

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

In the Matter

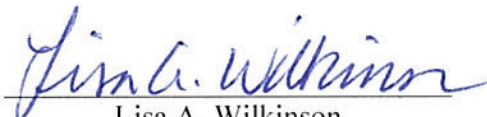
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the Application of **BCD Consultants, LLC DBA Phipps & Co.**  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60433

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson  
Administrative Law Judge

January 3, 2018

## SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny BCD Consultants, LLC DBA Phipps & Co. (BCD or applicant) certification as a woman owned business enterprise (WBE) should be modified and, as modified, affirmed for the reasons set forth below.

## PROCEEDINGS

In a letter dated August 5, 2016, the Division determined that BCD does not meet the eligibility requirements to be certified as a woman owned business enterprise, and denied BCD's application (*see* WBE Exhibit 3).

By letter (undated) received by the Division on August 26, 2016, Maya Phipps<sup>1</sup>, as the president of BCD and its majority (51%) shareholder, appealed from the Division's determination to deny WBE certification. Ms. Phipps agreed to file a written appeal in lieu of a hearing.

By notice dated September 19, 2016, the Division acknowledged BCD's request to proceed with a written appeal. The September 19, 2016 notice set October 31, 2016 as the due date for BCD's written appeal. The notice also reiterated the Division's bases for the denial.

Ms. Phipps timely filed a written appeal on behalf of BCD in the form of a letter denominated as a petition on October 24, 2016 (Appeal). Ms. Phipps included the following papers with the Appeal, which I marked as exhibits: New York State Department of State filing receipt (BCD Exhibit 1); Consent of Action Taken by the Managers and Members dated January 3, 2010 transferring of 1% of ownership interest to Ms. Phipps (BCD Exhibit 2); Consent of Action Taken by the Managers and Members dated January 3, 2010 designating Ms. Phipps as the managing member (BCD Exhibit 3); BCD Operating Agreement dated February 6, 2009 (BCD Exhibit 4); and purchase orders (BCD Exhibit 5).

Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, filed the Division's response dated October 25, 2017 (Response). With the Response, the Division included five exhibits, which are identified in the attached exhibit chart. Among the exhibits included with the Response is a copy of BCD's completed application for WBE certification (*see* WBE Exhibit 1 [Application No. 5032879, submitted June 17, 2015]), as well as other application materials related to the bases for the Division's August 26, 2016 determination.

An exhibit chart is attached to this report.

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<sup>1</sup> As of the date of the application, the woman owner, Maya Phipps, is married to Jerome Phipps and uses the surname Phipps. When BCD was established on February 2009 and at the time of Jerome Phipps's transfer of a 1% interest in January 2010, Maya's surname was Ben-Avner, the name indicated on documents in WBE Exhibit 2 and BCD Exhibits 2, 3, and 4. This report refers to the woman owner as Maya Phipps as indicated in the WBE application.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a woman owned business enterprise are established by regulation (*see* 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, and control of the business enterprise on the basis of 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, BCD, 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 August 5, 2016 denial letter, the Division determined that the application failed to meet the WBE certification criteria related to Maya Phipps's ownership as reflected by her capital contribution to the business enterprise, and BCD's independence from a corporation allegedly owned and operated by Ms. Phipps's husband, Jerome Phipps (*see* WBE Exhibit 3 at Bates 48-49). The Division asserted that the contribution of Maya Phipps is not 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). According to the Division, Ms. Phipps possesses a 51% interest in the business enterprise, as compared to Mr. Phipps who possesses a 49% interest. Nevertheless, applicant failed to provide documentation that Ms. Phipps made a greater capital contribution to the business as compared to Mr. Phipps. (*See* WBE Exhibit 3 at Bates 48.)

In addition, the Division asserted that BCD did not demonstrate that it is an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and 144.2(c)(2). The Division cited the following facts: Ms. Phipps and Mr. Phipps own business concerns in addition to BCD, including Phipps Construction, Inc.; Phipps Construction provides general construction services; BCD distributes materials utilized by Phipps Construction on construction projects; BCD and Phipps Construction operate from the same business address and have no formal arrangement for paying for rent and shared resources; and Phipps Construction and BCD transfer funds between each other on an as-needed basis to maintain cash flow. (*See* WBE Exhibit 3 at Bates 48-49.)

## BCD

On appeal, Ms. Phipps argues that the Division improperly concluded that her capital contribution was not proportionate to her ownership interest and that she made “an independent contribution” including “cash and expertise to substantiate her ownership pursuant to the M/WBE rules.” Ms. Phipps contends that the Division “improperly applied the decision making criteria to the relevant facts in this case in that it improperly reviewed the facts and misrepresented the relevant MWBE rules which provides [sic] that the criteria to be considered includes. . . the applicant’s experience and technical competence in the business enterprise, the applicant’s working knowledge and ability to operate the business enterprise, and the applicant’s ability to devote time on an ongoing basis.” She maintains that “[the Division] failed to inquire of the Petitioner her historic contributions of expertise.” (*See* Appeal, unnumbered pages 2 and 4.)

Ms. Phipps also asserts that the Division improperly applied the MWBE rules concerning independence and that BCD’s business is as a supplier of construction and non-construction related material, while Phipps Construction provides construction related services. According to Ms. Phipps, BCD derives its revenues from other business entities in addition to supplying material to Phipps Construction, and has historically fulfilled purchase orders and contracts in its own name and not that of Phipps Construction. Ms. Phipps states that she has an overall understanding of, and managerial and technical competence directly related to the business in which BCD is engaged. (*See* Appeal, unnumbered pages 5-6.)

With the appeal papers, Ms. Phipps included invoices showing material that was supplied to vendors other than Phipps Construction and that the type of support that Phipps Construction provided to BCD was “back office support” which is not unlike the industry practice of hiring staffing company services. Ms. Phipps also represents that “BCD recently hired its own staff and is not relying on Phipps Construction’s staff” and that “Phipps Construction has been recently winding down and will soon close its doors. Prior to DMWBE’s decision to deny, BCD had initiated steps to hire staff on its own payroll.” (*See* Appeal, unnumbered pages 2-3.)

## **FINDINGS OF FACT**

### **I. General**

1. BCD Consultants, LLC DBA Phipps & Co. is located at 347 East 61<sup>st</sup> Street, Ground Floor, New York, NY 10065 (WBE Exhibit 1 at Bates No. 2 and 3).
2. Maya Phipps is president and owns 51% of BCD. Her husband, Jerome Phipps, owns 49% of BCD. Jerome Phipps is also an owner of Phipps Construction. (*See* WBE Exhibit 1 at Bates 3-5.)
3. Maya Phipps, formerly known as Maya Ben-Avner, submitted a short-form “Fast Track” application to certify BCD as a WBE on June 17, 2015 through the New York State Contract System (*see* WBE Exhibit 1 at Bates 8).

4. BCD is primarily engaged in manufacturing and supplying interior finishes, millwork, furniture, fixtures, and equipment (*see* WBE Exhibit 1 at Bates 4). According to the application, BCD “specializes in the custom manufacturing and supply of interior finishes as well as Millwork and FF&E for the residential, commercial and hospitality sectors” (*see id.*).

#### Ownership

5. BCD was formed by Maya Phipps and Jerome Johnson Phipps on February 6, 2009, each of whom was designated as a member of the company. Pursuant to the operating agreement Ms. Phipps and Mr. Phipps each contributed \$100 for a 50% stake in the company (*See* BCD Exhibit 3 [BCD Consultants Operating Agreement and Exhibit A]).
6. Ms. Phipps and Mr. Phipps executed an amended and restated limited liability company agreement on January 3, 2010, stating that Ms. Phipps and Mr. Phipps “shall contribute their expertise as their respective capital contributions and shall not be required to contribute cash” (*see* WBE Exhibit 2 [amended agreement]) at Bates 15). Ms. Phipps was designated as the Managing Member of the corporation (*see* WBE Exhibit 2 at Bates 16).
7. On January 4, 2010, Mr. Phipps and Ms. Phipps executed a membership interest transfer agreement whereby Mr. Phipps conveyed a 1% interest in BCD to Maya Phipps for consideration of one dollar (\$1.00). According to the transfer agreement, Maya Phipps would acquire a 51% ownership interest in the company. Mr. Phipps, as the seller of his ownership interest, represented and warranted that the “[c]ompany has good and marketable title to all properties, equipment and assets owned by it free and clear of all mortgages, liens and encumbrances.” (*See* WBE Exhibit 2 at Bates 10-11.)
8. With the transfer agreement, Maya Phipps was designated as the managing member and president and authorized to carry out the duties and responsibilities set forth in the operating agreement (*see* BCD Exhibit 3).

#### Independence

9. Jerome Phipps is an owner of Phipps Construction Inc. (Phipps Construction) (*see* WBE Exhibit 1 at Bates 4).
10. In a supplemental response to the Division’s request for information, Maya Phipps stated that she owns 51% of Phipps Construction and Jerome Phipps has a 49% stake in the corporation (*see* WBE Exhibit 1 at Bates 8).
11. Phipps Construction and BCD operate from the same address at 347 East 61st Street, New York, NY 10065 and “utilize one office for the entire operation” (*see* WBE Exhibit 1 at Bates 8).

12. As stated in the application, “Phipps & Co. is a consolidation of two operating entities, BCD Consultants & Phipps Construction Inc. BCD is a distributor of the building construction materials providing the product for the construction projects. Phipps Construction Inc. provides the construction and installation of said product for the various projects. Phipps Construction Inc., being the provider of the actual construction work and the bulk of potential liability, carries all payroll and related tax and insurance liabilities related to the construction projects” (*see* WBE Exhibit 1 at Bates 8).
13. BCD and Phipps Construction “contribute on a cash availability basis between the two operating bank accounts” to pay rent rather than adhere to a set formula for such payments (*see* WBE Exhibit 1 at Bates 8).
14. According to BCD’s 2014 US Return of Partnership Income, BCD had no payroll expenses (*see* WBE Exhibit 4 at Bates 52 [Form 1065, line 9]).
15. Phipps & Co. employs ten employees and assumes the payroll and potential liability for these employees (*see* WBE Exhibit 1 at Bates 8).

## **DISCUSSION**

This recommended order considers BCD’s August 26, 2016 appeal and subsequent written filing dated June 15, 2016 with attached exhibits from the Division’s August 2, 2016 determination to deny certification of BCD as a woman owned business enterprise pursuant to Executive Law Article 15-A. The bases identified in the Division’s August 2, 2016 denial letter (*see* WBE Exhibit 3) are addressed below.

### **I. Ownership**

With respect to the ownership criteria, Division staff asserted that applicant failed to provide documentation showing that Ms. Phipps’s contributions were 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) and, thus, greater than the capital contributions of Mr. Phipps (*see* WBE Exhibit 3 at Bates 48). The Division’s determination is supported by substantial evidence.

Ms. Phipps submitted a Fast Track application to the Division to certify BCD as a WBE (*see* 5 NYCRR 144.8). Fast Track applications do not require applicants to identify their capital contributions (*see* Response at 4). According to corporate documents, however, Maya Phipps and Jerome Phipps formed BCD in February 2009, each contributing \$100 for a 50% stake in the company (*see* BCD Exhibit 3 [BCD Consultants Operating Agreement and Exhibit A]). With respect to Ms. Phipps’ acquisition of a majority interest in BCD in January 2010, the membership interest transfer agreement indicates that Ms. Phipps paid her husband nominal consideration of \$1.00 to receive her majority interest (*see* WBE Exhibit 2 at Bates).

On June 14, 2016, Division analyst Matthew LeFebvre asked Ms. Phipps to “please explain how the business was initially capitalized and provide any documentation (bank statements, cancelled checks, etc.) to support it.” On June 21, 2016, Mr. LeFebvre asked as a follow up question, “[y]ou indicated you initially capitalized the business with cash in 2010. What were each of your capital contributions, where were the funds sourced, and can you provide any documentation to support that?” (See WBE Exhibit 1 at Bates 6-7.) In response, Ms. Phipps stated that BCD was capitalized via “[c]ash investment from members in 2010,” that “[t]he cash investment to capitalize the business start-up was minimal from the ownership, and there are no longer records on hand to support this” (*id.* at Bates 7-8). Despite several opportunities for Ms. Phipps to substantiate her capital contribution to the business enterprise, she failed to establish that she made a contribution to the business enterprise greater than her husband’s and proportionate to her majority interest in the corporation.

Ms. Phipps argues on appeal that the Division misapplied its regulations and failed to conduct a thorough review of her contributions to BCD, failed to consider Mr. Phipps’s operation of another company, and failed to quantify Ms. Phipps’s contributions of expertise (*see* Appeal, unnumbered page 4). Her arguments are meritless. Ms. Phipps’s belated attempt to assert she contributed expertise to the business enterprise after the application was denied is unavailing. Neither the application nor the Appeal offer any evidence that Ms. Phipps had experience in the manufacturing and supply of furniture and fixtures prior to forming BCD in 2009, or that she agreed to work without compensation in consideration for her majority ownership interest, both of which are indicia of a contribution of expertise. The fact that Mr. Phipps sold his 1% interest in BCD to start another business is irrelevant to the issue of Ms. Phipps’s capital contribution. Moreover, the nominal consideration Ms. Phipps paid to acquire a majority interest in the business enterprise falls short of proving her capital contribution was proportionate.

I note that neither article 15 of the Executive Law nor the implementing regulations at 5 NYCRR part 144 (Statewide Certification Program) place the Division under a legal obligation to research the nature of a woman owner’s capital contributions, make inquiries with respect to the same, or complete the WBE application on her behalf. In this case, the Division issued several requests for information regarding Ms. Phipps’s capital contributions, and received nothing from her to demonstrate that she met the eligibility criteria for ownership under 5 NYCRR 144.2(a)(1).

Based on the administrative record, the Division reasonably concluded that Ms. Phipps did not demonstrate that she made a capital contribution to the business enterprise proportionate to her majority ownership interest.

## II. Independence

To be eligible for WBE certification, the Division’s regulations state that (1) “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” (5 NYCRR 144.2[a][2]) and (2) “an eligible. . . woman applicant must be an independent business

enterprise” (5 NYCRR 144.2[c][2]). In its Response, the Division explained the independence requirement as follows:

First, requiring the independence of MWBEs prevents businesses from receiving program benefits that have been shielded from discrimination in the market place as a result of their connection to an established business enterprise, which connection may allow them access to contracting opportunities or business resources that a *bona fide* MWBE would struggle to obtain. Second, where the business operations of an applicant for MWBE certification are intertwined with the operations of an established business entity, requiring MWBE independence prevents program benefits from being passed over to a non-MWBE firm.

(Response at 6). The Division concluded that “BCD is not independent because it relies upon Mr. Phipps’s construction company, Phipps Construction, to deliver services to clients” (*id.*).

In its denial letter, Division staff concluded that BCD was not an independent business enterprise based on BCD’s relationship with Phipps Construction (*see* WBE Exhibit 3 at Bates 48-49; WBE Exhibit 1 at Bates 4 [3.E]) and Bates 8). Division staff noted the following as relevant facts: Ms. Phipps and Mr. Phipps own other business concerns, including Phipps Construction; BCD distributes materials utilized by Phipps Construction on construction projects; BCD and Phipps Construction operate out of the same business address and have no formal arrangement for paying for rent and shared resources; BCD does not maintain its own employees, but utilizes employees of Phipps Construction to provide its services; and BCD and Phipps Construction transfer funds between each other on an as-needed basis to maintain cash flow (*see* WBE Exhibit 3 at Bates 48-49). The Division’s findings of fact are supported in the record (*see* Findings of Fact No. 11-15).

Notwithstanding the Division’s findings, an open question of law exists regarding how the Division interprets 5 NYCRR 144.2(a)(2) and 144.2(c)(2) that is relevant to whether the Division’s determination with respect to independence is supported by substantial evidence. Specifically, it is unclear in the record whether the Division interprets its regulations to require an applicant for WBE certification to demonstrate that it is independent of all business enterprises, or that it is independent of business entities that do not qualify for MWBE certification. If complete independence is required, the Division’s findings are supported by substantial evidence and the Division’s determination should be affirmed on this ground (*see* Findings of Fact No. 11-15). Ms. Phipps’s arguments that Phipps Construction will soon close its doors and that BCD has recently hired employees were not before the Division at the time it made its determination on the application and are, therefore, beyond the scope of this appeal (*see* Appeal, unnumbered pages 2-3; 5 NYCRR 144.5[a]).

If, on the other hand, the Division interprets its regulations to allow an applicant for WBE certification to be associated with a business enterprise that has, or qualifies for, MWBE certification, the analysis of independence may be different. BCD could meet eligibility requirements for an independent business under 5 NYCRR 144.2(a)(2) and 144.2(c)(2) if the



related business entity also qualified for WBE certification. On this record there is insufficient information to make this determination with respect to Phipps Construction.

In response to the application question, “[d]o any of your immediate family members own or manage another company?”, Ms. Phipps stated that Jerome Phipps owned Phipps Construction (*see* WBE Exhibit 1 at Bates 4 [3.E]). Division staff sent Ms. Phipps an information request, stating “[w]e need to unpack the relationship between BCD and Phipps Construction, which you indicate in your application is owned by Mr. Phipps,” suggesting that staff may have viewed Phipps Construction as a disqualified business enterprise based on Mr. Phipps’s ownership. Ms. Phipps replied in part that “BCD Consultants and Phipps Construction are both owned 51% by Mrs. Maya Phipps and 49% by Mr. Jerome Phipps,” raising the possibility that Phipps Construction could be qualified as a WBE (WBE Exhibit 1 at Bates 8). It is not clear from the record whether the Division found Mr. Phipps’s *per se* involvement in Phipps Construction to be problematic, whether the other factors cited in the Division’s denial letter would have disqualified BCD outright from meeting the eligibility criterion for independence regardless of Ms. Phipps and Mr. Phipps’s respective ownership interests, or whether BCD could have satisfied the requirement for independence if Phipps Construction were qualified as a WBE. The Division’s expressed concerns about program benefits not passing from a MWBE certified business through to a non-MWBE entity could, arguably, be assuaged if an applicant for MWBE certification had a relationship with a business that qualified for MWBE certification, as opposed to one that did not qualify.

In any event, it is not necessary for me to inquire further into this issue. On this record, BCD has not demonstrated that it complies with the eligibility criterion for ownership at 5 NYCRR 144.2(a)(1). Because legal questions remain regarding the applicable standard for evaluating independence, I do not make any findings with respect to how the eligibility criterion in 5 NYCRR 144.2(a)(2) and 144.2(c)(2) apply to this record, and recommend that the Division not rely on these grounds in its denial.

### **CONCLUSION**

1. With respect to the ownership criterion at 5 NYCRR 144.2(a)(1), BCD did not meet its burden to show that the Division’s August 5, 2016 determination to deny the application for WBE certification is not based on substantial evidence.
2. With respect to the independence criteria at 5 NYCRR 144.2(a)(2) and 144.2(c)(2), I reach no conclusion whether the Division’s August 5, 2016 determination to deny the application for WBE certification is based on substantial evidence.

### **RECOMMENDATION**

The Division’s determination to deny BCD’s application for certification as a woman owned business enterprise should be modified by striking the second basis for denial. As so modified, the determination should be affirmed, for the reasons stated in this recommended order.

Attachment: Exhibit Chart

**Exhibit Chart**  
**Matter of BCD Consultants, LLC DBA Phipps & Co.**  
**WBE File ID No. 60433**

<b>WBE Exhibit No.</b>	<b>Description</b>
1	BCD Consultants LLC WBE certification application (Application No. 5032879, submitted June 17, 2016)
2	BCD Consultants LLC Membership Interest Transfer Agreement dated January 4, 2010; Amended and Restated Limited Liability Company Agreement of BCD Consultants, LLC dated January 3, 2010 with exhibit A, exhibit B, and exhibit C; BCD Consultants LLC Operating Agreement with exhibit A, exhibit B Officers and exhibit C New Member's Consent
3	Division's Denial Letter dated August 5, 2016
4	BCD Consultant's US Return of Partnership Income Form 1065
5	BCD Consultants About Us
<b>BCD Exhibit No.</b>	<b>Description</b>
1	New York State Department of State Corporations Filing Receipt for Phipps Construction Inc. dated June 23, 2010
2	Consent of Action Taken by the Managers and Members of BCD Consultants dated January 3, 2010 [regarding transfer of 1% membership interest by Jerome Phipps to Maya Phipps]
3	Consent of Action Taken by the Manages and Members of BCD Consultants dated January 3, 2010 [regarding designation of Maya Phipps as the Managing Member]
4	BCD Consultants LLC Operating Agreement dated February 6, 2009 with exhibit A [members, ownership and capital contribution]
5	Purchase Orders