

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

In the Matter

-of-

the Application of **HUSTED CONCRETE PRODUCTS CO., INC.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 48205

RECOMMENDED ORDER



Helene G. Goldberger
Administrative Law Judge

December 1, 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 Husted Concrete Products Co., Inc. (Husted or applicant) for recertification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Husted applied for recertification as a woman-owned business enterprise on August 8, 2016. *See*, Exhibit (Ex.) DED 1. By letter dated December 4, 2019, the Division determined that Husted does not meet the eligibility requirements to be certified as a 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), women do not make decisions pertaining to the business enterprise;
- Pursuant to 5 NYCRR §§ 144.2(a)(2) and 144.2(c)(2), Husted is not an independent business enterprise.

By letter dated January 16, 2020, Ms. Cathy Powers of the Division responded to Ms. Judith Husted's request to file a written appeal to the Division's decision and notified Ms. Husted that the applicant had until March 16, 2020 to submit said appeal. Ex. DED 3. The appeal, dated March 10, 2020, was timely received by DED on March 13, 2020.

Husted's appeal consists of a letter by Ms. Husted with other documentation. Attached to Ms. Husted's letter are ten pages of accounting and bill payment information; a Certificate of Limited Liability Company with attachments related to J.P. Nolan, LLC; and a copy of a map and survey relating to Husted Concrete Products, Inc.

In the Division's responding papers, Attorney Bella Satra submitted the Division's memorandum of law and the affidavit of Glenn Butler, a Senior Certification Analyst with DED, dated November 13, 2020. Attached to Mr. Butler's affidavit are 10 exhibits which are described in the chart annexed to this recommended order.

Attorney Satra notes that the documentation submitted by Husted 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.), p. 10. 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 documentation submitted by Ms. Husted that was not part of the company's application.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of NYCRR § 140, *et seq.* Among the criteria are requirements that the woman owner of the company be in both a position to make decisions on behalf of the applicant company and that the woman owner demonstrates control of negotiations and other functions of the company through presentation of relevant documents. 5 NYCRR §§ 144.2(b)(1) and 144.2(b)(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, Husted bears the burden of proving that the Division's denial for WBE 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 Husted for recertification as a woman-owned business enterprise with a letter dated December 4, 2019. (*see*, Exhibit DED 2). The Division determined that Husted failed to demonstrate: (1) the woman owner controlled the operations of the business enterprise; and (2) that the applicant was an independently-owned enterprise.

The Division concluded that Ms. Husted did not control the critical core functions of the company – specifically, "to obtain contracts and complete the work by manufacturing or supplying the requisite concrete products." DED Br., pp. 6, 8. Rather, the Division concluded, based upon the resumes submitted as part of Husted's application, that Ms. Husted's role in the company was limited to financial, procurement, marketing and human resources. DED Ex. 7; Butler Affidavit (Aff.), ¶ 14. The Division contrasted Ms. Husted's resume with that of her husband's and several other personnel concluding that they had the specific relevant skills and background to oversee operations of Husted, while Ms. Husted did not. Butler, ¶¶ 15-16.

With respect the independence of the applicant, the Division found that based on its failure to pay rent for several years to an entity that was identified as owned by Mr. Husted, the applicant was not independently owned. DED Br., p. 9; Butler Aff., Para. 17.

The Division concluded its submissions by noting that the “[a]dditional documents and related testimony submitted for the first time on appeal should be stricken or disregarded in the entirety as they were not before the Division during its review of the application and therefore could not have been considered.” DED Br., p. 10; Butler Aff., ¶ 19.

Husted

On its appeal received by the Division on March 13, 2020, Ms. Husted responds to each of the Division’s conclusions regarding the applicant’s lack of qualifications for WBE status. Specifically, concerning control of operations, Ms. Husted submits that she holds a Bachelor’s degree in Industrial Engineering from the SUNY College of Technology. Husted Letter, p. 2. In addition, Ms. Husted explains that at the time of the renewal application, she had approximately thirty-one years of experience in a manufacturing environment including twenty-one years as owner of Husted. She describes her daily meetings with the Vice President, Mr. David K. Husted, concerning the production and shipping schedules and her decisionmaking role on bids. *Id.* She also provides that she establishes the company’s sales goals, is the Safety Office and Environmental Officer, manager of Workers Compensation issues; her role as and in charge of personnel, selection of software, insurance, capital improvements, and decisions on new product lines. *Id.*, pp. 2-3. She also points to her role as Chief Financial Officer, the signatory on all contracts, manager of cash flow and her involvement in an equipment change decision as evidence of her decisionmaking role in the company. *Id.*, pp. 3-4.

With respect to the issue concerning the independence of the applicant, Ms. Husted submits that the company did pay rent for the year 2018 but in the years 2017 and 2019, she elected not to pay due to financial issues. Husted Letter, p. 4. She maintains that it was an error in the application to identify Mr. Husted as owner of J.P. Nolan LLC (the entity which owns at least part of the property where the company is situated) and provides a number of documents that name her as the owner. *Id.*, pp. 4-5.

FINDINGS OF FACT

1. Husted Concrete Products Co., Inc. is located at 50 Sauquoit Street, New York Mills, New York. Ex. DED 1, § 1. E.
2. The company is engaged in the manufacture of concrete products, including precast and wet cast concrete, concrete beams and concrete panels. Ex. DED 1, § 5.A.
3. Husted was established in June 1990 Ex. DED 1, § 1. R.

4. Judith Husted is president and owns 80% of the company and David Husted, her husband, owns 20% and is vice-president. Ex. DED 1, § 3.A.
5. Ms. Husted graduated with a Bachelor's degree in Industrial Engineering from SUNY College of Technology in 1984 and she was in the Mechanical Engineering Program and Drafting Technology Program at Mohawk Valley Community College from 1979 – 1982. DED, Ex. 7. Since 1984, she has had several positions in manufacturing related capacities. *Id.* Her work at Husted is focused on financial and legal responsibilities as well as human resources and risk management. *Id.*
6. Mr. Husted oversees the manufacturing operations at the company, proposes new products to the president, manages the preventive maintenance aspects of the operation, negotiates new equipment purchases, develops capitol improvement plans, and is the administrator for quality control. DED, Ex. 7. In addition to his role at Husted since 1990, Mr. Husted was employed at a construction company previously and his educational background is in construction equipment. *Id.*
7. Mr. William Robert Kurtelawcz is responsible for the bidding process at Husted. DED, Ex. 7. In addition to his ten years of experience at Husted, he was previously employed for nine years at a concrete products company. *Id.*

DISCUSSION

This recommended order considers Husted's appeal from the Division's December 4, 2019 determination to deny Husted's application for recertification 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 4, 2019 denial letter (*see*, Ex. DED 2), Husted did not demonstrate that (1) the woman owner controlled the operations of the business enterprise; and (2) that it was an independently owned enterprise. 5 NYCRR §§ 144.2(b)(1), 144.2(a)(2) and 144.2(c)(2).

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 . . . women claiming ownership of that business enterprise." 5 NYCRR § 144.2(b)(1). A review of Ms. Husted's resume that was submitted with the company's application reveals that she has considerable experience at Husted and in prior manufacturing positions since 1984. DED Ex. 7. However, with respect to her specific role at Husted, the resume indicates that her duties focus on financial, human resources, and marketing. *Id.* Even in the appeal letter, Ms. Husted describes her actions

as collaborative – that is meeting with her husband daily to go over a variety of company matters. Husted Appeal, p. 2. She outlines a number of other roles that appear important to the operation of the applicant; however, these were not submitted as part of the application and therefore, cannot be considered. *See*, 5 NYCRR § 144.4(e). And, even if they were, DED staff points out that the resumes submitted with the application identify Mr. Husted and Mr. Kurtelawcz as the individuals in charge of operations and the development of bids – the core functions of the company. DED Ex. 7.

It 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.” *Matter of J.C. Smith, Inc. v. New York State Dept. of Economic Dev.*, 163 A.D.3d 1517, 1519 (4th Dept. 2018) (holding that DED’s decision to deny the applicant business was based on substantial evidence).

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

II. Independence

The applicable regulatory criteria state that the “the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities;” and “an eligible minority group member or woman applicant must be an independent business enterprise.” 5 NYCRR §§ 144.2(a)(2) and 144.2(c)(2). In the application submitted by Husted, Mr. Husted is identified as the owner of J.P. Nolan, LLC, the entity that owns at least a portion of the property that Husted leases. DED Ex. 1, 4. E. In addition, in review of documentation submitted with the application, DED staff noted that the company did not pay rent to J.P. Nolan, LLC for several years. *Butler Aff.*, ¶ 17. Based upon the ownership of the property by Mr. Husted and the failure to pay rent, staff concluded that the applicant was not an independently owned entity.

On appeal, Ms. Husted claims that rent was paid for 2018, that for the other years where it wasn’t, she made the decision to withhold rent based upon financial considerations. Appeal Letter, pp. 4-5. In addition, Ms. Husted claims that the application was in error and provides documentation showing that she is the owner of J.P. Nolan LLC. *Id.* However, as I noted above, to the extent that the submitted documentation supports Ms. Husted’s claims, I cannot consider them because they were not part of the application. 5 NYCRR § 144.4(e).

On this record, I conclude that the Division’s determination regarding the failure of Husted to establish itself as an independent entity is supported by substantial evidence.

CONCLUSION

1. With respect to the operation criterion at 5 NYCRR § 144.2(b)(1), Husted did not meet its burden to show that the Division’s determination of December 4, 2019 to deny the application for WBE recertification is not based on substantial evidence.

2. With respect to the company's independence governed by 5 NYCRR §§ 144.2(a)(2) and 144.2(c)(2), Husted did not meet its burden to show that the Division's December 4, 2019 determination to deny the application for WBE recertification is not based on substantial evidence.

RECOMMENDATION

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

Attachment: Exhibit Chart

**MATTER OF HUSTED CONCRETE PRODUCTS CO., INC.
EXHIBIT LIST**

EXHIBIT NO.	DESCRIPTION	NOTES
DED 1	Application for Certification	
DED 2	Denial Letter	
DED 3	Notice to Proceed Via Written Appeal	
DED 4	Response to Application Question no. 6, #3, Material Supply Agreement	
DED 5	Response to Application Question no. 6, #1	
DED 6	2015 Form 1120S	
DED 7	Resumes	
DED 8	Certifications - Response to Application Question no. 4	
DED 9	Response to Application Question no. 7	
DED 10	Response to Application Question no. 10	
APP 1	2016 Vendor Inquiry – J.P. Nolan, LLC Commercial Checking – ██████████ statements – December 2016, March 2017, April 2017, June 2017, July 2017, February 2018, April 2019; Bill Payment History JP Nolan LLC, Bill Payment Stub and Bill Payment History 2018 Monthly Rent	Not considered - not part of the application
APP 2	Certificate of Limited Liability Company – J.P. Nolan LLC, Filing Receipt with Dep't of State, Articles of Organization J.P. Nolan LLC, Operating Agreement, Managers, Members, Certificate of Incumbency, Filing Certification DOS, Limited Liability Company Borrowing Authorization	Not considered - not part of the application
APP 3	Survey to the Exhibit Chart 1	