cleaning, painting and unspecified day to day oversight. Ex. DED 5. In the statement that the company provided to summarize the owners' respective duties at the company, there is no distinction of the roles of Mr. and Ms. Dwight, indicating that this enterprise is a family run company. Ex. DED 4. As set forth by Attorney Slavov in the Division's memorandum of law, "[i]t has been established that, indeed, the woman or minority group member owner must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification" *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 A.D.3d 1517, 1519 (4th Dept. 2018) (holding that DED's decision to deny the applicant business was based on substantial evidence)" (DED Brief in Response to Appeal at 8).

While the law does not require necessarily that the minority and woman owner must possess the technical expertise, there must be operational control. *See Era Steel Construction Corp. v. Egan*, 145 AD2d 795 (3rd Dep't 1988). In reviewing Ms. Dwight's resume in combination with the documentation submitted with the application, this standard is not met.

Accordingly, based on the record before me, I find that the Division reasonably concluded that Ms. Dwight does not control the business.

II. Production of Relevant Documents

The applicable regulatory criteria state that the "[m]inority group members or women must demonstrate control of negotiations, . . . and other business transactions through production of relevant documents." 5 NYCRR § 144.2(b)(3). The documents that CBHI submitted in support of its application – and there are many – all have Mr. Dwight's signature on them. These are contracts, estimates and other documentation needed for moving forward on their contracting jobs. One document, as noted by Division staff, even sets forth that Mr. Dwight is the owner of the company without any mention of Precious Dwight. *See*, DED Memorandum of Law, p. 4 and Ex. DED 7. This information all points to Mr. Dwight as the negotiator and prime contact for these contracts.

While on appeal, the company produces contracts that Ms. Dwight signed on behalf of the company, I cannot consider these because they were not before the Division when it reviewed the application. 5 NYCRR § 144.4(e). In addition, even some of these documents have Mr. Dwight as co-signatory, specifically the Affirmation of Income Payments from January 2012.

On the appeal, Ms. Dwight complains that the Division took too much time to provide its determination. Appeal, p. 3. The Division staff has a great number of applications to consider, review and decide. As noted in the Division's letter granting CBHI its certification in 2019, the WBE status is granted for three years pursuant to Executive Law § 314(5) and the Division is charged with reviewing every application whether for certification or recertification on its merits and is not bound by prior determinations. *See, Matter of the Application of Coverco, Inc.*, Recommended Order (ALJ O'Connell, 1/27/17), Final Order 17-06 (1/30/17); 159 AD3d 1538 (4th Dep't 2018) (court confirmed agency's determination and dismissed Article 78 petition challenging it). SAPA § 401(2) allows for the continuation of the license pending the administrative review. CBHI was able to continue pursuant to its former certification during this period, but that benefit does not entitle it to any permanent status.

On this record, I conclude that the Division's determination that the company's production of documents failed to demonstrate that the minority and woman owner was in control is supported by substantial evidence.

CONCLUSION

1. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), CBHI did not meet its burden to show that the Division's March 17, 2017 determination to deny the application for MWBE recertification is not based on substantial evidence.
2. With respect to the company's documentation governed by 5 NYCRR § 144.2(b)(3), CBHI did not meet its burden to show that the Division's March 17, 2017 determination to deny the application for MWBE certification is not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny CBHI's application for recertification as a minority and woman owned business enterprise should be affirmed for the reasons stated in this recommended order.

Attachment: Exhibit Chart

**DIVISION OF MINORITY & WOMEN'S BUSINESS DEVELOPMENT
NEW YORK STATE DEPARTMENT OF ECONOMIC DEVELOPMENT**

CHRISTIAN BROTHERS HOME IMPROVEMENT, INC. EXHIBIT LIST¹

EXHIBIT NO.	DESCRIPTION
DED 1	Application for recertification – February 11, 2015
DED 2	Denial Letter – March 17, 2017
DED 3	Notice to Proceed with Written Appeal – June 9, 2017
DED 4	Job Description for Sean Dwight and Precious Dwight
DED 5	Resume for Sean Dwight
DED 6	Resume for Precious Dwight
DED 7	Contract 3193-013
DED 8	██████████ Contract
DED 9	██████████ Change Order
DED 10	██████████████████████████████████████ – Certificate of Completion
DED 11	██████████ Contract
DED 12	██████████ Letter – February 27, 2017 re: ██████████ propert

¹ The ALJ is not considering any of the documents from the Appellant except for APP 1 which is the denial and is the same as DED 2 and APP 7 which is the 2010 certification letter.

EXHIBIT NO.	DESCRIPTION
DED 13	Notice to Proceed – January 13, 2017 – [REDACTED]
DED 14	Contract - [REDACTED] – February 1, 2017
DED 15	Service Contract – [REDACTED] – February 20, 2017
DED 16	HUD Project # [REDACTED]
DED 17	[REDACTED] – Certificate of Compliance – Village of Walton
APP 1	Denial dated March 17, 2017
APP 2	Letter dated April 10, 2017 from Senator Seward to Howard Zemsky
APP 3	Letter dated April 7, 2017 from Velga Kundzins
APP 4	Letter dated April 11, 2017 from Anthony Scalici Executive Director, Otsego Rural Housing Assistance, Inc. to Ms. Cathy Powers
APP 5	Letter dated July 20, 2017 from Lynda Hitt of Delaware Opportunities, Inc. to Whom It May Concern
APP 6	Job Description for Precious Dwight
APP 7	Letter dated June 15, 2010 from Director Michael H. Jones-Bey to Precious Dwight
APP 8	[REDACTED] Construction Contract – April 7, 2017
APP 9	[REDACTED] Construction Contract – April 7, 2017
APP 10	Certificate and Release – [REDACTED] – July 29, 2016
APP 11	[REDACTED] Contract for Rehabilitation – July 5, 2017

EXHIBIT NO.	DESCRIPTION
APP 12	█ Certificate and Release dated November 30, 2016
APP 13	Notice to Proceed – █ – April 4, 2017
APP 14	█ Scope of Work – █ – July 19, 2017
APP 15	Affirmation of Income Payments – February 10, 2011
APP 16	Town of Stamford Inspection Report for Payment – █ – May 19, 2016
APP 17	Affirmation of Income Payments – January 6, 2012
APP 18	Affirmation of Income Payments – January 2, 2012