

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

In the Matter

- of -

the Application of **ETHANY CORPORATION**
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 47557

RECOMMENDED ORDER

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

January 21, 2021

SUMMARY

The determination of the Division of Minority and Women's Business Development of the New York State Department of Economic Development (Division or DED) to deny Ethany Corporation (Ethany or applicant) recertification as a woman-owned business enterprise (WBE) should be affirmed for the reasons set forth below.

PROCEEDINGS

In a letter dated March 20, 2018, the Division determined that Ethany does not meet the eligibility requirements to be recertified as a woman-owned business enterprise and denied Ethany's application. *See*, DED Exhibit (Ex.) 2; Applicant (App.) Ex. A. The grounds for the Division's denial 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), women do not make decisions pertaining to the business enterprise;
- Pursuant to 5 NYCRR § 144.2(b)(2), relevant business agreements do not permit the woman owner to make decisions without restrictions.

By letter dated April 16, 2018, Carole L. Dakin, President of Ethany Corporation, submitted applicant's appeal to the MWBE Appeals Unit. With the appeal, Ms. Dakin submitted DED's denial letter of March 20, 2018, Ms. Dakin's resume, Michael J. Dakin's resume, the resume of their daughter Bethany Jovkovski, and the minutes from Ethany's annual board of directors and shareholder meeting dated April 6, 2018. I have marked these as Ethany's Exhibits A-E. However, I am unable to consider Exhibit E because it was not included as part of the documentation submitted with the application and thus, was not before Division staff when it made its review. *See*, 5 NYCRR § 144.4(e).

Bella Satra, Esq., Counsel for New York State Division of Economic Development, filed the Division's brief in response dated December 23, 2020 (DED Br.). With the response, the Division also submitted the affidavit of Raymond Emanuel, the Certification Director of the Division, dated December 12, 2020. Attached to Mr. Emanuel's affidavit are seven exhibits, which are identified in the attached exhibit chart. Among the exhibits included with the response is a copy of Ethany's completed application for WBE recertification (*see* DED Ex. 1 [Application No. 6410171, submitted May 4, 2015]), as well as other application materials related to the bases for the Division's March 20, 2018 determination.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation. *See*, 5 NYCRR § 144.2. To determine whether an applicant should be granted WBE status or recertified with WBE status, the Division assesses the ownership, operation, and control of the business enterprise based on 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, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts. *See*, 5 NYCRR § 144.5(a).

STANDARD OF REVIEW

On this administrative appeal, Ethany, as applicant, bears the burden of proving that the Division’s denial of its application 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 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

In the March 20, 2018 denial letter (DED Ex. 2), the Division determined that the application failed to meet the WBE certification criteria related to Carole Dakin’s role in the company based upon its determination that *women do not make decisions pertaining to the operation of the business enterprise* pursuant to 5 NYCRR § 144.2(b)(1) and *relevant business agreements do not permit the woman owner to make decisions without restrictions* pursuant to 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(2).

The Division found in its review of the 2018 application that Ms. Dakin managed an array of primarily administrative and financial duties at Ethany including oversight of human resources, financials, account receivables and payables, corporate activities and office management. Emanuel Affidavit (Aff.) ¶ 12; DED Ex. 4; App. Ex. B. Division staff also noted Ms. Dakin’s responsibilities with respect to marketing, vendor forms and surveys, customer forms and surveys, mailings, and legal activities. *Id.* DED staff contrasted this description with that contained in the resume of Mr. Dakin that cited his responsibilities as management of project managers and software developers, decision-making, marketing strategies and pursuing prospective opportunities. Emanuel Aff., ¶ 13; DED Ex. 3; App. Ex. C. DED staff notes that in Ethany’s appeal letter, the company agrees that staff’s identification of her primary responsibilities “for managing financial and human resources aspects of the business” is an “accurate . . . job description of her daily work activities.” DED Br., p. 8. DED staff also points out that Ethany does not dispute the Division’s summary of Mr. Dakin’s position as “responsible for developing the proposals and managing the projects at a day to day” basis. *Id.*, p. 8. Staff concludes with respect to decisionmaking, that although Ms. Dakin generally describes herself as managing the operation, they determined based on the detail provided by the applicant in the narrative responses and resumes that the critical daily decisions are made by non-qualifying individuals. *Id.*, p. 8.

The Division also concluded that based on the bylaws submitted at the time of the application, it is the president - Mr. Dakin - that was the key manager of the enterprise. DED Br., p. 9; DED Exs. 6 and 7. With respect to the subsequent designation of Ms. Dakin as president as noted in the April 6, 2018 board of directors' meeting minutes (App. Ex. E), staff maintains that because that information was not part of the documentation before staff at the time of the application, it cannot be considered. DED Br., pp. 9-10. Finally, in response to the applicant's statements pertaining to its past certification status, DED staff explains that past certification does not guarantee future approval and that the Division is required to ensure that each applicant meets the requirements at the time of application. *Id.*, p. 10.

Ethany

In the company's appeal, Ms. Dakin states that the Division failed to identify that she "manage[s] the operations and strategies of the corporation [and] responsibilities range from managing office personnel, financial aspects, corporate policies, decision-making and pursuing prospective opportunities to provide growth and stability of the Corporation. Direct aspects of the Project Leaders on the Software Development Life cycle (SDLC) to ensure projects are delivered with the highest quality, on time, and within budget" citing to her resume. App., p. 1, App. Ex. B, DED Ex. 4. Ms. Dakin maintains that staff has an exaggerated view of Mr. Dakin's role based upon their interpretation of his resume. App., p. 1; App. Ex. C; DED Ex. 3. Ms. Dakin explains that the company has three project managers including Mr. Dakin which is an important "piece" of the business activity but notes that it is shared by three people. App., pp. 1-2. She also describes the roles of other personnel including four software developers and one salesperson. App., p. 2. Ms. Dakin clarifies that her daughter, while owning a small percentage of the company, has no role in its operations. App. p. 2.

With respect to the issue of control as determined by the corporation's organizational documents, Ms. Dakin provides that Mr. Dakin's designation as president was an "oversight" with respect to the "understanding and differences of the definition of titles in the Bylaws, the need for titles in a day-to-day activities, and the philosophy of how I have always ran ETHANY." App., p. 2. She references the April 6, 2018 minutes of the board of directors at which time she was designated President, Treasurer and Secretary. App., p. 2; App. Ex. E.

FINDINGS OF FACT

1. Ethany Corporation is located at 19 Main Street, Scottsville, New York. DED Ex. 1 at 1.E.
2. At the time of the application review, Carole Dakin was CFO of Ethany and served as Vice-President, Secretary and Treasurer, and owned 58% of the company. DED Ex. 1, 3.A.; DED Ex. 6. Michael Dakin was CEO, President and had ownership of 38% of the company. DED Ex. 1, 3.A.; DED Ex. 6. Bethany Dakin was identified as an office assistant and owned 4% of the company. DED Ex. 1, 3.A.
3. Ethany applied for recertification as a WBE on May 4, 2015. *See*, DEC Ex. 1.

4. Ethany is engaged in computer software programming services. *See*, DED Ex. 1 at 5.C and Emanuel Aff., ¶ 10.
5. The company was established in or around 1999. Emanuel Aff., ¶ 10. Ms. Dakin went back to college to obtain her Bachelor of Science in Computer Science in order to prepare to take over a portion of her father’s business upon his retirement. App. p. 2.
6. Ms. Dakin’s responsibilities at Ethany include managing office personnel, financial aspects, corporate policies, decision-making, pursuit of prospective opportunities and direction of “aspects of the project Leaders on the Software Development Life Cycle to ensure projects are delivered with the highest quality, on time, and within budget.” DED Ex. 4; App., Ex. B. She is responsible for human resources, employee schedules, closeouts when a project is completed, administrative activity, tax filings, corporate filings, policies, procedures, business plans, customer forms and surveys, vendors forms and surveys, mailing, legal activities, payroll, and benefits. *Id.*
7. Mr. Dakin is both a project manager of three including himself and the manager of that group that develops customer proposals and manage projects from inception through implementation. DED Exs. 3, 4; App. Ex. C. He provides technical assistance to peers as needed, orders new hardware and software to maintain or improve technologies being used, and works with the sales team to improve marketing material and website. *Id.* He is also the manager of the software developers. DED Ex. 4.
8. The board minutes of April 6, 2017 provide that Michael J. Dakin was president. DED Ex. 6. The corporate bylaws submitted to DED with the application provide in Article IV that the president is the chief executive officer that shall “have the management of the business of the corporation and shall see that all orders and resolution of the board are carried into effect.” DED Ex. 6.

DISCUSSION

This recommended order considers Ethany’s April 16, 2018 appeal including Exhibits A-D and the response of the Division staff including Exhibits 1-6. I am not relying upon Ethany’s Exhibit E as this record was not before the Division at the time of the application. The bases identified in the Division’s March 20, 2018 denial letter (*see* DED Exhibit 2) are addressed below.

I. Operation

Section 144.2(b)(1) of 5 NYCRR requires that “[d]ecisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise.” Ms. Dakin’s resume, narrative and her appeal letter describe her

many duties with the company. However, as noted by Division staff, her primary role (which is not contested on appeal) is her management of financial and human resources. Emanuel Aff., ¶ 12. There is mention of some generalized activities such as promotion of the values and strategies of the business and pursuit of opportunities that will strengthen the services and structure of Ethany without any detail. DED Ex. 4. While Ms. Dakin argues on the appeal that Mr. Dakin’s role as noted by DED staff is “exaggerated”; in fact, staff was merely relying upon the documentation provided by Ethany. Specifically, the narrative with respect to Mr. Dakin provides that he develops customer proposals, works with the project managers and manages them as well as the software developers. DED Ex. 4. Mr. Dakin is also responsible for pursuit of business opportunities and the development and execution of marketing programs that increase brand identity and brand awareness. *Id.* With respect to several of the roles that Ms. Dakin claims, he has responsibilities with these as well such as “the vision and direction of the business.”¹ DED Ex. 4.

Staff notes in its determination that Mr. Dakin also “direct[s] aspect of the Project Leaders on the Software Development Life Cycle . . . to ensure projects are delivered with the highest quality, on time and within budget.” Emanuel Aff., ¶ 13; DED Ex. 4. Ms. Dakin’s resume also notes her involvement in this aspect of quality control at Ethany. DED Ex. 4. However, DED staff’s conclusion that her involvement at Ethany is primarily administrative is reasonable and that while she clearly shares in other duties, she is not the chief operator. Rather, the company operates to some degree as a family business with input from both spouses. *Matter of C.W. Brown, Inc. v. Canton*, 216 A.D.2d 841, 843 (3rd Dept. 1995). This structure, however, is not enough to meet the criteria of the WBE program. As noted by staff, the woman or minority group owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification.” *Matter of J.C. Smith, Inc. v. New York State Dept. of Economic Dev.*, 163 A.D.3d 1517, 1519 (4th Dept. 2018). While Ms. Dakin’s description of her role in the company is an important one by tending to all the administrative details such as payroll, website development, tax filings, insurance and keeping track of bills and bank balances, the certification requires that the woman owner makes the decisions with respect to the core functions of the company. *See, Matter of Upstate Electrical, LLC v. New York State Dept. of Economic Dev.*, 179 A.D.3d 1343 (3rd Dept. 2019).

Ethany failed to demonstrate in its application or on its appeal enough information to rebut staff’s conclusions to the contrary that Ms. Dakin was in control of the significant operations of Ethany. Accordingly, based on the record before me, I find that the Division reasonably concluded that Ms. Dakin failed to demonstrate her control of the business operations.

II. Control

The applicable regulatory criteria state that the “[a]rticles of incorporation, corporate bylaws, partnerships agreements and other agreements . . . must permit . . . women who claim ownership of the business enterprise to make those decisions without restrictions.” 5 NYCRR

¹ Ms. Dakin references “private information” in the appeal as another ground to support Ethany’s appeal. Because this information was not before the Division upon the review of the application, I cannot consider this information.

§ 144.2(b)(2). Here too, Ethany's qualifications fail for recertification. The bylaws in effect at the time of application provide that the president of the company has the authority over the business affairs of the corporation and its officers. DED Ex. 7, Article IV, Section 3. And, in the 2017 minutes presented to DED to support the application, it is Mr. Dakin who is president. DED Ex. 6. Accordingly, Ms. Dakin was not in charge pursuant to these essential corporate documents. As stated above, while the company appears to have subsequently elected Ms. Dakin as president, this documentation was not before the Division at the time that review of the application was made and therefore, I cannot consider this change. 5 NYCRR § 144.4(e).

With respect to Ethany's reference to past certifications of the company, the State is rarely estopped from addressing errors in order to carry out its statutory mandates. *See, Matter of Empire Air Specialties v. New York State Dept. of Economic Dev.*, 2016 NY Slip Op. 816909 (U) (7/29/16 Sup. Ct., Albany County). 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 Coverco, Inc.*, Recommended Order (ALJ O'Connell, 1/27/17), Final Order 17-06 (1/30/17); 159 A.D.3d 1538 (4th Dep't 2018) (court confirmed agency's determination and dismissed Article 78 petition challenging it).

Based upon the record before me, I conclude that the Division reasonably found that the company's governing documents precluded Ms. Dakin from being in control of the enterprise.

CONCLUSION

1. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), Ethany did not meet its burden to show that the Division's March 20, 2018 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the control criteria at 5 NYCRR §§ 144.2(b)(2), Ethany did not meet its burden to show that the Division's March 20, 2018 determination to deny the application for WBE certification is not based on substantial evidence.

RECOMMENDATION

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

Attachment: Exhibit Chart

Exhibit Chart
Matter of Ethany Corporation
WBE File ID No. 47557

EXHIBIT NO.	DESCRIPTION
DED-1	Application for Certification dated May 4, 2015
DED-2	Denial Letter dated March 20, 2018
DED-3	Michael Dakin's Resume
DED-4	Narrative and Resume of Carole Dakin
DED-5	Narrative Response, Ethany Corporation Supporting Documentation – March 2018
DED-6	April 6, 2017 Meeting Minutes
DED-7	Ethany Bylaws
APP-A	March 20, 2018 Denial
APP-B	Carole L. Dakin Resume
APP-C	Michael J. Dakin Resume
APP-D	Bethany Jovkovski Resume
APP-E	Annual Board of Directors and Shareholder Meeting - April 6, 2018